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Country report

Gender equality

Turkey

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Country report

Gender equality

How are EU rules transposed into national law?

Turkey

Kadriye Bakirci

Reporting period 1 January 2019 – 31 December 2019

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1 Introduction

1.1 Basic structure of the national legal system

In 2018, Turkey transformed from a parliamentary system to a quasi-presidential political system (as of 9 July 2018).

In principle, the amended Constitution of Turkey (1982)[1] provides for a separation of executive, legislative and judicial powers. However, under the new system there are certain exceptions to this rule for example, the legislative powers of the President to issue presidential decrees (decrees having the effect of law) or to declare a state of emergency (Constitution, Article 104).

The legislative function is exercised by the Grand National Assembly of Turkey. Laws introduced by the Grand National Assembly prevail over the presidential decrees with respect to the same subject in the hierarchy of norms (Constitution, Article 104).

In principle, fundamental and personal rights and duties and political rights and duties cannot be regulated under presidential decrees. Further, under the Constitution, presidential decrees cannot be issued on matters that are explicitly and exclusively regulated by law or that are clearly regulated by law (Constitution, Article 104/17). However, under the state of emergency, the President can issue a presidential decree without being subject to the above restrictions. The presidential decrees issued under the state of emergency are submitted for review and approval by the Grand National Assembly on the day of their publication in the *Official Journal*, and enter into effect on the same day (Constitution, Article 119/6). Such decrees are discussed and resolved on by the Grand National Assembly within three months from their effective date, otherwise presidential decrees issued during the state of emergency will be annulled automatically (Constitution Article 119/7).

The Ministry of Family, Employment and Social Services,[2] which was established in 2018, is in charge of women's affairs.[3]

The legal system of Turkey is based on the division of public law and private law. This division is mainly influenced by continental Europe (civil law) legal systems based on codified laws.

Public law regulates the relations between the citizens, the state, the state bodies, international organisations and other states. It is divided into constitutional law, administrative law, criminal law, tax law, and international law.

Private law regulates the relations between individuals and legal entities. It is divided into civil law, commercial law, employment/labour and social security law and international private law.

In Turkey, workers are classified as self-employed (independent) or dependent workers. Dependent workers are: employees working under a private law employment contract either in the public or private sector; civil servants; and public officials working under an administrative law employment contract in public sector. Different strands of legislation apply to these three groups of (dependent) workers,[4] as do different levels of protection

[1] See Constitution (*Anayasa*) No. 2709, *Official Journal*, 9.11.1982, No. 17863.

[2] Presidential Decree on the Establishment and Duties of the Ministry of Family, Employment and Social Services *(Aile, Çalışma ve Sosyal Hizmetler Bakanlığının Teşkilat ve Görevleri Hakkında Kararname),* Decree No. 1, *Official Journal* 10.6.2018; amended by Decree No. 4, 15.7.2018.

[3] Presidential Decree on the Establishment and Duties of the Ministry of Family, Employment and Social Services *(Aile, Çalışma ve Sosyal Hizmetler Bakanlığının Teşkilat ve Görevleri Hakkında Kararname),* Decree No. 1, *Official Journal* 10.6.2018; amended by Decree No. 4, 15.7.2018; See section 1.3.

[4] See section 2.2, below.

against discrimination.[5] Labour/employment law is only applicable to employees. On the other hand, the relationship between civil servants and public officials working under an administrative law employment contract and the state is not a private contractual relationship and they therefore fall under the scope of a special section of public law (administrative law).[6]

Turkey's legal system consists of two types of courts: judicial courts (civil and criminal courts) and administrative courts. Between the first instance courts and the supreme courts are the civil and criminal regional appellate courts. The three supreme courts within the judicial system are the Constitutional Court, the Court of Cassation (the civil and criminal court of appeal) and the Conseil d'Etat (the administrative court of appeal). In addition, the Court of Jurisdictional Disputes rules on cases that cannot be classified readily as falling within the purview of one court system.

There are specialised courts for certain legal areas within the scope of the powers of civil courts and administrative courts. Although disputes involving employees are settled by labour courts, disputes involving civil servants and public officials working under an administrative law employment contract are settled by administrative courts.

Turkey recognised the right of individuals to petition the European Court of Human Rights (the ECtHR) in 1987, and the mandatory judicial power of the ECtHR in 1990. As a result of the right of individual communication to ECtHR, the court has a higher monitoring function for the citizens of Turkey. For this reason, all citizens of Turkey who have exhausted internal processes have the opportunity to apply to the ECtHR in respect of a violation of their rights.[7] In addition, Protocol No. 12 of the European Convention on Human Rights (the ECHR) was signed by Turkey on 18 April 2001.

With an amendment made to the Constitution in 2010 (Article 148), the possibility for individual application to the Constitutional Court[8] was opened. The citizens who believe that their fundamental rights and freedoms, as set forth in the ECHR and guaranteed by the Constitution may have been infringed by a public authority can apply to the Constitutional Court individually before filing an application to the ECtHR. In gender discrimination cases, an individual application may be made to the Constitutional Court.[9]

International law duly approved and enacted by the legislature is also deemed to be part of the legal system (Constitution Article, 90/5).[10] In disputes involving the rights recognised by the ratified conventions, the parties (e.g. trade unions, NGOs, individuals) may apply to the international supervisory mechanisms, such as the ILO Governing Body Committee on Freedom of Association, ILO Committee of Experts on the Application of Conventions and Recommendations, UN Committee on Economic Social and Cultural Rights (CESCR), UN Committee on the Elimination of Discrimination Against Women (the CEDAW Committee),[11] the Council of Europe's European Committee of Social Rights (ECSR) and the independent expert body responsible for monitoring the implementation of the Convention on Preventing and Combating Violence against Women and Domestic Violence (GREVIO).

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5 See section 2.2, below.

6 See Bakirci, K (2017), 'The Concept of Employee: The Position in Turkey' in B. Waas/ G.H. van Voss eds., *Restatement of Labour Law in Europe: Vol I: The Concept of Employee*, (1st edn) Hart Publishing, United Kingdom.

7 See e.g. ECtHR, *D.B.* v. *Turkey*, No. 33526/08, 13.7.2010, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-99907%22]}; *Ozpinar* v. *Turkey*, No. 20999/04, 19.1.2011 http://hudoc.echr.coe.int/tur?i=001-101212; *Opuz* v. *Turkey*, No. 33401/02, 9.6.2009, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-92945%22]}.

8 The Establishment and Rules of Procedures of the Constitutional Act (*Anayasa Mahkemesinin Kuruluşu ve Yargilama Usulleri Hakkinda Kanun*), No. 6216, *Official Journal* 3.4.2011.

9 See section 11.3, below.

10 See section 1.3, below.

11 See e.g. CEDAW Committee, *R.K.B* v. *Turkey*, 24.2.2012 http://www2.ohchr.org/english/law/docs/CEDAW-C-51-D-28-2010_en.pdf.

Turkey is a candidate for European Union membership and is also a member of international organisations, such as the UN, the ILO and the CoE, and has ratified various conventions by these organisations.

1.2 List of main legislation transposing and implementing the directives

At the Helsinki summit of December 1999, the EU granted Turkey EU candidate status and drafted and approved an EU Accession Partnership for Turkey.[12] As a candidate for EU membership, Turkey is required to harmonise its legislation with the EU's *acquis communautaire*.

Accordingly, the main legislation transposing and implementing directives in Turkey are:

- The Constitution (*Anayasa*), Act No. 2709, *Official Journal* 9 November 1982;
- Establishment and Rules of Procedures of the Constitutional Court Act (*Anayasa Mahkemesinin* Kuruluşu *ve Yargilama Usulleri Hakkinda* Kanun), (No. 6216), *Official Journal* 3 April 2011;
- Employment Act (*İş Kanunu*), (No. 4857), *Official Journal* 10 June 2003 (EA);
- Press Employment Act (*Basın Mesleğinde Çalışanlarla Çalıştıranlar Arasındaki Münasebetlerin Tanzimi Hakkında Kanun*), (No. 5953), *Official Journal* 20 June 1952 (PEA);
- Maritime Employment Act (*Deniz İş Kanunu*), (No. 854), *Official Journal* 29 June 1967 (MEA);
- Labour Courts Act (*İş Mahkemeleri Kanunu*), (No. 7036), *Official Journal* 12 October 2017;
- Obligations Act (*Borçlar Kanunu*), (No. 6098), *Official Journal* 4 February 2011 (OA);
- Employee Trade Unions and Collective Bargaining Act (*Sendikalar ve Toplu İş Sözleşmesi Kanunu*), (No. 6356), *Official Journal* 7 November 2012;
- Civil Servants Act (*Devlet Memurları Kanunu*), (No. 657), *Official Journal* 23 July 1965 (CSA);
- Statutory Decree No. 399 on the regulation of the personnel regime of state economic enterprises and abrogation of some articles of the Statutory Decree No. 233 (*Kamu İktisadi Teşebbüsleri Personel Rejiminin Düzenlenmesi ve 233 sayili Kanun Hükmünde Kararnamenin Bazi Maddelerinin Yürürlükten Kaldirilmasina Dair Kanun Hükmünde Kararname*), Decree No. 399, *Official Journal* 29 January 1990;
- Administrative Procedure Act (*İdari Yargılama Usulü Kanunu*), (No. 2577), *Official Journal* 20 January 1982;
- Public Personnel Trade Unions and Collective Bargaining Act (*Kamu Görevlileri Sendikaları ve Toplu Sözleşme Kanunu*) (No. 4688), *Official Journal* 12 July 2001;
- Act on the Disabled (*Engelliler Hakkında Kanun*) (No. 5378), *Official Journal* 7 July 2005;
- Occupational Health and Safety Act (*İş Sağlığı ve Güvenliği Kanunu*), (No. 6331), *Official Journal* 30 June 2012 (OHSA);
- Social Insurance and General Health Insurance Act (*Sosyal Sigortalar ve Genel Sağlık Sigortası Kanunu*), (No. 5510), *Official Journal* 16 June 2006;
- Unemployment Insurance Act (*İşsizlik Sigortası Kanunu*), (No. 4447), *Official Journal* 8 September 1999;
- Act on the Committee on Equality of Opportunity Between Men and Women for The Grand National Assembly of Turkey (*TBMM Kadın Erkek Fırsat Eşitliği Komisyonu Kanunu*), (No. 5840), *Official Journal* 24 March 2009;
- Human Rights and Equality Institution Act *(Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu),* (No. 6701), *Official Journal*, 20 April 2016 (HREIA);
- Public Auditing Institution (Ombudsperson) Act (*Kamu Denetçiliği Kanunu*), (No. 6328), *Official Journal* 29 June 2012;
- Act on the restructuring of certain receivables and amendment to the Social Insurance Act and certain laws (*Bazı Alacakların Yeniden Yapılandırılması İle Sosyal*

[12] See Helsinki European Council 10 and 11 December 1999 Presidency Conclusion, http://www.europarl.europa.eu/summits/hel1_en.htm.

Sigortalar ve Genel Sağlık Sigortası Kanunu ve Diğer Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılması Hakkında Kanun) (No. 6111), *Official Journal* 25 February 2011;

- Civil Code (*Medeni Kanun*), (No. 4721), *Official Journal* 8 December 2001;
- Civil Procedure Act (*Hukuk Muhakemeleri Kanunu*), (No. 6100), *Official Journal* 4 February 2011;
- Mediation Act (*Hukuk Uyuşmazliklarinda Arabuluculuk Kanunu*), (No. 6325), *Official Journal* 22 June 2012;
- Act on protection of the family and the prevention of violence against women (*Ailenin Korunması ve Kadına Karşı Şiddetin Önlenmesine Dair Kanun*), (No. 6284), *Official Journal* 20 March 2012;
- Establishment, Duties and Procedure of Family Courts Act (*Aile Mahkemelerinin Kuruluş, Görev ve Yargılama Usullerine Dair Kanun*), (No. 4787), *Official Journal* 18 January 2003;
- Presidential Decree on the establishment and duties of the Ministry of Family, Employment and Social Services *(Aile, Çalışma ve Sosyal Hizmetler Bakanlığının Teşkilat ve Görevleri Hakkında Kararname),* Decree No. 1, *Official Journal* 10 June 2018 and Decree No.4 15 July 2018;
- Municipality Act (*Belediye Kanunu*), (No. 5393) *Official Journal* 13 July 2005;
- Act on the establishment of radio and television enterprises and their media services (*Radyo ve Televizyonların Kuruluş ve Yayın Hizmetleri Hakkında Kanun*), (No. 6112), *Official Journal* 3 March 2011;
- Penal Code (*Türk Ceza Kanunu*), (No. 5237), *Official Journal* 12 October 2004 (PC);
- Criminal Procedure Act (*Ceza Muhakemesi Kanunu*), (No. 5271), *Official Journal* 17 December 2004;
- Political Parties Act (*Siyasi Partiler Kanunu*), (No. 2820), *Official Journal* 24 April 1983;
- Basic Act on National Education (*Milli Eğitim Temel Kanunu*), (No. 1739), *Official Journal* 24 June 1973;
- Bylaw amending previous bylaw on dress code of the public personnel working in public institutions (*Kamu Kurum ve Kuruluşlarında Çalışan Personelin Kılık ve Kıyafetine Dair Yönetmelikte Değişiklik Yapılmasına İlişkin Yönetmelik*) (Decision No. 2013/5443), *Official Journal* 8 October 2013;
- Bylaw amending the bylaw on dress code of students of state schools (*Milli Eğitim Bakanlığına Bağlı Okul Öğrencilerinin Kılık ve Kıyafetlerine Dair Yönetmelikte Değişiklik Yapılması Hakkında Yönetmelik*), *Official Journal*, 27 September 2014;
- Bylaw on the minimum wage (*Asgari Ücret Yönetmeliği*), *Official Journal* 1 August 2004;
- Bylaw on the conditions of night shifts of working women (*Kadın Çalışanların Gece Postalarında Çalıştırılma Koşulları Hakkında Yönetmelik*), *Official Journal* 24 July 2013;
- Bylaw on the working conditions for pregnant or nursing workers, and nursing rooms and day nurseries (*Gebe veya Emziren Kadınların Çalıştırılma Şartlarıyla Emzirme Odaları ve Çocuk Bakım Yurtlarına Dair Yönetmelik*), *Official Journal* 16 August 2013;
- Bylaw on the establishment and operation principles of private nurseries and daycare centres and private children's clubs (*Özel Kreş ve Gündüz Bakımevleri İle Özel Çocuk Kulüplerinin Kuruluş ve İşleyiş Esasları Hakkında Yönetmelik*), *Official Journal* 30 April 2015;
- Bylaw on the birth allowance (*Doğum Yardımı Yönetmeliği*), *Official Journal* 23 May 2015;
- Bylaw on part-time work following maternity leave or unpaid leave (*Analık İzni veya Ücretsiz İzin Sonrası Yapılacak Kısmi Süreli Çalışmalar Hakkında Yönetmelik*), *Official Journal* 8 November 2016;
- Bylaw on the implementation of Act No. 6284 on the protection of the family and the prevention of violence against women (*6284 Sayılı Ailenin Korunması ve Kadına Karşı Şiddetin Önlenmesine Dair Kanuna Ilişkin Uygulama Yönetmeliği*), *Official Journal* 18 January 2013;

- Bylaw on the establishment and functioning of guest houses (shelters) (*Kadın Konukevlerinin Açılması ve Işletilmesi Hakkında Yönetmelik*), *Official Journal* 5 January 2013;
- Bylaw on centres for prevention and monitoring of violence (*Şiddet Önleme ve İzleme Merkezleri Hakkında Yönetmelik*), *Official Journal* 17 March 2016;
- Bylaw on the treatment of and other obligations imposed on those convicted of crimes against sexual inviolability *(Cinsel Dokunulmazlığa Karşı Suçlardan Hükümlü Olanlara Uygulanacak Tedavi ve Diğer Yükümlülükler Hakkında Yönetmelik), Official Journal* 26 July 2016;
- The Ministry of Justice Circular on the implementation of Act No. 6284 on the protection of the family and the prevention of violence against women (*Ailenin Korunması ve Kadına Karşı Şiddetin Önlenmesine Dair Kanunun Uygulanması Hakkında Genelge)*, No. 154/1, 17 December 2019 https://www.adalet.gov.tr/Genelgeler/genelge_pdf/154-1.pdf;
- The Ministry of Interior Circular on Combating Violence Against Women (*Icisleri Bakanlığı Kadına Karşı Şiddetle Mücadele Genelgesi*), 1 January 2020, https://www.icisleri.gov.tr/kurumlar/icisleri.gov.tr/icerikYonetimi/haberler/2020/01/__Kadina-Yonelik-Siddetle-Mucadele.pdf;
- The Prime Ministry Circular on the Prevention of Mobbing in Workplaces (*İşyerlerinde Psikolojik Tacizin* (*Mobbing*) *Önlenmesi Hakkında Başbakanlık Genelgesi*), *Official Journal* 19 March 2011;
- The Prime Ministry Circular on Promoting Employment of Women and Ensuring Equal Opportunities (*Kadın İstihdamının Artırılması ve Fırsat Eşitliğinin Sağlanması*), No. 2010/14, *Official Journal* 25 May 2010;
- State Personnel Department Public Personnel Circular, Serial No. 2 (*Kamu Personeli Genel Tebliği, Seri no: 2*), *Official Journal* 15 April 2011;
- Capital Markets Board Communiqué No. 57 amending the former Communiqué on the determination and application of corporate government principles (*Kurumsal Yönetim İlkelerinin Belirlenmesine ve Uygulanmasına İlişkin Tebliğde Değişiklik Yapılmasına Dair SPK Tebliği*), *Official Journal* 11 February 2012.

1.3 Sources of law

The main feature of civil law systems is that the laws are organised into systematic written codes.

Sources of law are the international conventions, the Constitution, statutes, presidential decrees, bylaws and circulars, in a hierarchical order.

International conventions regarding basic rights and freedoms are the highest source of legal order stated in Article 90/5 of the Constitution. According to this article:

> 'International conventions which are duly put into effect have the same effect as domestic laws. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In case of conflicts between international agreements duly put into effect regarding basic rights and freedoms and domestic laws, due to different provisions on the same issue, the provisions of international conventions shall be prevail.'

According to Article 11 of the Constitution: 'The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals.' Therefore, international conventions are binding upon the legislative, executive, and judicial organs, the administrative authorities, and other institutions and individuals.

Case law is taken into consideration for the interpretation of laws. The verdicts of the ECtHR, the Constitutional Court, the Court of Cassation, the regional courts of appeal, the

Conseil d'Etat and the courts of first instance (such as labour courts) are among the main judicial sources in the field of gender equality. Higher court decisions have influence over the lower courts to ensure uniformity in judicial practice. However a criticism frequently made against the courts of Turkey is that their rulings have not been consistent in similar cases.[13]

Apart from the judicial rulings, the observations and views of the international supervisory mechanisms are also sources of law.

[13] See, for example, Constitutional Court, 18.9.2013, 2013/6932, *Official Journal* 9.5.2015, No. 29350, in which the Constitutional Court critised the Court of Cassation for its different rulings in similar cases.

2 General legal framework

2.1 Constitution

2.1.1 Constitutional ban on sex discrimination

Article 10, paragraph 1 of the Turkish Constitution bans all types of discrimination including sex discrimination. According to this paragraph, all individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations.[14]

Article 70 of the Constitution provides that every citizen of Turkey has the right to enter public service. No criteria other than the qualifications for the office concerned will be taken into consideration for recruitment into public service.[15]

The Constitution also states that state bodies and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings (Article 10/5). No privilege shall be granted to any individual, family, group or class (Article 10/4).

Since the international agreements that have been duly put into effect have the force of law (Constitution, Article 90/5) the framework of legislation prohibiting sex discrimination consists of provisions in the Constitution, as well as provisions included in ratified international instruments.

The international instruments in this field that are binding on Turkey include: CEDAW, Optional Protocol of CEDAW, UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UN Convention on the Rights of Persons with Disabilities, ILO conventions on Unemployment (No. 2), Minimum Wage-Fixing Machinery (No. 26), Forced Labour Convention (No. 29), Fee-Charging Employment Agencies (No. 34), Underground Work (Women) (No. 45), Labour Inspection (No. 81), Freedom of Association and Protection of the Right to Organise (No. 87), Employment Service Convention (No. 88), Protection of Wages (No. 95), Fee-Charging Employment Agencies (Revised) (No. 96), Right to Organise and Collective Bargaining (No. 98), Minimum Wage Fixing Machinery (Agriculture) (No. 99), Equal Remuneration (No. 100), Social Security (Minimum Standards) (No. 102), Abolition of Forced Labour (No. 105), Discrimination in Respect of Employment and Occupation (No. 111), Equality of Treatment (Social Security) (No. 118), Employment Policy (No. 122), Workers' Representatives (No. 135), Minimum Age (No. 138), Labour Relations (Public Service) (No. 151), Occupational Safety and Health (No. 155), Termination of Employment at the Initiative of the Employer (No. 158), Occupational Health Services (No. 161), Worst Forms of Child Labour (No. 182), Promotional Framework for Occupational Safety and Health (No. 187).[16]

[14] See Constitutional Court, 7.6.1999, 10/22, *Official Journal* 21.7.2000, No. 24116.

[15] See Conseil d'Etat 12th Division, 22.2.2006, 2004/4382, 2006/539.

[16] The ILO's Indigenous and Tribal People Convention, 1989 (No. 169) (See Bakirci, K (2011), 'Indigenous Women's Issues', in *Encyclopedia of Women in Today's World*, Vol.2 (eds. Z.Stange/C.K.Oyster/J.E.Sloan), Sage, USA) and the Domestic Workers' Convention, 2011 (No. 189) (See Bakirci, K (2011), 'Domestic Workers', in *Encyclopedia of Women in Today's World*, Vol. 1 (eds. Z.Stange/C.K.Oyster/J.E.Sloan), Sage, USA) specifically prohibits sexual harassment in the workplace. The amendments to the Maritime Labour Convention 2006 (No. 186), include issues of bullying and harassment. None of them has been ratified by Turkey.

Turkey also has to respect and promote principles and rights in the ILO Declaration on Fundamental Principles and Rights at Work (1998)[17] and the ILO Declaration on Social Justice for a Fair Globalisation (2008).[18]

The European instruments in this field that are binding on Turkey are the ECHR, the (revised) European Social Charter and the CoE Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention).

2.1.2 Other constitutional protection of equality between men and women

The principle of equality between women and men is acknowledged explicitly in the Constitution.

The Constitution states: 'Men and women shall have equal rights' (Article 10/2).

However, according to Article 50, paragraph 2 of the Constitution, no one shall be required to perform work unsuited to his/her age, sex, and capacity. Minors, women, and persons with physical or mental disabilities have special protection with regard to working conditions. The inclusion of minors and persons with mental disabilities in the same paragraph as the reference to women gives the impression that women are not equal citizens but legally restricted persons, who do not have full legal capacity. It suggests that they are weak, helpless, and in need.[19]

Article 41 of the Constitution states that the family is 'based on equality between spouses'.

According to the Article 42 of the Constitution, no one will be deprived of the right to education. Primary education is compulsory for all citizens of both sexes and is free of charge in state schools.

The framework of legislation requiring equality between men and women consists of provisions in the Constitution, as well as provisions included in the ratified international and European instruments (listed above).

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[17] The Declaration commits Member States to respect and promote principles and rights in four categories, whether or not they have ratified the relevant Conventions. These categories are: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation.

[18] The Declaration expresses the universality of the decent work agenda: all Members of the ILO must pursue policies based on the strategic objectives – employment, social protection, social dialogue, and rights at work. At the same time, it stresses a holistic and integrated approach by recognising that these objectives are 'inseparable, interrelated and mutually supportive', ensuring the role of international labour standards as a useful means of achieving all of them.

[19] See Bakirci, K./ O.Karadeniz/ H.Yilmaz./ E.N.Lewis/ N.Durmaz (2014), *Women in the World of Work* (*İş Dünyasında Kadın*), Volume 2, Turkonfed Yayini, Istanbul; Bakirci, K. (2014), 'Do Women Equal Citizens in Relation to Right to Work' (*Çalışma Hakkı Açısından Kadınlar Eşit Vatandaşlar Mıdır*?), *Toprak Isveren Dergi*si, Sayi: 101, Mart; Bakirci, K. (2012), *Searching for Gender Equality and the Non-Discrimination Principle Based on Gender in Employment in International, European Union, United States and Turkish Law* (*Uluslararası Hukuk, AB ve ABD Hukuku İle Karşılaştırmalı Çalışma Yaşamında Kadın Erkek Eşitliği Arayışı, Cinsiyet Ayrımcılığı Yasağı ve Türkiye*), Seckin Yayinlari, Ankara, June; Bakirci, K. (2010-2011), 'Gender Equality in Employment in Turkish Legislation with Comparisons to EU and International Law', in *Journal of Workplace Rights*, Vol. 15, No. 1-2; Bakirci, K. (2009), 'Social Rights in the Constitutions of 1961 and 1982 and in the Draft Constitution of 2007' (*1961 ve 1982 Anayasalarında ve 2007 Tarihli Anayasa Önerisinde Sosyal Haklar*), *Prof. Dr. Yilmaz Aliefendioglu'na Armagan* (Eds. F.Hakan Baykal/ Ibrahim O. Kaboglu/ Nihal Saban), Yetkin Yayim Basim Dagitim, Ankara; Bakirci, K. (2008), 'Social Rights of Working Women in the Draft Turkish Constitution' (*Anayasa Önerisi'nde Kadınların Sosyal Hakları*), Eğitim-Sen Eğitim ve Bilim İşkolunda Çalışan Kadınların Sosyal Hakları ve İş Güvencesi Sempozyumu 12-13 January 2008, Eğitim-Sen Yayınları, Ankara; Bakirci, K./ Budak, G./ Ozkaya, M./ Yılmaz, H./ Karadeniz, O. (2007), *Women in the World of Work* (*İş Dünyasında Kadın*), Turkonfed Yayini, Istanbul.

2.2 Equal treatment legislation

A general principle with regard to the prohibition of discrimination in the employment relationship was first stipulated for employees by the Employment Act (the EA) in 2003. Under the EA (Articles 5 and 18), it is the duty of the employer and employers' representatives (Article 2/4) to treat women and men employees equally.[20] Under the EA (Article 2/4), the employer is directly liable towards the employees for the conduct and responsibilities of his/her representative acting in this capacity.

However, with a few exceptions,[21] the EA provides only limited coverage that benefits only the regulated sector of the labour market, which is the minority of the market. The EA does not cover following the activities and employment relationships (EA, Article 4):

a) 'Sea and air transport activities;
b) Establishments and enterprises employing a minimum of 50 employees (50 included) where agricultural and forestry work is carried out;
c) Any construction work related to agriculture which falls within the scope of family economy;
d) Works and handicrafts performed in the home without any outside help by members of the family or close relatives up to and including the 3rd degree;
e) Domestic services;
f) Apprentices, without prejudice to the provisions on occupational health and safety;
g) Sportspeople;
h) Those undergoing rehabilitation;
i) Establishments employing three or fewer employees and falling within the definition given in Article 2 of the Tradesmen and Small Handicrafts Act.'[22]

Seafarers are covered by a special Maritime Employment Act[23] (the MEA) and journalists (who are also outside of the scope of the EA) are covered by the Press Employment Act[24] (the PEA). The rest of the jobs that are outside the scope of the EA that are mentioned in Article 4 of the EA, including female-dominated jobs such as domestic work, work in agricultural enterprises employing a maximum of 50 employees, and works and handicrafts performed in the home without any outside help by members of the family or close relatives up to and including the 3rd degree, are covered by the Obligations Act[25] (the OA).[26]

The Civil Servants Act of 1965[27] (the CSA) which applies to civil servants (CSA Article 4) does not contain explicit anti-discrimination provisions. Article 10/2 provides that senior officials shall treat the civil servants in their charge 'equally and fairly'. 'Equally and fairly' may be interpreted as 'without discrimination'. Article 7 states that civil servants must be impartial. A civil servant while fulfilling his/her duty is forbidden from making any discrimination based on language, race, gender, political thought, philosophical belief, religion and sect etc.

[20] See section 4.3, below.
[21] Employment Act, Article 74 (on leave related to maternity/adoption/care and right to work part time (see section 4.3 below), and Article 39 (on minimum wage, see section 3.2 below) apply to all employees whether they are in the scope of the EA or not.
[22] Tradesmen and Small Handicrafts Act (*Esnaf ve Sanatkarlar Kanunu*), No. 507, *Official Journal* 21.6.2005.
[23] Maritime Employment Act (*Deniz İş Kanunu*), (No. 854), *Official Journal* 29.4.1967.
[24] Press Employment Act (*Basın Mesleğinde Çalışanlarla Çalıştıranlar Arasındaki Münasebetlerin Tanzimi Hakkında Kanun*), (No. 5953), *Official Journal* 20.6.1952.
[25] Obligations Act (*Borçlar Kanunu*), (No. 6098), *Official Journal* 4.2.2011.
[26] See section 4.3, below.
[27] Civil Servants Act (*Devlet Memurları Kanunu*), (No. 657), *Official Journal* 23.7.1965.

No explicit protection against discrimination is provided for public officials working under an administrative law employment contract in the legislation about this group.[28]

The Penal Code[29] (the PC) stipulates penal sanctions against direct discrimination in access to employment (Article 122).

In order to remove the deficiencies in the employment, administrative and criminal law legislation in relation to protection against discrimination, the Human Rights and Equality Institution Act (the HREIA) was introduced in 2016.[30]

The HREIA also established an equality body, the Human Rights and Equality Institution of Turkey, to ensure the right to equal treatment of all persons and prevent discrimination.[31]

A person claiming discrimination/harassment/mobbing or victimisation can resort to mediators or, the courts[32] or the Human Rights and Equality Institution.[33] However, applications concerning the allegations which are under the scope of Article 5 of the EA[34] may be lodged only if no sanction is imposed after reviewing the procedures of complaint stated under the EA and the relevant legislation (HREIA, Article 17/5).[35]

[28] For example see, Statutory Decree No. 399 on the regulation of personnel regime of state economic enterprises and abrogation of some articles of the Statutory Decree No. 233 (*Kamu İktisadi Teşebbüsleri Personel Rejiminin Düzenlenmesi ve 233 sayili Kanun Hükmünde Kararnamenin Bazi Maddelerinin Yürürlükten Kaldirilmasina Dair Kanun Hükmünde Kararname*), Decree No. 399, *Official Journal* 29.1.1990.

[29] Penal Code (*Türk Ceza Kanunu*), (No. 5237), *Official Journal* 12.10.2004.

[30] Human Rights and Equality Institution Act *(Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu),* (No. 6701), *Official Journal* 20.4.2016; see in 11.7.

[31] See section 11.7, below.

[32] See section 11.9, below.

[33] See section 11.7, below.

[34] See section 4.3, below.

[35] See section 11.7, below.

3 Implementation of central concepts

3.1 General (legal) context

3.1.1 Surveys on the definition, implementation and limits of central concepts of gender equality law

No surveys and/or reports have been published in Turkey in recent years that provide insights into the legal definition, implementation and limits of the central concepts of gender equality.

3.1.2 Other issues

Although it is possible to observe important improvements in line with the EU acquis on gender equality in Turkey between 2005-2010, unfortunately since 2011 there has been a tendency to promote the concept of 'gender justice' instead of 'gender equality'. Whereas 'gender equality' focuses on equality between two sexes, 'gender justice' emphasises the different 'natural' characteristics of men and women. In this context, according to the political discourse, women and men have inborn differences which assign them different roles: looking after family for men and taking care of children for women.[36] In other words, this approach normalises the 'natural division of duties derived from biological differences', which is in direct contradiction of the concept of gender equality. As a result, the idea of 'women' has been reduced to the idea of 'mother, wife and daughter' and women are not recognised as individuals, but as dependent on the male members of the family.

3.1.3 General overview of national acts

There are problems of harmonisation with EU and international standards in the wording, personal and material scope of the Turkish legislation.

The language used in the MEA and in some provisions of the OA is sexist. The MEA of 1967 still uses the word 'seaman' instead of 'seafarer' and does not mention female seafarers at all, since it is based on the idea that only men can work in the maritime sector.[37] The OA of 2011 has some provisions that refer to 'male worker/performer' instead of using gender neutral language (Article 66).[38]

On the other hand, the Constitution and the EA cover a non-exhaustive list of discriminatory grounds.

The grounds in the HREIA and the PC that are expanded in comparison to the EU equality law are: philosophical or political opinion, colour, language, sect, wealth, birth status, civil (marital) status, and health condition.

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[36] Aybars, A.I., Copeland, P. and Tsarouhas, D. (2018), 'Europeanization without substance? EU–Turkey relations and gender equality in employment', in *Comparative European Politics*, April, https://www.researchgate.net/publication/324623529_Europeanization_without_substance_EU-Turkey_relations_and_gender_equality_in_employment.

[37] Bakirci, K. (2012), *Uluslararası Hukuk, AB ve ABD Hukuku İle Karşılaştırmalı çalışma Yaşamında Kadın Erkek Eşitliği Arayışı Cinsiyet Ayrımcılığı Yasağı ve Turkiye* (Searching for Gender Equality and the Non-Discrimination Principle Based on Gender in Employment in International, European Union, United States and Turkish Law), Seckin Yayinlari, Ankara, June; Bakirci, K (2019), 'Is Hukuku ve Toplumsal Cinsiyet Bakis Acilarindan "Adam" Calistiranin Sorumlulugu' ('The Liability of "Geschaftsherrn" From the Perspectives of Employment and Gender Equality Laws'), *Akit Disi Sorumlulukta Bedensel Zararlar Uluslararası Kongre* (Eds. S.Ucakhan Gulec/N.Basa), TBB Yayinlari, Ankara.

[38] Bakirci, K. (2019), 'Is Hukuku ve Toplumsal Cinsiyet Bakis Acilarindan "Adam" Calistiranin Sorumlulugu' ('The Liability of "Geschaftsherrn" Form the Perspectives of Employment and Gender Equality Laws'), *Akit Disi Sorumlulukta Bedensel Zararlar Uluslararası Kongre* (Eds. S.Ucakhan Gulec/N.Basa), TBB Yayinlari, Ankara.

3.1.4 Political and societal debate and pending legislative proposals

After the Helsinki European summit in 1999 granted Turkey official EU candidate country status, women's rights in Turkey underwent a period of rapid legislative change and development between 2001-2010. The EU demanded better women's and human rights from Turkey and Turkey's desire to join the EU moved the Government to change outdated laws against women.

However, when it became clear that the EU would not extend membership to Turkey in 2006, it gave the Government an incentive to roll back many of the gains in women's rights. This regression in women's rights included:

- in 2012, the name of the state Ministry for Women's Affairs was changed to the Ministry of Family and Social Policies and then, in 2018, to the Ministry of Family Employment and Social Services. As many women's organisations have pointed out, this decision reflects the Government's perspective on gender and women's rights, revealing its desire to define women only in terms of their role within the family rather than accepting them as individuals/citizens;
- in 2013, the legislature attempted to draft a law limiting abortion rights;[39]
- in 2016, the legislature attempted to amend Article 103 of the PC on sexual abuse of children to delay the punishment of the offender and its complete removal after five years in the event of marriage between the offender and the child rape victim;[40]
- in 2017, mandatory mediation in employment disputes, including sexual harassment was introduced by the Labour Courts Act;[41]
- in 2018, a draft law on mandatory consultation and implementation of conciliation in cases of divorce was introduced;[42]
- married women's right to carry their own surname is still problematic;[43]
- since last year, some politicians have sided with men who want to stop paying alimony to divorced women, which is something that low-income single mothers cannot live without;
- although Turkey was one of the the first states to sign and ratify the Istanbul Convention, we have seen a backlash against the Istanbul Convention. Some politicians claim that Turkey should withdraw from the convention.[44]
- since the beginning of the Covid-19 pandemic, the Government is once again preparing to put a possible amnesty for child abusers through marriage on the

[39] See Turkish Medical Association (2013) 'Women's Abortion Rights in Healthy and Safe Conditions cannot be Restricted' 17 January 2013. Available at: https://ttb.org.tr/haberarsiv_goster.php?Guid=6702500c-9232-11e7-b66d-1540034f819c&1534-D83A_1933715A=227f04f9eb83322bd9734332b1be2ed579778de2; see section 9.9, below.

[40] Article 103 of the PC states: 'Any person who abuses a child sexually is sentenced to imprisonment from three years to eight years. Sexual molestation (includes) sexual attempt(s) against children who are under the age of fifteen or against those (who) attained the age of fifteen but lack (the) ability to understand the legal consequences of such act(s).' The draft bill aims to lower the age at which sexual relations with a child (under the cover of marriage) is considered a crime from 15 years old to 12 years old. If it passes, it will 'pardon' the underage-marriage offences of approximately 10 000 men currently serving prison sentences on sexual abuse charges. Such an amnesty would whitewash and encourage illegal 'marriages' with children. It would also discourage the victims from appealing to the legal mechanisms and reintroduce the concept of 'marriage with rape offenders' into law. The Government proposed a similar bill in 2016, but it was withdrawn as a result of the reaction from women's rights groups and the public. The current attempt to bring the bill before the Parliament for a vote has also caused outrage among rights groups in Turkey.

[41] See section 10.1, below.

[42] See DW (Deutsche Welle) (2018) 'Mediation debates in family law "fosters discrimination against women"' https://www.dw.com/tr/aile-hukukunda-arabulucu-tart%C4%B1%C5%9Fmalar%C4%B1-kad%C4%B1na-y%C3%B6nelik-ayr%C4%B1mc%C4%B1l%C4%B1%C4%9F%C4%B1-k%C3%B6r%C3%BCkler/a-48071832.

[43] See Hurriyet (2016) 'Married women can use their maiden name' http://www.hurriyet.com.tr/gundem/evli-kadinlar-sadece-bekarlik-soyadini-kullanabilecek-40059512.

