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Country report

Non-discrimination

Turkey
2019
including summary



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and Consumers*

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Country report

Non-discrimination

Transposition and implementation at national level of
Council Directives 2000/43 and 2000/78

Turkey

Dilek Kurban

Reporting period 1 January 2018 – 31 December 2018

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EXECUTIVE SUMMARY

1. Introduction

After snap presidential elections on 24 June 2018, Turkey changed from a parliamentary to a presidential system,¹ which the Venice Commission has found to constitute 'an excessive concentration of executive powers in the hands of the President and the weakening of parliamentary control of that power'.² The President now has unsupervised and exclusive powers to appoint and dismiss ministers and high-ranking state officials, dissolve the Parliament on any grounds and declare a state of emergency. He also appoints four of the 13 members of the High Council of Judges and Prosecutors, which oversees the appointment, promotion and dismissal of judges and prosecutors. The President also has wide de facto legislative powers by virtue of his authority to issue presidential decrees on 'matters relating to executive powers'.

Since the failed coup in 2016, Turkey has been ruled by a de facto presidential system against the principles of the separation of powers, constitutional review and the supremacy of the Parliament in law-making. During the emergency regime, declared on 21 July 2016 and lifted on 17 July 2018, 36 executive decrees having the force of law were adopted.³ Of the 31 decrees adopted up to March 2018, only five were approved by the Turkish Parliament,⁴ although the Constitution requires their *ex post facto* legislative approval. None of the decrees has been subject to review by the Constitutional Court.⁵

2. Main legislation

As Turkey is not a member of the European Union, Directives 2000/43/EC and 2000/78/EC have not been implemented. The Law on the Human Rights and Equality Institution of Turkey (No. 6701), the anti-discrimination law adopted in 2016, prohibits direct, indirect and multiple discrimination as well as instruction to discriminate, discrimination by assumption, segregation, harassment and mobbing in the workplace. Victimisation and discrimination by association are not included.

Furthermore, there are anti-discrimination provisions in the Constitution and in several laws. The equality protection clause of the Turkish Constitution, Article 10, provides a non-exhaustive list of the following enumerated grounds: language, race, colour, gender, political opinion, philosophical belief, religion and denomination. Most notable among the laws with anti-discrimination clauses is the Law on Persons with Disabilities, which could be considered an anti-discrimination law. However, the law prohibits discrimination solely on the ground of disability and has limited material scope. In addition, various laws, including the Labour Law, the Penal Code and the Law on National Education, have anti-discrimination clauses, but again with limited material scope. Sexual orientation is not enumerated in any of the laws or in the Constitution, despite the consistent efforts of human rights and LGBTI associations. On the other hand, in 2017 the Constitutional Court explicitly recognised sexual orientation as a ground of discrimination (Section 1).

¹ The presidential system is set to be fully operational by November 2019, following the next presidential and parliamentary elections.

² Venice Commission, *Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017*, CDL-AD(2017)005, 13 March 2017, para. 47, available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2017\)005-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2017)005-e).

³ Erem, O., 'OHAL sona erdi: İki yıllık sürecin bilançosu' ('The emergency rule has ended: The balance of the two years' process), *BBC Türkçe*, 19 July 2018, available at: <https://www.bbc.com/turkce/haberler-turkiye-44799489>.

⁴ Tartanoğlu, S., 'OHAL kaosu daha da derinleştirdi' ('The Emergency Rule chaos has further intensified'), *Cumhuriyet*, 9 March 2018, available at: http://www.cumhuriyet.com.tr/haber/turkiye/940196/OHAL_kaosu_daha_da_derinlestirdi.html.

⁵ European Commission (2018), *Turkey 2018 Report*, Strasbourg, 17 April 2018, p. 3, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-turkey-report.pdf>.

Age is explicitly listed as a protected ground only in the Law on the Human Rights and Equality Institution of Turkey.

While hatred and incitement to hatred are prohibited under the Penal Code, as noted by the European Commission against Racism and Intolerance (ECRI), the 'definition of hate crime is excessively narrow and the Criminal Code does not explicitly provide that racist and homo/transphobic motivation constitutes an aggravating circumstance.'⁶ Moreover, hate speech grounds are exhaustive and do not include ethnicity, age and sexual orientation. The anti-discrimination law does not prohibit hate speech or hate crime.

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

3. Main principles and definitions

The only ground defined under Turkish law is disability. The Law on the Human Rights and Equality Institution of Turkey and the Law on Persons with Disabilities contain identical definitions, which are in line with the definition under the UN Convention on the Rights of Persons with Disabilities (UNCRPD) and in the Court of Justice of the European Union (CJEU) judgment in *Ring and Skouboe Werge*, as well as with the human rights approach of the Committee on the Rights of Persons with Disabilities (CRPD).⁷

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

The national legal framework is completely blind to sexual orientation, as is evident from the absence of any provision criminalising homosexual, bisexual or transsexual conduct. At the same time, there is widespread and systematic discrimination against LGBTI people, stemming from the blatantly discriminatory texts of the laws and regulations and/or their discriminatory interpretation and application by the judiciary (Section 2.1.1). The principal way in which laws are applied in a discriminatory way against LGBTI individuals is through the judicial interpretation of terms such as 'morality', 'indecent behaviour' and 'dishonourable behaviour'.

The Law on the Human Rights and Equality Institution of Turkey prohibits direct and indirect discrimination; multiple discrimination; harassment; mobbing; segregation; discrimination by assumption; instruction to discriminate and compliance with such

⁶ European Commission against Racism and Intolerance (ECRI) (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, pp. 9, 15 and 39, available at: <https://rm.coe.int/fifth-report-on-turkey/16808b5c81>.

⁷ Judgment of 11 April 2013, *Ring and Skouboe Werge v Denmark*, C-335/11 and C-337/11.

instruction; and failure to provide reasonable accommodation. The Labour Law, the Law on Persons with Disabilities, the Penal Code, the Law on National Education and the Law on Civil Servants also prohibit one or more of these types of discrimination, each on limited grounds. The Turkish legal framework is silent on discrimination by association and situation testing. Victimisation is prohibited only in a very limited fashion.

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

There are several laws and regulations which, although they are not designated as positive action by the legislation, stipulate positive measures in the areas of education and employment and in a number of services (social insurance, transportation etc.), including employment quotas for persons with disabilities. No positive action exists for the Roma in Turkey, even after the Government launched its Roma initiative with the promise to enhance employment, education and housing conditions for the Roma. The special situation of non-Muslim groups under the Treaty of Lausanne does not confer on them a right to positive discrimination based on religion. On the contrary, the state in Turkey continues to limit state funding for religious services to the Sunni Muslim majority by paying the salaries of Sunni preachers (*imams*) and providing free electricity and water to mosques.

4. Material scope

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

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

5. Enforcing the law

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

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

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

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

The right of constitutional complaint is limited to nationals, and the scope of the complaint is limited to rights and liberties protected under the Constitution that fall within the scope of the European Convention on Human Rights (ECHR) and the additional protocols to which Turkey is a party. Applicants whose complaint is found to be inadmissible reserve the right to petition the European Court of Human Rights (ECtHR). There are deterrents to filing a constitutional complaint, such as the 30-day time limit and the petition fee.

Another option for victims is to apply to non-judicial bodies, such as provincial and district-level human rights boards and the Human Rights Inquiry Commission of the Turkish Grand National Assembly, which have the competence to inquire into complaints of discrimination in employment. Human rights boards are not independent from the executive and are extremely underused. The Human Rights and Equality Institution of Turkey has the competence to impose administrative sanctions (in the form of monetary fines) against legal and natural persons who engage in discrimination. The decisions of all these bodies are non-binding and their powers of enforcement are weak. There are also labour inspectors, insurance inspectors and school inspectors who are tasked with inspecting compliance with the respective laws. Labour and school inspectors have the competence to receive and review individual complaints, including those alleging violation of the anti-discrimination provisions of the Labour Law and the Law on National Education.

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

Associations/organisations/trade unions are not entitled to act in support of victims of discrimination. However, they can call on prosecutors to act to prosecute perpetrators and they can intervene in criminal cases initiated by the public prosecutors where they can demonstrate 'harm by the crime'. In recent years, LGBTI organisations have persistently asked to be involved in ongoing criminal cases to act on behalf of victims of hate crime and honour killings. While in many cases courts reject such requests, there have been a few instances in which the response from the court has been affirmative. In a landmark decision given in early 2015, the Constitutional Court granted several NGOs leave to submit *amicus curiae* briefs in an ongoing enforced disappearance case.⁸ While this is not a discrimination case, nor has the applicant made a discrimination claim, the Court's decision to accept *amicus curiae* submissions from civil society has set a significant precedent. On 30 March 2017, one of the NGOs that had submitted the *amicus curiae* brief in 2015 submitted to the Constitutional Court another *amicus curiae* for consideration in pending cases concerning enforced disappearances.⁹

⁸ Constitutional Court (*Anayasa Mahkemesi*), application No. 2013/2640, 8 April 2013.

⁹ Hakikat Adalet Hafıza Merkezi, *Amicus Curiae Görüşü*, 30 March 2017, available at: https://hakikatadalethafiza.org/wp-content/uploads/2017/11/AYM-Amicus_Hu%CC%88Iya-Dinc%CC%A7er-Osman-Doq%CC%86ru-SON-TR.pdf.

National law permits a shift in the burden of proof from the complainant to the respondent. Under Article 21 of the Law on the Human Rights and Equality Institution of Turkey, once an applicant puts forward a *prima facie* case of discrimination, the burden of proof shifts back to the respondent to prove that discrimination has not occurred. However, this provision 'seems to be restricted to applications to the [Human Rights and Equality Authority] and does not apply to court proceedings'.¹⁰ Labour law contains the only provisions that include rules on the burden of proof in discrimination cases. While the burden of proof rests with employees, if an employee puts forward a situation that strongly suggests the probability of such a violation, the employer is obliged to prove that no such violation exists.

Sanctions in cases of discrimination vary. Under the anti-discrimination law, the Human Rights and Equality Institution of Turkey, where it finds breaches of non-discrimination law, has the power to issue administrative sanctions by way of monetary fines ranging between TRY 1 000 and TRY 15 000 (EUR 160 and EUR 2 410), depending on the gravity of the impact and consequences of the breach, the financial status of the perpetrator and the aggravating effect, if any, of multiple discrimination. Where the Council – the Institution's decision-making body – deems it necessary, the fine may be converted into a warning on one occasion only. In cases of repetition, the fine will be increased by 50 %.

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

The Government develops policies, designs laws and adopts executive measures on human rights and anti-discrimination without consulting NGOs or, in the rare cases where it does, without taking into account their suggestions or criticisms. A recent example of this was the adoption of the national strategy for the Roma in 2016. Representatives of civil society organisations that had taken part in the deliberative process during 2009-2016 criticised the Government for significantly shortening and watering down the draft strategy that was shared with them in February 2016, on which they had provided feedback.¹¹

6. Equality bodies

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

The Institution has a mandate to receive discrimination claims on grounds of race/ethnicity, religion/belief, age and disability. Sexual orientation is excluded from its

¹⁰ ECRI (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, p. 16, available at: <https://rm.coe.int/fifth-report-on-turkey/16808b5c81>.

¹¹ Foggo, H., 'Ulusal Roman Strateji Planı "İzleme Kurulu"na Öneriler-1' ('Proposals for the National Roma Strategy Plan "Monitoring Council"'), P24, 24 February 2017, available at: <http://www.platform24.org/p24blog/yazi/2838/roman-strateji-izleme-kurulu-na-oneriler>.

mandate. It has the duty and power to receive discrimination claims from natural and legal persons and to initiate investigations into violations of non-discrimination on its own initiative. With regard to general human rights violations, it has only *ex officio* investigative powers. Where it finds discrimination or human rights violations which constitute crimes, the Institution has legal standing to file a criminal complaint on behalf of the identified victim(s).

Filing a complaint with the Institution is free of charge. Acts relating to the exercise of legislative and judicial competences; the High Council of Prosecutors and Judges' decisions; and acts that are exempt from judicial review under the Constitution cannot be the subject of complaints. The Institution, which became operational in March 2017, issued its first decision on 30 October 2018, 20 months after it had been set up. As of April 2019, the Institution had issued a total of eight decisions (seven in 2018 and one in 2019), none of which concerned discrimination claims falling within the scope of the directives.¹²

The Ombudsman Institution, which was established in June 2012 with the mandate of receiving complaints concerning general human rights issues and disability, partially fulfils the requirements of the Racial Equality Directive. While it might also take on the function of an independent body on racial discrimination, it lacks the power to carry out investigations on its own initiative and there are concerns regarding its impartiality and neutrality. The reports and recommendations of the Ombudsman Institution are not binding, and it is not possible to appeal its recommendations. The law is silent on follow-up actions to track and secure the implementation of the Ombudsman Institution's recommendations. It lacks powers to impose sanctions.

The Ombudsman Institution began receiving complaints in 2013. In the past two years, there has been a significant increase in the number of applications received and recommendations issued by the Ombudsman Institution. The rate of compliance with its recommendations increased to 70 % in 2018.¹³ However, the European Commission has stated: 'lacking powers to initiate investigations and to intervene in cases with legal remedies, the Ombudsman remained silent on certain human rights concerns, most notably on reported human rights violations in the south-east.'¹⁴

7. Key issues

Although the directives have not (yet) been transposed into national law, the following issues raise concerns.

- The overarching issue of concern is the rapid eradication of democracy and the rule of law, and the consolidation of authoritarian rule in Turkey.
- The dismissal of around 115 000 state employees, including 30 % of judges and prosecutors,¹⁵ has paralysed the Government.
- The Government's preoccupation with 'counter-terrorism' and the effective halt of the EU accession process has led human rights reforms, including in the area of anti-discrimination, to be entirely dropped from the agenda of public institutions.
- The equality body also fulfils the function of the National Prevention Mechanism on Torture, which may dilute its strength and effectiveness.

¹² For the list and content of these decisions, see <https://www.tih.gov.tr/kategori/2018-kurul-kararlari> (for 2018) and <https://www.tih.gov.tr/kategori/2019-kurul-kararlari> (for 2019).

¹³ The Ombudsman Institution of Turkey (Türkiye Kamu Denetçiliği Kurumu) (2019), *2018 Faaliyet Raporu* (2018 Activities Report), p. 76, available at: https://www.ombudsman.gov.tr/yillik-rapor/kdk_y%C4%B1llik_rapor2018/mobile/index.html#p=20.

¹⁴ European Commission (2018), *Turkey 2018 Report*, Strasbourg, 17 April 2018, p. 15, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-turkey-report.pdf>.

¹⁵ European Commission (2018), *Turkey 2018 Report*, Strasbourg, 17 April 2018, p. 23, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-turkey-report.pdf>.

- The equality body's independence has not been ensured in line with the UN Paris Principles and the EU *acquis*.
- The equality body has not yet started to fulfil its anti-discrimination mandate.
- The grounds of anti-discrimination in the laws do not include sexual orientation.
- The scope of the duty to provide reasonable accommodation is more limited than in the Employment Equality Directive (Directive 2000/78/EC). The test regarding reasonable accommodation is non-existent: consequently, there is no guidance for labour inspectors, judges, employers and persons with disabilities.
- There is no specific prohibition regarding victimisation, discrimination by association and hate speech.
- The Law on the Human Rights and Equality Institution of Turkey and the Law on Disabilities do not elaborate on what can be considered a legitimate aim for the purpose of objective justification of indirect discrimination.
- Sanctions are not explicitly mentioned in laws with anti-discrimination provisions. Where they are mentioned, they are not dissuasive. Violations that are criminal offences are punishable with short prison sentences often convertible to small fines.
- Turkish law does not explicitly recognise the standing of NGOs to bring claims in support of victims of discrimination, with the exception of trade unions, consumer protection associations and associations working for the protection and preservation of the environment, culture and heritage. In addition, in criminal cases, any legal entity which can demonstrate harm is de jure entitled to be granted standing. However, court practice varies.
- The mandates of the national and local human rights bodies and the Ombudsman Institution do not explicitly refer to protection from discrimination and offer limited possibilities for intervention and influence.
- Discriminatory and hate speech and conduct against minorities, particularly the Roma, LGBTI persons, Kurds and non-Muslims (in particular Jews) is rampant in daily life, political discourse and the media.
- The judicial authorities are reluctant to enforce legislation prohibiting hate speech and discrimination.
- The limited gains made towards the recognition and protection of the Kurdish language and culture have been reversed since the coup attempt.
- The ECtHR's rulings against mandatory religion courses; the non-recognition of Alevi places of worship and the exclusion of these places of worship from social advantages granted to mosques; and the mandatory indication of religion in official identity cards remain unimplemented. The ECtHR's ruling concerning the inability of Jehovah's Witnesses to open places of worship also remains unimplemented.
- Turkey is the only member of the Council of Europe which does not recognise the right to conscientious objection to military service. The ECtHR's rulings on this issue remain unimplemented.

INTRODUCTION

The national legal system

Following snap presidential elections on 24 June 2018, Turkey formally transitioned from a long-standing parliamentary system to a presidential system¹⁶ which, according to the Venice Commission, constitutes 'an excessive concentration of executive powers in the hands of the President and the weakening of parliamentary control of that power'.¹⁷ The President now has unsupervised and exclusive powers to (*inter alia*) appoint and dismiss ministers and high-ranking state officials, dissolve the Parliament on any grounds and declare a state of emergency and issue decrees on 'matters necessitated' by any such emergency. The President also has the power to appoint 4 of the 13 members of the High Council of Judges and Prosecutors, which oversees the appointment, promotion and dismissal of judges and public prosecutors. These changes are, the Venice Commission said, a decisive move 'towards an authoritarian and personal regime',¹⁸ wiping out any remnants of democracy and the rule of law in Turkey. While the Parliament's power to make laws is non-derogable, the President now has wide de facto legislative powers by virtue of his authority to issue presidential decrees on 'matters relating to executive powers'. The further weakening of the Parliament, where Opposition deputies could at the very least introduce progressive legal amendments and submit queries to the executive, has eradicated the already limited oversight of the Government on human rights issues in general and anti-discrimination in particular.

Since the failed coup of 20 July 2016, Turkey has been ruled by a de facto presidential system that disregards the constitutional principles of the separation of powers, constitutional review and the supremacy of the Parliament in law-making. During the emergency regime, which was declared on 21 July 2016 in response to the coup attempt and lifted on 17 July 2018, the Constitutional Court refrained from exercising the power it had granted itself in 1991¹⁹ to review the temporal, geographical and substantive compatibility of emergency decrees with the boundaries of emergency rule.²⁰ A total of 36 executive decrees having the force of law were adopted during the emergency rule.²¹ Of the 31 decrees adopted up to March 2018, only five were approved by the Turkish Parliament,²² although the Constitution requires the prompt *ex post facto* legislative approval of emergency decrees. None of the decrees has been subject to review by the Constitutional Court.²³

Pursuant to Article 90 of the Constitution, in cases of conflict between domestic laws and duly ratified international human rights treaties, the latter shall prevail. Turkey is a party

¹⁶ The presidential system is set to be fully operational by November 2019, following the next presidential and parliamentary elections.

¹⁷ Venice Commission, *Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017*, CDL-AD(2017)005, 13 March 2017, para. 47, available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2017\)005-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2017)005-e).

¹⁸ Venice Commission, *Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017*, CDL-AD(2017)005, 13 March 2017, para. 133, available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2017\)005-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2017)005-e).

¹⁹ Constitutional Court, judgment E. 1990/25, K. 1991/1, 10 January 1991; judgment E. 1991/6, K. 1991/20, 3 July 1991.

²⁰ Constitutional Court, judgment E. 2016/166, K. 2016/159, 12 October 2016; judgment E. 2016/167, K. 2016/160, 12 October 2016; judgment E. 2016/171, K. 2016/164, 2 November 2016; judgment E. 2016/172, K. 2016/165, 2 November 2016.

²¹ Erem, O., 'OHAL sona erdi: İki yıllık sürecin bilançosu' ('The emergency rule has ended: The balance of the two years' process), *BBC Türkçe*, 19 July 2018, available at: <https://www.bbc.com/turkce/haberler-turkiye-44799489>.

²² Tartanoğlu, S., 'OHAL kaosu daha da derinleştirdi' ('The Emergency Rule chaos has further intensified'), *Cumhuriyet*, 9 March 2018, available at: http://www.cumhuriyet.com.tr/haber/turkiye/940196/OHAL_kaosu_daha_da_derinlestirdi.html.

²³ European Commission (2018), *Turkey 2018 Report*, Strasbourg, 17 April 2018, p. 3, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-turkey-report.pdf>.

to a considerable number of treaties containing provisions on anti-discrimination and equal treatment, though with significant reservations and declarations aimed at precluding the extension of minority protection under the national legal framework.

On 25 June 2014, the Constitutional Court issued its first finding of discrimination under the constitutional complaint mechanism that entered into force in September 2012, ruling that a lower court's decision to bar a female lawyer from attending a hearing on the ground that she wore a headscarf constituted discrimination on grounds of religious belief. The Constitutional Court has not found discrimination on any of the other relevant grounds under the directives. For example, it did not find the dismissal of a public school teacher on the basis of his sexual orientation to be discriminatory.²⁴

The Law on the Human Rights and Equality Institution of Turkey constitutes Turkey's anti-discrimination legislation.²⁵ In addition, there are anti-discrimination provisions in the Constitution and in several laws. Article 10 of the Constitution provides a non-exhaustive list of protected grounds; allows positive measures for elderly persons and for persons with disabilities; and entrusts the state with ensuring equality between men and women. The Law on Persons with Disabilities prohibits discrimination on the ground of disability and its material scope is limited to employment. The Labour Law also has several anti-discrimination clauses, but again with a material scope limited to employment relations.

List of main legislation transposing and implementing the directives

Law on the Human Rights and Equality Institution of Turkey (No. 6701)²⁶

Date of adoption: 6 April 2016

Latest amendments: 2 July 2018

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

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

Labour Law (No. 4857)²⁷

Date of adoption: 22 May 2003

Latest amendments: 2 July 2018

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

Material scope: employment (public and private)

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

Turkish Penal Code (No. 5237)²⁸

Date of adoption: 26 September 2004

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

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

Law on Persons with Disabilities (No. 5378)²⁹

²⁴ Constitutional Court, application No. 2013/2928, 18 October 2017.

²⁵ Turkey, Law on the Human Rights and Equality Institution of Turkey (*Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu*), No. 6701, 6 April 2016.

²⁶ Turkey, Law on the Human Rights and Equality Institution of Turkey, No. 6701, 6 April 2016.

²⁷ Turkey, Labour Law (*İş Kanunu*), No. 4857, 22 May 2003.

²⁸ Turkey, Penal Code (*Ceza Kanunu*), No. 5237, 26 September 2004.

Date of adoption: 1 July 2005
Latest amendments: 18 November 2014
Grounds covered: disability.
Material scope: public and private employment

Basic Law on National Education (No. 1739)³⁰
Date of adoption: 14 June 1973
Latest amendments: 2 December 2016
Grounds covered: language, race, gender, religion, disability
Material scope: education

Law on Civil Servants (No. 657)³¹
Date of adoption: 14 July 1965
Latest amendments: 27 March 2015
Grounds covered: language, race, gender, political thought, philosophical belief, religion and sect
Material scope: all acts of civil servants – unlimited material scope (public employment, access to goods or services (including housing) provided by the public sector, social protection, social advantages, public education

²⁹ Turkey, Law on Persons with Disabilities (*Engelliler Kanunu*), No. 5378, 1 July 2005.

³⁰ Turkey, Basic Law on National Education (*Milli Egitim Temel Kanunu*), No. 1739, 14 June 1973.

³¹ Turkey, Law on Civil Servants (*Devlet Memurlari Kanunu*), No. 657, 14 July 1965.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The Constitution of Turkey includes the following articles dealing with non-discrimination:

Article 10, on equality before the law, is a general equality clause. It explicitly covers the grounds of language, race, colour, gender, political opinion, philosophical belief, religion and sect and implicitly covers the remaining grounds with reference to 'any such considerations'. This provision applies to all areas covered by the directives, and its material scope is broader than that of the directives. However, the personal scope of the provision, as it does not explicitly refer to sexual orientation and ethnic origin among the grounds of equality, is more limited than that of the directives. In several individual petitions, these excluded grounds were unsuccessfully invoked in Article 10 claims.³² While the Constitutional Court found these cases to be inadmissible, it did, in entertaining the applicants' claims of discrimination, effectively accept that ethnic origin and sexual orientation are among the prohibited grounds.³³ In an inadmissibility decision in 2017, the Constitutional Court explicitly ruled, with reference to ECtHR case law, that discrimination on the ground of sexual orientation is prohibited.³⁴ This was the first verdict in which the Constitutional Court explicitly recognised sexual orientation as a ground on which discrimination is prohibited.

Article 10 is directly applicable and can be enforced against private actors. While not explicitly stating it as such, Article 10 introduces the principle of positive action to the Constitution. It stipulates that measures to be adopted to ensure equality between men and women, as well as measures to be adopted for children, elderly persons, persons with disabilities, widows and orphans of martyrs,³⁵ ex-soldiers disabled in war and veterans, shall not be considered as violations of the principle of equality.

Article 48 is a specific clause which guarantees the freedom to work, conclude contracts and establish private enterprises without referring to any particular ground. It is directly applicable and can be enforced against private actors. Article 50 is a specific clause stating that 'no one shall be required to perform work unsuited to his/her age, gender, and capacity' and entitling persons with physical or mental disabilities to 'special protection with regard to working conditions'. The Constitutional Court interpreted this provision to cover all persons with disabilities.³⁶ Thus, it can be inferred that reference to 'mental disabilities' covers both intellectual disabilities and psychosocial disabilities. The material scope of these Articles is not broader than that of the directives. The Articles are directly applicable and can be enforced against private actors.

³² Constitutional Court, application No. 2013/1948, 23 January 2014 (invoking sexual orientation to argue that the homosexuality of her murdered brother was used as a mitigating factor in the sentencing of the perpetrator, who was more favourably treated than other individuals convicted of homicide); application No. 2013/1280, 28 May 2015 (invoking ethnic origin to claim that in assessing their compensation claim for the murder of their daughter in a terrorist attack which specifically targeted people of Kurdish origin the lower court awarded them damages lower than those awarded in similar cases of death caused by the negligence of the administration).

³³ Ulaş Karan (2015), 'Bireysel Başvuru Kararlarında Ayrımcılık Yasağı ve Eşitlik İlkesi' ('The non-discrimination and equality principle in individual petition rulings'), *Anayasa Yargısı*, vol. 32 (2015), pp. 235-294, at p. 249.

³⁴ Constitutional Court, application No. 2014/19308, 15 February 2017.

³⁵ Although widely used in Turkey's legal framework and political discourse, a legal definition of the term 'martyr' does not exist. With its roots in a religious notion, it originally referred to individuals killed while defending the nation. In more recent years, it has been used by Government officials, political leaders and the media to refer also to civilians killed in terrorism or counter-terrorism activities. On the need for legal clarity for this term, see Ersan Şen (2015), "'Şehit" kime denir?' ('"Who should be called a "Martyr"?''), *Haber7Com*, 25 October 2015, available at: <http://www.haber7.com/yazarlar/prof-dr-ersan-sen/1620770-sehit-kime-denir>.

³⁶ Constitutional Court, judgment E. 2006/101, K. 2008/126, 19 June 2008.

Article 70 is a specific clause implicitly prohibiting discrimination in entry to public service without explicitly specifying any grounds: 'Every Turk has the right to enter public service. No criteria other than the qualifications for the office concerned shall be taken into consideration for recruitment into public service.' It is directly applicable and can be enforced against private actors.

2 THE DEFINITION OF DISCRIMINATION

The Constitutional Court defined equality under Article 10 of the Constitution as follows:

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

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

However, 'public interest' or 'legitimate aim' should be a) clear b) relevant to the aim c) reasonable and just. If the rule adopted does not comply with one of these requirements which complement, support and strengthen each other, then it can be concluded that it is in contradiction to the principle of equality.³⁷

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

'entails the provision or rejection of opportunities on the basis of grounds such as religion, political opinion, sexual and sex identity which are the elements of the individual's personality and are based on personal choices or personal traits such as gender, race, disability and age which cannot be questions of choice under any circumstance.'³⁸

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in the **main legislation** transposing the two EU anti-discrimination directives: race,³⁹ language,⁴⁰ colour,⁴¹

³⁷ Constitutional Court, judgment E. 2008/95, K. 2010/18, 28 January 2010.

³⁸ Constitutional Court), application No. 2014/256, 25 June 2014, para. 114.

³⁹ Turkey, Constitution (*Türkiye Cumhuriyeti Anayasası*), 7 November 1982, Article 10; Law on the Human Rights and Equality Institution of Turkey, 6 April 2016, Article 3(2); Penal Code, 26 September 2004, Article 3(2); Labour Law, 22 May 2003, Article 5(1); Basic Law on National Education, 14 June 1973, Article 4; Law on Civil Servants, 14 July 1965, Article 7; Civil Code (*Medeni Kanun*), 22 November 2001, Article 68; Law on Political Parties (*Siyasi Partiler Kanunu*), 22 April 1983, Article 12; Law on Social Services (*Sosyal Hizmetler Kanunu*), 24 May 1983, Article 4(d); Law on the Execution of Penalties and Security Measures (*Ceza ve Güvenlik Tedbirlerinin İnfazı Hakkında Kanun*), 13 December 2004, Article 2(1); Law on the Establishment of the Ombudsman Institution (*Kamu Denetçiliği Kanunu*), 29 June 2012, Article 30; Turkish Armed Forces Discipline Law (*Türk Silahlı Kuvvetleri Disiplin Kanunu*), 31 January 2013, Article 18; Law on Prevention of Violence and Disorder in Sports (*Sporda Şiddet ve Düzensizliğin Önlenmesine Dair Kanun*), 14 April 2011, Article 14; Regulation on Minimum Wage (*Asgari Ücret Yönetmeliği*), 1 August 2004, Article 5; Law on the Foundation and Broadcasting of Radio and Television Channels (*Radyo ve Televizyonların Kuruluş ve Yayın Hizmetleri Hakkında Kanun*), 15 February 2011, Article 8(e).

⁴⁰ Turkey, Constitution, 7 November 1982, Article 10; Law on the Human Rights and Equality Institution of Turkey, 6 April 2016, Article 3(2); Penal Code, 26 September 2004, Article 3(2); Labour Law, 22 May 2003, Article 5(1); Basic Law on National Education, 14 June 1973, Article 4; Law on Civil Servants, 14 July 1965,

gender,⁴² disability,⁴³ political opinion/thought,⁴⁴ philosophical belief/opinion,⁴⁵ religion,⁴⁶ sect (denomination),⁴⁷ nationality,⁴⁸ national origin,⁴⁹ ethnic origin,⁵⁰ social origin,⁵¹

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- Article 7; Civil Code, 22 November 2001, Article 68; Law on Political Parties, 22 April 1983, Article 12; Law on Social Services, 24 May 1983, Article 4(d); Law on the Execution of Penalties and Security Measures, 13 December 2004, Article 2(1); Law on the Establishment of the Ombudsman Institution, 29 June 2012, Article 30; Turkish Armed Forces Discipline Law, 31 January 2013, Article 18; Law on Prevention of Violence and Disorder in Sports, 14 April 2011, Article 14; Regulation on Minimum Wage, 1 August 2004, Article 5; Law on the Foundation and Broadcasting of Radio and Television Channels, 15 February 2011, Article 8(e).
- ⁴¹ Turkey, Constitution, 7 November 1982, Article 10; Law on the Human Rights and Equality Institution of Turkey, 6 April 2016, Article 3(2); Penal Code, 26 September 2004, Article 3(2); Labour Law, 22 May 2003, Article 5(1); Civil Code, 22 November 2001, Article 68; Law on the Execution of Penalties and Security Measures, 13 December 2004, Article 2(1); Law on the Establishment of the Ombudsman Institution, 29 June 2012, Article 18; Law on the Foundation and Broadcasting of Radio and Television Channels, 15 February 2011, Article 8(e).
- ⁴² Turkey, Constitution, 7 November 1982, Article 10; Law on the Human Rights and Equality Institution of Turkey, 6 April 2016, Article 3(2); Penal Code, 26 September 2004, Article 3(2); Labour Law, 22 May 2003, Article 5(1); Basic Law on National Education, 14 June 1973, Article 4; Law on Civil Servants, 14 July 1965, Article 7; Civil Code, 22 November 2001, Article 68; Law on Political Parties, 22 April 1983, Article 12; Law on the Execution of Penalties and Security Measures, 13 December 2004, Article 2(1); Law on the Establishment of the Ombudsman Institution, 29 June 2012, Article 30; Turkish Armed Forces Discipline Law, 31 January 2013, Article 18; Law on Prevention of Violence and Disorder in Sports, 14 April 2011, Article 14; Regulation on Minimum Wage, 1 August 2004, Article 5.
- ⁴³ Turkey, Labour Law, 22 May 2003, Article 5(1); Law on the Human Rights and Equality Institution of Turkey, 6 April 2016, Article 3(2); Law on Persons with Disability, 1 July 2005; Basic Law on National Education, 14 June 1973, Article 4; Law on the Foundation and Broadcasting of Radio and Television Channels, 15 February 2011, Article 8(e).
- ⁴⁴ Turkey, Constitution, 7 November 1982, Article 10; Law on the Human Rights and Equality Institution of Turkey, 6 April 2016, Article 3(2); Penal Code, 26 September 2004, Article 3(2); Labour Law, 22 May 2003, Article 5(1); Law on Civil Servants, 14 July 1965, Article 7; Law on the Execution of Penalties and Security Measures, 13 December 2004, Article 2(1); Law on the Establishment of the Ombudsman Institution, 29 June 2012, Article 30; Turkish Armed Forces Discipline Law, 31 January 2013, Article 18; Regulation on Minimum Wage, 1 August 2004, Article 5; Law on the Foundation and Broadcasting of Radio and Television Channels, 15 February 2011, Article 8(e).
- ⁴⁵ Turkey, Constitution, 7 November 1982, Article 10; Law on the Human Rights and Equality Institution of Turkey, 6 April 2016, Article 3(2); Penal Code, 26 September 2004, Article 3(2); Labour Law, 22 May 2003, Article 5(1); Law on Civil Servants, 14 July 1965, Article 7; Law on the Execution of Penalties and Security Measures, 13 December 2004, Article 2(1); Law on the Establishment of the Ombudsman Institution, 29 June 2012, Article 30; Turkish Armed Forces Discipline Law, 31 January 2013, Article 18; Regulation on Minimum Wage, 1 August 2004, Article 5; Law on the Foundation and Broadcasting of Radio and Television Channels, 15 February 2011, Article 8(e).
- ⁴⁶ Turkey, Constitution, 7 November 1982, Article 10; Law on the Human Rights and Equality Institution of Turkey, 6 April 2016, Article 3(2); Penal Code, 26 September 2004, Article 3(2); Labour Law, 22 May 2003, Article 5(1); Basic Law on National Education, 14 June 1973, Article 4; Law on Civil Servants, 14 July 1965, Article 7; Civil Code, 22 November 2001, Article 68; Law on Political Parties, 22 April 1983, Article 12; Law on Social Services, 24 May 1983, Article 4(d); Law on the Execution of Penalties and Security Measures, 13 December 2004, Article 2(1); Law on the Establishment of the Ombudsman Institution, 29 June 2012, Article 18; Turkish Armed Forces Discipline Law, 31 January 2013, Article 18; Law on Prevention of Violence and Disorder in Sports, 14 April 2011, Article 14; Regulation on Minimum Wage, 1 August 2004, Article 5; Law on the Foundation and Broadcasting of Radio and Television Channels, 15 February 2011, Article 8(e).
- ⁴⁷ Turkey, Constitution, 7 November 1982, Article 10; Law on the Human Rights and Equality Institution of Turkey, 6 April 2016, Article 3(2); Penal Code, 26 September 2004, Article 3(2); Labour Law, 22 May 2003, Article 5(1); Law on Civil Servants, 14 July 1965, Article 7; Civil Code, 22 November 2001, Article 68; Law on Political Parties, 22 April 1983, Article 12; Law on Social Services, 24 May 1983, Article 4(d); Regulation on Minimum Wage, 1 August 2004, Article 5; Law on the Foundation and Broadcasting of Radio and Television Channels, 15 February 2011, Article 8(e); Law on the Execution of Penalties and Security Measures, 13 December 2004, Article 2(1); Turkish Armed Forces Discipline Law, 31 January 2013, Article 18; Law on Prevention of Violence and Disorder in Sports, 14 April 2011, Article 14.
- ⁴⁸ Turkey, Penal Code, 26 September 2004, Article 3(2); Law on the Execution of Penalties and Security Measures, 13 December 2004, Article 2(1); Law on the Foundation and Broadcasting of Radio and Television Channels, 15 February 2011, Article 8(e).
- ⁴⁹ Turkey, Penal Code, 26 September 2004, Article 3(2).
- ⁵⁰ Turkey, Law on the Human Rights and Equality Institution of Turkey, 6 April 2016, Article 3(2); Law on the Execution of Penalties and Security Measures, 13 December 2004, Article 2(1); Law on Prevention of Violence and Disorder in Sports, 14 April 2011, Article 14.
- ⁵¹ Turkey, Penal Code, 26 September 2004, Article 3(2); Law on the Execution of Penalties and Security Measures, 13 December 2004, Article 2(1).

birth,⁵² economic or other social status,⁵³ family,⁵⁴ marital status,⁵⁵ class,⁵⁶ profession,⁵⁷ regional differences,⁵⁸ health⁵⁹ and age.⁶⁰ Discrimination is occasionally prohibited more generally, without enumerating any grounds.⁶¹ Thus, the only ground of discrimination that is not prohibited under Turkish law is sexual orientation.⁶²

At the same time, most of the lists, excepting the list in the anti-discrimination law,⁶³ are open-ended. As mentioned in Section 1, the Constitutional Court has verified the open-ended nature of Article 10 of the Constitution by entertaining discrimination claims on the basis of sexual orientation and, effectively, ethnic origin. However, the Court established a hierarchy among the enumerated and non-enumerated grounds by considering only those enumerated as suspect grounds requiring 'very important reasons' for their restriction.⁶⁴ While the Court explicitly included sexual orientation among the prohibited grounds in a ruling issued in February 2017, it did not address whether it still assumed there to be a hierarchy between the various grounds.⁶⁵

In 2008, the Court of Cassation said that Article 5 of the Labour Law prescribes an open-ended prohibition of discrimination and should be interpreted as prohibiting discrimination based on sexual orientation (the term used by the Court was 'sexual preference') among other grounds.⁶⁶ In a precedent-setting judgment issued on 7 November 2014 and published in March 2015, the Council of State found the Ministry of National Education's dismissal of a teacher from the profession due to his/her sexual orientation to be unconstitutional. While the applicant based his/her claim on the equality and non-discrimination clauses of the Turkish Constitution (Article 10) and the ECHR (Article 8), the Court did not frame the case as an equality issue, but rather restricted its analysis to the right to privacy, finding Article 20(1) of the Turkish Constitution and Article 8 of the ECHR to have been violated.⁶⁷

In addition to constitutional and legislative provisions on anti-discrimination, Articles 216 and 122 of the Penal Code prohibit incitement to hatred and hatred on enumerated grounds.⁶⁸ While hate crime has thus been introduced into the Turkish legal system,

⁵² Turkey, Law on the Human Rights and Equality Institution of Turkey, 6 April 2016, Article 3(2); Penal Code, 26 September 2004, Article 3(2); Law on the Execution of Penalties and Security Measures, 13 December 2004, Article 2(1).

