REPORT ON MEASURES TO COMBAT DISCRIMINATION IN THE 13 CANDIDATE COUNTRIES (VT/2002/47)
COUNTRY REPORT
TURKEY
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Chapter 1 The legal framework, definitions and scope

a. The legal framework

Does national law guarantee the principle of equal treatment or non-discrimination with respect to the grounds racial or ethnic origin, religion or belief, disability, age and sexual orientation? If so, what is the nature of the national legal framework (e.g. Are the anti-discrimination laws and provisions general or ground-specific? Is discrimination on all of the grounds listed in Art.13 EC expressly prohibited in law as opposed to a non-exhaustive list that could be interpreted to include all listed grounds)? What is the scope of these laws and provisions? Is the level of protection the same for all grounds? Is there a definition of the grounds racial or ethnic origin, religion or belief, disability, age and sexual orientation, in legislation or case law? Does national law cover other grounds of discrimination (in particular nationality and membership of a national minority)?

A- CONSTITUTIONAL FRAMEWORK

1- General principle on Equality

Article 10 of the current 1982 Constitution provides the basis for equal treatment:

"All individuals shall be equal before the law without any distinction based on language, race, colour, sex, political opinion, philosophical belief, religion, membership of a religious sect or other similar grounds.

No privileges shall be granted to any individual, family, group or class.

State bodies and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings."

Although the expression "similar grounds" indicates that the list is not exhaustive, equality based on

"Ethnic origin", "sexual orientation," "age" and "disability" is not expressly stated in the article and there has been no example of inclusion of them into the scope of Article 10 in the case law of the Turkish Constitutional Court1.

2- The relationship between Article 10 and other articles of the Constitution

All articles in the Constitution are of equal force. Therefore, Article 10, which has no superiority should be read together with the other articles, especially the Preamble and Article 15.

The Preamble of the Constitution covers some guiding principles in 8 paragraphs2. These principles

are not directly applicable, but are used in interpretation of the articles3. Paragraphs 5 and 6 of the

Preamble are of importance for the interpretation of the equal treatment clauses of the Constitution:

"The recognition that no protection shall be accorded to an activity contrary to Turkish national interests, the principle of the indivisibility of the existence of Turkey with its state and territory, Turkish historical and moral values or the nationalism, principles, reforms and modernism of Atatürk and that, as required by the principle of secularism, there shall be no interference whatsoever by sacred religious feelings in state affairs and politics;

1 LAMBDA Turkey, a gay and lesbian group, made a public statement before the last general elections. In this statement

they demanded an amendment in Article 10 of the Constitution on equality which does not contain specific provisions for

people who have different sexual orientations. ILGA (International Lesbian and Gay Association) also states that the antidiscrimination
clause in the Constitution is only worded in a general way and thus does not protect on the grounds of sexual orientation. See www.ilga.org.
2 See Appendix-1
3 Ergun Özbudun, *Anayasa Hukuku*, Yetkin Yayýnlari, Ankara 1995, pp. 49-51.

The acknowledgement that it is the birthright of every Turkish citizen to lead an honourable life and to develop his or her material and spiritual assets under the aegis of national culture, civilisation and the rule of law, through the exercise of the fundamental rights and freedoms set forth in this Constitution in conformity with the requirements of equality and social justice; (...)"
The Constitutional Court decides on the constitutionality of laws, justifying its decisions by the principles of the Preamble. According to the Court, the principles of the Preamble are guiding interpretative rules. The Court, in decisions repealing a provision of law allowing immovable property
transfers to foreigners4 and privatisation of Turkish Electricity Administration5, justified its decisions
on the ground of paragraph 5 and other paragraphs of the Preamble.
In times of war, mobilisation, martial law, or state of emergency, the exercise of fundamental rights
and freedoms can be partially or entirely suspended, or measures may be taken, to the extent required
by the exigencies of the situation (Art. 15/1). Articles 15/1 restricts individual rights and, thus may
have an impact on, directly or indirectly, equal treatment.

3- Horizontal Effect of the Constitution

"The provisions of the Constitution are fundamental legal rules binding upon the legislative, executive
and judicial organs, and administrative authorities and other institutions and individuals" (Article 11).
The horizontal effect of the Constitution has not been adopted in the case law of the labour courts and
the Court of Cassation which basically justify their decisions on the basis of the Labour Code, collective agreements and employment contracts. If the provisions of labour laws are not clear and
need interpretation, labour courts may construe these provisions in the light of general principles of
the Constitution.
The equality clause of the Constitution may be enforced against the administration by administrative
courts and the Council of State6. Administrative courts may repeal the administrative decisions directly on the basis of the equality clause.
Neither labour nor administrative courts can repeal contracts or administrative decisions against the

principle of equality of the Constitution when they are justified by a provision of law. Instead, they apply to the Constitutional Court to review the relevant provision of law which will be enforced against the parties of the pending cases. The Constitutional Court decides on the matter and make
public its judgement within five months of receiving the application. If no decision is reached within
this period, the trial court concludes the case under existing legal provisions (Article 152/3).

4- "Equal before the law"

Article 10 stresses that individuals are equal before the law. According to Article 13 of the Constitution, fundamental rights and freedoms may be restricted only by law. In other words, rights of
the people cannot be restricted by regulations with a lower degree of force than laws. Furthermore,
Article 125 of the Constitution stipulates that judicial review shall be available against all acts of public bodies. Administrative regulations are repealed by administrative courts when they are found to
violate the laws. But, there are some exceptions of the principle of judicial review in the Turkish legal
system. According to the Constitution, the statutory decrees enacted during the period of martial law
and state of emergency cannot reviewed by the Constitutional Court (Art. 148/1). Secondly, no judicial procedures are available against decisions of High Military Council and decisions of the

4 E. 1984/14, K. 1986/7, *AYMKD* (Journal of the Constitutional Court Decisions), v. 21, pp. 173-174;
5 E. 1994/43, K. 1994/42-2, *AYMKD*, v. 31, pp. 292, 295.
6 Metin Gunday, *Turk Idare Hukuku*, Imaj Yayincilik, Ankara 2002, s. 35.

President with a single signature (Art. 125, third paragraph). Thirdly, the Martial Act7 stipulates that
in the period of martial law judicial review of administrative regulations and decisions is not possible.

5- Case Law Principles of the Constitutional Court

The Turkish Constitutional Court was established by the previous Constitution in 1961. Like the similar bodies in Continental European countries, the main function of the Court is to review laws and
the statutory decrees (*kanun hükmünde kararname*) on the basis of Constitutional provisions, and to
repeal those which are found to be against the Constitution. This authority makes the Court a unique
body to construe the articles of the Constitution. In this respect, the Court's decisions and precedents
on equality and discrimination matters should be reviewed to determine the meaning of Article 10.

Two fundamental principles can be derived from the case law of the Constitutional Court on equality

and discrimination. Firstly, individuals who are placed in similar situations should be bound by the
same rules. Therefore, individuals who are in different situations may be treated differently and it would not be against the law to treat them differently.8 Secondly, if there are just reasons, the law may
discriminate against individuals who are placed in similar situations. Public interest may also be a
reason to justify differences between individuals. The Constitutional Court has developed tests to
determine those "just reasons": the reasons should be "understandable," "reasonable and fair," and
"relevant to the aim."

6- Constitutional provisions on labour market, right to work, labour market and positive action for disabled individuals

"Everyone has the freedom to work and conclude contracts in the field of his choice. The establishment of private enterprises is free." (Art. 48, first paragraph)

"Everyone has the right and duty to work." (Art. 49, first paragraph)

"The State shall take the necessary measures to raise the standard of living of workers, and to protect workers and the unemployed in order to improve the general conditions of labour, to promote employment, to create suitable economic conditions for preventing unemployment and to secure labour peace." (Art. 49, second paragraph)

"No one shall be required to perform work unsuited to his age, sex, and capacity." (Art. 50, first paragraph)

"Minors, women and persons with physical or mental disabilities, shall enjoy special protection with regard to working conditions." (Art. 50, second paragraph)

7- Constitutional provisions on education

The constitutional rules for primary, secondary and higher education can be found in Article 42.

"No one shall be deprived of the right of learning and education". (Art. 42, first paragraph)

"No language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education". (Art. 42, ninth paragraph)

8- Constitutional provisions on right to housing and social security

7 Sikiyonetim Kanunu (Martial Law), Act No. 2342, 14 November 1980.

8 E. 1988/4, K. 1989/3, *AYMKD*, v. 25 pp. 6-8;
E 1986/16, K. 1986/25, *AYMKD* v. 22, pp. 291-293;
E. 1986/11, K. 1986/26, *AYMKD* v. 22, pp. 314-316;
E. 1997/65, K. 1999/15, *Official Gazette*, 16.2.2000, issue 23966, p. 45.

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

"Everyone has the right to social security.

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

security.” (Art. 60)

9- Constitutional provisions on membership of labour unions and employers’ associations

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

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

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

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

The regulations, administration and functioning of labour unions and their higher bodies should not be inconsistent with the fundamental characteristics of the Republic and principles of democracy.” (Art. 51)

10- Ethnic origin, sexual orientation and age

There is no provision on ethnic origin, sexual orientation or age in the Constitution.

Assessment

The equality clause of the Constitution does not expressly prohibit discrimination on all grounds listed in the Directives. The Preamble of the Constitution and Articles 15/1, 42/9, 125/3 and 148/1 which contain restrictive provisions should be taken into account in the interpretation and implementation of all articles of the Constitution including Article 10.

Compatibility of the Constitution with the Directives should be reviewed.

B- LAWS

There is no separate anti-discrimination legislation in the Turkish legal system.

1- Turkish Civil Code

The Turkish Civil Code (adopted from the Swiss Civil Code and accepted in 1926) was comprehensively reviewed and amended, and after a long preparation period enacted in 2001. In the

previous Code there was no general provision on the prohibition of discrimination. The amendment of
the Code would have been a good opportunity to add an article on discrimination, however it did not
happen.

2- Turkish Criminal Code

The Turkish Criminal Code does not include a general provision concerning discrimination. However,
there are some articles including ground specific provisions. Article 312 sets forth that:

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"It shall be an offence, punishable by six months' to two years'imprisonment, publicly to praise or defend an act punishable by law as an offence or to urge the people to disobey the law.

Anyone who incites enmity or hatred among people on the base of social class, race, religion and sect differences in such a way as to endanger public safety shall be punishable by one to three years' imprisonment.

Anyone who insults a part of the people in such a way as to humiliate and degrade them shall be punishable by the way set forth in the first paragraph.

The penalties for the acts set out in the preceding paragraphs shall be doubled where they have been committed by means indicated in Article 311."

The other relevant articles of the Criminal Code are Article 175,9 Article 176,10 and Article 179/2.11

The Ministry of Justice has been preparing a new criminal code introducing comprehensive changes
since 1990. An expert committee composed of senior lawyers has worked on it and after many reviews
the proposal has reached its final form. Although the work on this proposal has not been completed
yet, it may give an idea of the future form of the Criminal Code. One of the significant changes in the
proposal is a new offence called "discrimination" which does not exist in the current Code. According
to this regulation, if discrimination, on basis of origin, sex, family status, custom, trade union, membership of a certain ethnic group, race, political opinion, philosophical belief, religion, denomination, membership of a religious sect, results in the refusal to offer public service or food products, preventing individuals from economic activities, makes recruitment and access to employment subject to above mentioned features or hampers the purchase, sale and transfer of movable or immovable property, it shall be punishable by 6 months' to 1 year imprisonment. When
this provision is enacted, discrimination will be a criminal offence in the specified fields.

3- Turkish Labour Code

The Labour Code contained no separate or general provision on equality and discrimination until recently. The Code was partially amended by Act No. 4773 of 9 August 2002. Thus, for the first time

in Turkish Labour law, a provision on job security was adopted. The Act was due to enter into force
on March 15, 2003, but the Parliament decided that the law should enter into force together with Labour Code reform. The new Labour Code (Act No. 4857) came into force in June 200312 and contains a general principle of equal treatment and most of the articles of Act No. 4773. These articles
are as follows:

9 Article 175 of the Criminal Code:
"A person who hampers and violates religious practice or worship or rituals of one of the religions shall be punishable by six months' to one year imprisonment and shall be fined 1.965.000 liras to 9.825.000 liras.
(…)
A person who insults God, or a religion, or a prophet, or a holy book, or a denomination, or condemns or derides or insults another person because of his religious belief, or fulfilling the orders of his religion or abstaining from its prohibitions shall be imprisoned for six months to one year and shall be fined 1.965.000 liras to 9.825.000 liras."

10 Article 176 of the Criminal Code: "A person who demolishes or causes damage to temples, burial sites, graves or similar
places, or objects in these places with the purpose of insulting the corresponding religion shall be imprisoned for one to three
years and shall be fined 7.860.000 liras to 39.300.000 liras."

11 Paragraph 2 of the Article 179 of the Criminal Code:
"A person who illegally deprives another person of his personal liberty shall be imprisoned for one to five years and shall be fined not less than 3.930.000 liras.
If, before or during the commission of this felony the offender threatens or treats badly, or uses fraud or ruse, or commits the offence with motives of vengeance or benefit, or with national or religious purposes, or with a purpose arising from differences in political, ideological or social opinions, or delivers the victim to a foreign country to be used in military service, he shall be punished by heavy imprisonment for three to eight years and shall be fined not less than
7.860.000 liras."