[44] See section 10.1, below.

country's agenda.[45] If passed, the bill will allow for the release from prison of men guilty of assaulting a minor if the age difference between the offender and the victim is up to 10 or 15 years, the act was committed without 'force, threat, or any other restriction on consent' and if the aggressor 'marries the victim.' The proposal would open the door for sexual predators, encourage marriage to minors (child marriages) and would override the interest of the child. This would also constitute a violation of Article 37 of the Istanbul Convention, which provides that child marriage is a form of gender based violence.

Despite the complaints of so-called 'men's rights' activists, who claim that women's equality has gone too far, gender equality is not advancing and there has been a decline in women's rights. Rather than fighting for progress, feminists are simply trying to hold on to laws that were passed in the last two decades.

3.2 Sex/gender/transgender

3.2.1 Definition of gender and sex

National legislation does not define either gender or sex. The term used in the national legislation is 'sex' (*cinsiyet*).

However, the Istanbul Convention, which is binding for Turkey, defines gender, for the purpose of the Convention, as 'the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men' (Article 3(c)).

3.2.2 Protection of transgender, intersex and non-binary persons

Although discrimination based on gender reassignment amounts to sex discrimination under Turkish law, there is no explicit prohibition of discrimination on grounds of sexual orientation.

However, the Constitution (Article 10/1) and the EA (Article 5/1) prohibits discrimination based on any grounds. These are non-exhaustive (open-ended) lists therefore transgender, intersex and non-binary persons will be deemed to be included in the prohibition of discrimination based on similar grounds under the Constitution and the EA.

Furthermore, Article 14 of the ECHR, Article E of the European Social Charter, and Article 4(3) of the Istanbul Convention provide that the enjoyment of the rights and freedoms in these conventions must be secured without discrimination on any ground. Although the term 'sexual-orientation-based discrimination' is not mentioned explicitly in Article 14 of the ECHR, there are ECtHR decisions that deem it to include discrimination based on sexual orientation.[46] Since the decisions of the ECtHR, provisions of the ECHR, the European Social Charter and the Istanbul Convention are binding for Turkey, courts (including the Constitutional Court) and equality bodies have to make sure that their decisions are compatible with the ECtHR decisions, provisions of the ECHR, European Social Charter and Istanbul Convention in relation to transgender, intersex and non-binary persons.

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[45] See BBC Turkey (2020) 'Can amnesty come to the fore again for child abuse crimes that are excluded from the scope of the Act No 7242?' (15.4.2020), https://www.bbc.com/turkce/haberler-turkiye-52296798; see section 10.1.2 below.

[46] See e.g. ECtHR, *Identoba and Others* v. *Georgia*, No. 73235/12, 12.5.2015, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Identoba%20and%20Others%22],%22itemid%22:[%22001-154400%22]}; *M.C. and A.C.* v. *Romania* No. 12060/12, 12.4.2016; https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-161982%22]}; *Aghdgomelashvili and Japaridze* v. *Georgia*, No. 7224/11, 3.12.2013 https://hudoc.echr.coe.int/eng#{"itemid":["001-140309"]}; *X* v. *Turkey*, No. 24626/09), 27.5.2013, https://hudoc.echr.coe.int/eng#{"itemid":["001-113876"]}; See also Bakirci, K. (2011), 'Sexual Orientation Based Social Discrimination: Outside the United States', in Z.Stange, C.K.Oyster and J.E.Sloan (eds.) *Encyclopedia of Women in Today's World*, Sage Publications, USA.

Persons who have been through gender reassignment surgery and changed their sex are protected under the sex discrimination provisions of the Turkish legislation.

However, the HREIA (Article 3/2)[47] and the PC (Article 122/c),[48] in conflict with the ECHR, European Social Charter, Istanbul Convention, the Constitution and the EU equality law, have exhaustive lists that do not cover transgender, intersex and non-binary persons and cannot be extended by the courts or equality bodies.

Therefore the protection against discrimination provided for transgender, intersex and non-binary persons is not sufficient and not in conformity with the Constitution, the European conventions and EU law.

Neverthless these groups can go to court to seek penal sanctions under the PC for general crimes against them. In theory, they can also seek damages under the EA, administrative law and tort law[49] for the violation of their rights.

Moreover, there is recourse to the Constitutional Court and appeals against its decisions can be taken to the ECtHR on the basis of a violation of the ECHR.

3.2.3 Specific requirements

There are no specific requirements for the protection of transgender, intersex and non-binary persons under the anti-discrimination provisions of the Constitution.

However under Article 5 of the EA, in order to benefit from the protection against discrimination in the employment relationship or in the termination of the employment relationship, one needs to be within the scope of the EA.[50]

3.3 Direct sex discrimination

3.3.1 Explicit prohibition

The EA and the HREIA explicitly prohibit direct discrimination with regard to the sex.

The EA does not provide any definition of direct discrimination but provides that except for reasons related to the nature of the job the employer must not discriminate directly against an employee in the concluding, conditions, implementation, and termination of an employee's employment contract due to sex (Article 5, paragraph 3).

The HREIA defines direct discrimination. According to the HREIA, 'direct discrimination' is 'Any different treatment which prevents or makes difficult the equal exercise of legal rights and freedoms by a real or legal person when compared with other persons having the same rights, on the grounds of discrimination cited in this Act' (Article 2).

Under the HREIA discrimination includes segregation, direct discrimination, indirect discrimination, harassment, mobbing, multiple discrimination, instruction to discriminate, failure to make reasonable accommodation and wrongful treatment of those who have initiated proceedings against discrimination, those who have been engaged in these proceedings and their representatives.
In addition, Article 122 of the Penal Code prohibits direct sex discrimination stemming from hate.

[47] See section 4.3, below.
[48] See section 4.3, below.
[49] See section 11.6, below.
[50] See section 2.2, above.

3.3.2 Prohibition of pregnancy and maternity discrimination

Only the EA and the HREIA explicitly prohibit discrimination with regard to pregnancy and maternity.

The EA provides that, except for biological reasons, the employer must not discriminate, either directly or indirectly, against an employee in the concluding, conditions, implementation, and termination of an employee's employment contract due to sex or pregnancy (Article 5, paragraph 3).

Article 18 of the EA provides that sex, marital status, pregnancy, maternity, and family responsibilities do not constitute valid reasons for the termination of an employment contract.

Article 5 of the EA does not explicitly prohibit maternity discrimination, but discrimination on the grounds of sex and pregnancy includes maternity discrimination.

However, the protection provided by Articles 5 and 18 of the EA are not adequate (see section 4.3, below).

The HREIA, which covers all workers (employees and public officials) states that the employer or a person authorised by the employer, must not reject job applications due to pregnancy, motherhood and childcare (Article 6/3). Although the act does not explicitly prohibit pregnancy discrimination at all stages of employment, the prohibition of sex discrimination should be deemed to include pregnancy discrimination.

3.3.3 Specific difficulties

The distinction between the concepts of direct and indirect discrimination is not yet known in Turkey. All the available case law is about direct discrimination and the courts give their verdict without discussing the concept.

3.4 Indirect sex discrimination

3.4.1 Explicit prohibition

The EA does not define indirect discrimination. It prohibits indirect discrimination with regard to sex or pregnancy.

It does not explicitly refer to indirect discrimination based on language, race, political opinion, philosophical belief and religion, or similar grounds.

The EA provides that the employer must not discriminate, indirectly, against an employee in the concluding, conditions, implementation, and termination of an employee's employment contract due to sex or pregnancy (Article 5, paragraph 3).

The HREIA defines indirect discrimination. According to the HREIA 'indirect discrimination' is 'putting a real or legal person in a disadvantaged situation in the exercise of their legal rights and freedoms where it is not possible to justify the situation objectively, regarding the grounds of discrimination cited in this Act and as a result of actions, processes and applications which do not seem discriminatory' (Article 2).

3.4.2 Statistical evidence

Article 24 of the HREIA states that:

> 'The Equality Board of the Human Rights and Equality Institute shall decide with the Turkish Statistical Institute (TUIK) and other relevant organisations and institutions the fields on which official statistics need to be gathered to fight discrimination. The Turkish Statistical Institute within the scope of the Official Statistics Program shall be charged with gathering the statistical information required to reveal all indications of discrimination under a system where they are constantly and easily accessible.'

However, statistical evidence is neither collected nor used in Turkey for the purpose of revealing direct discrimination or establishing a presumption of indirect discrimination.[51]

3.4.3 Application of the objective justification test

The concept of the reliance on objective justification to defend allegations of indirect discrimination is not known in Turkey. However, the proportionality principle in relation to restrictions to fundamental rights and freedoms exists in the Constitution of Turkey (Article 13). The employer's freedom of contract is restricted by this principle in addition to the principle of equality before the law (Article 10). Therefore, the employer is under the obligation to justify objectively an indirectly discriminatory policy.

3.4.4 Specific difficulties

Although there is no available data in relation to the concepts of direct and indirect discrimination and the distinction between the two, in the view of the author of this report, the concepts are not clear to the courts/practitioners/public because they have only recently been introduced.

3.5 Multiple discrimination and intersectional discrimination[52]

3.5.1 Definition and explicit prohibition

Multiple discrimination is explicitly recognised in the HREIA and the Act on the Disabled.

Article 2/ç of the HREIA defines multiple discrimination as where the discriminatory action is related to more than one ground regarding the implementation of the HREIA.

Article 4/h of the Act on the Disabled recognises that women and girls with disabilities are subject to multiple discrimination, and in this regard measures must be taken to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.[53]

3.5.2 Case law and judicial recognition

The author of this report is not aware of any case law that addresses multiple discrimination and/or intersectional discrimination (where gender is one of the grounds at stake), but not all court decisions are published.

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[51] Istanbul Convention, Article 11 obliges State Parties to collect disaggregated relevant statistical data at regular intervals on cases of all forms of violence covered by the scope of the Convention; and endeavour to conduct population-based surveys at regular intervals to assess the prevalence of and trends in all forms of violence covered by the scope of the Convention.

[52] See for more information Fredman, S. (2016), *Intersectional discrimination in EU gender equality and non-discrimination law*, European network of legal experts in gender equality and non-discrimination, available at https://www.equalitylaw.eu/downloads/3850-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law-pdf-731-kb.

[53] Measures taken for all women in Turkey are also relevant for women and girls with disabilities. Additionally, all measures focusing on persons with disabilities cover women and girls with disabilities.

3.6 Positive action

3.6.1 Definition and explicit prohibition

In 2004, the Turkish Parliament adopted constitutional amendments that introduced the following provision: 'Men and women shall have equal rights. The State has the duty to ensure that this equality is put into practice' (Article 10/2). In September 2010, a referendum on amendments to the Constitution resulted in the incorporation of the following words: 'Measures ensuring equality between men and women would not be considered a violation of the principle of equality' (Article 10/2).

As a result, according to Article 10 of the Constitution, the state is now obliged to take positive measures to achieve de facto equality between men and women.

Under the HREIA, any necessary, proportionate and different treatment that is in line with the aim to remove inequalities does not constitute a violation of the equality principle (Article 7/f).

The Act on the protection of the family and the prevention of violence against women[54] also states that special measures that are necessary to prevent and protect women from gender-based violence will not be considered to be discrimination under the terms of the act (Article 1/2ç).

3.6.2 Conceptual distinctions between 'equal opportunities' and 'positive action' in national law

Equality is a complex concept having a variety of meanings (equal treatment, equal opportunities, formal equality, and substantive or de facto equality). However, in legal literature, equal opportunities is interpreted as formal equality while positive action is an expression of the principle of de facto equality.

3.6.3 Specific difficulties

Turkey has been slow to integrate the idea of de facto equality of women into the functioning of its democracy. The traditional liberal notion is of equality of opportunity, rather than equality of results. Positive action measures are still far from a reality in Turkey. Since the positive action provisions are regarded as exceptions to equality, there is concern even among women about the legality of such action. Most of the positive measures taken in Turkey are supportive measures and are usually adopted in order to improve women's position, for instance in the employment market, in training and in the education system. The main purpose of these supportive measures is to give the underrepresented sex the opportunity and/or the qualifications to be able to apply for positions on an equal footing with the other sex.

3.6.4 Measures to improve the gender balance on company boards

Although women in Turkey obtained the right to vote and be elected in the mayoral elections in 1930 and the general election in 1934, they continue to be marginalised in political and public life and in decision making. There are no meanningful incentives to increase the participation rate of women in decision-making positions in Turkey.

Electoral quotas are the main type of positive measure taken to increase women's political representation and a form of affirmative action to help them overcome the obstacles that prevent them from entering politics in the same way as their male colleagues. However, in Turkey, there are no legal quotas that are binding for all political entities. Voluntary

[54] Act on protection of the family and the prevention of violence against women (*Ailenin Korunması ve Kadına Karşı Şiddetin Önlenmesine Dair Kanun*), (No. 6284), *Official Journal* 20.3.2012.

party quotas are set up by parties themselves to guarantee the nomination of a certain number or proportion of women, but they are not legally binding and therefore there are no sanctions to enforce them.[55]

Turkey has not adopted specific legislation imposing quotas on board membership or making special provision permitting positive action in this area.[56] However Communiqué No. 57 issued by the Capital Markets Board (SPK),[57] set out a quota for the number of women on boards. Having at least one female member in the five-member executive committees has become a general principle for companies listed on the Istanbul Stock Exchange. The application of this principle is based on a 'comply or explain' approach: if a company does not comply with this principle, its reasons for not complying will be made public in its 'Report of compliance with the corporate governance principles.'

3.6.5 Positive action measures to improve the gender balance in other areas

There are supportive positive action measures to improve gender balance in employment, in training and in the education system.

In order to increase women's employment and provide gender equality, the Prime Ministry of Turkey issued a circular in 2010, entitled 'Promoting Employment of Women and Ensuring Equal Opportunities'.[58] All public institutions are given duties and responsibilities to strengthen the socio-economic status of women, provide equality between men and women in social life, increase women's employment in order to accomplish social development and sustainable economic growth goals and provide equal pay for equal work. To that end, with the participation of representatives from many governmental institutions as well as representatives from NGOs and universities, the National Employment Monitoring and Coordination Board was established.

Some of the most important regulations to encourage the employment of women (and other groups) are the provisional articles added to the Unemployment Insurance Act[59] by an omnibus act (the Act on the restructuring of certain receivables and amendment to the Social Insurance and General Health Insurance Act and certain laws)[60] in February 2011. The aim of the regulations is to create employment by granting social security premium incentives for employing women, young people and those with a vocational qualification certificate. Pursuant to said incentives the employer contribution share of some employee social security premiums will be paid from the Unemployment Insurance Fund for certain periods and under conditions stated in the provisional Article 10 of the Unemployment Insurance Act. Although these incentives had been planned to continue until the end of 2015, a Government decree has now extended the incentives until 31 December 2020.[61]

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55 Bakirci, K. (2011), 'Gender Quotas in Government', in Stange, Z., Oyster, C.K. and Sloan, J.E. (eds.) *Encyclopedia of Women in Today's World*, Vol. 2, Sage Publications, USA.

56 ILO (2019) *A quantum leap for gender equality: for a better future of work for all*, International Labour Organization – Geneva (Quantum leap report). The report states 'When men share unpaid care work more equally, more women are found in managerial positions'. See: http://esitizberaberiz.org/wp-content/uploads/2019/03/ILO-Report-A-Quantum-leap-for-gender-equality.pdf.

57 Capital Markets Board Communiqué No. 57 amending the former Communiqué on the determination and application of corporate government principles (*Kurumsal Yönetim İlkelerinin Belirlenmesine ve Uygulanmasına İlişkin Tebliğde Değişiklik Yapılmasına Dair SPK Tebliği*), Official Journal 11.2.2012; See Sural, N. (2018), *Country Report Gender Equality (Turkey)*, European Network of Legal Experts in Gender Equality and Non-Discrimination, available at: https://www.equalitylaw.eu/downloads/4732-turkey-country-report-gender-equality-2018-pdf-1-76-mb.

58 Prime Ministry Circular on promoting employment of women and ensuring equal opportunities (*Kadın İstihdamının Artırılması ve Fırsat Eşitliğinin Sağlanması Basbakanlik Genelgesi*), No. 2010/14, *Official Journal* 25.5.2010, No. 27591.

59 Unemployment Insurance Act (*İşsizlik Sigortası Kanunu*), (No. 4447), *Official Journal* 8.9.1999.

60 Act on the restructuring of certain receivables and amendment to the Social Insurance and General Health Insurance Act and certain laws (*Bazi Alacaklarin Yeniden Yapilandirilmasi İle Sosyal Sigortalar ve Genel Sağlik Sigortasi Kanunu ve Diğer Bazi Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapilmasi Hakkinda Kanun)*, No. 6111 *Official Journal* 25.2.2011, No. 27857.

61 Government Decree No. 2015/8321 (4447 Sayılı İşsizlik Sigortası Kanununun Geçici 10 uncu Maddesinin Uygulanma Süresinin Uzatılmasına İlişkin Bakanlar Kurulu Kararı), *Official Journal* 28.12.2015, No. 29576.

The Government also made some additional efforts, through schemes such as the additional employment incentive, managed by the Turkish Employment Agency (ISKUR). Under this scheme, the agency provides 12 months of insurance premiums for each employee under certain circumstances (Unemployment Insurance Act, provisional Articles 20 and 21).[62] The employee must be employed in the private sector between 1 January 2018 and 31 December 2020. However, if the employee is a woman the support period increases to 18 months. The aim of this incentive is to encourage employers to employ women.

A provision regarding domestic employees was inserted to the Social Insurance and General Health Insurance Act[63] (provisional Article 9) by an omnibus act (the Act amending the EA and some other acts and statutory decrees and restructuring some public receivables).[64] Accordingly, domestic employees are covered under the scope of the social security system depending on whether they are hired for more than 10 days a month.[65]

There have been several developments in order to ensure that having children will not negatively affect a woman's career.

First, the amendments to the Income Tax Act[66] and the Corporate Tax Act[67] by Articles 5 and 64 of an omnibus act (Act No. 6745)[68] in 2016, ensured that special nurseries and daycare centres will be exempt from income and corporate tax for five accounting/taxation periods as of their starting date. Under the Bylaw on the working conditions for pregnant or nursing workers, and nursing rooms and day nurseries,[69] nurseries and daycare centre services provided in the workplace directly by the employer for female employees are exempt from income tax without any limit.[70] In 2018, through another omnibus act (Act No. 7103)[71] tax exemption for nursery and daycare services provided outside the workplace was increased up to 50 % of the monthly minimum wage. Act No. 7103 stipulates that where such a service is not provided in the workplace, payment to an outside institutions for such a service will be exempt from income tax up to 15 % of the monthly gross minimum wage for each child. The act also authorises the Council of Ministers to increase this rate up to 50 %.

In addition, the Parliament passed several laws to maintain women's participation in work after childbirth. In January 2016, the Parliament enacted an omnibus act (Act No. 6111)[72] to extend the personal and material scope of the leave related to maternity, adoption,

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62 Act amending tax laws, certain laws and certain decree laws, No. 7103 (*Vergi Kanunları İle Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılması Hakkında Kanun*), *Official Journal* 27.3.2018, No. 30373.

63 Social Insurance and General Health Insurance Act (*Sosyal Sigortalar ve Genel Sağlık Sigortası Kanunu*), (No. 5510), *Official Journal* 16.6.2006.

64 Act amending the EA and some other acts and statutory decrees and restructuring some public receivables (*İş Kanunu İle Bazi Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapilmasi İle Bazi Alacaklarin Yeniden Yapilandirilmasina Dair Kanun*) No. 6552*, Official Journal* 11.9.2014 No. 29116.

65 See section 6.3, below.

66 Income Tax Act (*Vergi Usul Kanunu*) No. 193 *Official Journal* 6.1.1961 No. 10700.

67 Corporate Tax Act (*Kurumlar Vergisi Kanunu*) No. 5520 *Official Journal* 21.6.2006 No. 26205.

68 Act on supporting investments on project basis and amending certain laws and decree laws No. 6745 (*Yatirimlarin Proje Bazinda Desteklenmesi İle Bazi Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapilmasina Dair Kanun*) *Official Journal* 7.9.2016 No. 29824.

69 Bylaw on the working conditions for pregnant or nursing workers, and nursing rooms and day nurseries (*Gebe veya Emziren Kadınların Çalıştırılma Şartlarıyla Emzirme Odaları ve Çocuk Bakım Yurtlarına Dair Yönetmelik*), *Official Journal* 16.8.2013.

70 See section 5.12, below.

71 Act amending tax laws, certain laws and certain decree laws, No. 7103 (*Vergi Kanunları İle Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılması Hakkında Kanun*), 27.3.2018, No. 30373.

72 Act on the restructuring of certain receivables and amendment to the Social Insurance and General Health Insurance Act and certain laws (*Bazi Alacaklarin Yeniden Yapilandirilmasi İle Sosyal Sigortalar ve Genel Sağlik Sigortasi Kanunu ve Diğer Bazi Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapilmasi Hakkinda Kanun)*, No. 6111 *Official Journal* 25.2.2011, No. 27857.

care, and paternity and to grant the opportunity to work part time after maternity or adoption leave.[73]

Another incentive was the removal of legal barriers for women with headscarves wanting to take up public posts. In 2013 and 2016,[74] the amendment made in the previous Bylaw on the dress code of the public personnel working in public institutions,[75] opened the way for women who wear the headscarf to work in public institutions. Before that time, women who wore the headscarf were not allowed to work in public institutions. Currently, women can wear the headscarf in any field.

Turkey is trying to close the gender gap in relation to the participation of girls in education. In addition to the boarding service provided for children from poor families, scholarships are provided for the 6th, 7 th and 8 th grades of primary education institutions and general and vocational secondary education institutions. With the scholarship services and the conditional cash transfers programme, assistance is provided all over Turkey in order to create a social aid network aiming at the complete take up of basic education services by the children of families belonging to the most destitute layer of the population. In order to increase the school enrolment rates and the transfer rates from primary to secondary education for girls, the amount of the financial benefit is kept higher for girls and students who continue to secondary education, with the benefits being paid to the mothers. The Inclusive Early Childhood Education for Children with Disabilities Project, which was carried out in partnership between the Ministry of National Education and UNICEF, and co-financed by Turkey and the EU, was implemented in 90 pilot schools in the provinces of Antalya, Bursa, Konya, İzmir, Gaziantep and Samsun between 29 May 2017 and May 2020.[76] The UN Joint Programme on the Elimination of Child, Early and Forced Marriages (CEFM) was initiated under the leadership of UNICEF with the interventions of other UN agencies to support policy-making, implementation, quality service provision and monitoring of programmes to prevent, combat and respond to cases of child marriage in Turkey.[77]

3.7 Harassment and sexual harassment

3.7.1 Definition and explicit prohibition of harassment

Violence at work may occur only once or might have an increasingly repetitive pattern. It might take the form of exposure to physical harassment and/or all types of emotional or psychological harassment, such as threats, abuse, pressure, mobbing, sexual and/or racial harassment etc. It may be either explicit and direct, or implicit and indirect.

The HREIA defines harassment and mobbing in the workplace (Article 2) and explicitly prohibits them (Article 4).

According to the HREIA, 'harassment is any painful, degrading, humiliating and disgraceful behaviour which is intended to violate human dignity or lead to such consequence based on one of the discriminatory grounds cited in the Act (on the basis of gender, race, colour, language, religion, faith, sect, philosophical or political opinion, ethnic origin, wealth, birth status, civil status, medical condition, disability or age) including psychological and sexual harassment' (Article 2/j).

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[73] See section 5, below.

[74] Decree No. 2016/9432 (*2016/9432 sayılı Bakanlar Kurulu Eki Yönetmelik*), *Official Journal* 11.11.2016, No. 29885; See also 'Turkey - Dismissal of a female civil servant for wearing a headscarf' (by Bakirci, K.). https://www.equalitylaw.eu/downloads/4862-turkey-dismissal-of-a-female-civil-servant-for-wearing-a-headscarf-pdf-89-kb.

[75] Bylaw amending the Bylaw on the dress code of the public personnel working in public institutions (*Kamu Kurum ve Kuruluşlarında Çalışan Personelin Kılık ve Kıyafetine Dair Yönetmelikte Değişiklik Yapılmasına İlişkin Yönetmelik*) *Official Journal* 8.10.2013, No. 28789.

[76] Republic of Turkey Ministry of Family, Employment and Social Services General Directorate on the Status of Women (2019), *Women in Turkey*, Ankara, May.

[77] https://www.unicef.org/turkey/en/child-marriage.

Mobbing at the workplace[78] is actions that are intended to alienate a person from a job, exclude or distress (exhaust) the person on the basis of discrimination cited in the HREIA (on the basis of gender, race, colour, language, religion, faith, sect, philosophical or political opinion, ethnic origin, wealth, birth status, civil status, medical condition, disability or age).

A Prime Ministry Circular on the prevention of mobbing in workplaces[79] issued in March 2011 is important in this context. This circular states that whether it occurs in the public or private sector, mobbing has a negative impact on the individual. The circular defines mobbing as deliberate and systematic behaviour during which a worker is humiliated, degraded, socially excluded, intimidated, has his/her personality and dignity violated and is subjected to (hostile) ill-treatment. With this, employers are deemed as the primary responsible person and they are obliged to take measures to prevent harassment. The call centre of the Ministry of Family, Employment and Social Services[80] (Alo 170) has an advice line providing access to psychologists to offer support and advice. A commission was also established under the auspices of the ministry to inspect, evaluate and provide solutions for cases where workers are exposed to psychological violence. The commission looks into all psychological harassment cases and concludes them as soon as possible.

The Constitution (Articles 10, 11, 17, 50, 56), the OA (Article 417), the EA (Articles 5, 18, 24/II, 25/II), and the PC (Articles 105, 122), and the Occupational Health and Safety Act[81] make it clear that it is the duty of the employer to treat women and men equally, to show respect for the employee's person or dignity, to guarantee working conditions that protect the worker's health and life, to act in good faith, to protect the worker from unlawful conduct in the workplace and safeguard the health and safety of the workers, to take all health and safety measures that are necessary, that are feasible using the latest technology and that are appropriate to the particular circumstances of the workplace.[82]

Workplace harassment under the title of 'psychological harassment' (also known as 'moral harassment' or 'mobbing') in employment was first prohibited in the OA in 2011. Under the OA (Article 417/1) it is the duty of the employer to show respect for the employee's person or dignity, to act in good faith, and to guarantee working conditions free from psychological harassment. The employer must ensure that any complainant of sexual harassment suffers no further adverse consequences and that the employee is protected from any other unlawful conduct in the workplace.

Although 'harassment' is not explicitly mentioned in the EA, Articles 24/II and 25/II of the EA provide grounds for the immediate termination of an employment contract under the heading of 'Immoral, dishonourable or malicious conduct or other similar behaviour by the employer/employee'. 'Similar behaviour' implies that the listing is non-exhaustive and that 'harassment' may be interpreted as behaviour similar to 'immoral, dishonourable or malicious conduct'. The MEA has similar provisions (Article 14/I and 14/II).

Article 24/II(c) and (f) of the EA states that an employee is entitled to terminate the employment contract, whether this contract is for a definite or an indefinite period, before

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78 See Bakirci, K. (2008), 'University Workers: Psychological Violence and Mobbing at the Universities' (*Universite Calisanlari ve Universitede Psikolojik Siddet ve Yildirma (Mobbing)*), *Donusturulen Universiteler ve Egitim Sistemimiz*, Egitim Sen Yayinlari, Ankara.

79 Prime Ministry Circular on the prevention of mobbing in workplaces (*İşyerlerinde Psikolojik Tacizin* (*Mobbing*) *Önlenmesi Hakkında Başbakanlık Genelgesi*), *Official Journal* 19.3.2011.

80 See https://alo170.gov.tr/.

81 Occupational Health and Safety Act (*İş Sağlığı ve Güvenliği Kanunu*), (No. 6331), *Official Journal* 30.6.2012.

82 For sexual harassment as a health and safety issue see Bakirci, K. (2000), *Sexual Harassment in Employment Law* (*İş Hukuku Açısından İşyerinde Cinsel Taciz*), Yasa Yayinlari, Istanbul; Bakirci, K. (2001), 'Remedies Against Sexual Harassment of Employees Under Turkish Law', in *European Public Law*, Issue 3, September; Bakirci, K. (1999), 'How Sexual Harassment of Employees Is Treated Under Turkish Law', Symposium Organised by Berlin Technical University and Istanbul Technical University, Istanbul, 12 November.

its expiry, or without having to observe the specified notice periods if, *inter alia*, the following provisions apply: the employer assaults or threatens the employee or a member of his/her family to commit an illegal action; or commits an offence against the employee or a member of his/her family which is punishable with imprisonment; or levels serious and groundless accusations against the employee in matters affecting his/her honour (*şeref ve haysiyet*) if the employer fails to implement the conditions of employment.

Article 25/II(b), (d) and (f) of the EA states that an employer may terminate the employment contract, whether the contract is for a definite or an indefinite period, before its expiry or without having to comply with the prescribed notice periods if the employee: is guilty of any speech or action constituting an offence against the honour or dignity (*şeref ve namus*) of the employer or a member of his/her family, or levels groundless accusations against the employer in matters affecting the latter's honour or dignity (*şeref ve haysiyet*); assaults or threatens the employer, a member of his/her family or a fellow employee; or commits an offence on the premises of the undertaking which is punishable with seven days' or more imprisonment without probation.

The PC prohibits certain behaviour that constitutes harassment, but does not explicitly mention harassment and/or mobbing.

The Istanbul Convention has called attention to different dimensions of violence against women, including psychological violence, and proposed important prevention measures and sanctions (Article 33).[83]

There are no explicit provisions in relation to harassment in either the PEA or the CSA.

3.7.2 Scope of the prohibition of harassment

Under the EA and the OA, all types of harassment can involve employers, employers' representatives (managers/ supervisors), employees, contractors, volunteers, clients, customers and others connected with or attending a workplace. It can happen at work, at work-related events, between the employer and employee or between colleagues outside the work environment.[84] These provisions apply to employers or employers' representatives who harass their own employees or fail to adopt appropriate measures that would prevent any act of harassment by other employees or by third persons.

The EA also includes the protection of the family members of employees and employers.

Although provisions of the EA (Articles 24/II and 25/II) cover only the employees who are in the scope of the EA,[85] the OA (Article 417) covers all employees. The EA (Articles 24/II and 25/II) and the OA (Article 417) provide protection against harassment in the execution of an employment contract. They do not provide protection in access to employment.

The Occupational Health and Safety Act covers public and private sector workers, apprentices and interns.

Under the HREIA, the prohibition on harassment covers all workers in both the public and private sectors, in self-employment and access to goods and services. It covers access to employment, vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience and promotion (Articles 5-6).

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[83] See section 10, below.

[84] Bakirci, K. (2000), 'The Liability of Employers for the Acts of Third Persons' (*İşçilerin Üçüncü Kişilerin Saldırısına Uğramaları Halinde İşverenin Sorumluluğu*), *Cimento Isveren*, C.14, S.3, Mayis; Bakirci, K. (2000), *Sexual Harassment in Employment Law* (*İş Hukuku Açısından İşyerinde Cinsel Taciz*), Yasa Yayinlari, Istanbul; Bakirci, K. (2001), 'Remedies Against Sexual Harassment of Employees Under Turkish Law', in *European Public Law*, Issue 3, September.

[85] See section 2.2, above.

The PC prohibits certain behaviour that may amount to harassment wherever it occurs.

3.7.3 Definition and explicit prohibition of sexual harassment

There is no definition of sexual harassment in Turkish law. However, Article 40 of the Istanbul Convention defines sexual harassment as 'any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment'. This definition is binding in Turkish law.

The offence of sexual harassment was introduced in Turkey for the first time in the EA in 2003,[86] the PC in 2004,[87] the OA in 2011[88] and the HREIA in 2016.[89] Furthermore, in 2012 the Higher Education Board included sexual harassment in higher education institutions as a disciplinary offence in the Bylaw on students' disciplinary offences in higher education institutions.[90]

Article 2/j of the HREIA recognises sexual harassment as a form of harassment and states that harassment is 'any painful, degrading, humiliating and disgraceful behaviour which is intended to violate human dignity or lead to such a consequence based on one of the discriminatory grounds cited in the Act (on the basis of gender, race, colour, language, religion, faith, sect, philosophical or political opinion, ethnic origin, wealth, birth status, civil status, medical condition, disability or age) including psychological and sexual harassment'.

Under Article 417 of the OA, entitled 'Protection of the employee's personality', employers are to take the necessary measures to prevent sexual harassment in the workplace and to prevent further damage for those who have already been victims of sexual harassment. The employer has to 'provide an environment compatible with morals' in their workplace.

Although workplace sexual harassment is one of the most important problems for women in the workplace, the EA does not cover the issue in detail. The EA does not provide any preventive measures or any definition of sexual harassment. It does not regulate it in the context of access to employment and vocational training or as a form of gender discrimination. Workplace sexual harassment is only mentioned in Articles 24/II and 25/II as a reason for the immediate termination of the employment contract (termination for a just cause).

Article 24/II of the EA allows an employee to terminate an employment contract without notice on the grounds of malicious, immoral, or dishonourable conduct or other similar behavior. Article 25/II allows an employer to do likewise.

Article 24/II(b) and (d) of the EA states that an employee is entitled to terminate the employment contract, whether this contract is for a definite or an indefinite period, before its expiry, or without having to observe the specified notice periods if, inter alia, the following provisions apply: the employer is guilty of any words or action constituting an offence against the dignity or honour (*şeref ve namus*) of the employee or a member of the employee's family; the employer harasses the employee sexually; or if, in cases where

[86] See Bakirci, K. (2006), 'Human Rights of Women Employees' (*Isci Kadinlarin Insan Haklari*), Ankara Barosu Hukuk Kurultayi, C.III, Ankara Barosu Yayini, Ankara.

[87] See Bakirci, K. (2001), 'Sexual Harassment in the Workplace and Draft Criminal Bill' (*Isyerinde Cinsel Taciz ve Turk Ceza Kanunu On Tasarisi*), Istanbul Barosu Dergisi, S.1, Mart.

[88] See Bakirci, K. (2008), 'Sexual Harassment and Sex Discrimination in the Draft Obligations Bill' (*Kadınlara Yonelik Hukuksal Ayrimciligin Bir Baska Urunu: Borclar Kanunu Tasarisi'nda Cinsel Taciz ve Ayrimcilik*), Is Mufettisleri Dernegi II. Calisma Yasami Kongresi Tartisma ve Panel Notlari, Is Mufettisleri Dernegi, Ankara.

[89] See Bakirci, K. (2020), 'Public Campaigns, the Reception of #MeToo, and the Law Concerning Sexual Harassment in Turkey' in *The Global #MeToo Movement* (Paperback) (Ann M. Noel/David B. Openheimer (eds), Full Court Press, 1st edition, USA.

[90] Bylaw on students' disciplinary offences in higher education institutions (*YÖK Öğrenci Disiplin Yönetmeliği*), *Official Journal* 18.8.2012, No. 28388.

the employee was sexually harassed by another employee or by third persons in the establishment, adequate measures were not taken although the employer was informed of such conduct.

Paragraph (d) is problematic. If the employer knew, or should have known, of the sexual harassment, the employee should not be required to inform the employer of such conduct.

Article 25/II (b), (c) and (f) of the EA states that an employer may terminate the employment contract, whether the contract is for a definite or an indefinite period, before its expiry or without having to comply with the prescribed notice periods if the employee is guilty of any speech or action constituting an offence against the dignity or honour (*şeref ve namus*) of the employer or a member of his/her family, or levels groundless accusations against the employer in matters affecting the latter's dignity or reputation (*şeref ve haysiyet*) or if the employee sexually harasses another employee of the employer or if the employee commits an offence on the premises of the undertaking which is punishable with seven days' or more imprisonment without probation.

Articles 24/II and 25/III of the EA refer to the violation of '*namus*', '*şeref*' and '*haysiyet*' of a person instead of using the words 'harassment' and/or 'sexual harassment'. Although these Turkish words have different connotations, they are all related to a person's 'honour'. The ideology of honour in Turkey is directly related to patriarchal gender roles: conformity to these roles is demanded and is a source of status and acceptance within the community, whereas deviance is censured. Therefore the concept of honour is different for women and men in Turkish culture. Although honour is often defined as moral integrity or the esteem accorded to virtue or talent, for women it is a type of sexual honour that presupposes physical and moral qualities that women ought to have. It is associated with the shame of women and women's families. Since the concept of honour is almost always associated with women's sexuality, most of the acts directed towards women employees or the female family members of male employees prohibited by the EA may be deemed as 'sexual impropriety'.

According to Article 26 of the EA and Article 15 of the MEA, the right to terminate the employment contract for immoral, dishonourable, or malicious behavior (such as all types of harassment including sexual harassment) may not be exercised after six working days from the time when the facts become known, and in any event after one year has elapsed following the commission of the act. The deadline for terminating the contract after the facts are known is too short, since most women take a longer time to report the facts.[91]

Article 105 of the PC states that:

> '(1) Any person who harasses another person with sexual intent shall be sentenced to a penalty of imprisonment of three months to two years or a judicial fine, upon a complaint being made by the victim.'

However, the important part is that if the offender takes advantage of working in the same place as the victim to sexually harass them, the punishment will increase by one half:

> '(2) Where these acts are committed by misusing the influence derived from a hierarchical, service, education/training, or familial relationship, or where such acts are committed by taking advantage of working at the same workplace, the penalty to be imposed under the above section shall be increased by one half. Where the victim has had to leave his/her employment or school or separate from his/her family, the penalty to be imposed shall not be less than one year.'

[91] Bakirci, K. (2000), *Sexual Harassment in Employment Law* (*İş Hukuku Açısından İşyerinde Cinsel Taciz*), Yasa Yayinlari, Istanbul.