⁵³ Turkey, Law on the Human Rights and Equality Institution of Turkey, 6 April 2016, Article 3(2) (wealth); Penal Code, 26 September 2004, Article 3(2); Law on the Execution of Penalties and Security Measures, 13 December 2004, Article 2(1).

⁵⁴ Turkey, Civil Code, 22 November 2001, Article 68; Law on Political Parties, 22 April 1983, Article 12.

⁵⁵ Turkey, Law on the Human Rights and Equality Institution of Turkey, 6 April 2016, Article 3(2).

⁵⁶ Turkey, Civil Code, 22 November 2001, Article 68; Law on Political Parties, 22 April 1983, Article 12; Law on Social Services, 24 May 1983, Article 4(d).

⁵⁷ Turkey, Law on Political Parties, 22 April 1983, Article 12.

⁵⁸ Turkey, Law on Social Services, 24 May 1983, Article 4(d).

⁵⁹ Turkey, Law on the Human Rights and Equality Institution of Turkey, 6 April 2016, Article 3(2).

⁶⁰ Turkey, Law on the Human Rights and Equality Institution of Turkey, 6 April 2016, Article 3(2).

⁶¹ Turkey, Law on the Establishment and Duties of the Turkish Football Federation (*Türkiye Futbol Federasyonu Kuruluş ve Görevleri Hakkında Kanun*), 5 May 2009, Article 3, (prohibiting the Federation from engaging in racism and any kind of discrimination).

⁶² The grounds of 'sexual identity' and 'social status' were included in the 2009 draft law, but were taken out of the final text.

⁶³ Under the draft prepared in 2009, the list was open-ended.

⁶⁴ Constitutional Court, application No. 2014/256, 25 June 2014, para. 146.

⁶⁵ Constitutional Court, application No. 2014/19308, 15 February 2017.

⁶⁶ Ninth Civil Chamber of the Court of Cassation, judgment E. 2008/27309, K. 2008/22094, 25 July 2008.

⁶⁷ 12th Circuit of the Council of State, judgment E. 2011/750, K. 2014/7169, 7 November 2014.

⁶⁸ Article 216 of the Turkish Penal Code criminalises (1) incitement to enmity or hatred on grounds, *inter alia*, of race, religion or denomination in a manner which may present a clear and imminent danger to public safety; (2) open denigration of a section of the population on grounds, *inter alia*, of race, religion or denomination; and (3) open denigration of religious values of a part of the population. Article 8(b) of the Law on the Foundation and Broadcasting of Radio and Television Channels prohibits the encouragement of hatred through making distinctions based on race, language, religion, sect and regional differences. Article 8(g) bans broadcasts which exploit children, the weak and persons with disabilities and provoke violence against them (material scope limited). Article 122 of the Turkish Penal Code prohibits hatred based on language, race, nationality, colour, gender, disability, political opinion, philosophical belief, religion or sect

amendments introduced in 2014 removed the word 'discrimination' from the text of Article 122 (though retaining it in its title, 'Hatred and discrimination') and, most importantly, changed the open-ended nature of the Article. While nationality has been added to the enumerated grounds, a flexible judicial interpretation of Article 122 to encompass discrimination based on ethnicity, age and sexual orientation has thus been foreclosed with the abolishment of the open-ended nature of this Article. The anti-discrimination law does not prohibit hate speech or hate crime, although the 2009 draft law that it replaced included such a provision, prohibiting hate speech against 'an individual or group'.⁶⁹

The Committee on the Elimination of Racial Discrimination (CERD), in its report *Concluding observations on the combined 4th to 6th periodic reports of Turkey*, published on 11 January 2016, expressed concern that Article 216 of the Penal Code sets 'a clear and imminent danger to public order' as a condition for the prosecution of acts that incite racial hatred; regretted the absence of a racist motive as an aggravating circumstance; and expressed concern that Article 216 has been used to curtail free speech and to penalise human rights defenders and those advocating minority rights.⁷⁰ CERD also expressed concern about incidents of hate speech and discriminatory statements in the public discourse, and about hate crimes, including physical attacks against ethnic minorities, and the inadequate and ineffective investigation of such crimes.

Similarly, ECRI, in its *Report on Turkey (fifth monitoring cycle)*, stated that the 'definition of hate crime is excessively narrow and the Criminal Code does not explicitly provide that racist and homo/transphobic motivation constitutes an aggravating circumstance'.⁷¹ ECRI noted that Article 216 of the Penal Code does not mention incitement to violence and discrimination and does not include the grounds of ethnic origin, sexual orientation and gender identity.⁷² Emphasising that hate crime encompasses not only discrimination but all hate-motivated offences, including racist and homo/transphobic murder and physical attack, ECRI regretted that the 2015 amendments to the Penal Code did not codify hate crimes accordingly. It also noted that the Penal Code 'does not explicitly criminalise racially-motivated threats'.⁷³

2.1.1 Definition of the grounds of unlawful discrimination within the directives

Disability is the only ground of unlawful discrimination defined under Turkish law. While neither the Turkish constitution nor laws define race, ethnicity or religion, the country's founding treaty, the international Treaty of Lausanne (1923), makes a distinction between non-Muslim citizens and the rest by conferring minority status on the former (without providing a definition for minority). While this distinction de jure refers to categorisation on the basis of religion, since 1925 the Turkish Government has in practice limited the protection of the Treaty of Lausanne to Jews, and Armenian and Greek Orthodox Christians, whose identities refer to both a specific religion and a specific ethnic origin.

(material scope limited to the sale or transfer of goods, the execution of a service, employment, the provision of food services and the undertaking of economic activity).

⁶⁹ Articles 2(1)(g) and 3(8) of the draft law.

⁷⁰ Committee on the Elimination of Racial Discrimination (CERD) (2016), *Concluding observations on the combined fourth to sixth periodic reports of Turkey*, CERD/C/TUR/CO/4-6, 11 January 2016, pp. 3-4, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2fCO%2f4-6&Lang=en.

⁷¹ ECRI (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, p. 9, available at: <https://rm.coe.int/fifth-report-on-turkey/16808b5c81>.

⁷² ECRI (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, p. 13, available at: <https://rm.coe.int/fifth-report-on-turkey/16808b5c81>.

⁷³ ECRI (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, p. 14, available at: <https://rm.coe.int/fifth-report-on-turkey/16808b5c81>.

In August 2013, a lower court challenged this policy by holding that the Treaty of Lausanne granted minority status and rights to all non-Muslim citizens, without enumerating any specific group.⁷⁴ The decision was given in a case brought by the Syriac community (a group which also has a distinct religious and ethnic identity), whose request to open a kindergarten where children would also be taught their mother tongue was rejected by the Ministry of National Education.⁷⁵ However, due to the broad reasoning of the court, which concluded that all non-Muslim communities are entitled to minority rights under the Treaty, and the fact that the Ministry decided not to appeal the decision, it is likely that the decision will be used by other non-Muslim groups in challenging state policies. Following the court decision, the Syriac community set up a kindergarten, its first educational institution, which started to operate in the 2014-2015 academic year.

a) Racial or ethnic origin

Racial origin is not defined in any current law.

Ethnic origin is not defined in any current law.

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

b) Religion and belief

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

Civil registries and identity cards in Turkey indicate the religion of their holders. One of only three religions can be indicated on identity cards: Christianity, Islam and Judaism. All Turkish citizens, irrespective of religion or denomination, have the right, on submission of a petition and payment of a small fee, to leave blank the box on their identity card indicating religion.⁷⁶ The choice is between indicating one of the three religions recognised by the state or leaving the box blank. Other believers are still not allowed to indicate their faiths, religions or denominations on their identity cards. In rare cases in which such people have applied for the identification of their true faith, their requests have been denied. In a case concerning a request of this kind by a Bahá'í, whose religion was indicated by the state as Islam, the Court of Cassation, on the basis of the opinion of the Directorate of Religious Affairs, decided that the Bahá'í faith is not a religion, without defining religion or elaborating any criteria by which it determines a faith as a religion.⁷⁷

Another important issue in this regard is the definition of a Muslim. The official identity cards of persons who belong or are assumed to belong to the Muslim faith indicate their religion to be 'Islam', without specifying a denomination. In a country that is extremely divided along religious/denominational lines, the difference matters, since people belonging to non-Sunni denominations of Islam⁷⁸ feel discriminated against by state policies that protect the rights and interests of people believing in the Sunni version of Islam. While the vast majority of Muslims in Turkey belong to the Sunni-Hanefi

⁷⁴ European Commission (2013), *Turkey 2013 Progress Report*, Brussels, p. 61, available at: https://www.ab.gov.tr/files/2013%20ilerleme%20raporu/tr_rapport_2013_en.pdf.

⁷⁵ Thirteenth Administrative Court of Ankara, judgment E. 2012/1746, K. 2013/952, 18 June 2013.

⁷⁶ Turkey, Law on Civil Registry Services (*Nüfus Hizmetleri Kanunu*), 29 April 2006.

⁷⁷ See, for example, Tenth Civil Chamber of the Court of Cassation, judgment E. 1992/3226, K. 1995/4872, 25 October 1995; Third Civil Chamber of the Court of Cassation, judgment E. 1988/8776, K. 1988/9515, 11 November 1988; Sixth Civil Chamber of the Court of Cassation, judgment E. 1974/2007, K. 1974/2242, 7 May 1974.

⁷⁸ The majority of Muslims in Turkey belong to the Sunni denomination of Islam.

denomination, there is a significant Alevi community and small Caferi and Nusayri communities, which follow different interpretations and practices of the Muslim faith from those of the Sunni majority. Requests by Alevis to change the indication on their identity card from 'Islam' to 'Alevi' are declined by the courts and all Alevis are registered as Muslims.

This issue was brought before the ECtHR, which, on 2 February 2010, ruled in the case of *Sinan Işık v Turkey* that the indication of religion on the identity card, even where it is no longer obligatory, is a breach of Article 9 of the ECHR.⁷⁹ The Court held that the regulation obliged individuals to apply to the authorities in writing for the deletion of religion from their identity cards and disclosed the religious or personal convictions of individuals who chose to have the religion box left blank. The Court found this to be in violation of the negative aspect of Article 9, namely the freedom not to manifest one's religion or belief. Though the judgment is binding under Article 90 of the Constitution, it remains unimplemented. There is virtually no debate at national level on the non-implementation of the judgment, except among Alevi organisations and media.

The choice between leaving the box blank and being officially identified against their true conviction or faith leaves many individuals with a dilemma. A blank box in an official identity card, which is used on a daily basis to access public services, serves to enable the detection of religious minorities such as Alevis, Protestants, Bahá'ís and Syriacs, as well as atheists and agnostics, and exposes them to discriminatory treatment. The European Commission reported 'discriminatory practices or harassment by local officials of persons who converted from Islam to another religion and thereafter sought to amend their ID cards'.⁸⁰ Therefore, few persons dare to leave the religion section blank for fear of discrimination. As far as Armenian, Greek Orthodox and Jewish people are concerned, a choice not to identify their religion on their identity cards may mean that their children are not exempt from mandatory religion courses (see Section 3.2.8).

c) Disability

Article 2(1)(f) of the Law on the Human Rights and Equality Institution of Turkey and Article 3(c) of the Law on Persons with Disabilities define a person with disability as 'an individual who is influenced by attitudes and environmental factors which hinder his/her full and effective participation in social life on an equal basis with others due to loss of physical, mental, psychological or sensory capabilities at various levels'.⁸¹ The law defines discrimination based on disability as 'every kind of difference, exclusion or restriction based on disability which hinders the full exercise of human rights and liberties on equal footing with others in political, economic, social, cultural, civil or any other area'. These definitions are in line with the UN Convention on the Rights of Persons with Disabilities and the CJEU's judgment in the joined cases of *Ring and Skouboe Werge*.⁸² In fact, the Turkish law goes beyond the CJEU definition and, on paper, provides broader protection for persons with disabilities in that its application is not limited to professional life.

Various laws and regulations that provide disability-related benefits and positive measures have their own definitions of and/or criteria for disability that do not reflect those contained in Law No. 5378, which was adopted in 2005. In the light of the Turkish courts' unwillingness to expand legal protection through judicial interpretation and lack of a tradition of judicial activism, it is highly unlikely that judges will interpret other laws in accordance with the Law on Persons with Disabilities and the anti-discrimination law.

⁷⁹ *Sinan Işık v Turkey*, No. 21924/05, 2 February 2010.

⁸⁰ European Commission (2012), *Turkey 2012 Progress Report*, Brussels, 10 October 2012, p. 25, available at: http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/tr_rapport_2012_en.pdf.

⁸¹ Turkey, Law on Persons with Disabilities, No. 5378, 1 July 2005, Article 3(c).

⁸² Judgment of 11 April 2013, *Ring and Skouboe Werge v Denmark*, C-335/11 and C-337/11.

Under Article 3(c) of the Law on Social Services, a person with disability is defined as someone who 'does not adapt to the needs of normal life and is in need of protection, care, rehabilitation, consulting and support services'. Under Article 3(d), in order to be eligible for disability benefits, the person with disability must receive a disability report from special health boards established pursuant to the Regulation on the Criteria and Classification of Disability and Health Board Reports to be given to the Disabled.⁸³ As indicated by its name, the Regulation sets out the criteria for the classification of persons with disabilities in various categories based on the percentage degree of their disability, which determine his/her eligibility to receive special social services provided by the state. Making special social services to be provided by the state conditional on the degree of disability, which is calculated through a technical process and on the basis of mathematical formulations, not only 'ignores the special circumstances of the individual'⁸⁴ but also shows that the Turkish state is far from adopting a rights-based perspective on disability.

Disability can also be defined in a negative aspect in disqualifying individuals from certain professions. According to Article 8(g) of the Law on Judges and Prosecutors (No. 2802), in order to be appointed as a candidate judge or prosecutor, a person 'should not have any physical or mental illness or disability that would prevent the person from carrying out his/her responsibilities as a judge or a prosecutor continuously in every part of the country; or any disabilities which cause limitations in controlling the movements of the organs; speech different from that which is customary and would be found odd by people'. Similarly, Article 74(e) of the Law on the Union of Chambers and Commodity Exchanges of Turkey (No. 5174) states that in order to be eligible to hold the position of general secretary of the Union of Chambers and Commodity Exchanges, a person 'shall not have a physical or mental illness, or physical disability that shall prevent him performing his duties continuously'. In some cases, although the relevant law does not exclude persons with disabilities from entering a certain profession, public institutions can apply the rules in an exclusionary and discriminatory fashion. A case in point is the Ministry of National Education which, on its informative website on professions, introduced an eligibility requirement for the diplomatic profession not contained in any of the relevant laws.⁸⁵ The website stated that to be a diplomat a person shall 'not have a physical disability'.⁸⁶

A law adopted on 25 April 2013 replaced the terms *özürlü* (handicapped, defective, deficient), *sakat* (crippled, defective) and *çürük* (rotten, unfit) with that of *engelli* (disabled) in a total of 96 laws and decrees having the force of law, including the Civil Code, Anti-Terror Law, Law on Civil Servants, Law on Social Services, Law on Persons with Disabilities, the Penal Code, Law on Social Insurance and General Health Insurance and various laws concerning the families of martyrs, war veterans and retired members of the military.⁸⁷ However, the Constitution, various other laws, official documents and Government offices continue to use the rather pejorative term *özürlü*.

⁸³ Turkey, Regulation on the Criteria and Classification of Disability and Health Board Reports to be given to the Disabled (*Özürlülük Ölçütü, Sınıflandırması ve Özürlülere Verilecek Sağlık Kurulu Raporları Hakkında Yönetmelik*), *Official Gazette*, 30 March 2013.

⁸⁴ Şenyurt Akdağ, A., Tanay, G., Özgül, H., Kelleci Birer, L., Kara, Ö. (2011), *Türkiye'de Engellilik Temelinde Ayrımcılığın İzlenmesi Raporu: 1 Ocak-30 Haziran 2010* (Monitoring Report on Discrimination on Grounds of Disability in Turkey: 1 January-30 June 2010), İstanbul Bilgi Üniversitesi, p. 14.

⁸⁵ Association for Monitoring Equal Rights (Eşit Haklar için İzleme Derneği) (2011), *Türkiye'de Engellilere Yönelik Ayrımcılık ve Hak İhlalleri: 2011 İzleme Raporu* (Discrimination and Rights Violations against Persons with Disability in Turkey: 2011 Monitoring Report), p. 44, available at: <http://www.esithaklar.org/wp-content/uploads/2012/06/ESHID-EngelliRaporu2011.pdf>.

⁸⁶ Association for Monitoring Equal Rights (2011), *Türkiye'de Engellilere Yönelik Ayrımcılık ve Hak İhlalleri: 2011 İzleme Raporu* (Discrimination and Rights Violations against Persons with Disability in Turkey: 2011 Monitoring Report), p. 44, available at: <http://www.esithaklar.org/wp-content/uploads/2012/06/ESHID-EngelliRaporu2011.pdf>.

⁸⁷ Turkey, Law on Making Amendments in Various Laws and Decrees having the Force of Law with the Purpose of Changing References to Persons with Disabilities in Laws and Decrees having the Force of Law (*Kanun ve Kanun Hükmünde Kararnamelerde Yer Alan Engelli Bireylere Yönelik İbarelerin Değiştirilmesi Amacıyla Bazı*

d) Age

Age is not defined in any law in Turkey. There is a lack of case law on the issue.

e) Sexual orientation

Sexual orientation is neither defined nor prohibited in any law in Turkey. The only slight elaboration was made by the Constitutional Court in its 2017 inadmissibility decision in which it found sexual orientation to be a prohibited ground of discrimination: 'the right to determine one's sexual preference' entails 'sexual orientation, sexual acts and attitudes'.⁸⁸ While the initial text of the draft anti-discrimination law referred to and defined 'sexual identity', all such references were removed by the Government in 2011. The initial draft shared with civil society provided the definition of 'sexual identity' as covering 'heterosexual, homosexual, bisexual, transsexual, transvestite and similar sexual identities'. However, the anti-discrimination law eventually adopted in 2016 does not contain a definition.

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

The principal way in which laws are applied in a discriminatory way against LGBTI people is through the judicial interpretation of terms such as 'morality,' 'indecent behaviour' and 'dishonourable behaviour'. Article 125(E)(g) of the Law on Civil Servants allows the dismissal of public servants found to have acted 'in a shameful and embarrassing way unfit for the position of a civil servant'. This phrase, undefined in the law, has been interpreted by the courts to cover homosexual conduct, as a result of which the dismissal from public service of gay men has been upheld by the judiciary.⁸⁹ In 2012, a police officer was dismissed due to his perceived sexual orientation.⁹⁰ While his appeal against the dismissal was rejected by an administrative court, in March 2018 the ruling was reversed by the Council of State on the ground of the right to privacy and sent back to the lower court.⁹¹ Although in 2013 the European Commission reported three more ongoing court cases concerning discrimination in the workplace on the grounds of sexual

Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılmasına Dair Kanun), 25 April 2013, available at: <http://www.resmigazete.gov.tr/eskiler/2013/05/20130503-1.htm>.

⁸⁸ Constitutional Court, application No. 2014/19308, 15 February 2017, para. 39.

⁸⁹ Amnesty International reported two cases of sexual orientation discrimination in which 'gay men in public sector employment have been dismissed from their jobs for the explicit reason that they are gay'. See Amnesty International (2011), *'Not an Illness nor a Crime': Lesbian, Gay, Bisexual and Transgender People in Turkey Demand Equality*, London, p. 23, available at:

<http://www.amnestyusa.org/sites/default/files/notillnessnorcrime.pdf>. In one case, on 20 April 2004, the High Discipline Board of the Ministry of Interior dismissed a police officer based on oral evidence that he engaged in anal sex with another man. The decision was upheld by the Council of State on the basis of Article 125 of the Law on Civil Servants, which provides for the dismissal of persons who have been found 'to act in an immoral and dishonourable way which is not compatible with the position of a civil servant'. The other case concerned the dismissal by the High Discipline Board of the Ministry of National Education (Milli Eğitim Bakanlığı) of a teacher for having engaged in a 'homosexual relationship'. This dismissal too was upheld by the court. While the courts' decisions in these two cases are not publicly available, Amnesty International reported having seen the official court documents.

⁹⁰ Kaos GL, LGBTI News Turkey, IGLHRC (2014), *Human Rights Violations of LGBT Individuals in Turkey*, p. 5, available at: <http://iglhrc.org/sites/default/files/uprSubTurkey.pdf> (joint report submitted by national and international LGBTI NGOs to the UN Human Rights Council Working Group on the Universal Periodic Review, 21st session, January-February 2015.)

⁹¹ Karakaş, B. (2018), 'Eşcinsel diye işine son verilen memur için Danıştay Kararı: "Hukuka Aykırı"' ('Council of State ruling concerning the public servant dismissed from his job for being gay: "It's against the law"'), *Medium*, 15 March 2018, available at: <https://medium.com/@burcuas/e%C5%9Finsel-diye-i%C5%9Fine-son-verilen-memur-i%C3%A7in-dan%C4%B1%C5%9Ftay-karar%C4%B1-hukuka-ayk%C4%B1r%C4%B1-5c770cfb88f6>.

orientation, no further information was available on the outcome of these cases.⁹² In most cases, individuals dismissed by their employers because of their sexual orientation do not go to court due to fear of rejection by their families, friends and colleagues and due to negative media attention around such court cases, which leads to further victimisation of victims.⁹³ There are no data on harassment, physical violence or death threats against LGBTI individuals by family members. The only sources of information are LGBTI associations, which report on instances they become aware of in a sporadic fashion. In one case, a gay man who survived a near-fatal knife attack by his brother who found out about his sexual orientation filed a criminal complaint with the authorities. The brother is on being prosecuted on charges of intentional injury, threat and insult.⁹⁴

There are similar provisions in various laws and regulations allowing dismissal from employment of individuals due to their sexual orientation, which are not possible to list in an exhaustive manner. Examples can be found in the Military Penal Code, Law on Military Judges, Law on the Military Court of Cassation, Law on Lawyers, Law on Judges and Prosecutors, Regulation on Health Capability of the Turkish Armed Forces and Regulation on the Selection of Candidates for Military Judges.⁹⁵ The Turkish Armed Forces Discipline Law of 2013, despite protests from LGBTI groups, added a new discriminatory provision to this list.⁹⁶ Article 20 of this Law enumerates homosexuality among the violations of disciplinary rules which require immediate dismissal from the Turkish Armed Forces. According to Article 20(g), 'engaging in unnatural intercourse or voluntarily submitting oneself to such an act' is a ground for dismissal from the army. It is common knowledge in Turkey that the term 'unnatural intercourse' refers to anal intercourse and hence homosexual relationships. There are several cases of dismissal of homosexual men from public service or the military⁹⁷ on the basis of oral evidence of their engagement in anal sex with other men.

In a precedent-setting judgment issued on 7 November 2014 and published in March 2015, the Council of State ruled on the issue. The Court found the Ministry of National Education's rejection of a teacher from the profession due to his/her sexual orientation to be in violation of the right to privacy and the right to family life as protected under Article 20(1) of the Turkish Constitution and Article 8 of the ECHR. It is notable that the Court cited the ECtHR's relevant jurisprudence.⁹⁸ This is the first time that the high court found that a public institution had discriminated against its employee on the basis of his/her sexual orientation. As stated in Section 1, the Constitutional Court has now explicitly accepted sexual orientation as a prohibited ground. However, in its 2017 ruling, in not

⁹² European Commission (2013), *Turkey 2013 Progress Report*, Brussels, p. 59, available at: https://www.ab.gov.tr/files/2013%20ilerleme%20raporu/tr_rapport_2013_en.pdf.

⁹³ Opinion expressed by Fırat Söyle and Yasemin Öz, both of whom are leading lawyers in the area of sexual orientation discrimination cases. For an overview of case law concerning the dismissal of LGBTI individuals from the civil service, see Öz, Y., *Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity, Legal Report: Turkey*, Danish Institute for Human Rights, p. 19, available at: http://www.coe.int/t/commissioner/source/lgbt/turkeylegal_e.pdf.

⁹⁴ Kaos GL (2018), 'When I was 17, my brother attacked me with a knife and kicked me out of home, I want justice' ('17 yaşındayken abim bıçakla saldırdı, evden kovdu, adalet bekliyorum'), 22 November 2018, available at: <https://www.kaosgl.org/sayfa.php?id=27107>.

⁹⁵ For a more detailed list of these laws and regulations as well as their relevant provisions, see Güner, U., Kalkan, P., Öz, Y., Özsoy, E.C., Söyle, F. (2011), *Türkiye'de Cinsel Yönelim veya Cinsiyet Kimliği Temelinde Ayrımcılığın İzlenmesi Raporu: 1 Ocak-30 Haziran 2010 (Monitoring Report on Discrimination on Grounds of Sexual Orientation or Gender Identity in Turkey: 1 January -30 June 2010)*, pp. 27-28.

⁹⁶ Turkey, Turkish Armed Forces Discipline Law, 31 January 2013.

⁹⁷ For examples of the dismissal of homosexual personnel from the Turkish Armed Forces and the jurisprudence of military courts upholding this practice, see Güner U., Kalkan, P., Öz, Y., Özsoy, E.C., Söyle, F. (2011), *Türkiye'de Cinsel Yönelim veya Cinsiyet Kimliği Temelinde Ayrımcılığın İzlenmesi Raporu: 1 Ocak-30 Haziran 2010 (Monitoring Report on Discrimination on Grounds of Sexual Orientation or Gender Identity in Turkey: 1 January -30 June 2010)*, pp. 28-29.

⁹⁸ 12th Circuit of the Council of State, judgment E. 2011/750, K. 2014/7169, 7 November 2014 (citing the following ECtHR judgments: *Dudgeon v UK*, No. 7525/76, 22 October 1981; *Smith and Grady v UK*, No. 33985/96, 27 September 1999; *Lustig/Prean and Beckett v UK*, No. 31417/96, 27 September 1999; *Perkins and R. v UK*, No. 43208/98, 22 October 2002; *Beck, Copp and Bazeley v UK*, No. 48535/99, 22 October 2002; *Özpinar v Turkey*, No. 20999/04, 19 October 2010).

finding that there had been discrimination in the dismissal of an elementary school teacher on the basis of his sexual orientation, the Constitutional Court effectively considered heterosexuality to be a necessary qualification for teachers, in particular those involved in the education of young children.⁹⁹ This approach was criticised by the dissenting judges. Pointing out that the applicant was dismissed from his job due to his sexual orientation and that his request to be reinstated was rejected for the same reason, one dissenting judge noted that there was no legal provision preventing homosexuals from working as teachers; that the school administration had failed to present any concrete evidence to suggest that the applicant had an adverse influence on his young pupils; and that the applicant had been discriminated against on the basis of his sexual orientation. The verdict has gone unnoticed by the public and in the media.

In 2015, the Constitutional Court declined the request of a lower court for the annulment of the phrase 'in unnatural ways' in Article 226 of the Turkish Penal Code on the ground that it violated, among others, the constitutional right to privacy. Article 226, entitled 'Obscenity', criminalises the production, sale, transfer, storage, sharing and ownership of print, audio or visual materials depicting sexual behaviour conducted 'through violence, with animals, on dead human bodies or in unnatural ways.'¹⁰⁰ In a divided opinion released on 1 April 2015, the Constitutional Court upheld the provision on the ground that the prohibition of the storage of materials depicting sexual behaviour in 'unnatural ways' for the purpose of dissemination was proportionate to the legitimate aim of protecting public morality and was in accordance with the ECtHR jurisprudence on obscenity. A minority of four dissenting judges raised issues that the majority of 12 judges avoided addressing. They pointed out that the provision was in violation of the principles of equity and proportionality because it penalised equally individuals who produced such materials for commercial purposes and those who owned them for personal use. They also pointed out that the Court of Cassation, in its case law, had also interpreted the phrase 'unnatural ways' to refer to oral sex, anal sex, group sex and lesbian and homosexual relationships, even when such relationships were consensual. Noting that all kinds of consensual sexual relationships that do not contain violence are protected by the right to privacy, the dissenting judges argued that the Court should have annulled the phrase.¹⁰¹

Authorisation of the dissolution of associations on grounds of 'public morality' under the Civil Code has frequently been resorted to by prosecutors acting against LGBTI associations. In many cases, the courts have ruled against the associations, as in the case of the confiscation by court order of all copies of a magazine published by Kaos GL on the grounds that its content was obscene and against public morality. On 22 November 2016, the ECtHR found the confiscation of all copies of volume 28 of the magazine to be a disproportionate infringement of freedom of expression that is not necessary in a democratic society.¹⁰² The judgment did not receive any public or Government reaction except from LGBTI groups.

In rare cases in which Turkish courts ruled against the dissolution of LGBTI associations, the reasoning reflected a homophobic mentality which associates homosexuality with morality. For example, in 2008, in overturning the decision of a lower court to dissolve Lambdaistanbul, the Court of Cassation based its decision on the fact that the association did not pursue the goal of 'encouraging others to be an LGBTI person'. The Court reasoned as follows: 'The fact which is deemed to be immoral by society at large is not to be lesbian, gay, bisexual, transvestite or transsexual and the use of these words, but for these individuals to promote and to encourage with their lifestyles others' to follow an LGBTI lifestyle.'¹⁰³

⁹⁹ Constitutional Court, application No. 2013/2928, 18 October 2017.

¹⁰⁰ Turkey, Penal Code, Article 226(4), which penalises such offences with one to four years of imprisonment.

¹⁰¹ Constitutional Court, judgment E. 2014/118, K. 2015/35, 1 April 2015.

¹⁰² *Kaos GL v Turkey*, No. 4982/07, 22 November 2016.

¹⁰³ Seventh Chamber of the Court of Cassation, judgment E 2008/4109, K 2008/5196, 25 November 2008.

In a similar vein, the authorities interpret the above-mentioned Article 226 of the Penal Code, entitled 'Obscenity', to unlawfully limit freedom of expression. In August 2013, the Fourteenth Penal Chamber of the Court of Cassation in Istanbul overturned a lower court judgment acquitting the publisher and translator of a French book, on the ground that the book's homosexual content was offensive.¹⁰⁴ The Law on the Foundation and Broadcasting of Radio and Television Channels is also used by the Turkish courts to block gay social networking websites and by the Supreme Board of Radio and Television to fine broadcasters for airing programmes with homosexual content.¹⁰⁵

2.1.2 Multiple discrimination

In Turkey, multiple discrimination is prohibited in law.

Article 4(1)(c) of the Law on the Human Rights and Equality Institution of Turkey defines multiple discrimination as 'discriminatory treatment related to more than one discrimination ground'.¹⁰⁶ Under Article 25(1), multiple discrimination is an aggravating factor to be taken into account in determining the amount of administrative fines – ranging between TRY 1 000 and TRY 15 000 (EUR 160 and EUR 2 410) – imposed on natural or legal persons found to have engaged in discrimination.

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

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

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Turkey, discrimination based on a perception or assumption of a person's characteristics is prohibited in national law.

Article 4(1)(c) of the Law on the Human Rights and Equality Institution of Turkey defines discrimination by assumption as 'the discriminatory treatment of a natural or legal person in the exercise of legal rights and freedoms because it is assumed that s/he/it shares one of the discrimination grounds prohibited under this law, although that is in reality not the case'.¹⁰⁷

There is no case law dealing with discrimination by assumption.

b) Discrimination by association

In Turkey, discrimination based on association with persons with particular characteristics is not prohibited in national law.

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

a) Prohibition and definition of direct discrimination

¹⁰⁴ Radikal (2013), 'Yargıtay Fransızca Kitabı Müstehcen Buldu' ('The Court of Cassation Held the French Book to be Obscene'), 6 August 2013, available at: http://www.radikal.com.tr/turkiye/yargitay_fransizca_kitabi_mustehcen_buldu-1145084.

¹⁰⁵ Kaos GL, LGBTI News Turkey, IGLHRC (2014), *Human Rights Violations of LGBT Individuals in Turkey*, available at: <http://iglhrc.org/sites/default/files/uprSubTurkey.pdf> (joint report submitted by national and international LGBTI NGOs to the UN Human Rights Council Working Group on the Universal Periodic Review, 21st session, January-February 2015.)

¹⁰⁶ Turkey, Law on the Human Rights and Equality Institution of Turkey, No. 6701, 6 April 2016, Article 2(1)(c).

¹⁰⁷ Turkey, Law on the Human Rights and Equality Institution of Turkey, No. 6701, 6 April 2016, Article 2(1)(m).

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

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

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

Article 10 of the Constitution; Articles 3(2) and 122 of the Penal Code; Article 5(1) of the Labour Law; Article 4 of the Basic Law on National Education; Article 68 of the Civil Code; Article 12 of the Law on Political Parties; Article 8 of the Law on the Foundation and Broadcasting of Radio and Television; Article 4(d) of the Law on Social Services; Article 2(1) of the Law on the Execution of Penalties and Security Measures; and Article 7 of the Law on Civil Servants prohibit direct discrimination within their limited material scopes, but do not define direct discrimination. In elaborating on the concept of equality and anti-discrimination under Article 10 of the Constitution, discussed in the Introduction to Section 2, the Constitutional Court did not make a distinction between direct or indirect discrimination or say whether the definition concerned only direct discrimination.

b) Justification for direct discrimination

The law does not permit the justification of direct discrimination. On the other hand, based on the Constitutional Court's 2010 judgment cited above in the Introduction to Section 2, it seems that Turkey's highest court permits the justification of direct discrimination.

2.2.1 Situation testing

a) Legal framework

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

b) Practice

In Turkey, situation testing is not used in practice. Anti-discrimination NGOs are either not knowledgeable about the method¹⁰⁸ or do not believe in its effectiveness in the Turkish context, in which LGBTI associations do not dare to use this method due to the risk of violence and the ideological stance of the law enforcement authorities and the judiciary.¹⁰⁹ An anti-discrimination lawyer representing an LGBTI association stated that in the only incident that he knows of – in which he participated – that arguably comes

¹⁰⁸ In answer to a query, a lawyer representing one of the leading LGBTI associations stated that she is not familiar with situation testing methods. Email correspondence with Yasemin Öz, 23 April 2013.

¹⁰⁹ Email correspondence with Murat Köylü, an anti-discrimination lawyer representing an LGBTI association, 22 April 2013.

closest to the use of situation testing, a group of transgender individuals attempted to enter a bar to test whether they would be admitted. In denying them entry, the management justified the act on the ground that 'women with headscarves and people with uniforms were also not allowed'.¹¹⁰

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

a) Prohibition and definition of indirect discrimination

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

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

Article 2(1)(e) of the Law on the Human Rights and Equality Institution of Turkey defines indirect discrimination as: '[a] natural or legal person being put in a disadvantageous situation, as a result of any action, procedure or practice which does not appear discriminatory, in exercising his/her legally recognised rights and liberties on the grounds prohibited under this law in such a way that cannot be objectively justified.' The following additional sentence which existed under the corresponding article of the 2009 draft law has been removed: 'In order for an action, procedure or practice to be objectively justified, it must have a legitimate aim and be proportionate.'

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

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

b) Justification test for indirect discrimination

An objective test must be satisfied to justify indirect discrimination under Article 2(1)(e) of the Law on the Human Rights and Equality Institution of Turkey and Article 3(b) of the Law on Persons with Disabilities. Neither law elaborates on what can be considered a legitimate aim for the purpose of objective justification. There is no case law on this recently introduced concept in Turkish law.

2.3.1 Statistical evidence

a) Legal framework

¹¹⁰ Email correspondence with Murat Köylü, an anti-discrimination lawyer representing an LGBTI association, 22 April 2013.

In Turkey, there are (conditional) national rules permitting data collection for the purpose of proving discrimination. In connection with the Organization for Security and Co-operation in Europe (OSCE) hate crime reporting system, the Government provides data only on incitement to hatred and not on other forms of criminal hate speech. Furthermore, Turkey provides only judicial, and not police, data. Neither the judiciary nor the police collect data on the ethnic origins of victims. ECRI reported that a unit established within the Ministry of Justice is preparing to include that information in the statistics.¹¹¹

The Law on the Human Rights and Equality Institution of Turkey provides that the Institution has the competence, together with the Turkish Statistical Institute and other public bodies, to decide on areas where official statistics are needed for the purpose of combating discrimination. However, the Turkish Statistical Institute is responsible for gathering such statistics.

While there are several institutions conducting public opinion surveys entailing questions about ethnic origin and religious background, their data has not yet been used as statistical evidence for the purpose of proving discrimination in courts of law. A noteworthy civil society initiative, begun in 2009, is the compilation of reports on hate speech in the national and local media by the Hrant Dink Foundation, based on its daily monitoring of over 1 000 news outlets.¹¹²

Article 20(3) of the Constitution reads:

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

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

Turkey adopted its first piece of legislation on data protection in 2016.¹¹³ Distinguishing between personal data and sensitive personal data, the law defines the latter as personal data about an individual’s race, ethnic origin, political opinion, philosophical belief, religion, denomination or other beliefs, appearance, membership of an association or trade union, health, sexual life, information about his/her criminal convictions and security measures, and biometric and genetic data. While the law prohibits the processing of sensitive personal data without the express consent of the individual, it contains an extensive list of exceptions on grounds of national defence, national security, public security, public order, economic security, and processing of personal data by judicial and law enforcement authorities. The law provides for the establishment of a Data Protection Agency, which will be affiliated with the Office of the Prime Ministry and whose nine members are to be selected by the Parliament (five), the President (two) and

¹¹¹ ECRI (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, p. 18, available at: <https://rm.coe.int/fifth-report-on-turkey/16808b5c81>.

¹¹² Hrant Dink Foundation, Media Watch on Hate Speech project, available: <http://hrantdink.org/en/asulis-activities/projects/media-watch-on-hate-speech>.

¹¹³ Turkey, Law on the Protection of Personal Data (*Kişisel Verilerin Korunması Kanunu*), No. 6698, 24 March 2016.

the Council of Ministers (two). The Data Protection Agency became operative with the completion of the appointment of its members in January 2017. In its 2016 report, the European Commission found the law not to be fully in line with the EU *acquis* because the composition and functioning of the Data Protection Agency did not guarantee its complete independence and because 'the activities of the law enforcement agencies and judicial authorities are not entirely covered by the obligation to respect the personal data protection rules.'¹¹⁴ In 2018, the European Commission reiterated this conclusion.¹¹⁵

Ethnicity and race

While periodic censuses conducted by the Government previously contained questions regarding ethnic origin, the 1965 census was the last one in which people were asked about their mother tongue and ethnicity. Consequently, there is no longer any publicly available official data on the ethnic background of people collected on the basis of their informed consent and the principle of confidentiality. On the contrary, the collection of such data is *de jure* prohibited by the Government. A circular issued by the Ministry of Interior is cited regularly as an administrative act prohibiting the production of statistical data on race and ethnicity by public institutions. However, this circular is not publicly accessible. Otherwise, there are no specific rules on collection of data and no 'coherent, comprehensive system of data collection ... to assess the situation of the various minority groups or the scale of racism and racial discrimination in Turkey'.¹¹⁶

Turkey has time and again reiterated to CERD that it does not collect, keep or use qualitative or quantitative data on the ethnic backgrounds of its citizens,¹¹⁷ noting that this is 'a sensitive issue, especially for those nations living in diverse multicultural societies for a long period of time'.¹¹⁸ In its report *Concluding observations on the combined 4th to 6th periodic reports of Turkey*, CERD regretted the fact that Turkey has still not provided recent, reliable and comprehensive data on economic and social indicators, the use of mother tongues and languages or other indicators of ethnic origin that would enable the Committee to better evaluate the enjoyment of economic, social and cultural rights by various groups, including minorities.¹¹⁹

At the same time, public authorities in Turkey collect data on the ethnic and racial origin of citizens, not for use in research and litigation but for the purpose of profiling and policing ethnic minorities, particularly Kurds and the Roma. A few examples of such practices have been inadvertently made available to the public by Government institutions – for example, a provincial police department website contained information about the ethnic background of residents. The information note stated that 'families of kurdish¹²⁰ dissent [sic] who migrated from eastern provinces' resided in neighbourhoods

¹¹⁴ European Commission (2016), *Turkey 2016 Report*, Brussels, November 2016, p. 71, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_turkey.pdf.