12 The Labour Code (Is Kanunu) (No. 4857), Official Gazette, 10 June 2003, No. 25134.

Article 5 - Principle of Equal Treatment
In labour relations no discrimination shall occur on the grounds of language, race, sex, political opinion, philosophical belief, religion, membership of a religious sect or other similar grounds.
An employer, unless there are important reasons, shall not treat part-time employees differently than
full- time employees, or employees employed for a definite period of time differently than employees
employed for an indefinite period of time.
An employer, unless biological reasons and nature of the work require otherwise, shall not treat differently, directly or indirectly, an employee in the formation, implementation and termination of a
contract, or determination of conditions, on the grounds of sex and maternity.
Lower wages shall not be paid for the same work or work of equal value.
Special provisions protecting employees on the grounds of sex shall not justify lower wages.
In the case of any treatment in a labour relationship or the termination of a contract that is contrary to
the above provisions, an employee may claim compensation amounting to a maximum of four months

worth of wages and other rights of which he deprived. The provisions of Article 31 of the Trade Unions Act shall be reserved / shall be without prejudice.
An employee, on the condition that provisions of Article 20 are reserved, shall prove the fact that the
employer has acted against provisions in paragraphs above. However, when an employee puts facts
down strongly indicating the possibility of the existence of a violation, the employer shall prove that
there is no such a violation.
Article 18- Valid Reason for Termination
In workplaces where thirty or more employees are employed, the employer who terminates a contract
of employment of an undetermined duration of an employee who has at least six months seniority,
should give a valid reason based on the qualifications or conduct of the employee or requirements of
the enterprise, workplace or work.
(...)
The following circumstances in particular shall not form a valid reason for termination:
_ Membership of trade unions and/or participation in the activities of trade unions outside, or with the consent of the employer, within the working hours,
_ being a workplace trade union representative,
_ Application to administrative or judicial authorities to enforce rights arising from legislation or a contract or to participate in such process commenced already regarding this point,
_ Race, colour, sex, civil status, family obligations, pregnancy, religion, political opinion and similar reasons,
_ Not to come to work within periods when in accordance with Article 74 of the Labour Code prohibiting work for women,
_ not to come to work temporarily due to disease or accident within the waiting period laid down in Article 25, paragraph (I) and sub-paragraph (b).
Article 19- Procedure for termination of a contract
The employer is obliged to notify the employee of the termination in writing and state the reason for
termination briefly and definitely.
An employment contract of an undetermined duration cannot be terminated due to reasons related to
the conduct or productivity of the said employee without taking his defence into consideration (...).

Article 20- Objection to notification of termination and procedure
An employee whose contract of employment is terminated may bring legal action in a labour court
within one month of the date of notification of the termination with the claim that no reasons were

indicated or reasons put forward are invalid. The dispute is referred to a special arbitrator within the
same period, provided that there is a clause in the collective labour agreement or the parties come to
an agreement on the subject.
The employer is obliged to prove that the termination is based on valid reasons.
The legal action is concluded within two months in accordance with the speedy trial procedure. In case
of appeal of the decision of the court, the Court of Cassation shall make its final decision within one
month.
Article 21- Conclusion of termination with unjust reasons
"Whenever it is determined by the court that no valid reason have been presented or the presented
reasons are not just, and it is decided that termination is invalid, the employer is obliged to re-employ
the employee within one month. If the employer does not re-employ the employee within one month
following his application, he shall be obliged to pay compensation to the employee amounting at least
four months and at most eight months salary. When the termination is found to be invalid, the court or
arbitrator determines the amount of compensation to be paid if the employee is not re-employed.
A maximum four months' wages and other benefits of the employee realised until the final court decision shall be paid to him.
The employee is obliged to submit an application to the employer to be re-employed in the 10 days
following the notification of the final court decision. Should the employee not submit an application
in this period, the termination shall be considered as a valid termination and the employer shall be
responsible only for the legal consequences of the termination.
Provisions included in paragraphs one, two and three shall in no way be subject to amendment by
contracts of employment; conflicting contract provisions shall be deemed invalid."

4- Trade Unions Act

Article 20- Conditions for trade union membership
Persons who are over the age 16 can be members of trade unions. Individuals who are below 16 years
old can be members of trade unions upon their parents' consent.
Article 31- The guarantee for being a member or not a member of a trade union
The recruitment of employees shall not be made subject to any condition as to their membership of a

trade union, or obliging them to join or refrain from joining a given trade union or to remain a member
or resign from a given trade union (Art 31/1).
Employees, regardless of their being a member of a trade union or not, or a member of another trade
union, are equal and not to be discriminated against with respect to recruitment, arrangement, and
distribution of work, promotion, wages, bonuses, premiums, social and fringe benefits, discipline rules
or provisions respecting other questions, including termination of employment.(Art 31/3).
Employees cannot be dismissed and subject to discrimination (...) on account of his or her
participation in the activities of a trade union or confederation. (Art 31/5)

5- Other Provisions

9

Article 5 of the Political Parties Act (No. 2820) stipulates that the right to form a political party shall
not be used to discriminate on the grounds of language, race, religion, denomination, difference in
region, or establishing, by any means, a system of government based on any such a notion or concept.
Articles 78,13 82,14 and 8315 of the Act contain similar provisions.
Article 5 of the Associations Act (No. 2908) prohibits the formation of associations “with the purpose
of jeopardising or destroying the existence of the Republic of Turkey by discriminating on the basis of
language, race, class, religion or denomination”.
Article 4 of National Education Fundamental Act (No. 1739) states that, “Educational institutions are
open to all, with no distinction of language, race, sex and religion. No privilege shall be granted to any
individual, family, group or class in education”.
Article 5 of the Higher Education Act (No. 2547) includes a provision on equality of opportunity:
“The necessary measures shall be taken to provide equality of opportunity in higher education”.
Article 4 of the Act on the Foundation and Broadcasting of Radio and Television Channels (No. 3984)
stipulates that radio and television broadcasting shall be made, *inter alia*, in accordance with the
principles that “people shall not be offended because of their race, sex, social class or religious belief”
and “(...) without leading the community to violence, terror, ethnic discrimination (...)”.

6- Definition of Disability

There is no definition of disability in the Labour Code. Article 2/1 of the Regulation on Employment
of Disabled Persons16 defines disability:

“Persons who are deprived of more than 40% of their labour capacity because of physical, mental or
psychological disability shall be qualified as disabled in the framework of this regulation when disability is verified by the health committee medical report”
A parallel definition can be found in Article 2 of the Regulation Concerning Conditions of the Access
to Employment for Disabled Persons as Civil Servants17.

C- INTERNATIONAL INSTRUMENTS

13 Article 78 of the Political Parties Act:
“Political parties,
(...)
(a) shall not aim (...)
(...)
jeopardise the existence of the Turkish State and Republic, abolish fundamental rights and freedoms, introduce discrimination on grounds of language, race, colour, religion or denomination, or establish, by any means, a system of government based on any such notion or concept.”
14 Article 82 of the Political Parties Act: **“**Political Parties shall not aim for regionalism or racism in the indivisibly integrated country and shall not engage in similar activities.”
15 Article 83 of the Political Parties Act: “Political parties shall not have purposes against the principle of equality of all individuals without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion, denomination or similar considerations.”
16 Sakatlarin Istihdami Hakkinda Tuzuk (Regulation on Employment of Disabled Persons), 26 February 1987, No. 87/11545.
17 Sakatlarin Devlet Memurluguna Alinma ile Hangi Islerde Calistirilacaklari Hakkinda Yonetmelik (Regulation Concerning
Conditions of the Access to Employment as Civil Servant), 12 May 1983, No. 83/6526, *Official Gazette*, 27 July 1983, No.
18117.

According to Article 90 of the Constitution, international agreements enjoy all the qualities of a statute
in the Turkish legal system. No appeal to the Constitutional Court can be made with regard to these
agreements on the ground that they are unconstitutional. International treaties are subject to adoption
by the Turkish Grand National Assembly by a law approving this ratification. Treaties which are approved become enforceable after their publication in the Official Gazette. The self-executing character of the provisions of treaties is accepted if they are implemented directly without any legislation.
When a contradiction arises between a provision of a statute ratifying an international treaty and other
statutes, the conflict is solved according to the general principles of law. In such cases the subsequently issued statute prevails over the earlier one *(lex posteriori derogat a priori*) and the particular rule prevails over the general one *(lex specialis derogat lex generali*). According to the Constitutional Court, international human rights instruments and the Constitution are complementary;
they should be interpreted in harmony with each other. This line of thought makes international human

rights instruments equal to the Constitution in the hierarchy of laws. But, interpretations of the Court of Appeal and the Constitutional Court may differ. For example, according to Ninth Chamber of the Court of Appeal, if a right regulated in an ILO Convention to which Turkey is a party is not mentioned in a subsequent statute, the statute prevails over the ILO convention and that convention is not applied to the case.18.

The international instruments, including ILO conventions, which have been signed and ratified by Turkey can be found in Appendix 2.

The Revised European Social Charter which contains new provisions including Article 26 on the right to dignity at work, which emphasises the promotion of awareness and prevention of sexual harassment and victimisation, Article 31 on the right to housing, and Article E of Part V on Non-Discrimination, have not been ratified by Turkey.

The Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages have not been signed by Turkey yet.

Article 14 of the European Convention on Human Rights provides safeguards for equality. However, it does not grant a general framework. The discrimination complained of must have some connection with one of the rights and freedoms guaranteed by the Convention, otherwise Article 14 cannot be applicable.19 In order to enlarge the scope of current regulation on discrimination, the Council of Europe adopted a new Protocol (Protocol No. 12), which establishes a general prohibition of discrimination. Turkey signed Protocol No. 12 to the European Convention on Human Rights on 18 April 2001. Protocol No. 12 has not yet been approved by the Turkish Grand National Assembly, and according to the Foreign Ministry official in the Council of Europe Department there will be no approval in the near future.20

The Lausanne Treaty which was signed between Turkey and allied States in 1923 is an international peace agreement including provisions on the rights of non-Muslim minorities living on the Turkish borders. Under the Lausanne Treaty, Turkey must treat the rights thereby granted to minorities as fundamental rights and may not adopt any laws, bylaws, regulations, communiqués and administrative orders, or perform any acts in breach of these rights. For the relevant provisions of the treaty see

Appendix 2.

D- REACTION OF THE TURKISH GOVERNMENT TO THE EU DIRECTIVES

18 Ninth Civil Law Chamber of Court of Cassation, E. 1996/2261, K. 1996/5790, 18.10.1996.

19 As of 10 February 2003 there are 59 Court decisions on Turkey in which complaints under Article 14 were reviewed.

After reviewing these complaints the European Court found that some are unsubstantiated, or decided that it was not necessary to examine them separately under Article 14 because of violations of other articles.

20 Interview with Yesim Kebapcioglu from the Turkish Foreign Ministry, Council of Europe Department.

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The texts of the directives are known by the experts working in EU Section of the Ministry of Labour,
and the Presidency of Administration for Disabled. But State departments have not begun to compare
Turkish law with the Directives yet. Therefore, there are no proposals directly based on these directives.

E- NATIONAL PROGRAMME FOR ADOPTING THE EU ACQUIS

The Turkish government adopted a national programme in 2001 to harmonise Turkish law with the
EU Acquis. The Programme contains some undertakings related to the equality of individuals (see
Appendix 3). The government revised the National Programme in 2003 but it has not been made public yet.

Assessment

The inclusion of an anti-discrimination clause into the new Labour Code is a positive step forward.
However, all grounds in the directives are not expressly stated in Articles 5 and 18. One of the grounds, “ethnic and social origin” which had been mentioned in Act No 4773, does not appear in the
new regulation. These rules were enacted in June 2003, therefore no case law of the labour courts is
presently available on the expression “similar grounds”. It can only be said, at this moment, that the
lists in these articles are not exhaustive.
Another problem is the scope of the implementation of the provisions in Article 18. It is estimated that
only 15-20% of all employees (around two million out of ten million estimated population of employees) may benefit from the clause on the shift of the burden of proof in dismissal cases.
The current Civil Code, Criminal Code and Civil Servants Act do not cover general antidiscrimination
provisions. The definition of disability should not be left to administrative regulations
which are accepted and amended by the Council of Ministers. The definition excluding persons who
are deprived of less than 40% of their labour capacity may be against the principle of equality. For

example, persons loosing sense of fingers are not considered disabled, despite the fact that certain
activities can not be performed without sense of touch such as playing musical instruments21.
Article 312 has usually been used to limit freedom of expression in Turkey and criticised by lawyers
and human rights organisations for that reason.
Positive steps have been taken in ratifying the basic international instruments especially since 1999.
The problem is the implementation of the provisions of international law in the national sphere. Judges, prosecutors and attorneys need training on international instruments. In order to overcome *lex*
posteriori and *lex specialis* arguments, international agreements, at least the ones related to human
rights, have to be made superior to the statutes in written law.
Compatibility of the laws with the Directives should be reviewed.

Article 2 (Racial Equality Directive and Employment Equality Directive)

Direct and indirect discrimination

Is there a definition in law of both direct and indirect discrimination? If so, does this conform to the definitions in the Directives?

Harassment

Does national law define harassment, as defined in the Directives?

Are there any existing or forthcoming Codes of Practice on harassment?

Instruction to discriminate

Is it contrary to national law to give instructions to discriminate? Does this conform to the Directives?

21 Interview with Ahmet Faruk Oztimur, the President of the Confederation of Disabled Persons.

Definitions of “direct discrimination,” “indirect discrimination,” and “harassment” do not exist in the
Turkish legal system. These definitions in the Directives are essential to secure equality in any jurisprudence.
There is no particular provision of law prohibiting giving instructions to discriminate. Article 312 of
the Criminal Code can be applied when an employer gives instructions in the form that these instructions at the same time incite enmity and hatred or insult a part of the people in such a way as to
humiliate and degrade.

Assessment

These definitions are crucial to secure all aspects of EU Directives in national law.
They will guide judges, attorneys and bureaucrats in their work. Turkish legal culture, since the beginning of the Republican period, has been “text-based” rather than “decision-based”. Therefore, it
would not be realistic to wait for the inclusion of definitions into the legal system by judge-made law.
Compatibility with the Directives should be reviewed.

Article 3.1 (Racial Equality Directive and Employment Equality Directive)

Does the prohibition of racial and ethnic discrimination apply to all the fields of application listed in Article 3 of the Racial Equality Directive, including both the private and the public sector? Does the prohibition go beyond the scope foreseen in the Directive?
Does the prohibition of discrimination on grounds of religion or belief, disability, age or sexual orientation apply to all the fields of application listed in Article 3 of the Employment Equality Directive, including both the private and the public sector? Does the prohibition go beyond the scope foreseen in the Directive?
Conditions for access to employment, to self employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of professional hierarchy, including promotion.