According to this definition, sexual harassment occurs when acts of a sexual nature sexually disturb the victim thereby violating the moral decency, but not the physical inviolability of the victim. In other words, this behaviour may be verbal (remarks about one's figure/looks, crude sexual jokes, verbal sexual advances/offers, unwanted messages or emails) or non-verbal (staring, whistling, indecent exposure) but not physical. Acts involving physical contact, such as patting, kissing, fondling, hugging, grabbing, and rape (PC, Article 102) constitute types of sexual assault, such as child sexual abuse (Article 103), indecent behaviours (Article 225), and obscenity (Article 226).

There has been an application to the Constitutional Court claiming that Article 105(1) of the PC on sexual harassment was unconstitutional, based on the fact that sexual harassment has not been defined therein and it therefore remained an ambiguous concept, which contradicted the constitutional principle of the legality of crimes and penalties. The Constitutional Court rejected the claim stating that on the basis of other crimes specified under the title 'Crimes against sexual inviolability' and the reasons appended to Article 105, sexual harassment has to be understood as any disturbing behaviour with a sexual aim or overtone that does not amount to a sexual assault or sexual exploitation.[92]

According to the first paragraph of Article 105 of the PC, in criminal cases sexual intent is necessary for the offence of sexual harassment to occur. If the perpetrator did not have any sexual intent (note that sexual intent is very difficult to prove), then the offence will consist of an insult, which is regulated in Article 125 of the PC.

There are no explicit provisions in relation to sexual harassment in the PEA, the MEA or the CSA.

3.7.4 Scope of the prohibition of sexual harassment

Under the EA and the OA, sexual harassment can involve employers, employers' representatives (managers/supervisors), employees, contractors, volunteers, clients, customers and others connected with or attending a workplace. It can happen at work, at work-related events or between employer and employee or colleagues outside the work environment. In a decision of the Supreme Court on sexual harassment, the Court held that harassment is not required to take place in the workplace. Actions performed by employees outside the workplace and working hours could also be considered as sexual harassment.[93]

The EA also covers the protection of an employee's or employer's family members because 'honour' in Turkey plays a forceful role in all types of relationships, especially the relationship of women to men.[94] Either real or presumed violations of honour may produce severe sanctions especially among the rural segments of the population.[95] As stated above, for males, 'honour' is gained through exerting dominance and control over females and younger males, and lost through weakness and failure to control; it can be restored through violent and coercive acts. For females, 'honour' is preserved through subordinancy, obediency, chastity, endurance and virginity, and it may be lost through any autonomous acts, particularly those relating to sexuality, and cannot be restored. Causing a scandal or gossip within the community is often the most significant aspect of an offence against 'honour'. Ultimately it is those with power within the family and community (men and older women who have proved their internalisation of the 'honour'

[92] Constitutional Court, 25 February 2010, Case No. 2008/55, Decision No. 2010/41 (*Official Gazette* 22.6.2010, No. 27619).

[93] Bakirci, K. (2000), *Sexual Harassment in Employment Law* (*İş Hukuku Açısından İşyerinde Cinsel Taciz*), Yasa Yayinlari, Istanbul.

[94] Bakirci, K. (2008), 'Ethics in the Workplace' (*İşçi-İşveren İlişkilerinde Ahlaka Aykırılık*), *Guncel Hukuk Dergisi*, Aralik.

[95] Honour killings occur only on the basis of women's behaviour and, in nearly all cases, women are the only ones who are killed, even though their impropriety (assumed or acted upon) always includes a male partner (see Article 12/5 of the Istanbul Convention).

code through the policing of younger women) who decide whether acts are 'honourable' or 'dishonourable'.[96]

Although provisions of the EA (Articles 24/II and 25/II) cover only the employees who are in the scope of the EA, the OA (Article 417) covers all employees. The EA (Articles 24/II and 25/II) and Article 417 of the OA provide protection against sexual harassment in the execution an employment contract. They do not provide protection in access to employment.

Article 125 of the PC covers everbody and wherever it occurs. The article regulates sexual harassment not only by a senior person, but also between workers.

Turkey extended its provisions on workplace sexual harassment to the contexts of access to employment, vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience and promotion, in the HREIA (Article 6).

According to the HREIA, the prohibition on sexual harassment covers not only employment but also self-employment and access to goods and services (Article 5).

3.7.5 Understanding of (sexual) harassment as discrimination

According to the HREIA (Article 4/d), harassment constitutes a form of discrimination, for the purposes of the act.

Sexual harassment constitutes discrimination and is a prohibited behavior under the Istanbul Convention (Article 3).[97]

Although sexual harassment is not specified as a form of discrimination in any other national legislation it needs to be interpreted as a form of discrimination under anti-discrimination legislation/provisions as well, because the Istanbul Convention is binding upon Turkey (Article 3).[98]

3.7.6 Specific difficulties

Turkish law falls short of EU law[99] in relation to harassment or sexual harassment.

An explicit prohibition of sexual harassment as a form of sex discrimination is lacking in the employment legislation. Workplace harassment and/or sexual harassment is only mentioned in the EA and MEA as a reason for the immediate termination of an employment contract. There are no explicit provisions in relation to harassment or sexual harassment in the PEA and the CSA.

The HREIA explicitly prohibits harassment and sexual harassment as a form of discrimination according to the EU law however it does not specify the distinction between quid-pro-quo sexual harassment (harassment by employers or supervisors) and hostile environment sexual harassment (harassment by colleagues or third persons) and does not explicitly define them.

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[96] Sharma, K. (2016), 'Understanding the concept of Honour Killing within the Social Paradigm: Theoretical Perspectives', in *IOSR Journal Of Humanities And Social Science* (IOSR-JHSS) Volume 21, Issue 9, Ver. 8 (September) pp. 26-32 http://www.iosrjournals.org/iosr-jhss/papers/Vol.%2021%20Issue9/Version-8/E2109082632.pdf.

[97] See Bakirci, K. (2015), 'Istanbul Convention (Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence)' (*İstanbul Sözleşmesi*), *Ankara Barosu Dergisi*, Yil:73, Sayi:2015/4.

[98] See Bakirci, K. (2015), 'Istanbul Convention (Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence)' (*İstanbul Sözleşmesi*), *Ankara Barosu Dergisi*, Yil:73, Sayi:2015/4.

[99] Bakirci, K. (1998), 'Sexual Harassment in the Workplace in Relation to EC Legislation', in *International Journal of Discrimination and the Law*, Vol. 3, No. 1

Apart from under the anti-discrimination provisions, the burden of proving the harassment or sexual harassment is on the claimant.[100]

3.8 Instruction to discriminate

3.8.1 Explicit prohibition

The HREIA prohibits giving orders to discriminate and fulfilling such orders (Article 4/1b). According to the act, a discriminatory order is an order given by someone to persons who are authorised to take action on his/her behalf or a discriminatory order given by a public official to others (Article 2/1b).

3.8.2 Specific difficulties

There is neither data nor case law on giving or following instructions to discriminate.

3.9 Other forms of discrimination

The HREIA also prohibits other forms of discrimination as set out below.

Article 4 prohibits the failure to make reasonable accommodation. Reasonable accomodation means moderate, necessary and convenient changes and measures that are required on certain occasions within the boundaries of financial means in order to enable the disabled to exercise and benefit from rights and freedoms fully and equally as other individuals (Article 2).

Article 4 also prohibits discrimination based on an assumed ground: where a real or legal person is discriminated against during the exercise of rights and freedoms, presumably because of having one of the grounds cited in the act (gender, race, colour, language, religion, faith, sect, philosophical or political opinion, ethnic origin, wealth, birth status, civil status, medical condition, disability or age), even though it is not related to one of the discriminatory grounds mentioned in the act (Article 2).

The Istanbul Convention (Article 3/a) and the Act on the protection of the family and the prevention of violence against women (Article 1/m)[101] also prohibit economic violence as a form of discrimination.

3.10 Evaluation of implementation

Case law on harassment and sexual harassment is scarce, because victims cannot prove it,[102] or they fear victimisation and/or do not want to risk acquiring a 'bad reputation' in the labour market. Therefore even when a right exists and is protected by law, its implementation is problematic.

3.11 Remaining issues

Although the HREIA implicitly prohibits harassment based on sex (gender based harassment) (Article 2/1b), it does not explicitly mention it. It is important to define these terms and prohibit it explicitly in order to eliminate sexist behaviour, especially at work.[103]

[100] See section 11.5, below.
[101] See section 10, below.
[102] See section 11.5, below.
[103] See Bakirci, K. (1998), 'Sexual harassment in the workplace in relation to EC legislation', in *International Journal of Discrimination and the Law*, 1: 3–28.

4 Equal pay and equal treatment at work (Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Recast Directive 2006/54)

4.1 General (legal) context

4.1.1 Surveys on the gender pay gap and the difficulties of realising equal pay

Equal pay is essential to achieving full gender equality in the world of work and a fairer, more inclusive world in general. Target 8.5 of the UN Sustainable Development Goals calls for equal pay for work of equal value by 2030.[104]

There is no national survey on the gender pay gap in Turkey. However the ILO's 2018 report, *Global Wage Report 2018/19: What lies behind gender pay gaps*[105] and the 2019 ILO report, *A quantum leap for gender equality: for a better future of work for all*[106] cover Turkey.

The ILO's *Global Wage Report* is based on an analysis of 70 countries and 80 % of wage earners worldwide, comparing women and men in homogeneous subsets by education, age, hours worked (full time vs part time) and public vs private sector using weighted measures.

The study reveals that the global gender pay gap stood at 18.8 %. The gap is 12 % in Turkey. The gender pay gap remains a challenge for all countries to overcome.[107]

A 2017 ILO-Gallup global report[108] shows the wide pay gap between working mothers and working non-mothers It states that with a pay gap of 29.6 %, Turkey is the country with the highest motherhood penalty among both upper-middle and lower-middle income countries, and hosts the most disadvantageous conditions in this regard. Working mothers pay the highest penalty by receiving 30 % less in wages than non-mothers. Motherhood also causes labour market interruption, and women's permanent exit from labour markets.[109]

Women's participation in the labour force is lower than men in all countries worldwide, regardless of pay level or age group. Most disadvantaged are women in the 25-35 age group, whose participation in the labour market generally goes down following first-time motherhood in this period. Unfortunately, most women of the 25-35 age group who leave the labour market for motherhood do not return.[110]

An infographic poster on 'Understanding the Gender Pay Gap,[111] deriving from the ILO's *Global Wage Report* and *Quantum Leap* report, produced by the ILO Office for Turkey, states that women in paid employment are better educated than men and that the public

[104] UN, Transforming our world: the 2030 Agenda for Sustainable Development https://sustainabledevelopment.un.org/post2015/transformingourworld.
[105] ILO (2018) *Global Wage Report 2018/19: What lies behind gender pay gaps*. International Labour Organisation, Geneva. https://www.ilo.org/global/publications/books/WCMS_650553/lang--en/index.htm.
[106] ILO (2019) *Quantum leap report*. http://esitizberaberiz.org/wp-content/uploads/2019/03/ILO-Report-A-Quantum-leap-for-gender-equality.pdf.
[107] ILO (2019) *Quantum leap report*.
[108] ILO-Gallup Report (2017) *Towards a better future for women and work: Voices of women and men*, International Labour Organization, Geneva. https://www.ilo.org/global/publications/books/WCMS_546256/lang--en/index.htm.
[109] ILO (2019) *Quantum leap* report: 'Recent studies identify a "motherhood penalty" as a source of gender pay gaps. This indicator of pay gap between mothers and non-mothers reveals striking results when compared to the "fatherhood premium" indicating the pay gap between fathers and non-fathers'. http://esitizberaberiz.org/wp-content/uploads/2019/03/ILO-Report-A-Quantum-leap-for-gender-equality.pdf.
[110] ILO (2019) *Quantum leap report*.
[111] See http://esitizberaberiz.org/wp-content/uploads/2019/03/Infographic-on-%E2%80%9CUnderstanding-the-Pay-Gap%E2%80%99.pdf.

sector employment rate of women is higher than men's, meaning that in the private sector, the pay gap for lower educated women is even higher in Turkey.

This shows that traditional explanations for the pay gap, such as differences in the levels of education between men and women who work in paid employment, do not solely explain gender pay gaps. In other words, women are paid less not because they have lower education. On the contrary, women in paid employment have higher education levels than men.[112]

4.1.2 Surveys on the difficulties of realising equal treatment at work

There are no national surveys on the difficulties of realising equal treatment at work but the ILO Office for Turkey's infographic poster also shows that:

- women have limited access to decent work and are more likely to be in informal employment;
- the feminisation rate increases the pay gap and feminisation leads to lower wages;
- as the labour participation of women decreases, the pay gap increases;
- women's age affects the pay gap they face; and
- motherhood increases the pay gap.[113]

The ILO Office for Turkey's infographic poster does not mention the fact that women are still underrepresented at the top and better paid jobs, which is one of the reasons for the relatively low gender pay gap in Turkey. The 'motherhood leadership penalty' is also not mentioned in the infographic poster.

In the view of the author of this report, the gender pay gap (12 %) is very low when compared with other countries mentioned in the ILO report. The reason might be because women are mostly concentrated in occupations such as nursing, teaching, dietetics, administrative assistance, sales or social services with low wages, or as unpaid family workers in agriculture. However, men focus on more prestigious and income generating occupations (especially management positions).[114] Therefore, the main problem as regards the gender pay gap is probably the difficulty in detecting it, given that the equal pay principle applies to workers who belong to the same category, have the same formal qualifications and provide the same services aimed at serving the same category of needs, under the same conditions. So, workers with different qualifications or performing different duties are not compared, even where they perform the same work under the same conditions.

4.1.3 Other issues

Subcontracting is a justification for differentials where there are different employers. Subcontractor relations are regulated in Article 2/6-7 of the EA. A subcontractor can simply be defined as an individual or a legal entity who contracts (undertakes) to perform part of another legal entity's work. The work that is undertaken by the subcontractor is generally an auxiliary task requiring technological skill, or work meeting the operational requirements of a primary employer. Although collusional subcontractor relationships, such as those where work is carried out by the subcontractor employing the primary employer's employees, and restricting the gained rights and entitlements of employees, is prohibited by the EA (Article 6), in practice, primary employers do establish a primary employer-subcontractor relationship by engaging the primary employer's employees

[112] See http://esitizberaberiz.org/wp-content/uploads/2019/03/Infographic-on-%E2%80%9CUnderstanding-the-Pay-Gap%E2%80%99.pdf.

[113] http://esitizberaberiz.org/ilo-draws-attention-to-gender-pay-gap-in-the-conference-on-the-occasion-of-international-womens-day/.

[114] See Gürer, P./ B. Onay Özman/ R. Çamdereli (Ed. M. Tatar) (2017), *Women Empowerment Principles (WEPs) Implementation Guide*, UN Women Regional Office for Europe and Central Asia. UN Women. https://eca.unwomen.org/en/digital-library/publications/2017/01/weps-implementation-guide.

through the subcontractor[115] in order to keep employee payments low, avoid obligations related to social insurance, and prevent employees from using their trade union rights or collective labour agreements.

4.1.4 Political and societal debate and pending legislative proposals

Equal pay is not prioritised by either the Government or trade unions. Therefore, there is no political and societal debate about the issue. However as stated above, there were some discussions on the topic by the ILO Office in Ankara in 2019.[116]

4.2 Equal pay

4.2.1 Implementation in national law

The EA provides equal pay for women and men suggesting that 'differential remuneration for similar jobs or for work of equal value is not permissible' (Article 5/4). It also states that 'Application of special protective provisions due to the employee's sex shall not justify paying him (her) a lower wage' (Article 5/5).

The Bylaw on the minimum wage[117] states that when determining the minimum wages (by the Minimum Wage Determination Committee) there would be no discrimination based on the language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations (Article 5/1).

The EA grants equal treatment between: a full-time and a part-time employee (Articles 5 and 13); an employee working under a fixed-term employment contract (contract made for a definite period) and one working under an open-ended employment contract (contract made for an indefinite period) (Articles 5 and 12); between remote and non-remote employees (Article 14); or employers' own employees and temporary agency employees (Article 7). Articles 12 and 13 of the EA also grant application of the pro-rata-temporis principle to the remuneration of part-time work.

There is no equal pay provision for the employees in the scope of the MEA, the PEA and the OA or civil servants in scope of the CSA, or public officials with an administrative law employment contract. However, the principle of equal pay is a part of the anti-discrimination and sex equality principle of the Constitution (Article 10) and the Constitution binds all employers. Furthermore, the equal pay provisions of the international conventions ratified by Turkey are binding.

4.2.2 Definition in national law

Wages in general, employees' wages, the minimum wage,[118] and the salaries of public officials are regulated by the Constitution, the EA, the OA, the Bylaw on the minimum wage, the Income Tax Act and the CSA.

Article 55 of the Constitution provides that wages must be paid in return for work. The state must take the necessary measures to ensure that workers earn a fair wage

[115] See e.g. Court of Cassation 7th Division, 19.10.2015, 16920/19734; Bakirci, K (2017), 'The Concept of Employee: The Position in Turkey' in, *Restatement of Labour Law in Europe: Vol I: The Concept of Employee*, 1st Edn (B. Waas/ G.H. van Voss eds.), Hart Publishing, United Kingdom, pp. 721-747.

[116] http://esitizberaberiz.org/ilo-draws-attention-to-gender-pay-gap-in-the-conference-on-the-occasion-of-international-womens-day/.

[117] Bylaw on the minimum wage (*Asgari Ücret Yönetmeliği*), *Official Journal* 1.8.2004.

[118] The Bylaw on the minimum wage defines the minimum wage as the amount which is based on an employee's one day work, and determined in terms of minimum vital needs such as food, dwelling, clothing, health, lighting, vehicle, cultural activities and entertainment (Article 4/d). The minimum wage does not take into consideration the families of employees, instead minimum wage is determined for an employee himself/herself.

commensurate with the work they perform and that they enjoy other social benefits. In determining the minimum wage, the living conditions of the workers and the economic situation of the country must also be taken into account.

Employee wages are regulated in detail by Articles 32-52 of the EA. Article 32 of the EA defines wage as 'In general terms, wage is the amount provided and paid in cash to a person by the employer or by a third party in return for work performed by him/her' (Article 32(1)).

A more detailed definition of wage is given under Article 61 of the Income Tax Act, which defines a wage as

> 'a benefit provided by cash in kind and cash, represented by cash, in return of services performed by employees registered and subject to an employer. It does not change the true nature of wage by paying it under the names of indemnity, allowance, cash compensation (financial liability ındemnity), allocation, increment, advance, remuneration, attendance fee, premium, bonus, in return of an expense or determined by a particular percent of revenue provided not to have the attribute of a partnership.'

Employees' wages must be paid once a month at the latest. The payment period may be reduced to one week through employment contracts or collective labour agrements (EA, Article 31/5; MEA, Article 29/3; PEA, Article 14/1).

Article 2 of the EA states that the primary employer is jointly liable with the subcontractor for the obligations ensuing from the EA, from employment contracts of subcontractor's employees or from the collective labour agreement to which the subcontractor has been a signatory.

The salaries of public officials are determined by laws. The salary is the same for any civil servant employed in the same post at different institutions. Salaries are paid in the middle of the month in advance. There are biannual increases in parallel with the inflation rate.

4.2.3 Explicit implementation of Article 4 of Recast Directive 2006/54

Explicit regulation of equal pay based on sex only exists in the EA (Article 5).

A job classification system is regulated in the CSA and it is used for determining the pay of civil servants. It is based on the same criteria for both men and women.

However, there is no job classification system in the EA. Job classifications might be set up by the employers themselves or by collective labour agreements that are not challenged by the employees or the courts.

4.2.4 Related case law

Case law on these issues is very scarce.[119] There are many difficulties in practice because of the complex laws to navigate, the requirement in practice for (expensive) specialist legal assistance, the lack of wage transparency and the concerns that workers have about being victimised for bringing discrimination/equal pay complaints.

[119] Court of Cassation 9th Division, 24.10.1995, 12072/32880; Court of Cassation 7th Division, 7.3.2013, 2013/2572, 2013/2349.

4.2.5 Permissibility of pay differences

There is no mention of any derogation from the equal pay principle in Turkish law. However varying objective factors,[120] such as the position, significance of the post, diploma or educational level, seniority, professional experience, qualifications or performing different duties, working conditions are determinants in the level of wages of employees. This list is not exhaustive.

The salary is the same for any civil servant employed in the same post at different institutions.

However, differences in the legal nature of the employment relationship (e.g. one person is employed under a private-law contract, or a person employed under an administrative law contract, while another is a civil servant) are often used as justification in public institutions, even within the same institution or service where the workers are employed by the same institution and perform the same work.[121] This is incompatible with the principle of equal pay for equal work or work of equal value.

4.2.6 Requirement for comparators

There is no explicit requirement for comparators (i.e. an actual, historical or hypothetical comparator) in relation to equal treatment or equal pay under the Constitution (Article 10) and the EA (Articles 5 and 18). Although case law on equal pay is scarce and does not indicate whether the claimant should point to a comparator, the existence of discrimination does imply a comparison with other workers.[122]

However, under the EA, Article 12 on part-time work, Article 13 on fixed-term contracts and Article 14 on remote work point to a comparator.

Article 12 of the EA states that an employee working under an employment contract for a definite period must not be subjected to differential treatment in relation to a comparable employee working under an employment contract for an indefinite period. Divisible amounts for a given time period relating to wages and other monetary benefits to be given to an employee working under a fixed-term contract must be paid in proportion to the length of time during which the employee has worked. In cases where seniority (length of service) in the same establishment or the same enterprise is treated as the criterion in order to take advantage of an employment benefit, the seniority criterion foreseen for a comparable employee working under an open-ended contract must be applied to an employee with a fixed-term contract, unless there is a reason justifying the application of a different seniority criterion for an employee working under a fixed-term contract. The comparable employee is the one who is employed under an open-ended contract in the same or a similar job in the establishment. If there is no such employee in the establishment, then an employee with an open-ended contract performing the same or a similar job in a comparable establishment falling into the same branch of activity will be considered as the comparable employee.

According to Article 13 of the EA, an employee working under a part-time employment contract must not be subjected to differential treatment in comparison to a comparable full-time employee solely because his/her contract is part time, unless there is a justifiable cause for differential treatment. The divisible benefits to be accorded to a part-time employee in relation to wages and other monetary benefits must be paid in accordance to

[120] Court of Cassation 9th Division, 2.12.2009, 2009/33837, 2009/32939.

[121] Civil Servants Act (*Devlet Memurları Kanunu*), (No. 657), *Official Journal* 23.7.1965; Statutory Decree No. 399 on the regulation of personnel regime of state economic enterprises and abrogation of some articles of the Statutory Decree No. 233 (*Kamu İktisadi Teşebbüsleri Personel Rejiminin Düzenlenmesi ve 233 sayili Kanun Hükmünde Kararnamenin Bazi Maddelerinin Yürürlükten Kaldirilmasina Dair Kanun Hükmünde Kararname*), Decree No. 399, *Official Journal* 29.1.1990.

[122] Court of Cassation 9th Division, 1.11.2004, 8671/24558.

the length of his/her working time proportionate to a comparable employee working full time. The comparable employee is the one who is employed full time in the same or a similar job in the establishment. In the event that there is no such employee in the establishment, an employee with a full-time contract performing the same or similar job in an appropriate establishment in the same branch of activity will be considered as the comparable employee.

Article 14 of the EA on remote employment states that in the remote employment, employees must not be subjected to any procedure different than a comparable worker, due to the nature of his/her employment contract, unless there is a reason justifying discrimination.

However, the HREIA explicitly requires a comparator only in cases of direct discrimination (Article 2) based on sex, race, colour, language, religion, faith, sect, philosophical or political opinion, ethnic origin, wealth, birth status, civil status, medical condition, disability or age (Article 3/2).[123]

4.2.7 Existence of parameters for establishing the equal value of the work performed

Turkish national law does not lay down any parameters for establishing the equal value of the work performed. However, most employers in the private sector do not have job classification or job description schemes and have not made an evaluation of every profession or post for the purpose of defining what is the same work or work of equal value. More generally, there is a tendency to justify pay differences on budgetary grounds and by mere generalisations.

4.2.8 Other relevant rules or policies

Under the EA, complaints (such as those relating to wages, salary or discrimination based on the ground of sex) against employers can be lodged with the Labour Inspectorate of the Ministry of Family, Employment and Social Services (EA, Articles 91-97).[124] However no data is available either about these complaints or about the result of the investigations.

4.2.9 Job evaluation and classification systems

Under Turkish law, a job classification system is only regulated in the CSA and it is used for determining the pay of civil servants. It is based on the same criteria for both men and women. In Article 3/A of the CSA, the 'classification' principle is defined. According to the Act, civil servants are classified according to the requirements of the job and relevant qualifications. In Article 36, there are 12 classes: general administrative services (e.g. managers, office workers, enforcement officers of public insitutions); technical services (e.g. engineers, architects, technical support workers of the public institutions); health services and allied health services (e.g. public doctors, other public health workers, pharmacists of public hospitals); training and education services (e.g. public school teachers, headteachers); legal services (e.g. lawyers of public institutions); religious services (e.g. mosque workers); police services (e.g. policemen, policewomen); gendarme services (e.g. seargants of Gendarmerie General Command); coast guard services (e.g. seargants of Coast Guard Command); assisted services (e.g. cleaning staff, security staff of public institutions); civil administration services (e.g. governors of cities and towns); and national intelligence services (e.g. national intelligence workers).

4.2.10 Wage transparency

There are no rules on wage transparency in Turkish law. Payments to employees and public officials are confidential. Therefore it is difficult to detect any differences in wages.

[123] See section 3.3, above.
[124] Right to Information Act No. 4982 (*Bilgi Edinme Hakkı Kanunu*), *Official Journal* 24.10.2013, No.25269.

However, in a recent case, the Court of Cassation decided that sharing the amount of a pay rise with a colleague did not constitute a valid ground for the termination of the employment contract.[125]

A public official can obtain information on the salary of a fellow colleague who is in a comparable situation under the Right to Information Act.

4.2.11 Implementation of the transparency measures set out by European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women

The Commission's Recommendation on strengthening the principle of equal pay through transparency is not applied in Turkey.

4.2.12 Other measures, tools or procedures

The state has the power to supervise and inspect the implementation of employment/labour legislation governing working conditions,[126] either by carrying out an investigation on its own initiative for reviewing the EA or by examining complaints submitted about violations of the EA (EA, Article 91).[127]

4.3 Access to work, working conditions and dismissal

4.3.1 Definition of the personal scope (Article 14 of Recast Directive 2006/54)

The personal scope in relation to access to employment, vocational training, working conditions etc. differs in Turkish law.

The anti-discrimination provisions of the Constitution (Articles 10 and 70) cover all Turkish citizens.

In principle, the non-discrimination provisions of the EA (Articles 5, 12, 13 and 14) apply to public and private sector employees working under a private law (employment) contract and who are in the scope of the EA (Article 4).[128]

The EA does not cover job applicants, interns, apprentices, persons who apply for internship or apprenticeship, or anyone who wishes to receive information about the workplace or the work in order to become an employee or an intern or an apprentice.

The provisions of the EA providing protection against discriminatory dismissal (Articles 18, 19, 20 and 21) cover only employees who are covered by the EA's and the PEA's job security provisions. These articles cover employees who have concluded an open-ended employment contract with the employer and have been employed for at least six months at a workplace with at least 30 employees. Certain employer representatives (managers) are excluded from the scope of the job security. Article 18 of the EA excludes employees who have been employed less than six months, small undertakings employing fewer than 30 employees and some employer representatives holding managerial positions (employer representatives and their assistants authorised to manage the entire enterprise as well as

[125] Court of Cassation 9th Division, 5.10.2017, 2016/24041, 2017/15069.
[126] See section 11.9, below.
[127] See section 11.9, below. The PC, Article 117, provides that any person who employs helpless, homeless and dependent person(s) without payment or with a low wage incomparable with the standards or forces him/her to work and live in inhumane conditions, is sentenced to imprisonment from six months to three years or a punitive fine not less than hundred days (paragraph 2). Any person who unlawfully increases or decreases the wages, or forces employees to work under the conditions different than that of agreed in the contract, or causes suspension, termination or re-start of the works, is sentenced to imprisonment from six months to three years (paragraph 4).
[128] See section 2.2, above.

the employer representative who manages the entire work place, but who are also authorised to recruit and dismiss employees) from its coverage. On the other hand, given that agricultural and forestry establishments employing a minimum of 50 employees are excluded from the scope of the EA,[129] job security was introduced for the agricultural and forestry employees working for an employer with at least 50 employees. Article 18(3) of the EA determines that sex, marital status, pregnancy, maternity, family responsibilities, race, colour, birth status, religion, political opinion or similar grounds do not constitute valid reasons for the termination of an open-ended employment contract of this group with notice. Article 18(3) of the EA provides better protection against invalid dismissal for employees who are in the scope of the job security provisions of the EA (Articles 18-21) and the PEA (Article 6).[130]

Employees in this group can claim reinstatement, while excluded employees (such as employees who are employed in a workplace with fewer than 30 employees, or who have been employed less than six months at a workplace with more than 30 employees, or certain employer representatives who are excluded from the scope of the Article 18, or employees who have concluded a fixed-term employment contract with the employer) can only claim compensation against discriminatory dismissal either under Article 5 of the EA or under the provisions related to abusive dismissal.[131]

Thus, within the EA there is a lack of equality between employees, although they are all in the scope of the EA.[132]

No similar protection is provided against discriminatory dismissal for employees in the scope of the MEA and OA.[133]

There are no anti-discrimination provisions in the OA, MEA or PEA for employees who are in the scope of these acts.

The EA also provides protection against discrimination based on certain types of employment relationships, such as discrimination in temporary agency employment, part-time employment,[134] fixed-term employment and remote employment.[135]

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[129] See section 3.3, above.

[130] See section 3.3, above.

[131] The MEA (Article 16) and the OA (Article 434) allow the termination of open-ended employment contracts by giving notice with no reason. On the other hand the EA (Article 17) and the PEA (Article 8) allow the termination of open-ended employment contracts by giving notice with no reason except for the employees who are in the scope of the EA, Article 18 and the PEA, Article 6. Therefore the EA and the PEA allow termination by giving notice, with no reason, in the case of open-ended employment contracts of employees who are employed in an establishment with fewer than 30 employees, or those who are employed in an establishment with 30 or more employees but who do not have a minimum seniority of six months, or for the employer's representative and his/her assistants authorised to manage the entire enterprise as well as the employers' representative managing the entire establishment but who is also authorised to recruit and terminate employees (Articles 17, 18).
This freedom cannot, however, be exercised in violation of the principle of good faith (Civil Code of Turkey, Article 2; EA, Article 17; MEA, Article 16; OA, Article 434). Therefore, in cases of dismissal in bad faith, whilst terminating the contract is seemingly lawful and proper, the employer is deemed to have acted in a covert way and with abusive intention in the employee's dismissal (abusive dismissal). The dismissal may be contrary to certain specified rights of the employee, for example, if it is based on gender, pregnancy, maternity or filing a grievance or any other abusive ground. The restriction in this regard relates to the payment of specific protection compensation by the employer, if his/her action was motivated by an abuse of the right to terminate the employment relationship (EA, Article 17/V, MEA, Article 16/D(1) and OA, Article 434).

[132] See Bakirci, K (2016), 'New Forms of Employment in Turkey' in R. Blanpain, F. Hendricx and B. Waas (eds.) *New Forms of Employment in Europe*, Bulletin of Comparative Labour Relations 94, Wolters Kluwer, pp. 361-365.

[133] See section 3.3, above.

[134] Bakirci, K. (2011) 'Part-time Work', in Stange, Z., Oyster, C.K., Sloan, J.E. (eds.) *Encyclopedia of Women in Today's World, Vol. 3*, Sage Publications, USA.

[135] See Bakirci, K. (2016), 'New Forms of Employment in Turkey' in Blanpain, R., Hendricx, F. and Waas, B. (eds.) *New Forms of Employment in Europe*, Bulletin of Comparative Labour Relations 94, Wolters Kluwer.

Article 7 of the EA on temporary agency employees states that an employer who employs temporary agency employees must allow temporary agency employees to benefit from the social services of the business in accordance with the principle of equal treatment, in the periods where temporary agency employees are employed (paragraph 9(d)). The principal working conditions of the temporary agency employees must not be below the conditions to be met in case of direct employment by the same employer for the same work, during the working period of the temporary employee at the workplace of the employer who employs the employee (paragraph 10). Temporary agency employees must be allowed to benefit from educational and childcare services in the private employment agency when they are not employed (paragraph 9(d)).

Article 5 of the EA states that unless there are essential reasons for differential treatment, the employer must not make any discrimination between a full-time and a part-time employee (paragraph 2). Article 13(2) provides that an employee working under a part-time employment contract must not be subjected to differential treatment in comparison to a comparable full-time employee solely because his/her contract is part time, unless there is a justifiable reason for differential treatment.

According to Article 5(2) of the EA, unless there are essential reasons for differential treatment, the employer must not make any discrimination between an employee working under a fixed-term employment contract (a contract made for a definite period) and one working under an open-ended employment contract (a contract made for an indefinite period). Article 12/1 of the EA provides that an employee working under an employment contract for a definite period must not be subjected to differential treatment in relation to a comparable employee working under an employment contract for an indefinite period.

Article 14 of the EA on remote employment states that in the remote employment relationship, employees must not be subjected to any differential treatment in relation to a comparable employee, due to the nature of his/her employment contract, unless a reason justifying discrimination exists.

The anti-discrimination provisions of the CSA cover civil servants. The CSA does not cover job applicants, interns, apprentices, or persons who apply for an internship or apprenticeship, or anyone who wishes to receive information about the workplace or the work in order to become a civil servant or an intern or an apprentice.

There is no special provision on prohibiting discrimination against public officials working under an administrative law employment contract in the administrative law legislation.

The HREIA[136] covers all workers who work for the public institutions and organisations that provide education, training, judicial services, law enforcement, health services, transportation, communication, social security, social services, social aid, sports, accommodation, cultural, touristic or similar services, professional organisations with the nature of public institutions, real or private legal persons (Article 5(1)).

The anti-discrimination provision of the PC (Article 122) covers all Turkish citizens.

4.3.2 Definition of the material scope (Article 14(1) of Recast Directive 2006/54)

Article 70 of the Constitution provides protection against discrimination in relation to recruitment to the public service.

[136] See section 11.7, below.

Article 5/1 of the EA prohibits discrimination based on language, race, sex, political opinion, philosophical belief and religion, or similar grounds in the employment relationship.[137]

Article 5/2 of the EA prohibits direct or indirect discrimination in the conclusion, conditions, execution, pay and termination of an employment contract due to the employee's sex or pregnancy. However, it does not cover job advertisements, conditions for access to employment, to occupation, including selection criteria and recruitment conditions, or access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience.

Article 5/4 of the EA prohibits discrimination in pay based on the employee's sex.

Article 18 of the EA prohibits invalid dismissal based on sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, absence from work during maternity leave when female employee must not be engaged in work, as provided by Article 74 of the EA. This protection is provided only for the employees who are in the scope of the EA job security provisions that are described above (Articles 18, 19, 20 and 21).

Article 10/2 of the CSA encompasses the whole process of the employment relationship.

Nevertheless, the 2004 Prime Ministry Circular on equal treatment in the public personnel recruitment process,[138] states that unless there is a genuine and determining occupational requirement, job notices by public bodies and organisations cannot specify the sex of applicants.

In 2005 and 2014, amendments to the PC introduced penal sanctions against direct discrimination in access to employment, which the EA had not specified. Article 122 of the PC prohibits discrimination stemming from the motive of hate in 'employing or not employing (access to employment)' based on sex. Article 122 takes into account cases of 'access to employment', but does not cover other stages of employment (such as training, working conditions, etc).

In addition, Article 216/2 of the PC states that anyone who publicly insults (degradates) a segment of population on the basis of social class, race, religion, sect, gender or regional differences will be sentenced to imprisonment.[139]

The HREIA provides that any employment contract and performance contracts that do not fall under the scope of the EA will be within the scope of Article 6 (Article 6/5).

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[137] Apart from discrimination based on sex and pregnancy, the EA prohibits only 'discrimination, (exercised) in the employment relationship or in the termination of the relationship' (Article 5), but does not prohibit discrimination in 'access to employment.' See Bakirci, K./ O.Karadeniz/ H.Yilmaz./ E.N.Lewis/ N.Durmaz (2014), *Women in the World of Work* (*İş Dünyasında Kadın*), Volume 2, Turkonfed Yayini, Istanbul; Bakirci, K. (2014), 'Do Women Equal Citizens in Relation to Right to Work' (*Çalışma Hakkı Açısından Kadınlar Eşit Vatandaşlar Mıdır*?), *Toprak Isveren Dergisi*, Sayi: 101, Mart; Bakirci, K. (2012), *Searching for Gender Equality and the Non-Discrimination Principle Based on Gender in Employment in International, European Union, United States and Turkish Law* (*Uluslararası Hukuk, AB ve ABD Hukuku İle Karşılaştırmalı Çalışma Yaşamında Kadın Erkek Eşitliği Arayışı, Cinsiyet Ayrımcılığı Yasağı ve Türkiye*), Seckin Yayinlari, Ankara, June; Bakirci, K. (2010-2011), 'Gender Equality in Employment in Turkish Legislation with Comparisons to EU and International Law', in *Journal of Workplace Rights*, Vol. 15, No. 1-2; Bakirci, K./ Budak, G./ Ozkaya, M./ Yılmaz, H./ Karadeniz, O. (2007), *Women in the World of Work* (*İş Dünyasında Kadın*), Turkonfed Yayini, Istanbul; Bakirci, K. (2007), 'Gender Equality in Employment and the Necessary Reforms in Legislation and Public Policy' (*İstihdamda Cinsiyetler Arası Eşitlik ve Mevzuatta ve Kamusal Politikalarda Yapılması Gereken Değişiklikler*), *Sicil Is Hukuku Dergisi*, S. 8, December.