¹¹⁵ European Commission (2018), *Turkey 2018 Report*, Strasbourg, 17 April 2018, p. 33, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-turkey-report.pdf>.

¹¹⁶ ECRJ (2011), *Report on Turkey (fourth monitoring cycle)*, CRI 2011 (5), adopted on 10 December 2010, Strasbourg, p. 9, available at: <https://rm.coe.int/fourth-report-on-turkey/16808b5c7e>.

¹¹⁷ Turkey, *Written replies by the Government of Turkey to the list of issues to be taken up by the Committee on the Elimination of Racial Discrimination in its consideration of the third periodic report of Turkey* (CERD/C/TUR/3), p. 1, available at: <http://www2.ohchr.org/english/bodies/cerd/docs/AdvanceVersions/WrittenReplieTurkey74.pdf>.

¹¹⁸ CERD (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, 17 April 2014, p. 3, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en.

¹¹⁹ CERD (2016), *Concluding Observations on the Combined Fourth to Sixth Periodic Reports of Turkey*, CERD/C/TUR/ CO/4-6, 11 January 2016, pp. 2-3, available at: <http://www.un.org.tr/humanrights/attachments/article/9/G1600350.pdf>.

¹²⁰ Spelling mistake in original text, not by author.

located near the highways while 'gypsies [sic]¹²¹ resided in the neighbourhoods of yeni mahalle and mezbaha.' While 'it was observed that the public residing in areas that fell within [the] responsibility [of the police department] do not have a specific political-ideological aim and thought', the police department had ascertained that residents of certain other neighbourhoods were 'people who came from the east and the southeast', who 'committed crimes such as battery and theft'.¹²²

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

A news report published in 2013 revealed not only that racial profiling of minorities is continuing but how deeply rooted this discriminatory state practice is. The Armenian-Turkish weekly newspaper *Agos* published official correspondence within the provincial representation of the Ministry of National Education in Istanbul, which revealed that the population registry records contain a confidential 'racial code'.¹²³ The news concerned the attempts of a parent who had converted from Islam to the Armenian Orthodox religion to register her child at an Armenian kindergarten, for which she needed to receive authorisation from the Ministry of National Education. Upon the parent's application, the provincial representation of the Ministry in Istanbul sent an official letter to its district branch, stating that the parent in question could be given authorisation only if her 'confidential racial code' in her population registry record is 2, which is the racial code given to Armenian citizens.¹²⁴ According to the news report, not only Armenian citizens but all citizens in Turkey are racially profiled, and not only for the purpose of identifying the eligibility of students for enrolment in non-Muslim schools. According to an undisclosed source in the population registry services, there are racial codes for Greek Orthodox, for Jews, for Syrians and for 'others.' In his May 2014 response to queries on this issue submitted by a member of the Parliament in August 2013,¹²⁵ the Minister of the Interior simply stated that 'procedures concerning registry incidents are being conducted in accordance with the law'.¹²⁶ However, in February 2016, in response to another query from an Opposition MP belonging to the Armenian ethnic minority, the Minister of the Interior implicitly confirmed the policy, noting that all citizens in Turkey, irrespective of their religion or ethnicity, were coded.¹²⁷ In March, the same MP stated in a speech in

¹²¹ Spelling mistake in original text, not by author.

¹²² Alp, S., Taştan, N. (2011), *Türkiye'de Irk veya Etnik Köken Temelinde Ayrımcılığın İzlenmesi Raporu: 1 Ocak-31 Temmuz 2010 (Monitoring Report on Discrimination on Grounds of Race or Ethnic Origin in Turkey: 1 January-31 July 2010)*, İstanbul Bilgi Üniversitesi, p. 77 (citing information available on 11 May 2010 on the website of the Köprübaşı Police Station of the Konya Police Department, which was no longer accessible at the time of the writing of this report).

¹²³ Balancar, F. (2013) '90 Yıldır "Soy Kodu" ile Fişlemişler' ('They have been branding with the "Race Code" for 90 Years'), *Agos*, 1 August 2013, available at: <http://www.agos.com.tr/tr/yazi/5384/90-yildir-soy-kodu-ile-fislemisler>.

¹²⁴ For the official letter from the Istanbul branch of the Ministry of National Education to its district representation in Şişli, see: <http://www.agos.com.tr/tr/yazi/5384/90-yildir-soy-kodu-ile-fislemisler>.

¹²⁵ For the text of the MP's written queries to the Prime Minister, see: <http://www2.tbmm.gov.tr/d24/7/7-29686s.pdf>. For the text of the MP's second written query to the Prime Minister, see: <http://www2.tbmm.gov.tr/d24/7/7-29694s.pdf>.

¹²⁶ For the text of the Minister's written response, see: <https://www2.tbmm.gov.tr/d24/7/7-29686sgc.pdf>.

¹²⁷ T24 (2016), 'İçişleri Bakanı Efkan Ala 'Soy Kodu'nun Tüm Vatandaşlar için Uygulandığını Söyledi' ('Minister of Interior Efkan Ala said the 'Race Code' is applicable to all citizens'), 15 February 2016, available at: <http://t24.com.tr/haber/icisleri-bakani-efkan-ala-soy-kodunun-tum-vatandaslar-icin-uygulandigini-soyledi,328285>.

Parliament that he had been verbally informed by a population registry official that the practice had been brought to an end.¹²⁸

Disability

General censuses conducted in 1985 and 2000 contained insufficient information on the quantitative dimension of disability in Turkey.¹²⁹ In 2002, the Presidency on Disabled People, under the auspices of the Prime Ministry, commissioned the Turkish Statistical Institute to conduct a survey.¹³⁰ This study – the first statistical research on disability in Turkey – identified the number of persons with disabilities in Turkey to be 8 431 937, which is 12.29 % of the total population. This was the first and last official survey on disability in Turkey, and 16 years later, Government policies are still developed on the basis of the data generated by that study. In addition, in 2010, the Ministry of Family and Social Policies and the Turkish Statistical Institute conducted a needs assessment survey.¹³¹

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

The Prime Ministry's State Personnel Presidency regularly publishes up-to-date statistics on persons with disabilities employed in the public sector. The data are segregated according to the provinces, sectors, public institutions where persons with disabilities are employed, as well as on the basis of the 'disability levels', education levels and types of disabilities of these persons. The data include information about vacancies available at each public institution, which is legally obliged to fulfil an employment quota of 3 %.¹³² In addition, until 2013 the Turkish Statistical Institute released annual data on the number of persons with disabilities employed in both the public and the private sectors and the number of vacancies in both sectors, where there are legal obligations to fulfil employment quotas.¹³³

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

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

¹²⁸ Cihan (2016), 'Garo Paylan: Soy Kodu Uygulaması Kaldırılmış, Teşekkür Ediyorum' ('Garo Paylan: I have been told that the Race Code Policy had been brought to an end, I thank you'), 2 March 2016, available at: <https://www.haberler.com/garo-paylan-soy-kodu-uygulamasi-kaldirilmis-8216221-haber/>.

¹²⁹ Şenyurt Akdağ A., Tanay, G., Özgül, H., Kelleci Birer L., Kara, Ö. (2011), *Monitoring Report on Discrimination on Grounds of Disability in Turkey: 1 January-30 June 2010 (Türkiye'de Engellilik Temelinde Ayrımcılığın İzlenmesi Raporu: 1 Ocak-30 Haziran 2010)*, İstanbul Bilgi Üniversitesi, p. 13.

¹³⁰ For the results of the 2002 *Disability Survey of Turkey*, see Tufan, İ., Arun, Ö. (2006), *Secondary Data Analysis of Disability Survey of Turkey (Türkiye Özürlüler Araştırması 2002 İkincil Analizi)*, available at: http://ozgururun.com.tr/wp-content/uploads/2015/08/TufanveArun_TOA.pdf.

¹³¹ Ministry of Family and Social Policies and Turkish Statistical Institute (2011), *Survey on Problems and Expectations of Disabled People 2010*, available at: http://www.tuik.gov.tr/Kitap.do?metod=KitapDetay&KT_ID=1&KITAP_ID=244.

¹³² See: <http://www.dpb.gov.tr/tr-tr/istatistikler/engelli-personel-ve-omss-istatistikleri>.

¹³³ This information is no longer publicly available on the website of the Turkish Statistical Institute.

b) Practice

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

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

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Turkey, harassment is prohibited. It is defined in law.

Article 4(1)(g) of the Law on the Human Rights and Equality Institution of Turkey prohibits harassment on grounds of sex, race, colour, language, religion, belief, denomination, philosophical and political opinion, ethnic origin, wealth, birth, marital status, health, disability and age.

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

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

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

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

In Turkey, harassment explicitly constitutes a form of discrimination under Article 4(1)(g) of the Law on the Human Rights and Equality Institution of Turkey.

b) Scope of liability for harassment

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

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

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

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

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

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

In Turkey, such instructions explicitly constitute a form of discrimination.

Article 4(1)(b) of the Law on the Human Rights and Equality Institution of Turkey prohibits instructions to discriminate on grounds of sex, race, colour, language, religion, belief, denomination, philosophical and political opinion, ethnic origin, wealth, birth, marital status, health, disability and age. Article 2(1)(b) defines instruction to discriminate as 'the instruction to discriminate given by an individual to others s/he has authorised to engage in actions or procedures in his/her name or behalf or by a public official to other individuals'. This definition is not entirely compatible with the directives, as sexual orientation is excluded from the grounds on the basis of which direct discrimination is prohibited under Article 4(1)(c).

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

b) Scope of liability for instructions to discriminate

In Turkey, the discriminator is liable.

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

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

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

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

Article 5(2) of the Law on the Human Rights and Equality Institution of Turkey entails the duty to provide reasonable accommodation, but only in respect of persons with disabilities. Article 4(1)(f) considers the denial of reasonable accommodation to be a form of discrimination.

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

'a disproportionate and excessive burden', Law No. 6701 imposes less stringent obligations on employers.

The duty to provide reasonable accommodation is also included in the Law on Persons with Disabilities, but only in respect of persons with disabilities. The denial of reasonable accommodation is not considered to be a form of discrimination under this Law. Article 4(A) stipulates that 'requisite measures for providing the reasonable accommodation of persons with disabilities in order to ensure equality and remove discrimination' be taken and Article 14(4) requires employers as well as relevant Government institutions to undertake reasonable accommodation measures in workplaces employing persons with disabilities. Article 3(j) defines reasonable accommodation as 'necessary and appropriate changes and precautions which do not impose a disproportionate and excessive burden and which are needed in a certain situation in order to ensure that the disabled exercise or benefit from their human rights and fundamental freedoms fully and on equal footing with others'. The legal commitment to reasonable accommodation under Article 4(A) is not limited to employment – as the duty of employers to undertake reasonable accommodation is explicitly stated under Articles 3(j) and 14(4) – and the reference to 'the disabled' in general arguably renders this duty proactive, although the subject of this general duty is left unclear. The law does not define what would constitute a 'disproportionate burden' on employers.

A very limited duty of reasonable accommodation for employees with disability is found in the Law on Civil Servants, limited to individuals working in the public sector. Article 53 prescribes a duty limited to the provision of tools which would enable those civil servants to carry out their duties. Notably, the limited duty of reasonable accommodation on employers does not rest on a rights-based or anti-discrimination perspective. This is evident, for example, in the fact that disability is not a protected ground under the Law on Civil Servants. Consequently, breaches of the duty of reasonable accommodation are not considered to constitute discrimination under the Law. Article 100 of the Law authorises public sector employers to adapt the start and end of working hours and the duration of lunch breaks according to the needs of persons with disabilities, the requirements of the job and climate and transportation conditions. However, this Article does not impose a *duty* to accommodate, only a power to do so, which is left to the employer's discretion. Thus, a failure by an employer to take such measures is not necessarily discrimination. Article 101 entails a negative duty, whereby persons with disabilities working in the public sector cannot be forced to work on night shifts or night duty unless they want to do so.¹³⁴

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

b) Practice and case law

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

¹³⁴ Turkey, Law on the Restructuring of Certain Debts and on the Amendment of Social Securities and General Health Insurance Law and of Various Other Laws and Decrees having the Force of Law (*Bazı Alacakların Yeniden Yapılandırılması ile Sosyal Sigortalar ve Genel Sağlık Sigortası Kanunu ve Diğer Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılması Hakkında Kanun*), 13 February 2011.

c) Definition of disability and non-discrimination protection

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

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

In Turkey, there is a discrepancy in the law regarding whether the failure to meet the duty of reasonable accommodation in employment for people with disabilities counts as discrimination.

A failure to meet the duty of reasonable accommodation in employment for people with disabilities counts as discrimination under Article 4(1)(f) of the Law on the Human Rights and Equality Institution of Turkey. However, the Law does not specify whether such failure amounts to a particular form of discrimination; it simply lists the failure to meet the duty of reasonable accommodation as a ground of non-discrimination. The Law does not envisage a specific sanction for the failure to meet this duty. Therefore, the general sanctions provided under the Law, and discussed below in Section 6.5, apply.

Under the Law on Persons with Disabilities, the denial of reasonable accommodation is not considered to be a form of discrimination.

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

In Turkey, there is a legal duty to provide reasonable accommodation for people with disabilities outside the area of employment.

Article 5(2) of the Law on the Human Rights and Equality Institution of Turkey provides a duty of reasonable accommodation for persons with disabilities in the areas of 'education, judicial, law enforcement, health, transportation, communication, social security, social services, social assistance, sports, accommodation, culture, tourism and the like'.

Article 4(A) of the Law on Persons with Disabilities states that 'necessary measures will be taken for the reasonable accommodation of the disabled to ensure equality and bring an end to discrimination'. While the law contains a specific provision concerning reasonable accommodation in employment (Article 14(4)), no corresponding provisions exist for fields outside employment. Consequently, it is not clear whether non-employment areas are covered by the law.

In the ECtHR's 2016 ruling ¹³⁵ on a petition filed by a young woman with visual disability who had not been admitted to a music academy in Turkey because she did not submit a report showing that she could follow the classes without help, the Court found that there had been a violation of the prohibition on discrimination guaranteed under Article 14 together with the right to education protected under Article 2 of Protocol 1. Referring to both Article 14 and the UNCRPD in its discussion of reasonable accommodation, the Court concluded that the Turkish authorities made no effort whatsoever to identify the needs of

¹³⁵ *Çam v Turkey*, No. 51500/08, 23 February 2016.

the applicant. This was the first time that the Court began to explain the concept of reasonable accommodation in its jurisprudence. The ruling has neither stimulated public discussion in Turkey nor led the Government to revise its anti-discrimination policies.

In 2018, in its judgment on an application filed by a university student with disability whose request for the adaptation of university premises so that he could resume his studies was rejected on grounds of budgetary reasons and time constraints, the ECtHR held that the national judicial and university authorities failed to show the required diligence to ensure that the applicant could continue to enjoy his right to education on equal terms with other students.¹³⁶ The Court noted that the courts did not engage in any effort to ascertain whether there were possible solutions that would have enabled the applicant to resume his studies with provisions as close as possible to those provided to students with no disability, without imposing an undue burden on the university administration. Instead of examining whether a fair balance had been struck between the applicant's interest and the administration's financial and logistic capacities, the national judicial authorities deemed it sufficient for someone to assist the applicant on the premises, without showing how such a solution would be satisfactory. Therefore, the Court found a violation of Article 14 (on the prohibition of discrimination) read in conjunction with Article 2 of Protocol 1 (on the right to education). The ECtHR did not deem it necessary to examine separately the applicant's complaints under Article 14 in conjunction with Article 8 (on the right to privacy).

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

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

In past years, the Parliament adopted a temporary practice of accommodating members of the Parliament belonging to the Alevi religious faith during their fasting period in the month of Muharrem. Following a petition from an Alevi parliamentarian, the Speaker of the Turkish Parliament authorised the serving of special food in accordance with the dietary restrictions of Alevi deputies in restaurants on the premises of the Parliament during the month of Muharrem in 2012.¹³⁷ This was the first time ever that a public office accommodated Alevis during their fasting period. The practice was repeated during the Muharrem fast in 2013, but not in subsequent years.

¹³⁶ *Enver Sahin v Turkey*, No. 23065/12, 30 January 2018.

¹³⁷ Özel, R (2012), 'TBMM Lokantasında Muharrem Orucu Menüsü' ('Muharrem fast menu at the restaurant of the Turkish Parliament'), *Hürriyet*, 14 November 2012, available at: <http://www.hurriyet.com.tr/tbmm-lokantasin-da-muharrem-orucu-menu-su-21924575>.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

In Turkey, there is no national law transposing these directives. Therefore, there are no residence or citizenship/nationality requirements for protection. Undocumented/irregular immigrants are not protected under Turkish law.

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

a) Protection against discrimination

The personal scope of anti-discrimination law covers natural and legal persons for the purpose of protection against discrimination. The definitions of direct and indirect discrimination and discrimination by assumption in Article 2(d), (e) and (m) of the Law on the Human Rights and Equality Institution of Turkey explicitly refer to both natural and legal persons as objects of such discrimination. The national provisions partly comply with the directives, as sexual orientation is excluded among the grounds on the basis of which direct discrimination is prohibited under Article 4(1)(c).

b) Liability for discrimination

The personal scope of anti-discrimination law covers natural and legal persons for the purpose of liability for discrimination. Article 3(4) of the Law on the Human Rights and Equality Institution of Turkey states that natural and legal persons are under an obligation to 'identify and remove discrimination and ensure equality in areas falling under their scope of authority'. Article 5(1) prohibits natural and legal persons to discriminate in the provision of services in the fields of 'education, justice, law enforcement, health, transportation, communication, social security, social services, social assistance, sports, accommodation, culture, tourism and the like'. Article 5(3) prohibits natural and legal persons from discriminating in provision of goods for sale, purchase or rent.

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

Various laws have provisions on anti-discrimination, the scope of which is limited to the areas/sectors they govern. For example, the broad ban on discrimination on grounds of language, race, nationality, colour, gender, disability, political opinion, philosophical belief, religion or sect under Article 3(2) of the Penal Code is limited to the application of this Law. Other similar examples are: Article 5(1) of the Labour Law; Article 4 of the Basic Law on National Education; Article 7 of the Law on Civil Servants; Article 12 of the Law on Political Parties; Article 8(e) of the Law on the Foundation and Broadcasting of Radio and Television; Article 4(d) of the Law on Social Services; and Article 2(1) of the Law on the Execution of Penalties and Security Measures. In most cases, these provisions do not explicitly distinguish between natural persons and legal persons, which gives rise to the assumption that both natural and legal persons are protected against discrimination and can be held liable for discrimination. There is limited case law

confirming the protection of natural persons against discrimination.¹³⁸ There is no case law regarding legal persons.

Civil law explicitly refers to the distinction between natural and legal persons. Article 48 of the Civil Code, Article 68 of which prohibits associations from discriminating among its members based on the grounds enumerated, stipulates that legal persons have all the rights and obligations other than those which are tied to qualities that are specific to natural persons (such as birth and age). Criminal law also contains an explicit reference to legal persons, exempting them from criminal liability. According to Article 20(2) of the Turkish Penal Code, 'no punitive sanctions may be imposed on legal persons'. However, sanctions in the form of 'security precautions' stipulated in the law are reserved.¹³⁹

In certain situations, natural persons can be held liable for discrimination along with a legal person. For example, criminal charges can be brought against a person working in the human resources department of a company, while a civil case for compensation against the company can be brought to the courts.

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

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

a) Protection against discrimination

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

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

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

Article 5(1) and (3) of the Law on the Human Rights and Equality Institution prohibits public bodies from discriminating in the provision of 'education, judicial, law enforcement, health, transportation, communication, social security, social services, social assistance, sports, accommodation, culture, tourism and the like', and in the sale, purchase and rent of goods, respectively. Article 10(5) of the Constitution obliges public bodies to act in compliance with the principle of equality before the law in all their proceedings. Article 7 of the Law on Civil Servants prohibits civil servants from discriminating in the course of their duties on the basis of language, gender, race, political view, philosophical belief, religion or sect. Civil servants who engage in discrimination are subject to disciplinary sanction under Article 125 of the Law. Article 18 of the Turkish Armed Forces Discipline Law subjects members of the organisation who engage in discrimination to disciplinary sanctions. Article 4(d) of the Law on Social Services prohibits discrimination in the

¹³⁸ Constitutional Court, application No. 2014/256, 25 June 2014 (finding that the barring of a lawyer wearing a headscarf from courtroom constitutes discrimination). For more, see Introduction.

¹³⁹ 'Security precautions' are sometimes alternatives to typical criminal sanctions (imprisonment, fine etc.), and sometimes complementary to sanctions. 'Security precautions' can be anything from rehab to community service. According to the new Turkish Penal Code, legal persons can also be held responsible for crimes. As imprisonment is not an option for legal persons, the law says that security precautions can be imposed by the courts. If the organs or representatives of a legal person are involved in a crime, the court might decide, for example, that the licence of the legal person is to be suspended, or certain properties which are fruits of the crime can be confiscated etc.

execution and provision of social services on grounds of class, race, language, religion, sect or religious differences.

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

Article 5(1) and (3) of the Law on the Human Rights and Equality Institution of Turkey prohibits public bodies from discriminating in the provision of 'education, judicial, law enforcement, health, transportation, communication, social security, social services, social assistance, sports, accommodation, culture, tourism and the like' and in the sale, purchase and rent of goods, respectively. Article 5 of the Labour Law prohibits discrimination on the grounds of language, race, gender, political thought, philosophical belief, religion, sect and similar grounds in employment relations. Article 82 of the Law on Political Parties prohibits political parties from pursuing the aims of racism. Article 83 prohibits political parties from engaging in discrimination on grounds of language, race, colour, gender, political opinion, philosophical belief, religion and sect, or other similar considerations. Article 12 prohibits discrimination against applicants for membership to political parties on grounds of language, race, gender, religion, sect, family, group, class or profession. Article 30 of the Law on Associations prohibits the establishment of associations for objectives prohibited under the Constitution and laws, which includes discrimination. Article 68 of the Civil Code prohibits discrimination among members of associations on the basis of language, race, gender, religion, sect, family, group or class. Finally, Article 122 of the Penal Code prohibits hate acts based on language, race, nationality, colour, gender, disability, political opinion, philosophical belief, religion or sect in the sale or transfer of goods, the execution of a service, employment, the provision of food services and the undertaking of economic activity. While legal persons cannot be held criminally liable, Article 20 of the Penal Code exempts from that ban sanctions to be introduced for the violation of this Law.

b) Liability for discrimination

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

Article 3(3) of the Law on the Human Rights and Equality Institution of Turkey makes public bodies liable for discrimination, while Article 3(4) imposes such liability on the private sector as well.

3.2 Material scope

3.2.1 Employment, self-employment and occupation

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

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

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

discriminatory. Article 5 of the Labour Law prohibits discrimination in employment relations by private actors on grounds of language, race, sex, political thought, philosophical belief, religion, sect and similar grounds.

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

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

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

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

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

General rules for recruitment of public servants

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

There is no provision in the Law on Civil Servants which prohibits discrimination in the selection, recruitment or promotion of civil servants. The Law only prohibits discrimination by civil servants while carrying out their duties (Article 7). In the legislation regarding the selection, recruitment and promotion of public employees, whether they are civil servants or working under various types of contracts, there are limited specific provisions prohibiting discrimination based on grounds covered by the

directives. For example, according to the Regulation on the Promotion of Civil Servants, objective criteria such as education, achievement in exams, length of service and positive employment record shall be taken into account in the promotion of civil servants. Public employees are selected by the Public Employee Selection Examination. Those who pass the examination are subject to a trial period prior to their full appointment. In addition, Article 3 of the Regulation stipulates that, unless it is explicitly laid down by special provisions in laws, by-laws and regulations, public institutions cannot require an upper age limit for those who are to be appointed to public offices through central examinations.

As with the headscarf ban at universities, which was at issue in the ECtHR's judgment in the *Leyla Şahin* case,¹⁴⁰ the headscarf ban in public and private service jobs never had a constitutional or legal basis.¹⁴¹ Nevertheless, until recently, there was widespread employment discrimination against women who wear the headscarf on the basis of a de facto ban precluding their employment in the public sector. The 'legal' basis of this ban was an executive regulation that was adopted by the military regime in 1982, requiring female employees to have their 'heads uncovered'.¹⁴² This stipulation has been relied on by the state in refusing to hire women who wear headscarves in the public sector as well as firing public service employees who wear headscarves in large numbers at certain moments of high political tension.¹⁴³ The ban in the public sector has had a 'spill-over effect' and has spread over time to the private sector.¹⁴⁴

On 5 November 2012, the Eighth Chamber of the Council of State held that the headscarf ban does not apply to lawyers, who are not public servants although they provide a public service.¹⁴⁵ The judgment was delivered in a case brought by a female lawyer against the Union of Turkish Bar Associations, which declined to issue her a new professional identity card on the ground that she had submitted a photograph of herself wearing a headscarf. The decision drew the boundaries of the ban, restricting it to the public sector. It has enabled lawyers who wear a headscarf to enter court hearings for the first time in decades. Notwithstanding the judgment, however, there have been attempts by lower courts to bar lawyers wearing headscarves from entering courtrooms. The issue was finally brought to the Constitutional Court. On 25 June 2014, the Court found that a lower court's barring of a lawyer from the courtroom on the basis of her headscarf violated the applicant's freedom of religion and conscience and constituted discrimination on the basis of religious belief. The Court reversed its prior case law, which had formed the sole juridical basis for the headscarf ban in Turkey.

Political developments followed these court decisions. On 8 October 2013, the Government removed the headscarf ban for those in public office, with the exception of the military, judiciary and police.¹⁴⁶ On 31 October 2013, four members of the Parliament (MPs) from the governing AKP entered the Parliament wearing headscarves, bringing an end to the de facto ban applying to female parliamentarians. In 2015, several political

¹⁴⁰ *Leyla Şahin v Turkey*, No. 44774/98, 29 June 2004.

¹⁴¹ The ECtHR's judgment was limited to the headscarf ban at universities and did not address the ban in employment.

¹⁴² Turkey, Regulation Concerning the Attire of Personnel Working at Public Institutions (*Kamu Kurum ve Kuruluşlarında Çalışan Personelin Kılık ve Kıyafetlerine Dair Yönetmelik*), *Official Gazette*, 25 October 1982.

¹⁴³ The dismissal of women wearing headscarves from the public sector has not been a continuous or consistent policy. Rather, it was employed at extraordinary political periods in Turkey's history such as during the military regime of 1980-1983 and the period following the 'soft coup d'état' of 28 February 1997. NGOs representing headscarved women claim that 5 000 women wearing headscarves were dismissed and another 10 000 were forced to resign between 1998 and 2002. Dilek Cindoğlu (2010), *Headscarf Ban and Discrimination: Professional Headscarved Women in the Labor Market (Başörtüsü Yasağı ve Ayrımcılık: Uzman Meslek Sahibi Başörtülü Kadınlar)*, Istanbul, p. 35.

¹⁴⁴ Dilek Cindoğlu (2010), *Headscarf Ban and Discrimination: Professional Headscarved Women in the Labor Market (Başörtüsü Yasağı ve Ayrımcılık: Uzman Meslek Sahibi Başörtülü Kadınlar)*, Istanbul.

¹⁴⁵ The unofficial text of the judgment is available at: <http://www.istanbulgercegi.com/danistay-8-dairesinin-turbana-iliskin-kararinin-tam-metni-3143451.html>.

¹⁴⁶ Turkey, Regulation Amending the Regulation Concerning the Attire of Personnel Working at Public Institutions, *Official Gazette*, 8 October 2013.

parties nominated female candidates who wear headscarves for the general elections held in June 2015. On 15 November 2013, an anchorwoman wearing a headscarf presented the news on Turkish Radio and Television (TRT), bringing to an end the de facto ban on journalists in public broadcasting wearing the headscarf. In 2015, following news reports regarding judges and prosecutors wearing the headscarf, the High Court of Appeals requested an opinion from the High Council of Judges and Prosecutors as to whether there were any regulations barring this.¹⁴⁷ In response, the High Council stated that there were no such internal rules.¹⁴⁸ Thus, the headscarf ban in the judiciary came to an end. In August 2016, the Government removed the headscarf ban for members of the police with a regulatory amendment.¹⁴⁹ Finally, in February 2017, the headscarf ban in the military was removed, allowing female officers of all ranks as well as students in the military academy to wear the headscarf.¹⁵⁰

Special rules for recruitment of civil servants for certain professions

Separate examinations are held for the recruitment of public employees to certain professions, such as judges and prosecutors. The qualifications required to be appointed as a candidate judge or prosecutor are listed in Article 8 of the Law on Judges and Prosecutors. Two of these requirements are relevant to the directives. According to paragraph (g), candidates should 'not have any physical and mental illness or disability that would prevent from the conduct of his/her duties as a judge or a prosecutor and in a continuous manner and in every part of the country; not have disabilities such as having difficulties in controlling the movements of the organs, speech different from that which is customary and which would be found odd by people'. The former paragraph (b), which required candidates not to be older than 35 years of age, was repealed by the Constitutional Court on 14 February 2013 on the ground that it violated Article 91 of the Constitution, which prohibits issues pertaining to fundamental rights and liberties to be regulated by executive decrees having the force of law.¹⁵¹ The judgment entered into force on 30 September 2014.

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

Contract-based recruitment to public and private sectors

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

According to Article 71 of the Labour Law, the minimum age for employment is 15 years. However, children who have reached the age of 14 years and have also completed their primary education may be employed in light work that will not hinder their physical,

¹⁴⁷ The 2013 regulatory amendments had left the regulation of the headscarf ban to the Ministry of Justice and the High Council on Judges and Prosecutors.

¹⁴⁸ Göktaş, K. (2015), 'Hakim ve Savcıya Başörtüsü İzni Çıktı' ('Headscarf Authorisation for Judges and Prosecutors'), *Milliyet*, 1 June 2015, available at: <http://www.milliyet.com.tr/hakim-ve-savciya-basortusu-izni-gundem-2067366/>.

¹⁴⁹ Turkey, Regulation Amending the Regulation Concerning the Attire of Personnel Working at Public Institutions, *Official Gazette*, 27 August 2016.

¹⁵⁰ Ergan, U. (2017), 'Son Dakika: TSKda Başörtüsü Yasağı Kalktı' ('Last Minute: The Headscarf Ban in the Turkish Military Forces has been Removed'), *Hürriyet*, 22 February 2017, available at: <http://www.hurriyet.com.tr/gundem/tskda-basortusu-yasaqi-kalkti-40373902>.

¹⁵¹ Constitutional Court, judgment E. 2011/89, K. 2013/29, 14 February 2013.

mental and moral development and, for those who continue their education, in jobs that will not prevent their school attendance. There is no general upper age limit for employment.

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

Sectors governed by special labour laws

Under Article 4 of the Labour Law, the following sectors or groups of persons fall outside the scope and application of the law: sea and air transport activities; establishments and enterprises employing fewer than 50 employees where agricultural and forestry work is carried out; any construction work related to agriculture which falls within the scope of family economy; works and handicrafts performed in the home without any outside help from members of the family or close relatives up to the third degree; domestic services; apprentices; sportsmen and sportswomen; those being treated in physical, drug or alcohol rehabilitation programmes; and establishments with three or fewer employees and falling within the definition in the Tradesmen and Small Handicrafts Act. Consequently, the prohibition of discrimination prescribed in Article 5(1) of the Labour Law does not apply to these categories.

Recruitment to and service in the armed forces

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

A long list of laws and regulations within the separate realm of the military legal system explicitly discriminate on the basis of sexual orientation. Article 153(2) of the Military Penal Code allows the dismissal of military personnel who engage in homosexual conduct (which is understood to refer to same-sex sexual intercourse), a practice upheld by the High Military Administrative Court.¹⁵² Gay military personnel who are found to have engaged in homosexual conduct can be dismissed from graduate education, excluded from promotion to assistant professorship in the Military Medical Academy and debarred from professional examinations required for entry to various professions. On 31 January 2013, the Turkish Armed Forces Discipline Law was adopted by the Turkish Parliament despite protests from LGBTI groups.¹⁵³ Article 20 of the Law enumerates homosexuality among the violations of disciplinary rules that require immediate dismissal from the Turkish Armed Forces. According to clause (g), 'engaging in unnatural intercourse or voluntarily submitting oneself to such an act' is a ground for dismissal from the army. In the Turkish context, the term 'unnatural intercourse' refers to anal intercourse and hence to homosexual relationships. There are several cases of dismissal of homosexual men from public service or the military upon oral evidence of their engagement in anal sex with other men (see Section 3.2.3).

In 2017, the Military High Court of Appeals applied to the Turkish Constitutional Court for the repeal of Article 153(2) on the following grounds: that the dismissal of officers without any concrete evidence to show that their 'unnatural' sexual acts undermined their military discipline infringes on the principle of justice; that the individuals' dismissal from employment solely on the basis of their sexual lives constitutes a disproportionate infringement of the right to private life; and that the disparate treatment of military

¹⁵² High Military Administrative Court, judgment E. 1998/888, K. 1999/482, 11 May 1999, available at: http://www.msb.gov.tr/ayim/Ayim_karar_detay.asp?IDNO=1316&ctq=000002000002000001.

¹⁵³ Turkey, Turkish Armed Forces Discipline Law, 31 January 2013.

personnel who lose their jobs for engaging in 'unnatural intercourse' and non-military civil servants (such as police officers and members of the judiciary) who do not face the same penalty for the same act violates the principle of equal treatment. In a judgment given on 29 November 2017 and published on 20 February 2018, the Constitutional Court rejected the request. Defining 'unnatural intercourse' as 'sexual acts which cannot be accepted as normal by all social orders and which adversely affect the moral standards of society',¹⁵⁴ the Constitutional Court concluded that the intervention in the private life of military officers was proportionate to the legitimate aims of ensuring military discipline and providing public safety. Noting that individuals who choose to join the military accept that they are bound by rigid professional rules, the Constitutional Court did not find discrimination in the fact that only military officers, and not civilian civil servants, are punished for the crime of engaging in 'unnatural intercourse'. The Court did not engage with the ECtHR case law. In a strongly worded opinion, which made extensive references to international human rights law as well as empirical data on the discrimination of LGBTI individuals in Turkey, Judge Ergun Yildirim dissented from the majority.

Military regulations governing exemption from mandatory military service result in multiple forms of discrimination against homosexual conscientious objectors who refuse to serve in the military due to their political beliefs and/or conscience. In *Halil Savda v Turkey*, the ECtHR held that the absence of any procedure to examine requests for exemption from military service on grounds of conscientious objection constituted an 'insurmountable conflict' between that obligation and an individual's deeply and genuinely held beliefs. A system which did not provide such a procedure or alternative civilian service violated the positive obligations of states to protect freedom of religion under Article 9. The Court also found the applicant's repeated prosecution by military courts for refusing to wear military uniform constituted degrading treatment and violated the applicant's right to a fair trial.¹⁵⁵ In its judgment in *Tarhan v Turkey* issued the following month, on 17 July 2012, the ECtHR found that the non-recognition of the applicant's right to conscientious objection and the criminal proceedings launched against him on that basis violated Article 3 (on the prohibition of inhuman or degrading treatment) and Article 9.¹⁵⁶ The ECtHR judgment was restricted to Mr Tarhan's political convictions as a conscientious objector and did not address his sexual orientation. Furthermore, the Court did not address the discrimination issues that the case raised under Article 14 of the Convention, arguably due to the applicant's failure to make a discrimination claim.

In assessing eligibility for exemption, the regulations of the Turkish Armed Forces consider homosexuality as a psychosexual disorder and individuals having such a 'condition' to be 'unfit for military service'. In order to be exempt from military service, gay men were routinely required to 'prove' their homosexuality by either going through a forced anal examination or providing photographic evidence of being engaged in passive anal sex.¹⁵⁷ In recent years, due to wide media coverage and international pressure, this practice seems to have been abandoned. Instead, authorities now subject individuals to psychological tests to test their homosexuality and, where they find the test results unconvincing, request a 'family meeting', forcing individuals to make a choice between coming out to their families or military service. In cases in which a family meeting takes place, authorities may still not be convinced, in which case they require the individual to be admitted to the psychiatric wards of military hospitals, known as 'the pink wards'.¹⁵⁸ A

¹⁵⁴ Constitutional Court, judgment E. 2015/68, K. 2017/166, 29 November 2017, para. 14, *Official Gazette*, No. 30338, 20 February 2018.

¹⁵⁵ *Savda v Turkey*, No. 42730/05, 12 June 2012.

¹⁵⁶ *Tarhan v Turkey*, No. 9078/06, 17 July 2012.

¹⁵⁷ For examples, see Amnesty International (2011), 'Not an Illness nor a Crime': Lesbian, Gay, Bisexual and Transgender People in Turkey Demand Equality, London, p. 23, available at: <http://www.amnestyusa.org/sites/default/files/notillnessnorcrime.pdf>.

¹⁵⁸ İnce, E. (2012), "'Pembe Tezkere"ye Koğuş İşkencesi' ('Ward Torture for "Pink Certificate"'), *Radikal*, 15 April 2012, available at: <http://www.radikal.com.tr/Radikal.aspx?aType=RadikalDetayV3&ArticleID=1084969&CategoryID=77>.

referee, who was expelled from his profession by the Turkish Football Federation when the 'unfit for military service' report he had received was leaked, had spent a total of 22 days at three different hospitals in such wards before he was provided with the report.¹⁵⁹ The process of psychological tests and family meetings typically lasts for several days and requires multiple visits to more than one military hospital.¹⁶⁰

Mandatory military service also infringes freedom of religion and conscience. As Turkey is the only country in the Council of Europe that does not allow alternative civilian service, the Turkish legal framework discriminates against individuals who refuse to serve in the military due to religious beliefs, namely Jehovah's Witnesses. In June 2014, the ECtHR found that the prosecution and sentencing of four Jehovah's Witnesses who refused to serve in the military violated Articles 3 and 9 of the ECHR.¹⁶¹

Self-employment and statutory office

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

There are various laws on certain professions, such as the Law on Attorneys (No. 1136), the Law on Pharmacists and Pharmacies (No. 6197) and the Law on Notaries (No. 1512), none of which contain specific provisions on the prohibition of discrimination. These constitutional and legal provisions do not have aspects which constitute direct discrimination in the selection, recruitment and promotion of both public and private sector employees. However, there are also no specific provisions which comprehensively prohibit discrimination based on all the grounds covered by the directives in respect of access to employment, self-employment and occupation. In the absence of data and case law, it is not possible to assess the current situation.¹⁶² In situations for which data exist – such as data regarding non-compliance with quota requirements for persons with disabilities – they clearly indicate that discrimination exists (see below on quotas).