1- Laws

The main legislation for employees (*isciler*) working under labour contracts is the Turkish Labour Law (No. 4857). There are also separate labour laws for media and maritime employees.22 Civil servants (*Devlet memurlari*) working in the public sector are subject to separate legislation called the
Act on Civil Servants (No. 657).23 Persons who work for the public sector under contracts (*sozlesmeli*
personel) are subject to special regulations.24 According to the Act on Civil Servants, "public personnel" is a general concept referring to persons working for the public sector, and includes civil
servants, personnel employed on a contractual basis, workers working under labour contracts and
temporary personnel (*gecici isciler*). In the framework of current legislation, personnel employed on a
contractual basis and temporary personnel are subject to private law, that is, the Labour Law.

2- Conditions for Access to Employment, Selection Criteria, and Recruitment Conditions in Laws

22 Deniz Is Kanunu (Maritime Labour Law) (No. 854), *Official Gazette,* 29 April 1967, No. 12586; Basin Mesleginde Calisanlarla Calistiranlar Arasindaki Münasebetlerin Tanzimi Hakkinda Kanun (Law Concerning the Regulation of Relations
between Employers and Employees Working in the Profession of Press) (No. 5953), *Official Gazette,* 20 June 1952, No.
8140.
23 Act No 657, *Official Gazette,* 23 July 1965, No. 12056.
24 Statutory Decree No. 399; Decision of the Council of Ministers, 6 June 1978, No. 7/15754.

Recruitment as a civil servant is subject to special conditions. These conditions are as follows:25
_ to have Turkish citizenship,
_ to be above 18 years old,
_ to be graduated (at least) from secondary school,
_ not to have been punished for crimes above 6 months' imprisonment or heavy punishment or fine,
_ not to be called for military service at the application date,
_ not to have been punished for certain offences (offences against the State, disgraceful offences
like embezzlement, theft, fraud etc.),
_ not to be disabled.

These are minimum conditions for application. For qualified personnel, additional conditions (university degree, foreign language, etc.) may be required.
Civil servants are selected from the candidates who meet the conditions upon competitive examinations. Those who qualify are subject to a probationary (training and testing) period prior to
their appointment. Appointment is followed by an oath, promising loyalty to the Constitution and faithful compliance to the laws of the Republic.
According to the Labour Code, an employee is a person who works under a contract of employment in
any job for wage. Article 66 of the Code prohibits anyone from being employed under the age of 15.
There is no other general condition for employees for access to employment. The rights of foreigners
may be restricted by law.26

B- GROUND SPECIFIC PROBLEMS

1- Racial or Ethnic Origin

There is no legal provision excluding individuals from employment because of their racial or ethnic
origin. However, in the absence of nation-wide and reliable statistical data on employment by racial or
ethnic origin, it is hard to evaluate the situation in the private or public sector. Public institutions have
been forbidden to produce any kind of statistical data on race and ethnicity following a circular issued
by the Ministry of Interior. Therefore, it is not possible to compare employment rates according to population of ethnic groups living in Turkey. Official data on the total population of ethnic groups is
not available, either.
A discriminatory practice in Ordu, a northern province, has been on the agenda of human rights organisations since 1998. The Governor of Ordu issued a circular disallowing Kurdish seasonal workers from entering the province in the hazelnut harvest season. This unlawful practice which also
violates civil rights of the individuals has not been prevented by governmental authorities. In 2002 the
Chamber of Agriculture announced that seasonal workers from Urfa, Diyarbakir, and Mardin were not
allowed to enter Ordu.
Despite the protective provisions of the Constitution and the Lausanne Treaty, non-Muslim applicants
are discriminated against in the job market. Members of non-Muslim minority groups claim that they
have limited career prospects in government and especially in the military, and they are not appointed
to high-level posts in the courts, the police department and diplomatic service.

2- Age

There is no upper age limit for access to employment in the Labour Law. However, some private companies specify an upper age limit (usually between ages 30-35) in their job announcements. In the Labour Law the lower age limit for employment is 15 (Article 71 of the Labour Code). Turkey signed the ILO Convention on the Minimum Age (1973), and the Labour Code is in conformity with this convention.

25 Act on Civil Servants, Art. 48.

26 Article 16 of the Constitution: "The fundamental rights and freedoms of aliens may be restricted by law in a manner consistent with international law."

Employers do not want to employ persons who either have no experience or are above 50 years old.

Persons between 20-25 years old, at the beginning of their careers, and senior employees above 50 have more difficulties finding a job in comparison to other age groups.

Concerning civil servants, there are upper age limits in various regulations. State departments do not accept job applications from individuals over 30 or 31 years old. Male applicants should complete or delay their military service (individuals pursuing university education may delay their military service until the age of 33).

In order to be employed as a civil servant, one has to be over 18 years old as a rule. Although it is a rare practice, graduates of vocational schools between the ages 15-18 may be employed as civil servants on the condition that their maturity is approved by the court.

3- Disabled People

One of the most important problems of disabled people is employment. There is no statistical data on the disabled population. The results of a recent nation-wide survey have not yet been published. The total unemployment rate of disabled people is not known either. But it is estimated that a high percent of the disabled population is unemployed. Most of the disabled people are only primary school graduates, or are barely literate. It should be noted that the education level of the employed labour force is also low. According to a research conducted by the Employment Organisation, of the total labour force 69% are unqualified, and it is estimated that between 75%-83% of disabled people are unqualified.

There are discriminatory practices in the public and private sectors. Public and private bodies do not

even use their 3% quotas reserved for disabled individuals.
Some large scale corporations do not accept individuals with certain disabilities into their workplaces.
It can be said that less disabled ones are preferred. The type and degree of disability plays an important role. Especially visually impaired persons have difficulties in finding a job (some corporations do not employ visually impaired individuals in their workplaces)27.

4- Sexual Orientation

Homosexuality and bisexuality are legal and do not constitute criminal offences in Turkey. Although there are no direct legal restrictions for access to employment for homosexuals and bisexuals, discrimination against these individuals does exist in practice. Homosexuality is still perceived as a psychological illness in Turkish society. Traditional family values, conservative tendencies and religious concerns play an important role in discrimination based on sexual orientation, and in violations of the civil rights of these persons28. Lesbian, gay and bi-sexual (hereinafter LGB) persons, until recently, had concealed their sexual orientation from the public. There is still no foundation or association of LGB persons, but groups based in Ankara (KAOS GL) and Istanbul (LAMBDA) organise seminars, group activities, and publish journals.
Public regulations do not cause major problems. LGB people complain about harassment, and argue that it is not regulations but state officials or private persons who trouble them. Insulting behaviour, degrading treatment, verbal and other kind of abuse is widespread. To avoid harassment, LGB people are concealing themselves. One of their main problems is unemployment. For people who do not conceal their orientation, it is really difficult to find a job29.

27 Interview with Ahmet Faruk Oztimur.
28 Interview with Umut Guner, Representative of KAOS-GL, Gay and Lesbian group in Ankara.
29 Interview with Umut Guner

There is more discrimination towards those with effeminate characteristics. Two years ago the Ministry of Education attempted to issue a circular to eliminate male teachers who have effeminate characteristics from the Ministry30. This attempt was not supported by the government.

5- Religion or Belief

One of the fundamental pillars of the Turkish Republic is *laïcité.* The Preamble of the Constitution (paragraph 5) stipulates that “as is required by the principle of *laïcité*, the sacred tenets of religion shall in no way be involved in the affairs of the State and in politics.” Article 2 of the Constitution covers the basic characteristics of the Republic. According to this article the Turkish Republic is a

democratic, laic, and social state governed by the rule of law. Article 14 on the abuse of fundamental rights sets forth that none of the rights and freedoms included in the Constitution can be construed and interpreted so as to abolish democratic and laic Republic based on human rights.

The implementation of the principle of *laïcité* has been problematic in certain areas. The government imposes some restrictions on the freedom of expression of persons. An intense debate continues over a government ban on wearing Muslim religious headscarves in state facilities, including universities, schools, and workplaces. The State departments do not employ women who wear headscarves as civil servant.

Christians who have converted from Islam and Bahá'is face societal suspicion and mistrust31.

According to Turkish law, a person's religion appears on identity card. This requirement has been found not to be against the Constitution by the Constitutional Court in two different cases. As stated by the European Commission against Racism and Intolerance (ECRI), this practice invites intolerance and discrimination32.

Assessment

"Sexual orientation" has not been mentioned in Article 10 of the Constitution as a ground of discrimination. Anti-discriminatory rules for LGBs should be included in the Labour Code, like the Czech or Lithuanian parliaments did recently.

The State should justify minimum and maximum age limits for access to employment as a civil servant.

The conditions for access to employment as a civil servant which are not in conformity with EU Directives were accepted thirty eight years ago and they need to be revised.

According to Article 48/7 of the Civil Servants Act (No. 657) permanently disabled individuals cannot be civil servants if the disability prevents them from working. Despite Article 53 of the Civil Servants Act which lays down a 3% quota for disabled persons, the provision in Article 48 is discriminatory and should be amended. First of all, it reflects an exclusionary philosophy. Secondly, the existence of quotas for disabled persons does not justify Article 48/7. Quotas are adopted to establish minimum standards, not maximum ones.

According to the experts of Ministry of Labour and the major employees' confederations in Turkey, local patriotism (to be from the same village, town or city, *hemsehricilik*) and ethnic concerns may

play a role in the selection of employees in the private sector. Although there is no official data or

30 Hurriyet (a national newspaper), 10 June 2002.

31 Interview with Orhan Kemal Cengiz, Izmir Bar Association, attorney of Protestant community. See also, UN Commission on Human Rights, Elimination of All Forms of Religious Intolerance –Situation in Turkey, Fifty-fifth Session item 116(b) of the provisional agenda, para. 148; UN Commission on Human Rights, Fifty-seventh session.

32 ECRI, Second Report on Turkey, Adopted on 15 December 2000, CRI(2001)37, p. 7, 3 July 2001, Strasbourg.

study on this issue, the impact of local patriotism and ethnic concerns on access to employment is an area worth exploring33.

Compatibility with the Directives should be reviewed.

Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience.

The Vocational Education Act (No. 3308) regulates vocational and technical high schools (*mesleki ve teknik liseler*), organised and diffused education after primary education (8 years) at secondary school level. A Council (Vocational Education Board-VEB) composed of bureaucrats of different ministries, representative of universities and representatives of civil society organisations and employer and employee trade unions with the highest number of members, has been established by the Act. The Vocational Education Board is the highest consultative body for vocational and technical high schools and apprenticeship education or training. The decisions are taken by the Ministry of Education. In each province, there is a vocational education board composed of a governor, the head of the municipality, representatives of civil society organisations, bureaucrats of different ministries, an Employment Organisation, and the trade union with the highest number of members.

The Ministry of National Education (*Milli Egitim Bakanligi*) has the responsibility for long term planning, curriculum and programme development, execution, monitoring and supervision of all types and levels of education and training. Other ministries, organisations and institutions may establish formal and non-formal vocational education and training programmes at the secondary level to meet their own skilled labour force needs. The State agency responsible for the training of unemployed individuals is the Employment Organisation (*ISKUR*). The Employment Organisation's training activities have targeted youth, women, those who have lost their jobs, those receiving unemployment allowance, the disabled, and ex-convicts. At least 60% of the individuals who are attending the

courses are employed by the partner organisation. 96,499 individuals participated in these courses
between the years 1992-2002.

1- Vocational Training at Secondary School Level

Vocational high schools are the backbone of vocational secondary education. The departments of
these schools are open to primary education graduates. Technical high schools pick their students from
among those who have successfully completed their first year in vocational high schools.

2- Apprenticeship Training

According to the Act, everybody whose physical and health conditions allow them to perform the occupation for which he or she will be trained, has graduated from primary school and is over 14 years
old, may work as an apprentice in a branch of work.34 Apprentices have the status of student and they
are not included in the personnel of the employer they work for. Employers who have more than 20
employees in their workplace recruit students (between 5%-10% of employees they hired) from vocational and technical high schools for skill development training. In order to increase efficiency
and technical capacity of employees, these employers organise courses.

Assistant-mastership (*kalfa*) and mastership (*usta*) certificates are given by the Ministry of Education.

Persons who are trained before can be assistant-master when they reach the age of 16. Individuals who
are 18 years old can directly apply to it. For the mastership, the candidates should be successful in the
exam done by the Ministry. Assistant-masters with the completion of age 22 can be master if they are
successful in the mastership exam.

The upper age limit of 18 to commence formal apprenticeship training was removed in 2001.

33 Osman Yildiz from HAK-IS Confederation, Yildirim Koc from TURK-IS Confederation, Ummuhan Bardak from the Ministry of Labour and Social Security.

34 Vocational Education Law, Art. 10.

3- Vocational Higher Schools

The Higher Education Law (No. 2547, Art. 45) stipulates that graduates of high schools, with programmes oriented toward a profession, such as vocational and technical high schools, receive
special and favourable weight for their high school grade-point averages when they are being considered for placement in their preferred higher education programmes and corresponding to the
field of their high school education.

In university entrance exams, candidates who have been permanently disabled by a defect in their

eyesight, hearing or by an orthopaedic problem are subject to special treatment by the Student Selection and Placement Centre as required by their condition. To benefit from such special treatment
a disabled candidate has to submit a petition to the Student Selection and Placement Centre giving all
the information about her/his handicap along with a medical report obtained from a State or university
hospital confirming her/his infirmity.

B- GROUND SPECIFIC PROBLEMS

1- Racial and Ethnic Origin

One of the problems of minorities is the lack of institutions giving vocational training in their mother
tongues.

2- Age

There are not enough vocational re-training activities for older persons. Because of the limited capacity of vocational training institutions, State departments and universities design programmes for
young people only. Employees who do not update their technical knowledge may loose their position
in the job market. Continuous education programmes are not supported at the higher education level.
The Employment Organisation's support is valuable but not sufficient (see below).

3- Disabled People

One of the conditions for applicants to vocational training centres is to be physically healthy. Because
of this rule, disabled individuals do not benefit enough from the programmes. The Presidency of Administration for Disabled People raised this issue in the Supreme Council for Disabled35.
The main reason for high unemployment rates among the disabled population is the lack of training
and education. Most disabled individuals cannot continue education after primary school.