[138] Prime Ministry Circular on equal treatment in the public personnel recruitment process (*Personel Temininde Eşitlik İlkesine Uygun Hareket Edilmesi ile İlgili 2004/7 Sayılı Başbakanlık Genelgesi*), No. 2004/7, *Official Journal* 22.1.2004, No. 25354.

[139] The PC also provides protection for freedom of work and occupation (Article 117/1). See section 8.1, below.

Employment in public institutions and organisations is based on the provisions of Article 6 of the HREIA (Article 6/6). Article 6 states that an employer or a person authorised by the employer must not discriminate against an employee or applicant for a job, a person gaining applied work experience or an applicant for that kind of work and anyone wishing to receive information about the workplace or the work in order to be an employee or gain applied work experience, while being informed of the work, during the application process, selection criteria, work and termination of work and in terms of conditions for recruitment. The ban on discrimination encompasses job announcements, workplaces, working conditions, vocational counselling, access to vocational training, all types and degrees of retraining, promotion and professional hierarchy, in-service training, social interests and similar subjects.

Therefore the HREIA extends the non-discrimination principle to all stages of employment (Article 6/1), as well as self-employment,[140] and goods and services.[141]

However, although Article 10 of the Constitution and Articles 5 and 18 of the EA do not limit the protected grounds by using the phrase 'similar grounds' or 'inter alia', Article 122 of the PC and Article 3 of the HREIA identify an exhaustive list of prohibited grounds for discrimination claims. This seems to conflict with the equality provision of the Constitution (Article 10).[142] Within the scope of the PC, discrimination based on 'language, race, nationality, colour, gender, disability, political thoughts, philosophical beliefs, religions or sects' and within the scope of the HREIA, discrimination on the basis of 'gender, race, colour, language, religion, faith, sect, philosophical or political opinion, ethnic origin, wealth, birth status, civil (marital) status, health condition, disability or age' is prohibited (Article 3).

4.3.3 Implementation of the exception on occupational activities (Article 14(2) of Recast Directive 2006/54)

Turkish law allows a difference of treatment that is based on a discriminatory ground, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out. Such a characteristic constitutes a genuine and determining occupational requirement provided that its objective is legitimate and the requirement is proportionate.

Constitution Article 70 provides that no criteria other than the qualifications for the office concerned shall be taken into consideration for recruitment into public service.

According to Article 50, paragraph 2 of the Constitution, no one shall be required to perform work unsuited to his/her age, sex, and capacity.[143]

Article 5 of the EA states that except for biological reasons or reasons related to the nature of the job, the employer must not make any discrimination, either directly or indirectly, against an employee in the conclusion, conditions, execution and termination of an employment contract due to the employee's sex or pregnancy.

Another exception can be found in Article 72 of the EA.[144] It prohibits women from entering certain jobs, including underground or underwater work such as in mines, cable-laying,

[140] See section 4.3 above and section 8, below.
[141] See section 9, below.
[142] See section 2.1, above.
[143] See section 2.1, above; Bakirci, K. (2010-2011), 'Gender Equality in Employment in Turkish Legislation with Comparisons to EU and International Law', in *Journal of Workplace Rights*, Vol. 15, No. 1-2.
[144] For providing gender equality, the Bylaw amending the Bylaw on heavy and dangerous works was published on 8 February 2013, abolishing the Bylaw on heavy and dangerous works, which limited the employment of women and youths. With this initiative, women and youths were encouraged to work in any occupation by obeying occupational health and safety measures provided by the Occupational Health and Safety Act (*Official Journal*, 8 February 2013, No. 28553); See Bakirci, K. (2009), 'Prohibition to Employ Women in

and the construction of sewers and tunnels (Article 72).[145] This constitutes discrimination based on sex, which is prohibited by the Constitution (Article 10) and it conflicts with Article 5 of the EA.[146]

The HREIA provides the cases and exceptions where the allegation of discrimination cannot be asserted within the scope of the act (Article 7). Justifications for differences in treatment are not specifically with regard to employment, but relate to all types of discrimination. The cases and exceptions within the scope of the HREIA are as follows.

a) Cases where the sex of the worker constitutes a genuine occupational qualification (a determining factor) in employment and self-employment and that the objective sought is proportionate and the exception is also proportionate.[147]
b) Cases where only persons from a single sex should be employed.
c) Different treatment during recruitment and employment when determining and implementing age limits due to exigencies of the work offered, provided that it is in line with the necessities and purpose of the work,
d) Special measures and protection measures for children or persons who must be kept in a particular place.
e) Cases where in a religious institution persons only belonging to that religion are employed to give religious service or education and training.
f) Necessary, proportionate and different treatment that is in line with the aim to remove inequalities.
g) Different treatment of those who are not Turkish nationals arising from their different conditions and legal status during entry into the country and residence.

4.3.4 Protection against the non-hiring, non-renewal of a fixed-term contract, non-continuation of a contract and dismissal of women connected to their state of pregnancy and/or maternity

Protection against non-hiring:

The EA does not provide protection against the non-hiring of women connected to their state of pregnancy and/or maternity (Article 5). There are no explicit provisions in the MEA, the PEA, the OA or the CSA. However, Article 6(3) of the HREIA provides that the employer or a person authorised by the employer must not reject job applications due to pregnancy, motherhood or childcare.

Protection against non-renewal of a fixed-term contract:

Heavy and Dangerous Work and Women's Employment (in Turkey)' (*Kadınların Ağır ve Tehlikeli İşlerde Çalıştırılmasına İlişkin Yasaklar ve Kadın İstihdamı*), TMMOB Kadin Muhendis, Mimar ve Sehir Plancilari Kurultayi (21-22 November 2009), TMMOB Kadin Kurultayi Sonuc Bildirgesi ve Kararlar, TMMOB, Istanbul; Bakirci, K. (2008), 'Health and Safety of Women Employees' (*Kadın İşçilerin İş Sağlığı ve Güvenliği*), Calisma Yasaminda Kadin Muhendisler, Mimarlar ve Sehir Plancilari, TMMOB Istanbul Il Koordinasyon Kurulu Kadin Komisyonu, 8 Mart Dünya Emekci Kadinlar Gunu Paneli (Harita Muhendisi Gulseren Yurttas Anisina, 1.3.2008), Istanbul.

[145] See Bakirci, K. (2012), *Exceptions and Objective Justifications for Sex Discrimination in Employment in International, European Union, United States and Turkish Law* (*Uluslararası Hukuk, AB ve ABD Hukuku İle Karşılaştırmalı İş Hukukunda Cinsiyet Ayrımcılığı Yasağı İlkesinin İstisnaları ve Objektif Haklı Nedenler*), Seckin Yayinlari, Ankara; Bakirci, K. (2012), *Searching for Gender Equality and the Non-Discrimination Principle Based on Gender in Employment in International, European Union, United States and Turkish Law* (*Uluslararası Hukuk, AB ve ABD Hukuku İle Karşılaştırmalı Çalışma Yaşamında Kadın Erkek Eşitliği Arayışı, Cinsiyet Ayrımcılığı Yasağı ve Türkiye*), Seckin Yayinlari, Ankara, June; Bakirci, K. (2010-2011), 'Gender Equality in Employment in Turkish Legislation with Comparisons to EU and International Law', in *Journal of Workplace Rights*, Vol. 15, No. 1-2.

[146] Bakirci, K. (2010-2011), 'Gender Equality in Employment in Turkish Legislation with Comparisons to EU and International Law', in *Journal of Workplace Rights*, Vol. 15, No. 1-2.

[147] The Constitutional Court annulled a provision of the Nursing Act (Act No.6283), which prevented men from accessing the profession, which was found to be as violation of Article 10 of the Constitution in 2009 (Constitutional Court, 23.7.2009, 2006/166, 2009/113, *Official Journal*, 19.3.2010, No. 27526).

In theory, a woman's state of pregnancy and/or maternity is not a valid ground for the non-renewal of a fixed-term contract.

Protection against non-continuation of a contract or dismissal:

In principle, a worker who is pregnant is protected against dismissal for the period starting at the beginning of her pregnancy, until the end of the leave or absenteeism period recognised by the private and public law legislation (EA, HREIA). Under the EA, this principle does not apply when the employee is guilty of a behaviour that justifies their immediate dismissal (without giving notice) (EA 25) or where her fixed-term contract has expired.[148]

4.3.5 Implementation of the exception on the protection for women in relation to pregnancy and maternity (Article 28(1) of Recast Directive 2006/54)

Article 5 of the EA states that the prohibition of direct or indirect discrimination based on sex or maternity does not apply when the biological reasons constitute a determining factor in the conclusion, conditions, execution and termination of employment.

Article 5(5) provides that the application of 'special protective provisions due to the employee's sex shall not justify paying him (her) a lower wage.'

4.3.6 Particular difficulties

There are difficulties as regards the recognition of pregnancy and maternity discrimination.

4.3.7 Positive action measures (Article 3 of Recast Directive 2006/54)

There are no specific positive action measures in relation to pregnancy and maternity. However as stated above, the Constitution provides that 'Men and women shall have equal rights. The State has the duty to ensure that this equality is put into practice. Measures ensuring equality between men and women would not be considered a violation of the principle of equality' (Article 10/2). Under the HREIA, necessary, proportionate and different treatment that is in line with the aim to remove inequalities does not constitute a violation of the equality principle (Article 7/f).

4.4 Evaluation of implementation

It is clear from the case law of the Court of Cassation that unfavourable treatment and the dismissal of women employees is usually related to pregnancy and/or maternity[149] and there are difficulties for women in making use of their right to return to work or to an equivalent job after pregnancy and/or maternity leave.

4.5 Remaining issues

No explicit protection is provided for pregnant women employees during the probation period in national law.

Protection may, however, be claimed if the termination of the employment relationship during the probation period is deemed to be abusive or discriminatory or invalid or unjustified since the EA (Articles 5 or 18) and the HREIA (Article 6) prohibit discrimination in the termination of the employment contract.

[148] See section 5.2.8, below.
[149] See Court of Cassation 9th Division, 6.10.2003, 2003/ 3501, 2003/16308; Court of Cassation 9th Division, 14.4.2016, 2015/29051, 2016/9441.

5 Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54, 2010/18 and 2019/1158)[150]

5.1 General (legal) context

5.1.1 Surveys and reports on the practical difficulties linked to work-life balance

The gender-based division of labour in Turkey mostly forces women to carry out the housework, child and elder care. The total workload of women is always higher than men no matter in which category the women stands. Among the OECD and 30 non-OECD countries, the female population aged 15-64 in Turkey spend the highest proportion of time on household maintenance.[151]

The ILO's *Quantum Leap* report shows that a 'number of factors are blocking equality in employment, and the one playing the largest role is caregiving',[152] and the ILO Office for Turkey's infographic poster shows that women's unpaid care work, including child and elderly care prevent them getting into paid labour.[153]

The *Women's Empowerment Strategy and Action Plan (2018-2023)*,[154] adopted by the Directorate of Women's Status in the Ministry of Family, Employment and Social Services states that marriage and child care both increase women's housework and weaken their participation in labour markets, while the opposite is true for men. The major impediment to women's participation in the workforce stems from a lack of sufficient preschool education and care services.[155]

As stated above, studies identify a 'motherhood penalty' as a source of gender pay gaps. This pay gap indicator between mothers and non-mothers reveals striking results when compared to the 'fatherhood premium' indicating the pay gap between fathers and non-fathers.[156]

5.1.2 Other issues

Although Turkey is not a party to the ILO Convention concerning Workers with Family Responsibilities (No. 156), according to Article 12/2(c) of the UN Convention on the

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[150] See Masselot, A. (2018), *Family leave: enforcement of the protection against dismissal and unfavourable treatment* European network of legal experts in gender equality and non-discrimination. https://www.equalitylaw.eu/downloads/4808-family-leave-enforcement-of-the-protection-against-dismissal-and-unfavourable-treatment-pdf-962-kb; McColgan, A. (2015), *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, European network of legal experts in gender equality and non-discrimination. https://www.equalitylaw.eu/downloads/3631-reconciliation.

[151] See Memis, E., Ones, U. and Kizilirmak, B. (2012), 'Housewifization of Women: Contextualising Gendered Patterns of Paid and Unpaid Work', in S. Dedeoglu and A. Elveren (eds.) *Gender and Society in Turkey: The Impact of Neo-liberal Policies, EU Accession and Political İslam*, I.B.Tairus; See also ILO-CEACR, Observation (CEACR) – adopted 2015, published 105th ILC session (2016), Discrimination (Employment and Occupation) Convention 1958 (No. 111).

[152] ILO (2019) *Quantum leap report*.

[153] http://esitizberaberiz.org/wp-content/uploads/2019/03/ILO-Report-A-Quantum-leap-for-gender-equality.pdf.

[154] Republic of Turkey Ministry of Family, Employment and Social Services General Directorate on the Status of Women (Kadının Statüsü Genel Müdürlüğü), *Strategy Paper and Action Plan on Empowerment of Women* (*Kadının Güçlenmesi Strateji Belgesi ve Eylem Planı*) (2018 - 2023) http://www.sp.gov.tr/upload/xSPTemelBelge/files/RySPo+KADININ_GUCLENMESI_STRATEJI_BELGESI_VE_EYLEM_PLANI_2018-2023_.pdf.

[155] Committee on Equality of Opportunity Between Men and Women for the Grand National Assembly of Turkey (Kadin Erkek Firsat Eşitliği Komisyonu) (2013), *Report on Promoting Women's Employment in Turkey* (*Her Alandaki Kadin İstihdaminin Artirilmasi ve Cözüm Önerileri Komisyon Raporu*) https://www.tbmm.gov.tr/komisyon/kefe/docs/komisyon_raporu_2014_1.pdf.

[156] ILO (2019) *Quantum leap report*. http://esitizberaberiz.org/wp-content/uploads/2019/03/ILO-Report-A-Quantum-leap-for-gender-equality.pdf.

Elimination of Discrimination Against Women, Turkey is under an obligation to encourage the provision of supportive social care services to enable parents to combine family obligations with work responsibilities and participation in public life. Specifically this is to be carried out through the promotion of the establishment and development of a network of childcare facilities. Pursuant to the revised European Social Charter and with a view to achieving equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers, Turkey must undertake to develop or promote services, public or private, and in particular child daycare services and other childcare arrangements (Article 27).

5.1.3 Overview of national acts on work-life balance issues

In order to provide work-life balance, employment legislation covers provisions related to issues such as:

- maternity leave;
- paternity leave for biological fathers;
- paid and unpaid care leave for adopting parents;
- care leave for parents of disabled or ill children;
- unpaid care leave for biological employee mothers;
- unpaid care leave for civil servant parents;
- right to part time work for employee parents;
- right to part time work for civil servant mothers;
- right to switch from full-time work to part-time work and vice versa for employee parents;
- right to switch from full-time work to part-time work for civil servant mothers;
- right to return to work;
- protection against discrimination due to pregnancy, maternity, or family responsibilities;
- protection of employees against unjustified, invalid, abusive or discriminatory dismissal;
- obligation of certain employers to establish nursing rooms and childcare centres;
- right to benefit from unpaid birth/maternity leave related to retroactive social security premium payment for women employees who stopped working not exceeding two years after giving birth;
- right to change the night shifts for employee couples.

However, there are several gaps in or problems with the legislation:

- unpaid care leave is only recognised for biological employee mothers and there is no unpaid care leave for biological employee fathers;
- a leave of absence for employees in the event of the illness of a dependent family member is not recognised;
- there is no bottle-feeding leave for fathers of newly born children;
- there is no explicit provision recognising the right to return to work for employees after taking leave; and
- the right to part-time work and the right to switch from full-time work to part-time work is only recognised for women civil servants but not for male civil servants.

5.1.4 Political and societal debate and pending legislative proposals

This subject is mostly discussed in the feminist academic literature,[157] as well as at conferences and in panels, seminars and training programmes organised by womens NGOs to ensure that Turkish law is compatible with EU law.

[157] See Bakirci, K., Karadeniz, O., Yilmaz, H., Lewis, E.N. and Durmaz, N. (2014), *Women in the World of Work* (*İş Dünyasında Kadın*), Volume 2, Turkonfed Yayini, Istanbul; Bakirci, K. (2012), *Searching for Gender Equality and the Non-Discrimination Principle Based on Gender in Employment in International, European*

5.2 Pregnancy and maternity protection

5.2.1 Definition in national law

Definitions of a pregnant worker, a worker who has recently given birth and a worker who is breastfeeding are provided by the Bylaw on the working conditions for pregnant or nursing workers, and nursing rooms and day nurseries.[158] The bylaw covers all workers (employees, civil servants, public officials with an administrative law employment contract).

According to Article 4 of the Bylaw:

- a pregnant worker means a pregnant worker who informs her employer of her pregnancy through a document received from any health institution (paragraph a);
- a worker who is breastfeeding means a worker who is using breastfeeding leave within the meaning of the applicable legislation governing her status and who informs her employer of her condition, in accordance with that legislation (paragraph b);
- a worker who has recently given birth means a worker who has recently given birth and who informs her employer of her condition (paragraph c).

5.2.2 Obligation to inform employer

According to the Bylaw on the working conditions for pregnant or nursing workers, and nursing rooms and day nurseries, the worker has to inform her employer when she becomes pregnant or starts breastfeeding (Article 6/a).

5.2.3 Case law on the definition of a pregnant worker, a worker who has recently given birth and/or a worker who is breastfeeding

There is no known case law that defines a pregnant worker, a worker who has recently given birth and/or a worker who is breastfeeding in a different way to the legislation mentioned above.

5.2.4 Implementation of protective measures (Article 4-6 of Directive 92/85)

According to the HREIA there cannot be a claim for discrimination where there are special and preventive measures for children and other people (Article 7/5).

Under the Bylaw on the working conditions for pregnant or nursing workers, and nursing rooms and day nurseries and the Occupational Health and Safety Act, as soon as a female employee notifies her employer of her pregnancy or breastfeeding period, the employer must immediately implement the necessary protective measures. The employer must substantiate the risks based on the individual workspace of the employee, take the protective measures identified, offer the pregnant woman the opportunity to discuss the adjustment of her working conditions and monitor the effectiveness of the protective measures taken. If an employer fails to conduct an individual risk assessment, and there are identifiable risks where protective or preventative measures should have been taken,

Union, United States and Turkish Law (*Uluslararası Hukuk, AB ve ABD Hukuku İle Karşılaştırmalı Çalışma Yaşamında Kadın Erkek Eşitliği Arayışı, Cinsiyet Ayrımcılığı Yasağı ve Türkiye*), Seckin Yayinlari, Ankara, June; Bakirci, K. (ed.) (2019), A Guide to Reconcilation of Working and Family Life (*Is ve Aile Yasamının Uyumlastırılmasi Rehberi* (*Is ve Aile Yasamının Uyumlastırılmasi Rehberi*), Oz Iplik Is, Ankara; Bakirci, K. (2011), 'Parental Leave', in Z. Stange C.K. Oyster and J.E. Sloan (eds.), *Encyclopedia of Women in Today's World*, Vol. 3, Sage Publication, USA; Bakirci, K. (2010-2011), 'Gender Equality in Employment in Turkish Legislation with Comparisons to EU and International Law', in *Journal of Workplace Rights*, Vol. 15, No. 1-2; Bakirci, K., Budak, G., Ozkaya, M., Yılmaz, H. and Karadeniz, O. (2007), *Women in the World of Work* (*İş Dünyasında Kadın*), Turkonfed Yayini, Istanbul.

[158] Bakirci, K. (2006), 'Protection of Women Employees Before and After Childbirth in Turkish Employment Law', in *International Journal of Comparative Labour Law and Industrial Relations*, Volume 22, Issue 4, December.

the employer could face a claim for pregnancy and maternity discrimination, for failing to safeguard health and safety. The Occupational Health and Safety Act also imposes fines on employers or their representative who acts in violation of the principles and obligation set out in the Bylaw on the working conditions for pregnant or nursing workers, and nursing rooms and day nurseries (Article 26/n). However the author of this report has no information on the enforcement of these provisions.

5.2.5 Case law on issues addressed in Article 4 and 5 of Directive 92/85

There is no relevant case law of which the author is aware.

5.2.6 Prohibition of night work

According to the Article 9 of the Bylaw on the employment conditions of pregnant and breastfeeding women and nursing rooms and childcare centres, and the Bylaw on conditions of employment of women employees on night shifts, women employees cannot be assigned to night shifts from the time the pregnancy is ascertained in a physician's report, until birth.

Women civil servants will be exempted from night watches and shifts for the first 24 weeks of pregnancy (CSA, Article 101).

5.2.7 Case law on the prohibition of night work

There is no case law related to the prohibition of night work for pregnant or breasfeeding women.

5.2.8 Prohibition of dismissal

Protection of women employees against dismissal

The protection against the dismissal of women employees based on pregnancy and/or maternity or family responsibilites is covered by the provisions on the prohibition of discriminatory dismissal, invalid dismissal, abusive dismissal or unjustified dismissal.

However the protection provided is inadequate because, apart from the PEA (Article 12), in none of the cases is the employer obliged to reinstate the dismissed employee even when the dismissal was found to be discriminatory/invalid/unjustified or abusive by the mandatory mediator, the labour court or the arbitrator.[159]

Protection against unjustified (immediate) dismissal

Although there is no explicit prohibition, pregnancy and/or maternity is not a just cause for immediate dismissal of women employees. However under certain conditions abstenteeism as a result of illness or accidents is a just cause for dismissal. According to Article 25/I(b) of the EA, in the event of illness (such as arising from pregnancy or

[159] Bakirci K. (2015), 'Insecurity in Employment and Turkish Legislation' (*Türkiye'de Güvencesiz Çalıştırmaya Dair Yasal Durum*), *Guvencesizlestirme ve Kadin Emegi Calistaylari Raporu 2014*, KESK Yayini, Ankara; Bakirci, K. (2010-2011), 'Gender Equality in Employment in Turkish Legislation with Comparisons to EU and International Law', in *Journal of Workplace Rights*, Vol. 15, No. 1-2; Bakirci, K. (2006), 'Termination of Employment Contract', *The Socio-Legal Studies Association Annual Conference 2006*, University of Stirling, 28-30 March; Bakirci, K. (2006), 'Employment Security Provisions of Turkish Labour Act and the Relationship Between Abusive Compensation and Discriminatory Compensation' (*İş Güvencesi Kapsamındaki İşçilerin Doğrudan Tazminat Talep Hakları ve Kötüniyet veya Sendikal Tazminat İle Ayrımcılık Tazminatı İlişkisi*), *Sicil Is Hukuku Dergisi*, p. 2, June; Bakirci, K. (2004), 'Unfair Dismissal in Turkish Employment Law', in *Employee Responsibilities and Rights Journal*, Volume 16 (Issue: 2), June; Bakirci, K. (1998), 'ILO Convention Concerning Termination of Employment at the Initiative of the Employer (No. 158)' (*UÇÖ Hizmet İlişkisine Son Verilmesi Sözleşmesi*), *Turkiye Sendikacilik Ansiklopedisi*, C.2, Tarih Vakfi Yayini, Istanbul; Bakirci, K. (1995).

confinement) or accidents that are not attributable to the employee, the employer may terminate the employment contract if recovery from the said incidents lasts for more than six weeks beyond the notice period set out in Article 17. In cases of pregnancy or confinement, the six-week period will begin at the end of the maternity leave stipulated in Article 74 of the EA.

An employee who is in the scope of the EA Article 18 and who is dismissed without a just cause may file a lawsuit according to Articles 18, 20 and 21 of the EA by claiming that the termination was not in conformity with Article 25 of the EA and claim for reinstatement. However, even if a mandatory mediator, the court or the arbitrator declares the dismissal unjustified and awards reinstatement, the employer has the right to refuse reinstatement of the employee and may pay compensation instead (Article 21).

The rest of the employees outside of the scope of the EA Article 18 are only entitled to claim compensation from the employer.

Protection against discriminatory, invalid, abusive dismissal by giving notice

Employees with an open-ended employment contract can be dismissed by giving notice (EA Article 17, MEA Article 16, PEA Article 8, OA Article 434). The EA provides various forms of protection against the ending of open-ended employment contracts by giving notice, depending on the number of employees in the establishment, and the seniority and position of the employee. However the protection against dismissal by giving notice (discriminatory dismissal, invalid dismissal and abusive dismissal) provided for women is unsufficient.

Protection against discriminatory dismissal by giving notice

The EA provides an explicit but limited protection for all women who are in the scope of the EA connected to their state of pregnancy and/or maternity against discriminatory dismissal with notice (Article 5).

Article 5 of the EA states that except for biological reasons or reasons related to the nature of the job, the employer must not make any discrimination, either directly or indirectly, against an employee in the conclusion, conditions, execution and termination of an employment contract due to the employee's sex or pregnancy. If the employer violates this provision in the execution or termination of the employment relationship, the employee may demand compensation up to four months' wages, plus other benefits of which s/he has been deprived (Article 5/5).[160]

There are no similar provisions in the MEA, the PEA or the OA.

Protection against invalid dismissal by giving notice

The EA provides an explicit but limited protection for women who are in the scope of the job security provisions of the EA (Articles 18, 19, 20, 21)[161] connected to their state of pregnancy and/or maternity or family responsibilities against invalid dismissal with notice (Article 18). This protection also applies to journalists who are in the scope of the PEA (PEA, Article 6).

According to Article 18 of the EA, the termination of the contract of an employee who is in the scope of the job security provisions of the EA and engaged for an indefinite period, must be based on a valid reason connected with the capacity or conduct of the employee or based on the operational requirements of the establishment or service (Article 18). The EA states that the gender, marital status, family responsibilities, pregnancy, absence from

[160] Court of Cassation 9th Division, 6.10.2003, 2003/3501, 2003/16308.
[161] See section 4.3, below.

work during maternity leave (referred to in EA, Article 74), inter alia, are not valid reasons for termination.[162] Article 18 of the EA also states that illness or injury that might cause temporary absence from work (referred to in EA, Article 25/I(b)), is not a valid reason for terminating an open-ended employment contract of an employee who is covered by the job security provisions of the EA.

There is no similar protection is provided in the MEA or the OA.

Protection against abusive dismissal by giving notice

Implicitly, women are also protected against abusive dismissal with notice (EA, Article 17/V, MEA, Article 16/D(1) and OA, Article 434).[163]

As a result of these different levels of limited protection provided by the EA, employees who are in the scope of the EA have different choices for lodging an appeal and benefiting from different protection such as:

Employees who are employed in an establishment with fewer than 30 employees, or those who are employed in an establishment with 30 or more employees (minimum 50 employees for agricultural and forestry establishments) but who do not have a minimum seniority of six months, or the employer representative and their assistants authorised to manage the entire enterprise as well as the employer representative managing the entire establishment but who is also authorised to recruit and terminate employees, have a choice to lodge an appeal either in accordance with the provision on abusive dismissal (Article 17/6), or in accordance with the provision on sex discrimination (Article 5).

On the other hand, an employee who is employed in an establishment with 30 or more employees (more than 50 employees for agricultural and forestry establishments) and who has a minimum seniority of six months can lodge an appeal either in accordance with the provision on invalid dismissal (Article 18) or with the provision on sex discrimination (Article 5).

The burden of proof under the EA is different for discriminatory dismissal (Article 5), invalid dismissal (Article 18) and abusive dismissal (Article 17).[164]

Protection of civil servants and public officials with an administrative law employment contract against dismissal

In administrative law, civil servants enjoy life tenure and are implicitly protected against the dismissal based on pregnancy and/or maternity or absenteesim arising from the pregnancy or confinement or family responsibilities.

There is no specific legislation on job security for public officials with an administrative law employment contract. Their protection is provided in the case law of the administrative courts and the Conseil d'Etat.[165]

Protection of all women workers under the HREIA

The HREIA (Article 6) prohibits dismissal based on sex and marital status but does not cover dismissal based on family responsibilities.

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[162] EA, Article 18 provides protection against dismissal based on union membership or participation in union activities. However, the Employee Trade Unions and Collective Bargaining Act ((*Sendikalar ve Toplu İş Sözleşmesi Kanunu*), (No. 6356), *Official Journal* 7.11.2012), which provides greater protection, preceded this provision.

[163] See section 4.3, above.

[164] See section 11.5, below.

[165] See e.g. Conseil d'Etat 12th Division, 30.1.2014, 2013/1265, 2014/278.

Although it does not explicitly mention pregnancy and/or maternity, the concept of sex is deemed to include pregnancy and/or maternity as well. This act covers all employees, regardless of whether they are within or outside the scope of the EA. However according to the HREIA, applications concerning allegations that are under the scope of the EA Article 5[166] may be lodged if no sanction is imposed after reviewing the procedures of complaint stated under the EA and the relevant legislation (Article 17/5). The HREIA also covers civil servants and public officials with an administrative law employment contract.

5.2.9 Redundancy and payment during maternity leave

Apart from cases where the immediate dismissal is based on just cause (EA Article 25) or the fixed-term contract has expired, the employment contract is suspended for a total of 16 weeks during maternity leave: eight weeks before confinement and eight weeks thereafter (18 weeks in the case of a multiple pregnancy), (EA Article 74).[167] The employment contract is suspended for eight weeks for one of the parents who adopt a child up to the age of three years.

Article 409 of the OA provides that, in the event that the employment contract is suspended (where the employee fails to perform his/her work without any fault of his/her own, e.g. sick leave, maternity leave or similar reasons), no notification period applies during the suspension period. Therefore, if notice of termination of the employment contract is given by the employer during the period of suspension (e.g. maternity leave), the notice period takes effect after the expiration of the suspension. If the employment contract is fixed term, it may expire within the said suspension period.

The same article also states that the employer is required to pay the employee compensation during the suspension period in accordance with the principles of equity if this period was not compensated in another way.

Unless there is a provision to the contrary in the individual contract or a collective labour agreement, there will be no pay by the employer during maternity leave; the employee will be paid a maternity allowance equalling sick pay by the Social Security Institution (Social Insurances and General Health Insurance Act, Article 18).[168]

A civil servant will continue being paid her normal remuneration during maternity leave (Social Insurances and General Health Insurance Act, Article 18).[169]

5.2.10 Employer's obligation to substantiate a dismissal

Under Turkish law, the employer is not always obliged to indicate substantiated grounds for the dismissal either in writing or orally.

However under the provisions of the EA and the PEA related to invalid dismissal, as explained above, the employer has to justify the dismissal of the employee. The gender, marital status, family responsibilities, pregnancy, absence from work during maternity leave (referred to in EA, Article 74), inter alia, are not valid reasons for dismissal (Article 18). In this type of dismissal, the employer must give the employee written notice of the decision to terminate his/her employment contract, and must clearly state the precise reason or reasons for the termination (Article 19). Notice of termination must be given by the employer in writing (EA, Article 19/1). The written form is a condition of the validity of the transaction and a violation of this requirement would result in the termination being deemed invalid.

[166] See section 11.7, below.
[167] See chapter 5.
[168] See section 5.3, below.
[169] See section 5.3, below.

Public employers have to substantiate the dismissal and notify the civil servants and public officials working under an administrative law employment contract in writing.

5.2.11 Case law on the protection against dismissal

Few cases brought to court are related to dismissal based on pregnancy. When challenged in the Court of Cassation, these dismissals are found to constitute abusive dismissal[170] or invalid dismissal.[171]

5.3 Maternity leave

5.3.1 Length

The definition of maternity leave is provided by the Bylaw on part-time work following maternity leave or unpaid leave.[172] According to the Bylaw, maternity leave means the permission granted for the period when the female employee is not employed due to childbirth (Article 4/a).

According to the EA (Article 74/1) and the CSA (Article 104/A), female workers must not be engaged in work for a total period of 16 weeks: eight weeks before confinement and eight weeks after confinement. For multiple pregnancy, an extra two week period will be added to the eight weeks before confinement during which female employees must not work.

However, a female employee whose health condition is suitable as approved by a physician's certificate may work at the establishment if she so wishes up until three weeks before the delivery. In this case, the time during which she has worked will be added to the time period allowed to her after giving birth (EA Article 74/1; CSA Article 104/A).

Where the female employee gives premature birth, the period that could not be used by her and during which she cannot be employed can be used as additional to the period after delivery (EA Article 74/1; CSA Article 104/A).

In case of mother's death during or after delivery, the periods that cannot be used after delivery can be used by the father (EA Article 74/1; CSA Article 104/A).

The time periods mentioned above may be increased before and after confinement if deemed necessary in view of the female employee's health and the nature of her work. The increased time increments must be indicated in the physician's report (EA Article 74/3).

Article 74 of the EA applies to any kind of employees employed through an employment contract, without regard to whether they are within the scope of the EA or not (EA, Article 74/8).

Maternity leave is considered as having been worked in the calculation of the annual leave of employees (EA, Article 55/b).

[170] See e.g. Court of Cassation, 9th Division, 27.3.1997, 1996/22900, 1997/6115; Court of Cassation, 9th Division, 13.12.2006, 14045/32850; Court of Cassation, 9th Division, 11.6.2007, 2006/32353, 2007/18337; Court of Cassation, 9th Division, 1.2.2007, 2006/17547, 2007/1767; Court of Cassation, 9th Division,16.1.2012, 2011/25631, 2012/193.

[171] See e.g. Court of Cassation, 9th Division, 14.4.2016, 2015/29051, 2016/9441.

[172] Bylaw on part-time work following maternity leave or unpaid leave (*Analık İzni veya Ücretsiz İzin Sonrası Yapılacak Kısmi Süreli Çalışmalar Hakkında Yönetmelik*), *Official Journal* 8.11.2016.

5.3.2 Obligatory maternity leave

The total 16 weeks of maternity leave or 18 weeks in the event of multiple pregnancy is obligatory (EA, Article 74/1; CSA, Article 104/A).

An employer or his/her representative will be liable to a fine if s/he causes pregnant or confined women employees to work in leave periods before and after birth (EA, Article 104).

5.3.3 Legal protection of employment rights (Article 5, 6 and 7 of Directive 92/85)

According to Article 50, paragraph 2 of the Constitution, no one can be required to perform work unsuited to his/her age, sex, and capacity. Minors, women, and persons with physical or mental disabilities enjoy special protection with regard to working conditions.[173]

Some arrangements concerning the safety and health of workers who are pregnant, who have recently given birth and who are breastfeeding exist in the Occupational Health and Safety Act, the OA, the EA, the CSA, the Bylaw on the working conditions for pregnant or nursing workers, and nursing rooms and day nurseries, the Bylaw on conditions of employment of women employees on night shifts, and the Bylaw on part-time work following maternity leave or unpaid leave.

The protection of working women before and after childbirth includes the right to time off for antenatal examinations, the right to take leave for certain periods before and after childbirth, and the right to special protection in occupational health and safety for a period of time before and after childbirth.

Under the Occupational Health and Safety Act, employers are responsible for providing occupational health and safety measures for workers.

Under the OA, employers are obliged to prevent employees from facing psychological and sexual harassment and must take preventive occupational health and safety measures.

A woman worker is entitled to leave with pay for periodic antenatal examinations during her pregnancy (EA, Article 74/3 and Bylaw on the working conditions for pregnant or nursing workers, and nursing rooms and day nurseries, Article 11).

These periods are to be treated as part of working time under Article 55/j of the EA.

Employees who are pregnant, who have recently given birth and who are breastfeeding may under no circumstances be obliged to perform duties for which the assessment has revealed a risk of exposure to the agents (physical or biological agents, or chemicals) and working conditions (for example, in work involving non-ionising radiation) listed in Annexes I-II of the Bylaw on the working conditions for pregnant or nursing workers, and nursing rooms and day nurseries (Articles 6, 7 and 13).

The employer is required to change the working conditions and/or working hours of the employee in question for a temporary period if the results of an assessment show a safety or health risk for employees who are pregnant, who have recently given birth or who are breastfeeding or there is the risk of an effect on the pregnancy. If it is technically or physically impossible to adapt the working conditions and/or working hours, the employer is required to take necessary measures to transfer the employee in question to different duties (Bylaw on the working conditions for pregnant or nursing workers, and nursing rooms and day nurseries, Article 8). However, if transfer to a different duty is not technically or reasonably possible, in the period needed to protect the occupational safety

[173] See section 2.1, above.

and health of the employee, she can be considered to be on leave without pay, if she so desires. This period is not to be considered in determining the year of service for entitlement to annual leave with pay (Article 7). However, the fact that the employee's loss of income is not compensated with mandatory social security or state funds during the period of leave without pay will tend to lower her standard of living, to her disadvantage. Therefore, measures are needed to ensure income support to provide a suitable level of living standards. Failure to ensure an income for employees in these circumstances is contrary to EU Directive 92/85 (Article 11).

According to the Bylaw on the working conditions for pregnant or nursing workers, and nursing rooms and day nurseries (Article 9), a woman employee who is pregnant, has recently given birth, or is breastfeeding cannot be made to work more than seven and a half hours a day.

If employers refuse to comply with the obligations set out in the Bylaw on the working conditions for pregnant or nursing workers, and nursing rooms and day nurseries, there will be a fine for each non-compliance and for each month of non-compliance (Occupational Health and Safety Act, Articles 26/n and 30).

According to the Bylaw on the employment conditions of pregnant and breastfeeding women and nursing rooms and childcare centres (Article 8), and the Bylaw on conditions of employment of women employees on night shifts (Article 9), women employees who are breastfeeding cannot be assigned to night shifts for a one year period starting from childbirth. The period for employees who are breastfeeding can be extended if deemed necessary for the health of the mother or the baby in the report by the physician.

Women civil servants will be exempted from night watches and shifts before the 24th week of pregnancy for a period of two years after childbirth (CSA, Article 102).

5.3.4 Legal protection of rights ensuing from the employment contract

Under Turkish law, employment rights during pregnancy and maternity are guaranteed by statutory laws but these can be improved by the individual employment contracts.