Another group that suffers employment discrimination through seemingly neutral selection criteria is homosexual men. Many jobs in the public and private sectors require men to have fulfilled their military service duties and to provide documentary evidence of either having served in the military or having been lawfully exempted on health grounds. Homosexual men who can 'prove' their homosexuality are exempted for being 'unfit' to serve in the military. This exemption can cause serious impediments to their ability to find employment. In 2011, a homosexual man filed a discrimination claim with the provincial human rights board of Istanbul against a private company that refused to hire him after having found out about his sexual orientation. While the applicant was initially verbally told that he had been accepted for the job, the employer changed her mind when the applicant revealed, in answer to a query, that the ground of his exemption from

¹⁵⁹ İnce, E. (2012), "'Pembe Tezkere"ye Koğuş İşkencesi' ('Ward Torture for "Pink Certificate"'), *Radikal*, 15 April 2012, available at:

<http://www.radikal.com.tr/Radikal.aspx?aType=RadikalDetayV3&ArticleID=1084969&CategoryID=77>. For more on the ill treatment to which homosexuals are subjected at military hospitals, see the website of LGBTI news portal Kaos GL, available at: <https://www.kaosgl.org/>.

¹⁶⁰ For a detailed first-hand account by a transgender person of a six-day process involving multiple visits to four different military hospitals, see: <http://www.kaosgl.org/sayfa.php?id=9147>.

¹⁶¹ *Buldu and Others v Turkey*, No. 14017/08, 3 June 2014.

¹⁶² According to the information provided in 2008 by the Turkish authorities in the state report submitted to CERD and in the replies to the list of issues, 'the Business Inspection Board of the Ministry of Labour and Social Security is tasked with investigating allegations of discrimination in business relations. To date, the Board has not found any acts of discrimination, including racial discrimination, during its inspections.' See CERD, *Reports submitted by States parties under article 9 of the Convention – International Convention on the Elimination of all Forms of Racial Discrimination: 3rd periodic reports of States parties due in 2007: addendum: Turkey*, 13 February 2008, CERD/C/TUR/3, para. 145, available at: <http://www.unhcr.org/refworld/docid/4885cfa60.html>.

military service was his sexual orientation.¹⁶³ Homosexual men who are able to hide their sexual orientation in the recruitment phase are always faced with the risk of losing their jobs if and when their employers are informed about health reports exempting them from military service. A case in point is an experienced referee who was dismissed from his profession by the Turkish Football Federation after 14 years of service after the unlawful disclosure of a health report issued by a military hospital certifying his 'unfitness for military service' on the basis of his sexual orientation (see Section 3.2.3).

The Roma in Turkey face an 'extremely high' degree of structural unemployment and 'face specific disadvantages and prejudices in employment related to their ethnicity'.¹⁶⁴ According to the European Commission's *Turkey 2018 Report*, the overall employment rate for the Roma is 31 %, while a mere 11 % have full-time paid jobs and 6 % are self-employed.¹⁶⁵ Field research conducted by Roma associations has produced empirical evidence of employment discrimination against the Roma.¹⁶⁶

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

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

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

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

The prohibition on discrimination prescribed in Article 122 of the Turkish Penal Code is limited to recruitment and does not cover employment and working conditions. Article 5 of the Labour Law prohibits discrimination in the employment relationship based on an open-ended list of enumerated grounds that includes language, race, colour, gender, political opinion, philosophical belief, religion and sect, and which, since February 2014, explicitly mentions disability but not ethnic origin, sexual orientation or age. While Article 5 could and should be interpreted to cover all grounds, so far there has been no case law on the issue.

According to Article 18 of the Labour Law, business owners who employ at least 30 employees must have a valid reason arising from the adequacy or behaviour of the employee or the necessities of the business, workplace or job if they wish to terminate the contracts of employees with a minimum of six months' tenure in that business. According to paragraph (d), 'race, colour, gender, marital status, family responsibilities,

¹⁶³ Kaos GL (2011), 'Cinsel Yöneliminizden Dolayı İşe Alımınızı İptal Etmek Zorundayız' ('We need to revoke the decision to hire you due to your sexual orientation'), 15 June 2011, available at: <http://www.baskahaber.org/2011/06/cinsel-yoneliminizden-dolay-ise-almnz.html>.

¹⁶⁴ European Roma Rights Centre and the Edirne Roma Association, *Written Comments Concerning Turkey for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at its 74th Session*, p. 18, available at: http://www2.ohchr.org/english/bodies/cerd/docs/ngos/ERRC_Turkey_CERD74.pdf.

¹⁶⁵ European Commission (2018), *Turkey 2018 Report*, Strasbourg, 17 April 2018, p. 40, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-turkey-report.pdf>.

¹⁶⁶ European Roma Rights Centre and the Edirne Roma Association, *Written Comments Concerning Turkey for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at its 74th Session*, pp. 18-20, available at: http://www2.ohchr.org/english/bodies/cerd/docs/ngos/ERRC_Turkey_CERD74.pdf.

pregnancy, birth, religion, political opinion and similar reasons' are not valid reasons. However, as mentioned earlier, the material scope of the Labour Law is limited, and the ban is valid only for medium and large sized businesses and for employees with a minimum contract of six months. Article 29 of the Labour Law defines collective dismissal as the dismissal of at least 10 workers in a business employing 20-100 employees; at least 10 % of the workers in a business employing 101-300 employees; and at least 30 workers in a business employing 301 or more employees. While the provision does not entail a blanket ban on collective dismissals, it states that collective dismissal cannot be used to circumvent Article 18.

Civil servants are employed on a permanent basis; unless a concrete reason for termination occurs, their position as a civil servant is secure. According to Article 125 of the Law on Civil Servants, there are enumerated grounds for irreversible dismissal from civil service. The relevant ground for the purposes of this report is clause (E)(g), according to which disgraceful and dishonourable acts that are irreconcilable with the title of civil servant are cause for dismissal from the service. This clause is being used to dismiss homosexual civil servants. For example, a police officer was dismissed from the Turkish Police Force for having engaged in anal intercourse with another man. The decision of the High Disciplinary Board of the Ministry of Interior was upheld by the courts, including the Council of State, and the case was closed.¹⁶⁷ On the other hand, in 2014 the Council of State changed its jurisprudence on the issue, finding that the dismissal of a teacher from the profession due to his/her sexual orientation¹⁶⁸ violated the Turkish Constitution and the ECHR (see section 2.1.1.). Having said that, a 2017 ruling by the Constitutional Court, which did not find that there was discrimination in the dismissal of a teacher based on allegations of homosexuality, has left the state of affairs uncertain with regard to the protection of civil servants against discrimination on the basis of sexual orientation (see Introduction).

Homosexual individuals are also routinely discriminated against in the private sector. A high-profile case concerning the Turkish Football Federation's dismissal of a referee with 14 years' experience from the profession on the basis of his sexual orientation resulted in a precedent-setting, though not entirely satisfactory, judgment by a lower court. On 29 December 2015, the 20th Civil Court of First Instance in Istanbul ordered the TFF to pay the applicant TRY 3 000 (EUR 483) in pecuniary damages and TRY 20 000 (EUR 3 216) in non-pecuniary damages.¹⁶⁹ In early February 2016, the Court published the judgment containing its reasoning.¹⁷⁰ The Court found that the TFF's dismissal of the applicant in accordance with its by-laws, which disqualify individuals who are exempted from military service on health grounds from being a referee, constituted a subjective decision that did not rest on objective criteria and was therefore deemed to be legally invalid. The Court noted that the health report that exempted the applicant from military service diagnosed the applicant with 'psychosocial disorder' and did not refer to a health problem that would ban the applicant from working as a referee. Thus, the Court held, the TFF's conclusion that the applicant was unfit to be a referee was exclusively based on his sexual orientation, which should not constitute a barrier to a person's performance of sports activities. Furthermore, the Court stated that this attitude contrasts with the

¹⁶⁷ Sosyal Politikalar, Cinsiyet Kimliği ve Cinsel Yönelim Çalışmaları Derneği (SPoD) (2012), *LGBT Davaları: AİHM, Yargıtay ve Danıştay İçtihatları (LGBT Cases: The Jurisprudence of the ECtHR, Court of Cassation and the Council of State)*, p. 68, available at: http://www.fes-tuerkei.org/media/pdf/Publikationen%20Archiv/Ortak%20Yay%C4%B1mlar/2012/lgbt_ictihat_kitap_web_du_suk.pdf.

¹⁶⁸ The dismissal was based on Law No. 4357 governing the recruitment, promotion, punishment and dismissal of elementary school teachers employed in private schools. Article 7(e) of this Law requires the dismissal of individuals engaged in behaviours 'lacking chastity and dignity'.

¹⁶⁹ The legal basis of the judgment became clear when the Court published the judgment containing its reasoning in early February 2016, in which it found the dismissal to be in violation of the equality clause of the Constitution and the by-laws of the Turkish Football Federation.

¹⁷⁰ 20th Civil Court of First Instance in Istanbul (*Istanbul 20. Asliye Hukuk Mahkemesi*), judgment E. 2010/399, K. 2015/554, 29 December 2015 (the date of the decision), 3 February 2016 (the date of the writing of the opinion).

reality of the industry, where one frequently encounters homosexual referees and athletes. The Court concluded that the TFF's decision violated the Constitution's anti-discrimination clause as well as the TFF's own by-laws. In assessing the amount of damages to be paid to the applicant, the Court relied on Article 42 of the former text of the Law of Obligations, which was in effect at the time when the applicant had filed the case. The Law tasks the judge with determining the amount of compensation in cases in which the applicant has difficulty in proving the actual pecuniary costs that he incurred or in which he cannot be reasonably expected to prove such costs. Accordingly, based on the number of games in which the applicant was precluded from working during the 2009-2010 football season, the judge awarded him TRY 3 000 (EUR 482) in pecuniary damages. Concluding that the applicant had been subject to discrimination on the basis of his sexual orientation in violation of the equality clause of the Turkish Constitution and the provisions of the ECHR, the Court awarded the applicant an additional TRY 20 000 (EUR 3 216) in non-pecuniary damages.

While this was the first time that a Turkish court had awarded compensation to a claimant who made a claim under private law for discrimination based on sexual orientation, the Court awarded the claimant an extremely low amount of compensation in comparison with the pecuniary and non-pecuniary losses he had suffered during the previous five years. The Court based its calculation of pecuniary damages solely on the one season during which the applicant was not allowed to work as a referee, not taking sufficiently into account the fact that he had been unemployed ever since his dismissal from the profession and had been unable to find new employment due to the media publicity around his sexual orientation. The applicant, who had demanded a total of TRY 110 000 (EUR 17 688) in compensation, appealed against the decision to the Court of Cassation on the ground of the inadequacy of the amount of the compensation awarded. In September 2018, the Court of Cassation overruled the lower court's ruling in favour of the TFF on the ground that the applicant had not suffered non-pecuniary damages. The applicant applied to the Court of Cassation for rectification of the ruling. The applicant's lawyer expects the Court of Cassation to insist on its judgment, in which case the case will go back to the lower court. Should the lower court also insist, the case will be referred to the General Civil Assembly of the Court of Cassation.¹⁷¹

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

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

According to Article 39 of the Labour Law, minimum limits for wages are determined at intervals of no longer than two years by the Ministry of Labour and Social Security through the Minimum Wage Determination Committee for regulating the economic and social conditions of all workers working on labour contracts, whether or not they are covered by this Law. Surprisingly, the Regulation on Minimum Wages contains an explicit provision prohibiting discrimination. Article 5 of the Regulation states that 'no

¹⁷¹ Alpar, A. (2018), 'Yargıtay kararı muğlak ve çelişkili ifadelerden ibaret' ('The Court of Cassation's ruling is made up of vague and inconsistent statements'), *Kaos GL*, 21 September 2018, available at: <https://www.kaosgl.org/haber/yargitay-karari-muglak-ve-celiskili-ifadelerden-ibaret>.

discrimination can be made on grounds of language, race, colour, gender, disability, political opinion, philosophical belief, religion and denomination and similar reasons in the determination of a minimum wage'. In 2014, the gross minimum wage was around TRY 2 029 (EUR 326) per month.

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

Statistical data in the field of employment are collected by the Turkish Statistical Institute.¹⁷² Employment, unemployment and wage data are collected, but they are disaggregated only on the basis of gender. Thus, it is not possible to make an evaluation based on facts. However, as a general observation, it can be stated that most vulnerable groups, such as the Roma, work in the informal sector and as a rule their earnings are less than the earnings of persons employed in the formal sector. According to the European Commission, the Roma are 'employed in mostly unregistered, temporary, low-paid jobs requiring low or unskilled manual labour.'¹⁷³ The European Network against Racism (ENAR) *Shadow Report 2012-2013: Racism and related discriminatory practices in employment in Turkey* states that the unemployment rate among the Roma is estimated at 85 %. In its 2016 report, ECRI did not give figures, but stated that unemployment is 'high' and that the Roma 'mostly work in unqualified, unstable and insecure jobs'.¹⁷⁴

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

In 2013, in response to the refugee crisis following the Syrian civil war, the Turkish Government adopted the Law on Foreigners and International Protection (No. 6458) to establish a framework for the integration of migrants and refugees. Under Article 89, applicants and beneficiaries may apply for work permits six months after lodging their applications for international protection. After a long delay, in January 2016 the Government adopted the Regulation on Work Permits to implement Law No. 6458. Syrian nationals who have been granted a residence permit for at least six months or those who set up their own company are entitled to a one-year work permit. Syrian refugees who are under temporary protection are not to be paid less than the minimum wage and are entitled to participate in work and programmes organised by İŞKUR (the Turkish Employment Agency). On 28 July 2016, the International Labour Force Law (No. 6735) was adopted to regulate work permits and work permit exemptions. Foreigners under temporary protection are given work permit exemptions provided that they work only in seasonal agriculture and livestock labour. By the end of 2017, the number of work permits issued to Syrians living under temporary protection was only around 15 000.¹⁷⁵ As of August 2017, around 21 000 work permits were granted to Syrians outside the scope of temporary protection.¹⁷⁶ Field research conducted by the Turkish Government in 2013 revealed that 51.9 % of Syrians living in temporary accommodation centres and

¹⁷² See: www.turkstat.gov.tr.

¹⁷³ European Commission (2014), *Progress Report on Turkey*, Brussels, October 2014, p. 62, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf.

¹⁷⁴ ECRI (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, p. 30, available at: <https://rm.coe.int/fifth-report-on-turkey/16808b5c81>.

¹⁷⁵ European Commission (2018), *Turkey 2018 Report*, Strasbourg, 17 April 2018, p. 19, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-turkey-report.pdf>.

¹⁷⁶ The Ombudsman Institution of the Republic of Turkey (2018), *Syrians in Turkey: Special Report*, p. 102, available at: <https://www.ombudsman.gov.tr/syrians/report.html#p=1>.

77 % of those living outside the camps were looking for a job.¹⁷⁷ The high level of unemployment among Syrian refugees prompted most of them to take up self-employment or illegal work, 'which increased the risks of exploitation and low wages'.¹⁷⁸

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

In Turkey, national legislation prohibits discrimination in vocational training outside the employment relationship, such as adult lifelong learning courses or vocational training provided by technical schools or universities.

Article 6(2) of the Law on the Human Rights and Equality Institution of Turkey prohibits discrimination in vocational guidance, vocational training and retraining, including practical work experience and on-the-job training, on the grounds of race/ethnicity, religion/belief, age and disability. Sexual orientation is excluded.

İŞKUR organises special training courses exclusively for persons with disabilities. However, these courses suffer from a lack of mainstreaming; do not offer a real choice, as they are provided in a very limited number of sectors; and are not designed to take into consideration market needs, resulting in persons with disabilities being trained to work in sectors where there is no shortage of employees. The Turkish Government reported that 'due to lack of education materials and physical shortcomings of education environments, the number of students with disabilities that benefit from vocational education in inclusive classes has not reached to the desired level.'¹⁷⁹ Since 1991, İŞKUR has also provided vocational and occupational counselling services to persons with disabilities to help them find an occupation fitting their personal abilities and interests. According to the Turkish Government, 44 627 people had received consultancy services of this kind as of September 2013.¹⁸⁰

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

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

The general principles of vocational education are prescribed in the Law on Vocational Education (No. 3308). There are no specific provisions prohibiting discrimination. According to Article 10, in order to be an apprentice (*çırak*) a person has to be between 14 and 19 years of age. However, there are exceptions to the upper age limit. According

¹⁷⁷ The Ombudsman Institution of the Republic of Turkey (2018), *Syrians in Turkey: Special Report*, p. 102, available at: <https://www.ombudsman.gov.tr/syrians/report.html#p=1>.

¹⁷⁸ ECRI (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, p. 29, available at: <https://rm.coe.int/fifth-report-on-turkey/16808b5c81>.

¹⁷⁹ Turkey, *Initial Report on the Convention on the Rights of Persons with Disabilities based on Article 35 of the Convention*, 3 August 2015, p. 50, p. 46 (grammatical error in the original), available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en.

¹⁸⁰ Turkey, *Initial Report on the Convention on the Rights of Persons with Disabilities based on Article 35 of the Convention*, 3 August 2015, p. 50, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en, p. 46.

to Article 13, workplaces falling within the scope of this Law can employ only apprentices who are younger than 18 under an apprenticeship contract. This rule does not apply to persons who are graduates of vocational and technical education schools and to those who have a certificate of assistant mastership (*kalfa*). As stipulated in Article 4 of the Labour Law and Article 13 of the Law on Vocational Education, labour law does not apply to those who work under apprenticeship contracts.¹⁸¹

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

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

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

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

In Turkey, national legislation prohibits discrimination in social protection, including social security and healthcare as formulated in the Racial Equality Directive.

Article 5(1) of the Law on the Human Rights and Equality Institution of Turkey prohibits discrimination in the provision of social security and healthcare. Under Article 3(2), non-discrimination grounds are limited to race/ethnicity, religion/belief, disability and age. Sexual orientation is excluded.

The constitutional and legal provisions that regulate social protection do not contain a prohibition on discrimination. According to Article 60 of the Constitution, 'everyone has the right to social security'. The Law on Social Insurance and General Health Insurance and the Law on Individual Pension Savings and Investment System (No. 4632) do not have provisions that relate to any of the prohibited grounds, except for disability.

The provisions on disability are for positive measures such as early retirement (Article 25 of the Law on Social Insurance and General Health Insurance). Persons with disabilities who have never been employed or who cannot work due to disability and children with disabilities whose families are economically deprived receive a disability pension (under Law No. 2022). The amount of monthly disability pension varies in accordance with the degree of disability and ranges between one fourth and two fifths of the minimum wage.¹⁸² The medical treatment costs of persons who receive a disability pension are covered by general health insurance. As of October 2018, the number of persons receiving a disability pension was around 600 000.¹⁸³

¹⁸¹ The phrase 'without prejudice to the provisions on occupational health and safety' in this clause was deleted on 20 June 2012 by Law No. 6331.

¹⁸² Committee on the Rights of Persons with Disabilities (CRPD), *List of issues in relation to the initial report of Turkey – Addendum: Replies of Turkey to the list of issues*, 21 January 2019, p. 22, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2fO%2f1%2fAdd.1&Lang=en.

¹⁸³ CRPD, *List of issues in relation to the initial report of Turkey – Addendum: Replies of Turkey to the list of issues*, 21 January 2019, p. 22, available at:

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

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

Since they first entered Turkey in April 2011, Syrian refugees have been provided with free health services. While Syrian refugees who are under temporary protection have the right to receive primary, secondary, emergency and tertiary care, those who are not can only access emergency health services.¹⁸⁴

Again, Article 7 of the Law on Civil Servants prohibits discrimination on enumerated grounds by civil servants while carrying out their duties. While the provision does not explicitly mention the provision of social services, as these services are provided by the civil services the prohibition also covers discrimination in the provision of social services.

a) Article 3.3 exception (Directive 2000/78)

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

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

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

Article 5(1) of the Law on the Human Rights and Equality Institution of Turkey prohibits discrimination in the provision of 'social assistance'. Under Article 3(2), non-discrimination grounds are limited to race/ethnicity, religion/belief, disability and age. Sexual orientation is excluded.

Social advantages are provided generally on the basis of income, old age and disability. Irrespective of income, everyone above the age of 65 years can use public transportation free of charge.¹⁸⁵ Persons with disabilities can benefit from free or discounted public transportation provided by various municipalities. Both the national Government and local governments give welfare benefits to poor persons and families. Persons with disabilities and their families can, under certain conditions, benefit from cash benefits.

A Government policy initiated in 2002, with the support of the World Bank, provides conditional child grants to lower-income families which do not have any social security coverage. Known as 'conditional cash transfer', it provides monthly stipends per child for children of both pre-school and school age. Payment is conditional on school enrolment for children of school age and on regular health checks for children of pre-school age.

https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2fQ%2f1%2fAdd.1&Lang=en.

¹⁸⁴ The Ombudsman Institution of the Republic of Turkey (2018), *Syrians in Turkey: Special Report*, pp. 87-88, available at: <https://www.ombudsman.gov.tr/syrians/report.html#p=1>.

¹⁸⁵ Turkey, Regulation on Free of Charge or Discounted Travel Cards (*Ücretsiz veya İndirimli Seyahat Kartları Yönetmeliği*), *Official Gazette*, 4 March 2014.

The amounts vary based on the gender of the child (more for girls than boys) and the level of schooling (more for children at secondary level than for those at elementary school).¹⁸⁶ Initially introduced as a pilot programme in six provinces, the policy began to be implemented across the country in 2005. A similar social subsidy to increase schooling is the free distribution by the Ministry of Family and Social Policies of school materials and lunch assistance to families in need.

In June 2017, the conditional cash transfer was extended to refugee children, reaching 72 000 beneficiaries as of the end of 2018. The Government aims to reach 230 000 refugee children.¹⁸⁷ Moreover, Syrian refugees living under temporary protection (those living both inside and outside the camps) are provided with cash and in-kind social assistance distributed by the Social Assistance and Solidarity Foundations, including special assistance given to orphans, widows, the elderly and individuals with disabilities. Refugees staying inside and outside the camps are given special cards worth TRY 50 (EUR 8) and TRY 100 (EUR 16) per person per month respectively for needs such as food shopping. Elderly refugees and refugees with disability are given TRY 120 (EUR 19) per person per month. In addition, municipalities hosting large refugee populations living outside the camps also distribute in-kind and cash assistance.¹⁸⁸

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

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

Until 2013, the Turkish Government provided an exclusive social advantage to mosques, covering their electricity bills from the budget allocated to the Directorate of Religious Affairs, a subsidy denied to other places of worship belonging to the Christian, Jewish and Alevi faiths. Pursuant to an amendment in the Electricity Market Law (No. 6446) on 30 March 2013, electricity bills for all places of worship are now covered by the state. In its report to the UN Human Rights Council's Working Group on the Universal Periodic Review, the Turkish Government reported that 387 churches and synagogues were benefiting from 'this right' at the beginning of 2014.¹⁸⁹

However, since the definition of what constitutes a 'place of worship' continues to be in the exclusive domain of the Government, only those faiths recognised by the Government are entitled to this social advantage. The Alevis, whose religion/denomination is not officially recognised, continue to be excluded from this social advantage, a practice the ECtHR judged to be discriminatory in a unanimous ruling issued in 2014 in the case of *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v Turkey*.¹⁹⁰ The ECtHR concluded that *cemevis* were places of worship for the Alevis and that the Turkish Government's exclusion of *cemevis* from a social advantage granted to places of worship under Turkish law amounted to discrimination. The ECtHR held that the exclusion

¹⁸⁶ On average, the payments are around TRY 40 (approximately EUR 6.4) per child.

¹⁸⁷ The Ombudsman Institution of the Republic of Turkey (2018), *Syrians in Turkey: Special Report*, pp. 79-80, available at: <https://www.ombudsman.gov.tr/syrians/report.html#p=1>.

¹⁸⁸ The Ombudsman Institution of the Republic of Turkey (2018), *Syrians in Turkey: Special Report*, pp. 103-106, available at: <https://www.ombudsman.gov.tr/syrians/report.html#p=1>.

¹⁸⁹ Turkey (2014), *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 7, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/194/36/PDF/G1419436.pdf?OpenElement>.

¹⁹⁰ *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v Turkey*, No. 32093/10, 2 December 2014.

of *cemevis* from the exemption from paying electricity bills granted to other places of worship violated Article 14, in conjunction with Article 9, of the ECHR. Similarly, in a judgment issued in May 2016, the ECtHR found the inability of Jehovah's Witnesses to obtain from local authorities an appropriate place to engage in worship to be an infringement of their freedom of religion as protected under Article 9.¹⁹¹

On 26 April 2016, the Grand Chamber of the ECtHR issued a precedent-setting judgment finding Turkey to have violated the rights of the Alevi minority under Article 9 (on freedom of religion) and Article 14 (on non-discrimination).¹⁹² Building on earlier Chamber judgments which had addressed various individual human rights issues raised by the Alevi minority – such as mandatory religion courses,¹⁹³ the mandatory indication of religion in official identity documents¹⁹⁴ and the Government's refusal to grant an Alevi foundation an exemption from paying electricity bills that was granted to Sunni places of worship¹⁹⁵ – the Grand Chamber addressed Turkey's policies on the Alevis in their entirety. Noting that Alevis face numerous problems with regard to the organisation of their religious life; the right of parents not to have their children attending primary and secondary schools to take mandatory religion classes teaching the Sunni faith and interpretation of Islam; and the lack of legal status of their religious leaders (*dedes*) and absence of any institution to train personnel to deliver their religious services, the Grand Chamber concluded that the Alevi faith was excluded from all benefits enjoyed by the recipients of Sunni religious public services. The non-recognition of the Alevi faith and the absence of a clear legal framework governing such unrecognised religious minorities caused numerous legal, organisational and financial problems for the Alevi community – such as an inability to access the courts and to receive donations – and subjugated the Alevis to the good will of the authorities, in violation of Article 9. In respect of Article 14, the Grand Chamber concluded that the Alevis received less favourable treatment than the beneficiaries of the religious public services provided by the Diyanet, despite being in a situation comparable with that of the Sunni majority. Pointing out that the religious services provided by the Diyanet to the holders of the Sunni faith were regarded as a public service and received substantial funds from the state budget, and indeed were almost entirely subsidised by the state, the Grand Chamber found that depriving the Alevis of comparable status on the ground that their faith was classified as a 'Sufi order' by the authorities constituted differential treatment that lacked an objective and reasonable justification. While the judgment was widely covered in the national media, it did not generate any reaction from the Government.

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

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

Article 5(1) of the Law on the Human Rights and Equality Institution of Turkey prohibits discrimination in the provision of education. Under Article 3(2), non-discrimination grounds are limited to race/ethnicity, religion/belief, disability and age. Sexual orientation is excluded. While migrants are not explicitly specified as right-bearers, the law's exceptions clause refers to the conditions imposed on and the treatment of non-nationals for the purpose of their entry into and residence in Turkey but not their access to public services, including education (Article 7(g)). By implication, migrants arguably have the right to be free from discrimination in the field of education. On the other hand, the absence of discriminatory provisions against migrants in the anti-discrimination law

¹⁹¹ *Association for Solidarity with Jehovah Witnesses and Others v Turkey*, Nos. 36915/10 and 8606/13, 24 May 2016.

¹⁹² *İzzettin Doğan and Others v Turkey*, Grand Chamber, No. 62649/10, 26 April 2016.

¹⁹³ *Hasan and Eylem Zengin v Turkey*, No. 1448/04, 9 January 2007; *Mansur Yalcin and Others v Turkey*, No. 21163/11, 16 September 2014.

¹⁹⁴ *Sinan Işık v Turkey*, No. 21924/05, 2 February 2010.

¹⁹⁵ *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v Turkey*, No. 32093/10, 2 December 2014.

does not mean that other laws may not contain such provisions or that discriminatory practice does not exist.

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

At the end of the 2000s, the Government started to take minimal steps to educate pupils on anti-discrimination. As reported by ECRI, 'an obligatory anti-discrimination class was taught to all pupils as their first class of the school year' at the start of the 2009-2010 school year.¹⁹⁶ The Ministry of National Education also carried out a study to review all textbooks to eliminate discriminatory content, although 'a subsequent study has highlighted the need for further progress in this field'.¹⁹⁷ On the other hand, despite some improvements in recent years, the textbooks used in secondary education contain content that is discriminatory against non-Muslim minorities. This applies in particular to the sections in history textbooks on the National Liberation War and the establishment of the Republic of Turkey. While the 10th-grade history textbook was amended in 2013 in response to complaints from the Syriac community,¹⁹⁸ discriminatory content about missionaries and minorities remains.¹⁹⁹

Article 89 of the Law on Foreigners and International Protection gives all applicants and beneficiaries of international protected access to primary and secondary education.²⁰⁰ In addition, there are 'temporary education centres', accredited by the Ministry of National Education and staffed with Syrian teachers, using a modified Syrian Arabic curriculum. During the 2017-2018 academic year, the number of school-age Syrian children was reported to be 976 000, of whom 619 000 (63 %) were receiving education. Of the latter category, 267 000 were schooled in temporary classrooms, while around 350 000 received education in public schools.²⁰¹ In the 2014-2015 academic year, only 230 000 Syrian students had access to education, of whom 40 000 were placed in public schools.²⁰²

In their applications to the Ombudsman Institution, refugee children raised several issues that were impeding their access to quality education. Among other issues, they complained of being subjected to exclusion and discrimination in schools; the inadequacy of Turkish-language courses; the overcrowding of classrooms; and the failure of schools

¹⁹⁶ ECRI (2011), *Report on Turkey (fourth monitoring cycle)*, CRI 2011 (5), adopted on 10 December 2010, Strasbourg, p. 7, available at: <https://rm.coe.int/fourth-report-on-turkey/16808b5c7e>.

¹⁹⁷ ECRI (2011), *Report on Turkey (fourth monitoring cycle)*, CRI 2011 (5), adopted on 10 December 2010, Strasbourg, p. 7, available at: <https://rm.coe.int/fourth-report-on-turkey/16808b5c7e>.

¹⁹⁸ European Commission (2013), *Turkey 2013 Progress Report*, Brussels, p. 61, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2013/package/tr_rapport_2013_en.pdf.

¹⁹⁹ European Commission (2013), *Turkey 2013 Progress Report*, Brussels, p. 62, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2013/package/tr_rapport_2013_en.pdf.

²⁰⁰ Turkey, Law on Foreigners and International Protection (*Yabancılar ve Uluslararası Koruma Kanunu*), No 6458, 4 April 2013.

²⁰¹ The Ombudsman Institution of the Republic of Turkey (2018), *Syrians in Turkey: Special Report*, p. 74, available at: <https://www.ombudsman.gov.tr/syrians/report.html#p=1>.

²⁰² The Ombudsman Institution of the Republic of Turkey (2018), *Syrians in Turkey: Special Report*, p. 76, available at: <https://www.ombudsman.gov.tr/syrians/report.html#p=1>.

and administrators to resolve these problems.²⁰³ In its special report on Syrian refugees, the Ombudsman Institution noted the 'significant increase' in the number of Syrian students who have access to education and in the number of those students in public schools. However, it still concluded that the education level of Syrian refugees in Turkey is 'far below the national average', noting that 33 % are illiterate²⁰⁴ and that the number of such children not attending school is still quite high.²⁰⁵ Among the problems that Syrian students encounter, the Ombudsman Institution highlighted issues arising from language differences; the marked decrease in the schooling of Syrian children at upper grades; families' resistance to enrol their children due to fears of assimilation; financial difficulties; and an unwillingness to send girls to school beyond primary education.²⁰⁶

Students belonging to religious minorities

In Turkey, the general approach to education for pupils belonging to religious minorities raises problems, some of which are common to all minorities while others are specific to certain groups. An example of the former concerns the mandatory religion courses that are taught in primary and secondary schools pursuant to Article 42 of the Constitution. Although a 1990 decision by the Ministry of National Education exempted Christian and Jewish students from these classes,²⁰⁷ in practice the exemption is limited to the officially recognised non-Muslim minorities (Jews, Armenian and Greek Orthodox Christians), excluding other Christian groups. Moreover, exemption requests by students belonging to officially recognised minorities may arbitrarily be refused by school administrators, although the Ministry of National Education has in recent years taken steps to counter this.²⁰⁸

In order to be exempted, Armenian, Greek Orthodox and Jewish students are required to submit a request signed by their parents and to 'prove' their faith by producing official identity documents where their religion is indicated. This requirement contradicts a 2006 law which allows citizens – upon paying, as of May 2015, around TRY 7 (EUR 1.12) – to leave the 'religion' section on their identity document blank.²⁰⁹ For non-Muslim parents who want their children to be exempt from religion courses, exercising the right not to identify their religion on their identity documents is not an option in practice. In fact, requests submitted by parents who had opted to leave the 'religion' section on their identity documents blank have been rejected.²¹⁰ A second issue in respect of exemption concerns the lack of adequate and rights-based arrangements to accommodate students who request to be exempted. Such students are not offered alternative classes and have to spend idle time on school premises during the hours that religion courses are taking place. Finally, requesting an exemption may result in students being excluded from

²⁰³ The Ombudsman Institution of Turkey (2019), *2018 Faaliyet Raporu (2018 Activities Report)*, p. 272, available at: https://www.ombudsman.gov.tr/yillik-rapor/kdk_y%C4%B1llik_rapor2018/mobile/index.html#p=20.

²⁰⁴ The Ombudsman Institution of the Republic of Turkey (2018), *Syrians in Turkey: Special Report*, p. 35, available at: <https://www.ombudsman.gov.tr/syrians/report.html#p=1>.

²⁰⁵ The Ombudsman Institution of the Republic of Turkey (2018), *Syrians in Turkey: Special Report*, p. 78, available at: <https://www.ombudsman.gov.tr/syrians/report.html#p=1>.

²⁰⁶ The Ombudsman Institution of the Republic of Turkey (2018), *Syrians in Turkey: Special Report*, pp. 78-79, available at: <https://www.ombudsman.gov.tr/syrians/report.html#p=1>.

²⁰⁷ Ministry of National Education, Religious Education General Directorate for Higher Education and Training Committee decision, 9 July 1990.

²⁰⁸ European Commission (2013), *Turkey 2013 Progress Report*, Brussels, p. 61, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2013/package/tr_rapport_2013_en.pdf.

²⁰⁹ The ECtHR had, however, found this 'reform' to be inadequate to ensure the protection of freedom of religion. *Sinan Işık v Turkey*, No. 21924/05, 2 February 2010. This ECtHR judgment remains unimplemented.

²¹⁰ Altıparmak, K. (2013), *Hasan ve Eylem Zengin/Türkiye Kararının Uygulanması: İzleme Raporu (Implementation of Hasan and Eylem Zengin Judgment: Monitoring Report)*, Ankara, p. 10, available at: http://aihmiz.org.tr/files/01_Hasan_ve_Eylem_Zengin_Rapor_TR.pdf (citing decision: Ankara First Administrative Court, judgment E.2012/1133, K. 2012/2367, 11 October 2012).

school, which means that families refrain from filing complaints with the authorities for fear of further stigmatisation of their children.²¹¹

The minority group which has been the most vocal against mandatory religion classes has been the Alevis, who took the issue to the ECtHR. In 2007, the Court found that the content of these classes violated Article 9 of the ECHR,²¹² on the ground that the textbooks gave disproportionate weight to teaching Islam in relation to other religious and philosophical beliefs. The ECtHR also found that the obligation of non-Muslim parents to disclose their identity and religion in order to get an exemption for their children violated the right to freedom of religion, noting that the absence of a legal basis leaves exemption decisions to the discretion of school administrators, leading to arbitrary rejections. However, the ECtHR did not find that the classes as such violated the ECHR.

While the ECtHR did not prescribe a general measure for the Turkish Government, the judgment made clear that the authorities were obliged to grant unconditional exemptions to all students, irrespective of their religion, denomination or belief. Turkey could have chosen any one of the following general measures: making the courses optional, completely revising the content of the courses or taking measures to ensure that parents and students are provided with an exemption without having to disclose their faith.²¹³ Opting for the second of these, the Ministry of National Education revised the textbooks, seemingly in accordance with the demands expressed by Alevi representatives within the framework of the 'Alevi opening' (for more on the Alevi opening, see Section 8.1.). The new textbooks were formally adopted on 30 December 2010 and first used during the 2011-2012 school year.²¹⁴ However, an expert evaluation found that, notwithstanding a few additions and editorial changes, the general content, values and concepts of the old books were preserved.²¹⁵ The course continues to teach a particular religion and fails to fulfil the criteria of inclusiveness, impartiality and lack of indoctrination.²¹⁶

Until the revision of the textbooks, the administrative courts were favourable to Alevis. Lower courts in several cities had ruled in favour of parents who brought cases to exempt their children from these classes and ordered a stay of execution.²¹⁷ On 28 December 2007, the Eighth Circuit of the Council of State, citing the ECtHR judgment, held that the content of these classes failed to meet the requirements of objectivity, pluralism and

²¹¹ Norwegian Helsinki Committee (2014), *The Right to Freedom of Religion or Belief in Turkey – Monitoring Report January-June 2013*, p. 45, available at: <http://inancozgurlugugirisimi.org/wp-content/uploads/2014/01/NHC-1%CC%870%CC%88G-FoRB-Report-Eng.pdf>.

²¹² *Hasan and Eylem Zengin v Turkey*, No. 1448/04, 9 January 2007.

²¹³ Altıparmak, K. (2013), *Hasan ve Eylem Zengin/Türkiye Kararının Uygulanması: İzleme Raporu (Implementation of Hasan and Eylem Zengin Judgment: Monitoring Report)*, Ankara, pp. 3-4, available at: http://aihmiz.org.tr/files/01_Hasan_ve_Eylem_Zengin_Rapor_TR.pdf.

²¹⁴ The written response of the Strategic Development Presidency of the Ministry of National Education, No. 337, 17 January 2012, cited in Altıparmak, K. (2013), *Hasan ve Eylem Zengin/Türkiye Kararının Uygulanması: İzleme Raporu (Implementation of Hasan and Eylem Zengin Judgment: Monitoring Report)*, Ankara, p. 8, available at: http://aihmiz.org.tr/files/01_Hasan_ve_Eylem_Zengin_Rapor_TR.pdf.

²¹⁵ Yıldırım, M. (2012), *2011-2012 Öğretim Yılında Uygulanan Din Kültürü ve Ahlak Bilgisi Dersi Programına İlişkin bir Değerlendirme (An Evaluation of the Curriculum of the Religious Culture and Ethics Course Instructed during the 2011-2012 Academic Year)*, available at: <http://www.aihmiz.org.tr/aktarimlar/dosyalar/1349647350.pdf>.

²¹⁶ Yıldırım, M. (2012), *2011-2012 Öğretim Yılında Uygulanan Din Kültürü ve Ahlak Bilgisi Dersi Programına İlişkin bir Değerlendirme (An Evaluation of the Curriculum of the Religious Culture and Ethics Course Instructed during the 2011-2012 Academic Year)*, pp. 7-8, available at: <http://www.aihmiz.org.tr/aktarimlar/dosyalar/1349647350.pdf>.