4- Sexual Orientation

There is no fundamental problem for homosexual and bisexual students in vocational training. A general discriminatory practice against them has not been observed. However, students who do not
conceal their orientation may face harassment and biased approaches from teachers and administrators36.

5- Religion or Belief

State education institutions apply a ban on women wearing headscarves for religious reasons. Female
students wearing headscarves are denied access to high school and university education including
vocational training schools. Regulations prohibit any student from wearing a headscarf whilst sitting

university examinations taken in June each year. Students who want to continue education at higher
vocational training schools have to take this exam37.

35 Interview with Kezban Karckay, expert in the Employment Chamber of The Presidency of Administration for Disabled
People.

36 Interview with Umut Guner.

37 Interview with Yilmaz Ensaroglu, Head of Mazlum-Der (Organisation for Human Rights and Solidarity for Oppressed
People); www.mazlumder.org/basortusu/act.html; Human Rights Watch 2003 World Report.

In recent years, some students wearing headscarves were dismissed from schools through disciplinary
procedures. They sued government departments but first instance administrative courts and the Council of State found disciplinary punishments in conformity with the law. As a last resort some students applied to European Court of Human Rights. The Fourth Chamber of European Court of
Human Rights found two applications admissible in 2002. One of the applications was given by Zeynep Tekin (No. 41556/98) who was dismissed from the High Vocational School for Nurses in Izmir. The Court has not reached final decision yet. Friendly solution attempts of the Court have not
been successful yet.

Closure of theological schools giving vocational training to priest candidates has been an important
problem for non-Muslim minorities since 1969.

Assessment

The problems of disabled persons, students wearing headscarves and belonging to minority groups
should be eliminated. Compatibility with the Directives should be reviewed.

Employment and working conditions, including dismissals and pay.

1- Wages

Article 55 of the Constitution makes the State responsible for taking the necessary measures to ensure
that workers earn a fair wage commensurate with the work they perform. As stated above, Article 5/4
of the Labour Code stipulates that for the same work or work of equal value a lower wage can not be
paid. According to Article 10 of the Regulation on Employment of Disabled Persons, disability cannot
be a reason for wages less than those paid to non-disabled employees.

2- Dismissals

a- Labour Code

Article 18 of the Labour Code includes provisions on dismissals (see above). Article 29 of the Labour
Code regulates collective dismissals of employees. When the employer resorts to a termination of

contracts of employment collectively due to economic, technological, structural or similar enterprise,
workplace or work requirements, he or she notifies the matter to the employees' trade union representatives, the relevant regional directorates, and the Turkish Employment Organisation in writing at least thirty days before dismissal. Such notifications should include information on the reason for the dismissal of the employees, the number and groups of employees to be dismissed, and
the duration of the period in which the dismissal is to be executed. The employer is obliged to prove
that the termination is based on just reasons in collective dismissals of employees, in a similar way to
individual dismissals.

c- The Civil Servants Act

Civil servants are employed on a permanent basis; their status is lifelong unless a reason for termination occurs. According to Civil Servants Act, No. 657, there are two reasons to terminate the
employment of civil servants before compulsory retirement age:

_ being found guilty at the end of disciplinary procedures,

_ having bad records for three years consecutively by two different superior officers (Article 120 of the Civil Servants Act).

Joining political parties, not going to workplace for 20 days in a year without excuse, attacking superiors or colleagues physically, disturbing the order of the workplace, participating in strikes, boycotts and similar activities, and revealing secret documents to the public without authorisation are
reasons enough to be expelled from the civil service. Dismissed civil servants have the right to file an
action against State departments in the administrative courts. The employer is not obliged to justify the
validity of the termination. But, administrative courts have the authority to review cases *ex officio* and
they collect all relevant material from State departments before the verdict.

GROUND SPECIFIC PROBLEMS

1- Racial and Ethnic Origin

There is no reliable survey related to wage discrimination. Human rights associations have received
some complaints from individuals who have been dismissed from public departments because of their
ethnic origin38. Especially Armenians may face dismissal from public departments after a "security
investigation." There are few alleged discrimination-based dismissals. Individuals who are dismissed
from the military by the decisions of the High Military Council have no right to bring an action against

these decisions.

2- Age

Senior employees may be forced to retire early (see below).

3- Disabled People

There are specific problems for disabled people. Employed individuals may be dismissed after a trial period by employers. Employers who do not want to pay fines for infringing quota rules apply a "hire and fire" strategy. Sometimes employers force the employee not to come to the workplace or to retire early. It is not expressly stated in Article 18 of the Labour Code that disability is a ground for antidiscrimination or an invalid ground for dismissal. However, the list in Article 18 is not exhaustive.

4- Sexual Orientation

Homosexuals and bisexuals, especially those who do not conceal their orientation, may face dismissals especially in the private sector. There are no protective rules against dismissals of LGBs. The Labour Code does not cover sexual orientation as a ground for anti-discrimination or an invalid ground for arbitrary dismissal. This makes discriminatory acts against LGBs more likely in comparison with other categories included in the Code.

Article 153 of the Military Criminal Code39 contains a provision on so called "unnatural relations" which cover homosexual relations between individuals. Homosexuality is treated as unnatural and military officials having sexual relations of that nature may be dismissed from the military.

5- Religion or Belief

Some government ministries have amended their internal regulations and dismissed civil servants suspected of anti-State (including Islamist) activities. According to Mazlum-Der (Organisation for Human Rights and Solidarity for Oppressed People), a non-governmental human rights organisation40, the military regularly dismisses observant Muslims from employment. Allegedly such dismissals are based on behaviour that the military believes identifies these individuals as Islamic fundamentalists, and the concern is that such individuals have less loyalty to a secular, democratic state.

Dismissals from the military are decided by the Supreme Military Council, a body composed of the prime minister and high-ranking military personnel. As stated above, according to Article 125 of the Constitution, decisions of the Supreme Military Council are outside the scope of judicial review.

Therefore, officials who are dismissed from the military cannot file bring an action before the Supreme Military Court.
Women who wear headscarves have been punished with administrative fines or lost their jobs in the
public sector. These dismissed persons went to the administrative courts. The courts rejected the
claims of the applicants. Most of the files are waiting for the final decision of the Council of State.
38 Interview with Husnu Ondul, Head of Human Rights Association.
39 Askeri Ceza Kanunu (Military Criminal Code) (No. 1632), *Official Gazette*, 15 June 1930, No. 1520.
40 Interview with Yilmaz Ensaroglu, Head of Mazlum-Der (Organisation for Human Rights and Solidarity for Oppressed
People); www.mazlumder.org/basortusu/act.html.

Assessment

Equal wages should be evaluated on the basis of similarity of work and equality of performance. But
these abstract frameworks need to be clarified through objective methods. Otherwise it would be very
difficult to say something about wage inequality. Research on work evaluation and efficiency
evaluation is needed. Provisions on wages in collective agreements should be based on these
evaluations but it is not a widespread practice in the country today.41
Members of ethnic groups, homosexuals, old persons and observant Muslims may face with
discriminatory actions by employers. Article 5 of the Labour Code does not expressly recognise ethnic
origin, sexual orientation and age as grounds of discrimination.
The new Labour Code makes dismissals on the basis of religion or belief and race invalid. It is early to
argue on the implementation of Article 18 of the Code. As stated above only 15-20% of the total
employees may benefit from the procedural rights laid down in Article 18.
Decisions of the Supreme Military Council, including those related to dismissals, should be reviewed
by the courts. Although the provision of the Constitution preventing judicial review is criticised by
governments, political parties, high judges and media, it has not been amended yet.
Compatibility with the directives should be reviewed.

Membership of, and involvement in, an organisation of workers and employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

1. Membership of Trade Unions

Trade unions are established without prior authorisation of State departments. Individuals who are
below 16 years old can be a member of a trade union upon their parents' consent.42
The Trade Unions Act stipulates that a contract of employment cannot force an employee to be
member of a trade union. The Act does not allow employers to discriminate against employees on the
basis of trade union membership.

2. Membership of Organisations for Professionals and the Self-Employed

According to Article 135 of the Constitution, public professional organisations and their higher organisations are public corporate bodies established by law, with the objectives of meeting the common needs of the members of a given profession, facilitating their professional activities, ensuring
the development of the profession in keeping with common interests, and safeguarding professional
discipline and ethics in order to ensure integrity and trust in relations among its members and with the
public; their organs are elected by secret ballot by their members in accordance with the procedure set
forth in the law, and under judicial supervision.
Membership of these organisations is compulsory. Persons regularly employed in public institutions,
or in state owned economic enterprises are not required to become members of public professional
organisations.
Although there is no rule in the Constitution, persons who do not have Turkish nationality may not
become a member of professional organisations. The conditions of membership are regulated by law.

GROUND SPECIFIC PROBLEMS

1- Racial and Ethnic Origin

41 Melek Onaran Yüksel, *Turk Is Hukukunda Kadin-Erkek Esitligi*, Beta Yayinlari, Istanbul 2000, pp. 214-219.
42 Sendikalar Kanunu, (Trade Unions Act No. 2821), Art. 20.

There is no discriminatory practice with respect to racial or ethnic origin for persons who have Turkish citizenship to be member of any kind of organisation. Persons who are not Turkish citizens
cannot be founders of trade unions and may not be members of public professional organisations.43

2- Age

Persons can be a member of an organisation for professionals irrespective of their age, with the exception of individuals who are below 18 years old. According to Turkish law people below maturity
age cannot be a member of organisations without the consent of their parents.

3- Religion or Belief

There are some problems for women wearing headscarves. Women lawyers wearing headscarves have
difficulties; for example, they were invited by the members of Usak (a western province) Bar Association Board not to wear headscarf in the General Assembly in October 2002.

Assessment

Employees below 18 years old and women wearing headscarves have some difficulties in membership
of trade unions and professional organisations. Compatibility with the Directives should be reviewed.

Social protection, social advantages, education, access to supply of goods and services which are available to the public (Directive 2000/43 only).

1- Social Security and Health Care

Social security and health care are provided by three different State organisations for civil servants, employees and self-employed people. Regardless of ethnic origin or race all individuals may benefit from social protection. There have been some problems in practice; for example, people who do not know Turkish may have difficulties in communication at hospitals and state departments in which there is no staff serving these people in their mother tongues. Communication with officials is especially a problem for uneducated Kurdish individuals, especially women, living in the southeast of Turkey.

2- Minority Foundations

Minority foundations (*cemaat vakiflari,* community foundations) play an important role in the social life of non-Muslim minorities. On 8 May 1974, the Civil Law General Assembly of the Court of Cassation decided that the acquisition of immovable property by minority foundations by whatever means after 1936 was illegal and contrary to the public order. The Assembly stressed that "acquisition of immovable property by the minority foundations had been a practice strengthening minorities in Turkey." The Court described minorities as "foreigners who presented a danger to the State" and that the declarations submitted in 1936 by minority foundations to the Department of Foundations were in the nature of "deeds of trust," also considering that those declarations contained no expression to the effect that further property could be acquired in the future.44 Upon this decision, the Department of Foundations and the Ministry of Finance brought legal actions for the annulment of the title-deeds of the immovable properties acquired by minority foundations after 1936 and for their registration in the name of the State or their return to the former owners, and they obtained court judgements to thiseffect. As a result, the property which was acquired by Greek and Armenian minority foundations was taken away from them. The courts continued to cancel the land registration records on minority foundations until recently. These actions prevented minority foundations from functioning properly.

The Turkish Grand National Assembly passed Act No. 4778 (fourth harmonisation package).45 According to this legislation, the General Directorate of Foundations has been authorised for

permissions for acquisitions of immovable property similar to other foundations.

43 The conditions of membership are not the same for all professions. For example non-Turkish citizens cannot be lawyers
in Turkey. Therefore, it is not possible for them to be a member of organisations.

44 Yargitay Hukuk Genel Kurulu, E. 1971/2-820, K. 1974/505. See *YKD*, 1975, Vol. 1, No. 8 (August), pp. 16-18.

45 Law No. 4778, "Law Amending Various Laws," *Official Gazette,* 11 January 2003, No. 24990.

3- Education

According to Article 42 of the Constitution, no one shall be deprived of the right of learning.
In the same article there is a rule on the language of the education. No language other than Turkish
shall be taught as a mother tongue to Turkish citizens at any institutions of training or education.

4- Language

The third Paragraph of Article 26 of the Constitution had stipulated that languages prohibited by the
law could not be used to express and disseminate thoughts and opinions. This provision was repealed
in 2001.46

The third harmonisation package, enacted in August 2002 includes an article (Article 8) amending
Article 4 of Law No. 3984 "the Establishment and Broadcasting of Radio Stations and Television Channels Law." The amended Article 4 of Law No. 3984 reads as follows:

"(...) there may be broadcasts in the different languages and dialects used traditionally by Turkish citizens in their daily lives. Such broadcasts shall not contradict the fundamental principles of the Turkish Republic enshrined in the Constitution and the indivisible integrity of the state with its territory and nation. The principles and procedures for these broadcasts and the supervision of these broadcasts shall be determined through a regulation to be issued by the Supreme Board."

The regulation indicating the implementation of Article 4 of Law No. 3984 was published in the Official Gazette in December 2002.47 Article 4 of the Regulation stipulates that, in principle, broadcasting is done in Turkish. Article 5 includes rules on broadcasting in different languages and
dialects.

Basic principles for broadcasting in the different languages and dialects are as follows:

_ Only Turkish Radio and Television Administration (*TRT*) can broadcast in different languages and dialects,

_ Broadcasting shall not aim at teaching these languages. Only news, musical and cultural programmes for adults are allowed,

_ A protocol shall be done between the Radio and Television Supreme Board (*RTUK*) and the Turkish Radio and Television Administration through which broadcasting and profile of end users of broadcasting in different languages is determined.

_ Broadcasting in different languages shall not exceed 45 minutes daily and four hours weekly for radio channels, and 30 minutes daily and two hours weekly for television channels.

_ The Administration, when it broadcasts in different languages, shall do it together with Turkish subtitles in television broadcasting. Radio broadcasting will be repeated in Turkish

afterwards.