5.3.5 Level of pay or allowance

In relation to pregnancy and giving birth, there are maternity medical benefits (benefits in kind) and benefits in cash under the Social Insurance and General Health Insurance Act[174] and the CSA.

During their maternity status, all insured workers and self-employed workers have the right to healthcare under the provisions of the general health insurance.[175] Spouses of male insured workers or self-employed workers, women pensioners and spouses of male pensioners as well as women who receive another income replacement benefit, have the right to healthcare provisions and the birth aid benefit, but not to the maternity allowance.

Under the Turkish legislation, the maternity allowance is a short-term incapacity benefit ('short term insurance') designed to compensate for a worker's loss of earnings due to pregnancy and giving birth (Social Insurance and General Health Insurance Act, Article 18).[176]

Insured women employees, and self-employed workers fall under the provisions related to the maternity allowance of the Social Insurance and General Health Insurance Act. During maternity leave, insured employed and self-employed persons are entitled to an

[174] See section 5.2, above.
[175] See in 7, below.
[176] See section 5.2, above.

allowance for a period of up to 16 weeks (18 weeks in the event of multiple birth). Spouses of the insured employed and self-employed people are not entitled to a maternity allowance.

The amount of the maternity allowance is different depending on whether the beneficiary is receiving inpatient (hospitalised) or outpatient (not hospitalised) treatment. For inpatient treatment, the maternity allowance is set at half the daily earnings. For outpatient treatment the amount is set a two thirds of the daily earnings. The daily earning is calculated by taking the earnings that were subject to the contribution payment in the last three months during the twelve months prior to the date of birth, divided by the number of paid premium days that are due (Social Insurance and General Health Insurance Act, Article 18). As is the case for sick employees, employees who are benefiting from the maternity allowance receive a lower income replacement benefit when they are hospitalised than when they are not, which in fact means that half of their replacement income during the hospitalisation period is used for covering the medical care costs.

In daily practice, the maternity allowance is not paid during the maternity leave itself but as a one-off payment of the integral allowance on the 56th day after the birth of the child. Employers often continue to pay wages/replacement benefit to their pregnant staff during the maternity leave and reclaim the amount once the maternity allowance is paid to the beneficiary.

Civil servants do not fall under the Social Insurance and General Health Insurance Act for short-term incapacity benefits. The CSA governs their entitlements with regards to their social security rights in cases of sickness, maternity, short-term and permanent incapacity for work. According to the CSA, civil servants have the right to maternity leave with maintenance of the full salary for a total of 16 weeks (usually 8 weeks before and after birth). The CSA specifies that the rights and benefits provided to civil servants under the maternity insurance scheme cannot be less than those provided by the general social insurance regime (under the Social Insurance and General Health Insurance Act).

Maternity allowances are free from taxation and social security contributions.

Statutory maternity benefits may be supplemented by some employers up to the normal remuneration, but only in the case of female employees as opposed to female civil servants and public officials working under an administrative law employment contract. As a general rule, employees are paid in return for work. However, the employer and the employee might have agreed on a fixed monthly amount regardless of periods of absenteeism. If a female employee receives such a fixed wage, then the amount paid by the Social Security Institution is to be deducted from the wage paid to the salaried employee remunerated on a monthly basis (EA, Articles 48 and 49/4). This is also the case for the sickness allowance.

5.3.6 Additional statutory maternity benefits

Nursing benefit for insured employees and self-employed persons, birth aid benefit (child benefit) and family allowances for civil servants exist as part of the Turkish social security system. They are governed by the Social Insurance and General Health Insurance Act and the CSA.

Nursing benefit for employees and the self-employed

The Social Insurance and General Health Insurance Act provides for a nursing benefit[177] for insured employees and self-employed people on the condition of a minimum of 120 paid premium days in the year preceding the birth. For self-employed women, an

[177] The Social Insurance and General Health Insurance Act calls the birth grant for employees the 'nursing benefit' whereas for civil servants the birth grant is referred to as the 'birth aid allowance'.

additional condition is to have paid all due contributions and to have a clean debt record at the Social Security Institution (Article 16).

Employed and self-employed women who gave birth receive a one-off birth grant for every newborn. Spouses of male insured employees or self-employed workers, women pensioners and spouses of male pensioners as well as women who receive another income replacement benefit, have the right to nursing benefit.

In cases where an uninsured woman is the spouse of an insured employee or self-employed worker, the nursing benefit is paid to the father.

Birth aid benefit (child benefit) for civil servants

Additional Article 4 of the Decree on making certain arrangements in the field of social services[178] provides that, from 15 May 2015, there will be a birth aid benefit of TL 300 (EUR 50) for the first child, TL 400 (EUR 65) for the second child, and TL 600 (EUR 100) for the third child of a Turkish citizen.

If the mother has Turkish nationality, then whether she is married to a Turk or a foreigner, she will be the one to receive the benefit. If the mother is a foreign national, then the benefit will be given to the father of Turkish nationality. At least one of the spouses must have Turkish nationality to receive this benefit.

Where this benefit is paid to a civil servant, then no other birth aid benefit will be paid.

Birth aid benefits are free from taxation.

Employees and self-employed workers are not entitled to birth aid benefit. However if a public sector employee is entitled to a birth aid benefit due to an employment contract or collective labour agreement, the public sector employee will be paid the difference, if the amount of the civil servant benefit is higher than the one received by the public sector employee.

Family aid allowance for civil servants

Family benefits do not exist as a separate branch in Turkey's social security system as regulated by the Social Insurance and General Health Insurance Act. However the CSA contains provisions on 'family aid allowance' for civil servants (Articles 202-206).[179]

There are two types of 'family aid allowances' under the CSA: those that are paid to a married civil servant when the spouse does not have an (employment or social security) income and those that are paid for each of up to two children (Article 202).
The family allowances are paid out monthly together with the salary (Article 203).

Family aid allowance is paid to a civil servant who becomes parent. If both parents are civil servants, the family aid allowance is paid to the father (Article 203). If the other partner is entitled to a birth aid benefit due to an employment contract or collective agreement, the civil servant will not receive the family aid allowance unless the amount of the latter is higher than the one received by the partner, in which case the difference will be paid (Article 202).

[178] Decree on making certain arangements in the field of social services (*Sosyal Hizmetler Alaninda Bazi Düzenlemeler Hakkinda Kanun Hükminde Kararname*), No. 6223, *Official Journal* 8.6.2011 No. 27958.

[179] See Bakirci, K. (ed.) (2019), *A Guide to Reconcilation of Working and Family Life* (*Is ve Aile Yasamının Uyumlastırılmasi Rehberi*), Oz Iplik Is, Ankara; Bakirci, K. (2006), 'Family Allowances in Turkish Social Security Law' (*Türk Sosyal Güvenlik Hukuku'nda Aile Yardımları*), *Hukuk ve Adalet*, Yil:2, p. 8, April; Bakirci, K. (2005), 'Family Allowances in Turkish Social Security Law', The VIIIth European Congress of the International Society for Labour and Social Security Law, Bologna (Italy), 20-23 September.

Family aid allowances are free from taxation.

5.3.7 Conditions for eligibility (Article 11(4) of Directive 92/85)

The Social Insurance and General Health Insurance Act establishes minimum qualifying periods for employees and self-employed workers for entitlement to the short-term incapacity for work benefits. The minimum qualifying periods are expressed in terms of paid premium days in a one-year reference period prior to the moment the incapacity occurred: 90 paid premium days for the sickness and maternity benefit and 120 paid premium days for the nursing benefit (Article 18).

A further condition to obtain maternity allowance is that the birth must have taken place. For self-employed persons, receipt of the maternity allowance is conditional upon having no outstanding debts in regards to contribution payments to the Social Security Institution.

However, insured workers (including spouses of insured male workers and self-employed workers, women pensioners and spouses of male pensioners and women who receive a pension or other income due to her own work) have during their maternity status access to healthcare without the general condition applicable under the general sickness insurance scheme requiring a minimum contribution record of 30 premium days paid within the previous year.

5.3.8 Right to return to the same or an equivalent job (Article 15 of Directive 2006/54)

There is no explicit provision providing a right to return to the same or an equivalent job after maternity leave. However this right exists implicitly under the EA and the CSA.

According to Article 22 of the EA, it is not possible for the employer to make a substantial change in the employee's working conditions without the employee's consent. It states that any change by the employer in working conditions based on the employment contract, on the rules of work which are annexed to the contract, and on similar sources or workplace practices, may be made only after a written notice is served by him/her on the employee. Changes that are not in conformity with this procedure and not accepted by the employee in written form within six working days will not bind the employee. If the employee does not accept the offer for change within this period, the employer may terminate the employment contract by respecting the term of notice, provided that s/he indicates in written form that the proposed change is based on a valid reason or there is another valid reason for termination.[180] In this case the employee may file suit according to the provisions of Articles 17 and 21.

The parties may always change working conditions by mutual agreement. A change in working conditions may not be made retroactively.

Under the EA during maternity leave, and (exercising) the right to work part-time during parental leave, or during a period of suspension in a continuing employment contract of employees who cannot perform their work for the employer due to any other reasons, the employer can employ a temporary agency employee (EA, Article 7). If a temporary agency employee has been employed during the leave period, the temporary employee's employment ends automatically when the employee on leave returns to his/her job (Bylaw on part-time work following maternity leave or unpaid leave, Article 14).

Although there is no explicit provision providing that workers have the right to return to the same job, this right exists implicitly under the EA and the CSA.

[180] Court of Cassation 9th Division, 23.6.2008, 2007/41015, 2008/17093; Court of Cassation 9th Division, 29.11.2011, 2009/19835, 2011/46440.

5.3.9 Legal right to share maternity leave

Maternity leave is limited to women. It cannot be used by the father nor be transferred to fathers.

However if mother dies during maternity leave, the father, if he so requests, may use the leave granted to the mother (EA, Article 74/1 and CSA, Article 104/A).

5.3.10 Case law

A few cases brought to the Court of Cassation related to dismissal based on maternity leave have been found to be unjustified dismissal[181] or invalid dismissal.[182]

5.4 Adoption leave

5.4.1 Existence of adoption leave in national law

Paid and unpaid adoption leave exists both for employees and civil servants.

Paid adoption leave

The EA provides that the employee shall be given a three-day leave in cases where s/he adopts a child (Additional Article 2/1). Those who adopt a child under three years of age, together with his/her spouse or individually, can benefit from eight weeks' adoption leave as of the date on which the child is delivered de facto (Article 74/1).

The same rule as in the EA, Article 74/1, applies to civil servants (CSA, Article 104/A).

Unpaid adoption leave

Under the EA, after the paid leave (eight-week period) has elapsed, a female or male employee adopting a child under the age of three has the right

- either to request unpaid leave, for half of the weekly working hours for a period of 60 days for the purposes of caring and raising the child. In cases where the child is disabled, this period shall be applied as 360 days (EA Article 74/2);
- or to request unpaid leave up to six months (EA, Article 74/2). This period shall not be taken into account in calculating the right of annual paid leave.

In addition, after the paid leave (the eight-week period) has elapsed, civil servants (both men and women) adopting a child under the age of three have the right to work for half of the weekly working hours for a period of two months for the first child for the purposes of caring and raising the child. In cases where the child is disabled, this period will be applied as 12 months. After these period have elapsed they have the right to request unpaid leave of up to 24 months (CSA, 108/C).

5.4.2 Protection against dismissal (Article 16 of Directive 2006/54)

Adoption leave is not explicitly mentioned as a protected ground in Turkish legislation. However, as protected grounds in Article 5 and 18 of the EA are not exhaustive, adoption will be considered as falling under these provisions if an employee who uses his/her adoption leave is dismissed on this ground (discriminatory or invalid dismissal). Also

[181] See e.g. Court of Cassation, 9th Division, 27.3.1997, 1996/22900, 1997/6115; Court of Cassation, 9th Division, 13.12.2006, 14045/32850; Court of Cassation, 9th Division, 11.6.2007, 2006/32353, 2007/18337; Court of Cassation, 9th Division, 01.2.2007, 2006/17547, 2007/1767; Court of Cassation, 9th Division, 16.1.2012, 2011/25631, 2012/193.

[182] See e.g. Court of Cassation, 9th Division, 14.4.2016, 2015/29051, 2016/9441.

dismissal based on adoption leave can be considered abusive dismissal under the EA, the PEA, the MEA or the OA[183] or unjustified dismissal under the EA, the PEA, or the OA.[184]

On the other hand, adoption is not a ground for dismissing a civil servant. Civil servants enjoy comprehensive job security under the CSA (Articles 94-98). There is no specific legislation on job security for public officials with an administrative law employment contract. Their protection is provided in the case law of the administrative courts and the Conseil d'Etat.[185]

The HREIA cites neither adoption leave nor family responsibilities among reasons that cannot constitute a ground for dismissal.

5.4.3 Case law

The author of this report is aware of no relevant case law.

5.5 Parental leave

5.5.1 Implementation of Directive 2010/18

There is no legislation and/or national collective labour agreement, or case law which specifically speak of parental leave within the understanding of Directive 2010/18 and there is no leave called 'parental leave.'[186]

There are forms of leave related to child or other dependent family members or leave that may be used for family/parental issues.

5.5.2 Applicability to public and private sectors (Clause 1 of Directive 2010/18)

Child related leave in the EA (Article 74) is applicable to all employees who work in either the public or private sector. Article 74 of the EA applies to any kind of employees employed through an employment contract, without regard to whether they are within the scope of the EA or not (EA, Article 74/8).

The CSA covers civil servants. There are no explicit provisions for public officials with an administrative law employment contract who work in the public sector.

Generally speaking, types of leave for civil servants are more generous than those for employees.

5.5.3 Scope of the transposing legislation

Turkish legislation does not meet the requirements of the Council Directive 2010/18/EU since unpaid care leave for newborn child is only recognised for women employees (including part-time employees, fixed-term employees, temporary employees or temporary agency employees) and women civil servants in Turkish law.

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[183] See section 4.3, above.
[184] See section 4.3, above.
[185] See e.g. Conseil d'Etat 12th Division, 30.1.2014, 2013/1265, 2014/278.
[186] See Bakirci, K. (2013), 'Which Employment/Labour Law? Family Friendly or Women Friendly?' (*Hangi Çalışma Hukuku? Aile Dostu mu Kadın Dostu mu*?), *Başka Bir Aile Anlayışı Mümkün mü Toplantısı*, Heinrich Boell Stiftung Turkei, Istanbul, 9.11; Bakirci, K. (2011), 'Parental Leave', in Z. Stange, C.K. Oyster, J.E. Sloan (eds.) *Encyclopedia of Women in Today's World*, Vol. 3, Sage Publication, USA; Bakirci, K. (2011), 'Parental Leave Act', in *Encyclopedia of Women in Today's World*, Vol. 3; Bakirci, K. (ed.) (2019), *A Guide to Reconcilation of Working and Family Life* (*Is ve Aile Yasamının Uyumlastırılmasi Rehberi*), Oz Iplik Is, Ankara.

Unlike employees, civil servant parents (mothers and fathers) can also take additional unpaid care leave for their infants.

5.5.4 Length of parental leave

Unpaid care leave for women employees taking care of infants

Under the EA, after the expiry of the maternity leave, an employee mother has two options of unpaid leave, but there are no arrangements for fathers.

Article 74/2 of the EA provides that after the expiry of the maternity leave (the 16-week period, or after the 18-week period in case of multiple pregnancy), the female employee will be allowed to use unpaid leave, upon her request, for half of the weekly working hours, for a period of 60 days for the first child, for a period of 120 days for the second child and for a period of 180 days for the third child, for the purposes of caring and raising the child and provided that the child survives. In the event of multiple births, these periods will be extended for 30 days each. In cases where the child is born disabled, this period will be applied as 360 days (EA, Article 74/2). The provisions relating to breastfeeding leave do not apply within the period used in accordance with the provisions of Article 74.[187]

As a second option an employee mother who has given birth can, upon request, be granted full-time unpaid leave of up to six months after the expiry of the maternity leave (EA, Article 74). This period will not be taken into account in calculating the right to annual paid leave.

Paid leave for women civil servants for taking care of infants

Under the CSA, Article 108, after the expiry of the maternity leave (the 16-week period, or after the 18-week period in case of multiple pregnancy), women civil servants have the right to work for half of the weekly working hours for a period of two months for the first child, for a period of four months for the second child and for a period of six months for the third child, for the purposes of caring and raising the child. In cases where the child is born disabled, this period will be applied as 12 months.

These provisions are based on the belief that the responsibility for childcare and child raising rests on the woman alone. However, although pregnancy and childbirth is a biological function peculiar to women, childcare and child-raising are a societal responsibility. This responsibility pertains to the mother, father, and the state, as reflected in the ILO Convention concerning Workers with Family Responsibilities (No. 156), CEDAW, and Council Directive 2010/18/EU. Placing parental responsibilities only on women and maintaining the traditional role distribution constitutes direct sex discrimination, one of the most important obstacles to equal opportunity in the working life of women and does not meet the requirements of Directive 2010/18/EU. These responsibilities should be equally shared by the mother and the father. Otherwise, due to childcare responsibilities, married women are prevented from taking their place in employment or are forced to work part time, resulting in a loss of income.

Unpaid care leave for civil servant parents

Unlike employees, civil servant parents have the right to additional unpaid care leave for their infants.

[187] The *Quantum Leap* report sets out laws and practices that are changing this dynamic, for a more equal sharing of care within the family, and between the family and the state. The report highlights the role of men in creating a more gender-equal work of work: 'When men share unpaid care work more equally, more women are found in managerial positions'. ILO (2019) *A quantum leap for gender equality: for a better future of work for all* International Labour Organisation, Geneva. http://esitizberaberiz.org/wp-content/uploads/2019/03/ILO-Report-A-Quantum-leap-for-gender-equality.pdf.

Under the CSA, Article 108/C, civil servant mothers and fathers may request unpaid leave for up to 24 months from the end of maternity leave and after the expiry of the two/four/six month period of part-time work.

If both parents are civil servants they have the right to request to share 24 months of unpaid leave (CSA, Article 108/C).

5.5.5 Age limits

No age limits related to unpaid care leave for children is explicitly mentioned in Turkish legislation.

5.5.6 Individual nature of the right to parental leave

The EA and the CSA entitle women workers to an individual right to unpaid care leave.

The CSA entitles men and women civil servants to an individual right to additional unpaid care leave.

5.5.7 Transferability of the right to parental leave

Under the CSA, if both parents are civil servants they have the right to request to share an additional 24 months of unpaid leave (CSA, Article 108/C). However it is transferable and may be used by either civil servant.

Sickness and patient companionship leave,[188] or leave for providing parenting to a disabled child or a child with a permanent sickness,[189] which are mentioned below, may be used by either (civil servant) parent. Once they decide which parent is to make use of the leave, it is non-transferable.

Leave upon the marriage or death of a child is available for both (civil servant/employee) parents.

5.5.8 Form of parental leave

Under the EA, unpaid care leave after maternity leave is granted on a full-time or part-time basis depending on the choice of the women employees.

Under the CSA, unpaid care leave is granted in a piecemeal way. Unpaid care leave after the maternity leave is granted on a part-time basis for women civil servants. Additional unpaid care leave is granted on full-time basis for both parents.

5.5.9 Work and/or length of service requirements (Clause 3(b) of Directive 2010/18)

There are no work and/or length of service requirements for the enjoyment of unpaid care leave under Turkish law.

5.5.10 Notice period

There is no explicit provision in relation to notice periods to be given by the worker to the employer when exercising the right to unpaid care leave under Turkish law.

[188] See section 5.8, below.
[189] See section 5.8, below.

5.5.11 Postponement of parental leave (Clause 3(c) of Directive 2010/18)

Under Turkish law, an employer is not allowed to postpone the granting of unpaid care leave. There can be no gap between maternity leave and unpaid care leave (EA, Article 74).

Under the EA, an employer or his/her representative will be liable to a fine if s/he fails to grant the employee leave without pay contrary to the provisions of Article 74 (Article 104).

5.5.12 Special arrangements for small firms (Clause 3(d) of Directive 2010/18)

Article 74 of the EA applies to any kind of employees employed through an employment contract, without regard to whether they are within the scope of the EA or not (EA, Article 74/8). Therefore no special arrangements are available for small firms for the leave provided in Article 74.

However, the Bylaw on the employment conditions of pregnant and breastfeeding women and nursing rooms and childcare centres obliges certain employers to establish nursing rooms and childcare centers. Legally, the main responsibility for providing any childcare service lies with the public and private law employers and that is only for substantially large workplaces, which account for a relatively small segment of total employment.[190]

5.5.13 Special rules and exceptional conditions for parents of children with a disability or long-term illness (Clause 3(3) of Directive 2010/18)

The employee or civil servant will be given paid leave for up to 10 days, in a block or in sections, within one year during the treatment of his/her child who is at least 70 % disabled or has a chronic illness, depending on the medical report and provided that only one of the working parents use such leave (EA, Additional Article 2/2 and CSA, Article 104/E). This leave can be used wholly or partially during a period of one year. There is no age limit for the child.[191]

A 'sickness and patient companionship leave' for family members including children applies only to civil servants and public employees. According to the CSA, Article 105/7, civil servants have the right to request paid leave up to three months upon a medical report if the mother or father or spouse or child of a civil servant has a serious accident or if they suffer from a long-lasting illness. The leave may be extended for the same duration (Article 105/7). If the situation continues, then upon the submission of a medical report specifying this, the civil servant parent will be granted unpaid leave for up to 18 months (Article 108/A CSA). There is no age limit for the child.

Article 1 of the amended Act on the transition of the employees in temporary work positions to the status of permanent employees or administrative law contracted personnel status[192] relates to the leave for permanent employees employed in the public sector. Permanent employees employed in the public sector are entitled to an unpaid 'sickness and patient companionship leave' of six months plus an additional six months.

Although permanent public sector employees fall within the scope of the EA, more rights have been recognised for them by the amended Act on the transition of the employees in temporary work positions to the status of permanent employees or administrative law

[190] See section 5.12, below.
[191] For adoption leave see section 5.4, above.
[192] Amended Act on the transition of the employees in temporary work positions to the status of permanent employees or administrative law contracted personnel status (*Kamuda Geçici İş Pozisyonlarında Çalışanların Sürekli İşçi Kadrolarına veya Sözleşmeli Personel Statüsüne Geçirilmeleri, Geçici İşçi Çalıştırılması ile Bazı KanunlardDeğişiklik Yapılması Hakkında Kanun*), No. 5620 *Official Journal* 21.4.2007, No. 26500.

contracted personnel status. Leave of absence for private sector employees in the event of the illness of dependent family members is not permitted.

5.5.14 Measures addressing the specific needs of adoptive parents (Clause 4 of Directive 2010/18)

There are no additional measures that specifically address the specific needs of adoptive parents.

5.5.15 Provisions protecting workers against less favourable treatment or dismissal (Clause 5(4) of Directive 2010/18)

Family responsibilities is cited among reasons that cannot constitute a valid ground for dismissal in the EA, Article 18 and the PEA, Article 6. The EA also provides protection against discriminatory dismissal based on a non-exhaustive list of grounds, and the EA, the PEA, the MEA and the OA provide protection against abusive or unjustified dismissal based on a non-exhaustive list of grounds. Therefore the protection provided by the EA, the PEA, the MEA and the OA also cover dismissal based on family responsibilities.[193]

Article 5 of the EA explicitly forbids an employer from discriminating based on a non-exhaustive list of grounds during the execution of an employment contract. An employer who violates his/her obligations under Article 5 of the EA is guilty of an offence and in the case of a conviction is subject to a fine (Article 99).

The OA provides protection during the suspension period of an employment contract and prevents employers from giving notice of the termination of an employee's employment during the leave period (OA, Article 409).[194]

In administrative law, civil servants enjoy life tenure and are protected against dismissal based on family responsibilities. There is no specific legislation on the job security of public officials with an administrative law employment contract. Their protection is provided in the case law of the administrative courts and the Conseil d'Etat.[195]

The HREIA does not cover discrimination based on family responsibilities but covers discrimination based on marital status (Article 3/2).

5.5.16 Right to return to the same or an equivalent job (Clause 5(1) of Directive 2010/18)

Under the European Social Charter, Turkey is under an obligation to enable workers with family responsibilities to enter into and remain in employment, as well as to reenter employment after an absence due to those responsibilities. This includes the provision of facilities for vocational guidance and training (Article 27/a).

There is no explicit provision providing that workers have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship at the end of unpaid care leave. However this right exists implicitly under the EA and the CSA.

As stated above, according to Article 22 of the EA, it is not possible for the employer to make a substantial change in the employee's working conditions without the employee's consent. It states that any change by the employer in working conditions based on the employment contract, on the rules of work that are annexed to the contract, and on similar sources or workplace practices, may be made only after a written notice is served by him on the employee. Changes that are not in conformity with this procedure and not accepted

[193] See section 4.3, above.
[194] See section 5.5.
[195] See e.g. Conseil d'Etat 12th Division, 30.1.2014, 2013/1265, 2014/278.

by the employee in written form within six working days will not bind the employee. If the employee does not accept the offer for change within this period, the employer may terminate the employment contract by respecting the term of notice, provided that s/he indicates in written form that the proposed change is based on a valid reason or there is another valid reason for termination. In this case the employee may file suit according to the provisions of Articles 17 and 21 of the EA.

The parties may always change working conditions by mutual agreement. Any change in working conditions may not be made retroactively.

Under the EA, during paid or unpaid care leave, and (exercising) the right to work part-time during parental leave, or during a period of suspension in a continuing employment contract of employees who cannot perform their work for the employer due to any other reasons, the employer can employ a temporary agency employee (EA, Article 7). If a temporary agency employee has been employed during the leave period, the temporary employee's employment ends automatically when the employee on leave returns to his/her job (Bylaw on part-time work following maternity leave or unpaid leave, Article 14).

5.5.17 Maintenance of rights acquired or in the process of being acquired by the worker (Clause 5(2) of Directive 2010/18)

Under the EA and the CSA (Article 36/C(8)) rights acquired or in the process of being acquired by the worker on the date on which unpaid care leave starts are maintained as they stand until the end of unpaid care leave. At the end of unpaid care leave, these rights are applicable.

5.5.18 Status of the employment contract or relationship during parental leave

The employment contract is suspended during paid and unpaid leave mentioned above.[196] As stated above, when the employment contract is suspended, no notification period applies during the suspension period. Therefore, if notice of termination of the employment contract is given by the employer during the period of suspension, the notice period takes effect after the expiration of the suspension (OA, Article 409). If the employment contract is fixed term, it may expire within the said suspension period.

5.5.19 Continuity of entitlement to social security benefits

Under the Social Insurance and General Health Insurance Act and the CSA, all entitlement to social security benefits continues for both employees and civil servants during paid or unpaid care leave.

5.5.20 Remuneration

Women employees and civil servant parents are not paid during the unpaid care leave for taking care of infants (EA, Article 74 and CSA, Article 108/C).

However, women civil servants will continue being paid their normal remuneration during paid leave for taking care of children or infants (CSA, Article 104).

5.5.21 Social security allowance

The Turkish social security system does not provide for an allowance during paid or unpaid care leave.

[196] See section 5.5.

5.5.22 More favourable provisions (Clause 8 of Directive 2010/18)

There are provisions that provide an entitlement to retirement for parental reasons.

A woman employee/civil servant/self-employed person with a disabled child in need of constant care will be entitled to early retirement (Social Insurance and General Health Insurance Act, Article 28). For the period following 1 October 2008, one quarter of the premium-paid days will be added to the total premium paid days. It is the Social Security Institution Health Board that determines the child's condition on the basis of the Bylaw on incapacity for work and schemes for invalidity.[197] This right is recognised only for mothers. It is hoped that as a result of such measures, working mothers will not lose the hope of being entitled to old-age benefits and will therefore be encouraged not to stop working or to re-enter work following a break.

During a period of unpaid maternity leave the worker may, if she chooses, pay contributions for the statutory (compulsory) maternity leave but the employer will not have a duty to contribute. If the worker pays contributions for the statutory maternity leave period, this period counts as a pensionable service.

Also, where an employee/civil servant/self-employed person resigns due to pregnancy or having given birth, she may, if she chooses, pay contributions for a maximum period of two years during which she remains unemployed (Social Insurance and General Health Insurance Act, Article 41). This two-year period starts at the time of the birth and the working woman may benefit from this provision for three separate births (360 days x 6 years = 2 160 days). A working woman fully benefiting from this provision will retire six years earlier.

5.5.23 Case law

There is no case law in relation to parental leave. The case law that exists relates to maternity leave (mentioned above).[198]

5.6 Paternity leave

5.6.1 Existence of paternity leave in national law

Paternity leave is designed for employees and civil servants separately.

The EA provides that employees will be given a five-day leave if his spouse gives birth (Additional Article 2/1).

In the event of the spouse of a civil servant giving birth, the civil servant may enjoy a paternity leave of 10 days (CSA, Article 104/B).

There are no provisions in relation to paternity leave in the MEA, the PEA and the OA.

5.6.2 Protection against unfavourable treatment and/or dismissal (Article 16 of Directive 2006/54)

Family responsibilities is cited among the reasons that cannot constitute a valid ground for dismissal in the EA, Article 18. The EA also restricts the right of an employer to dismiss an employee on unjustified, abusive, discriminatory or invalid grounds. The PEA protects employees against dismissal on unjustified, abusive, or invalid grounds. The MEA and the OA protects employees against dismissal on unjustified or abusive grounds. These are

[197] Bylaw on incapacity for work and schemes for invalidity (*Çalışma Gücü ve Meslekte Kazanma Gücü Kaybı Oranı Tespit İşlemleri Yönetmeliği*), *Official Journal* 11.10.2008, No. 27021.

[198] See section 4.3, above.

non-exhaustive provisions and paternity leave will be considered as falling under such provisions if an employee who uses his paternity leave is dismissed on this ground. Under the EA, Article 5, that would amount to direct sex discrimination.

The OA also provides protection during the suspension period of an employment contract and prevents employers from giving notice of the termination of an employee's employment during the leave period (OA, Article 409).[199]

Civil servants enjoy comprehensive job security under the CSA (Articles 94-98). The protection of public officials with an administrative law employment contract is provided in the case law of the administrative courts and the Conseil d'Etat.[200] The HREIA protects all workers aganst dismissal on discriminatory grounds that are covered by the act (Article 6).

5.6.3 Case law

There is no case law in relation to paternity leave. The case law that exists relates to maternity leave (mentioned above).[201]

5.7 Time off for *force majeure*

5.7.1 Time off for *force majeure*

The term '*force majeure*' is not legally defined in Turkish law. However it is understood to mean external obstacles that are not anticipated as of the date of the contract, are beyond the party' s control, are not caused directly or indirectly by the fault or negligence of the party seeking relief, and that prevent or delay the affected party from performing its contractual/legal obligation(s).

Family/parental related reasons are not considered as *force majeure* under Turkish Law. However sabbatical leave for civil servants and public employees and unpaid leave for civil servants for valid reasons may be used for family/parental related reasons which are mentioned below.[202]

5.7.2 Case law

There is no relevant case law of which the author of this report is aware.

5.8 Care leave

5.8.1 Existence of care (or carers') leave in national law

There is paid breastfeeding leave, paid leave upon the marriage or death of the child, and leave that may be used for family/parental related reasons, such as sabbatical leave for civil servants and public sector employees, and unpaid leave for civil servants for a valid reason in Turkish law.

Paid breastfeeding leave

Female workers are granted a breastfeeding leave to feed their infants below the age of one. This period is reckoned within the daily working hours.

[199] See section 5.5, above.
[200] See e.g. Conseil d'Etat 12th Division, 30.1.2014, 2013/1265, 2014/278.
[201] See section 4.3, above.
[202] See section 5.8 below.

Under the EA, employee mothers will be granted breastfeeding leave for one and a half hours a day in total to feed their infants below the age of one. The length of time off for nursing will be treated as part of the daily working time (EA, Article 74/7).

However, the CSA provides for breastfeeding leave of three hours a day during the first six months and decreasing to one and half hours a day during the second six months (CSA, Article 104/D).

The employee and civil servant can decide herself at what times and in how many instalments she will use this time.

Paid leave upon the marriage or death of the child

A civil servant parent is entitled to seven days' paid leave (CSA, 104/B) and an employee is entitled to three days' paid leave (EA, Additional Article 2/1) upon the marriage or death of the child. There is no age limit for the child. Seven days' paid leave is also provided for the death of the spouse, the spouse's parent(s) or sibling(s).

Sabbatical leave for civil servants and public sector employees

Sabbatical leave applies only to civil servants and public employees.

Civil servants who have five years seniority have the right to request unpaid sabbatical leave for up to one year (CSA, Article 108/E). An unpaid sabbatical leave of one year to be used as one continuous period or in two parts is granted to civil servants who have completed five (previously ten) years of service. The sabbatical leave can only be taken once throughout the entire period of service (CSA, Article 108/E).

The amended Act on the transition of the employees in temporary work positions to the status of permanent employees or administrative law contracted personnel status, Article 1, provides that employees permanently employed in the public sector are also entitled to an unpaid 'sabbatical leave' of six months upon the completion of ten years of employment. This sabbatical leave can only be taken once throughout the entire period of employment.

No specific reason needs to be given to use this leave. Therefore, this sabbatical leave may be taken to be used as a form of 'care leave.'

Sabbatical leave has not been recognised for private sector employees.

Unpaid leave of civil servants for valid reasons

Only civil servants have the right to unpaid leave for a valid reason. According to the CSA, Article 104/C, civil servants have the right to request unpaid leave of up to 10 days in one year. This may be extended up to 20 days upon request in a period of one year. The second 10-day period will be considered as part of the annual leave (CSA, Article 104/C).

These forms of leave may be taken for family-related reasons.

5.8.2 Case law

There is no case law in relation to care leave.

5.9 Leave in relation to surrogacy

There are no legal rules on surrogacy. If parental leave is denied and the case came before the courts, it would be for the court to decide.

5.10 Flexible working time arrangements

5.10.1 Right to reduce or extend working time

Part-time working is an option for parents who are employees or civil servants. One of the parents can benefit from this right once for each child.

Right to work part time for women employees

Article 74/2 of the EA provides that after the expiry of the maternity leave (the 16-week period, or after the 18-week period in case of multiple pregnancy), the female employee shall be allowed to use unpaid leave, upon her request, for half of the weekly working hours, for a period of 60 days for the first child, for a period of 120 days for the second child and for a period of 180 days for the third child, for the purposes of caring and raising the child and provided that the child survives. In the event of multiple births, these periods can be extended for 30 days each. If the child is born disabled, this period will be applied as 360 days (EA, Article 74/2).

The provisions relating to breastfeeding leave do not apply within the period used in accordance with the provisions of this paragraph (EA 74).[203]

Right to part-time work for biological and adopting employee parents

Employee parents are given the right to work part time for each child until the child reaches obligatory primary schooling age.

Under the EA, following the expiry of the forms of leave set out in Article 74, one of the parents may request part-time working, until the beginning of the month following the date on which the child starts his/her compulsory primary school education. If one of the spouses is not employed, then the other working spouse cannot benefit from this option. Such a request must be met by the employer. A request for this option will not constitute a valid reason for an employer to terminate her/his contract (Article 13/5).

Under the EA, after the paid leave (the eight-week period) has elapsed, a female or male employee adopting a child under the age of three has the right to ask to work, for half of the weekly working hours for a period of 60 days for the purposes of caring and raising the child. In cases where the child is disabled, this period will be applied as 360 days (EA, Article 74/2). Alternatively, the employee can ask to work part time until the beginning of the month following the date on which the child starts his/her compulsory primary school education (EA, Article 13).

Those who adopt a child under three years of age, together with his/her spouse or individually, benefit from that right as of the date on which the child is delivered de facto (Article 13).

The employer's approval will be required if the requesting employee is:

a) employed in the health sector in particular jobs such as a responsible director, a responsible doctor, a responsible person at a medical laboratory, or in a position requiring permanent employment;
b) employed in seasonal or campaign work with a duration of less than one year;
c) employed in industrial shift work necessitating indivisibility; or

[203] The *Quantum Leap* report sets out laws and practices that are changing this dynamic, for a more equal sharing of care within the family, and between the family and the state. The report highlights the role of men in creating a more gender-equal work of work: 'When men share unpaid care work more equally, more women are found in managerial positions'. ILO (2019) *Quantum Leap report*.

d) if the work performed cannot be divided into workdays due to its nature (Bylaw on part-time work following maternity leave or unpaid leave, Article 12).

These limitations are not imperative (absolutely binding) and the social partners are free to define work in which part-time work is possible through collective agreements (Bylaw on part-time work following maternity leave or unpaid leave, Article 13).

Under the CSA, only women civil servants and adopting civil servant parents may request to work part time after the expiry of maternity leave (Article 104). A female civil servant may opt for part-time work (half of the statutory working time, which is 40 hours per week) following the end of fully paid maternity leave. This will be in the amount of two months for the first child, four months for the second child, and six months for the third child. The duration of part-time work will be longer in the case of multiple births (specified periods plus one month) or if the child is disabled (12 months). The provisions relating to breastfeeding leave do not apply within the period used in accordance with the provisions of this paragraph. The periods are the same for adoptive parent(s) (CSA, Article 104/F).

Switching from full time to part time and vice versa

An employee who has opted for part-time work may return to full-time work by informing the employer in writing at least one month in advance. This right cannot be exercised for the same child again (EA, Article 13/5).

Where the employee who initially works as part-time but starts to work as full-time, the employment contract of the person employed in his/her place must be terminated ipso facto without employment protection (EA, Article 13/5).

There is no explicit provision on switching from full time to part time and vice versa for civil servants.

Also an employee who engages in overtime (work performed beyond 45 hours per week) may either request a wage for overtime work or time off. If the employee requests time off, then s/he will have 1.5 hours for each hour of overtime worked as time off. S/he may use the time-off period during a period of six months coinciding with his/her working time (Article 41).