²¹⁷ For example, on 30 December 2005, the Fifth Administrative Court in Istanbul approved, on the basis of freedom of religion and conscience, a parent's petition for the exemption of his child from the religion course. Bianet (2006), 'Zorunlu Din Dersi İstemeyen Yargıya Gitmeli' ('Whoever Objects to the Compulsory Religion Course should go to Court'), 24 November 2006, available at: <http://www.bianet.org/bianet/insan-haklari/88237-zorunlu-din-dersi-istemeyen-yargiya-gitmeli>. A similar decision was issued in December 2010 by the Regional Administrative Court in İzmir, approving the decision of the First Administrative Court to the same effect. Bianet (2010), 'Zorunlu Din Dersi yine Yarıdan Döndü' ('Another Court Judgment against the Compulsory Religion Course'), 17 December 2010, available at: <http://www.bianet.org/bianet/egitim/126667-zorunlu-din-dersi-yine-mahkemedenden-dondu>.

respect for the religious and philosophical opinions of parents.²¹⁸ Nevertheless, Alevi children continued to be forced to take religion classes at primary and secondary level. The Government's revision of the textbooks had a reverse effect on the national courts' jurisprudence. The Eighth Circuit of the Council of State reversed its jurisprudence, on the basis that the revisions changed the curricula of the courses from religious education to the teaching of different religions and faiths, including the Alevi faith.²¹⁹

In 2014, the ECtHR revisited the issue in the case of *Mansur Yalcin and Others v Turkey*. It held that the revisions did not introduce a real change in the curriculum, which continued to focus predominantly on the knowledge of Islam as interpreted by the Sunni majority and violated the state's duty of neutrality and impartiality in regulating matters of religion. The Court noted that the absence of an appropriate exemption procedure left pupils, including Alevis, caught between the religious instruction given in schools and their parents' religious and philosophical convictions. Noting that the violation had arisen out of a 'structural problem', the ECtHR called on the Government 'to remedy the situation without delay' in particular by introducing a system to allow the exemption of pupils without requiring their parents to disclose their religious or philosophical convictions. The reactions of Government officials indicate that this ruling too may face resistance. Prime Minister Ahmet Davutoğlu implied his disagreement with the ruling, stating that his Government 'cannot accept the attempts to reflect [the religion courses] as an instrument of religious pressure'. The President of the Directorate of Religious Affairs stated that the ECtHR ruling may arise from the conflation of religious education with religious culture classes, arguing that the pupils are not instructed in accordance with any particular religion but are instead taught about the cultural aspects of various religions.

At a time when there was intense public debate on the teaching of religion in schools, and amid expectations that the religion classes would be abolished altogether, the AKP Government introduced an extremely controversial law on 30 March 2012. This 'education reform bill draft' not only did not abolish the religion classes or make them elective; instead, it introduced new elective courses on religion in secondary schools.²²⁰ The two elective courses explicitly identified in the law are on the Kor'an and the life of the Prophet Mohammed, both concerning the Muslim faith.²²¹ A circular subsequently adopted by the Ministry of National Education²²² identified a number of further elective courses to be offered in secondary education, including 'Fundamental Religious Knowledge'. Thus, the law increased from two to eight per week the number of hours of religion courses that students can potentially take. From the outset, religious minorities faced difficulties in respect of the implementation of the law. Where non-Muslim students are granted exemption from the mandatory religion course, they may find themselves having to take an elective course on Islam, due to the obligation to obtain a minimum of elective credits and the fact that opening a new elective course requires the written request of at least 10 students. The case of a Protestant student is a telling example. While she was granted an exemption, the fact that only three elective courses were available in her school meant that she had to choose between the elective courses on the Kor'an, the Prophet Mohammed and Fundamental Religious Knowledge or lose one year's credits. The provincial authorities offered to transfer the student to another school.²²³

²¹⁸ Eighth Circuit of the Council of State, judgment E. 2006/4107, K. 2007/7481, 28 December 2007.

²¹⁹ Eighth Circuit of the Council of State, judgment E. 2009/10610, K. 2010/2413, 13 July 2010. For a critical and detailed analysis of this and subsequent similar judgments of the 8th Circuit as well as the impact of this new case law on lower courts, see Altıparmak, K. (2013), *Hasan ve Eylem Zengin/Türkiye Kararının Uygulanması: İzleme Raporu (Implementation of Hasan and Eylem Zengin Judgment: Monitoring Report)*, Ankara, pp. 13-16, available at: http://aihmiz.org.tr/files/01_Hasan_ve_Eylem_Zengin_Rapor_TR.pdf.

²²⁰ Turkey, Law on Amendments in Law on Primary Education and Various Other Laws (*İlköğretim ve Eğitim Kanunu ile Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun*), 30 March 2012.

²²¹ Turkey, Law on Amendments in Law on Primary Education and Various Other Laws, Article 9, 30 March 2012.

²²² Ministry of National Education, circular No. 2012/37, 31 August 2012.

²²³ Association of Protestant Churches (Turkey) (2013), *2012 Human Rights Violations Report*, 15 January 2013, p. 6, available at: http://www.worldeaa.org/images/wimg/files/2012_Rights_Violations_Report.pdf.

Upon the family's application, the Ministry of National Education intervened, and the school provided a special elective course for this student.²²⁴

Another disconcerting Government practice concerns the centralised competitive examinations for entrance to higher education. The Administration for the Selection and Placement of Students decided to include in the 2013 examination 13 questions based on the religion courses. Non-Muslims protested against the decision on the ground that it would result in unequal treatment of minority children who had received an exemption. In response, the Ministry of National Education declared that there would be alternative questions for such students.²²⁵ The 2014 national examination was the first in which students were tested on religion, although the Administration claimed that the questions resembled the questions on philosophy.²²⁶ For 2015, the Administration applied yet another system, whereby students who were not 'legally obliged' to take the religion courses were allowed to answer alternative questions based on the philosophy course, whereas the rest of the students were tested on religion.²²⁷ In 2017, yet another system was introduced, and students belonging to recognised minority groups are now asked questions about their own religion.²²⁸ Students from unrecognised religious minorities continue to be tested on the Sunni denomination of Islam.

In addition, non-Muslim minority schools authorised under the Treaty of Lausanne face serious and arbitrary limitations, making their management 'very difficult, to the extent of jeopardising the existence of some schools'.²²⁹ Until 2007, the teachers of 'Turkish culture' classes and the deputy principals of these schools were required to be 'of Turkish origin' (read 'Muslim'), and were appointed by the Ministry of National Education.²³⁰ An amendment to the Law on Private Education Institutions in 2007 removed this restriction, enabling the recruitment of minority teachers to these positions.²³¹ However, the implementing regulation has not yet been adopted and 'the situation remains the same'.²³² Minority schools do not have any say in the selection of these teachers, who are appointed by the Ministry of National Education and are not subject to the supervision of the non-Muslim principal.

Students belonging to ethnic minorities

In Turkey, the general approach to education for pupils belonging to ethnic and linguistic minorities raises problems. Tens of millions of such students are denied the right to learn and/or receive education in their mother tongue, a right granted on a limited basis to Armenians, Jews and Greek Orthodox communities in accordance with the minority status they were granted on the basis of their religious (but not ethnic) identity. With the

²²⁴ Norwegian Helsinki Committee (2014), *The Right to Freedom of Religion or Belief in Turkey – Monitoring Report January-June 2013*, p. 44, available at: <http://inancozgurluqugirisimi.org/wp-content/uploads/2014/01/NHC-1%CC%87O%CC%88G-FoRB-Report-Eng.pdf>.

²²⁵ European Commission (2013), *Turkey 2013 Progress Report*, Brussels, p. 54, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2013/package/tr_rapport_2013_en.pdf.

²²⁶ Statement by the Administration for the Selection and Placement of Students regarding the religion course questions in the 2015 national examination (no longer publicly available on the internet).

²²⁷ Statement by the Administration for the Selection and Placement of Students regarding the religion course questions in the 2015 national examination (no longer publicly available on the internet).

²²⁸ Ogretmenlersitesi (2017), 'Azınlık Öğrencilerine Ayrı Din Dersi Soruları Sorulacak' ('Minority Students will be Asked Separate Religion Course Questions'), *Ogretmenlersitesi*, 4 December 2017, available at: <https://www.ogretmenlersitesi.com/azinlik-ogrencilerine-ayri-din-dersi-sorulari-sorulacak/44575/>.

²²⁹ ECRI (2011), *Report on Turkey (fourth monitoring cycle)*, CRI 2011 (5), adopted on 10 December 2010, Strasbourg, p. 33, available at: <https://rm.coe.int/fourth-report-on-turkey/16808b5c7e>.

²³⁰ The law required teachers of Turkish culture classes and the deputy principal in schools opened by 'foreigners' to be 'of Turkish origin and a citizen of the Turkish Republic'. Turkey, Law on Private Education Institutions (*Özel Öğretim Kurumları Kanunu*), 8 June 1965, Article 24,

²³¹ Turkey, Law on Private Education Institutions, No. 5580, 8 February 2007.

²³² Kaya, N. (2009), *Forgotten or Assimilated? Minorities in the Education System of Turkey*, Minority Rights Group International, January 2009, p. 17, available at: <http://minorityrights.org/publications/forgotten-or-assimilated-minorities-in-the-education-system-of-turkey-march-2009/>.

initiation of the EU accession process in 1999, a new phase in the state's approach to non-recognised ethnic and linguistic minorities commenced. Permitting the teaching of minority languages in private courses in 2002 was followed by the opening of Kurdish language and literature departments at public universities from 2009 and the introduction of on-demand elective courses in selected minority languages in secondary schools.²³³ From the academic year 2012-2013, public secondary schools started to offer elective courses on demand in selected minority languages (the Kurmanji and Zazaki dialects of Kurdish, the Adige and Abkhaz dialects of Circassian and the Laz language). The various Roma languages were not included among the selected languages. During the academic year 2012-2013, a total of 28 587 students nationwide opted for these elective courses. While 9 714 did not express a demand for a specific language, the rest demanded classes in Kurdish and Caucasian languages.²³⁴ The number of students enrolled in Kurdish language courses during the academic year 2012-2013 was 18 847.²³⁵ According to the Turkish Government's report to the UN, a total of 23 697 fifth-grade pupils and 19 896 sixth-grade pupils enrolled in Kurdish, Circassian and Laz language classes in the academic years 2012-2013 and 2013-2014.²³⁶

On 2 March 2014, the Law on the Teaching of and Education in Foreign Languages and the Learning of Different Languages and Dialects by Turkish Citizens was amended to allow the opening of secondary schools providing education in non-official languages.²³⁷ However, the scope of this right is limited to private secondary schools and does not extend to elementary schools or to public secondary schools. There is also a content restriction: history, Turkish language and literature, history of the revolution and Atatürkism, geography, social sciences, religion and ethics and other courses related to the Turkish language can be taught only in Turkish.²³⁸ The Government's limitation of education in minority languages to private institutions was received with criticism by the pro-Kurdish movement across the political spectrum. Pointing out that the majority of Kurds in the region are very poor, critics have found the privatisation of education in the mother tongue to be discriminatory in socio-economic terms. They cite the fact that the state does not subsidise non-Muslim minority schools, with the exception of paying the salaries of vice-principals and teachers of mandatory Turkish-language classes, as a further reason to oppose private education. Furthermore, they find that the denial to Kurds and other minority groups of a right granted to Turks constitutes ethnic discrimination.

The dispute between the Government and the Kurdish national movement over the issue culminated in a political crisis at the start of the academic year 2014-2015, when Kurdish civil society commenced a civil disobedience campaign to provide alternative education without authorisation from the central authorities. Three NGOs established private elementary schools in Turkey's Kurdish region and commenced providing education on 15 September 2014. The schools, each given a Kurdish name, were opened in the predominantly Kurdish-populated provinces of Diyarbakır, Hakkari and Şırnak. Opened, funded and run on the civil initiative of three NGOs, the schools were immediately closed down by the judicial authorities on the instructions of the Ministry of Interior.

²³³ Turkey, Law on Amendments in Law on Primary Education and Various Other Laws, 30 March 2012.

²³⁴ Hürriyet (2013), 'İşte "Seçmeli Kürtçe'nin Türkiye Haritası' ('And here is the Turkey Map of the "Elective Kurdish")', 6 February 2013, available at: <http://www.hurriyet.com.tr/gundem/22534618.asp>.

²³⁵ European Commission (2013), *Turkey 2013 Progress Report*, Brussels, p. 62, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2013/package/tr_rapport_2013_en.pdf.

²³⁶ Turkey (2014), *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 14.

²³⁷ Turkey, Law on the Teaching of and Education in Foreign Languages and the Learning of Different Languages and Dialects by Turkish Citizens (*Yabancı Dil Eğitimi ve Öğretimi ile Türk Vatandaşlarının Farklı Dil ve Lehçelerinin Öğrenilmesi Hakkında Kanun*), 2 March 2014.

²³⁸ Turkey, Regulation on the Amendment of the Regulation on Private Educational Institutions of the Ministry of National Education (*Millî Eğitim Bakanlığı Özel Öğretim Kurumları Yönetmeliğinde Değişiklik Yapılmasına Dair Yönetmelik*), *Official Gazette*, 5 July 2014.

Furthermore, criminal investigations were commenced against the school administrators on charges of opening educational institutions without authorisation and committing offences in the name of a terrorist organisation. Defying the court orders, families, Kurdish politicians and civil society broke the seals on the schools and recommenced the provision of education. The authorities replied by closing down the schools once again. During the one week that had passed since the beginning of the new academic year, the schools were closed down by the Government and reopened by Kurdish society three times. Violent clashes occurred between the security forces and Kurdish youth and a number of public schools in the area were set on fire by Kurdish protestors.²³⁹ The crisis was partially resolved when Ferzad Kemanger Kurdish Elementary School in Diyarbakır recommenced providing education in October after having sought and received authorisation from the Ministry of National Education.²⁴⁰ However, in October 2016 the school was once again closed down by the authorities without explanation. Providing education to around 250 pupils from the first grade to the third grade, it was the only Kurdish-language school in Turkey.²⁴¹ Following the coup attempt in July 2016, the Government used emergency decrees to close several private Kurdish-language schools in the Kurdish region, leaving some 238 students without a school in the middle of the school year.²⁴²

From the perspective of discrimination against ethnic minority students, the most significant development in recent years has been the removal of the national oath that pupils were required to take every school day. Introduced in 1933 as mandatory for all primary and secondary students, including non-Muslim pupils in minority schools, the oath was perceived as discriminatory and assimilationist by ethnic minorities. Removed first in secondary schools in 2012, the oath was abolished entirely in 2013.²⁴³ However, it was reintroduced in October 2018 when the Council of State, in a case filed by a nationalist trade union, found the removal of the oath to be contrary to the stability of the Administration. Holding that the oath strengthened pupils' sense of belonging as constitutional citizens, the Council of State said that the oath could be repealed only on the basis of reasons based on a scientific truth.²⁴⁴

a) Pupils and students with disabilities

In Turkey, the general approach to education for pupils with disabilities raises problems.

After decades of endorsing the principle of segregation for the education of children with disabilities, which went against its commitments under international human rights

²³⁹ Bianet (2014), 'Okullar Yakıldıktan Sonra Kürtçe Okula İzin Sinyali' ('Signal of Authorisation for Kurdish School after the Schools were Burned Down'), *Bianet*, 19 September 2014, available at: <https://www.haberler.com/okullar-yakildiktan-sonra-kurtce-okula-izin-6499691-haber/>.

²⁴⁰ Radikal (2014), 'Diyarbakır'da Mühürlenmiş Kürtçe Okul Yeniden Açıldı' ('The Kurdish School in Diyarbakır re-opened after having been sealed off'), *Radikal*, 6 November 2014, available at: <http://www.radikal.com.tr/turkiye/diyarbakirda-muhurlenen-kurtce-okul-yeniden-acildi-1225340/>.

²⁴¹ Kamer, H. (2016), 'Diyarbakır'da Kürtçe Eğitim Veren Ferzad Kemanger Okulu Kapatıldı' ('Kurdish Education Providing Ferzad Kemanger School in Diyarbakır was Shut Down'), *BBC Türkçe*, 10 October 2016, available at: <http://www.bbc.com/turkce/haberler-turkiye-37608054>.

²⁴² US Department of State (2016), *Turkey 2016 Human Rights Report*, p. 65, available at: <https://www.state.gov/documents/organization/265694.pdf>.

²⁴³ Turkey, Regulation on the Amendment of the Regulation on Institutions of Primary Education of the Ministry of National Education, *Official Gazette*, 8 September 2013.

²⁴⁴ Habertürk (2018), 'Danıştay "Öğrenci Andı"yla İlgili Kararını Verdi' ('The Council of State has issued its ruling with regard to the "Pupils' Oath"'), 19 October 2018, available at: <https://www.haberturk.com/danistay-ogrenci-andiyla-iligili-kararini-verdi-2183902>.

norms,²⁴⁵ today Turkey formally endorses integrated/mainstream education as the ruling principle and special education as the exception.²⁴⁶

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

The principle of mainstream education was introduced for the first time in 1983, with the adoption of the Law on Children in Need of Special Education.²⁴⁷ Article 4 recognises, on the one hand, the right of children with disabilities to special education based on their needs, and on the other hand, it tasks the state with the duty to 'take the requisite measures' to enable children with disabilities 'whose conditions and characteristics are appropriate' to attend schools with 'normal children'. A circular adopted in 1988 put forth the conditions for the successful application of the principle of integration.²⁴⁸ In 1997, a decree was adopted that established the 'Integration Implementation System' and emphasised the importance of individualised education for every child with disability based on their needs and through the use of appropriate techniques and tools.²⁴⁹ The 2005 Law on Persons with Disabilities also endorses the principle of mainstream education. Article 15 recognises the right of children with disabilities to access integrated education on the basis of their special situations. While the provision states that the education of students with disabilities 'cannot be prevented on the basis of any reason', it does not prohibit discrimination. The 2006 Regulation on Special Education Services puts forth the rules and principles to be followed for the establishment of special education schools, but stresses that special education is the exception to mainstream education.²⁵⁰ The July 2012 amendments to the Regulation on Special Education Services were largely about terminology, with very little potential positive impact on implementation.²⁵¹

²⁴⁵ Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye'de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu (The Status of Integrated Education in Turkey)*, p. 20, available at: http://www.egitimreformugirisimi.org/wp-content/uploads/2017/03/Turkiyede_Kaynastirma_Butunlestirme_Yoluyla_Egitimin_Durumu.pdf.

²⁴⁶ Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye'de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu (The Status of Integrated Education in Turkey)*, p. 24, available at: http://www.egitimreformugirisimi.org/wp-content/uploads/2017/03/Turkiyede_Kaynastirma_Butunlestirme_Yoluyla_Egitimin_Durumu.pdf.

²⁴⁷ Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye'de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu (The Status of Integrated Education in Turkey)*, p. 24, available at: http://www.egitimreformugirisimi.org/wp-content/uploads/2017/03/Turkiyede_Kaynastirma_Butunlestirme_Yoluyla_Egitimin_Durumu.pdf.

²⁴⁸ Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye'de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu (The Status of Integrated Education in Turkey)*, p. 24, available at: http://www.egitimreformugirisimi.org/wp-content/uploads/2017/03/Turkiyede_Kaynastirma_Butunlestirme_Yoluyla_Egitimin_Durumu.pdf.

²⁴⁹ Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye'de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu (The Status of Integrated Education in Turkey)*, p. 24, available at: http://www.egitimreformugirisimi.org/wp-content/uploads/2017/03/Turkiyede_Kaynastirma_Butunlestirme_Yoluyla_Egitimin_Durumu.pdf.

²⁵⁰ Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye'de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu (The Status of Integrated Education in Turkey)*, pp. 21-23, available at: http://www.egitimreformugirisimi.org/wp-content/uploads/2017/03/Turkiyede_Kaynastirma_Butunlestirme_Yoluyla_Egitimin_Durumu.pdf.

²⁵¹ Sabancı University (2013), *Engelsiz Türkiye için: Yolun Neresindeyiz? Mevcut Durum ve Öneriler (Towards a Barrier-Free Turkey: Where do we Stand? The Status Quo and Proposals)*, p. 179, available at: https://gazetesu.sabanciuniv.edu/sites/gazetesu.sabanciuniv.edu/files/2013/13019_sabanci_rapor_tr.pdf.

The implementation of these laws and regulations concerning mainstream education lags far behind the legal framework. Mainstream education facilities, transportation to these schools, educative tools (charts, maps etc.) and other education materials are not accessible to most children with disabilities. Neither teachers in mainstream education nor students without disabilities and their families receive training in this regard. Students with disabilities tend to be excluded by their peers, whose families express discomfort regarding the presence of students with disabilities in classrooms. Studies conducted in these schools show that the teachers lack the training and skills to address these problems and feel desperate and frustrated as a result. Of the teachers working in integrated schools, 86.4 % felt that they lacked sufficient knowledge about mainstream education for students with disabilities; 77.1 % said that individualised education programmes were not being prepared for students with disabilities in their classrooms; and 70.9 % said they simply implement the standard curricula for these students.²⁵²

In response to these problems, the Ministry of National Education conducted limited training for teachers in mainstream education; signed a protocol with the Anatolian University for a three-month distance learning programme to train special education teachers; and commenced, in cooperation with civil society, pilot projects for the improvement of mainstream education.²⁵³ However, the scope of these efforts, significant as they are, remains very limited in comparison with the magnitude of the problem.

Although statistics are available on the number of children who are registered as having disabilities, there are no up-to-date data on the number or percentage of students with disabilities who have successfully completed their primary education and continued their education in secondary schools. The 2002 Disability Survey of Turkey provides the following statistics on the education levels of persons with disabilities: 34.5 % are graduates of elementary school and primary education; 5.4 % have a junior high school diploma; and 6.9 % are graduates of high school or equivalent. The survey results show that the rate of illiteracy among persons with disabilities (36.3 %) is three times that of the general population (12.9 %).²⁵⁴ In 2015, after four years' delay, the Turkish Government submitted its country report under the UNCPRD. In this report, the Government provided updated statistics based on a 2011 survey on persons with disabilities, which it stated was conducted in accordance with the International Classification of Functioning Disability and Health (ICF), as opposed to the 2002 survey, which was conducted 'with a medical approach'.²⁵⁵ According to the 2011 survey, the rate of literacy for persons with disabilities is 76.7 %, in comparison with 95.5 % for the general population.²⁵⁶

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

²⁵² Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye'de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu (The Status of Integrated Education in Turkey)*, p. 29, p. 13, available at: http://www.egitimreformugirisimi.org/wp-content/uploads/2017/03/Turkiyede_Kaynastirma_Butunlestirme_Yoluyla_Egitimin_Durumu.pdf.

²⁵³ For the website of the project, see [kaynastirma-ve-butunlestirmenin-etkinligini-artirmak-ic-politika-ve-uygulama-oneriler](http://www.kaynastirma-ve-butunlestirmenin-etkinligini-artirmak-ic-politika-ve-uygulama-oneriler.org).

²⁵⁴ Tufan, İ., Arun, Ö. (2006), *Secondary Data Analysis of Disability Survey of Turkey (Türkiye Özürlüler Araştırması 2002 İkincil Analizi)*, Scientific and Research Council of Turkey, Social Sciences and Humanities Research Grant Group (Türkiye Bilimsel ve Teknik Araştırma Kurumu, Sosyal ve Beşeri Bilimler Araştırma Grubu), p. 21, available at: http://ozgururun.com.tr/wp-content/uploads/2015/08/TufanveArun_TOA.pdf.

²⁵⁵ Turkey, *Initial Report on the Convention on the Rights of Persons with Disabilities based on Article 35 of the Convention*, 3 August 2015, p. 6, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en.

²⁵⁶ Turkey, *Initial Report on the Convention on the Rights of Persons with Disabilities based on Article 35 of the Convention*, 3 August 2015, p. 6, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en.

According to the Ministry of National Education's annual report, during the academic year 2017-2018 the total number of students with disabilities receiving integrated or special education was 353 610.²⁵⁷ The numbers continue to be extremely low in comparison with the estimated total number of children of school age with disabilities. In 2009-2010, the total number of children with disabilities in the age group 0-19 years who received half- or part-time education at pre-school, primary and secondary levels was 116 031. That fell far below the overall population of children with disabilities in that age group, for whom the estimated number in 2010 was 1 105 630.²⁵⁸

The gap between the goals and the situation on the ground is reflected in the findings of international organisations. In its *Turkey 2016 Report*, the European Commission noted that, while the number of pupils with disabilities in primary and secondary education continued to increase, 'access to higher education remained a problem and "lifelong learning" opportunities were limited.'²⁵⁹ The UN Committee on the Rights of the Child (CRC), noting that a large number of school-age children with disabilities did not enjoy their rights to education, urged the Turkish Government to further encourage the integration of these children in the regular education system.²⁶⁰ Similarly, UNESCO encouraged Turkey to intensify its efforts in respect of the integration of children with disabilities in the regular education system.²⁶¹ In its report to the UN Human Rights Council for the Universal Periodic Review, the Turkish Government stated that '[e]xcept for moderately or severely disabled persons, students with mild disabilities were included in the integration program within the twelve-year compulsory education plan'.²⁶²

Turkish legislation recognises the right of students with disabilities to receive the special education support that they need because of their impairments. However, only eight hours of individual special education support or four hours of group special education support monthly is covered financially by the state. This means one or two hours of special education support per week. This support education is provided at private rehabilitation centres for students enrolled in mainstream schools. Students who need more hours of special education support have to cover the costs themselves. However, there is a scarcity of special education institutions. On 5 May 2012, in response to a parliamentary question, the Ministry of National Education stated that there are 667 special education institutions within the mandate of the Ministry, 38 of which are fully physically accessible for students with disabilities.²⁶³ The fact that a mere 5.7 % of educational institutions that have been specially established for students with disability

²⁵⁷ Ministry of National Education, National Education Statistics: Formal Education (*Milli Eğitim İstatistikleri: Örgün Eğitim*) (2017-18), p. 40, available at: http://sgb.meb.gov.tr/meb_iys_dosyalar/2018_09/06123056_meb_istatistikleri_orgun_egitim_2017_2018.pdf.

²⁵⁸ Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye'de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu* (*The Status of Integrated Education in Turkey*), p. 26, available at: http://www.egitimreformugirisimi.org/wp-content/uploads/2017/03/Turkiyede_Kaynastirma_Butunlestirme_Yoluyla_Egitimin_Durumu.pdf.

²⁵⁹ European Commission (2016), *Turkey 2016 Report*, Brussels, 9 November 2016, p. 76, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_turkey.pdf.

²⁶⁰ Office of the UN High Commissioner for Human Rights (2014), *Compilation prepared in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Turkey*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review 21st session: 19-30 January 2015, p. 13.

²⁶¹ Office of the UN High Commissioner for Human Rights (2014), *Compilation prepared in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Turkey*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review 21st session: 19-30 January 2015, p. 13.

²⁶² Turkey (2014), *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review 21st session: 19-30 January 2015, p. 14, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/194/36/PDF/G1419436.pdf?OpenElement>.

²⁶³ Sabancı University (2013), *Engelsiz Türkiye için: Yolun Neresindeyiz? Mevcut Durum ve Öneriler* (*Towards a Barrier-Free Turkey: Where do we Stand? The Status Quo and Proposals*), p. 186, available at: https://gazetesu.sabanciuniv.edu/sites/gazetesu.sabanciuniv.edu/files/2013/13019_sabanci_rapor_tr.pdf.

are accessible to those students speaks volumes about the state's deliberate neglect of persons with disabilities and the absence of comprehensive planning and coherence in Government policies.

An additional problem is the under-representation of girls among the population of students with disabilities.²⁶⁴ Of the 353 610 students with disabilities enrolled in integrated or special education institutions in the academic year 2017-2018, the number of female students was 128 882.²⁶⁵ The large difference between these figures shows not only that female children with disabilities are lagging behind male children, but also that the state is failing in the realisation of compulsory education for all. Furthermore, there is a downward trend in the number of girls with disabilities registered in schools.

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

Article 15 of the Law on Persons with Disabilities, adopted in 2005, made a commitment to the development of Turkish Official Sign Language. However, it took the Government over a decade to take steps in this direction. In June 2015, the Ministry of National Education prepared and published 10 000 copies of the *Turkish Sign Language Dictionary*.²⁶⁶ In August 2015, the Ministry of National Education published the curriculum for the use of Turkish Official Sign Language for the first year of primary education in special schools for pupils with hearing disabilities. The curriculum was first applied during the academic year 2015-2016.²⁶⁷ In August 2016, the Ministry also published the curriculum for the second and third years.²⁶⁸ In November 2016, the Ministry of National Education published a book for the teaching of Turkish Official Sign Language in the first grades of elementary schools that provide education in sign language. The book was first used in the academic year 2016-2017. The Ministry announced that work was in progress on educational material for use in the second and third years of primary education.²⁶⁹

Under the current system, the acquisition of the ability to use sign language takes at least 10 years.²⁷⁰ At the level of higher education, as of the academic year 2013-2014, sign language has been included among the elective courses offered at public universities. In the academic year 2014-2015, it was included in the mandatory curriculum for university training for teaching those with hearing disability.

While the UN estimates the number of deaf people in Turkey to be 2.5 million, in 1998 the Turkish Ministry of National Education reported that the number was 400 000, of which 120 000 were reportedly children.²⁷¹ The current official schooling data from the Ministry indicate the extremely low level of schooling for deaf children. In the academic

²⁶⁴ No data exist on the proportion of ethnic or religious minority students among the students with disabilities receiving education. As part of its general policy, the Turkish state does not collect data on minorities.

²⁶⁵ Turkey, Ministry of National Education, *National Education Statistics: Formal Education (Milli Eğitim İstatistikleri: Örgün Eğitim)* (2017-18), p. 40, available at: http://sqb.meb.gov.tr/meb_iys_dosyalar/2018_09/06123056_meb_istatistikleri_organ_egitim_2017_2018.pdf.

²⁶⁶ See: <http://www.meb.gov.tr/isitme-engelli-ogrenciler-icin-turk-isaret-dili-sozluugu/haber/9056/tr>.

²⁶⁷ See: <http://www.meb.gov.tr/turk-isaret-dili-dersi-ogretim-programi-yayimlandi/haber/9347/tr>.

²⁶⁸ See: <http://meb.gov.tr/isitme-engelli-ogrencilere-turk-isaret-dili-dersi/haber/11663/tr>.

²⁶⁹ See: <http://www.meb.gov.tr/turk-isaret-dili-ogretim-materyali-kitabi-tanitildi/haber/12244/tr>.

²⁷⁰ Şenyurt Akdağ, A., Tanay, G., Özgül, H., Kelleci Birer, L., Kara, Ö. (2011), *Türkiye'de Engellilik Temelinde Ayrımcılığın İzlenmesi Raporu: 1 Ocak-30 Haziran 2010 (Monitoring Report on Discrimination on Grounds of Disability in Turkey: 1 January-30 June 2010)*, İstanbul Bilgi Üniversitesi, February 2011, p. 32.

²⁷¹ Turkish Sign Language, prepared as part of Dr Asli Ozyurek's research project, information previously available at: <http://turkisaret dili.ku.edu.tr/en/tid.aspx> (website no longer online).

year 2017-2018, the total number of deaf children in primary and secondary schools was 3 753.²⁷²

Persons with disabilities who, for various reasons, did not attend school, or persons who became disabled beyond school age, have very limited education and rehabilitation opportunities. Public training centres under the Ministry of National Education provide vocational courses for persons with disabilities. However, instead of mainstreaming these courses, specific courses are organised for persons with disabilities in limited areas. Persons with disabilities are not therefore free to choose the area in which they want to receive vocational training; instead they have to choose from a limited range of options. In addition, literacy courses are opened every year in July and August for illiterate adults with hearing or visual disabilities. Nonetheless, these courses are insufficient to meet the educational needs of adults with disabilities, as is evident from the fact that a total of only 509 persons with disabilities attended them during the period 2003-2010.²⁷³ The ECtHR's 2016²⁷⁴ and 2018²⁷⁵ rulings, which found that Turkey's failure to provide reasonable accommodation to a young woman with visual disability and to a university student with physical disability violated the prohibition on discrimination under Article 14 together with the right to education under Article 2 of Protocol 1, did not lead to a change in practice.

b) Trends and patterns regarding Roma pupils

In Turkey, there are specific trends and patterns (whether legal or societal) in education regarding Roma pupils, such as segregation.

National legislation prohibits segregation. Article 4(1)(a) of the Law on the Human Rights and Equality Institution of Turkey lists segregation among the enumerated prohibited grounds of discrimination.

The greatest hurdle to access to education for the Roma is poverty. Due to their dire socio-economic conditions, exacerbated by the forced displacement generated by urban transformation projects in Roma neighbourhoods (see Section 3.2.10), Roma families are unable to meet the minimum education needs of their children. Textbooks and other course materials, school uniforms and clothing are prohibitively expensive for Roma families, leading to low levels of school attendance and high drop-out rates. According to research conducted among Roma communities, high school is the highest level of schooling attained. Roma children face exclusion and widespread discrimination from their teachers and classmates, and are seated separately from other children, often at the back of the classroom. Roma parents who file complaints with school administrators do not receive replies. Parents of non-Roma students often transfer their children to other schools, which results in de facto segregation. There have been reports of collective resignations by teachers from schools where Roma have become the majority of the student population as a result of the 'white flight' of other students. Some families displaced as a result of the demolition of their houses in gentrified neighbourhoods have reportedly been unable to enrol their children at schools on the ground that they no longer resided in these neighbourhoods.²⁷⁶ In the European Commission's 2014 *Turkey*

²⁷² Ministry of National Education, *National Education Statistics: Formal Education (Milli Eğitim İstatistikleri: Örgün Eğitim)* (2017-18), p. 40, available at: http://sqb.meb.gov.tr/meb_iys_dosyalar/2018_09/06123056_meb_istatistikleri_orgun_egitim_2017_2018.pdf.

²⁷³ Turkey, *Initial Report on the Convention on the Rights of Persons with Disabilities based on Article 35 of the Convention*, 3 August 2015, p. 32, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en.

²⁷⁴ *Çam v Turkey*, No. 51500/08, 23 February 2016.

²⁷⁵ *Enver Sahin v Turkey*, No. 23065/12, 30 January 2018.

²⁷⁶ Özmen, K. (2006), 'Evsiz Kalan Roman Çocuklar Okula da Alınmıyor' ('Displaced Roma pupils are now denied enrolment in school'), *Bianet*, 20 September 2006, available at: <http://m.bianet.org/biamag/bianet/85495-evsiz-kalan-roman-cocuklar-okula-da-alinmiyor>.

Progress Report on Turkey's progress towards EU accession, it reported high school drop-out levels, absenteeism and child labour among Roma children.²⁷⁷ There is no publicly available information on the Roma school-age population. In its *Turkey 2016 Report*, the European Commission noted that absenteeism among Roma school pupils 'remained high, including in compulsory primary education'.²⁷⁸

There have been Government initiatives at national and local level to meet the educational needs of Roma children. For example, in the province of Edirne, which has a significant Roma population, the British Council and the Ministry of National Education and its provincial representation cooperated during the 2005-2006 school year on a project which sought to improve the situation of Roma children.²⁷⁹ However, these positive examples are the exception rather than the rule, as is evident from the fact that the Government's Roma opening initiative has not produced any policy or strategy for enabling equal access to education for the Roma (on the Roma opening, see Section 8.1).

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

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

Article 5(1) and (3) of the Law on the Human Rights and Equality Institution of Turkey prohibits discrimination in access to services and the access to and supply of goods. Under Article 3(2), non-discrimination grounds are limited to race/ethnicity, religion/belief, disability and age. Sexual orientation is excluded.

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

According to Article 73 of the Law on Notaries (No. 1512), transactions and signatures by deaf or blind persons shall be carried out in the presence of two witnesses only if the person with disability requests this. Under Article 15 of the Law of Obligations, blind persons cannot be bound by their signatures unless it is proven that they were informed about the content of the text upon signature, or unless the transaction was properly approved.²⁸⁰

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

²⁷⁷ European Commission (2014), *Turkey Progress Report*, Brussels, October 2014, p. 62, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf.

²⁷⁸ European Commission (2016), *Turkey 2016 Report*, Brussels, 9 November 2016, p. 77, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_turkey.pdf.

²⁷⁹ Edirne Roma Association, European Roma Rights Centre, the Helsinki Citizens' Assembly (Edirne Roman Derneği, European Roma Rights Centre, Helsinki Yurttaşlar Derneği) (2008), *We are Here! Discriminatory Exclusion and Struggle for Rights of Roma in Turkey (Biz Buradayız! Türkiye'de Romanlar, Ayrımcı Uygulamalar ve Hak Mücadelesi)*, Istanbul, pp. 92-95, available at: <http://www.hyd.org.tr/tr/yayinlar/30-biz-buradayiz-turkiye-de-romanlar>.

²⁸⁰ Turkey, Law of Obligations (*Türk Borçlar Kanunu*), 11 January 2011. The law entered into force on 1 July 2012.

capacity of the person, a health report might be required. However, there is no legal basis for this. The practice is based on a general order issued by the General Directorate of Land Registry and Cadastre.²⁸¹

a) Distinction between goods and services available publicly or privately

National law does not distinguish between goods and services that are available to the public (e.g. in shops, restaurants, banks) and those that are only available privately (e.g. limited to members of a private association).

Article 122 of the Turkish Penal Code prohibits 'hatred' in the execution of a service, without making a distinction between public and private services. With regard to goods, Article 122 refers only to foodstuffs.

Article 7 of the Law on Civil Servants prohibits discrimination by civil servants in the conduct of their duties. Thus, the prohibition of discrimination in the provision of public services is implicitly covered by this provision.

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

In Turkey, national legislation prohibits discrimination in the area of housing as formulated in the Racial Equality Directive.

Article 5(1) of the Law on the Human Rights and Equality Institution of Turkey prohibits discrimination in housing. Under Article 3(2), non-discrimination grounds are limited to race/ethnicity, religion/belief, disability and age. Sexual orientation is excluded. While migrants are not explicitly specified as right-bearers, the law's exceptions clause refers to the conditions imposed on, and the treatment of, non-nationals for the purpose of their entry into and residence in Turkey but not their access to public services, including education (Article 7(g)). By implication, migrants arguably have the right to be protected against discrimination in the field of education.

While the 2013 Law on Foreigners and International Protection provides access to education, social services and employment for migrants and refugees, it does not address the field of housing. Around 90 % of the Syrian refugees in Turkey live outside the camps built by the Government and face dire housing problems. As of December 2017, there are around 3.4 million Syrian refugees living under temporary protection in Turkey, in addition to the pre-registered ones who are not yet under such protection. Of these, only around 228 000 (nearly 6.7 %) live in camps or temporary accommodation centres.²⁸²

Several laws and decrees have an impact on housing: Law on Municipalities (No. 5393); Law on Metropolitan Municipalities (No. 5216); Law on Privatisation Arrangements (No. 4046); Coastal Law (No. 3621); Law on Housing Aid for Employed and Retired Public Servants and Workers (No. 3320); Mass Housing Law (No. 2985); Expropriation Law (No. 2942); Law on Prevention of Slums (No. 775); Decree-Law on the Amendment of Various Provisions in the Law on Prevention of Slums; Urban Renewal Law (No. 5366). However, there is no specific legislation which prohibits discrimination in housing in general.