46 Law No. 4709 “Law Amending Some Articles of the Constitution of Turkish Republic,” *Official Gazette,* 17 October 2001, No 24556 (reissued). The new Article 26 is as follow:

Everyone has the right to express and disseminate his thoughts and opinion by speech, in writing or in pictures or through other media, individually or collectively. This right includes the freedom to receive and impart information and ideas without interference from official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, and similar means to a system of licensing.

The exercise of these freedoms may be restricted for the purposes of protecting national security, public order and public safety, the basic characteristics of the Republic and safeguarding the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation and rights and private and family life of others, or protecting professional secrets as prescribed

by law, or ensuring the proper functioning of the judiciary.

The formalities, conditions and procedures to be applied in exercising the right to expression and dissemination of thought shall be prescribed by law.

47 Regulation Concerning Languages Used in Broadcasting, *Official Gazette,* 18 December 2002, No. 24967.

5- Housing

According to Article 57 of the Constitution, the State shall take measures to meet the need for housing within the framework of a plan which takes into account the characteristics of cities and environmental conditions and supports community housing projects.

Settlement Act (No. 2510) contains provisions on immigrants from abroad. The State provides enough land for these immigrants. One of the responsibilities of the State is to meet the housing needs of these people. However, according to same act, not all foreigners are accepted as immigrants. Article 4 of the Act stipulates that persons who are not attached to Turkish culture, anarchists, spies, Roma people (nomadic gypsies used in the Act) and those who are expelled from Turkey do not fall in this category.

The Settlement Act contains provisions on internal tribes and Roma people. According to the Act, these groups are settled in suitable places to be determined by the Ministry of Health and Social Aid (Article 9).

The Draft Settlement Act amending the old law is awaiting enactment in the Parliament. The draft eliminates discrimination of Roma people and contains provisions on displaced persons which are not covered by the previous act48.

6- Unemployment Insurance

The unemployment insurance programme which was established by Law No. 4447 in 1999 covers

employees who are registered at a social insurance institution. Civil servants do not benefit from it.

Assessment

In the field of social security and health care the basic problem for ethnic groups is communication.

This point was stated also in ECRI's Second Report on Turkey: "inability to communicate when dealing with State authorities has resulted in difficulties for persons, particularly women, in accessing services like health care".49 The authorities should take measures to prevent these communication problems.

The problems of the non-Muslim Minority foundations on acquiring immovable property were solved after the last law and administrative regulation reforms. Although some obstacles remained, positive steps have been taken and foundations may acquire immovable property according to the new legislation.

Concerning education, mother tongue teaching in schools is not allowed for the members of ethnic groups other than non-Muslim minorities.

The Regulation on broadcasting in different languages and dialects which is in force today violates Articles 10 and 26 of the Constitution and Article 4 of Law No. 3984. These restrictions should be removed otherwise it would not be possible to argue that the expression and dissemination of thought in ethnic languages by the media is free in the country.

In the 1990s State security forces evacuated villages inhabited by Kurdish citizens in the Southern-East region for security reasons. Most of the displaced persons found accommodation in shantytown dwellings and some in tents around the cities. The Government's "return to village" project has not been implemented well. Furthermore, despite overcrowded and unsanitary housing, re-housing projects have not been developed for displaced persons currently living in cities50. The UN Guiding Principles on Internal Displacement state that all internally displaced persons, *inter alia*, have the right to shelter and housing (Principle 4 and 18)51.

48 Draft Settlement Act, No. 1/352.

49 ECRI, Second Report on Turkey, Adopted on 15 December 2000, CRI(2001)37, p. 9, 3 July 2001, Strasbourg.

50 For a comprehensive report published by Human Rights Watch in October 2002, see www.hrw.org/reports/2002/turkey.

51 For the text of the principles see www. unicef.org/emerg/GudingPrinciples.htm

Compatibility with the Directives should be reviewed.

Article 4 (Racial Equality Directive and Employment Equality Directive)

Do such exemptions exist on the national level? Does national law define 'genuine and determining occupational requirements' and, if so, how?

Please note that the Employment Equality Directive includes particular provisions with regard to organisations the ethos of which is based on religion or belief.

Does national law governing disability discrimination make any specific exceptions or provisions in relation to occupational health and safety rules?

Article 30/7 of the Labour Code stipulates that disabled persons cannot be employed in underground and underwater work.

Article 71 of the Labour Code sets forth that persons under 18 years old can be employed only for certain jobs. Persons who are 16 to 18 years old and who are 15 to 16 years old are divided into two categories by the article. The conditions for the employment of these groups are determined by a regulation of the Ministry of Labour and Social Security with six month after the date on which Code enters into force52. Employment of 15 to 16 year olds is possible only for light jobs and only if they have completed primary education.

According to Article 85 of the Labour Code, persons under 17 years old are not employed for arduous or dangerous work. The conditions of being employed in arduous and dangerous work for women and persons between 17 and 19 years old are determined by a regulation of the Ministry of Labour and Social Security on advice of the Ministry of Health. A list of arduous and dangerous types of work is also drawn up by the Ministry.

Administration for Religious Affairs can employ only men as clerical officials (*imam*). Homosexuals are also not employed as clerical officials53. Most Muslim scholars agree that Islam rejects homosexual acts.

Assessment

There is no ban in legislation on employment of homosexuals in mosques. However, conventionally, it is considered against the ethos of the religious institutions.

Reasonable accommodation

Article 5 (Employment Equality Directive)

Are there specific national law provisions regulating the use of pre-employment medical examinations? If so, what are the main provisions/norms? What is the relationship between this body of law and the principle of equal treatment/prohibition of disability discrimination? How does this body of law relate to the duty to provide a 'reasonable accommodation'?

Does national law permit an employer to inquire about disabilities prior to entering into a

contractual relationship with a prospective employee? If so, in which stage of the job application procedure? Are prospective employees required to disclose, prior to employment, disabilities that impact on job performance? If so, how much and what type of information are they obliged to disclose? According to the law, what consequences follow if they fail or refuse to disclose the information?

52 The Code entered into force in June 2003 and regulation has not been appeared yet.

53 See www.ilga.org/information/legal_survey/europe/turkey

Is the duty to provide reasonable accommodation defined by the law? Is the failure to provide such accommodation considered to constitute direct or indirect discrimination and/or does it infringe other (labour law) standards? Does such a duty exist only with respect to people with disabilities or also with respect to people discriminated against on the other grounds covered by the two directives?

How do courts determine whether accommodation is "reasonable" or whether it imposes a 'disproportionate burden'? What type of criteria is used (medical, occupational, educational, grants etc.)?

Pre-employment medical examinations are covered by the Regulation on Employment of Disabled Persons. Persons who want to benefit from the 3% quota should prove their disability by a report given by a council of expert physicians. A person cannot be officially admitted as disabled without a medical examination. There is no legal requirement of disclosure of disability in the Regulation. However, if the employee does not disclosure his or her disability in the pre-employment period, the employer will have a valid reason to terminate the contract without notice. Article 25 of the Labour Code stipulates that if the employee misleads the employer by falsely claiming to possess qualifications or to satisfy requirements constituting an essential feature of the contract or by giving false information or making false statements, the employer may terminate the contract without notice.

According to experts from the Ministry of Labour and Social Security, and trade union confederations, general medical investigations before the employment are rarely done.54 For persons employed in certain workplaces regular medical examinations are required by the law for the protection of public health.

There is no provision in the Labour Code or in other laws on reasonable accommodation. Article 22 of the Regulation on the Employment of Disabled People stipulates that employers should prepare the workplace according to the needs of disabled individuals. They have to draw up appropriate working conditions of disabled people, to employ them in appropriate fields of work and in positions which relate to their professions, and to improve their knowledge and abilities. The same

article stipulates that employers fulfil these obligations according to their resources. A parallel provision can be found in Article 10 of the Regulation Concerning Conditions of Access to Employment for Disabled Persons as Civil Servants55.

Although Articles 22 and 10 of the Regulation includes some duties for employers, those provisions
have been totally ineffective in practice. There is no mechanism to force employers to obey them.

Failure to provide reasonable accommodation does not constitute discrimination.

There are no provisions on reasonable accommodation in the Turkish legal system in respect to other
grounds of the Directives.

There is no Court decision on reasonable accommodation.

Assessment

Generally workplaces are not prepared for disabled employees in Turkey. Major problems can be
summarised as follows:

54 Osman Yildiz from HAK-IS Confederation, Yildirim Koc from TURK-IS Confederation, Ummuhan Bardak from the Ministry of Labour and Social Security.

55 Sakatlarin Devlet Memurluguna Alinma ile Hangi İslerde Calistirilacaklari Hakkinda Yonetmelik (Regulation Concerning
Conditions of Access to Employment as Civil Servants), 12 May 1983, No. 83/6526, *Official Gazette*, 27 July 1983, No. 18117.

_ Working hours are not arranged according to specific features of employees;

_ Employers generally are not sensitive to daily difficulties of disabled employees;

_ There is not enough support including psychological support;

_ Career opportunities of disabled employees are very limited. They are not preferred for senior positions, and they are excluded from training activities in the workplace.

Sometimes employers employ disabled individuals but do not include them in work teams. They are
paid but not asked to work.

Employers do not prepare the conditions of the workplace according to the needs of the disabled employees. Therefore, disabled employees do not have the opportunity to show their abilities.

Psychological problems and low performance, which can be overcome through reasonable accommodation, create tension between the employer and employee. Worsening relations between
them drive the employer or employee to terminate the contract56.

The State should enact a law on reasonable accommodation which will be effective in practice.

Compatibility with the Directives should be reviewed.

Article 6 (Employment Equality Directive)

When is differentiation on grounds of age 'objectively and reasonably' justified under national law? How is this test being applied?

Are any specific arrangements made in national law regarding age discrimination and occupational social security schemes?

Is compulsory retirement permitted? Are there any national provisions on retirement? Do they allow the fixing retirement ages by individual or collective labour agreements and, if so, what

are the conditions?
Are mandatory retirement ages fixed in national legislation/legally binding collective agreements? At what ages? What (if any) conditions/restrictions are imposed? Are rights to protection from unfair dismissal lost upon reaching this retirement age?
Are mandatory retirement ages widely imposed by employers (even if apparently in agreement with employees)? At what ages? Are rights to protection from unfair dismissal lost upon reaching these retirement ages?
Are early retirement schemes promoted by the State? If so, are they justified by any of the examples provided in Article 6 of the Directive?
Is selection for redundancy widely decided on age grounds?
Is there obvious evidence of age discrimination in access to training opportunities?

There is a compulsory retirement age for civil servants. It was 65 until recently. A new act passed by the Parliament in April 2003 reduced this age to 6157. But when a file was opened against the Act in the Constitutional Court, the implementation of it was postponed until the final decision of the Court58. The reason behind the reduction of the retirement age is to create more jobs for young people.

The mandatory retirement age for civil servants is 60. The State departments have discretionary power to decide on the retirement of civil servants who reach 60 years old. Discretionary power cannot be used arbitrarily. According to Turkish administrative law, decisions of the administration based on discretionary power are reviewed by the administrative courts. Therefore, the administration which decides on the retirement of a civil servant should give the reasons for the decision in court if the individual concerned brings a case. For example, health problems which prevent the person from working may be a just reason59.

There is no compulsory or mandatory retirement age for employees in the Labour Code. Employers may force the employees to retire early with or without a pension. Article 18 of the Labour Code does not state that age is an invalid ground for dismissal. No case law has appeared on the implementation of Article 18 yet. Experts generally agree that the list in Article 18 is not exhaustive and age is an invalid ground60.

According to Article 60 of the Social Insurance Act, persons who reach 58 (for women) or 60 years old (for men), or who have paid insurance premiums for at least 7000 days, or who have worked for

56 Interview with Ahmet Faruk Oztimur.
57 4839 Sayili Kanun (Act No 4839), *Official Gazette*, 17 April 2003, No. 25082.

25 years with insurance and paid premiums for 4500 days can retire and benefit from pensions61. The
retirement ages of civil servants are regulated by the Savings of Retired Persons Act. According to
Article 39 of the Act, persons who reach 58 (for women) or 60 years old (for men) and have worked
for 25 years may retire and benefit from pensions, should they wish to do so62. Disabled civil servants
may retire voluntarily after 15 years of work.
Retirement age cannot be determined by collective agreements. Collective agreements are private law
agreements and these agreements cannot change retirement ages which are fixed in Social Insurance
Law. However, collective agreements may include provisions on the retirement of employees who
reached the retirement age with a pension. But, In practice, collective agreements do not include
provisions on retirement. The retirement of employees before they have the right to a pension cannot
be decided by collective agreements.
The policy of the government on retirement was promotion of early retirement until two years ago.
Thus, it had been possible to create new jobs for young persons. But this policy failed because it
caused financial deficits in the social security institutions' budgets. Today the government does not
support early retirement.
According to Trade Union representatives, age may be one of the criteria used in selection for
redundancy. But, it would not be correct to make generalisations without data. In some branches of
work the employer may choose to work with senior employees. There is no reliable statistical data on
redundancy in Turkey.

Assessment

The government should justify compulsory and mandatory retirement ages.
Compatibility with the Directives should be reviewed.

58 E. 2003/31, K. 2003/3 (postponement of implementation), *Official Gazette*, 10 May 2003, No. 25104.
59 Danistay 3. Dairesi (Third Chamber of Council of State), 11 June 1982, E. 82/4645, K. 82/1865
60 Yildirim Koc, from Turk-Is Confederation.
61 Sosyal Sigortalar Kanunu (Social Insurance Act) (No. 506), *Official Gazette*, 29, 30, 31 July 1964, 1 August 1964, No.
11766-11779. (Article 60 was amended by Article 1 of the Act No. 4759).
62 Emekli Sandigi Kanunu (Savings of Retireds Act) (No. 5434), Official Gazette, 8 June 1949, No. 7235. (Article 39 was
amended by Article 23 of the Act No. 4447)

Positive Action
Article 5 (Racial Equality Directive) and Article 7 (Employment Equality Directive)

Do specific measures exist in order to ensure or promote full equality or to compensate disadvantages linked with racial or ethnic origin, religion or belief, age, disability or sexual orientation (e.g. mandatory or voluntary quota systems, positive action programmes, financial incentive schemes, etc.)? Is the government considering adopting such measures?
Are there comparable specific measures in relation to gender discrimination?
Please make precise reference to the relevant legal provisions and case law. Please avoid describing social policies and policies aimed at the integration of certain groups.