5.10.2 Right to adjust working time patterns

Except for a pregnant/recently given birth/breastfeeding worker who has the right to adjust their working time patterns as explained above[204] there is no explicit provision recognising the right to adjust working time patterns. The employee and civil servant has the right to decide herself at what times and in how many instalments she will use breastfeeding time.

For employees, adjusting working time patterns is an issue for individual bargaining.

5.10.3 Right to work from home or remotely

Working from home and working remotely are regulated by the EA (Article 14). This is possible if there is mutual consent.

5.10.4 Other legal rights to flexible working arrangements

In the case of work stoppages for various reasons (e.g. *force majeure*, or leave for a valid reason) compensatory work can be requested by the employer. Compensatory work

[204] See chapter 5.

cannot exceed three hours in a working day provided that the daily maximum hours of work (11 hours) is not exceeded. Compensatory work cannot be carried out on rest days and holidays (EA, Article 64).

5.10.5 Case law

There is no relevant case law of which the author of this report is aware.

5.11 Evaluation of implementation

Women who can access formal/informal care services are able to work more hours and remain longer in working life. This fact shows how important sharing care responsibilities and the supportive services of care responsibilities are for enabling women to participate in the labour market. However, caring responsibilities are still overwhelmingly carried by women and employers become less eager to employ women after giving birth. This excludes women from the labour market and formal services of the welfare state.

5.12 Remaining issues

In order to share family responsibilities, the Bylaw on the conditions of night shifts of working women provides that if the husband of a female employee is also working on night shift, whether in the same or a different workplace, the woman may request that her night shift is arranged so as not to coincide with the husband's. If the couple work in the same workplace, the woman's request to work on the same night shift with her husband should be met by the employer within the bounds of possibility.

It also provides that for workplaces beyond municipal boundaries or those for which public transport may not be convenient, the employer should provide convenient transport for women on night shift.

The Bylaw on the employment conditions of pregnant and breastfeeding women and nursing rooms and childcare centres, Article 15, requires employers to establish nursing rooms and childcare centres.

However, this requirement applies only to establishments where at least 100 women are employed, irrespective of their age or marital status.

If between 100 and 150 women are employed, a nursing room has to be provided by the employer for children of 0–1 years of age (Article 15/1).

If more than 150 women are employed, a childcare centre has to be opened by the employer for children of 0–6 years of age.

The fact that it is only the number of women employees that triggers this statutory requirement (Article 15/1, 2) causes employers to employ fewer women employees than the number stipulated, to escape the obligation. Hence, job opportunities for women are reduced, and discriminatory practice is ingrained.

That is why the obligation to open a nursing room and a childcare centre should be determined by taking the total number of male and female employees into account.[205]

[205] Sural, N. (2007) 'Legal framework for gender equality at work in Turkey' in *Middle Eastern Studies*, 5. Bakirci, K. (2008), 'The Evaluation of the Constitutional Court Decision Related to Severance Pay for the Newly Married Women' (*Anayasa Mahkemesi'nin Evlilik Sonrası İşten Ayrılan Kadın İşçilerin Kıdem Tazminatı Haklarına İlişkin Kararı*), *Sicil Is Hukuku Dergisi*, Yil:3, p. 12, December.

The regulation is a reflection of the attitude that it is the woman who should take care of the child. This is against the principle of equal rights between men and women, and the principle of equal sharing of family responsibilities.

According to Article 16 of the Bylaw, children of male employees can make use of the nursing rooms and the childcare centres in the father's workplace only if their mothers are dead or the children are under the guardianship of the father. This provision can be criticised, because the child should be able to make use of the facilities available in the father's workplace when there is no nursing room or childcare centre in the mother's workplace. This arrangement is a further obstacle to equality in the working life of women.[206]

Private kindergartens and daycare centres, as well as pre-school education institutions, are exempted from corporate and income taxes for five taxation periods, starting from their foundation.

All the expenses of the nursing rooms and daycare centres, such as the building, foundation, floor, vehicles, equipment, and nutrition, are under the responsibility of the employers (Article 21).

There is evidence that many of these large workplaces do not fulfill the childcare centre obligation and there is hardly any legal enforcement. The issue was brought up at a parliamentary session in 2013, which revealed that there are about 9 000 workplaces (1 658 public and 7 204 private) in Turkey that have more than 150 female workers. In 2012, only 172 of these were monitored with respect to their childcare centre obligations and it was found out that 76 did not have any childcare centres.[207] Therefore, in Turkey one of the consequences of the lack of formal childcare facilities is that informal care remains predominant, mainly provided by women and social protection, from which a significant number of people benefit, is dependent on the family. This applies to both childcare and elder care. In households where the level of income is relatively low, care services are usually transferred to other women of the family (such as grandmothers), whereas in households where the level of income is higher, legal or illegal, local or migrant domestic workers are employed.[208] Households that have higher levels of income also have the opportunity to buy care services from the market.

[206] Sural, N. (2007), 'Legal framework for gender equality at work in Turkey' in *Middle Eastern Studies*, 5. Bakirci, K. (2008), 'The Evaluation of the Constitutional Court Decision Related to Severance Pay for the Newly Married Women' (*Anayasa Mahkemesi'nin Evlilik Sonrası İşten Ayrılan Kadın İşçilerin Kıdem Tazminatı Haklarına İlişkin Kararı*), *Sicil Is Hukuku Dergisi*, Yil:3, p. 12, December.

[207] See 'No Nurseries in the Workplaces' (*İşyerinde kreşe yer yok*) http://www.radikal.com.tr/turkiye/isyerinde-krese-yer-yok-1145289/.

[208] Bakirci, K. (2011), 'Domestic Workers', in Z. Stange, C.K.Oyster and J.E.Sloan (eds.) *Encyclopedia of Women in Today's World*, Vol. 1, Sage Publications, USA.

6 Occupational social security schemes (Chapter 2 of Directive 2006/54)

6.1 General (legal) context

6.1.1 Surveys and reports on the practical difficulties linked to occupational and/or statutory social security issues

In Turkey, there is a clear distinction between statutory pension schemes and occupational pension schemes. More precisely, the general social insurance scheme and the health insurance scheme are considered to be statutory, whereas occupational pension schemes for workers in the public and private sector, the voluntary provident fund schemes and other similar pension schemes fall under the category of occupational pension schemes.

6.1.2 Other issues related to gender equality and social security

Under all occupational pension schemes, men and women enjoy equal treatment as provided in the HREIA (Article 5).

6.1.3 Political and societal debate and pending legislative proposals

There is neither any debate nor legislative proposals on this topic.

6.2 Direct and indirect discrimination

The HREIA prohibits direct and indirect sex discrimination in all matters relating to social security, which would include these matters (Article 2).

6.3 Personal scope

In addition to the public and compulsory (statutory) social security system, there are additional occupational social security funds, such as the Armed Forces Assistance Fund (OYAK);[209] the Police Assistance Fund (POLSAN),[210] the Primary School Teachers Assistance Fund (ILKSAN),[211] the Central Bank Personnel Social Security and Assistance Foundation,[212] the State-Owned Coal Mining Enterprise Employees' Accumulation and Assistance Fund (Eregli Komur Havzasi Amelebirligi Biriktirme ve Yardimlasma Sandigi);[213] and the Turk Telekom Accumulation and Assistance Fund.[214] Financial sector institutions, such as banks, insurance companies, reinsurance companies, the stock exchange, and chambers of commerce assistance funds (Social Insurance and General Health Insurance Act provisional Article 20) provide additional social security services through the foundations they have established. Currently, there are 38 such institutions.[215]

The following special non-contributory schemes are in place for specific professional groups:

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[209] Act on the Armed Forces Assistance Fund (*Ordu Yardimlaşma Kurumu Kanunu*), No. 205, *Official Journal*, 9.1.1961, No. 10702.

[210] Act on Law Enforcement Agency (*Emniyet Teşkilat Kanunu*), No. 3201, *Official Journal* 12.6.1937, No. 3629.

[211] Act on the Primary School Teachers Assistance Fund (*Hususi İdarelerden Maaş Alan İlkokul Öğretmenlerinin Kadrolarina, Terfi, Taltif ve Cezalandirilmalarina ve Bu Öğretmenler İçin Teşkil Edilecek Sağlik ve İçtimai Yardim Sandiği İle Yapi Sandiğina ve Öğretmenlerin Alacaklarina Dair Kanun*), No. 4357, *Official Journal* 19.1.1943, No. 5308; Membership of this fund is voluntary.

[212] Central Bank of Turkey Act (*Türkiye Cumhuriyet Merkez Bankasi Kanunu*), No. 1211, *Official Journal* 26.1.1970, No. 13409.

[213] Act on the State-Owned Coal Mining Enterprise Employees' Fund (*Ereğli Havzai Fahmiyesi Maden Amelesinin Hukukuna Müteallik Kanun*), No. 151, (8 Muharrem 1340 - 10 Eylül 1337).

[214] Act on Turk Telekom Accumulation and Assistance Fund (*Posta, Telgraf ve Telefon İdaresinin Biriktirme ve Yardım Sandığı Hakkında Kanun*), No. 4157, *Official Journal* 26.12.1941, No. 4994

[215] Danişoğlu, E. (2002), 'The Need for Reform in Social Security System' (*Sosyal Güvenlik Sisteminde Yenilenme İhtiyacı*); http://www.kalkinma.gov.tr/Documents/danisoge.pdf.

- schemes[216] that establish pensions and survivor's pensions for the spouses and children of members of the military;
- pension and survivor's schemes for specialised personnel of the armed forces and police;[217]
- a special pension scheme for Turkish civil servants who are victims of terrorism as well as their survivors;[218]
- one-off cash compensation is paid under a scheme for those who became disabled or who die when carrying out their duties to maintain public order;[219]
- a pension scheme for successful athletes at the European and World Championships and at the Olympic games as well as their dependants.[220]

The number of beneficiaries under these professional non-contributory schemes remains rather low.

The personal scope of occupational social security schemes for specified categories is more restricted than that of Directive 2006/54.

6.4 Material scope

As mentioned above the material scope of the occupational social security schemes is narrower than the risks specified in Article 7 of Directive 2006/54.

6.5 Exclusions

The acts listed above only cover specific categories of dependent workers.

There are no mandatory occupational social security schemes for the self-employed.

6.6 Laws and case law falling under the examples of sex discrimination mentioned in Article 9 of Directive 2006/54

None of the provisions of the above acts are contrary to the principle of equal treatment.

There is no relevant case law of which the author is aware.

6.7 Actuarial factors

Men and women pay the same contributions.

6.8 Difficulties

There are no difficulties of which the author is aware.

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[216] Act on the provision of pensions of honour during military service arrangements for those who were given a war-independence medal (*İstiklal Madalyasi Verilmiş Bulunanlara Vatani Hizmet Tertibinden Şeref Ayliği Bağlanmasi Hakkinda Kanun*), No. 1005, *Official Journal* 24.2.1968, No. 12835; Act on the provision of pensions in the scope of the military service (*Vatani Hizmet Tertibi Ayliklarinin Bağlanmasi Hakkinda Kanun*), No. 3292, *Official Journal* 3.6.1986, No. 19126.

[217] Act on compensation or those who provide flight, parachuting, submarine, diving and frogman services (*Uçuş, Paraşüt, Denizalti, Dalgiç ve Kurbağa Adam Hizmetleri Tazminat Kanunu*), No. 2629, Official Journal 28.2.1982, No.17619; Act on pension for pilots, flight crew and divers of police forces (*Emniyet Teşkilâti Uçuş ve Daliş Hizmetleri Tazminat Kanunu*), No. 3160, *Official Journal* 5.3.1985, No. 18685.

[218] Anti-Terrorism Act (*Terörle Mücadele Kanunu*), No. 3713, *Official Journal* 12.4.1991, No. 20843.

[219] Act on compensation in cash and pensions (*Nakdi Tazminat ve Aylık Bağlanması Hakkında Kanun*), No. 2330, *Official Journal* 6.11.1980, No. 17152.

[220] Act on pensions for successful athletes and on the granting of the state sportsman's title (*Başarili Sporculara Aylik Bağlanmasi İle Devlet Sporcusu Unvani Verilmesi Hakkinda Kanun*), No. 5774, *Official Journal* 9.7.2008, No. 26931.

6.9 Evaluation of implementation

There is no information about the implementation of the occupational social security schemes.

6.10 Remaining issues

There are no remaining issues of which the author is aware.

7 Statutory schemes of social security (Directive 79/7)

7.1 General (legal) context

7.1.1 Surveys and reports on the practical difficulties linked to statutory schemes of social security (Directive 79/7)

In 2006, the social security system in Turkey underwent a substantial reform. Four key strategic objectives were at its origin: the introduction of a new social insurance system merging three social insurance systems into one; the introduction of a general health insurance system; and the institutional transformation and introduction of non-contributory payments.

In 2006, the Social Insurance and General Health Insurance Act establishing the Social Security Institution merged the three main institutions in charge of social insurance and brought the 59 – at that time – existing pension schemes under one administrative umbrella.

The Social Insurance and General Health Insurance Act was enforced gradually between 1 January 2008 and 1 October 2008: some parts took effect on 1 January 2008, others on 30 April 2008 and on 1 July 2008, and the main provisions entered into force on 1 October 2008.

It should be noted however that several earlier acts (or provisions thereof) have remained in force, in parallel with the Social Insurance and General Health Insurance Act, such as the Social Insurance Act,[221] the Social Insurance for Agricultural Employees Act,[222] the Social Insurance for Craftsmen, Artisans and other Self-employed Persons Act,[223] and the Retirement Fund Act (for civil servants).[224]

7.1.2 Other relevant issues

In addition to the public and compulsory (statutory) Turkish social security system, private health and life insurance, and automatic enrolment in a private pension system is available.

Private Health and Life Insurance:

Although state social security covers healthcare services, some Turkish people and most of the foreign employers and employees choose to have additional private cover due to shorter waiting lists and foreign-language speaking staff in private hospitals. Some employers chose to provide private health and life insurance for their employee as benefit in kind.

Auto-Enrolment Private Pension:

The amended Private Pension Savings and Investment System Act[225] introduced compulsory automatic enrolment of workers in a personal private pension scheme by employers that is supplementary to the existing state pension plans. Under the act, all publicly and privately employed wage and salary earners (covered under Articles 4/a and

[221] Social Insurance Act No. 506 (*Social Sigortalar Kanunu*) *Official Journal* 29, 30, 31.7.1964.
[222] Social Insurance Act for Agricultural Employees No. 2925 (*Tarım İşçileri Sigortaları Kanunu*) *Official Journal* 20.10.1983.
[223] Social Insurance for Craftsmen, Artisans and other Self-employed Persons Act No. 1479 (*Esnaf ve Sanatkarlar ve Diğer Bağımsız Çalışanlar Sosyal Sigortalar Kurumu Kanunu*), *Official Journal* 14.9.1971.
[224] Retirement Fund Act No. 5434 (*Emekli Sandığı Kanunu*) *Official Jou*rnal 17.6.1949.
[225] Amended Private Pension Savings and Investment System Act (*Bireysel Emeklilik Tasarruf ve Yatırım Sistemi Kanunu)*, No. 4632, *Official Journal* 7.4.2001, No. 24366. (Amended by the Act No. 6740, which was published in the *Official Journal* on 25.8.2016).

4/c of the Social Insurance and General Health Insurance Act) who are less than 45 years of age are automatically assigned to an individual pension plan and start contributing at the minimum rate of 3 % of their taxable earnings, unless they request to opt out within two months of their automatic enrolment in the plan.

The participants are entitled to retirement benefits when they reach the age of 56 and have been saving under the scheme for at least 10 years. The retirement age applies to both genders and is lower than the statutory retirement ages, which are 58 for women and 60 for men. The completion of 10 years is compulsory and therefore if 10 years are not completed, the retirement age will be higher. Benefits can take the form of a lump-sum payment, a programmed withdrawal or an annuity.

The amended Private Pension Savings and Investment System Act only covers retirement.

7.1.3 Overview of national acts

Statutory schemes of social security are provided for in the Constitution, the Social Insurance and General Health Insurance Act, the Social Security Institution Act[226] and the Unemployment Insurance Act.[227]

The Constitution defines the Republic as a social state based on the rule of law and on the concept of national solidarity (Article 2). The Constitution contains a general equality and non-discrimination clause (Article 10). Under the Constitution, everybody has the right and the duty to work and the state is tasked with the obligation to take measures in order to raise the standard of living of workers and to protect workers and the unemployed (Article 49). Article 60 provides that 'Everyone has the right to social security. The state shall take the necessary measures and establish the organisation for the provision of social security' (Article 60). Furthermore, the Constitution provides for state responsibilities in respect of the protection of the disabled, the elderly, war victims and their surviving family members and children in need of protection (Article 61). The Constitution also explicitly attributes responsibilities to the state in order to regulate the central planning and functioning of the health services (Article 56). Moreover, the Constitution creates a legal basis for the creation by law of a general health insurance act (Article 56).

The Social Insurance and the General Health Insurance Act aims to create a unified compulsory social insurance and medical insurance system for all professionally active persons, irrespective of their status as civil servant, employee or self-employed.

The social insurance schemes mainly comprise of income replacement benefit schemes in the event of short and long-term incapacity for work due to sickness, maternity, invalidity (disability/incapacity), old age, decease, work accidents and occupational diseases. There are also some cost-covering cash benefit schemes, such as the birth, marriage and funeral grants and, for civil servants, some allowances that may be classified as family benefits.

The unemployment insurance scheme for employees is separately regulated by the Unemployment Insurance Act and administered by the Social Security Institution for the collection of contributions and delivered by the Directorate-general of the Turkish Employment Agency.

The non-contributory cash benefits include social assistance-type cash benefits for the poorer parts of the population as well as some non-contributory schemes for certain professional categories of beneficiaries such as, amongst others, the military, teachers

[226] Social Security Institution Act No. 5502 (*Sosyal Güvenlik Kurumu Kanunu*), *Official Journal* 20.5.2006.
[227] Unemployment Insurance Act No. 4447 (*İşsizlik Sigortası Kanunu*), *Official Journal* 8.9.1999.

working abroad and successful athletes. Access to healthcare for the poorest parts of the population is guaranteed through the green card system.[228]

7.1.4 Political and societal debate and pending legislative proposals

The main debate on statutory social security provision is about the extent to which the Turkish social security regime is based on a normative family model, according to which women and unmarried daughters are dependent on the status of the male breadwinner of the family. This ideal of a male breadwinner is also reflected in the survivor pension, which favours female over male survivors. Accordingly, women left without a male breadwinner are protected by the state, until they get (re)married.[229] The Turkish state also encourages women to (re)marry by additional payments. Hence, marriage is perceived as the real social security mechanism for women. Another debate relates to coverage: although some groups are covered by social security legislation and institutions, others, such as those working in the informal market, remain unprotected. Social protection outside the social insurance system basically consists of medical care for the poorest and benefits in the form of in-kind aid.

7.2 Implementation of the principle of equal treatment for men and women in matters of social security

The retirement pension system in Turkey is governed by several pieces of legislation, which, when introduced, created separate pension systems for different professional categories.

The Social Insurance and the General Health Insurance Act merged the main pension schemes into a single scheme (at least from an administrative point of view). The old-age pension system is administered by the Social Security Institution.

Differences in entitlement conditions between the different professional groups remain in force. For civil servants and self-employed persons who started their career after 1 October 2008 to be eligible for the pension, a minimum of 9 000 paid premium days (Article 27) is required whereas for employees, the minimum is 7 200 paid contribution days (Article 27).

In respect of the pensionable age, the actual age differs from one insured person to another, as it depends on the date that the person entered into the employment market.[230] The Social Insurance and General Health Insurance Act, which entered into force on 1 October 2008, maintained the pensionable age for women and men at 58 and 60 respectively, but introduced a gradual increase of the pensionable age up to 65 for both

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[228] The non-contributory system is regulated by the Act on payment of pension to old-aged persons (65 years old and over) who are destitute, the Social Security Institution Act, the Social Assistance and Solidarity Fund Act No. 3294 (*Sosyal Yardımlaşma ve Dayanışmayı Teşvik Kanunu*), the Social Services Act No. 2828 (*Sosyal Hizmetler Kanunu*), the Issuance of Green Cards for Citizens who are Incapable of Paying for Health Care Services Act No. 3816 (*Ödeme Gücü Olmayan Vatandaşların Tedavi Giderlerinin Devlet Tarafından Karşılanması ve Yeşil Kart Verilerek Karşılanması Hakkında Kanun*). The term 'universal' is most often used when referring to the health insurance system, although in some instances it is 'general' health insurance. However and in spite of the general scope of coverage as defined by the Social Insurance and General Health Insurance Act, the health insurance coverage in reality is predominantly oriented to the active population, implying that a considerable part of the resident population may de facto fall outside the scope of the health insurance system. In order to ensure the widest coverage in practice, the green card system was introduced to give access to healthcare for residents of Turkey who live below certain income levels (See: Coucheir, M and Hauben, H. (eds.) (2011) *Mapping Study: Introduction to Social Security in Turkey, Technical Assistance for Capacity Building of The Social Security Institution, Turkey*, Funded by the European Union and the Republic of Turkey EuropeAid/126747/D/SV/TR, https://www.avrupa.info.tr/fileadmin/Content/Files/Images/haber_arsivi/2012/Mapping_Study.pdf).

[229] See section 7.2, above.

[230] For employees who started to work before 8 September 1999, the pensionable age is 50 years for women and 55 years for men. Entitlement conditions to full pension are a minimum of 15 years of insurance and a contribution record of 3 600 premium days. The Social Insurance Act (No. 506) governs the pension rights of employees who started their working careers before 8 September 1999.

sexes as of the year 2036 with a one year increase per year for those who entered the labour market after the date the law entered into force. The retirement age will therefore be equal for women and men by the year 2048 (Article 28).

There are special provisions for women or daughters of deceased insured persons in the Social Insurance and General Health Insurance Act.

Some examples are:

Cash benefits - the long-term social insurance branch of the Social Insurance and General Health Insurance Act, is comprised of different cash benefits for the survivors of a deceased insured person. These cash benefits are: a survivor's pension or a single one-off payment in cases where the minimum qualifying periods for a survivor's pension have not been met; a marriage benefit for daughters of deceased insured persons who benefit from a survivor's pension; and a funeral grant.

A survivor's pension is granted to the surviving members of the family if the insured person dies during his/her working career or when s/he was entitled to an invalidity, duty invalidity or old-age pension or when the latter was terminated as a consequence of the insured getting back at work (Article 32).

A survivor's pension is payable to the widow of the deceased insured person and to children up to the age of 18.[231] If the child is disabled (having lost 60 % of their working capacity as established by the Social Security Institution Health Committee) no age limit applies. Unmarried, divorced or widowed daughters receive a survivor's pension irrespective of their age. Parents of the deceased insured person can also receive a survivor's pension but only in cases where, after the calculation of the rights of the widow and orphans, some finances are still available (Article 34).

The amount of the survivor's pension for the widow is 50 % or 75 % of the pension that the deceased person should have been entitled to, depending on whether she has children or not. The amount of the survivor's pension for the children corresponds to 25 % of the pension amount for each of the children up to 18 years of age, and to unmarried, divorced or widowed daughters as well as to disabled children irrespective of their age. Where the children have lost both parents, they are each entitled to 50 % of the pension amount. Parents of the deceased insured person are together entitled to 25 % of the pension amount if there are shares left after having allocated the pension to the widow and children on the condition that the amount is lower than the net minimum wage and that they have no pension rights in their own name or other type of income or revenue. If they are older than 65 they receive the amount even if there are no shares left after allocation to the widow and children (Article 34).

A marriage benefit is paid to the unmarried, divorced or widowed daughters of the deceased insured person. The amount is a one-off payment corresponding to the equivalent of two years of the income or pension of the deceased (Article 34).

Voluntary insurance – voluntary insurance is regulated under Article 50 of the Social Insurance and General Health Insurance Act. According to this article, voluntary insurance is connected with long-term insurance (invalidity, old-age and death) and general health insurance by paying voluntary premiums.

[231] 20 years for children attending high school education, 25 years for children who are in higher education; See Coucheir, M and Hauben, H. (ed.) (2011) *Mapping Study: Introduction to Social Security in Turkey, Technical Assistance for Capacity Building of The Social Security Institution, Turkey*, Funded by the European Union and the Republic of Turkey EuropeAid/126747/D/SV/TR, https://www.avrupa.info.tr/fileadmin/Content/Files/Images/haber_arsivi/2012/Mapping_Study.pdf.

To be voluntarily insured under this scope, the following conditions have to be satisfied:

- being a resident of Turkey;
- not working in a way that requires mandatory insurance;
- working with insurance, but fewer than 30 days a month or not full time;
- not receiving pensions due to previous insurance; and
- being at least 18 years of age.

However, the Social Insurance and General Health Insurance Act provides for conditions where mandatory and voluntary insurance relationships can be applied concurrently. According to this, those who are in a mandatory insurance relationship for less than 30 days a month are given the opportunity to voluntarily pay social security premiums for the remaining days for the long-term insurance branches, upon demand. For groups working part time, the duration that the voluntary insurance premiums are paid is added to the number of paid days of their mandatory premiums. However, these added days are considered as insurance under the scope of Article 4/a (as workers or previously insured by the Social Security Institution).

Voluntary insurance premiums are between the lower and upper limits (6.5 times the lower limit) of gross income and 32 % of the gross monthly income determined by the insurer. Twenty percent of this constitutes the invalidity, old-age and death insurance premiums and 12 % of it constitutes the general health insurance premium. The voluntarily insured are not considered under the scope of short-term insurance because they do not pay short-term insurance premiums. Therefore, the insured in question does not receive temporary incapacity benefits. On the other hand, considering the low levels of wages in the labour market in Turkey, the virtual nonexistence of constant job security and decent working relationships, it is almost impossible for a person who works, say 10 days, to pay the remaining 20 days within the scope of voluntary insurance and become fully insured, due to high premiums. Moreover, in addition to the conditions of being 61-63 years old and having paid premiums for 7 200 days, the low levels of retirement benefits show that the reality of voluntary insurance does not match the conditions of labour market.

Women working in domestic services – the amendments to the Social Insurance and General Health Insurance Act provide for women working in domestic services.

According to this, those who are recruited by one or more persons (these are considered employers) and whose number of work days, based on the total work hours in a month, is 10 or more, are regarded as insured under the scope of Article 4/a of the Social Insurance and General Health Insurance Act. The premiums of those recruited for 10 days and longer a month must be paid by their employers and they will benefit from the same rights provided to the insured employees under the Social Insurance and General Health Insurance Act Article 4/1(a), such as short-term insurance branches, long-term insurance branches, and general health insurance. Furthermore, unemployment insurance provisions will apply (Additional Article 9).

Those working for less than 10 days a month will be insured against occupational accidents and diseases, their premiums will be covered by the people who employ them (these people are not considered employers) and the insured are entitled to pay their long-term (retirement) and general health insurance premiums until the end of the following month, if they choose to do so (Additional Article 9). However, given the difficulties faced by women working in domestic services and their low income, the author considers this period should not be kept that short and they should be able to pay these premiums afterwards.

Although, the Social Insurance and General Health Insurance Act left domestic employees outside the umbrella of social security prior to the amendment, the decisions of the Court

of Cassations[232] opened up the possibility for them to be insured even if they go to the house they work at only once a week, regardless of the duration of employment. However, the provision in the Act amending the EA and some other acts and statutory decrees and restructuring some public receivables in 2014 invalidated the Court of Cassation decisions that opened up the possibility of all domestic employees to be insured.

Minimum qualifying conditions

Under the Social Insurance Act (No. 506), employees can qualify for a full pension in three situations (minimum entitlement conditions) at the age of 50 (women) or 55 (men):

- 20 years of work as minimum qualifying period and 5 000 contribution days for female workers and 25 years of work and 5 000 contribution days for male employees;
- 5 000 premium days;
- 15 years of insurance and 3 600 premium days.

The 1999 amendment to the Social Insurance Act (No. 506) – which introduced the pensionable age at 58 for women and 60 for men – established new minimum qualifying conditions for old-age pension entitlement: minimum 7 000 days (19 years, 5 months, 10 days) of invalidity, old-age and survivors insurance premiums' payment or an insurance period of 25 years and a minimum of 4 500 premium days for long-term incapacity insurance.

Since 2002, the minimum working career and contribution record are connected with the year in which the working career started and with the pensionable age.

The Social Insurance and General Health Insurance Act, in force as of 1 October 2008, set the minimum contribution record for employees who started to work after that date at 7 200 days.

Employees who do not meet the minimum qualifying conditions are entitled to a one-off single pension payment.

7.3 Personal scope

The personal coverage of the insurance schemes in the Social Insurance and General Health Insurance Act is defined differently between the (short and long-term) social insurance branches on the one hand and the general health insurance on the other. The personal coverage of unemployment insurance is provided by the Unemployment Insurance Act.

Social insurance coverage:

Article 4 of the Social Insurance and General Health Insurance Act defines the insured persons and refers thereby to the three professional categories: employees (including artists, and sex employees who work under an employment contract in licensed brothels, artists, performers, authors),[233] self-employed workers and civil servants.

[232] See Court of Cassation 10th Division, 9.11.1982, 1982/4086; Court of Cassation 10th Division, 27.10.2000, 6089/6479; Court of Cassation 10th Division, 1.9.1991, 5071/5904.

[233] The provisions related to work accidents and occupational diseases are furthermore extended to other categories of persons who are not considered as 'employees' such as:
- prisoners working in facilities and workshops in prisons, without having an employment contract;
- (candidate) apprentices and students doing compulsory internships in VET institutions;
- war veterans and beneficiaries of the duty invalidity pension;
- trainees in professional and vocational training schemes organised by the Turkish Employment Agency;
- workers posted abroad in countries not having a bilateral agreement with Turkey.

The act also refers to the individuals who have rights following the decease of an insured individual. The act defines as a 'right holder' the spouse, child, mother or father who qualify for receiving an income, pension or lump-sum payment in the event of the decease of the insured person or of the beneficiary of some of the social insurance benefits (permanent incapacity benefit, invalidity or duty invalidity or old-age pension). Family members or dependants obtain a right when the insured person has deceased. The definition of the right holder is connected with the concept of a 'surviving spouse, child or parent' under the legal provisions related to the survivor's pensions.

Health insurance coverage:

Article 60 of the Social Insurance and General Health Insurance Act determines who is insured under the health insurance scheme. Individuals who are residents in Turkey and who belong to one of the following categories, are deemed to be insured under the health insurance:

- individuals who are insured under Article 4/a and 4/c;
- individuals who are insured under Article 4/b;
- those who are voluntary insured;
- a series of categories who are not insured under Article 4/a and 4/b, such as citizens whose disposable income is below one third of the minimum wage, refugees and stateless persons; pensioners who receive a pension according to different laws concerned with pension entitlements; and individuals who benefit from social services;
- beneficiaries of unemployment benefit;
- persons who receive an income or pension pursuant to the provisions of the act or of other previous laws;
- citizens who fall outside of the scope of the above-mentioned categories and who are not entitled to health insurance abroad.

The health insurance personal coverage[234]– at least in law - covers all residents of Turkey who are socially insured plus all other Turkish citizens who are residing in the country. Foreign citizens, however, who are residing in Turkey for at least one year but who are not socially insured and who are not entitled to a pension, unemployment benefit or 'social assistance' benefit are not covered by the health insurance system.

Distinct from the concept of survivor's rights ('right holders') in relation to the decease of an insured person is the concept of 'derived rights'.[235] The concept of derived rights of family members exists only in the provisions related to the general health insurance scheme.

The Social Insurance and General Health Insurance Act determines that all persons covered by the general health insurance schemes as well as their dependants have the

[234] Unlike as is the case for insurance holders, the law does not make the payment of health insurance contributions a determining factor for being a health insurance holder. Health insurance contributions are nevertheless compulsory for all workers: employees, self-employed workers and civil servants. See Coucheir, M. and Hauben, H. (ed.) (2011) *Mapping Study: Introduction to Social Security in Turkey, Technical Assistance for Capacity Building of The Social Security Institution, Turkey*, Funded by the European Union and the Republic of Turkey EuropeAid/126747/D/SV/TR, https://www.avrupa.info.tr/fileadmin/Content/Files/Images/haber_arsivi/2012/Mapping_Study.pdf; Bakirci, K. (2011), 'Health Insurance Issues', in Stange, Z., Oyster, C.K. and Sloan, J.E. (eds.) *Encyclopedia of Women in Today's World*, Vol. 2 Sage Publications, USA.

[235] The concept of 'derived rights' is not explicitly cited in the text of the Social Insurance and General Health Insurance Act. Derived rights are typically the rights of family members in professionally organised social insurance schemes who can have entitlements not through their own insurance position but indirectly through their family relationship with the insured individual (See Coucheir, M. and Hauben, H. (eds.) (2011) *Mapping Study: Introduction to Social Security in Turkey, Technical Assistance for Capacity Building of The Social Security Institution, Turkey*, Funded by the European Union and the Republic of Turkey EuropeAid/126747/D/SV/TR, https://www.avrupa.info.tr/fileadmin/Content/Files/Images/haber_arsivi/2012/Mapping_Study.pdf).

right to benefit from healthcare services as defined by the act and makes the financing of healthcare an obligation for the Social Security Institution.

Dependants under the general health insurance provisions of the act are defined as individuals who are not insured, have not taken out voluntary insurance and who do not receive an income or pension due to their own status as an insured person (Article 62).

The following family members are considered dependants (Articles 3, 10) of the insured person:

- spouse;
- unmarried children below 18 years of age (20 and 25 years respectively when being in apprenticeship or in higher education; unmarried disabled children independent of their age); and
- parents when their livelihoods are determined to be covered by the insured person.

In relation to pregnancy and giving birth, there are maternity medical benefits (benefits in kind) and benefits in cash.

Unemployment Insurance

Unemployment insurance is open to employees, but not to self-employed workers and civil servants. The scheme is compulsory.

Unemployment insurance is for those whose employment is terminated without a valid reason. The unemployment insurance is a compulsory insurance branch established by the state to protect persons who have lost their job from the negative social and economic impacts of unemployment and to ensure social justice. To receive unemployment insurance benefit, the employee must:

(1) have been dismissed against their will and fault;
(2) register for a new job within 30 days following the termination of employment – except in case of *force majeure*;
(3) have paid unemployment insurance premiums for at least 600 days over the last three years;
(4) have worked and paid continuously unemployment insurance premiums in the last 120 days prior to the termination of employment (Unemployment Insurance Act, Article 51).

Those who are entitled to an unemployment allowance are also provided with job placement and vocational training services.

Unemployment allowance is granted according to the amount of premium paid in the last three years prior to the termination of employment, ranging between 180 and 300 days. The daily allowance is calculated as 40 % of the average daily gross earning of the insured person taken as basic to premium and this amount cannot exceed 80 % of the gross amount of the minimum wage.

7.4 Material scope

Social insurance under the Social Insurance and General Health Insurance Act covers:

- income replacement benefits in cases of temporary or short-term incapacity for work due to sickness, maternity and (temporary or permanent) incapacity for work due to a work accident or a professional disease;

- income replacement benefits in cases of long-term incapacity for work due to invalidity, old age or the decease of the insured person or of the beneficiary of a pension.

When the incapacity for work is due to a work accident or an occupational disease, more beneficial entitlement conditions or payment levels are applied and provisions are in place for those family members who survive where the insured person dies while being entitled to an incapacity-for-work benefit.

There are also 'cost covering' benefits, such as the funeral grant and the birth aid benefit and other benefits such as the marriage benefit. These benefits are technically part of the (short-term) incapacity for work benefit scheme due to a work accident or professional disease and of the (long-term) survivor's pension scheme.

Health insurance under the the Social Insurance and General Health Insurance Act covers the costs of medical care, including doctor's visits, hospital treatment, transportation costs, medical appliances and medicines.

Unemployment insurance under the Unemployment Insurance Act covers temporary income replacement benefit where employees have become unemployed.

Non-contributory benefits in the Turkish context refer to a wide set of cash benefits (both periodic and one-off payments) paid out to Turkish citizens in cases of need ('social assistance'), in cases of a 'compensation' for victims of terrorism of crime, or in cases of specific professional groups who have performed exceptionally (athletes, honorary pension for the military) or who have served the country (as a member of the military, armed forces or police).

7.5 Exclusions

Individuals who are not insured persons

The Social Insurance and General Health Insurance Act under Article 6 lists some categories of individuals who are not considered to be insured persons in the meaning of the act:

- spouse of an employer who works for free in the latter's business;
- relatives to the third degree who are living in the same residence as the insured person and who are working in the works carried out in the residence in cases when there is nobody external involved;
- individuals who work in domestic services (excluding whose number of work days, based on the total work hours in a month, is less than 10 days);
- individuals who fulfil military obligations as conscripts and enlisted specialists, and cadets of reserve officer schools;
- employees employed by a foreign based company who are working in Turkey and can prove that they are insured in another country, self-employed workers who are residing abroad and are insured in another country;
- students who work in the applied construction and productions sector during their education at recognised VET schools;
- 'patients' or 'disabled' individuals in training or rehabilitation by healthcare service providers;
- persons who fall under the scope of Article 4/b and 4/c but who have not reached 18 years of age;
- employees under temporary employment contracts in agriculture or forestry and self-employed in the agricultural sector who have a monthly average income from agriculture (after deduction of the costs) which is less than 30 times the lower limit of daily earning subject to contribution payment;

- self-employed individuals who are exempted from income tax and registered as traders and artisans who have an average monthly income (after deduction of the professional costs) that is lower than 30 times the lower limit of the daily earning subject to contribution payment;
- Turkish nationals who are employed abroad at representative offices who have a permanent residence or citizenship in that country and who are insured in that country.

For these categories no premiums have to be paid. They are in other words exempted from the compulsory social contribution payment applied to all workers, self-employed workers and civil servants.