One major problem regarding housing is the situation of internally displaced persons (IDPs), most of whom are of Kurdish origin and were displaced in the 1990s during the armed conflict between the Turkish military and the PKK. While a Government

²⁸¹ General Directorate of Land Registry and Cadastre (Tapu Kadastro Genel Müdürlüğü), No. 074/148-1568, 14 May 2003.

²⁸² The Ombudsman Institution of the Republic of Turkey (2018), *Syrians in Turkey: Special Report*, pp. 25-27, available at: <https://www.ombudsman.gov.tr/syrians/report.html#p=1>.

programme – the Return to Village and Rehabilitation Project, in force since 1999 – provides aid in kind to IDPs who wish to return to their homes, the assistance is insufficient to enable returnees to rebuild their houses and restart their lives in their villages. There are also other obstacles to their return to the villages, first and foremost the presence of landmines in rural areas; the continuation of the village guards system; the lack of sufficient economic means for living; and the continuation of armed conflict in the Kurdish region.²⁸³ Although a compensation law was enacted in 2004 to provide IDPs with compensation for their pecuniary losses, the substance and implementation of the law has suffered major setbacks such as the slow handling of applications, a high rate of rejections (around 30 % nationwide), low amounts of compensation and a high burden of evidentiary proof.²⁸⁴ Housing problems for Kurds are not limited to their status as internally displaced persons. Except for the predominantly Kurdish towns, cities and neighbourhoods, Kurds face difficulties in finding houses to rent.

Since summer 2015, the problem of forced displacement originating from and affecting the Kurdish region has exacerbated. In an operation which started in July 2015 and continued into 2017, the Turkish military raided densely populated towns with thousands of combat-ready troops, tanks, armoured vehicles and heavy artillery to remove the barricades and trenches that the PKK had built in residential areas. They bombed and razed entire towns without any regard for the presence of civilians trapped in the midst of the operations. From August 2015 onwards, the Government declared over 60 round-the-clock, open-ended curfews in more than 30 towns and neighbourhoods, which lasted for several days, weeks or months, with the stated purpose of combating terrorists and protecting public order and security.²⁸⁵ Around 1.6 million people were locked up without access to food supplies, water, electricity, power and emergency health services during the long winter months. No one, including the sick, the wounded, children and the elderly and disabled, was allowed to leave without authorisation. Breaching the curfew was not only very risky, but also subject to monetary fine and/or criminal sanctions. Domestic and international humanitarian aid workers, human rights observers and parliamentarians were denied access to the curfew zone.

During this period, over 355 000 Kurdish civilians were displaced.²⁸⁶ Satellite imagery documents the wholesale destruction of entire neighbourhoods, which in most cases were razed to the ground by the authorities in the immediate aftermath of security operations to prevent the return of the displaced inhabitants.²⁸⁷ According to the UN, 'based on satellite image analysis, UNOSAT attributes such damage to the use of heavy weapons

²⁸³ Kurban, D., Yüksek, D., Çelik, A. B., Ünal, T., Aker, T. (2007), *Coming to Terms with Forced Migration: Post-Displacement Restitution of Citizenship Rights in Turkey*, available at: <http://tesev.org.tr/wp-content/uploads/2015/11/Coming-To-Terms-With-Forced-Migration-Post-Displacement-Restitution-Of-Citizenship-Rights-In-Turkey.pdf>; Kurdish Human Rights Project, *Submission and List of Issues to be Taken up in Connection with the Consideration of Turkey's Initial Report Concerning the Rights Covered by Articles 1-15 of the International Covenant on Economic, Social and Cultural Rights*, May 2010, available at: http://www2.ohchr.org/english/bodies/cescr/docs/ngos/KurdishHRP_Turkey_44.pdf.

²⁸⁴ For the latest study on the implementation of the law in the province of Van, see Kurban, D., Yeğen, M. (2012), *On the Verge of Justice: The State and the Kurds in the Aftermath of Forced Migration - An Assessment of the Compensation Law no. 5233 – The Case of Van (Adaletin Kiyısında: 'Zorunlu' Göç Sonrasında devlet ve Kürtler/ 5233 Sayılı Tazminat Yasası'nın bir Değerlendirmesi- Van Örneği)*, available at: <http://tesev.org.tr/wp-content/uploads/2015/11/Adaletin-Kiyisinda-Zorunlu-Goc-Sonrasinda-Devlet-Ve-Kurtler-Duzeltimis-2-B-aski.pdf>.

²⁸⁵ Office of the United Nations High Commissioner for Human Rights (2017), *Report on the human rights situation in South-East Turkey: July 2015 to December 2016*, February 2017, pp. 5-7, available at: http://www.ohchr.org/Documents/Countries/TR/OHCHR_South-East_TurkeyReport_10March2017.pdf; Council of Europe, Commissioner for Human Rights (2016), *Memorandum on the Human Rights Implications of anti-Terrorism Operations in South-Eastern Turkey*, CommDH(2016)39, 2 December 2016.

²⁸⁶ Office of the United Nations High Commissioner for Human Rights (2017), *Report on the human rights situation in South-East Turkey: July 2015 to December 2016*, February 2017, pp. 5-7, available at: http://www.ohchr.org/Documents/Countries/TR/OHCHR_South-East_TurkeyReport_10March2017.pdf.

²⁸⁷ Office of the United Nations High Commissioner for Human Rights (2017), *Report on the human rights situation in South-East Turkey: July 2015 to December 2016*, February 2017, p. 10, available at: http://www.ohchr.org/Documents/Countries/TR/OHCHR_South-East_TurkeyReport_10March2017.pdf.

and, possibly, air-dropped munitions.²⁸⁸ The destruction of private property was 'systematic'.²⁸⁹ The authorities not only failed to open a single investigation into any of the allegations; they accused the deceased of being terrorists and engaged in retaliation against their families, charging those demanding accountability with terrorism.²⁹⁰ In March 2016, the Turkish Government adopted a decision to expropriate up to 100 % of the plots of land in the historical Sur district of Diyarbakır province, 'which has been largely populated by citizens of Kurdish origin'.²⁹¹ Residents of the Sur and Diyarbakır municipalities were reportedly never involved in or informed about the plans. The European Commission reported that 'only a small percentage of internally displaced persons have been offered new housing and only limited overall assistance, including compensation, has been made available'.²⁹² Legal cases filed against the expropriation of Sur district have been lost in administrative courts.²⁹³ On 4 September 2016, the Turkish Government announced a reconstruction and economic development plan for the Kurdish region, including USD 21 billion to be spent in areas 'destroyed by the PKK since July 2015'.²⁹⁴

Although the Turkish Government claims that racial discrimination 'by those who rent or sell houses or apartments is alien to Turkish society',²⁹⁵ there is widespread discrimination by private individuals.

Housing is a big problem for LGBTI individuals, especially for transgender persons. Many landowners decline to sell or rent houses to transgender individuals. Consequently, they can rent apartments only in certain areas of big cities, and they often have to pay rent above the market rates. Where they can find housing, they are harassed by other residents of the neighbourhood or by shop owners. In addition, as the areas where transgender individuals live are publicly known, they face physical attacks which are aimed at displacing them.²⁹⁶

Persons with disabilities have difficulties in finding physically accessible houses. If there is a family member with an intellectual or psychosocial disability in their household, it is hard for families to find a house to rent. Even if such families can find a house, it is not exceptional for them to be harassed via continuous complaints to various authorities because of noise, etc.

²⁸⁸ Office of the United Nations High Commissioner for Human Rights (2017), *Report on the human rights situation in South-East Turkey: July 2015 to December 2016*, February 2017, p. 10, available at:

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

²⁸⁹ Office of the United Nations High Commissioner for Human Rights (2017), *Report on the human rights situation in South-East Turkey: July 2015 to December 2016*, February 2017, p. 12, available at:

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

²⁹⁰ Office of the United Nations High Commissioner for Human Rights (2017), *Report on the human rights situation in South-East Turkey: July 2015 to December 2016*, February 2017, p. 8, available at:

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

²⁹¹ Office of the United Nations High Commissioner for Human Rights (2017), *Report on the human rights situation in South-East Turkey: July 2015 to December 2016*, February 2017, p. 12, available at:

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

²⁹² European Commission (2018), *Turkey 2018 Report*, Strasbourg, 17 April 2018, p. 18, available at:

<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-turkey-report.pdf>.

²⁹³ European Commission (2018), *Turkey 2018 Report*, Strasbourg, 17 April 2018, p. 18, available at:

<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-turkey-report.pdf>.

²⁹⁴ Office of the United Nations High Commissioner for Human Rights (2017), *Report on the human rights situation in South-East Turkey: July 2015 to December 2016*, February 2017, p. 13, available at:

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

²⁹⁵ CERD (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, p. 22, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en.

²⁹⁶ Öz, Y., *Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity, Legal Report: Turkey*, Danish Institute for Human Rights, p. 36, available at:

http://www.coe.int/t/commissioner/source/lgbt/turkeylegal_e.pdf.

a) Trends and patterns regarding housing segregation for Roma

In Turkey, there are trends and patterns of housing segregation and discrimination against the Roma.²⁹⁷

The Urban Renewal Law of 2005 had a disparate impact on Roma people, giving impetus to urban transformation projects, most of which resulted in massive destruction and dislocation of Roma neighbourhoods throughout Turkey.²⁹⁸ According to a joint report submitted by the Habitat International Coalition and its national partners for Turkey's universal periodic review by the UN Human Rights Council, the number of Roma displaced due to the Government's urban transformation projects by 2014 was about 10 000.²⁹⁹ In many cases, the displaced Roma had to move to neighbourhoods where rent was several times higher than in their old neighbourhoods or to high-rise buildings constructed by the Housing Development Administration of Turkey (*Toplu Konut İdaresi Başkanlığı* – TOKİ) in neighbourhoods outside city centres, which posed serious problems regarding access to employment. Many families could not afford the increases in their rental payments and had to move out of their new apartments to live with relatives. Homeowners had to sell their houses, but they could not afford to buy houses in other neighbourhoods.

The most high-profile and controversial urban transformation project was carried out in Istanbul's historical Roma neighbourhood of Sulukule. The residents and civil society organisations filed a court case in December 2007, requesting the suspension of the project. Despite appeals from the international community, 'the neighbourhood was razed in 2009 to make way for middle-income housing, its inhabitants displaced far from the centre and some of them compelled into forced nomadism'.³⁰⁰ The demolition of Sulukule and the ensuing resettlement 'caused dislocation and disruption';³⁰¹ unable to afford life in TOKİ houses outside the city centre, all but three of the families returned³⁰² 'to live in much poorer conditions'.³⁰³ The court case ended in June 2012 with a unanimous judgment ordering the revocation of the project. In the meantime, however, the project had nearly reached completion. The mayor of Fatih Municipality declared that they would not abide by the court's judgment, pointing out that 95 % of the construction of houses and shops had been completed.³⁰⁴

On 12 December 2013, Amnesty International issued an urgent action on behalf of around 30 Roma families who were under the threat of forced eviction by municipal authorities to make way for road construction.³⁰⁵ Amnesty called on the authorities to alleviate the living conditions of around 120 people – including 37 children, two of whom

²⁹⁷ Regarding parliamentary discussions in 2015 on the segregation of Roma in housing, see Section 7(h).

²⁹⁸ European Roma Rights Centre and the Edirne Roma Association, *Written Comments Concerning Turkey for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at its 74th Session*, available at: http://www2.ohchr.org/english/bodies/cerd/docs/ngos/ERRC_Turkey_CERD74.pdf.

²⁹⁹ Office of the UN High Commissioner for Human Rights (2014), *Summary prepared in accordance with paragraph 15(c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Turkey*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review 21st session: 19-30 January 2015, p. 9.

³⁰⁰ Council of Europe, Commissioner for Human Rights (2012), *Human rights of Roma and Travellers in Europe*, Strasbourg, February 2012, p. 151, available at: https://www.coe.int/t/commissioner/source/prems/prems79611_GBR_CouvHumanRightsOfRoma_WEB.pdf.

³⁰¹ European Commission (2011), *Turkey 2011 Progress Report*, Brussels, 12 October 2011, p. 40, available at: http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/tr_rapport_2011_en.pdf.

³⁰² Vardar, N. (2011), 'Sulukule Gönüllüleri Romanlara Destek Oluyor' ('Sulukule Volunteers Give a Hand to the Roma'), *Bianet*, 5 May 2011, available at: <http://bianet.org/bianet/toplum/129771-sulukule-gonulluleri-romanlara-destek-oluyor>.

³⁰³ European Commission (2011), *Turkey 2011 Progress Report*, Brussels, 12 October 2011, p. 40, available at: http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/tr_rapport_2011_en.pdf.

³⁰⁴ Vardar, N. (2013), 'Yeni "Sulukule" Yıkılmayacak' ('The New "Sulukule" will not Come Down'), *Bianet*, 19 June 2013, available at: <http://www.bianet.org/bianet/bianet/139176-yeni-sulukule-yikilmayacak>.

³⁰⁵ Amnesty International, urgent action, 'Children, Elderly at Risk of Forced Eviction, Turkey', EUR 44/030/2013, 12 December 2013, available at: <http://ua.amnesty.ch/urgent-actions/2013/12/331-13>.

had disabilities – and prevent their eviction. The group had been living in conditions of extreme poverty since their forced eviction on 19 July 2006 from their homes in the district of Küçükbakkalköy as part of a municipal urban regeneration project. They had been living on vacant land in Pendik since early 2008, without access to electricity, clean water, basic sanitation, health, education and employment. In response to Amnesty’s call for action, the authorities informed the Roma families that they would receive fuel and cash assistance during the winter period. In addition, the mayor of Pendik stated that his municipality did not have any plans for eviction.³⁰⁶ In November 2013, officials from the Ministry of Family and Social Policies visited the site to identify the conditions and needs of the Roma families. The delegation found that the vast majority of the children living at the site did not go to school and half of them were not officially registered. In response to Amnesty’s urgent action, the Ministry of Families and Social Policies stated that it was looking into the case. No further developments on this issue have been reported.

The Roma evictions drew reaction from the UN treaty bodies. In its feedback for the 2014 universal periodic review of Turkey by the UN Human Rights Council, the Committee on Economic, Social and Cultural Rights ‘noted with concern that forced evictions had taken place in Istanbul, without adequate compensation or alternative accommodation’ and emphasised their adverse effects on the schooling of children. The Committee urged the Government to review the legal framework governing urbanisation projects ‘to ensure those affected received adequate compensation and/or relocation’.³⁰⁷ In its 2016 report, the European Commission noted that urban development projects ‘continued to disadvantage the Roma by depriving them of traditional job opportunities and solidarity networks’.³⁰⁸

Hate-driven lynching attempts targeting Roma, Kurds and Alevi deprived them of their houses and living environment and turned them into displaced persons. In all cases, the authorities failed to act effectively and promptly to protect the victims who, in most cases, were asked to leave the district or province ‘for their own safety’. One such attack took place on 5 January 2010, when a crowd of more than 1 000 locals in the district of Selendi, in the province of Manisa, attacked Roma residents. The crowd threw stones at, and set fire to, the houses of Roma families and set cars on fire, causing panic and disorder. Slogans such as ‘Get the Gypsies out’ were chanted in the streets. The local police could not control the situation and sought reinforcements. The pretext for the attack was a fight between a Roma man and the owner of a coffee house on 31 September 2009 over the former’s refusal to abide by the smoking ban. However, it became clear after the incidents that the attack was planned and systematic, and was the outcome of long-term tensions between the Roma and other residents of Selendi. Instead of providing the Roma families with protection, the Governor of Manisa forcibly relocated the victims to the district of Gördes, and subsequently to the district of Salihli, on the ground that the local authorities would not be able to ensure their security in Selendi. The displaced Roma continue to live in exile in Salihli. Having lost their houses, furniture, businesses and savings, they live in economic hardship.

After some delay, a criminal case was launched against the perpetrators. On 23 December 2015, five years after the first hearing was held on 16 December 2010, the court delivered its judgment, which was published on 9 May 2016.³⁰⁹ The court held that

³⁰⁶ Amnesty International, urgent action, ‘Roma Families to Receive Winter Aid,’ 18 December 2013, available at: <https://www.amnesty.org/en/documents/EUR44/032/2013/en/>.

³⁰⁷ Office of the UN High Commissioner for Human Rights (2014), *Compilation prepared in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Turkey*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review 21st session: 19-30 January 2015, p. 12.

³⁰⁸ European Commission (2016), *Turkey 2016 Report*, Brussels, 9 November 2016, p. 77, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_turkey.pdf.

³⁰⁹ Saymaz, I. (2016), ‘Selendi Kararı: Saldırı, Romanlara karşı Birlik içinde Yapıldı’ (‘The Selendi Verdict: this was an organised attack against the Roma’), *Hürriyet*, 9 May 2016.

the defendants were part of a concerted action of around 150 individuals who had raided the Roma neighbourhood with stones, bats and rifles, thrown a Molotov cocktail and tried to burn houses, tents and cars belonging to the Roma. Some of the defendants openly incited the public to hatred and enmity by chanting slogans such as, 'They will leave here or else we will do what is necessary'; 'Selendi is ours and will remain so'; 'The Gypsies are insulting our mosques, religions, wives and daughters'; 'We do not want them here'; 'Let's kill them, let's burn their houses'; 'These are Gypsies, let's teach them a lesson'; and 'We have had enough of the Roma, who are stealing and harassing us.' The court found that the defendants had also attacked the law enforcement officers who tried to prevent them from burning down houses and offices belonging to the Roma. The court convicted 38 of the 80 defendants for incitement to enmity or hatred and denigration under Article 216 of the Turkish Penal Code, and for property damage under Articles 151 and 152. It sentenced them to terms of imprisonment of between eight months and 45 years, using its discretion to impose terms at the upper limits of available sentences.³¹⁰ The rest of the defendants were acquitted. The defendants appealed to the Court of Cassation, which had not issued its ruling as of the end of 2018. Pending a decision, the judgment is not final.

That was the first time that a Turkish Court had convicted perpetrators of hate crimes under Article 216 of the Turkish Penal Code, which had so far been used to protect individuals engaged in hate speech or acts against minorities rather than victims who had been subjected to such crimes.

The Roma face discrimination in access to housing. Private individuals are reported to refuse housing to Roma individuals on the basis of their identity.³¹¹

³¹⁰ Information received from the victims' lawyer Necati Özmedir, 19 January 2016.

³¹¹ European Roma Rights Centre and the Edirne Roma Association, *Written Comments Concerning Turkey for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at its 74th Session*, p. 18, available at: http://www2.ohchr.org/english/bodies/cerd/docs/ngos/ERRC_Turkey_CERD74.pdf.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In Turkey, national legislation provides for an exception for genuine and determining occupational requirements.

Article 7(1)(a) of the Law on the Human Rights and Equality Institution of Turkey provides that 'any differential treatment which is appropriate and proportional to the aim where inherent professional requirements exist with respect to employment and self-employment' shall not be deemed discrimination. In 2016, this provision was contested by the main Opposition, the Republican People's Party, in the Constitutional Court. Arguing that the provision violated Article 2 of the Constitution (on the rule of law), the applicant asked the Constitutional Court to annul Article 7(1)(a) and to issue an injunction prohibiting its execution.

In a majority ruling issued on 15 November 2017, the Constitutional Court rejected these requests.³¹² According to the Constitutional Court, it is not possible for the lawmaker to positively identify each and every inherent requirement for each professional activity, and in implementing the law, such requirements will need to be assessed on an individual basis. More generally, the Constitutional Court considered 'special skills, physical qualities, graduation from certain schools, acquisition of certain documents and information' as examples of inherent professional requirements that would justify differential treatment.³¹³ In his dissenting opinion, Judge Ergun Yildirim said that 'inherent professional requirements' and 'differential treatment which is appropriate and proportional to the aim' were uncertain and vague and would enable employers to engage in discrimination by arbitrarily indicating anything as an inherent occupational requirement. The second dissenting judge (Osman Paksut) said that the Human Rights and Equality Institution of Turkey, which is tasked with implementing the anti-discrimination legislation, lacked the expertise both to implement the Law and to determine what constitutes 'inherent professional requirement' and 'appropriate and proportional to the aim'. According to Paksut, the law granted the Institution an open-ended discretionary power that could be exercised arbitrarily. The dissenting judges found that Article 7(1)(a) lacks legal certainty and foreseeability in violation of Article 2 of the Constitution.

While they do not provide exceptions for genuine and determining occupational requirements, there are several relevant provisions in various laws. Article 30(4) of the revised Labour Law stipulates that persons with disabilities cannot be employed in underground and underwater work. According to Article 71 of the Labour Law, children under the age of 15 cannot be employed. However, children who have reached the age of 14 and have completed their primary education may be employed in light work that will not hinder their physical, mental and moral development and, for those who are continuing their education, in jobs that will not prevent their school attendance. Persons between the ages of 15 and 18 can be employed only in certain jobs identified in the law.

In a 2017 ruling, the Constitutional Court did not explicitly state that heterosexuality is an occupational requirement for teaching. However, its failure to find that there had been discrimination in the dismissal of an elementary school teacher on the basis of his sexual orientation could be interpreted as effectively saying just that.³¹⁴

³¹² Constitutional Court, judgment E. 2016/132, K. 2017/154, 15 November 2017.

³¹³ Constitutional Court, judgment E. 2016/132, K. 2017/154, 15 November 2017, para. 15.

³¹⁴ Constitutional Court, application No. 2013/2928, 18 October 2017.

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

In Turkey, national law provides for an exception for employers with an ethos based on religion or belief.

Article 7(1)(d) of the Law on the Human Rights and Equality Institution of Turkey provides for an exception for institutions that provide services, education or teaching in a particular religion, allowing exclusive admission to such institutions to members of the religion concerned. No similar ethos-based exemption is provided for associations working for the preservation of environmental, historical and cultural heritage. The exemption in the law is limited to admission to religious institutions and is therefore narrower than Article 4(2) of the Employment Equality Directive 2000/78/EC. At the same time, however, there is nothing in the law that alludes to whether this exception may not amount to discrimination on another ground.

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

In Turkey, national legislation provides for an exception for the armed forces in relation to health problems, which implicitly includes persons with disabilities (Article 3(4), Employment Equality Directive 2000/78/EC). While numerous laws stipulate age limits, it is not possible, given that age discrimination is not prohibited explicitly in the legislation, to say that limitations constitute exceptions.

The Turkish Armed Forces Regulation applies to military students, all civil and military personnel of the Turkish Armed Forces and all persons who are under an obligation to serve in the military.³¹⁵ Decisions regarding these persons depend on the health board reports issued by the Gülhane Military Medical Academy.³¹⁶ Health board reports are based on the Regulation on the Criteria and Classification of Disability and Health Board Reports to be given to the Disabled.

General and special laws regarding employment in the public sector contain age restrictions: however, these are not limited to the armed forces. The Law on the Personnel of the Turkish Armed Forces (No. 926) of 10 August 1967; the Law on Commissioned and Non-commissioned Officers to be Recruited under Contracts (No. 4678) of 21 June 2001; and the Law on Expert Gendarmerie (No. 3466) of 4 June 1988 provide upper age limits.

There are maximum age limits for many professions, including the police, prison and emergency services. According to Additional Article 24 of the Law on Police Organisation (No. 3201), the maximum age limit for recruitment is 27 years. According to Article 29 of the Regulation on the Establishment, Duties and Functioning of Staff Training Centres for Prison and Detention Centres,³¹⁷ in order to be accepted as a candidate student for becoming a prison or detention centre guard, the candidate should not be younger than 18 years of age or older than 30 years of age.

Various laws and regulations pertaining to the armed forces have discriminatory provisions in relation to LGBTI individuals. A 2013 law³¹⁸ explicitly enumerates

³¹⁵ Military service is obligatory in Turkey.

³¹⁶ Turkey, Regulation on Health Capability of the Turkish Armed Forces (*Türk Silahlı Kuvvetleri Sağlık Yeteneği Yönetmeliği*), *Official Gazette*, 24 November 1986.

³¹⁷ Turkey, Regulation on the Establishment, Duties and Functioning of Staff Training Centres for Prison and Detention Centres (*Ceza İnfaz Kurumları ve Tutukevleri Personeli Eğitim Merkezleri Kuruluş, Görev ve Çalışma Yönetmeliği*), *Official Gazette*, 4 May 2004.

³¹⁸ Turkey, Turkish Armed Forces Discipline Law, 31 January 2013.

homosexuality among the violations of disciplinary rules which require immediate dismissal from the Turkish Armed Forces (see Section 2.1.1).

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In Turkey, national law includes exceptions relating to difference of treatment based on nationality. Article 7(1)(g) of the Law on the Human Rights and Equality Institution of Turkey provides for an exception for differential treatment arising from the legal status and conditions for entry into Turkey and residence for non-nationals.

Article 16 of the Turkish Constitution stipulates that the fundamental rights and freedoms of foreigners can be limited only in accordance with international law. With the exception of political rights and the right to enter public service, the fundamental rights and freedoms set forth in the Constitution do not envisage any distinction between citizens and foreigners. In addition, certain professions are restricted to Turkish citizens. Foreigners are not allowed to work as: lawyers, public notaries, security guards, customs brokers, nurses, dentists, midwives, veterinarians, pharmacists and directors in private hospitals. They are also not allowed to fish in Turkey's continental waters.³¹⁹

In Turkey, nationality (as in citizenship) is explicitly mentioned as a protected ground, although not in national anti-discrimination law.

Article 3(2) of the Turkish Penal Code prohibits discrimination based on nationality. Revisions made in 2014 in Article 122 of the same Law added nationality to the grounds on which 'hatred and discrimination' are prohibited. The Law prohibits the prevention of the sale, transfer or rental of goods offered for public use; access to public services; recruitment; and the exercise of a regular economic activity, with a hate motive based on – among other grounds – nationality. Article 8(e) of the Law on the Foundation and Broadcasting of Radio and Television Channels prohibits broadcasts that discriminate on the basis of nationality. Article 2(1) of the Law on the Execution of Penalties and Security Measures prohibits discrimination based on nationality. However, the material scope of these prohibitions is limited to areas where the relevant laws are applicable.

b) Relationship between nationality and 'racial or ethnic origin'

There are discriminatory references to race in various laws and regulations. Under Article 3 of the Settlement Law (No. 5543), only individuals 'from the Turkish race and belonging to the Turkish culture' are admitted to Turkey as migrants. An executive regulation dated 23 February 2009 exempts 'foreigners of Turkish race' who live in Turkey from the requirement to obtain work permits and allows them to become members of professional organisations. The case brought by the Chamber of Architects and Engineers of Turkey for the annulment of this exemption was rejected by the Council of State.³²⁰

Similarly, favourable treatment exists in a regulation which exempts foreign students and trainees of Turkish descent from payment for tuition in private education institutions and provides them with scholarships.³²¹

³¹⁹ CERD (2017), *Concluding Observations on the Combined fourth to sixth periodic reports of Turkey Addendum: Information Received from Turkey on Follow-up to the Concluding Observations*, CERD/C/TUR/CO/4-6/Add.1, 9 February 2017, p. 24, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CERD%2fC%2fTUR%2fCO%2f4-6%2fAdd.1&Lang=en.

³²⁰ 10th Circuit of the Council of State, judgment K. 2009/9270.

³²¹ Turkey, Regulation on Graduate Education and Exams at Kafkas University (*Kafkas Üniversitesi Lisansüstü Eğitim-Öğretim ve Sınav Yönetmeliği*), *Official Gazette*, 9 February 2009, Article 4(1)(g).

These favourable treatments seek to favour individuals of Turkish race/ethnicity, irrespective of their nationality. Turkish laws do not contain definitions of race and ethnicity or differentiation between the two.

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

a) Benefits for married employees

In Turkey, it does not constitute unlawful discrimination in national law if an employer provides benefits only to those employees who are married. Turkey recognises marriage only between two persons of the opposite sex.

Article 5 of the Labour Law provides open-ended protection against discrimination. While marital status is not listed among the enumerated grounds in the provision, the non-exhaustive nature of the list suggests that employers are also prohibited from discriminating against their employees on the basis of their marital status. In practice, national courts interpret this article in such a way that they do not deem all kinds of differential treatment among employees based on their marital status to constitute discrimination. Rather, courts apply an arbitrariness test to determine whether such differential treatment is discriminatory. For example, where employers provide benefits (such as an annual one-salary bonus) exclusively to married employees whose spouses are unemployed (and do not provide the same benefit to single employees or married employees whose spouses are employed), this is not interpreted as constituting discrimination. Under Turkish law, while marriage is a legal status defined under civil law, in practice courts also recognise 'living together' as a lifestyle and grant rights to heterosexual couples who live together, including those who have been married in a religious ceremony but have not undergone a civil marriage. Thus, employers who provide exclusive benefits to married employees with unemployed spouses are also required to extend these benefits to unmarried employees whose partners are unemployed, so long as the latter submit proof (such as a document of residence) that they live together with their spouses. The employer's failure to do so would constitute an arbitrary distinction that is not justified on objective grounds. Where the employer acts out of moral, religious, or philosophical convictions and categorically excludes all unmarried or divorced employees from benefits provided to married employees, courts find this to be discriminatory.³²²

b) Benefits for employees with opposite-sex partners

It constitutes unlawful discrimination in national law if an employer provides benefits only to those employees with opposite-sex partners. Article 5 of the Labour Law provides for open-ended protection against discrimination. While sexual orientation is not listed among the enumerated grounds in the provision, the non-exhaustive nature of the list suggests that employers are also prohibited from discriminating between their unmarried homosexual and heterosexual employees. Therefore, in theory, an employment practice of this kind would constitute discrimination. However, there is no case law on the issue.

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

In Turkey, there are no exceptions in relation to disability and health and safety as allowed under Article 7(2) of the Employment Equality Directive.

However, there are certain restrictions regarding persons with disabilities which might be considered as exceptions in relation to health and safety. One of the most controversial restrictions was contained in Article 53(b)(4) of the Road Traffic Regulation, which

³²² Opinion expressed through email by Mehmet Uçum, a leading human rights lawyer specialising in employment law.

required a special sign on the registration plates of cars used by persons with disabilities. This provision was unsuccessfully challenged in 2009 before the Council of State by an applicant with disabilities.³²³ In September 2011, Article 53 was revised and the requirement for persons with disabilities to have a special sign on their registration plates was removed for new plates issued after the entry into force of the revised regulation on 9 September 2011.³²⁴

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

4.7.1 Direct discrimination

In Turkey, national law provides for specific exceptions for direct discrimination on the ground of age.

Article 7(1)(c) of the Law on the Human Rights and Equality Institution of Turkey provides that any distinction based on age in recruitment and employment processes shall not be deemed to be discrimination when the treatment is appropriate and necessary for the inherent requirements of a job. Article 3(2) of the same law prohibits discrimination on the basis of age.

a) Justification of direct discrimination on the ground of age

In Turkey, national law does not provide for justifications for direct discrimination on the ground of age.

b) Permitted differences of treatment based on age

In Turkey, national law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78/EC.

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

A Government policy initiated in 2002 with the support of the World Bank provides conditional child grants to lower-income families who do not have any social security coverage. Known as 'conditional cash transfer', the programme provides monthly stipends per child, for children of both pre-school and school age. Payment is conditional on school enrolment for school-age children and on regular health checks for pre-school children. The amounts vary, based on the gender of the child (more for girls than boys) and the level of schooling (more for secondary than elementary school).³²⁵ The policy, which started as a pilot programme in six provinces, began to be implemented across the country in 2005.

c) Fixing of ages for admission or entitlement to benefits of occupational pension schemes

National law allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by Article 6(2).

³²³ 8th Circuit of the Council of State, judgment E. 2007/4208, K. 2009/795, 17 March 2009.

³²⁴ Turkey, Regulation on the Amendment of the Regulation on Traffic on Highways (*Karayolları Trafik Yönetmeliğinde Değişiklik Yapılmasına Dair Yönetmelik*), *Official Gazette*, 9 September 2011.

³²⁵ On average, the payments are TRY 30 (EUR 4.83) per child, per month.

There are two mandatory occupational schemes: for the armed forces, there is the Turkish Army Members Solidarity Fund (Ordu Yardımlaşma Kurumu – OYAK), and for employees of the state-owned coal-mining enterprise, there is the Labour Union (Amele Birliği). In addition, voluntary occupational schemes have been established by numerous private sector corporations.³²⁶ In 2014, there were news reports about Government preparatory work to introduce an OYAK-inspired occupational pension scheme for retirees from specific sectors, such as steel and automobile manufacturing, which are regarded as sectors with difficult working conditions.³²⁷ There is no public information about the preparatory work done in this regard, nor have there been any further developments.

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

In Turkey, there are special conditions set by law for older and younger workers in order to promote their vocational integration (see Section 3.2.4), and for persons with caring responsibilities to ensure their protection (see Section 5b).

Article 13/1(d) of a 2006 regulation regarding persons with disabilities who are in need of care stipulates that relatives/guardians who assume caring responsibilities for persons with disabilities shall be paid a minimum wage by the state.³²⁸ However, according to Turkey's report to the relevant UN committee, individuals who provide home-based care for persons with disabilities are paid a monthly salary of three fourths of the minimum wage.³²⁹ By October 2018, around 500 000 caretakers for persons with disabilities had received such wages.³³⁰ Families who provide home-based care for their children with a minimum disability level of 40 % are also paid a monthly salary of three fourths of the minimum wage. By October 2018, 117 000 persons had benefited from this programme.³³¹ While home-carers 'have become a major component of Turkey's care system, (...) they lack professional training and incentives to pay social security premiums.'³³² No special conditions exist for carers who are employed.

Civil servants can be appointed to places of employment anywhere in Turkey. However, if there is a person with disability within the family who is in need of special education or rehabilitation, the civil servant has to be appointed to a place where such special education and rehabilitation services exist.

³²⁶ Organisation for Economic Co-operation and Development (OECD) (2009), *Private Pensions Outlook 2008 – Pension Country Profile: Turkey*, pp. 289-290, available at: <http://www.oecd.org/finance/private-pensions/42575085.pdf>.

³²⁷ Boyacıoğlu, H. (2014), 'OYAK modeli mesleki emeklilik' ('OYAK-style occupational pension'), *Hürriyet*, 3 September 2014, available at: <http://www.hurriyet.com.tr/oyak-modeli-mesleki-emeklilik-27128112>.

³²⁸ Turkey, Regulation on the Identification of Persons with Disabilities who are in Need of Care and on the Determination of the Needs for Care Services (*Bakıma Muhtaç Özürlülerin Tesbiti ve Bakım Hizmeti Esaslarının Belirlenmesine İlişkin Yönetmelik*), *Official Gazette*, 30 July 2006.

³²⁹ CRPD, *List of issues in relation to the initial report of Turkey – Addendum: Replies of Turkey to the list of issues*, 21 January 2019, p. 22, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2fO%2f1%2fAdd.1&Lang=en.

³³⁰ CRPD, *List of issues in relation to the initial report of Turkey – Addendum: Replies of Turkey to the list of issues*, 21 January 2019, p. 22, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2fO%2f1%2fAdd.1&Lang=en.

³³¹ CRPD, *List of issues in relation to the initial report of Turkey – Addendum: Replies of Turkey to the list of issues*, 21 January 2019, p. 7, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2fO%2f1%2fAdd.1&Lang=en.

³³² European Commission (2016), *Turkey 2016 Report*, Brussels, 9 November 2016, p. 60, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_turkey.pdf.

4.7.3 Minimum and maximum age requirements

There are exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training.

According to Article 71 of the Labour Law, the minimum working age is 16 years. However, this applies only to the private sector.

According to Article 4(1)(b) of the Regulation on the conditions and procedure regarding recruitment of workers in public institutions, applicants should not be below the age of 18.³³³

There are general and special laws regarding employment in the public sector and different requirements are laid down with regard to age limits. According to Additional Article 3 of the Regulation on the examinations organised for those to be appointed to public offices for the first time,³³⁴ unless it is explicitly laid down by special provisions in laws, by-laws and regulations, public institutions cannot require an age limit for those who are to be placed through central examinations. According to Article 48 of the Law on Civil Servants, in order to be recruited as a civil servant, a person should not be below the age of 18. The Regulation on the examinations organised for those to be appointed to public offices for the first time also refers to Article 48 of the Law on Civil Servants regarding recruitment conditions, including the minimum age limit of 18. There are numerous special laws which stipulate minimum and/or maximum age requirements. For example, according to Article 8 of the Law on Judges and Prosecutors, the maximum age for entry to those professions is 35 years.

Age limits also apply to training. The Law on the Personnel of the Turkish Armed Forces; the Law on Commissioned and Non-commissioned Officers to be Recruited under Contracts; and the Law on Expert Gendarmerie provide various upper age limits. For example, the upper age limit for recruitment as a pilot is 32.

4.7.4 Retirement

a) State pension age

In Turkey, there is a state pension age, at which individuals must begin to collect their state pensions. The pension age is stipulated in the Law on Social Insurance and Universal Health Insurance Law, adopted on 31 May 2006. Those who became insurance holders after the adoption of the Law shall retire at the age of 58 years (women) and 60 years (men). According to Article 28 of this Law, the state pension age will increase gradually and will reach 65 years for both men and women, for the former from 2044 onwards and for the latter from 2048 onwards.

If a person wishes to work for longer, the pension cannot be deferred.

An individual can collect a pension and still work. However, a special premium has to be paid. The premium to be paid varies depending on the date of entry into the work force, the type of retirement pension and the type of occupation. The law in this area is in constant flux.³³⁵

³³³ Turkey, Regulation on the Conditions and Procedure Regarding Recruitment of Workers in Public Institutions (*Kamu Kurum ve Kuruluşlarına İşçi Alınmasında Uygulanacak Usul ve Esaslar Hakkında Yönetmelik*), *Official Gazette*, 9 August 2009.

³³⁴ As amended in 2006. The original Regulation was published in the *Official Gazette* on 3 May 2002. The Regulation was amended many times. The amendment regarding 'age limits' was published in the *Official Gazette* on 4 March 2006.

³³⁵ In 2017, changes were introduced to the state pension system whereby individuals who worked under a service contract in the private sector or public sector and who continue to work after retirement have to pay

Persons with disabilities have the right to retire earlier than other persons. Those who are 60 % - 100 % disabled can retire after 15 years of work, if they have paid premiums for 3 600 days. Those who are 50 % - 59 % disabled can retire after 18 years of work if they have paid premiums for 4 000 days. Those who are 40 % - 49 % disabled can retire after 20 years of work, if they have paid premiums for 4 400 days. Persons with disabilities who run their own businesses and mothers of children with disabilities who are in need of special care can also retire early.

b) Occupational pension schemes

In Turkey, there are no occupational pension schemes, with the exception of the mandatory occupational schemes for the armed forces and the mining industry. Under the OYAK mandatory occupational pension scheme, since 1961 the armed forces have paid a supplementary pension to retired members in addition to the state pension they receive. Armed forces members who have made monthly contributions to the pension scheme for at least 10 years are eligible for this supplementary pension. Recipients can no longer work in the Armed Forces; this does not preclude their employment elsewhere.

c) State imposed mandatory retirement ages

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

d) Retirement ages imposed by employers

In Turkey, national law permits employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and/or collective bargaining and/or unilaterally. If there is agreement between an employee and an employer, the employee can continue working beyond state pension age.