1- Mandatory Quota System for Disabled People

According to Article 30 of the Labour Code, every employer employing 50 or more employees in his/her undertaking shall be obliged to ensure that 6% of the total workforce are disabled, ex-convicts and victims of terrorism, in accordance with their occupational skills and physical and mental capacities. Quotas for these three groups are determined by the Council of Ministers annually. The quota reserved for disabled persons cannot be less than 3%. In the event of more than one undertaking being operated by the same employer within a province, the quota of disabled persons to be employed should be determined on the basis of the total number of workers employed in such undertakings.

Priority shall be given to those who became disabled during their previous employment, ex-convicts and victims of terrorism.

The employers who are obliged to employ disabled persons apply to the Employment Organisation.

The candidates are determined by the Organisation63.

Article 53 of Civil Servants Act lays down that 3% of positions must be reserved for disabled persons.

The details on the employment of the disabled persons are determined by the regulation. Persons who want to be employed as civil servant should take the exam designed for disabled persons64.

Employers who do not fulfil the 3% quota rule for disabled people must pay administrative fines. According to Article 101 of the Labour Code an employer or his/her representative who does not employ disabled persons shall be liable for a fine of 750 million TL (approximately 400 Euro) on a monthly basis in respect of each disabled person s/he is required to employ.

2- Promotion of Employment of Disabled People

Another example of positive action can be found in Article 30 of the Labour Code. Employers who employ more disabled persons than the quotas determined by the Council of Ministers require, or who are not obliged to employ disabled persons, or who employ persons who have lost their labour capacity to more than 80% shall pay half of the insurance premiums due as the employer's contribution under the Social Insurance Act (No. 506) and the other half shall be paid by the Treasury65.

Special vocational rehabilitation centres have been planned for disabled individuals. The Employment
Organisation is responsible for the functioning of these centres. After 1991, with the financial support
of United Nations Development Programme, one of these centres was established in Ankara. The total
number of labour force training courses (for disabled persons only) was 128 in the period 1998-2002,
and 262 individuals participated these courses.66 Administrative fines taken from companies which do
63The Regulation on Employment of Disabled Persons, Art. 8.
64Regulation Concerning Conditions of Access to Employment as Civil Servants, Art. 8.
65 Article 30, paragraph 10 of the Labour Code.
66 The Employment Institution.

not obey quota rules have been spent on training for disabled individuals. But the number of participants on the courses is quite low in comparison with the total disabled population in the country.

3- Other benefits for disabled persons

Self employed disabled persons may get a loan from Social Solidarity and Mutual Aid Fund to establish their enterprises. Special projects and disabled students are also supported by the same Fund.

According to Income Law (No. 193) disabled people working as civil servants, employees on contracts, professionals or self employed persons benefit from income tax reduction.

Turkish Airlines and State Railways offer 40% reductions on ticket prices.

Some public institutions and ministries adopt regulations to ease the daily life of disabled persons in
workplaces like regulations on lavatories, lifts, stairs, etc.

4- Positive action for unemployed persons

Continuing education and life-long learning programmes are structured by the Employment Organisation. The Institution is charged with the task of conducting training activities based on labour
market needs analysis. The Organisation has instituted vocational development courses for unemployed individuals too. Unemployed people registered with the Employment Organisation may
attend these courses. The aim of these courses is to make individuals more qualified to find a job.

There are three different programmes: employment-guaranteed training courses, courses that develop
self-employment skills, and labour force training courses. Together with the courses for disabled individuals, these courses can be considered as “active labour market measures”.

5- Positive action in other areas

No similar provisions on positive action have been adopted for other groups including women.

Assessment

The departments of the Ministry of Labour and the Employment Organisation are responsible for

monitoring the implementation of quota rules. The administrative fine is discouraging (it amounts to
three times of minimum wage), but there are organisational problems in monitoring infringements.
The quantity and quality of positive action programmes for unemployed and disabled persons increased in recent years. But in comparison with the total population of these groups, they are not
sufficient to meet the demand.
30

Chapter 2 Remedies and Enforcement

Article 7 (Racial Equality Directive) and Article 9 (Employment Equality Directive)

a. Judicial and/or administrative procedures

What judicial, administrative and conciliation procedures are available on the national level for the enforcement of the principle of equal treatment? Is action needed on the national level to comply with Articles 7.1 and 9.1 respectively?

Please make precise reference to the relevant legal provisions and case law.

A- JUDICIAL AND/OR ADMINISTRATIVE PROCEDURES

1-Discrimination

a- Violations of Article 5 of the Labour Code

In relation to any treatment by the employer that violates the provisions of Article 5, the employee
may bring an action in the labour courts for compensation of damage. There is no case law on Article
5 (it was enacted in June 2003).

b- Victimisation and Dismissals

Article 20 of the Labour Code stipulates that an employee, whose contract of employment is terminated could bring an action in the labour courts on the grounds that no reasons were indicated or
that the reasons put forward are invalid. The dispute is referred to a special arbitrator within the same
period, provided that there is a clause in the collective labour agreement or the parties come to an
agreement on the subject.
31

Civil servants have the right to bring actions in administrative courts if the dismissal is not just. The
public body which dismisses the civil servant has to prove the fact that the dismissal was for just reasons. Otherwise, the administrative decision may be repealed by the court. State departments
should prove their decisions in administrative courts. Civil servants also have the right to apply to senior officials to review decisions. Military officials have no right to bring legal action before the Supreme Military Administrative Court against decisions of the High Military Council on dismissals.

In the case of collective dismissals, employees who lose their jobs may follow the same procedures

(Art 29/8 of the Labour Code). There is no case law on the above-mentioned provisions (they were
enacted in June 2003).
c- Access to Employment, Recruitment
The conditions of access to employment for contract based employees can be made subject to judicial
review on the basis of the anti-discrimination clause in Article 5.
Candidates can go to labour or administrative courts with the argument that the administrative regulations or decisions or the law infringe the Constitution. Administrative regulations and decisions
found not to comply with the Constitution are directly repealed by the administrative courts. If the law
infringes the Constitution, the file is sent to the Constitutional Court. On application of the lower court, the Constitutional Court may repeal the provisions of the law.
d- Membership of a trade union
Employees who are dismissed on the basis of trade union membership may bring legal action against
their employers (Article 31/5 of Trade Unions Act). In those cases, the dismissed employee should
prove the facts.67

2- Harassment

There is no judicial procedure available in harassment cases unless the act, at the same time, constitutes a crime defined in the Criminal Code such as defamation.

3- Instruction to Discriminate

There is no judicial procedure for these cases unless such instruction constitutes a crime defined in the
Criminal Code.

4- Other Procedures

Although it is not the practice, an anti-discrimination clause on the grounds of the Directives may be
included in individual contracts and collective agreements. In such cases both the employees and the
trade unions on their behalf and with their consent may challenge such violations before the courts. In
Turkish law, collective agreements are binding. Contracts of employment may not infringe collective
agreements.68
All decisions of the administration can be reviewed and be corrected by higher authorities on application.
Trade Unions may provide legal aid for their members or their heirs on the grounds of retirement,
social insurance and the exercise of similar rights.69

67 Yargitay 9. Hukuk Dairesi (Ninth Law Chamber of Court of Cassation), 1 October 1992, E. 1992/3250, K. 1992/10598;

27 January 1999, E. 1998/19528, K. 1999/646.
68 Collective Labour Agreement, Strike and Lock-Out Act (*Toplu Sözle°me, Grev ve Lokavt Kanunu*), No. 2822, Art. 6.
69 Trade Unions Act, No. 2821, Art. 33/1.

Assessment

The lack of judicial, administrative and conciliation procedures may encourage discrimination of employees. Harassment and giving instruction to discriminate are examples of acts for which no effective judicial procedures are instituted. The provision on judicial and conciliation procedures for dismissal and victimisation in the Labour Code is progress. But it can be available to only 20% of the total employees. Compatibility with the Directives should be reviewed.

b. Associations

Are associations and other entities with a legitimate interest in ensuring compliance with antidiscrimination law entitled to engage in judicial and/or administrative procedures on behalf of or in support of the complainant? If so, how often do associations and other entities make use of this possibility and with what results?

In administrative law, an association can file a case with the administrative courts in legal matters which relate to association's mandate. There is no law against acting on behalf of members, but according to the case law, associations cannot act as representatives of their own members70. For example, an association may not act on behalf of individuals who are harassed by employers if that association is not found to defend the rights of harassed individuals.

The administrative courts and Council of State may accept applications from trade unions if the cases are related to the rights of all employees guaranteed by law or administrative regulations and not to the subjective rights of an individual employee71.

According to Article 32 of the Trade Unions Law, trade unions have the capacity to act as plaintiff or defendant in matters arising out of legislation, custom and usage and collective labour agreements.

They have the right, at the written request of the person concerned, in legal matters concerning rights of transportation, copyright, partnership and employment contracts and insurance rights, to act as representative of their members and heirs of them. If the rule in the collective agreement contains provisions related to the interests of a group of employees, trade unions may act without the consent of the employee.

Associations other than trade unions cannot represent their members in labour courts.

Trade unions, associations and other legal entities cannot engage in administrative procedures on
behalf of their members. Only concerned individuals and their attorneys may apply to administrative
units.

Assessment

Trade unions may represent their members in administrative and labour courts for the enforcement of
laws and regulations. Associations and other legal entities have limited rights to act on behalf of their
members in courts and administrative units. Turkish law is partly compatible with the Directives.

c- Time Limits

What is the situation concerning time limits?

A- SITUATION CONCERNING TIME LIMITS

70Seref Gozubuyuk, **Yonetsel Yargi**, Turhan Kitabevi, Ankara 2001, pp. 181-182.

71Council of State, General Assembly of Chambers of Administrative Suits, E. 92/668, K. 94/217, **Danistay Dergisi**, Vol.
90, s. 193, 1996.

1- Time Limits in Administrative Law

The time limit to repeal regulations and administrative decisions is 60 days after the day of promulgation of the regulation or notification of the decision to the concerned individuals.72 For compensation of damages which are the result of administrative action, applications should be submitted within 1 years of the victim being informed and in any case within 5 years of the date of the
action causing damage.73 The appeals should be made in 30 days after the notification of lower courts' decisions.74

2- Time Limits in Labour Law

Civil law suits for compensation of damages should be filed within 1 year of the victim being informed and in any case within 5 years of the date of the action causing damage for tort cases.75 If
the case relates to the wages of the employees the limit is 5 years.76 For all the other matters the limit
is 10 years.77 The appeals should be made within 8 days of the notification of lower courts' decisions.78

The time limit for actions against dismissal is one month following the date of notification of termination of contract79.

3- Time Limits in Criminal Law

Turkish criminal law classifies time limits according to punishments. For offences resulting in less
than 5 years punishment, the limit is 5 years. If the punishment is between 10-20 years, the limit is 10
years and over 20 years it is 15 years.80 For some offences, like insult, the prosecutor can file a case
only upon receiving the complaint of the victim. For these offences the limit on filing a case is 6

months.81 Appeals should be made within one week of the oral notification of the verdict by the lower
court.82

d. The burden of proof

Article 8 (Racial Equality Directive) and Article 10 (Employment Equality Directive)

Does the principle of the shift or easing of the burden of proof in cases of discrimination exist under national law (constitutional, civil, penal, labour and administrative)? AH: as mentioned before, if included in penal law, this would be contrary to international human rights law

Are there comparable provisions in national law in relation to gender discrimination (NB this is covered by Directive 97/80/EC on the burden of proof in cases of discrimination based on sex)

The general rule on the burden of proof is stated in Article 6 of the Civil Code: each party must prove
the facts on which she has based her claim unless the contrary is stated by law. There are some exceptions to this rule Firstly, if a fact is admitted by the other party (*ikrar,* admission), it is deemed

72 Administrative Judicial Procedural Law (*İdari Yargilama Usulu Kanunu*) No. 2577, Art. 7.
73 Administrative Judicial Procedural Law (*İdari Yargilama Usulu Kanunu*), Art. 7.
74 Administrative Judicial Procedural Law (*İdari Yargilama Usulu Kanunu*), Art. 46/2.
75 Law of Obligations (*Borçlar Kanunu*), N.o 818, Art 60/1-2.
76 Law of Obligations (*Borçlar Kanunu*), Art 126.
77 Law of Obligations (*Borçlar Kanunu*), Art 125.
78 Law of Labour Courts (*Is Mahkemeleri Kanunu),* No. 5521, Art. 8.
79 The Labour Code, No. 4857, Art. 20/1.
80 Turkish Criminal Code (*Turk Ceza Kanunu*). Art. 102/1-6.
81 Turkish Criminal Code (*Turk Ceza Kanunu*), No. 765, Art. 108.
82 Criminal Judicial Procedural Law (*Ceza Muhakemeleri Usulu Kanunu*), No. 1412, Art. 310.

that there is no dispute between the parties, therefore no proof is necessary.83 Secondly, facts which
are beyond the area of reasonable dispute shall be accepted without proof. Thirdly in some specific
instances the law states who must prove the facts.84 Lastly, there are presumptions (*karineler*) which
indicate the existence of certain facts.85

Until recently, there was no provision in labour law on a shift of the burden of proof. Each party had
to prove the facts on which he/she has based his/her claim. The new Labour Code contains two provisions related to the burden of proof. According to Article 5 of the Code (see first section), the
burden of proof may be reversed if the employee puts facts down that strongly indicate the possibility
of a violation of the anti-discrimination clause, in which the employer has to prove that there is no
such a violation. Secondly, Article 20/2 of the Labour Code lays down that the employer must prove
that the termination is based on valid reasons. If the employee argues that there is another reason, he

or she should prove it. Paragraphs (c) and (d) of Article 18 of the same Code clearly state that applications made by the employee to administrative and judicial authorities, race, colour, sex, civic
status, family responsibilities, pregnancy, religion, political opinion and ethnic and social origin cannot be a valid reason for the termination.