Not included under the health insurance system are: the military[236] and students at the military schools, persons who have health insurance in another country and prisoners.

7.6 Actuarial factors

Sex is not used as an actuarial factor in statutory social security schemes and the unemployment insurance scheme.

7.7 Difficulties

The Turkish Social Security System basically provides social protection only to those who take part in regular/formal employment although, in principle, being in the social security system is possible by paying premiums. As the labour force participation rate for women is quite low in Turkey and most women work in undeclared work, the social security system is biased towards men. Women who are not able to participate in the labour market regularly and consistently are excluded from the social insurance programmes that are based on employment and regular contributions or access only the social benefit programmes that are not based on contributions.[237]

Furthermore, some of the exclusions in the scope of the insured persons by the Social Insurance and General Health Insurance Act (Article 6) are problematic for women's access to social security.

Since the ratio of female employers among all employers and the proportion of women who are insured by being an employer is very low, the exclusion of the spouse of the employer who is working for free[238] in the latter's business constitutes a problematic situation in terms of women's access to social security.

Another practice that constitutes an obstacle for women's access to social security is that they are not considered to be insured for the chores of the household performed among those who live in the same home, including relatives up to the third degree without the participation of any other person. Living in the same house prevents many women from accessing social security. For example, an aunt taking care of her nephew's child has to be registered at the institution for insurance due to the childcare work if they are not dwelling in the same house; whereas, this obligation does not apply if they are dwelling in the same house.

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[236] The military have a separate healthcare scheme.

[237] KEIG (*Women's Labour and Employment Initiative*) (2015), *Where Are Women In Social Security In Turkey? Analysis of Social Securities and Universal Health Security Law No. 5510 In Terms of Gender*, http://www.keig.org/wp-content/uploads/2016/03/sgkingweb.pdf; Bakirci, K. (2011), 'Homemakers and Social Security', in *Encyclopedia of Women in Today's World*, Vol. 2, Sage Publications, USA.

[238] An unpaid 'helping' spouse is not an employee as long as this help does not go beyond 'support for family–related reasons.' If this help is beyond mere support, then there is no legal hindrance to being employed under an employment contract. Like any other unregistered employee (undeclared work; employee not registered with the Social Security Institution), a partner may apply to the courts claiming that his/her work has remained undeclared.

Finally, Additional Article 9, which was added to the Social Insurance and General Health Insurance Act, invalidated the decision of the Court of Cassation that opened up the possibility for domestic employees to be insured even if they go to the house they work at only once a week.[239] Prior to the amendment, the Social Insurance and General Health Insurance Act left domestic employees outside the umbrella of social security but the Court of Cassation opened up the possibility for them to be insured even if they go to the house they work at only once a week, regardless of the duration of employment.[240]

Some of the provisions made in the field of social security contain practices that are incomplete or lack equality for women. For example, the condition of insurance prior to compulsory military service is not required for men to benefit from military service-related retroactive social security premium payments, whereas the condition of being insured prior to childbirth is required in order to benefit from unpaid birth/maternity leave related to retroactive social security premium payments for women employees who stopped working not exceeding two years after giving birth. Additionally, the right to early retirement for insured women with a disabled child is far from reaching its goal due to many restrictions. For example, while women with more than one disabled child can benefit from this right for only one of the children, they cannot benefit from any such right if the disabled child benefits from the services of protection, care and rehabilitation in accordance with the provisions of the Social Services and Child Protection Agency continuously or as a boarder, paid or free.

The social security system ignores many types of unpaid work done by women both in and outside the household and compels them to depend on the male members of their family until the end of their lives. The possibility of voluntary insurance is provided for women who work in undeclared jobs and who work as unpaid family workers under this umbrella. However, both the high level of premiums and the difficulty of fulfilling the conditions leave the voluntary insurance as theoretical. Additionally, the security that is offered falls behind what is offered under other categories of insurance. It is almost impossible for women who are in temporary employment relationships or left with no option but to work part time to have security of future by fulfilling the required conditions. In addition to having a narrower scope than other categories in terms of the opportunities it provides, voluntary insurance only covers women whose income can meet the premium payments.

7.8 Evaluation of implementation

Social security is a fundamental human right. Therefore, it is of utmost importance to establish a system that takes all individuals, regardless of their income status or recorded employment, under the umbrella of social security within the framework of human rights. The social security system in Turkey is established typically on the basis of working life and premium payments and also mainly takes the male employee as the person to be protected. In this regard, for women to become beneficiaries of social security, they have to work in an insured job in the formal sector; otherwise, they have to be dependent on a man. In short, when it comes to social security, women in Turkey are defined not as individuals, but within the framework of family and matrimony.

In the Turkish social security system, the social security of women is regulated in three ways; women benefit from social security through their own jobs, through their spouses as unemployed women, and as daughters.[241]

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[239] See Court of Cassation 10th Division, 9.11.1982, 1982/4086; Court of Cassation 10th Division, 27.10.2000, 6089/6479; Court of Cassation 10th Division, 1.9.1991, 5071/5904.

[240] See Court of Cassation 10th Division, 9.11.1982, 1982/4086; Court of Cassation 10th Division, 27.10.2000, 6089/6479; Court of Cassation 10th Division, 1.9.1991, 5071/5904.

[241] Alper, Y. et al., (2015), 'Ölüm Sigortasından Bağlanan Aylıkların Kız Çocuklarının İşgücüne Katılımına ve İstihdamına Etkisi' (The Effect of Pensions Granted to Daughters due to Death Insurance on their Participation to the Workforce and Employment), *Siyaset Ekonomi ve Yönetim Araştırmaları Dergisi*, 16. Çalışma Ekonomisi ve Endüstri İlişkileri Kongresi Özel Sayısı, 341; KEIG (Women's Labour and Employment Initiative) (2015), 'Where Are Women In Social Security In Turkey? Analysis of Social Securities and

Women's access to social security through their own job is the most guaranteed and continuous way of receiving social security. In these cases, women benefit from all kinds of social security benefits and become entitled to retirement through their own insurance. Situations such as marriage or divorce do not forfeit the rights they have acquired due to their own insurance. However, this situation is closely related to women's integration into working life. According to the 2017 statistics of TurkStat, while women make up half of the population of Turkey, they participate in the workforce at the ratio of one third compared to men.[242] This situation shows that women benefit at a much lower rate from the insurance benefits based on working and paying premiums, as actively insured, compared to men. Furthermore, women who manage to take part in the formal employment sector, are usually in precarious positions, due to atypical employment becoming widespread. Temporary agency employment, which was introduced in the EA (Article 7), constitutes a serious risk for women.

Another way by which women benefit from social security in the Turkish social security system is when they are unemployed and benefit from social security as passively insured through their spouses. In this case, the woman benefits from health insurance as long as her spouse is alive, and from the death pension when her spouse passes away. However, the existence of such a relationship requires a formal matrimonial bond between the spouses. When spouses divorce, the woman is left completely without social security. This way of accessing social security is not a right for women, but an opportunity that can be accessed by women via the mediation of men.

The third way in which women benefit from social security is as daughters through the general health insurance or death pensions of their parents. In both cases, the right acquired by the daughters is discontinued when they start to work or marry. Disentitlement of women to this right due to marriage or divorce can keep women away from working life. For example, the discontinuation of death pensions for daughters from their parents when they start to work pushes many women towards working in undeclared jobs, or they are reluctant to enter to the workforce because of concerns about the discontinuation of the death pension.

7.9 Remaining issues

The Turkish social security system strongly protects an occupational core, the level of state involvement in the social realm is extremely low and a safety net in the form of a social assistance scheme is lacking. The most significant common trait of the welfare regimes in Turkey is the importance of the family as the main institution of welfare.

Universal Health Security Law No. 5510 In Terms of Gender', http://www.keig.org/wp-content/uploads/2016/03/sgkingweb.pdf.

[242] http://www.tuik.gov.tr/PreHaberBultenleri.do?id=27594.

8 Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive)

8.1 General (legal) context

8.1.1 Surveys and reports on the specific difficulties of self-employed workers

The OECD's *Entrepreneurship at a Glance 2015* report says only 1.2 % of female workers in Turkey are employers. That is higher than Japan's 0.9 %, but below the OECD average of 2.2 %.[243]

The male-dominated social structure in Turkey constitutes a serious barrier to women's entrepreneurship. Gender discrimination experienced by women in the private as well as the public sphere significantly limits their visible participation in economic life outside their homes. A sample survey of nearly 5 000 micro and small enterprises (MSEs) found that 6 % of them led by women, which shows that women's businesses tend to be very small. Nearly half are in trade and one-third are in industry. Many of the one-person women's enterprises are in home-based manufacturing. Women entrepreneurs tend to be younger and have more education than men entrepreneurs, and about half of the women entrepreneurs were employed as wage earners before starting their own businesses. Virtually none of them made use of credit for starting their businesses and very few had access to business support services of any kind.[244]

8.1.2 Other issues

Another barrier to starting a business in Turkey is the lack of training on how to create and grow a start-up. Basic entrepreneurship training, for example, would require the individual to familiarise him/herself with the available opportunities and procedures for identifying supporting institutions and preparing project application packs, or obtaining bank loans, and the like (requiring at least a high school degree). This is not the current skill distribution suggested by the self-employed statistics in Turkey.[245]

8.1.3 Overview of national acts

Constitution Article 48 provides that everyone has the freedom to work and conclude contracts in the field of his/her choice. Establishment of private enterprises is free. The state must take measures to ensure that private enterprises operate in accordance with national economic requirements and social objectives and in security and stability. According to Article 117/1 of the Penal Code (PC), 'Any person who violates freedom of work and occupation by using violence or threat or performing an act contrary to the law, is sentenced to imprisonment from six months to two years and imposition of punitive fine upon complaint of the victim'.

The principle of equal treatment between men and women who are self-employed has been implemented through the HREIA and the PC. The PC stipulates penal sanctions for preventing a person from engaging in any economic activities due to reasons of hate based on 'language, race, nationality, colour, gender, disability, political thoughts, philosophical beliefs, religions or sects' (Article 122). The HREIA prohibits any discrimination regarding access to self-employment, licences, registration, discipline and similar subjects (Article 6/4).

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[243] OECD (2015), *Entrepreneurship at a Glance 2015*, OECD publishing, Paris. https://www.oecd-ilibrary.org/industry-and-services/entrepreneurship-at-a-glance-2015_entrepreneur_aag-2015-en.

[244] Ozar, S. (2016), 'Women Entrepreneurs in Turkey: Obstacles, Potentials, and Prospects' in Chamlou, N. and Karshenas, M. (eds.) *Women, Work and Welfare in the Middle East and North Africa*, World Scientific; OECD (2016), 'Women entrepreneurship Key findings: Turkey Who wants to be an entrepreneur?', March 2016, http://www.oecd.org/sdd/business-stats/EaG-Turkey-Eng.pdf. Bakirci, K. (2011), 'Women in Business: Overview', in *Encyclopedia of Women in Today's World*, Vol. 1, Sage Publications, USA.

[245] See OECD (2015), *Entrepreneurship at a Glance 2015*, OECD publishing, Paris.

The social protection of the self-employed is provided by Social Insurance and General Health Insurance Act.

8.1.4 Political and societal debate and pending legislative proposals

Turkey, in its *National Employment Strategy 2014-2023*,[246] aims to reach 41 % female participation in the labour market, including female entrepreneurs.

8.2 Implementation of Directive 2010/41/EU

Directive 2010/41/EU has not been explicitly implemented in national law.

8.3 Personal scope

8.3.1 Scope

The PC covers all self-employed workers without any exception.

The HREIA covers all self-employed workers but specifies justifications for differences in treatment (Article 7). Justifications are not specifically with regard to the self-employed, but with regard to all types of discrimination including the provision of goods and services.

There cannot be a claim for discrimination where:

1) there is a genuine and determining occupational requirement provided that the objective is legitimate and the requirement is proportionate;
2) sex is a determining factor;
3) the fixing of a minimum or maximum age for requirement in recruitment and in employment provided that the objective is legitimate and the requirement is proportionate;
4) there are special and preventive measures for children and other people;
5) it involves the employment of persons of a particular religion to serve or to provide education or training in religious institutions;
6) there are membership requirements in accordance with the purpose, principles and values laid down in their relevant legislation or internal regulations by associations, foundations, trade unions, employers' associations, political parties and professional organisations;
7) it involves positive action;
8) there are differences of treatment based on nationality governing entry, residence, and legal status. (Article 7, HREIA)

8.3.2 Definitions

A 'self-employed worker' is not explicitly defined in Turkish legislation but according to Article 4/b of the Social Insurance and General Health Insurance Act, which specifies the coverage of the self-employed for the purposes of the act, self-employed workers are mainly those who are not employed under an employment contract but who are working in their own name and on their own account.

8.3.3 Categorisation and coverage

There is no categorisation in the PC and the HREIA and all self-employed workers are covered by the both acts.

[246] Ministry of Labour and Social Security (2017), *National Employment Strategy 2014-2023* http://www.uis.gov.tr/media/1479/eylemplanlar%C4%B1_en.pdf.

However, under the Social Insurance and General Health Insurance Act, not all self-employed workers are considered part of the same category. Article 6 excludes some self-employed workers from the social insurance coverage. These are:

- persons who fall under the scope of Article 4/b but who are not 18 years of age;
- self-employed workers in the agricultural sector who have a monthly average income from agriculture (after deduction of the costs) which is less that 30 times the lower limit of daily earning subject to contribution payment; and
- self-employed individuals who are exempted from income tax and registered as traders and artisans who have an average monthly income (after deduction of the professional costs) that is lower than 30 times the lower limit of the daily earning subject to contribution payment.

8.3.4 Recognition of life partners

The Social Insurance and General Health Insurance Act covers self-employed workers and their spouses.

Life partners of self-employed workers are not covered and a life partner who is self-employed must be insured independently from his/her life partner.

The possibility of voluntary insurance is provided under the Social Insurance and General Health Insurance Act, however voluntary insurance only covers persons whose income can meet the premium payments.

Since the ratio of female employers among all employers and the proportion of women who are insured by being an employer is very low, married women usually benefit from social security by being passively insured through their spouses. In this case, the woman benefits from health and maternity insurance as long as her spouse is alive, and from the death pension when her spouse passes away. However, the existence of such a relationship requires a formal matrimonial bond between the spouses. When spouses divorce, the woman is left completely without social security. In such a situation social security is not a right for women, but an opportunity that can be accessed by women via the mediation of men.

8.4 Material scope

8.4.1 Implementation of Article 4 of Directive 2010/41/EU

The anti-discrimination principle of Directive 2010/41/EU (Article 4) has been impelemented by the provisions of the PC and the HREIA.

The PC prohibits discrimination in engagement in any economic activities (Article 122).

The HREIA prohibits discrimination in self-employed activities (Article 6/4). Harassment, sexual harassment, victimisation and instruction to discriminate are deemed to be discrimination and therefore prohibited.[247]

8.4.2 Material scope

The PC covers protection for freedom of occupation (Article 117) and prohibits discrimination in engagement in any economic activities (Article 122).

The HREIA covers access to self-employment, licences, registration, disciplinary sanctions and similar subjects (Article 6/4). This includes the terms and conditions for its exercise

[247] See section 3.3, above.

and termination of its exercise as regards access to education or vocational training, and includes practical work experience that is needed in order to have access to and exercise such a profession.

Under the Social Insurance and General Health Insurance Act, the self-employed are not covered by the unemployment insurance although, in principle, they are compulsorarily insured for the other branches such as maternity, invalidity, old age, occupational accidents and occupational diseases including health insurance covering the costs of medical care with the exception of the short-term incapacity benefit in case of illness.

8.5 Positive action

Turkey, in its *National Employment Strategy 2014-2023*,[248] aims to reach 41 % female participation in the labour market. In order to achieve that goal, there are ongoing Government policies encouraging female labour force participation by providing: flexible working-time arrangements; maternity leave; affordable childcare facilities; and positive discrimination for female entrepreneurs.

Therefore vocational training through the Turkish Employment Agency and support for young female entrepreneurs through the Ministry of Family, Employment and Social Services, and the Small and Medium Enterprises Development Organisation of Turkey (KOSGEB) have been significantly expanded. Many national and international plans, programmes, and projects are currently underway, including those run by the Women Entrepreneurs Association of Turkey (KAGIDER) and the Turkish Women's International Network (TurkishWIN).

According to the Social Insurance and General Health Insurance Act, a self-employed woman with a disabled child in need of constant care will be entitled to early retirement, just like employees and civil servants (Article 28).

Also, where an employee/civil servant/self-employed person resigns due to pregnancy or having given birth, she may, if she chooses, pay contributions for a maximum period of two years during which she remains unemployed (Social Insurance and General Health Insurance Act, Article 41).

8.6 Social protection

The Social Insurance and General Health Insurance Act provides for social protection for women who are self-employed as well as for the spouse of self-employed people as stipulated in Articles 2, 7 and 8 of Directive 2014/41/EU.

Article 4/b of the Social Insurance and General Health Insurance Act lists a series of categories of persons who are not employed by means of an 'employment contract'. They form a separate category of insured persons, the 'self-employed'. They consist of muhtars[249] of villages or quarters, and persons who work in their own name and on their own account and who are not bound by an employment contract provided that they are: subject to income tax due to commercial earnings or self-employed income; or exempted from income tax and are registered as traders, craftsmen or artisans; or active in the agricultural sector; or (in some cases) partners in joint stock companies or other legal entities; or jockeys and trainers who are subject to the Act on Horse Races.[250]

Individuals who are residents in Turkey and who are insured under Article 4/b of the Social Insurance and General Health Insurance Act are also insured under the health insurance

[248] Ministry of Labour and Social Security (2017), *National Employment Strategy 2014-2023* http://www.uis.gov.tr/media/1479/eylemplanlar%C4%B1_en.pdf.
[249] The Muhtar is the elected village head and highest civil servant in villages in Turkey.
[250] Act on Horse Races (*At Yarışları Hakkında Kanun*), No. 6132, *Official Journal* 10.7.1953, No. 8458.

scheme (with the exception of the short-term incapacity benefit in case of illness) (Article 60).

The self-employed are not covered by the unemployment insurance.

Self-employed workers register before the commencement of the self-employed activities with the tax authorities and remain registered until they terminate their activities. They can obtain a certificate confirming termination of the self-employed activities from the tax authorities.

Self-employed workers pay social contributions at the total combined rate of both employer's and employee's contribution rates (with the exception of the unemployment insurance contribution rates). Self-employed workers who can prove that they are earning less than the minimum wage can be exempted from social security contributions.

8.7 Maternity benefits

Apart from the lack of recognition of life partners, the Social Insurance and General Health Act is in conformity with Article 8 of the directive.

The self-employed and the employee are treated equally as regards maternity benefits. Article 15 of the Social Insurance and General Health Insurance Act applies to self-employed women, women employees and uninsured wives of male workers without making any differentiation. Like women employees and uninsured wives of male employees, self-employed women will receive full maternity benefits.

Nursing benefit for insured employees and self-employed workers is available under the Social Insurance and General Health Insurance Act (Article 16).

8.8 Occupational social security

8.8.1 Implementation of provisions regarding occupational social security

There are no mandatory occupational social security schemes for the self-employed.

8.8.2 Application of exceptions for self-employed persons regarding matters of occupational social security (Article 11 of Recast Directive 2006/54)

This is not relevant, given that there are no such schemes.

8.9 Prohibition of discrimination

Under the HREIA, men and women enjoy equal treatment and there must be no discrimination on grounds of sex as regards access to self-employment, licences, registration, disciplinary sanctions and similar subjects (Article 6/4). This includes the terms and conditions for its exercise and termination of its exercise as regards access to education or vocational training, and includes practical work experience that is needed in order to have access to and exercise such a profession.

The PC also stipulates penal sanctions for preventing a person from engaging in any economic activities due to reasons of hate based on discriminatory grounds (Article 122).

8.10 Evaluation of implementation

Lower levels of entrepreneurship among women are associated with the overall low labour force participation of women in Turkey, in particular among the least educated.

There are barriers affecting women's participation in self-employment, such as a lack of willingness to establish a business, social norms and culture, and access to finance.[251]

8.11 Remaining issues

In order to understand why self-employment priorities have not been set and women have not been targeted, self-employment should be seen in the context of the Turkish labour market. Self-employment in Turkey has not been an important driver of entrepreneurship, but rather a coping mechanism for the lack of primary sector jobs. It remains a key part of employment, albeit the unattractive part.[252]

[251] See Munoz Boudet, A. and Agar, M. (2014), *Female Entrepreneurship in Turkey*, World Bank, June 2014.
[252] See Ercan, H. (2010), 'Turkey, European Employment Observatory EEO Review: Self-employment'. https://ec.europa.eu/social/BlobServlet?langId=en&docId=12202&.

9 Goods and services (Directive 2004/113)[253]

9.1 General (legal) context

9.1.1 Surveys and reports about the difficulties linked to equal access to and supply of goods and services

There have been no relevant surveys or reports.

9.1.2 Specific problems of discrimination in the online environment/digital market/collaborative economy

There is no research or data to make comments on this issue.

9.1.3 Political and societal debate

There was a political and societal debate on the prohibition on wearing headscarves at universities (until 2010) Women wearing headscarves could not attend universities nor take up public posts. The de facto ban in access to university entrance examinations and universities gradually ceased to exist. There was no actual law prohibiting the use of headscarves by female university students, but this was prohibited by a Constitutional Court decision of a political nature.[254] The ban was eliminated in 2010 after the Higher Education Board sent a circular to universities on the issue.[255] Also starting from September 2014, female students in secondary education may wear headscarves in their schools, if they choose to do so.[256]

9.2 Prohibition of direct and indirect discrimination

The Constitution provides that state organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings (Article 10/5). No privilege may be granted to any individual, family, group or class (Article 10/4).

The Employee Trade Unions and Collective Bargaining Act[257] provides that unions and confederations shall observe the principle of gender equality in their activities and events in line with their establishment objectives (Article 14). The Public Personnel Trade Unions and Collective Bargaining Act[258] states that the trade unions and confederations shall observe the gender equality principle in their works and activities as well as among the members in enjoyment of the activities of these confederations and trade unions (Article 26). The Employee Trade Unions and Collective Bargaining Act covers private law employees and their employers. The Public Personnel Trade Unions and Collective Bargaining Act covers public officials and their (public law) employers. Neither act explicitly mentions the other discriminatory grounds, and they do not cover selection as a member of the trade union and/or selection to the bodies of the trade union and/or the termination of membership of the trade union.

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253 See e.g. Caracciolo di Torella, E. and McLellan, B. (2018), *Gender equality and the collaborative economy*, European network of legal experts in gender equality and non-discrimination, available at https://www.equalitylaw.eu/downloads/4573-gender-equality-and-the-collaborative-economy-pdf-721-kb.

254 Constitutional Court, 9.4.1991, 1991/8, 1990/36, *Official Journal* 31.7.1991.

255 http://bianet.org/bianet/siyaset/125225-yok-basortu-duzenlemesine-istanbul-dan-basladi.

256 Bylaw amending the Bylaw on the dress code of students of state schools (*Milli Eğitim Bakanlığına Bağlı Okul Öğrencilerinin Kılık ve Kıyafetlerine Dair Yönetmelikte Değişiklik Yapılması Hakkında Yönetmelik*), *Official Journal* 27.9.2014, No. 29132.

257 Employee Trade Unions and Collective Bargaining Act (*Sendikalar ve Toplu İş Sözleşmesi Kanunu*), (No. 6356), *Official Journal* 7.11.2012.

258 Public Personnel Trade Unions and Collective Bargaining Act (*Kamu Görevlileri Sendikaları ve Toplu Sözleşme Kanunu*) (No. 4688), *Official Journal* 12.7.2001.

The PC provides protection in the use of trade union rights. Article 118 states that any person who uses violence or threat against a person in order to force him to become or not to become a member of a trade union, or to participate or not to participate in the activities of the union, or to cancel his membership from the union or to declare his resignation from the management of the union, is sentenced to imprisonment from six months to two years. A person who prevents the activities of the trade union by using violence or threat or by performing any other act contrary to the law, is subject to punishment of imprisonment from one year to three years.

The Basic Act on National Education[259] lays down the principle that educational institutions are open to everyone without discrimination (Article 4). Article 8 states that equality of opportunity must be provided for every person, man or woman. Similarly, Article 2 of the Primary Education and Training Act states that primary education is compulsory for girls and boys at the age of education, and free of charge in state schools.

The PC prohibits discrimination stemming from the motive of hate in the sale, transfer or lease of any object to a person, or in using a public service (Article 122). According to Article 122, any person who prevents the sale, transfer of movable or immovable property, or performance of a service, or benefiting from a service, or to render a public service, due to reasons of hate stemming from differences in 'language, race, nationality, colour, gender, disability, political thoughts, philosophical beliefs, religions or sects', is sentenced to imprisonment from six months to one year or by the imposition of a punitive fine.

Direct and indirect discrimination in goods and services have been incorporated in the HREIA.

Article 5 of the HREIA transposes Council Directive 2004/113/EC implementing the principle of equal treatment in access to and the supply of goods and services. The HREIA applies to everyone who supplies goods and services to the public, both in the public and the private sector, and offered outside private and family life.

According to the HREIA, public institutions and organisations that provide education, training, judicial services, law enforcement, health services, transportation, communication, social security, social services, social aid, sports, accommodation, cultural, touristic or similar services, professional organisations with the nature of public institutions, and real or private legal persons must not discriminate against persons who benefit from, apply for benefiting from or those wishing to be informed of such services. This provision encompasses access to public places and buildings (Article 5/1).

Persons and institutions who are responsible for the planning, offering and auditing of the services mentioned in Article 5/1 are liable for taking into consideration the needs of different disabled groups and making reasonable accommodation (Article 5/2).

Public institutions and organisations, professional organisations with the nature of public institutions, real persons, private legal persons and those authorised by them must not discriminate during offering movables and immovables to the public against those wishing to purchase, rent such assets and those wishing to be informed about them; during the renting process, determining conditions in the lease agreement, renewal, termination, and sale or transfer of the lease agreement (Article 5/3).

Article 5(4) of the HREIA provides that no one can be discriminated against: while being selected as a member of associations, foundations, labour unions, political parties and professional organisations; while being chosen for their bodies or benefiting from their membership opportunities; and in terminating membership or participating in the activities

[259] Basic Act on National Education (*Milli Eğitim Temel Kanunu*), (No. 1739), *Official Journal* 24.6.1973.

of such bodies, without prejudice to exceptions specified in their legislation and regulations.[260]

9.3 Material scope

The gender equality provisions of the Employee Trade Unions and Collective Bargaining Act (Article 14) cover private law employees and their employers, while the gender equality provisions of the Public Personnel Trade Unions and Collective Bargaining Act (Article 26) cover public officials and their (public law) employers in relation to the activities and events of the confederations and trade unions.

The Political Parties Act (Article 83) provides equal participation in politics, and the Basic Act on National Education (Articles 4 and 8) guarantees an equal right to education to everybody.

The HREIA applies to all sectors whether these matters are covered by other legislative provisions or not. The material scope of national law is broader in the sense that discrimination is prohibited in the access to and supply of goods and services.

However, the HREIA covers everybody in relation to selection for membership of, involvement in, participation of activities, termination of membership of an organisation of workers or employers, or any organisation whose members carry on a particular profession (Article 5/4).

9.4 Exceptions

The HREIA does not apply in mass media and advertising as these matters are covered by other legislative provisions. According to the Act on the Establishment and Broadcasting of Radio and Television Stations,[261] radio and television programmes should not in any way promote violence and discrimination against women, children, and the disabled (Article 4/2u).

9.5 Justification of differences in treatment

Justifications for differences in treatment are specified in the HREIA (Article 7) not specifically with regard to the provision of goods and services, but with regard to all types of discrimination including the provision of goods and services.

There cannot be a claim for discrimination where:

a. there is a genuine and determining occupational requirement provided that the objective is legitimate and the requirement is proportionate;
b. sex is a determining factor;
c. the fixing of a minimum or maximum age for requirement in recruitment and in employment provided that the objective is legitimate and the requirement is proportionate;
d. there are special and preventive measures for children and other people;
e. it involves the employment of persons of a particular religion to serve or to provide education or training in religious institutions;
f. there are membership requirements in accordance with the purpose, principles and values laid down in their relevant legislation or internal regulations by associations, foundations, trade unions, employers' associations, political parties and professional organisations;
g. it involves positive action;

[260] See section 11.7, below.
[261] Act on the Establishment and Broadcasting of Radio and Television Stations (*Radyo ve Televizyonların Kuruluş ve Yayınları Hakkında Kanun)*, No. 3984, *Official Journal* 20.4.1994, No. 21911.

h. there are differences of treatment based on nationality governing entry, residence, and legal status. (Article 7, HREIA)

9.6 Actuarial factors

Sex is not a factor in the calculation of premiums and benefits.

9.7 Interpretation of exception contained in Article 5(2) of Directive 2004/113

Sex is not a factor in the calculation of premiums and benefits.

9.8 Positive action measures (Article 6 of Directive 2004/113)

The Constitution (Article 10) provides for positive action measures to ensure full equality in practice between men and women.[262] It also provides that the state shall provide scholarships and other means of assistance to enable students of merit lacking financial means to continue their education (Article 42/7).

There are no any specific provisions stated under the legislation to prevent or compensate for disadvantages linked to sex.

9.9 Specific problems related to pregnancy, maternity or parenthood

There are no known specific problems on the grounds of pregnancy and maternity in relation to the access to and supply of goods and services.

However while the abortion procedure is legal in Turkey, experts say in reality there is a de facto ban. According to a study by Kadir Has University in Istanbul, public hospitals in 53 of Turkey's 81 provinces reject an abortion request if it is made by the pregnant woman alone. In the regions near the Mediterranean and the Black Sea, abortions are no longer permitted in any hospitals. Across the entire country, only 7.8 % of the total of 431 public hospitals allow abortions to be performed when solely at the request of the woman and 11.8 % refuse outright to perform the procedure as a matter of principle.[263]

9.10 Evaluation of implementation

There is no research or case law on equal access to and supply of goods and services to be able to comment on the implementation of the principle. However as stated above, pregnant women face discrimination when trying to access services related to abortion.

9.11 Remaining issues

The law is in place but in many cases there is little awareness of equal access to and supply of goods and services. Thus, the first challenge is to raise awareness of the HREIA amongst the general public and stakeholders. Only when individuals are aware of their rights will claims be brought before the mediator/national courts or equality bodies.

[262] See section 2.1, above.
[263] See DW (2019) 'Women Face Dangerous Conditions to Obtain Legal Abortions' 21 January 2019: https://www.dw.com/en/turkeys-women-face-dangerous-conditions-to-obtain-legal-abortion/a-47257680.

10 Violence against women and domestic violence in relation to the Istanbul Convention

10.1 General (legal) context

10.1.1 Surveys and reports on issues of violence against women and domestic violence

On 25 November 2014, the Parliament decided to establish a parliamentary commission for an enquiry into the problem of violence against women.[264] The Commission prepared a 700-page comprehensive report on the issue, published on 8 May 2015.[265] The most problematic area is the degree of violence seen in practice embedded by social norms, culture and understanding. According to the report, different perceptions of violence by men and women, a lack of awareness of types of violence other than physical violence, societal acceptance of domestic violence, patriarchal and stereotypical views of a woman's traditional role, economic dependence on the perpetrator, and a lack of understanding on the part of women of their rights are among the factors hindering the fight against violence. Therefore, awareness raising is of the utmost importance. Figures outlined in the report show that, in 2014, 119 018 incidents of domestic violence were reported to the police (51 739 in 2010, 62 682 in 2011, 90 177 in 2012, and 89 565 in 2013). Of the 163 564 victims, 118 014 were women, 29 410 were men and 16 140 were children. Of the 234 people killed in domestic violence in 2014, 133 were women (113 women were killed in 2013, 98 in 2012, 91 in 2011 and 94 in 2010), 76 were men and 25 were children. Provisional protection measures were applied to 87 081 people in 2014, of whom 77 288 were women and 9 793 were men.

10.1.2 Overview of national acts on violence against women, domestic violence and issues related to the Istanbul Convention

One of the significant steps taken by Turkey relating to the seventh CEDAW period is that in April 2011, it hosted in Istanbul the Convention for Eliminating Violence against Women and Prevention of Domestic Violence adopted by the European Council (the Istanbul Convention). Turkey became the first country to sign (on 11 May 2011) and ratify (on 14 March 2012). The Istanbul Convention has called attention to different dimensions of violence against women and proposed important prevention measures and sanctions.

The Act on Protection of the Family and the Prevention of Violence Against Women, which makes special reference to and draws on the Istanbul Convention (Article 1/2a), was accepted unanimously in Parliament on 8 March 2012. This act abrogated the previous Protection of the Family Act[266] because the scope of the previous act was limited to the family and therefore was not in compliance with the obligations under the Convention. However the title of the current act is also open to criticism in that it locates women in the family as their primary sphere of existence by using the words 'protection of the family' instead of 'protection of the individual family members'.

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[264] Decision No. 1077, 25.11.2014, *Official Journal* 3.12.2014, No. 29194; Act on the Committee on Equality of Opportunity for Women and Men (*Kadın Erkek Fırsat Eşitliği Kanunu* (No. 5840) *Official Journal* 24.3.2009, No. 2717.

[265] Report of the Grand National Asembly of Turkey Research Committee Established to Determine the Measures to be Taken by Investigating the Reasons of Violence Against Women (*Kadina Yönelik Şiddetin Sebeplerinin Araştirilarak Alinmasi Gereken Önlemlerin Belirlenmesi Amaciyla Kurulan Meclis Araştirmasi Komisyonu Raporu*) 8.5.2015, For Part I of the report: https://www.tbmm.gov.tr/sirasayi/donem24/yil01/ss.717-bolum-1.pdf; and for Part II: https://www.tbmm.gov.tr/sirasayi/donem24/yil01/ss717-bolum-2.pdf.

[266] TurkProtection of the Family Act (*Ailenin Korunmasına Dair Kanun)*, No. 4320, *Official Journal* 17.1.1998, No. 23233; See Bakirci, K. (2007), 'Domestic Violence in International, European and Turkish Law' (*Aile İçi Şiddetle İlgili Ulusal Mevzuatın Uluslararası Belgeler ve Avrupa Belgeleri Karşısındaki Durumu*), *Guncel Hukuk Dergisi*, Eylul. Bakirci, K. /Uygur G./ Yalcin Sancar T. (2007), *The International, European and Turkish Legislation on Violence Against Women in the Domestic Sphere* (*Aile İçi Şiddete ve Yetkili Kurum ve Kuruluşlara İlişkin Mevzuat ve Değerlendirme Raporu (Uluslararası, Avrupa ve Türk Hukuk Mevzuatı)*), Research Project for the Turkish Prime Ministry, Department of Women's Status.

The specific purpose of the Act on Protection of the Family and the Prevention of Violence Against Women is the protection of women against all forms of violence, as well as the prevention, prosecution and elimination of violence against women and domestic violence. It covers acts of physical, sexual, psychological or economic violence between members of the family or domestic unit, irrespective of biological or legal family ties. All women, be they married, divorced, engaged or in a relationship (a dating relationship), who are subjected to violence, are covered. Children, family members and those being stalked are also protected (Article 1/2ç). The Act protects women against violence conducted in social and public space as well.

Stalking was regulated for the first time in the Act on Protection of the Family and the Prevention of Violence Against Women in 2012 (Article 13) according to the Istanbul Convention, Article 34.[267] It has gender-neutral language in the sense that it encompasses complainants and perpetrators of both sexes. There is no definition of stalking in the act, but the Istanbul Convention defines it as 'the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her/him to fear for her/his safety' (Article 34).[268]

The Convention prohibits child and forced marriage as a form of gender based violence (Article 37). Child marriage increases the possibility of women's exposure to domestic violence and violates the right to education of girls. The legal age limitation to get officially married in Turkey is 17, but women and men who are 16 years old can be married with the permission of a judge (Civil Code, Article 124). Research shows that child marriages are common in Turkey and in some marriages below the age of 18 (13 %) the age is forged.[269] Although, child marriage in itself is not a crime in the PC, it can be punished in the event that it includes sexual crimes such as child molestation (Article 103) or crimes regarding sexual intercourse between/with persons who have not attained the lawful age (Article 104), and restrictions to personal freedom (Article 109). Article 103 of the PC states: 'Any person who abuses a child sexually is sentenced to imprisonment from three years to eight years. Sexual molestation (includes) sexual attempt(s) against children who are under the age of fifteen or against those (who) attained the age of fifteen but lack (the) ability to understand the legal consequences of such act(s).' In 2016, legislators attempted to amend Article 103 of the PC on sexual abuse of children to delay the punishment of the offender and its complete removal after five years in the event of marriage between the offender and the child rape victim. The Government annexed this proposal to the omnibus bill that was brought to the Parliament that set out amendments to Article 103 of the PC. The bill aimed to lower the age at which sexual relations with a child (under the cover of marriage) is considered a crime from 15-years-old to 12-years-old. If it passed, it would have 'pardoned' the underage-marriage offences of approximately 10 000 men currently serving prison sentences on sexual-abuse charges. Such an amnesty would have whitewashed and encouraged illegal/forced 'marriages' with children. It would have also discouraged the victims from appealing to the legal mechanisms and would have reintroduced the concept of 'marriage with rape offenders' into law. The Government proposed a similar bill in 2005, but it was withdrawn as a result

[267] According to the domestic violence against women research of Hacettepe Institute of Population Studies, 27 % of women in Turkey are subjected to stalking at least once in their lives. However, women mostly define this crime as constant pestering, harassment, violation of protection measures taken as part of Law No. 6284 and constant threats, not as stalking (See Hacettepe Institute of Population Studies (2014), *National Research on Domestic Violence Against Women in Turkey 2014* http://www.hips.hacettepe.edu.tr/eng/english_main_report.pdf.