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, even if they remain in employment after attaining pensionable age or any other age.

f) Compliance of national law with CJEU case law

In Turkey, national legislation seems to lag behind the CJEU case law on age regarding mandatory retirement, which imposes an objective justification test for the introduction of mandatory retirement ages.

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

National law permits age or seniority to be taken into account in selecting workers for redundancy.

One of the most well-established principles of the Labour Law is that, in the selection of workers for redundancy, the employer should take into account the period for which the

a premium amounting to 32 % of their new salaries. Individuals who were self-employed until their retirement and who continue in self-employed work no longer have to pay the 10 % premium.

employee has worked for the employer. The shorter the period of work, the bigger the risk of selection for redundancy.

b) Age taken into account for redundancy compensation

National law provides compensation for redundancy. Compensation is affected not by the age of the worker, but by seniority (length of employment), whereby the longer an employee has worked, the higher amount of compensation he/she receives.

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

National law does not include exceptions that seek to rely on Article 2(5) of the Employment Equality Directive.

4.9 Any other exceptions

Other exceptions to the prohibition of discrimination (on any ground) provided in national law include the following: 'situations which oblige the employment of a particular sex'; 'special measures and protective precautions towards children or individuals who need to be kept in a special place';³³⁶ and conditions for membership to associations, foundations, trade unions, political parties and professional organisations (Article 7(1)(b), (c) and (e) of the Law on the Human Rights and Equality Institution of Turkey).

In 2016, Article 7(1)(b) was contested by the main Opposition party, the Republican People's Party, in the Constitutional Court. Arguing that the provision violated Article 2 (on the rule of law), Article 10 (on the right to equality) and Article 90 (on the supremacy of duly ratified international human rights documents) of the Constitution, the applicant asked the Constitutional Court to annul Article 7(1)(b) and to issue an injunction prohibiting its execution. In a majority ruling issued on 15 November 2017, the Constitutional Court rejected these requests.³³⁷ The broad and vaguely formulated exception clauses in Article 7(1)(b), (c) and (e) are not compatible with the directives.

³³⁶ The law does not indicate or define what a 'special place' is.

³³⁷ Constitutional Court, judgment E. 2016/132, K. 2017/154, 15 November 2017.

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

a) Scope for positive action measures

In Turkey, positive action is permitted in national law in respect of racial or ethnic origin, religion or belief, disability or age. Positive action in respect of sexual orientation is not permitted.

While not explicitly stating it as such, Article 10 of the Constitution entails the principle of positive action. It stipulates that measures to be adopted to ensure equality between men and women, as well as measures to be adopted for children, elderly persons, persons with disabilities, widows and orphans of martyrs, ex-soldiers disabled in the war, and veterans, shall not be considered as a violation of the principle of equality.

Article 7(1)(f) of the Law on the Human Rights and Equality Institution of Turkey provides an exception to the prohibition of discrimination for 'treatment which is necessary, appropriate and proportional towards eliminating inequalities'. The Law prohibits discrimination on grounds of racial or ethnic origin, religion or belief, disability or age.

Although they are not designated as positive action, there are a number of laws and regulations that stipulate positive measures in education, employment and a number of services (social insurance, transportation etc.), including employment quotas, for persons with disabilities. The special situation of non-Muslim groups under the Treaty of Lausanne does not confer on them a right to positive discrimination based on religion. On the contrary, the state in Turkey continues to limit state funding for religious services to the Sunni Muslim majority by paying the salaries of Sunni preachers (*imams*) and providing free electricity and water to mosques.

Discussions regarding discrimination in Turkey are still very new. Legal and political discussions focus more on the existence of discrimination and inequalities in Turkey. In other words, at this point the state and the general public are still not convinced that discrimination and inequalities exist in Turkey and that some groups are more disadvantaged than others. In the past, demands by women's organisations for quotas for women in political participation have been dismissed by the Prime Minister as being against international practice.

b) Quotas in employment for people with disabilities

In Turkey, national law provides for quotas for people with disabilities in employment.

There is a quota system in both private-sector and public-sector employment. Article 53(1) of the Law on Civil Servants requires a 3 % quota for civil servants with disabilities working in public institutions, for individuals who are officially recognised as having a disability. Under Article 30(1) of the Labour Law, the percentage of employees with disabilities of the total number of employees must be 3 % in private sector establishments and 4 % in public enterprises. However, this quota obligation applies only to workplaces where 50 or more persons are employed. If an employer has employed more persons with disabilities than the quota requires; if an employer who is not under an obligation to do so has employed persons with disabilities; or if an employer has employed a person who is more than 80 % disabled, half of the insurance premiums that normally have to be paid by the employer to employees with disabilities shall be paid by the Treasury. According to Article 101, if employers do not employ the number of persons with disabilities necessary to fulfil their quotas, they are penalised with a fine of TRY 1 700 (EUR 273) per month for every person with disability not employed. The same Article explicitly prescribes that public employers cannot be exempt from this fine.

The quota regime is favourable, as it guarantees access to employment to a degree. However, the system is applied as if it prescribes an upper limit for the employment of persons with disabilities. Employers who are under a quota obligation employ the required number of persons with disabilities on paper and ask them not to come to work. In many cases, workplaces are not accessible or there is no accessible transportation to the workplace. The quota system is also understood as an alternative to the prohibition of discrimination. In other words, when employers comply with their quota obligations, they feel that they are no longer under any equal treatment obligation.

According to the Prime Ministry's State Personnel Presidency, as of December 2018, of 2 026 068 persons employed in public institutions, 53 017 are persons with disabilities, which falls 9 379 short of the 60 959 target (discounting the 1 437 total number of surplus employees in several Government institutions).³³⁸ The number of state employees with disability is particularly low when the proportion of persons with disabilities in the general population is taken into consideration.

Until 2012, the recruitment of persons with disabilities for employment in public institutions was carried out on the basis of special examinations held separately by each institution. This decentralised system had caused major problems when public employers rejected candidates who chose to take the general and centralised examination instead of the special examinations for candidates with disabilities. In response, and to strengthen enforcement of the 3 % quota in public service recruitment, the Government amended Article 53(2) of the Law on Civil Servants³³⁹ and introduced a new system for the recruitment of persons with disabilities, based on a centralised examination. The first such examination was held on 29 April 2012. In addition to recruitment by examination, persons with disabilities who do not have any education higher than primary level are employed in public institutions through a lottery system. In 2012 and 2013, 1 579 individuals out of a total of 131 600 applicants were placed for employment in public institutions through the lottery system. As of December 2018, the total number of persons with disabilities placed for employment in public institutions as a result of examination and lottery was 51 580. The total number of persons that the Government is obliged to recruit under the quota system is 60 959.³⁴⁰

³³⁸ See: <http://www.dpb.gov.tr/tr-tr/istatistikler/engelli-personel-ve-omss-istatistikleri>.

³³⁹ Turkey, Law on the Restructuring of Certain Debts and on the Amendment of Social Securities and General Health Insurance Law and of Various Other Laws and Decrees having the Force of Law, 13 February 2011, Article 99.

³⁴⁰ See: <http://www.dpb.gov.tr/tr-tr/istatistikler/engelli-personel-ve-omss-istatistikleri>.

6 REMEDIES AND ENFORCEMENT

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

- a) Available procedures for enforcing the principle of equal treatment

In Turkey, the following procedures exist for enforcing the principle of equal treatment.

Discrimination claims are filed through general administrative and legal channels. In the courts, victims of discrimination can claim compensation for pecuniary damages, loss of earnings and/or damages for pain and suffering. Parallel proceedings are possible with regard to criminal, civil or administrative courts. Persons may simultaneously pursue a civil claim for compensation in the civil or labour courts, an administrative application or a criminal complaint. If the discriminatory act or action is administrative in nature, before going to court the victim of discrimination has to request compensation from the administrative body responsible for the action. The decisions of the courts are binding by definition.

To obtain a legal remedy, employment-related discrimination claims filed under Article 5 of the Labour Law must be brought before a labour court. There are labour courts that deal with employment-related issues in every province. On appeal, employment-related discrimination cases come before the Ninth Civil Chamber of the Court of Cassation. The possible remedies for a termination of a work agreement based on discrimination may be, but are not limited to, an order to continue the employment relationship, payment of lost income, compensation etc. An existing labour relationship is a precondition for bringing a labour lawsuit and those who face discrimination in the recruitment process cannot take this route. Article 5 does not explicitly provide that discriminatory provisions in employment contracts shall be null and void – an issue that ECRI raised in its monitoring reports.³⁴¹

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

Article 74 of the Constitution guarantees the right of complaint to the Constitutional Court. The right to file a constitutional complaint is limited to Turkish nationals, who are required to exhaust the national judicial remedies prior to filing a petition with the Constitutional Court. The scope of the complaint is limited to those rights and liberties protected under the Constitution which fall within the scope of the ECHR and its additional protocols to which Turkey is party. Persons can file a complaint against infringement of any of these rights by public authorities. Assessment of complaints is subject to a two-tier process: admissibility and substantive review. Persons whose complaints are found to be inadmissible reserve the right to petition the ECtHR. On 23 September 2012, the Constitutional Court began to receive complaints filed against

³⁴¹ ECRI (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, p. 16, available at: <https://rm.coe.int/fifth-report-on-turkey/16808b5c81>.

judicial decisions and actions that have become final (for details on the implementation of the mechanism, see Section 0.1).

There are also non-judicial mechanisms available to victims of discrimination. Human rights boards, established at district and province levels since 2000, accept discrimination complaints from individuals and issue non-binding decisions. The Bureau for Inquiry on Allegations of Human Rights Violations, established within the Ministry of the Interior in 2004, receives complaints concerning human rights violations, including claims of discrimination related to law enforcement officers.³⁴²

The Human Rights Inquiry Commission of the Turkish Parliament 'functions as a parliamentary monitoring mechanism' and examines the extent to which human rights practices comply with obligations under the Constitution, national legislation and international conventions to which Turkey is party.³⁴³ In 2011, the Commission 'gained a status of legislation commission' by being authorised to examine draft laws concerning human rights.³⁴⁴ It has investigatory powers to request information from the Government, public institutions, local authorities and private establishments. However, there is no corresponding duty, and in the past Government institutions and the military have often refrained from sharing 'sensitive' information. The Commission has the power to conduct on-site inspections without prior notification in detention centres and prisons. It has the power to establish, on its own initiative, ad hoc inquiry commissions on specific issues. Since 2010, the Commission has worked on – among other issues – racism, labour rights, the rights of persons with disabilities, allegations of profiling and refugee rights. It publishes annual and ad hoc reports with recommendations for relevant Government bodies. However, its recommendations are not binding and often remain unimplemented.

In December 2012, the Commission set up a sub-commission to investigate disability rights and violations of the human rights of persons with disabilities. The sub-commission published its report in 2013.³⁴⁵ The report concluded, *inter alia*, that: the derogatory term 'özürlü' (which means handicapped, defective, deficient) continued to be used by Government agencies and in legislation; both the private sector and the public sector do not comply with the legal obligation to hire persons with disabilities, warranting criminal sanctions; the payment of disability pensions to persons with disabilities has served to encourage them not to work and isolated them from social life; and reports prepared by labour inspectors do not include any findings regarding physical conditions at workplaces, which prevented the Commission from assessing the accessibility of workplaces for persons with disabilities. In addition, the report recommended that measures must be adopted to ensure that individuals with hearing and visual disabilities can use emergency police, ambulance and other hotlines; to ensure the accessibility of pavements, public institutions and schools for persons with disabilities; and to ensure the participation of persons with disabilities in public life.

³⁴² CERD (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, 17 April 2014, p. 9, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en.

³⁴³ CERD (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, p. 12, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en.

³⁴⁴ Turkey (2014), *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review 21st session: 19-30 January 2015, p. 5.

³⁴⁵ TBMM İnsan Haklarını İnceleme Komisyonu (2013), *Engelli Hakları İnceleme Raporu (Investigatory Report on the Rights of the Disabled)*, available at: https://www.tbmm.gov.tr/komisyon/insanhaklari/docs/2013/raporlar/engelli_haklari_inceleme_raporu.pdf.

Individuals can also file discrimination complaints with the Human Rights and Equality Institution of Turkey, which started to operate in 2017, and with the Ombudsman Institution, which has a mandate to receive complaints concerning general human rights issues as well as disability (see Section 7). The decisions of both institution are not binding.

After local remedies have been exhausted, claimants can file a discrimination claim with the ECtHR under Article 14 of the ECHR in conjunction with a substantive right protected under the Convention. Since Turkey has not ratified the optional Protocol 12 to the ECHR, which recognises a free-standing right to non-discrimination, claimants cannot bring a claim against Turkey on the basis of this protocol. Turkey is a party to the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) of the United Nations, and individual persons can also make an individual complaint to the Human Rights Committee under the anti-discrimination provision of Article 26 of the ICCPR. On 26 March 2015, Turkey ratified the Optional Protocol to the UNCRPD, enabling individuals or groups subject to its jurisdiction to file complaints with the CRPD.³⁴⁶ Turkey did not adopt any strategy to monitor the implementation of the ECHR or its Protocol.

If the victim seeks an amicable settlement instead of a court action, there are limited alternative dispute settlement methods, such as mediation, for disputes in civil matters. There are also labour inspectors, insurance inspectors and school inspectors tasked respectively under the Labour Law, the Social Security Institution Law and the laws governing education with inspecting compliance. Inspection under the Consumer Protection Law is carried out by executive officials at national and local levels (governors and district governors). These inspectors have powers to issue administrative and monetary fines where they identify violations of the respective laws. Labour and school inspectors have the competence to receive and review individual complaints, including those alleging violation of the anti-discrimination provisions of the Labour Law and the Law on National Education. Labour inspectors have the competence to issue sanctions, which include warnings or fines. School inspectors, on the other hand, lack sanctioning powers.

Persons whose requests for reasonable accommodation are denied by their employers can ask labour inspectors to monitor the observance of the Law on Persons with Disabilities. However, the inspectors do not have the power to order employers to provide reasonable accommodation. In cases of a breach of the duty to provide reasonable accommodation, employees in the private sector can go to the labour courts, and those in the public sector to the administrative courts. However, the labour courts do not have the power to order employers to provide reasonable accommodation or to award compensation in cases of denial of reasonable accommodation.

b) Barriers and other deterrents faced by litigants seeking redress

There are various barriers faced by litigants seeking redress through a court judgment. Except in cases in criminal courts, the litigants themselves have to collect evidence to establish the facts and prove their case, which makes the pursuit of a case without the support of a lawyer extremely difficult. Filing a lawsuit is costly, legal aid is provided only under very strict criteria and the assessment of legal aid applications takes up to two years.³⁴⁷ Unlike the ECtHR's individual petition mechanism, constitutional complaint is not free of charge: in 2018, the fee was TRY 294.70 (EUR 47.38). Litigants often face lengthy judicial proceedings. As a result, in many cases, taking a case to the court does not solve the problem. For example, if a student is expelled from school on the basis of ethnicity, or if an employment contract was terminated because the employer thought that the employee was gay, a court decision given two years after the discriminatory act will have

³⁴⁶ Turkey signed the Optional Protocol on 28 September 2009.

³⁴⁷ ECRI (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, p. 16, available at: <https://rm.coe.int/fifth-report-on-turkey/16808b5c81>.

limited effect. Similarly, administrative court cases filed by parents to exempt their children from mandatory religion courses can last for years, and may be finalised long after the students concerned have completed their secondary school education. In criminal cases brought against civil servants alleged to have engaged in discrimination, their superior's permission to prosecute is required under the Law on the Prosecution of Civil Servants and Other Public Employees and Article 129 of the Constitution. This is one of the major barriers facing victims of discrimination, as in many cases permission is not given.

Finally, there are strict time limits, which vary according to the type of legal remedy sought. Under administrative law, the time limit to repeal regulations and administrative decisions is 60 days after the day of promulgation of the regulation or notification of the decision to the persons concerned. For compensation for damages which are the result of administrative action, applications should be submitted within one year of the victim being informed and, in any case, within five years of the date of the action causing damage.³⁴⁸ Appeals should be made within 30 days of the notification of the lower court's decisions.³⁴⁹ Under criminal law, the time limits depend on the punishment. For offences resulting in less than five years' imprisonment, the limit for exercising the right of appeal is eight years. If the term of imprisonment is five to 20 years, the limit is 15 years; if the term of imprisonment is more than 20 years, the limit is 20 years; and for life imprisonment – depending on the type of such imprisonment – it is 25 or 30 years.³⁵⁰ For some offences, investigation and prosecution is bound to a complaint. Unless a complaint is brought within six months after the complainer becomes aware of the malicious act and of the offender, an investigation or prosecution cannot proceed.³⁵¹ Finally, constitutional complaints must be filed within 30 days of the exhaustion of domestic judicial remedies, or after the occurrence of the alleged human rights violation, where there are no other remedies available.

Another barrier concerns the social stigma and harmful publicity surrounding litigation, particularly for LGBTI litigants who have been subjected to discrimination on the basis of sexual orientation.

c) Number of discrimination cases brought to justice

There are no available statistics on the number of cases related to discrimination that have been brought to justice.

The Ministry of Justice does not collect data on the number of the cases brought before civil courts. Statistics on criminal cases are selectively published. In 2016, only 10 cases in which defendants had been charged with discrimination in the sale, transfer or rent of goods under Article 122 of the Penal Code resulted in a judgment. Of these, only two resulted in a conviction.³⁵² There are no publicly available disaggregated data on the grounds of discrimination in any of these statistics or on the total number of cases opened under Article 122 over the years.

There is better access to data on the use of newly available judicial and non-judicial mechanisms. As of the end of 2018, the Constitutional Court had received a total of 211 665 applications. Of the 172 380 applications the Court has concluded since the right of individual complaint came into force in 2012, only 7 140 resulted in a ruling in which a

³⁴⁸ Turkey, Law on Administrative Adjudication Procedure, (*İdari Yargılama Usulü Kanunu*), 6 January 1982, Article 13.

³⁴⁹ Turkey, Law on Administrative Adjudication Procedure, 6 January 1982, Article 46.

³⁵⁰ Turkey, Penal Code, 26 September 2004, Article 66.

³⁵¹ Turkey, Penal Code, 26 September 2004, Article 73.

³⁵² See: <http://www.adlisicil.adalet.gov.tr>.

violation was found. Of these, only 104 entailed a finding of the violation of non-discrimination legislation.³⁵³

The only publicly available statistics on discrimination claims made through the constitutional complaint mechanism have been reported by the Government to CERD. In its combined fourth to sixth report presented in February 2014, the Government reported that, of more than 10 000 individual complaints filed with the Constitutional Court between September 2012 and December 2013, 48 applications concerned racial discrimination. Of these, seven were found to be inadmissible, four were refused due to improper application and the rest were under review.³⁵⁴

The Ombudsman Institution began receiving complaints as of 29 March 2013. In contrast with a total of 24 851 complaints received by the Ombudsman Institution by the end of 2016,³⁵⁵ it received 17 131 and 17 585 complaints in 2017 and 2018, respectively.³⁵⁶ Of the 21 647 complaints that had been processed by the end of 2018, 81.37 % were concluded.³⁵⁷ Only a fraction of the complaints concerned individual rights. Of the applications received in 2018, 1.88 % concerned human rights and 0.67 % concerned disability rights.³⁵⁸ Of the 238 complaints concerning human rights, five related to non-discrimination.³⁵⁹ The breakdown of the 117 complaints received in 2018 concerning disability rights is as follows: social services and assistance (59); rehabilitation services (three); discrimination (seven); protection, care and assistance (two); and other issues (46).³⁶⁰ There has also been a significant increase in the number of recommendations issued by the Ombudsman Institution. In contrast with the 792 recommendations or partial recommendations issued during 2013-2017, 946 were adopted in 2018 alone.³⁶¹ 2 498 of the 4 106 complaints concluded in 2018 resulted in friendly settlements.³⁶² The rate of compliance with the Ombudsman Institution's recommendations has also increased, from 20 % in 2013 to 70 % in 2018.³⁶³ Yet, according to the European Commission, 'lacking powers to initiate investigations and to intervene in cases with legal

³⁵³ Constitutional Court) (2019), *Yıllık Rapor 2018 (Annual Report 2018)*, pp. 363, 365 and 372, available at: <https://anayasa.gov.tr/tr/yayinlar/yillik-raporlar/>.

³⁵⁴ CERD (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, 17 April 2014, p. 31, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en.

³⁵⁵ The Ombudsman Institution of Turkey (2017), *2016 Faaliyet Raporu (2016 Activities Report)*, p. 87, available at: <https://www.ombudsman.gov.tr/contents/files/kdk-2016-yili-faaliyet-raporu.pdf>.

³⁵⁶ The Ombudsman Institution of Turkey (2019), *2018 Faaliyet Raporu (2018 Activities Report)*, p. 50, available at: https://www.ombudsman.gov.tr/yillik-rapor/kdk_y%C4%B1llik_rapor2018/mobile/index.html#p=20.

³⁵⁷ The Ombudsman Institution of Turkey (2019), *2018 Faaliyet Raporu (2018 Activities Report)*, p. 78, available at: https://www.ombudsman.gov.tr/yillik-rapor/kdk_y%C4%B1llik_rapor2018/mobile/index.html#p=20.

³⁵⁸ The Ombudsman Institution of Turkey (2019), *2018 Faaliyet Raporu (2018 Activities Report)*, p. 52, available at: https://www.ombudsman.gov.tr/yillik-rapor/kdk_y%C4%B1llik_rapor2018/mobile/index.html#p=20.

³⁵⁹ The Ombudsman Institution of Turkey (2019), *2018 Faaliyet Raporu (2018 Activities Report)*, p. 69, available at: https://www.ombudsman.gov.tr/yillik-rapor/kdk_y%C4%B1llik_rapor2018/mobile/index.html#p=20.

³⁶⁰ The Ombudsman Institution of Turkey (2019), *2018 Faaliyet Raporu (2018 Activities Report)*, p. 68, available at: https://www.ombudsman.gov.tr/yillik-rapor/kdk_y%C4%B1llik_rapor2018/mobile/index.html#p=20.

³⁶¹ The Ombudsman Institution of Turkey (2019), *2018 Faaliyet Raporu (2018 Activities Report)*, p. 74, available at: https://www.ombudsman.gov.tr/yillik-rapor/kdk_y%C4%B1llik_rapor2018/mobile/index.html#p=20.

³⁶² The Ombudsman Institution of Turkey (2019), *2018 Faaliyet Raporu (2018 Activities Report)*, p. 78, available at: https://www.ombudsman.gov.tr/yillik-rapor/kdk_y%C4%B1llik_rapor2018/mobile/index.html#p=20.

³⁶³ The Ombudsman Institution of Turkey (2019), *2018 Faaliyet Raporu (2018 Activities Report)*, p. 76, available at: https://www.ombudsman.gov.tr/yillik-rapor/kdk_y%C4%B1llik_rapor2018/mobile/index.html#p=20.

remedies, the Ombudsman remained silent on certain human rights concerns, most notably on reported human rights violations in the south-east.³⁶⁴

In 2018, the Ombudsman Institution issued a special report on Syrian refugees in Turkey. For a discussion of the report's findings on Syrian refugees' access to education, work, social assistance and healthcare, see Section 3.2.8.

The Human Rights and Equality Institution of Turkey, the body with responsibility for implementing Turkey's new anti-discrimination legislation, became operational in March 2017. According to its *2017 Activity Report*, between November 2017 when its regulatory powers went into effect and the end of the year, the Institution received a total of 53 individual complaints, four of which concerned discrimination issues.³⁶⁵ The Institution issued its first decision on 30 October 2018, 20 months after it had been set up. As of April 2019, the Institution had issued a total of eight decisions (seven in 2018 and one in 2019), none of which concerned discrimination claims falling within the scope of the directives.³⁶⁶ The Institution is neither explicitly tasked with nor precluded from addressing issues relating to migrants. As of April 2019, it had not issued any decisions on issues concerning migrants.

d) Registration of discrimination cases by national courts

In Turkey, discrimination cases are not registered as such by national courts.

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

a) Engaging on behalf of victims of discrimination (representing them)

In Turkey, associations/organisations/trade unions are granted very limited entitlement to act on behalf of victims of discrimination. They also have limited legal standing to act on behalf of their members in limited circumstances.

The defunct Human Rights Institution of Turkey had granted human rights organisations and trade unions standing to file complaints with the Institution on behalf of victims of human rights violations. The Human Rights and Equality Institution of Turkey does not grant third parties such standing.

According to Article 26(2) of the Law on Unions and Collective Agreements, trade unions have the right to initiate cases and to intervene in ongoing cases on behalf of their members concerning the latter's rights arising from employment contracts and social security rights. Since the Labour Law provides legal protection against discrimination, the legal standing granted to trade unions is arguably also applicable in discrimination cases. However, this requires judicial interpretation.

b) Engaging in support of victims of discrimination (joining existing proceedings)

In Turkey, associations/organisations/trade unions may be allowed to act in support of victims of discrimination, depending on judicial interpretation.

Article 237(1) of the Law on Criminal Procedure allows legal personalities 'harmed by the crime' concerned in the case to join existing proceedings launched by public prosecutors.

³⁶⁴ European Commission (2018), *Turkey 2018 Report*, Strasbourg, 17 April 2018, p. 15, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-turkey-report.pdf>.

³⁶⁵ Human Rights and Equality Institution of Turkey (2017), *2017 Faaliyet Raporu (2017 Activity Report)*, available at: https://www.tihk.gov.tr/upload/file_editor/2019/03/1552307015.pdf.

³⁶⁶ For the list and content of these decisions, see <https://www.tihk.gov.tr/kategori/2018-kurul-kararlari> (for 2018) and <https://www.tihk.gov.tr/kategori/2019-kurul-kararlari> (for 2019).

Since the provision does not explicitly mention discrimination cases and sets forth a requirement of being harmed by the crime, its implementation in discrimination cases requires judicial interpretation. There are two instances in which NGOs are allowed limited legal standing under this provision. The first concerns a standing of general nature restricted to trade unions, consumer protection associations and associations working for the protection and preservation of the environment, culture and history. There are no membership or permanency requirements imposed on associations which are granted standing, since this right is already very limited and is granted only in rare circumstances. The second concerns standing in criminal cases for any legal entity which can demonstrate harm from the crime at issue. Associations or organisations cannot act on behalf of victims of discrimination nor can they file cases on their own initiative. However, they can call on prosecutors to act to prosecute perpetrators and they can intervene in criminal cases launched by public prosecutors where they can demonstrate 'harm by the crime'. However, the elements of this concept have not been elaborated by the courts. Thus, this legal standard can be interpreted both widely and narrowly, depending on the discretion of the courts.

Turkish courts are notorious for the way in which they persistently deny requests by human rights organisations to intervene on behalf of or in support of victims of discrimination. The most high-profile example of this phenomenon occurred in a criminal case against a number of police officers in Istanbul who were charged with the torture and murder of an African immigrant named Festus Okey, who was killed in police custody. Since the beginning of the case, the Progressive Lawyers Association (PLA) – as well as hundreds of individual lawyers – have unsuccessfully attempted to intervene in the case under Article 237(1) on behalf of the deceased victim, who is not represented in the case by a lawyer. However, on each occasion, the court has denied such requests on the ground that the PLA failed to demonstrate harm. On 13 December 2011, the lower court convicted one police officer and sentenced him to four years and two months' imprisonment.³⁶⁷ The Court of Cassation found the sentence to be too low and overturned the judgment, stating that the prosecutor should ask for 20 years' imprisonment. The case was reopened in June 2014 and, as of March 2019, had not been resolved. The next hearing will be held on 2 April 2019. In March 2018, Okey's family filed a complaint with the Constitutional Court, claiming that the prolonged legal process, which has been continuing since 2007, is a violation of the right to a fair trial. The Constitutional Court has not yet issued a ruling.

LGBTI organisations have begun to use Article 237(1) as a way to get involved in criminal cases to act on behalf of victims of hate crime and honour killings. While in many cases the courts reject such requests, there have been a few instances in which courts have accepted requests for intervention from LGBTI organisations. In a decision on 26 March 2012, a court in Izmir granted a request from the Black Pink Triangle Izmir Association on Sexual Orientation and Sexual Identity Studies and Solidarity against Discrimination to intervene in a criminal case concerning the killing of a transgender woman.³⁶⁸ The court did not elaborate on the reasoning for this decision. The contradictory stance of lower courts continued in 2013. On 18 January 2013, a favourable decision was given by a criminal court in Diyarbakır, which accepted the request of the Social Policies, Gender Identity and Sexual Orientation Studies Association (*Sosyal Politkalar, Cinsiyet Kimliği ve Cinsel Yönelim Çalışmaları Derneği* – SPoD), a national LGBTI organisation, to act on behalf of the victim in a case concerning a so-called 'honour killing'.

Soon afterwards, decisions by two different courts in Istanbul concerning the standing of LGBTI groups went in the opposite direction. On 25 January 2013, during the 12th hearing of a criminal case concerning the 'honour killing' of a homosexual man by

³⁶⁷ Istanbul 21st Heavy Penal Court, 13 December 2011.

³⁶⁸ İzmir 7th Heavy Penal Court, No. 2010/224, 26 March 2012.

members of his family,³⁶⁹ and on 13 February 2013, in a criminal case concerning the killing of a transgender woman,³⁷⁰ the courts in both cases rejected SPoD's request to intervene on the ground that the association did not suffer direct harm from the crimes committed.³⁷¹

c) *Actio popularis*

In Turkey, national law does not allow associations/organisations/trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*).

d) Class action

National law does not allow associations/organisations/trade unions to act in the interest of more than one individual victim (*class action*) for claims arising from the same event.

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

National law permits a shift of the burden of proof from the complainant to the respondent.

Under Article 21 of the Law on the Human Rights and Equality Institution of Turkey, once an applicant establishes a *prima facie* case of discrimination, the burden of proof shifts back to the respondent to prove that discrimination has not occurred. However, as ECRI has pointed out, this provision 'seems to be restricted to applications to HREA [the Human Rights and Equality Authority] and does not apply to court proceedings'.³⁷²

The Labour Law contains the only provisions that include rules on the burden of proof in discrimination cases. According to Article 5, with regard to violations of the principle of equality, the burden of proof rests with employees. However, if an employee brings forward a situation that strongly suggests the probability of such a violation, the employer is obliged to prove that no such violation exists.

According to Article 20 of the Labour Law, in cases in which a contract is terminated by the employer, the employer is under the obligation to prove that the termination is based on a valid reason. If the employee alleges that the termination is based on discrimination, the employee has to prove this allegation. According to Article 18, the following cannot be valid reasons for the termination of an employment relationship: race, colour, sex, civil status, family responsibilities, pregnancy, religion, political opinion and ethnic and social origin. However, under the same Article, the obligation to justify dismissal is binding only on employers who employ a minimum of 30 employees, and only if the dismissed employee has completed a minimum of six months' employment. This means that the reversal of burden of proof under Article 20 is not applicable in around 80 % of dismissal cases.³⁷³

³⁶⁹ Üsküdar 1st Heavy Penal Court, No. 2009/166, 25 January 2013.

³⁷⁰ Bakırköy 4th Heavy Penal Court, No. 2012/74, 13 February 2013.

³⁷¹ In December 2014, in a landmark decision constituting a first in Turkey, the Constitutional Court granted seven national NGOs and a European NGO leave to submit *amicus curiae* briefs in an ongoing case. While this is not a discrimination case nor has the applicant made a claim for equal treatment, the decision of the Constitutional Court to accept *amicus curiae* briefs from civil society has set a significant precedent which is likely to be used by civil society organisations in supporting victims of discrimination.

³⁷² ECRI (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, p. 16, available at: <https://rm.coe.int/fifth-report-on-turkey/16808b5c81>.

³⁷³ Levent Korkut (2003), *Report on Measures to Combat Discrimination in the 13 Candidate Countries (VT/2002/47)*, *Country Report Turkey*, May 2003, p. 35, available at: <http://www.humanconsultancy.com/project?pid=22>.

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

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

In Turkey, there are limited legal measures of protection against victimisation.

According to Article 18 of the Labour Law, application to administrative or judicial authorities against an employer with a view to seeking the rights arising from laws or the labour contract will not constitute a valid reason for termination of the contract. This provision protects only the person who makes an administrative or judicial application, and not any other person who supports the applicant employee.

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

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

a) Applicable sanctions in cases of discrimination – in law and in practice

As part of its mediation powers, where it finds discrimination, the Human Rights and Equality Institution of Turkey is able to recommend the payment of compensation. Under Article 25(1) of the Law on the Human Rights and Equality Institution of Turkey, the amount of the fine ranges between TRY 1 000 and TRY 15 000 (EUR 160 and EUR 2 410) depending on the gravity of the impact and consequences of the breach, the financial status of the perpetrator and the aggravating effect of multiple discrimination, if applicable. Where the Council – the Institution's decision-making body – deems it necessary, the fine may be converted into a warning on one occasion only. In the case of reoffending, the fine will be increased by 50 %.

If employers violate Article 5 of the Labour Law prohibiting discrimination, employees may demand compensation of up to four months' wages plus other benefits of which they have been deprived. According to Article 99 of the Labour Law, in cases of violation of Article 5, employers shall also be subject to a fine.

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

Individuals who violate the prohibition on hatred and discrimination based on the limited grounds and limited material scope stipulated in Article 122 of the Turkish Penal Code face imprisonment. The criminal penalty for these offences is a maximum of three years' imprisonment, with no possibility of conversion to a fine.

Article 125 of the Law on Civil Servants prescribes that if civil servants discriminate on the grounds of language, race, gender, political opinion, philosophical belief, religion or sect in carrying out their duties, their promotion shall be suspended for a period of between one and three years.

In addition, labour inspectors and school inspectors can issue sanctions for violations of anti-discrimination provisions or positive obligations. In cases of discrimination in violation of Article 5 of the Labour Law, the monetary sanction is TRY 134 (EUR 21.5) per employee who has been proven to have experienced discrimination. Where employers fail to fulfil their obligation to employ persons with disabilities, the sanction is TRY 2 096 (EUR 337) per month, per employee with disabilities who is not employed.

b) Ceiling and amount of compensation

Articles 5 and 21 of the Labour Law stipulate an upper limit for compensation. Although employees may claim other benefits of which they have been deprived in addition to compensation of up to four months' wages, these claims are limited to actual damage suffered. For example, if discrimination was suffered regarding wages, only the wage difference can be claimed. Moral damages cannot be claimed.

Under Article 25(1) of the Law on the Human Rights and Equality Institution of Turkey, the Institution has power to recommend payment of compensation in amounts ranging between TRY 1 000 and TRY 15 000 (EUR 160 and EUR 2 410), depending on the gravity of the impact and consequences of the breach, the financial status of the perpetrator and the aggravating effect of multiple discrimination, if applicable. Where the Council – the Institution's decision-making body – deems it necessary, the fine may be converted into a warning on one occasion only. In the case of reoffending, the fine will increase by 50 %.

There are no other specific provisions regarding compensation in Turkey's legal framework. Thus, the general rules of Turkish law on compensation should apply, the major principle being the prohibition on unjust enrichment.

c) Assessment of the sanctions

Sanctions are not explicitly mentioned in various laws containing anti-discrimination provisions. Where they are mentioned, they are not dissuasive. The number of cases in which discrimination is claimed is very small. The court decisions regarding most of these cases are not accessible. Violations that are criminal offences are punishable with short prison sentences, which are often convertible to small fines. Information is not available regarding the average amount of compensation provided for victims of discrimination. Consequently, it is not possible to provide any information regarding the amount of compensation.

7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

- a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

Pursuant to the Law on the Human Rights and Equality Institution of Turkey, Turkey has a 'specialised body' for the promotion of equal treatment irrespective of racial or ethnic origin which, however, is not in accordance with Article 13 of the Racial Equality Directive. The new equality body was set up and its members were appointed in March 2017, and secondary legislation regarding its anti-discrimination powers was adopted in November 2017. However, according to the European Commission, the Institution is not yet fully operational due to a lack of other key pieces of secondary legislation.³⁷⁴

The Ombudsman Institution, which was established in June 2012 with a mandate for receiving complaints concerning general human rights issues and disability, partially fulfils the requirements of the Racial Equality Directive.

- b) Political, economic and social context for the designated body

On 11 January 2016, Turkey's Deputy Prime Minister announced the decision to establish a national equality body in response to the EU's condition for visa liberalisation included in its refugee deal with Turkey. The equality body was established pursuant to the Law on the Human Rights and Equality Institution of Turkey, which was adopted on 6 April 2016.³⁷⁵

The establishment of the Institution drew criticism from local human rights groups from the outset. Citing the UN Paris Principles, which require that civil society participate in the preparatory work for the establishment of national equality bodies, human rights NGOs criticised the Government for drafting the law 'behind closed doors' from an instrumental perspective, 'in exchange for the visa exemption', without the knowledge and participation of civil society.³⁷⁶ Following the finalisation of the draft without any consideration of their criticisms, human rights organisations issued a second press release. Recalling that the now defunct Human Rights Institution of Turkey had already been criticised by the European Commission,³⁷⁷ the Council of Europe and the United Nations³⁷⁸ for its lack of independence from the executive branch, the election procedure of its members and the limitations on civil society involvement, the organisations declared that they saw the Human Rights and Equality Institution of Turkey as a further

³⁷⁴ European Commission (2018), *Turkey 2018 Report*, Strasbourg, 17 April 2018, p. 31, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-turkey-report.pdf>.

³⁷⁵ Turkey, Law on the Human Rights and Equality Institution of Turkey, No. 6701, 6 April 2016.

³⁷⁶ Human Rights Foundation of Turkey, Human Rights Association, Association of Human Rights and Solidarity with the Oppressed, Helsinki Citizens Assembly, Human Rights Agenda Association, Human Rights Studies Association and Amnesty International Turkey Branch (joint statement), 'Government Statement regarding the Establishment of the Human Rights and Equality Institution of Turkey: The Issue of the Institutionalisation of Human Rights is Perceived Fully from an Instrumental Perspective', 18 January 2016.

³⁷⁷ In its 2015 report, the European Commission noted that the functional independence of the Human Rights Institution of Turkey needs to be strengthened and its capacity needs to be built further. European Commission (2015), *Turkey 2015 Report*, Brussels, 10 November 2015, p. 62, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2015/20151110_report_turkey.pdf.

³⁷⁸ In its submission for Turkey's universal periodic review, the UN Country Team (UNCT) pointed out that the Human Rights Institution of Turkey had not requested accreditation from the International Coordinating Committee of National Human Rights Institutions and that the law establishing the Institution fell short of the Paris Principles. The UNCT also recommended legal amendment 'so as to guarantee the organic and financial independence' of the Institution. See Office of the UN High Commissioner for Human Rights (2014), *Compilation prepared in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Turkey*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review 21st session: 19-30 January 2015, p. 4, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/194/36/PDF/G1419436.pdf?OpenElement>.

setback. Human rights groups criticised the Government for not taking into account the internal reform efforts of the Human Rights Institution, made in consultation with and with the involvement of civil society, to enhance the independence of this institution.

c) Institutional architecture

In Turkey, the designated body forms part of a body with multiple mandates.