In Turkish administrative law which has been modelled on French administrative law, cases arising
between administrative agencies and individuals are reviewed by administrative courts (*idare mahkemeleri*) specialised in administrative law cases and the Council of State (*Danistay*). Judicial review in administrative courts is not only a matter of resolving conflicts between parties, but also an
effective preventive and corrective means of ensuring administrative agencies operate within legal
boundaries.86 Judges have the capacity to examine cases *ex officio* in the administrative courts. *Ex*
officio examination means that the judges can demand the plaintiff and contested administration send
all documents and information related to the case and they reach the decision without being bound to
the pleas of both sides87.

The system of *ex officio* examination may be protective for plaintiffs who sue the administrative agencies. However, it is not identical to the shift of burden of proof.

The constitutional Court has been built up on the European model in Turkey. It has been considered as
guardian of the constitution rather than an appellate body like US Supreme Court. Therefore, The
Court's decisions are response to complaints by persons who have no standing but who wish to bring
certain issues to the attention of it. As a result of this the Court examines the issues *ex officio* in the
absence of plaintiffs and contested authorities. In this institutional design burden of proof cannot be a
matter for review of unconstitutionality of laws, statutory decrees, and standing orders. There is no
constitutional review of actions of private or public bodies.

The burden of proof cannot be reversed in criminal law cases in Turkish criminal law.

Assessment

The provisions of the new Labour Code on the shift of burden of proof are a positive step forward.

But they are open to criticism. First of all the clause in Article 5 is not clear. The judges, after reviewing of the employee's plea, decide on a shift of the burden of proof. At this stage, the employee
should convince the judge that there are "facts indicating strongly the possibility of a violation".

Although it is too early to comment further on this matter, it should be noted that Article 5 accepts the
shift of the burden of proof conditionally and the condition itself may force the employee, instead of

83 Hukuk Usulü Muhakemeleri Kanunu (Code of Civil Procedures), Art. 236.
84 Medeni Kanun (Civil Code) Art. 29; Borclar Kanunu (Code of Obligations) Art. 42, 54, 55, 62 and 96.
85 Medeni Kanun (Civil Code) Art 3 and 285; Borclar Kanunu (Code of Obligations) Art. 31, 174/III, 218, 254, 263 and 472.
86 Sait Guran, "Administrative Court," *Introduction to Turkish Law,* Kluwer Law International, 1996, p. 57.
87 Idari Yargilama Usulü Kanunu (Code of Administrative Procedures), Art. 20.

the employer, to prove the facts. Article 20 of the Labour Code clearly states that in dismissals burden
of proof is reversed. But this provision cannot be implemented in all cases. The employer should justify dismissal with valid reasons only if he/she employs thirty or more employees. Furthermore, the
employer has no obligation to justify the dismissal if the employee does not have at least six months
seniority. Thus, provision in Article 20 will not be implemented in around 80% of all dismissal cases.
There is no provision on the shift of burden of proof in the Code of Administrative Procedures. Compatibility with the Directives should be reviewed.

e. Victimisation

Article 9 (Racial Equality Directive) and Article 11 (Employment Equality Directive)

Does protection against victimisation, as defined in Article 9 and Article 11 respectively, exist in national law?

Please make precise references to the relevant legal provisions and case law.

According to Article 18 of the Labour Code, an application by an employee to administrative or judicial authorities to enforce his or her rights arising from legislation or a contract or to participate in
proceedings that have already commenced does not constitute a valid reason for termination. Application by a civil servant to administrative or judicial authorities does not form a valid reason for
the termination of labour relationship. In such cases, the decision of termination taken by administrative authorities is called "decision taken on enmity" and is evaluated by the courts as "abuse
of authority." The courts should, normally, repeal the decision. These two conceptual frameworks
have been developed by the case law of the administrative courts and there is no written provision on
victimisation in the legal system.

Assessment

Around 20% of employees may benefit from Article 18. There is no written rule in administrative law
protecting persons against victimisation.
Compatibility with the directives should be reviewed.

f. Sanctions

Article 15 (Racial Equality Directive) and Article 17 (Employment Equality Directive

What provisions exist on the application of effective, proportionate and dissuasive sanctions, penalties and remedies in anti-discrimination cases? How do these compare to sanctions in other areas (e.g. labour law)? Do equivalent provisions already exist on the national level in other areas? Is multiple discrimination an aggravating circumstance?

Employers who violate the anti-discrimination clause of Article 5 of the Labour Code are obliged to pay compensation equal to a maximum of four months' of the employee's salary of the employee following the verdict of the labour court.

Under Article 21 of the Labour Code, if it is decided by the court that the termination is invalid, the employer is obliged to re-employ the employee within one month. If the employer does not re-employ the employee within one month following his application, he is obliged to pay compensation to the employee equal to at least four months and at most eight months' of the employee's salary. The provisions of Article 21 cannot be subject to amendment by contract.

If a civil servant is dismissed on unjust grounds or an unlawful decision is taken in relation to an individual or an unlawful regulation is enacted by the administration, the administrative courts repeal

the decision. The verdicts of these courts have retroactive effect. From the date of the dismissal all damages of the plaintiff are paid, including wages and the other financial benefits. All other decisions taken on the basis of the repealed decision become unlawful. The State administration is obliged to reemploy civil servants.

Employers who violate Article 31(1) of the Trade Unions Act (No. 2821) have to pay compensation not exceeding half of the monthly salary of the employees above 16 years old working in the industry.

Multiple discrimination is not accepted as an aggravating circumstance.

Sanctions for discriminatory acts are generally in parallel with sanctions in other areas of labour law.

The annulment of administrative regulations and illegal decisions and other sanctions bound to the annulment are common administrative sanctions for all unlawful administrative acts.

Assessment

It can be said that existing sanctions are not enough to cover all grounds of discrimination and the scope of the EC Directives. For example, there are no sanctions on harassment, discriminatory instructions and reasonable accommodation. The sanctions in Article 5 and 21 of the Labour Code

were recently enacted. For serious violations criminal sanctions should be applied. The Proposed
Criminal Code includes a crime called “discrimination with maximum 1 year imprisonment. Multiple
discrimination is not sanctioned by an aggravated sentence.

g. Dissemination of information

Article 10 (Racial Equality Directive) and Article 12 (Employment Equality Directive)

What action is being taken or is planned to ensure that anti-discrimination legislation has been or will be brought to the attention of the public?

What action is being taken or is planned to ensure - by means of information and training and where necessary by effective sanctions - that all officials and other representatives of the public authorities at every level abstain from any discriminatory speech or behaviour in the exercise of their functions?

There are no institutions in the Turkish administrative system that are specifically designed to disseminate information on anti-discrimination legislation.

The Human Rights Commission of the Grand National Assembly, the Human Rights Presidency of
Prime Ministry, the Human Rights Advisory Council, and the Decade Committee for Human Rights
are human rights bodies of the State. The Human Rights Commission of the Parliament has the authority to conduct research on specific subjects and publish them. For example, in recent years the
Commission produced reports on the conditions in prisons. The Human Rights Presidency of the Prime Ministry is planning awareness-raising and training programmes for the representatives of public authorities and individuals. The Presidency, together with the EU and the Council of Europe,
designed a project for awareness-raising. The project will start in June 2003. One of the concerns of
the project is to combat discrimination. The Human Rights Advisory Council includes both representatives of governmental and non-governmental organisations. The Council recently established committees. The committees have not begun to work yet. The function of the Advisory
Council is to build up dialogue between NGOs and the government. The Decade Committee for Human Rights is working mainly on human rights training of public officials. Human rights committees in provinces and districts were established to help individuals who complain about human
rights violations.

The EU Department of the Ministry of Labour, EU General Directorate and the Presidency of Disabled People are State bodies which have experts working on EU legislation on discrimination.

They inform the other State departments and civil society organisations, including trade unions, of
matters of EU law. Some of these experts also attend the meetings and seminars of EU departments.

A new body is the Parliamentary Commission on EU Matters. The Commission will play a role in harmonising legislation with EU law.
There are no long term plans for the dissemination of information and a reduction of discriminatory
acts of public officials.

Assessment

In the last decade some public bodies dealing with violations of human rights have been established in
Turkey. They may be involved in dissemination of information on discrimination. Establishing a national body that is specialised in discrimination will make the dissemination of information more
effective.
Current training programmes for officials and other representatives of public institutions are not sufficient in quality and quantity. They are usually financed by European bodies. There is a need for
training programmes to combat the discriminatory acts of public officials especially against ethnic
groups and LGBs.
Compatibility with the Directives should be reviewed.

h. Social dialogue and NGOs

Article 11 and 12 (Racial Equality Directive) and Article 13 and 14 (Employment Equality Directive)

Has the government taken steps to promote dialogue with the social partners at national level? If so, what are the measures adopted and what are the results?

Has the government taken steps to promote dialogue with non-governmental organisations at national level? If so, what are the measures adopted and what are the results?

A- GENERAL INFORMATION ON SOCIAL DIALOGUE WITH SOCIAL PARTNERS IN TURKEY

The institutions, boards and councils which play a role in social dialogue at the national level are:

_ Labour Council
_ Economic and Social Council
_ Turkey-EU Joint Advisory Committee
_ Minimum Wage Determination Commissions
_ Supreme Arbitration Board
_ Council for Using the Administrative Monetary Penalties
_ Provincial Labour Councils
_ Labour Force Market Information Board
_ Supreme Council for the Disabled

The Economic and Social Council which was established in 2001 by Act No. 4641 consists of the
following persons:
Prime Minister (chairman), deputy prime ministers, State minister responsible for State Planning Organisation, State minister responsible from Treasury, Under-secretary of External Trade , State

minister responsible for Personnel Administration, Minister of Finance, Minister of Agriculture and
Village Affairs, Minister of Labour and Social Security, Minister of Industry and Trade, Minister of Energy and Natural Resources, Under-secretary of State Planning Organisation, Under-secretary of
Customs, Head of State Personnel Administration; three representatives from each of the Chambers
and Stock Markets Union of Turkey, the Confederation of Employee Trade Unions of Turkey, the Confederation of Revolutionary Trade Unions, the Confederation of *Hak* Trade Unions. The Prime
Minister may invite the other concerned parties (State bureaucrats or members of civil society organisations) to the meetings of the Council.88

The duties and authorities of the Council have also been laid down in the Act. The Council incorporates society's economic and social actors into the policy-making activities of the government.
It provides reports and advisory opinions to the government and the public. The Council may establish
permanent and temporary committees and sub committees for specific subjects. It has the authority to
determine members of Turkey-EU Joint Advisory Committee. Arranging symposiums at national or
international level, sending representatives to meetings, and conducting research on economic and
social issues are among the functions of the Council. The government may consult the Council for its
opinions on economic and social issues, draft acts, development plans and annual plans.89

The Council members are called by the Prime Minister to meet four times per year. Upon the request
of one third of the Council members, the Council may be called for extraordinary meetings.90

The first meeting of the Council was held in January 2003. It is quite early to evaluate the impact of
the Council on working life. There are some positive comments about the Council. It is argued that the
Council may contribute economic development. Secondly, its decisions can act as a guide for decision
makers. Lastly, it may serve to improve Turkish democracy.91

Tripartite and multipartite structures are relatively new entities in Turkish labour culture. They were
build up in the last 20 years. The Eight Five-Year Development Plan has given top priority to the development of social dialogue. In this context, the Eight Five-Year Development Plan includes some
suggestions on how to improve social dialogue. According to the Plan, the legislation on social dialogue will be scrutinised and renewed in the period 2001-2005. A regulation establishing the Economic and Social Council was among the priorities of the Plan, which has been realised.

One of the major social dialogue instruments at workplace level is the collective labour agreement.

The Supreme Council for the Disabled is a social dialogue body for disabled people. The Council is an organ of The Presidency of Administration for Disabled People (*Ozurluler Idaresi Baskanligi*) which was established in 1997. The Presidency has been instituted to help build up a national policy for disabled individuals, to co-ordinate activities between national and international organisations, and to search and find solutions to the problems of disabled people. The institution has been attached to the Prime Ministry. There are four chambers in the Presidency working on medical help, education, vocational rehabilitation and employment, and the integration of disabled people into social life.

The Supreme Council for the disabled is composed of high ranking bureaucrats from different ministries and state institutions, representatives of trade unions, employers, the federation of disabled people, and experts. The Council is responsible for policy development.

The presidency also includes an advisory body called the Council of Disabled People. The Council meets twice a year.

88 Act No. 4641, Art. 2

89 Act No. 4641, Art. 3

90 Act No. 4641, Art. 7

91 Sarper Suzek, *Is Hukuku*, Beta Yayinlari, Istanbul 2002, p. 100.

The Presidency has no enforcement powers in the field of discrimination against disabled people.

According to experts working in the Presidency, the body has not been effective until recently. The political influence of ministers, lack of financial sources and enforcement powers are the main problems of the Administration. The experts of the Chamber of Vocational Rehabilitation and Employment are aware of the EU directives but they complain about a lack of communication between the EU and the Administration. Following a Council of ministries' circular, a commission on EU matters was recently established in the administration.

Turkey has ratified ILO Convention No. 144 Concerning Tripartite Consultations to Promote the Implementation of International Labour Standards.

Assessment

Social dialogue mechanisms are not effective in anti-discrimination matters. According to trade union participants, issues related to discrimination have never been discussed in the meetings of the abovementioned bodies92. Collective labour agreements are not effective in tackling discrimination, with the exception of a few examples relating to discrimination on the ground of sex.

The Supreme Council for the Disabled is a specialised national social dialogue mechanism. However,
the body has not been effective in preventing discrimination because of the reasons mentioned above.
Compatibility with the directives should be reviewed.

92 Interview with Yildirim Koc, TURK-IS Confederation

Chapter 3 Specialised bodies

Article 13 (Racial Equality Directive)

Does such a body exist on the national level? Where it does, what are its resources (staff and budget), powers and duties in relation to the requirements of the Racial Equality Directive? Has it also a mandate on other grounds of discrimination?

Are existing bodies addressing the issue of multiple discrimination?

Where a body does not exist on the national level, are there plans to establish such a body?

In the fields of racial and ethnic discrimination there are no such bodies at national or local level. Neither are there any public institutions that give independent assistance to victims, conduct independent research, or produce independent reports and recommendations, with the exception of
some academic works.