In addition, to being the national equality body, the Human Rights and Equality Institution of Turkey is vested with the additional mandate of preventing torture, also functioning as the national prevention mechanism in order to fulfil Turkey's obligation under the Optional Protocol to the UN Convention against Torture. This decision was criticized by local human rights groups as a measure seeking to create an ineffective counter-torture mechanism from the outset.³⁷⁹

While the Institution has the duty and power to investigate discrimination claims upon application or *ex officio*, it has the duty and power to investigate general human rights violations only *ex officio*. The duty and power to receive and investigate general applications regarding human rights violations is vested with the Ombudsman Institution, which also receives applications concerning disability rights. The major difference between the two bodies is that the Ombudsman Institution deals only with individual complaints filed against the actions of the public administration.

d) Status of the designated body/bodies – general independence

i) Status of the body

Under Article 8 of Law No. 6701, the Human Rights and Equality Institution of Turkey is a public-law legal entity and has administrative and financial autonomy. Article 10(1) stipulates that the Institution exercises its duties independently and that no other authority, individual or institution shall give orders, recommendations, suggestions or instructions to the decision-making organ of the Institution ('the Board') in the exercise of its authority.

Under Article 10(2) the Board has 11 members, all of whom are appointed by the executive. Originally, eight of these members were appointed by the Cabinet and three by the President. Pursuant to amendments made to Law No. 6701 on 2 July 2018 following Turkey's transition to a presidential system, all 11 members are appointed by the President among candidates who apply to vacant positions advertised publicly. The president and the vice-president of the Board are also appointed by the President (Article 10(2)).

The Institution has the exclusive powers to recruit and manage its 150 staff members.

The original Article 10(2), before it was amended on 2 July 2018, was contested by the main Opposition party, the Republican People's Party, before the Constitutional Court. Arguing that the provision violated Article 2 (on the rule of law); Article 7 (on the law-making power to be vested in the Parliament); and Article 123 (on the administrative structure of the Turkish state) of the Constitution, the applicant asked the Constitutional Court to annul Article 10(2) and to issue an injunction prohibiting its execution. In a majority ruling issued on 15 November 2017, the Constitutional Court

³⁷⁹ Human Rights Joint Platform (İnsan Hakları Ortak Platformu) (2016), *Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu Tasarısı Hakkındaki Görüşlerimiz (Our Opinions on the Draft Law on the Human Rights and Equality Institution of Turkey)*, 18 February 2016.

rejected these requests.³⁸⁰ The Constitutional Court reasoned that, in the absence of constitutional rules governing the issue, determination of the rules and procedures governing the appointment of members of the Institution falls within the discretion of the Parliament. Given that the qualifications required for members of this organ are objectively, concretely and clearly laid out in the law, the discretionary power granted to the President and the Council of Ministers in their appointment can be exercised only on the basis of these conditions and therefore does not jeopardise the Institution's impartiality and independence.

Originally accountable to the Prime Ministry, pursuant to Article 8(1) of Law No. 6701, as amended on 2 July 2018, the Institution is accountable to the President. According to Article 23, the sources of the Institution's budget are contributions to be made from the national budget, revenues to be obtained from the movables and immovable belonging to the Institution, revenues to be obtained from the investment of its revenues and other revenues.

According to Article 4(1) of Law on the Ombudsman Institution (No. 6328), the Ombudsman Institution is a public entity affiliated with the Turkish Parliament. Article 12(1) stipulates that no individual, authority or institution may give orders and instructions, issue circulars, or give recommendations or suggestions to the Chief Ombudsperson and Ombudspersons in the exercise of their mandate.

Under Article 4(2), the Ombudsman Institution constitutes of the Chief Ombudsman's Office and a General Secretariat. There is one Chief Ombudsman and five Ombudsmen. Ombudspersons are appointed by the Ombudsman Institution among qualified candidates who have applied to publicly announced vacancies.

Under Article 29, the sources of the Ombudsman Institution's budget are as follows: contributions made from the budget of the Turkish Parliament and other sources.

ii) Independence of the body

The independence of the Human Rights and Equality Institution of Turkey is stipulated in Article 10(1) of Law No. 6701. Accordingly, the Institution shall exercise its powers and fulfil its duties 'in an independent manner' and shall not receive instructions from anyone or any institution.

In practice, however, the body cannot be considered independent due to the election of its members by and its dependence on the executive branch. The body's lack of independence had been voiced by several stakeholders following the adoption of Law No. 6701 in its original form. Local human rights groups drew attention to the Institution's failure to comply with the UN Paris Principles, which require that national equality bodies are structurally, functionally and financially independent. The European Commission concluded that the equality body's 'functional, structural and financial independence has not been ensured in line with the Paris Principles and the EU *acquis*.'³⁸¹ In addition, ECRI stated that it is 'strongly concerned about the insufficient level of independence' of the Institution, noting that Law No. 6701 provided that the Institution shall be 'associated with the Prime Minister' and that the

³⁸⁰ Constitutional Court, judgment E. 2016/132, K. 2017/154, 15 November 2017.

³⁸¹ European Commission (2016), *Turkey 2016 Report*, Brussels, 9 November 2016, p. 69, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_turkey.pdf.

members of the new body shall be selected by the executive branch, which 'is incompatible with ECRI's standards on independence'.³⁸² Following Turkey's transition to the presidential system and the amendments made to Law No. 6701, which now authorise the President to unilaterally appoint all 11 members of the Board, concerns about the Institution's lack of independence are heightened.

Similar concerns have also been raised regarding the independence of the Ombudsmen. According to ECRI, there are 'concerns regarding the impartiality and neutrality of the Ombudsmen', referring to members of the Ombudsman Institution.³⁸³ According to the European Commission, neither the Human Rights and Equality Institution of Turkey nor the Ombudsman Institution 'has operational, structural or financial independence and [its] members are not appointed in compliance with the Paris Principles.'³⁸⁴

e) Grounds covered by the designated body/bodies

The Human Rights and Equality Institution of Turkey has a mandate to receive discrimination claims on grounds of race/ethnicity, religion/belief, age and disability. Sexual orientation is not mentioned among the mandates of the Institution.

The Ombudsman Institution and the human rights boards do not have explicit mandates to receive discrimination claims. While their mandate for general human rights protection arguably covers discrimination issues, the duty and power to investigate discrimination claims *ex officio* or on application is explicitly vested in the Human Rights and Equality Institution of Turkey. At the same time, one of the five Ombudsmen is responsible for disability issues and the Ombudsman Institution receives complaints concerning disability rights.

f) Competences of the designated body/bodies – and their independent exercise

i) Independent assistance to victims

The Human Rights and Equality Institution of Turkey has the competence to provide independent assistance to victims on available administrative and legal remedies. In light of the Institution's lack of independence from the executive, the highly polarised political environment in Turkey and the extreme politicisation of the notion of human rights, the Institution is not expected to perform this function effectively.

ii) Independent surveys and reports

The Human Rights and Equality Institution of Turkey has the competence to publish independent reports. It is tasked with preparing annual reports on anti-discrimination for the Presidency, the Parliament and the Prime Ministry as well as special reports on issues falling within its mandate where it deems this necessary.

In 2018, Institution published 10 investigation reports, one of which concerned the conditions in a private institution providing care for persons

³⁸² ECRI (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, p. 18, available at: <https://rm.coe.int/fifth-report-on-turkey/16808b5c8>.

³⁸³ ECRI (2013), *Conclusions on the implementation of the recommendations in respect of Turkey subject to interim follow-up*, CRI (2014) 6, adopted on 5 December 2013, Strasbourg, p. 7, available at: <https://rm.coe.int/interim-follow-up-conclusions-on-turkey-4th-monitoring-cycle/16808b5c93>.

³⁸⁴ European Commission (2018), *Turkey 2018 Report*, Strasbourg, 17 April 2018, p. 31, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-turkey-report.pdf>.

with disabilities.³⁸⁵ The Institution conducted its visit and issued its report pursuant to its torture-prevention mandate under the Optional Protocol to the UN Convention against Torture and not under its anti-discrimination competences. While the Institution published an investigative report on migrants with regard to the conditions of detention in a repatriation centre, it did so pursuant to its torture-prevention mandate under the Optional Protocol to the UN Convention against Torture and not under its anti-discrimination competences.³⁸⁶

The Human Rights and Equality Institution of Turkey does not have the competence to conduct independent surveys. Under Article 24 of Law No. 6701, the Institution, together with the Turkish Statistical Institute and other public bodies, is empowered to decide on areas where official statistics are needed for the purpose of combating discrimination. However, the Turkish Statistical Institute is responsible for gathering such statistics.

iii) Recommendations

The Human Rights and Equality Institution of Turkey has the competence to make recommendations on discrimination issues by monitoring and contributing to legislative activities relevant to its mandate. Due to reasons discussed earlier, the Institution is not able to effectively perform this task in an independent manner, as is evident from the fact that it has not yet made any recommendations (or issued decisions) concerning discrimination.

The Ombudsman Institution also has the competence to make recommendations on issues falling within its mandate. It is tasked with reviewing the acts and operations of the administration and making suggestions to ensure the administration's compliance with the principles of human rights, justice and the rule of law. According to ECRI, the Ombudsman Institution might also take on the function of an independent body on racial discrimination, but it 'lacks the power to carry out investigations on its own initiative'.³⁸⁷ The Ombudsman is therefore dependent on information provided to it by third parties (NGOs, Government) to exercise its review powers.

iv) Other competences

The other competences of the Human Rights and Equality Institution of Turkey include the prevention of discrimination and protection of human rights; raising awareness on anti-discrimination; assisting in the preparation of a curriculum on anti-discrimination to be used in secondary education; investigating human rights violations and violations of non-discrimination; and monitoring implementation of the international conventions that Turkey is a party to and participating in the meetings of relevant treaty bodies where Turkey's official country reports are presented. The Institution is able to receive complaints against both public and private legal and natural persons and, where it succeeds in reaching a friendly settlement between the parties, to order the party which has committed discrimination to pay compensation.

³⁸⁵ Human Rights and Equality Institution of Turkey (2018), *Kayseri Özel İhtisas Engelli Bakım Merkezi Ziyareti* (report No. 2018/17), December 2018, available at: https://www.tihek.gov.tr/upload/file_editor/2019/02/1551179882.pdf.

³⁸⁶ Human Rights and Equality Institution of Turkey (2018), *Izmir Harmandali Geri Gönderme Merkezi Ziyareti* (report No. 2017/18), December 2018, available at: https://www.tihek.gov.tr/upload/file_editor/2019/02/1551172797.pdf.

³⁸⁷ ECRI (2013), *Conclusions on the implementation of the recommendations in respect of Turkey subject to interim follow-up*, Strasbourg, p. 7, available at: <https://rm.coe.int/interim-follow-up-conclusions-on-turkey-4th-monitoring-cycle/16808b5c93>.

g) Legal standing of the designated body/bodies

In Turkey, the designated body does not have legal standing to bring discrimination complaints (on behalf of non-identified victim(s)) and cannot intervene *as amicus curiae* in ongoing legal cases concerning discrimination.

Under Article 18(5) of the Law on the Human Rights and Equality Institution of Turkey, the Institution may file criminal complaints with respect to complaints it has received where it finds that there is discrimination. However, the Institution is not able to initiate or participate in court proceedings on its own initiative. Article 11(1)(d) stipulates that the courts can ask the Institution for its opinion.

The Ombudsman does not have any standing to bring discrimination complaints.

h) Quasi-judicial competences

In Turkey, the bodies are not quasi-judicial institutions.

The Human Rights and Equality Institution of Turkey has the competence to receive discrimination complaints from natural and legal persons. Filing a complaint is free of charge. Under Article 17(4) of the new Law, acts relating to the exercise of legislative and judicial competences, the decisions of High Council of Prosecutors and Judges and acts that are exempt from judicial review under the Constitution cannot be the subject of complaints filed with the Institution. After receiving the written and, if it sees a need, oral statements of the parties, the Institution can invite the parties to reach a friendly settlement. Where the parties are unwilling or unable to settle their dispute through mediation, the Institution will reach a non-binding decision as to whether discrimination has taken place. Where it finds that discrimination has occurred, the Institution has the competence to file a criminal complaint.

In addition to the competence to receive individual complaints, the Institution has some general powers whose nature is rather vague. Under Article 9(1)(f), the Institution has *ex officio* powers to begin, on its own initiative, investigations into violations of human rights and non-discrimination. However, this is not a power to initiate *actio popularis* procedure. As noted by ECRI, the Institution 'can neither initiate nor participate in court proceedings on its own initiative'.³⁸⁸ Indeed, under Article 11(d), the Institution can give opinions to courts only when it is asked to do so. Article 11 (1)(c) provides that the Institution can monitor the execution of court judgments regarding human rights breaches and discrimination.

While the Institution has the power to impose sanctions (see Section 6.5.a above), the low amount of such monetary sanctions renders them ineffective. It is not possible to appeal the Institution's decisions, either to the body itself or to the courts). The law is silent on whether the Institution can take follow-up actions to track and secure the implementation of its decisions.

Since the Institution issued its first decisions only in October 2018, an assessment of whether they are respected is premature.

The Ombudsman Institution can also receive complaints from individual persons regarding human rights violations, including discrimination. However, it lacks a mandate to carry out investigations on its own initiative and its reports and recommendations are not binding. It does not have powers to impose sanctions. An appeal to the Ombudsman

³⁸⁸ ECRI (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, p. 17, available at: <https://rm.coe.int/fifth-report-on-turkey/16808b5c81>.

Institution's recommendations is not possible. The law is silent on follow-up actions to track and secure the implementation of the Ombudsman Institution's recommendations.

i) Registration by the body/bodies of complaints and decisions

In Turkey, the Human Rights and Equality Institution registers the number of complaints of discrimination made and decisions reached by field (whether they concern discrimination, torture or general human rights issues). It publishes its decisions on its website. So far, the Institution has not issued a decision concerning discrimination.

The Human Rights and Equality Institution provides general statistics about complaints and decisions that it has received each year, but these do not provide a breakdown of the discrimination claims.

j) Stakeholder engagement

The designated body engages with stakeholders as part of implementing its mandate. The Institution engages with ministries and other Government institutions, universities, select NGOs and trade unions. It does not, however, engage with independent NGOs that advocate human rights, anti-discrimination and equality for all.

k) Roma and Travellers

Neither the Human Rights and Equality Institution of Turkey nor the Ombudsman Institution treats Roma and Travellers as a priority issue.

8 IMPLEMENTATION ISSUES

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

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

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

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

In Turkey, the Government does not adopt measures to encourage dialogue with NGOs with a view to promote the principle of equal treatment.

The Turkish Government develops policies, designs laws and adopts executive measures in the area of human rights and anti-discrimination without consulting NGOs or, in the rare cases where it does so, without taking into account their suggestions or criticisms. Most recently, the Law on the Human Rights and Equality Institution of Turkey was adopted 'behind closed doors' without the knowledge and participation of civil society.³⁸⁹ Similarly, the 'Action Plan on Prevention of Violations of the European Convention on Human Rights' was adopted in 2014³⁹⁰ without the involvement of civil society.³⁹¹

In rare cases in which NGOs are invited to provide opinions and proposals on pending laws, their input is not (fully) taken into consideration at the drafting stage. For example, an initial version of the anti-discrimination law was distributed to universities and NGOs for their contributions and was revised on the basis of their feedback. However, the Government subsequently amended the text that had been agreed on and, despite the protests of the LGBTI movement and the NGOs that had collaborated on the draft, removed 'sexual identity' from the prohibited grounds of discrimination.

A rare positive example concerns the drafting of amendments to the Law on Persons with Disabilities in 2013. The Government shared with NGOs representing persons with disabilities the draft of the first national report which Turkey was to present to the CRPD regarding the Law on Persons with Disabilities and asked for their feedback. The Ministry of Family and Social Policies organised an evaluation meeting to receive in person the opinions and assessments of the relevant NGOs on the draft national report. The Ministry also formed a special section on the official website of its General Directorate of Services for Persons with Disabilities and the Elderly in order to raise awareness of the efforts to implement the UNCRPD.³⁹²

Since the coup attempt in July 2016, Turkey's legal, political and social landscape has changed dramatically, rendering the above discussions on the involvement of civil society

³⁸⁹ Human Rights Foundation of Turkey, Human Rights Association, Association of Human Rights and Solidarity with the Oppressed, Helsinki Citizens Assembly, Human Rights Agenda Association, Human Rights Studies Association and Amnesty International Turkey Branch (joint statement), 'Government Statement regarding the Establishment of the Human Rights and Equality Institution of Turkey: The Issue of the Institutionalization of Human Rights is Perceived Fully from an Instrumental Perspective', 18 January 2016.

³⁹⁰ Turkey, 'Action Plan on Prevention of Violations of the European Convention on Human Rights' ('Avrupa İnsan Hakları Sözleşmesi İhlallerinin Önlenmesine İlişkin Eylem Planı'), *Official Gazette*, 1 March 2014.

³⁹¹ European Commission (2014), *Turkey Progress Report*, Brussels, October 2014, p. 48, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf.

³⁹² Turkey, *Initial Report on the Convention on the Rights of Persons with Disabilities based on Article 35 of the Convention*, 3 August 2015, p. 14, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en.

in the development and implementation of Government policies redundant. Many of the NGOs working in the field of human rights, minority rights and discrimination have been closed down, and thousands of civil society activists have been arrested. While the exact toll remains unclear, according to the United Nations High Commissioner for Human Rights, the Government closed down 1 719 NGOs and arrested some 570 lawyers.³⁹³ According to the European Commission's *Turkey 2018 Report*, 358 associations were allowed to re-open after a re-examination of their case.³⁹⁴ At the time of reporting, there were no LGBTI NGOs among those closed down.

In response to the coup attempt, the Government reversed many of the significant gains made in respect of a democratic solution to the Kurdish conflict. An emergency decree adopted by the Government entrusted the President with the power to replace elected mayors with appointed trustees. During September 2016 and February 2019, the mayors of 95 municipalities run by the Democratic Regions Party (DBP), the regional affiliate of the pro-Kurdish Peoples' Democratic Party (Halkların Demokratik Partisi – HDP) were replaced by Government-appointed trustees,³⁹⁵ a practice that the European Commission believes has led to 'an important weakening of democracy'.³⁹⁶ 93 mayors and co-mayors were arrested,³⁹⁷ of whom 15 were sentenced to imprisonment on terrorism charges.³⁹⁸ The trustees removed Kurdish name-plates on the front of municipal buildings, Kurdish sign boards at the entrance to provinces and towns and Kurdish names given to public buildings, parks and cultural centres, and they closed down kindergartens and elementary schools providing education in Kurdish. Finally, the Government closed down Kurdish-language media outlets and cultural associations promoting the Kurdish language.³⁹⁹ Of the 39 Kurdish-language television and radio stations which had opened during the EU-induced reform process in the 2000s, 23 were closed on charges of terrorist propaganda.⁴⁰⁰ In 2017, over 100 000 websites, including a high number of pro-Kurdish websites and satellite TV channels, were blocked.⁴⁰¹

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

No measures have been taken by the authorities in this regard.

³⁹³ Office of the United Nations High Commissioner for Human Rights, *Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East: January-December 2017*, March 2018, paras. 9 and 13, available at:

http://www.ohchr.org/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf.

³⁹⁴ European Commission (2018), *Turkey 2018 Report*, Strasbourg, 17 April 2018, p. 16, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-turkey-report.pdf>.

³⁹⁵ Halkların Demokratik Partisi (HDP) (2019), *Kayım Raporu (Report on Trustees)*, 28 February 2019, p. 20, available at: <https://drive.google.com/file/d/1UOqhPsh3jCD9fbUMsGHe-Jz4DQGtNGsv/view>.

³⁹⁶ European Commission (2018), *Turkey 2018 Report*, Strasbourg, 17 April 2018, p. 4, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-turkey-report.pdf>.

³⁹⁷ HDP (2019), *Kayım Raporu (Report on Trustees)*, 28 February 2019, p. 20, available at: <https://drive.google.com/file/d/1UOqhPsh3jCD9fbUMsGHe-Jz4DQGtNGsv/view>.

³⁹⁸ HDP (2019), *Kayım Raporu (Report on Trustees)*, 28 February 2019, p. 79, available at: <https://drive.google.com/file/d/1UOqhPsh3jCD9fbUMsGHe-Jz4DQGtNGsv/view>.

³⁹⁹ See, e.g. Human Rights Watch (2017), 'Turkey: Crackdown on Kurdish Opposition: MPs Jailed, Elected Mayors Removed Ahead of Referendum', 20 March 2017, available at: <https://www.hrw.org/news/2017/03/20/turkey-crackdown-kurdish-opposition>; US Department of State (2016), *Turkey 2016 Human Rights Report*.

⁴⁰⁰ European Commission (2016), *Turkey 2016 Report*, Brussels, 9 November 2016, p. 29, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_turkey.pdf.

⁴⁰¹ Office of the United Nations High Commissioner for Human Rights, *Report on the Impact of the state of emergency on human rights in Turkey, including an update on the South-East: January-December 2017*, March 2018, para. 13, available at: http://www.ohchr.org/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf.

d) Addressing the situation of Roma and Travellers

The Ministry of Family and Social Policies has been appointed at the national level to address Roma issues. In 2011, it was tasked with the coordination of all initiatives undertaken by the Government under the 'Roma opening'. On 27 April 2016, the Turkish Government adopted the 2016-2021 national strategy for the Roma and the first stage of an action plan for the period 2016-2018. To monitor the implementation of the national strategy, a monitoring and evaluation board was set up, with membership comprised of relevant public institutions (half of the membership) and non-public sector representatives from NGOs, the academic community and professional organisations. The Council was expected to meet in February to assess the progress made in the previous calendar year and issue its annual report by the end of May. So far, the Council has met twice, in February 2017 and 2018, but it has not issued an annual report

In addition, the Institute for the Study of Roma Language and Culture at the University of Trakya, which opened in 2014,⁴⁰² is expected to contribute to the development of Government policies on the Roma community. The Institute has a mandate to conduct research and issue publications on the Roma; to partner with national and international institutions pursuing similar goals; and to engage in training, consulting, monitoring and data collection activities.⁴⁰³ The Institute is located in the province of Edirne, which hosts one of the largest Roma communities in Turkey.

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

a) Mechanisms

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

b) Rules contrary to the principle of equality

In Turkey, laws, regulations or rules that are contrary to the principle of equality are still in force or are interpreted in such a manner.

One major example of the violation of the principle of equality is found in Article 42 of the Constitution. According to Paragraph 9 of Article 42, 'No language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education.' This provision constitutes discrimination against ethnic and linguistic minorities.

Under Article 3(d) of the Settlement Law, only individuals 'from the Turkish race and belonging to the Turkish culture' are admitted to Turkey as migrants. Article 81 of the Law on Political Parties prohibits political parties from (a) claiming that 'minorities exist (...) based on national, religious, confessional, racial or language differences', (b) 'protecting, developing or disseminating language or cultures other than the Turkish language and culture' and (c) using languages other than Turkish in their party programmes, meetings, and written and visual propaganda materials.

⁴⁰² See the announcement on the University of Trakya's website: <http://www.trakya.edu.tr/news/roman-dili-ve-kulturu-arastirmalari-enstitusu-kuruldu>.

⁴⁰³ The decision to open a university institute specialising in Roma was announced as part of the 'democratisation package' launched by the Prime Minister on 30 September 2013. On 5 November 2013, the High Council on Education decided that the institute should be opened at the University of Trakya. Turkey, Council of Ministers, decision No. 2014/6070, *Official Gazette*, 23 March 2014.

Some provisions of the legislation are not discriminatory per se. However, they are interpreted and implemented in a discriminatory manner. For example, according to Article 8(g) of the Law on Judges and Prosecutors, in order to be appointed as a candidate judge or prosecutor, a person 'should not have any physical or mental illness or disability that would prevent the person from carrying out his/her responsibilities as a judge or a prosecutor continuously in every part of the country; or any disabilities which cause limitations in controlling the movements of the organs; speech different from that which is customary and would be found odd by people'. In practice, this provision leads to the elimination of all candidates with disabilities.

So far, no study that exhaustively identifies discriminatory legislation has been carried out.

9 COORDINATION AT NATIONAL LEVEL

Turkey does not have a Government department/other authority responsible for dealing with or coordinating issues regarding anti-discrimination on the grounds covered by this report.

According to a press statement issued on April 2010 by the Secretariat General for EU Affairs, a task force on anti-discrimination was established to monitor and coordinate the steps to be taken in the fight against discrimination.⁴⁰⁴ The task force was reported to include representatives from the Ministry of Justice, Ministry of the Interior, Ministry of Foreign Affairs, Ministry of Labour and Social Security, Human Rights Institution, General Directorate on the Status of Women, Disability Administration and Agency for Social Services and Child Protection. These representatives would be in touch with 81 deputy governors. These efforts would be coordinated by the Secretariat-General for EU Affairs.⁴⁰⁵ No further information is available on this. In 2013, the Disabled Rights Monitoring and Evaluation Board was established to 'carry out necessary administrative and legal arrangements for the protection and promotion of the rights of the disabled'.⁴⁰⁶

Turkey does not have any anti-racism or anti-discrimination national action plans.

As far as persons with disabilities are concerned, the General Directorate of Services for Persons with Disabilities and the Elderly within the Ministry of Family and Social Policy is the designated focal point for the implementation of the UNCRPD. The *Strategy Paper on Accessibility and the National Action Plan* (SPANAP), which was adopted in November 2010 pursuant to a Government decision which had declared 2010 the year of accessibility for persons with disabilities, exists only on paper.⁴⁰⁷ SPANAP is based on the premise that, despite a number of laws and regulations adopted since the late 1990s, the central Turkish Government and local municipalities fail to work in a holistic and systematic manner; rules concerning accessibility are implemented in an inadequate and inaccurate fashion; and many of the limited measures adopted to ensure accessibility are unusable. To remedy these problems, SPANAP aims to achieve the following three goals: revising the legislative framework, raising societal awareness and ensuring implementation. While a board for monitoring and evaluating the rights of people with disabilities was set up to 'promote the implementation and monitoring' of the UNCRPD,⁴⁰⁸ a national monitoring mechanism as required by the Convention has not yet been established.⁴⁰⁹

Since 2011, the Ministry of Family and Social Policies is tasked with national coordination of all initiatives undertaken by the Government under the 'Roma opening' policy, which was declared in 2009 'with a view to identifying and seeking solutions for the problems faced by the Roma particularly in the fields of employment, housing, health and education through increasing dialogue between the Roma and relevant Government

⁴⁰⁴ Turkey, Republic of Turkey Prime Ministry Secretariat General for EU Affairs (2010), 'Conclusions of the 20th Reform Monitoring Group Meeting' (press statement), Konya, 9 April 2010.

⁴⁰⁵ Müderrisoğlu, O. (2010), 'Ayrımcılık için Özel Görev Gücü Kuruluyor' ('New Task Force to be Established against Discrimination'), *Sabah*, 14 March 2010, available at: http://www.sabah.com.tr/Gundem/2010/03/14/ayrimcilik_icin_ozel_gorev_gucu_kuruluyor.

⁴⁰⁶ Turkey (2014), *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review 21st session: 19-30 January 2015, p. 18.

⁴⁰⁷ Turkey, *Strategy Paper on Accessibility Strategy and the National Action Plan (Ulaşılabilirlik Stratejisi ve Eylem Planı)* (2010-2011), *Official Gazette*, 12 November 2010.

⁴⁰⁸ Turkey, *Initial Report on the Convention on the Rights of Persons with Disabilities based on Article 35 of the Convention*, 3 August 2015, p. 8, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en.

⁴⁰⁹ European Commission (2013), *Turkey Progress Report*, Brussels, p. 58, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2013/package/tr_rapport_2013_en.pdf.

units'.⁴¹⁰ To that end, starting in December 2009 a series of workshops and meetings was held between senior Government leaders and representatives of the Roma community.⁴¹¹ The tangible outcomes of this deliberative process were as follows: an action plan to detect irregular school attendance and prevent Roma children dropping out of school among was drafted; the Turkish Employment Agency initiated various programmes to enhance Roma participation in the labour market; all governorates were instructed to issue identity cards to Roma citizens; and housing has been constructed for the Roma. On the other hand, despite this recent evidence of political will and the considerable lip-service paid to addressing the problems of the Roma, the Government did not join the international 2005-2015 Decade of Roma Inclusion initiative.⁴¹²

The single most important outcome of this process was the adoption on 27 April 2016 of the 2016-2021 national strategy for the Roma and the first stage of the action plan for the period 2016-2018. The strategy addresses key obstacles to the social inclusion of Roma and proposes measures in areas such as housing, education, employment and health. In the education field, the strategy aims to achieve equal opportunity and access to quality education for Roma students and seeks to ensure that Roma young people complete compulsory education at the very least. In the field of employment, the strategic aim is to facilitate the entry of Roma citizens to the job market and to enhance their employment in quality jobs with safe working conditions. In housing, health and social services, the strategic goals are to provide Roma with access to adequate housing and to ensure that they enjoy health and social services more effectively. At the same time, an item on discrimination is notably missing from the national strategy and the action plan. Representatives of international and domestic Roma civil society organisations who had taken part in the deliberative process during 2009-2016 criticised the Government for having significantly shortened and watered down the draft national strategy that the Ministry of Family and Social Policies had shared with them in February 2016, and on which they had provided feedback.⁴¹³

⁴¹⁰ CERD (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, 17 April 2014, p. 5, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en.

⁴¹¹ For a detailed listing of these events until 2014, see CERD (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, 17 April 2014, pp. 12-15, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en.

⁴¹² European Commission (2014), *Turkey Progress Report*, Brussels, October 2014, p. 62, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf.

⁴¹³ Foggo, H., 'Ulusal Roman Strateji Planı "İzleme Kurulu"na Öneriler-1' ('Proposals for the National Roma Strategy Plan "Monitoring Council"'), P24, 24 February 2017, available at: <http://www.platform24.org/p24blog/yazi/2838/roman-strateji-izleme-kurulu-na-oneriler>.

10 CURRENT BEST PRACTICES

There were no best practices to report in 2018.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

The directives have not (yet) been transposed to national law.

11.2 Other issues of concern

Although the directives have not (yet) been transposed into national law, the following issues raise concern.

- The overarching issue of concern is the rapid eradication of democracy and the rule of law, and the consolidation of authoritarian rule in Turkey, particularly since the coup attempt in July 2016.
- The dismissal of around 115 000 state employees, including 30 % of judges and prosecutors,⁴¹⁴ has paralysed Government functions. Tens of thousands have been arrested.
- The Government's preoccupation with 'counter-terrorism' and the effective halt of the EU accession process has led human rights reforms, including in the area of anti-discrimination, to be entirely dropped from the agenda of public institutions.
- The equality body also fulfils the function of the national prevention mechanism on torture, which may dilute its strength and effectiveness.
- The equality body's independence has not been ensured in line with the Paris Principles and the EU *acquis*.
- The equality body became operational after considerable delay and has not yet started to fulfil its anti-discrimination mandate.
- The grounds of anti-discrimination in the Law on the Human Rights and Equality Institution of Turkey, the Constitution and various laws still do not explicitly include sexual orientation, although the Constitutional Court ruled in 2017 that it is included in the open list of non-discrimination grounds.
- The scope of the duty to provide reasonable accommodation is more limited than the Employment Equality Directive 2000/78/EC. The test regarding reasonable accommodation is non-existent: consequently, there is no guidance for labour inspectors, judges, employers and persons with disabilities.
- There is no specific prohibition regarding victimisation, discrimination by association or hate speech.
- The Law on the Human Rights and Equality Institution of Turkey and the Law on Disabilities do not elaborate on what can be considered a legitimate aim for the purpose of objective justification of indirect discrimination.
- Sanctions are not explicitly mentioned in various laws containing anti-discrimination provisions. Where they are mentioned, they are not dissuasive. Violations that are criminal offences are punishable with short prison sentences, which are often convertible to small fines.
- Turkish law does not explicitly recognise the standing of NGOs to bring claims in support of victims of discrimination, with the exception of trade unions, consumer protection associations and associations working for the protection and preservation of the environment, culture and heritage. In addition, in criminal cases, any legal entity which can demonstrate harm is de jure entitled to be granted standing. However, court practice varies.
- The mandates of the national and local human rights bodies and the Ombudsman Institution do not explicitly refer to protection from discrimination and offer limited possibilities for intervention and influence.

⁴¹⁴ European Commission (2018), *Turkey 2018 Report*, Strasbourg, 17 April 2018, p. 23, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-turkey-report.pdf>.

- Discriminatory and hate speech and conduct against minorities, particularly the Roma, LGBTI persons, Kurds and non-Muslims (especially Jews) is rampant in daily life, political discourse and the media.
- There is widespread discrimination against the Roma, Kurds and LGBTI people in education, employment, health, housing and access to services. LGBTI people also face physical insecurity, including killings, targeted at transgender people in particular.
- Public authorities and private individuals use the amorphous concept of 'public morality' to dismiss LGBTI people from employment, refuse to give them housing, prosecute them and shut down their civil organisations.
- Non-Muslim minorities face significant restrictions on their freedom of religion. The inability to train clergy due to the absence of theological schools and the Government's refusal to grant permission to open new churches (for non-recognised Christian denominations) are among the main problems.
- The authorities utterly fail in protecting non-Muslims, especially Jews, against prevalent hate speech and hate crimes in the media, political discourse and daily life. The judicial authorities are reluctant to enforce legislation prohibiting hate speech and discrimination.
- The limited gains made towards the recognition and protection of Kurdish language and culture have been reversed since the coup attempt. Government-appointed trustees have replaced elected mayors in the Kurdish region and reversed their multiculturalist and multilingual policies.
- Thousands of Kurdish activists, mayors, journalists and parliamentarians have been arrested on terrorism charges for their advocacy of equality and justice for Kurdish civilians.
- The ECtHR's rulings against mandatory religion courses, the non-recognition of Alevi places of worship and the exclusion of these places of worship from social advantages granted to mosques and the mandatory indication of religion in official identity cards remain unimplemented. The ECtHR's ruling concerning the inability of Jehovah's Witnesses to open places of worship also remains unimplemented.
- The ECtHR's rulings concerning the right of access to education of students with disabilities also remain unimplemented.
- Turkey is the only member of the Council of Europe which does not recognise the right to conscientious objection to military service. The ECtHR's rulings on this issue remain unimplemented.

12 LATEST DEVELOPMENTS IN 2018

12.1 Legislative amendments

In 2018, no legislative amendments were adopted in relation to anti-discrimination law in Turkey.

12.2 Case law

Name of the court: European Court of Human Rights

Date of decision: 30 January 2018

Name of the parties: *Enver Şahin v. Turkey*

Reference number: Application No. 23065/12

Link: The text of the judgment in French is available at:

[https://hudoc.echr.coe.int/eng#{"itemid":\["001-180642"\]}](https://hudoc.echr.coe.int/eng#{);

A press release in English relating to the judgment is available at:

[https://hudoc.echr.coe.int/eng-press#{"fulltext":\["23065/12"\]}](https://hudoc.echr.coe.int/eng-press#{).

Brief summary: In a case brought by a university student with a disability, whose request for the adaption of university premises was denied by the rector's office on grounds of budgetary reasons and time constraints and who was instead offered assistance from someone on the premises, the ECtHR concluded that the national judicial and university authorities had failed to show the required diligence to ensure that the applicant could continue to enjoy his right to education on equal terms with other students without imposing an undue burden on the university administration. While it found that there had been a violation of Article 14 read in conjunction with Article 2 of Protocol 1, the ECtHR did not deem it necessary to examine separately the applicant's complaints under Article 14 in conjunction with Article 8.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: Turkey
Date: 31 December 2018

<p>Title of the law: Law on the Human Rights and Equality Institution of Turkey (no. 6701) Abbreviation: N/A Date of adoption: 6 April 2016 Latest relevant amendment: 2 July 2018 Entry into force: 20 April 2016 Web link: http://www.mevzuat.gov.tr/MevzuatMetin/1.5.6701.pdf Grounds covered: sex, race, colour, language, religion, belief, denomination, philosophical and political opinion, ethnic origin, wealth, birth, marital status, health, disability and age Civil law Material scope: Employment, social protection, social advantages, access to goods and services, education, housing (public and private) Principal content: direct discrimination; indirect discrimination; failure to provide reasonable accommodation; harassment; discrimination by assumption; multiple discrimination; mobbing; segregation; instruction to discriminate and compliance with such instruction</p>
<p>Title of the law: Labour Law (no. 4857) Abbreviation: N/A Date of adoption: 22 May 2003 Latest amendments: 2 July 2018 Entry into force: 10 June 2003 Web link: http://www.mevzuat.gov.tr/MevzuatMetin/1.5.4857.pdf Grounds covered: Language, race, colour, gender, disability, political opinion, philosophical belief, religion and sect or any such considerations Civil law Material scope: Employment (public and private) Principal content: Direct discrimination, indirect discrimination (gender and pregnancy based), (sexual) harassment, Victimization (very limited) Principal content: Direct discrimination, (sexual) harassment</p>
<p>Title of the law: Law on Persons with Disabilities (no. 5378) Abbreviation: N/A Date of adoption: 1 July 2005 Latest amendments: 18 November 2014 Entry into force: 7 July 2005 Web link: http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5378.pdf Grounds covered: Disability Civil law Material scope: Public and private employment Principal content: Direct discrimination, reasonable accommodation</p>
<p>Title of the law: Basic Law on National Education (no. 1739) Abbreviation: N/A Date of adoption: 14 June 1973 Latest amendments: 2 December 2016 Entry into force: Entry into force: 24 June 1973 Web link: http://www.mevzuat.gov.tr/MevzuatMetin/1.5.1739.pdf</p>

Grounds covered: Language, race, gender, religion, disability
Civil law
Material scope: Education
Principal content: Direct discrimination

Title of the law: Law on Civil Servants (no. 657)

Abbreviation: N/A

Date of adoption: 14 July 1965

Latest amendments: 27 March 2015

Entry into force: 23 July 1965

Web link: <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.657.pdf>

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

Civil law

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

Principal content: Direct discrimination

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Turkey
Date: 31 December 2018

Instrument	Date of signature	Date of ratification	Derogations / reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	4.11.1950	18.05.1954	No	Yes	Yes, particularly in constitutional complaints
Protocol 12, ECHR	18.04.2001	Not ratified	N/A	No	N/A
Revised European Social Charter	16.10.2004	27.06.2007	Article 4 (3), 7(5), 8, 15, 19, 20, 23, 27	Ratified collective complaints protocol? No	No
International Covenant on Civil and Political Rights	15.08.2000	23.09.2003	Article 27	Yes	In theory yes, but courts are reluctant to accept
Framework Convention for the Protection of National Minorities	Not signed	N/A	N/A	N/A	N/A
International Covenant on Economic, Social and Cultural Rights	15.08.2000	23.09.2003	Articles 13(3) and 4	N/A	In theory yes, but courts are reluctant to accept
Convention on the Elimination of All Forms of Racial Discrimination	13.10.1972	16.09.2002	No	No	In theory yes, but courts are reluctant to accept
Convention on the Elimination of All Forms of Discrimination	14.10.1985	19.01.1986	No	No	In theory yes, but courts are reluctant to accept

Instrument	Date of signature	Date of ratification	Derogations / reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
n Against Women					
ILO Convention No. 111 on Discrimination	13.12.1966	21.09.1967	No	Yes	In theory yes, but courts are reluctant to accept
Convention on the Rights of the Child	14.09.1990	4.04.1995	Articles 29 and 30	N/A	In theory yes, but courts are reluctant to accept
Convention on the Rights of Persons with Disabilities	30.03.2007	28.09.2009	None	No	In theory yes, but courts are reluctant to accept
None	Yes	In theory yes, but courts are reluctant to accept			

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