State departments do not plan to establish a specialised public authority or authorities for the prevention of discrimination on the grounds of race and ethnicity.

Existing bodies are the Human Rights Commission of the Grand National Assembly, the Human Rights Advisory Council of the Prime Ministry, and the human rights commissions at province and
district level. But these bodies were established recently (except for the Commission of the Parliament) and they do not undertake particular work on discrimination. Nor do they address the
issue of multiple discrimination.

Assessment

A specialised national body is required at national level. ECRI, in the Second Report on Turkey, stressed that a specialised body on combating racism and intolerance will play a fundamental role in
the supervising of anti-discrimination legislation.93 Compatibility with the Directives should be reviewed.

Chapter 4 Compliance and implementation

93 ECRI, Second Report on Turkey, Adopted on 15 December 2000, CRI(2001)37, p. 8, 3 July 2001, Strasbourg.

Article 14 (Racial Equality Directive) and Article 16 (Employment Equality Directive)

a. Screening

Does national law provide a mechanism for the abolition of laws, regulations and administrative provisions that are contrary to the principle of equal treatment?

Is there a mechanism under national law by which provisions in agreements, contracts or rules relating to professional activity, workers and employers that are contrary to the principle of equal treatment can be declared null and void or amended?

The Turkish Constitutional Court is authorised by the Constitution to decide on the unconstitutionality
of laws, statutory decrees (*kanun hukmunde kararname*), standing orders of the Turkish Grand

National Assembly (*TBMM Ictuzugu*) on the ground of substantive and procedural rules, and constitutional amendments on the ground of procedural rules only.94 Besides this main function, the
Court also decides on some other issues enumerated in the Article: dissolving and financially controlling political parties, notifying political parties which do not comply with rules laid down in the
Code of Political Parties, deciding on the criminal responsibilities of the president, government members, high ranking bureaucrats and judges for certain types of crimes, controlling the decisions of
the Turkish Grand National Assembly on lifting the immunity of parliamentarians and removing parliamentarian status.

According to Article 11 of the Constitution, laws shall not be in conflict with the Constitution. The review of laws is done by the Constitutional Court. Access to the Constitutional Court can be secured
in two ways: principal proceedings (*iptal davasi*) and incidental proceedings *(somut norm denetimi*). Principal proceedings can be instituted by the President of the Republic, the parliamentary group of
the government party and the main opposition party, or at least one fifth of the full membership of the
Parliament (Art. 150 of the Constitution). Challenges of unconstitutionality must be initiated within
sixty days of the promulgation of the law in question in the Official Gazette. Incidental proceedings
can be initiated by any individual and they are not subject to time limitation. Access to the Constitutional Court in incidental proceedings is dependent upon two conditions. First, a plea of unconstitutionality (*anayasaya aykirilik itirazi*) must be put forward in the course of judicial proceedings. Secondly, the regular court trying the case should determine whether access to the Constitutional Court is justified. If there is a plea and the judge of the court of the case decides that the
plea is serious, then the file is sent to the Constitutional Court for review of the law. The Constitutional Court repeals the law if it decides that it is against the Constitution. Laws which are
repealed by the Constitutional Court will be null after the publication of the decision in the Official Gazette. Unlike some European Countries, individuals have no direct access to the Constitutional
Court (objection of constitutionality) in Turkey.

The courts which have the authority to decide on administrative regulations are administrative courts
The Council of State (*Danistay*) is the appeal court of the administrative courts.

All administrative regulations (*tuzukler*) and bylaws (*yonetmelikler*) may be repealed by the by the administrative courts and *Danistay* (Council of State) if they are against laws and the Constitution in
60 days after the promulgation of administrative regulations. According to Article 125 of the

Constitution all acts of the administration shall be subject to judicial review. Individuals, without time
limit, may go to administrative courts to repeal administrative regulations if there is a pending case in
which that regulation will be applied.
In Labour Law any agreement (individual or collective) that breaches the law is void. Employment
agreements are void if they are not consistent with applicable collective bargaining agreements. In
such cases, void terms of the agreement are replaced by the provisions of the collective employment
agreement.
94 Turkish Constitution, Art. 148/1.

Assessment

All laws and administrative regulations can be reviewed by the courts. But, as stated above there are
some constitutional exceptions for judicial review. These exceptions, also contradicting principles
relating to the rule of law as well, should be eliminated. Compatibility with the Directives should be
reviewed.

APPENDIX-1

THE PREAMBLE OF TURKISH CONSTITUTION

In line with the concept of nationalism and the reforms and principles introduced by the founder of the
Republic of Turkey, Atatürk, the immortal leader and the unrivalled hero, this Constitution, which affirms the eternal existence of the Turkish nation and motherland and the indivisible unity of the Turkish state, embodies;
The determination to safeguard the everlasting existence, prosperity and material and spiritual wellbeing
of the Republic of Turkey, and to attain the standards of contemporary civilization as an honourable member with equal rights of the family of world nations;
The understanding of the absolute supremacy of the will of the nation and of the fact that sovereignty
is vested fully and unconditionally in the Turkish nation and that no individual or body empowered to
exercise this sovereignty in the name of the nation shall deviate from liberal democracy and the legal
system instituted according to its requirements;
The principle of the separation of powers, which does not imply an order of precedence among the
organs of state, but refers solely to the exercising of certain state powers and discharging of duties

which are limited to cooperation and division of functions, and which accepts the supremacy of the
Constitution and the law;
The recognition that no protection shall be accorded to an activity contrary to Turkish national interests, the principle of the indivisibility of the existence of Turkey with its state and territory, Turkish historical and moral values or the nationalism, principles, reforms and modernism of Atatürk
and that, as required by the principle of secularism, there shall be no interference whatsoever by sacred religious feelings in state affairs and politics;
The acknowledgment that it is the birthright of every Turkish citizen to lead an honourable life and to
develop his or her material and spiritual assets under the aegis of national culture, civilization and the
rule of law, through the exercise of the fundamental rights and freedoms set forth in this Constitution
in conformity with the requirements of equality and social justice;
The recognition that all Turkish citizens are united in national honour and pride, in national joy and
grief, in their rights and duties regarding national existence, in blessings and in burdens, and in every
manifestation of national life, and that they have the right to demand a peaceful life based on absolute
respect for one another's rights and freedoms, mutual love and fellowship and the desire for and belief
in 'Peace at home, peace in the world'.
This Constitution, which is to be embraced with the ideas, beliefs, and resolutions it embodies below
should be interpreted and implemented accordingly, thus commanding respect for, and absolute loyalty to, its letter and spirit.
Is entrusted by the Turkish nation to the patriotism and nationalism of its democracy-loving sons and
daughters.

APPENDIX-2

A- LIST OF RATIFICATIONS OF INTERNATIONAL INSTRUMENTS ON SOCIAL AND CULTURAL RIGHTS AND DISCRIMINATION

European Convention on Human Rights95

International Covenant on Economic, Social and Cultural Rights96.

International Covenant on Civil and Political Rights97

International Convention on the Elimination of all Forms of Racial Discrimination98

European Social Charter99

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)100

B- LIST OF RATIFICATIONS OF INTERNATIONAL LABOUR CONVENTIONS BY TURKEY (in force)

Convention Date of Ratification
C.2 Unemployment Convention, 1919 14.07.1950
C.11 Right of Association (Agriculture) Convention, 1921 29.03.1961
C.14 Weekly Rest (Industry) Convention, 1921 27.12.1946
C.26 Minimum Wage-Fixing Machinery Convention, 1928 29.01.1975
C.29 Forced Labour Convention, 1930 30.10.1998
C.42 Workmen's Compensation (Occupational Diseases) Convention (Revised), 1934 27.12.1946
C.45 Underground Work (Women) Convention, 1935 21.04.1938
C.77 Medical Examination of Young Persons (Industry) Convention, 1946 02.11.1984
C.80 Final Articles Revision Convention, 1946 13.07.1949
C.81 Labour Inspection Convention, 1947 05.03.1951
C.87 Freedom of Association and Protection of the Right to Organise Convention, 1948 12.07.1993
C.88 Employment Service Convention, 1948 14.07.1950
C.94 Labour Clauses (Public Contracts) Convention, 1949 29.03.1961
C.95 Protection of Wages Convention, 1949 29.03.1961
C.96 Free-Charging Employment Agencies Convention (Revised), 1949 23.01.1952

95 İnsan Haklarini ve Ana Hurriyetleri Koruma Sozlesmesi ve Buna Ek Protokolun Tasdiki Hakkinda Kanun (Act approving the Ratification of European Convention of Human Rights and its Protocol), Official Gazette, 19 March 1954, No. 8662.

96; Medeni ve Siyasi Haklara İliºkin Uluslararasý Sözleºmenin Uygun Bulunmasýna Dair Kanun (Act Approving the Ratification of International Covenant on Civil and Poltical Rights) (No. 4868), *Official Gazette*, 18 June 2003, No. 25142. The Government ratified the Covenant on 18 June 2003.

97 Ekonomik, Sosyal ve Kültürel Haklara İliºkin Uluslararasý Sözleºmenin Uygun Blunmasýna Dair Sözleºme Kanun (Act Approving the Ratification of International Covenant on Economic, Social and Cultural Rights) (No. 4867), *Official Gazette*, 18 June 2003, No. 25142. The Government ratified the Covenant on 18 June 2003.

98 Depending on Act No. 4750, 3 April 2002, the Government ratified the Convention on 13 May 2002. It was published in the Official Gazette on 16 June 2002 No: 24787. Turkey signed the Convention on 13 October 1972.

99 *Official Gazette*, 14 October 1989, No. 20312.

100 Act No. 3232, Official Gazette, 25 June 1985, No. 18792. The Government ratified the convention on 14 October 1985.

C.98 Right to Organise and Collective Bargaining Convention, 1949 23.01.1952
C.99 Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 23.06.1970

C.100 Equal Remuneration Convention, 1951 19.07.1967
C.102 Social Security (Minimum Standards) Convention, 1952 29.01.1975
C.105 Abolition of Forced Labour Convention, 1957 20.03.1961
C.111 Discrimination (Employment and Occupation) Convention, 1958 19.07.1967
C.115 Radiation Protection Convention, 1960 15.11.1968
C.116 Final Articles Revision Convention, 1961 02.09.1968
C.118 Equality of Treatment (Social Security) Convention, 1962 25.06.1974
C.119 Guarding of Machinery Convention, 1963 13.11.1967
C.122 Employment Policy Convention, 1964 13.12.1977
C.123 Minimum Age (Underground Work) Convention, 1965 08.12.1992
C.127 Maximum Weight Convention, 1967 13.11.1975
C.135 Workers' Representatives Convention, 1971 12.07.1993
C.138 Minimum Age Convention, 1973 30.10.1998
C.142 Human Resources Development Convention, 1975 12.07.1993
C.144 Tripartite Consultation (International Labour Standards) Convention, 1976 12.07.1993
C.151 Labour Relations (Public Service) Convention, 1978 12.07.1993
C.158 Termination of Employment Convention, 1982 04.01.1995
C.159 Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 26.06.2000
C.182 Worst Forms of Child Labour Convention, 1999 02.08.2001

C- LAUSANNE PEACE TREATY (Articles on the rights of non-Muslim minorities)

According to Article 40 of the Treaty, "Turkish nationals belonging to non-Muslim minorities shall enjoy the same treatment and security in law and in fact as other Turkish nationals. In particular, they shall have an equal right to establish, manage and control at their own expense, any charitable, religious and social institutions, any schools and other establishments for instruction and education, with the right to use their own language and to exercise their own religion freely therein". Article 42/1 of the treaty sets forth that "The Turkish Government undertakes to take, as regards non-Muslim minorities, in so far as concerns their family law or personal status, measures permitting the settlement of these questions in accordance with the customs of those minorities". The second paragraph of the Article 42 covers guaranties for religious and charitable institutions of non-Muslim minorities: "The Turkish Government undertakes to grant full protection to the churches, synagogues, cemeteries, and other religious establishments of the above-mentioned minorities. All facilities and authorisation will be granted to the pious foundations, and to the religious and charitable institutions of the said

minorities at present existing in Turkey, and the Turkish Government will not refuse, for the formation
of new religious and charitable institutions, any of the necessary facilities which are granted to other
private institutions of that nature".

APPENDIX-3

NATIONAL PROGRAMME FOR ADOPTING EU ACQUIS

In this chapter Turkish government undertakes to realise full enjoyment of all human rights and fundamental freedoms by all Individuals without any discrimination on the grounds of language, race,
colour, sex, political opinion, philosophical belief or religion. For the realisation of this undertaking,
In the short term, the Turkish Government planned to:

• ratify the UN Convention on the Elimination of All Forms of Racial Discrimination;
• reinforce in the Constitution the principle that men and women have equal rights;
• enact the Draft Turkish Civil Code which envisages improvements in gender equality;
• enact the Draft Law on the Organisation of the Directorate General on the Status and the Problems of Women, and Draft Law on the Organisation of the Family Research Institution;
• ratify the ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of Worst Forms of Child Labour (No.182) and put into effect the National Action Plan prepared in co-operation with ILO on this subject.

Except the enactment of Draft Law on the Organisation of the Directorate General on the Status and
the Problems of Women, and the Draft Law on the Organisation of Family Research Institution, all the
short term objectives have been realised.
In the medium term, the Turkish Government planned to:

• ratify the Optional Protocol to the UN Convention on the Elimination of All Forms of Discrimination against Women;
• ratify Protocol No. 4 to the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in Protocol No. 1;
• ratify Protocol No. 7 to the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms;
• ratify the European Social Charter (Revised) and the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints;
• ratify Protocol No. 12 to the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms;
• take further practical measures, within the framework of the legislation on protection of the public order, to facilitate the practice by non-Muslim foreign nationals residing in Turkey the requirements of their religions, and in relation to other practices concerning them;
• take measures in accordance with the ILO Convention (No. 159) Concerning Vocational Rehabilitation and Employment (Disabled Persons).

In terms of the medium term objectives, Optional Protocol to the UN Convention on the Elimination
of All Forms of Discrimination against Women, and ILO Conventions No. 159 have been approved.
The other medium term objectives have not been realised yet.