[268] See GREVIO (2018), *GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Turkey*, Secretariat of the monitoring mechanism of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Council of Europe, Strasbourg cedex, 15 October. https://rm.coe.int/eng-grevio-report-turquie/16808e5283.

[269] Hacettepe University Institute of Population Studies (2014), *Research on Domestic Violence against Women in Turkey 2014* (*Türkiye'de Kadına Yönelik Aile İçi Şiddet Araştırması 2014*), http://www.hips.hacettepe.edu.tr/ING_SUMMARY_REPORT_VAW_2014.pdf.

of the reaction from women's rights groups and the public. The current attempt to bring the bill before the Parliament for a vote has also caused outrage among rights groups in Turkey. The Government had to withdraw the motion in response to this reaction. Since the beginning of the Covid-19 pandemic the Government has once again been preparing to put a possible amnesty for child abusers through marriage on the country's agenda.[270]

Women who are subjected to male violence need economic support to build an independent life free from the cycle of violence and away from it. Article 18 of the Istanbul Convention provides that State Parties are under an obligation to aim for the empowerment of women subjected to violence so that they can gain economic independence. The Act on Protection of the Family and the Prevention of Violence Against Women considers the situation of working women subjected to violence and sets out special measures, such as a change in the workplace (Article 4/1A), a restraint order covering the workplace (Article 5/1C) and/or financial support for childcare facilities (Article 3/1D).[271] However, there is no mechanism to prioritise women who are impoverished due to violence accessing economic aid and all other services as fast as possible.

Another problem with women's employment is that the need for children's nurseries is often not met. It is virtually impossible to access free nursery services, especially for children under three years age. Article 50 of the Bylaw on the establishment and operation principles of private nurseries and daycare centres and private children's clubs[272] provides that, the children of women who stay or had stayed at shelters are entitled to free care services. According to this article, 3 % of the capacity of such institutions is allocated to the Provincial Directorate. In the previous Bylaw of 8 October 1996,[273] under the same article, a larger share was allocated for free quotas: 'The Provincial Directorate will utilise 5 % free quota, for at least two children, in accordance with the capacities of the institutions' (Article 27). In the new Bylaw, the quota was reduced from 5 % to 3 %, and the quota for at least two children utilising free services was eliminated. Thus, private nurseries, daycare and children's clubs with capacities of less than 34 children are not obliged to allocate free legal quotas to the children of women at shelters.

Women who do not have the means to start a life away from violence, or cannot afford a new place of abode and need economic support are forced to go into shelters due to a lack of alternatives. According to the report of the Istanbul Violence Prevention and Monitoring Centres[274] at the provincial coordination meeting held in Istanbul in 2016, 61.49 % of the women applying to shelters do so because of economic reasons.[275]

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[270] BBC Turkey (2020) 'Can amnesty come to the fore again for child abuse crimes that are excluded from the scope of the Act No 7242?',(15 April 2020) https://www.bbc.com/turkce/haberler-turkiye-52296798; see section 3.1.4 above.

[271] Bakirci, K. (2008), 'University Workers: Psychological Violence and Mobbing at the Universities' (*Üniversite Çalışanları ve Üniversitede Psikolojik Şiddet ve Yıldırma (Mobbing)*), in S.Akyol, M.K.Coskun, Z.Yilmaz, M.B.Aydin and R.Altunpolat (eds.), *Donusturulen Universiteler ve Egitim Sistemimiz* Egitim-Sen Yayinlari, Ankara; Bakirci, K. (2008), 'Violence Against Children in the Workplace' (*İşyerinde Küçüklere Yönelik Şiddet*), *Guncel Hukuk Dergisi*, April, 4-52.

[272] Bylaw on the establishment and operation principles of private nurseries and daycare centres and private children's clubs (*Özel Kreş ve Gündüz Bakımevleri İle Özel Çocuk Kulüplerinin Kuruluş ve İşleyiş Esasları Hakkında Yönetmelik*), *Official Journal* 30.4.2015 No. 29342.

[273] Bylaw on the establishment and operation principles of private nurseries and daycare centres and private children's clubs (*Özel Kreş ve Gündüz Bakımevleri İle Özel Çocuk Kulüplerinin Kuruluş ve İşleyiş Esasları Hakkında Yönetmelik*), *Official Journal* 8.10.1996 No. 22781.

[274] Bylaw on violence prevention and monitoring centres (*Şiddet Önleme ve İzleme Merkezleri Hakkinda Yönetmelik*), *Official Journal* 17.3.2016 No. 29656.

[275] See Istanbul Convention Monitoring Platform of Turkey (*Istanbul Sozlesmesi Turkiye İzleme Platformu*), (2017), *Shadow NGO Report on Turkey's First Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence for submission to the GREVIO Committee*, September. https://rm.coe.int/turkey-shadow-report-2/16807441a1.

The Bylaw on opening and operating women's guest houses[276] prepared in coordination with non-governmental organisations came into force in January 2013. However, considering the sheer number of women who are subjected to violence in the population of Turkey it is clear that the women's shelters are insufficient.[277] Under the Municipality Act of 2005,[278] municipalities with a population of 50 000 and above were obliged to open women's shelters. The 2005 act was revised in 2012 and the population limit was increased to 100 000 (Article 14). The provision under the previous act should be reinstated so that municipalities with a population of 50 000 and above are obliged to open shelters.

On the other hand although the Bylaw on the establishment and management of women's guest houses indicates that shelters are open to women and children subjected to violence, there exist many exceptions to this provision. According to the Bylaw, support services for women with boys over 12 years old and children with disabilities are to be conducted not in shelters, but in a house preferably close to the shelter whose expenses are covered by the budget of the respective shelter. However, this article is almost never implemented. Women applying to benefit from this right are informed that there is no such state support.[279] Apart from this obvious obstacle to the implementation of a right included in the regulations, it is known that, in some cases, boys over 12 years old are separated from their mothers in the shelter and sent to childcare centres affiliated to the Ministry of Family and Social Policies. In many cases, women prefer to stay in places where they are subjected to violence so as not to leave their children. It is clearly indicated that women over 60 are not received in shelters. Women over 60 subjected to violence are directed to the General Directorate of People With Disabilities and Elderly Persons (of the Ministry of Family, Employment and Social Services) and are thus deprived of specialised support services.[280]

Under the heading of prevention, the Convention requires the promotion of changes in prejudices, gender stereotypes and gender-biased customs and traditions, to eliminate discrimination against women (Article 12).[281] It states that State Parties must take the

[276] Bylaw on the establishment and management of women's guest houses (*Kadın Konukevlerinin Açılması ve İşletilmesi Hakkında Yönetmelik*) *Official Journal* 5.1.2013 No. 28519. Feminists in Turkey use the term 'shelter' because women who aspire to stay away from the battlefield at home come to these places to take shelter in a safe environment. As the term 'shelter' reveals the systematic violence of men in the society, the bylaw uses the term 'women's guest house'.

[277] However, in practice, only 40 out of 237 municipalities with a population of over 100 000 have a shelter as of 2017 and only 28 of them actively offer shelter support. Although the number of shelters is far below the required level, two shelters have been shut down or put out of commission by trustees under the authority of statutory decrees. Some municipalities shut down their shelters for 'renovation' purposes or discharged experienced social workers of these institutions. Although the GREVIO report submitted by Turkey declares the existence of four shelters administered by NGOs, the actual number is just one as of January 2017. Three shelters affiliated to NGOs serving women subjected to human trafficking were forced to be closed down due to lack of budget allowance and the non-renewal of protocols (See Istanbul Convention Monitoring Platform of Turkey (*Istanbul Sozlesmesi Turkiye İzleme Platformu*), (2017), *Shadow NGO Report on Turkey's First Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence for submission to the GREVIO Committee*, September. https://rm.coe.int/turkey-shadow-report-2/16807441a1).

[278] Municipality Act (*Belediye Kanunu*), No. 5393, *Official Journal* 13.7.2005 No. 25874.

[279] See Istanbul Convention Monitoring Platform of Turkey,(2017), *Shadow NGO Report on Turkey's First Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence for submission to the GREVIO Committee*, September. https://rm.coe.int/turkey-shadow-report-2/16807441a1.

[280] See Istanbul Convention Monitoring Platform of Turkey (2017), *Shadow NGO Report on Turkey's First Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence for submission to the GREVIO Committee*, September. https://rm.coe.int/turkey-shadow-report-2/16807441a1.

[281] CEDAW Article 5(a) states that States Parties must take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. The CEDAW Committee expressed concern about Turkey in its conclusions on the report of the 7th term on 25.7.2016 as follows: 'The Committee is concerned about the continuity of radical and discriminatory stereotypes concerning the roles and responsibilities of women and men in the family and society. These judgments over-emphasie the

necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men (paragraph 1); State Parties shall ensure that culture, custom, religion, tradition or so-called 'honour' shall not be considered as justification for any acts of violence covered by the scope of this Convention (paragraph 5). However, in cases of violence against women (such as honour killings, rape, forced marriage etc), judges using 'discretion' to impose reductions in punishment is a major problem.[282]

The family courts, which were established in 2003,[283] hear trials that arise from the enforcement of the Act on protection of the family and the prevention of violence against women in addition to the cases related to family law. Considering the workload of the family courts, specalised courts on violence against women that will examine only the violent cases in detail should be established.[284]

The Istanbul Convention prohibits mandatory alternative dispute resolution processes including mediation and conciliation, in relation to all forms of violence covered by the scope of the Convention (Article 48(2)). Although voluntary ADR might present advantages in some criminal and civil law cases, it can have negative effects in cases of violence against women, in particular if participation in such alternative dispute resolution methods are mandatory and replace adversarial court proceedings. Victims of gender based violence can never enter the ADR processes on a level equal to that of the perpetrator. It is in the nature of those offences that such victims are invariably left with a feeling of shame, helplessness and vulnerability, while the perpetrator exudes a sense of power and dominance. To avoid the re-privatisation of violence against women and to enable the victim to seek justice, it is the responsibility of the state to provide access to adversarial court proceedings presided over by a neutral judge and which are carried out on the basis of the national laws in force. However in Turkish law, mandatory conciliation is used in criminal law (Criminal Procedure Act, Articles 253, 254, 255) and mandatory mediation is used in employment law (Labour Courts Act, Article 3). In 2018, a draft law on mandatory consultation and implementation of conciliation in cases of divorce was introduced.[285] These regulations are in violation of the Istanbul Convention.[286] ADR also prevents the monitoring of the international conventions on gender equality that have been ratified by Turkey.[287]

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traditional roles of women as mothers and wives and thus undermine women's social status, autonomy, educational opportunities and professional careers, and at the same time constitute the main cause of sexual violence against women (par. 28).' http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fTUR%2fCO%2f7 &Lang=en.

[282] See GREVIO (2018), *GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Turkey*, Secretariat of the monitoring mechanism of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Council of Europe, Strasbourg cedex, 15 October. https://rm.coe.int/eng-grevio-report-turquie/16808e5283.

[283] The Establishment, Duties and Procedure of Family Courts Act (*Aile Mahkemelerinin Kuruluş, Görev ve Yargılama Usullerine Dair Kanun*), (No. 4787), *Official Journal* 18.1.2003 No. 24997.

[284] See https://www.sabah.com.tr/gundem/2019/02/01/arabulucular-yargi-yukunu-70-hafifletti; https://www.dw.com/tr/aile-hukukunda-arabulucu-tart%C4%B1%C5%9Fmalar%C4%B1-kad%C4%B1na-y%C3%B6nelik-ayr%C4%B1mc%C4%B1l%C4%B1%C4%9F%C4%B1-k%C3%B6r%C3%BCkler/a-48071832; https://www.memurlar.net/haber/7489/aile-mahkemelerinde-son-durum-dosya-cok-psikolog-ve-pedagog-atamalari-yapilmadi-yargiclar-bosamak-istemiyor.html.

[285] See https://www.haberturk.com/aile-arabuluculugu-sisteminin-ayrintilari-belli-oldu-aile-arabuluculugu-sistemi-nedir-1702998.

[286] Bakirci, K. (2015), 'Istanbul Convention (Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence)' (*İstanbul Sözleşmesi*), *Ankara Barosu Dergisi*, Yil:73, Sayi:2015/4; Bakirci, K. (2019), 'Towards an Alternative Employment Law Through the Use of Alternative Dispute Resolution by Mediation' ("*Alternatif" Bir Uyuşmazlik Çözüm Yolu (Arabuluculuk) Araciliğiyla "Alternatif" İş Hukukuna Doğru*"), *Turkiye Barolar Birligi Dergisi*, 140.

[287] See Bakirci, K. (2019), 'Towards an Alternative Employment Law Through the Use of Alternative Dispute Resolution by Mediation', ("*Alternatif" Bir Uyuşmazlik Çözüm Yolu (Arabuluculuk) Araciliğiyla "Alternatif" İş Hukukuna Doğru*"), *Turkiye Barolar Birligi Dergisi*, 140.

10.1.3 National provisions on online violence and online harassment

There is no special regulation targeting discrimination in the online environment. General provisions of the PC on the violation of the right to privacy, protection from threat, blackmailing, and harassment are applicable to online harassment as well. Research shows that women subjected to stalking also suffer from digital violence in most cases. It is observed that men use stalking methods such as constantly calling on the phone, harassing the woman via constantly sending messages or e-mails, monitoring social media accounts, opening social media accounts on behalf of the women, disclosing private information, and sending messages or e-mails to friends, boss or family members of the woman. This has an adverse impact on women's relations with their family and friends and their work life, condemning women to live with violence.[288]

10.1.4 Political and societal debate

Since 2010, there has been considerable difficulty in enforcing the laws in question and a serious regression in the intensive interventions to change the egalitarian aspects and articles of these laws. The legal regulations that were introduced to maintain equality are being turned into sexist practices, concepts are being rendered empty and anti-women practices are being undertaken.

The most concrete example of this approach can be found in the May 2016 report[289] prepared by 'The Parliament Research Commission Founded to Investigate the Factors Which Threaten the Unity of Family and Divorce Incidents and to Make Recommendations Concerning the Strengthening of the Institution of Family,' established in the Grand National Assembly of Turkey at the outset of 2016. The report suggested a huge backlash in women's and children's rights. Although it was clearly stated as being against the Istanbul Convention, among the suggestions were the compulsory enforcement of some alternative dispute resolution methods such as mediation and negotiation in cases of domestic violence, and closed sessions in courts for cases relating to family law for the 'protection of the privacy of family.' The report also suggested limiting women's right to alimony by treating the duration of marriage as a criterion and appointing religious faculty graduates as family consultants in order to give such consultancies a religious outlook and perspective. Furthermore, the practice of chemical castration as a punishment for crimes of sexual assault, harassment and exploitation or intercourse with a minor was first mentioned in this report.[290] Another suggestion of the report related to Article 103 of the PC, which regulates the crimes related to the sexual abuse of children.[291] It is clear that this report did not simply remain as just a report given that attempts were made to put the suggestions of the commission into law. Independent women's organisations successfully prevented the motions from passing into law but they are not as optimistic about the other suggestions of the Divorce Commission not becoming law in the future.

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[288] See Istanbul Convention Monitoring Platform of Turkey, (2017), *Shadow NGO Report on Turkey's First Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence for submission to the GREVIO Committee*, September. https://rm.coe.int/turkey-shadow-report-2/16807441a1.

[289] Turkish Grand National Assembly (2016) *Report of the Parliament Research Commission Founded to Investigate the Factors Which Threaten the Unity of Family and Divorce Incidents and to Make Recommendations Concerning the Strengthening of the Institution of Family* (*Aile Bütünlüğünü Olumsuz Etkileyen Unsurlar ile Boşanma Olaylarının Araştırılması ve Aile Kurumunun Güçlendirilmesi İçin Alınması Gereken Önlemlerin Belirlenmesi Amacıyla Kurulan Meclis Araştirmasi Komisyonu Raporu*) 14.5.2016 https://www.tbmm.gov.tr/sirasayi/donem26/yil01/ss399.pdf.

[290] Bylaw concerning treatment for prisoners of crimes against sexual ımmunity and other liabilities (*Cinsel Dokunulmazlığa Karşı Suçlardan Hükümlü Olanlara Uygulanacak Tedavi ve Diğer Yükümlülükler Hakkında Yönetmelik*), *Official Journal* 26.7.2016 No. 29782. For detailed information, see *Kadınlarla Mor Bülten*, October 2016, Issue 26, 'Kimyasal Hadım Yasası Cinsel Saldırı Suçlarını Meşrulaştırıyor' https://kadinininsanhaklari.org/wp-content/uploads/2018/06/Mor-Bulten-26.pdf,

[291] EŞİTİZ, 'Farkında Mıyız', press release http://www.keig.org/kadin-orgutlerinden-tbmm-bosanma-komisyonu-raporuna-tepki-yagiyor/.

In recent months, the Istanbul Convention became controversial and some politicians claim that Turkey should withdraw from the Convention because of the stipulation that violence against women is 'a form of gender-based violence that is committed against women because they are women'. The Istanbul Convention is gendered and is also individual centred. This contrasts with the way in which domestic violence is generally treated in Turkey. According to some academics:

> 'Despite always being driven by women's groups, policies that emerged tend to disregard its link to gender equality and talk about it as it would be a more general human rights issue, a child protection or a family protection issue, or a social policy issue. The explicit language used by the (Istanbul Convention) challenges this gender neutral path of policy development.'[292]

Moreover, there has been strong opposition to its definition of 'gender'. Debates on the Convention have escalated into mass denial as politicians saw the use of the word 'gender' in the context of 'social roles, behaviours, activities and characteristics that a particular society considers appropriate for women and men' as indicating the recognition of 'homosexuality'.[293]

10.2 Ratification of the Istanbul Convention

Turkey became the first country to have signed (on 11 May 2011) and ratified (on 14 March 2012) the Convention.

[292] Conny Roggeband and Andrea Krizsán, authors of *The Gender Politics of Domestic Violence: Feminists Engaging the State in Central and Eastern Europe,* quoted in IntelliNews (2018) 'Domestic Violence Treaty Rattles Governments Across Eastern Europe' 31.5.2018, https://www.intellinews.com/domestic-violence-treaty-rattles-governments-across-eastern-europe-142498/.

[293] See https://m.bianet.org/bianet/toplumsal-cinsiyet/210530-istanbul-sozlesmesi-kadinlarin-yasam-hakki.

11 Compliance and enforcement aspects (horizontal provisions of all directives)

11.1 General (legal) context

11.1.1 Surveys and reports about the particular difficulties related to obtaining legal redress

There are no relevant surveys and reports.

11.1.2 Other issues related to the pursuit of a discrimination claim

While access to courts is ensured in Turkey, the level of gender equality litigation is very low. In addition to the low levels of compensation that may act as a deterrent to engaging in judicial proceedings, the difficulties and barriers that victims of sex discrimination encounter, which may explain the low level of litigation, relate to lack of awareness and knowledge about equality law, women's lack of experience and custom of defending their own rights, the lack of skilled, experienced advice and assistance, traditional gender stereotypes that entail a greater degree of tolerance, the stigma of being a 'troublemaker' associated with such cases, the fear of retaliation or victimisation, the length of proceedings, a lack of trust or faith in the courts/legal system, claimants' lack of confidence that they will be believed and the difficulty of proving sex discrimination.

11.1.3 Political and societal debate and pending legislative proposals

For the time being there are no new rules under discussion.

11.2 Victimisation

A reporting person may be victimised as a reaction to a complaint or to proceedings aimed at enforcing compliance with the law.[294] Victimisation (retaliation) may take different forms, such as mobbing (moral or psychological harassment), bullying, stalking, dismissal, etc.[295]

The Istanbul Convention obliges State Parties to prevent secondary victimisation (Articles 15 and 18).

Employment legislation prohibits retaliatory dismissal (victimisation) related to the filing of a complaint or participation in proceedings against an employer involving an alleged violation of laws or regulations, or recourse to competent administrative authorities (EA, Articles 17/V and 18, MEA, Article 16/d(1), OA, Article 434, PEA, Article 11/4, and OHSA, Article 13). Under the EA (Articles 5, 17 and 18), Article 10 of the CSA and the HREIA, protection is available against retaliation if it takes the form of discrimination or discriminatory dismissal as a reaction to a complaint or to proceedings.

Under the HREIA, victimisation is the adverse reaction to a complaint or to proceedings aimed at enforcing compliance with the equality principle and is considered to be a type of discrimination. Article 4/2 states that if persons who have started or participated in administrative or legal proceedings in respect of the principle of equality, and the prevention of discrimination, are subjected to prejudicial treatment because of those proceedings, then such prejudicial treatment is considered to be a type of discrimination.

[294] Bakirci, K. (2014), 'Whistleblowing: A Turkish Perspective', *ISLSSL*, XI European Regional Congress, Dublin, Ireland, 17-19 September.

[295] See Bakirci, K., (2019), 'Work-Related Whistleblowing in Democratic Societies Context: A Comparative Study of International, EU and Turkish Law', *Journal of Financial Crime*, 26(4).

In addition, the general provisions of the Civil Code (Article 2), and PC are applicable to victimisation.[296]

Article 2 of the Civil Code provides that every person must act in good faith in the exercise of his/her rights and in the performance of his/her obligations, and that the manifest abuse of a right is not protected by law.

Some forms of retaliation may constitute crimes under the PC, such as bodily harm (Articles 86-89), torture (if the perpetrator is a public officer, Article 94), torment (Article 96), hate speech (Article 122), offences against honour (Articles 125-131), offences against privacy and secrecy of life (Articles 132-140), and offences against freedom (e.g. violation of freedom of occupation and employment (Article 117), prevention of use of trade union rights (Article 118)) etc.

However, it seems that in the last 20 years there have not been many case dealing with discrimination. Therefore it is likely that there is a structural problem that creates a situation where woman who have been discriminated against do not dare to file complaints with the competent courts.

11.3 Access to courts

Article 36 of the Constitution states that everyone has the right to a legal remedy either as claimant or defendant and the right to a fair trial before the courts. Therefore, everyone has the right to due legal judgment and public hearing and the courts serve as the key enforcement mechanism against the violation of the legislation.

Turkey recognised the right of individuals to petition the ECtHR in 1987 and the mandatory judicial power of the ECtHR in 1990. For this reason, all Turkish citizens who have exhausted domestic remedies have the opportunity of applying to the ECtHR in respect of a violation of their rights.

An amendment made to the Constitution in 2010 (Article 148), opened up the possibility for individual application to the Constitutional Court. Since 2012, any person whose fundamental rights and freedoms, as set forth in the ECHR and guaranteed by the Constitution, may have been infringed by a public authority can apply to the Constitutional Court before filing an application to the ECtHR. Where an individual has been exposed to gender discrimination, they can file an individual application to the Constitutional Court.

In some disputes, the parties are not permitted by law to apply to court before exhausting alternative dispute resolution (ADR) processes, while in some other disputes, the parties can voluntarily[297] apply to have their dispute settled through ADR. For instance, it is mandatory to undergo mediation in disputes between an employee and an employer regarding employee receivables (such as the wages the employee was owed, any pay in lieu of notice if the employee was dismissed without notice, pay for any holiday if the employee did not receive it before s/he was dismissed, any bonus or expenses the employee was entitled to etc.), and reinsatatement claims, before filing a lawsuit in the matter (Labour Courts Act, Article 3).[298] If there is an arbitration clause in the collective

[296] Bakirci, K. (2012), *Searching for Gender Equality and the Non-Discrimination Principle Based on Gender in Employment in International, European Union, United States and Turkish Law* (*Uluslararasi Hukuk, AB ve ABD Hukuku Ile Karsilastirmali Calisma Yasaminda Kadin Erkek Esitligi Arayisi, Cinsiyet Ayrimciligi Yasagi ve Turkiye*), Seckin Yayinlari, Ankara, June.

[297] See section 11.9, below.

[298] See section 10, above; Labour Courts Act (*İş Mahkemeleri Kanunu*), No. 7036, 12.10.2017; see Bakirci, K. (2015), 'Istanbul Convention (Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence)' (*İstanbul Sözleşmesi*), *Ankara Barosu Dergisi*, Yil:73, Sayi:2015/4; Bakirci, K. (2019), 'Towards an Alternative Employment Law Through the Use of Alternative Dispute Resolution by Mediation' ("*Alternatif" Bir Uyuşmazlik Çözüm Yolu (Arabuluculuk) Araciliğiyla "Alternatif" İş Hukukuna Doğru*"), *Turkiye Barolar Birligi Dergisi*, 140.

labour agreement or if the parties so agree, an invalid dismissal claim may be referred to private arbitration intead of a labour court (Employment Act, Article 20/1).[299]

On the other hand, complainants of discrimination that are not covered by the EA[300] and who have not been granted the right to access to the courts are granted only an alternative means of redress under the HREIA.[301]

Mandatory alternative means of redress violate the right to a fair trial and the right to an effective remedy referred to in the Constitution of Turkey (Articles 36 and 37), ECHR (Articles 6 and 13),[302] the UN Declaration on Human Rights (Article 8) and the UN Convention on Civil and Political Rights (Article 14(1)). It is the responsibility of the state to enable all citizens to seek justice in adversarial court proceedings presided over by a neutral judge and which are carried out on the basis of the national laws in force.[303] Furthermore, according to Article 48(1) of the Istanbul Convention, mandatory alternative dispute resolution and sentencing are prohibited in relation to all forms of violence covered by the scope of the Convention. This provision aims to take into account the negative effects that alternative methods can have in such cases, especially when they replace adversarial court proceedings.[304]

11.3.1 Difficulties and barriers related to access to courts

While the obstacles in access to justice are common for various groups, women may suffer more frequently from these obstacles and have a difficult time in overcoming them due to other spaces/structures that produce inequality.

Women may experience difficulties in gaining access to judicial institutions. Poverty and lack of education is a significant burden. Moreover, women are faced with institutional barriers. Male-dominated proceedings and institutions, as well as male officers including judges, prosecutors and the police, aggravate the complaints of women or the follow up process, alongside women's fears, such as shame or being stigmatised particularly in relation to issues such as domestic violence and rape. Furthermore, most cases of sex discrimination and other forms of harassment/violence take place in isolation and in verbal form. This means that victims of sex discrimination think that they cannot prove the case and so may end up not making a complaint. Domestic violence against women, men, children, and the elderly is also a hidden phenomenon. Break-ups and divorces do not mean the termination of an abusive relationship or physical safety; many women continue to suffer physical and sexual violence from former husbands/partners.

11.3.2 Availability of legal aid

It is possible to observe that the challenges related to disadvantaged groups to access legal assistance apply to women as well. For instance, because women are already subject to inequalities in social life, it is inevitable that they come across difficulties while trying to gain access to justice. Istanbul Bar Association's data for 2008-2010 show that the number of women applicants to legal aid is nearly three times higher than the number of men applicants.[305] This can also be interpreted as evidence of the fact that women have greater need for such services than men.

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[299] Employment Act (*İş Kanunu*), (No. 4857), *Official Journal* 10.6.2003.
[300] See section 2.2, above.
[301] See section 8.7, above.
[302] According to the ECtHR, these mechanisms are perfectly valid as long as their decisions may ultimately be supervised by a judicial body and conform to a general requirement of fairness (*Peck* v. *the United Kingdom*, No. 44647/98, judgment of 28.1.2003).
[303] See section 11.3, above.
[304] See section 10, above.
[305] See Berk, S.K. (2011), *Access to Justice in Turkey: Indicators and Recommendations*, TESEV Publications. https://www.tesev.org.tr/en/research/access-to-justice-in-turkey-indicators-and-recommendations/.

Legal aid in civil procedure is covered in the Civil Procedure Act[306] and the Attorneys Act.[307] Under the Attorneys Act, legal aid aims to ensure that those who are unable to meet an attorney's fee and court expenses are able to use legal services. The Civil Procedure Act requires people seeking legal aid to submit a summary of their indictments, the necessary evidence to support their indictments and the documentation on their financial status certifying that they do not have the financial means to cover judicial fees. In addition, Article 120 of the Civil Procedure Act provides that the claimant has to deposit the relevant judicial fees and the amount of advance payments determined by the Ministry of Justice to the court cashier before filing a case. It is highly possible that this regulation has a negative effect on people's access to justice.

The mandatory legal aid in criminal actions is regulated separately from the Attorneys Act. In certain cases set out in the Criminal Procedure Act, bar associations may appoint defence counsels under the Criminal Procedure Act Practice Services. It provides 'the appointment of a mandatory legal aid lawyer in the investigation and prosecution of crimes that are punished by a term of imprisonment with a minimum of more than five years'. The regulation means that a significant majority of cases are left outside the scope of mandatory criminal legal aid.

On the other hand, under the Act on protection of the family and the prevention of violence against women, no charges/costs/expenses can be demanded from victims of violence in cases of recourse to the courts or public bodies/institutions or the execution of decisions (Article 20/1). Furthermore, there may be provisional financial assistance. If the court deems it necessary, for the provisional period, victims of violence will be paid the net daily amount of the minimum wage for each day (Article 17/1). If the victim of violence is not covered by general health insurance, s/he will be covered without any means test (Article 19/1).

There are serious problems regarding legal aid and the involvement of NGOs and non-governmental bodies in judicial proceedings or lawsuits in relation to women victims.

The Ministry of Family Employment and Social Services has established a hotline – ALO 183 – that can be called 24 hours a day. This centre directs the callers to the nearest services providing legal aid and socio-psychological assistance, support centres, shelters and Centres for the Prevention and Monitoring of Violence. The remit of such centres[308] is to provide independent assistance to the victims of sexual harassment in pursuing their complaints.

There are legal aid regulations for each bar association in Turkey. In line with the legal aid regulations of the Union of Bar Associations of Turkey regarding free lawyer support of bars, anyone who cannot afford legal aid and proceedings fees can benefit from free legal aid. The documents that are required in order to apply for judicial support change according to the different bar associations, and there might also be either facilitating or complicating conditions. An increase in the number of required documents might complicate applications for judicial support by women who have limited or no option to get out of the house. It depends on the bar association whether it will appoint a free lawyer in emergencies in cases when the victim cannot submit the required documents. Bar associations are supervised by the Ministry of Justice in respect of the budget they allocate to legal aid services. Accordingly, women cannot benefit from free legal services and cannot have a lawyer in their search for justice when they work, even if it is for minimum

[306] Civil Procedure Act (*Hukuk Muhakemeleri Kanunu*), No. 6100, *Official Journal* 4.2.2011, No. 27836.
[307] Attorneys Act (*Avukatlık Kanunu*), No. 1136, *Official Journal* 7.4.1969, No. 13268.
[308] Centres for Prevention and Monitoring of Violence *(Şiddet Önleme ve İzleme Merkezleri)* are centres for preventing and surveillance of violence. They are attached to the Ministry of Family and Social Policies and are established in city centres. Working on a 24/7 basis, they provide psychological, social and economic guidance, legal aid and counselling, as well as guidance and health services to the victims of violence (Bylaw on Centres for Prevention and Monitoring of Violence (*Şiddet Önleme ve İzleme Merkezleri Hakkında Yönetmelik*), *Official Journal* 17.3.2016).

wage, or have a car or house registered in their name – and even, in some cases, if they are unemployed.

The Ministry of Family Employment and Social Services has the right to become involved (i.e. it has legal standing), if it deems this to be necessary, in all types of lawsuits against actual/threats of violence against women, children or family members (Act on protection of the family and the prevention of violence against women, Article 20/2). There are administrative entities, especially Centres for Prevention and Monitoring of Violence, that can provide independent assistance to the victims of sexual harassment in pursuing their complaints.

Under Turkish law, only trade unions can engage in judicial and/or administrative proceedings for their members (Employee Trade Unions and Collective Bargaining Act, Article 26/2; Public Personnel Trade Unions and Collective Bargaining Act, Article 19/2(f)). There is no provision allowing women's associations and/or organisations to intervene in civil and/or criminal proceedings in relation to women victims. The intervention of women's associations and/or organisations has been constantly rejected by the Turkish courts. The involvement of women's associations and organisations in civil and criminal proceedings is important, because by their engagement, feminist values and perspectives can be included in the judge's decision-making. For example, although the amendment to the Penal Code in 2005 stopped the passing of reduced sentences for honour killings, in many honour killing cases the defence of 'unfair provocation' has been used by judges to reduce the killer's sentence. However it has not been used in those cases that proceeded under the scrutiny of women's groups. Therefore the incorporation of viewpoints and perspectives from sections of society that remain underrepresented on the bench might improve the quality of judicial decisionmaking.[309]

11.4 Horizontal effect of the applicable law

11.4.1 Horizontal effect of relevant gender equality law

Turkey is a candidate country to the EU and therefore individuals cannot invoke EU law before courts.

However the courts and other non-judicial bodies are bound to enforce the international conventions on gender equality that have been ratified by Turkey (Constitution, Articles 10 and 90).

11.4.2 Impact of horizontal direct effects of the charter after *Bauer*

The effects of the charter are not relevant.

11.5 Burden of proof

The burden of proof is different in criminal law, administrative law, civil law and employment law cases.

As a general rule in criminal and administrative law, the burden of proof of the discriminatory behaviour rests on the claimant.

According to the general principle of the Civil Code (Article 6), the burden of proof that there has been a breach of the principle of equality rests on the claimant.

In employment law the burden of proof is formulated differently.

[309] See Hunter, R., McGlynn, C., Rackley, E. (2010) 'Feminist judgments: An introduction' in Hunter, R., McGlynn, C., Rackley, E. (eds.), *Feminist judgments: From theory to practice*, Oxford, Hart Publishing, pp. 3–29.

Article 5 of the EA provides a special rule on the burden of proof in cases of discrimination based on gender. Under the EA Article 5, the burden of proof in regard to the violation of the non-discrimination provisions of the article in the conclusion, conditions, execution and termination of an employment contract due to the employee's sex or pregnancy by the employer rests on the employee. However, if there is a strong likelihood of such a violation, the burden of proof that the alleged violation has not happened will rest on the employer. Therefore, the burden of proof is in favour of the employee who alleges that s/he is a victim of discrimination. This arrangement is in line with the EU directive.

On the other hand, in dismissal cases the burden of proof is formulated differently for those who benefit from the job security provisions of the EA (Articles 18-21) and those who do not.

According to the first sentence of Article 20/2 of the EA, the burden of proving that the termination was based on a valid reason will rest on the employer who is in the scope of Articles 18-21 of the EA. If the employee (who is in the scope of Articles 18-21 of the EA) shows that there is a strong likelihood of such a violation, the burden of proof that the alleged violation has not materialised rests on the employer. However although the first sentence of Article 20/2 reverses the burden of proof in favour of the employee (i.e., the burden of proof is placed on the employer), the second sentence states that the burden of proof will rest on the employee if s/he claims that the termination was based on a reason different from the one relied on by the employer. In other words, if the employer fails to establish the grounds for dismissal of the female employee, the female employee then has to prove a case that the termination was based on gender. By this second sentence the most important change that was made in the new EA on reversing the burden of proof has been undermined. In addition, the fact that the burden of proof is formulated differently for those who benefit from job security and those who do not benefit from job security is itself a form of discrimination.[310]

The same rule applies to the employee who may file a lawsuit against unjustified dismissal according to Articles 18, 20 and 21 by claiming that the termination was not in conformity with the subsections of Article 25 of the EA.

The burden of proof rests on those employees who are outside the scope of the job security provisions of the EA (Articles 18-21). This means that the burden of proof that the termination of a woman employee's contract is due to an abusive exercise of the right to terminate[311] rests on the woman employee, even though there is a gender discrimination element in the abusive exercise. This is a heavy burden for the woman employee.

The rule on the burden of proof cited in Article 5 of the EA is laid down in the HREIA[312] as regards the rule on the burden of proof in sex discrimination cases covering all stages of employment (including job advertisements, the application process, access to employment, access to all types and to all levels of vocational guidance, vocational training, vocational retraining, practical work experience, employment relationship and termination of employment) (Article 6/1), as well as self-employment, and goods and

[310] See Bakirci, K. (2010-2011), 'Gender Equality in Employment in Turkish Legislation with Comparisons to EU and International Law', in *Journal of Workplace Rights*, Vol. 15, No. 1-2; Bakirci, K. (2012), *Searching for Gender Equality and the Non-Discrimination Principle Based on Gender in Employment in International, European Union, United States and Turkish Law* (*Uluslararası Hukuk, AB ve ABD Hukuku İle Karşılaştırmalı Çalışma Yaşamında Kadın Erkek Eşitliği Arayışı, Cinsiyet Ayrımcılığı Yasağı ve Türkiye*), Seckin Yayinlari, Ankara, June.

[311] See Bakirci, K. (2010-2011), 'Gender Equality in Employment in Turkish Legislation with Comparisons to EU and International Law', in *Journal of Workplace Rights*, Vol. 15, No. 1-2; Bakirci, K. (2012), *Searching for Gender Equality and the Non-Discrimination Principle Based on Gender in Employment in International, European Union, United States and Turkish Law* (*Uluslararası Hukuk, AB ve ABD Hukuku İle Karşılaştırmalı Çalışma Yaşamında Kadın Erkek Eşitliği Arayışı, Cinsiyet Ayrımcılığı Yasağı ve Türkiye*), Seckin Yayinlari, Ankara, June.

[312] See section 11.7, below.

services. This complies with the EU law. Under the HREIA, the burden of proof shifts to the respondent when there is a prima facie case of discrimination (Article 21).

11.6 Remedies and sanctions

11.6.1 Types of remedies and sanctions

Violations of provisions relevant to gender equality in employment may end with the termination of the employment contract of the perpetrator, disciplinary sanctions for the perpetrator, fines for the employer or his/her representatives, reinstatement and/or compensation for the claimant who has been subjected to discrimination or dismissed or has been pressured to resign. The reporting employee also has the right to refrain from working (OA 97) or to terminate his/her employment contract based on just cause (EA Article 24/II).

With regard to the legislation on tort law, the remedies are physical and/or moral damages. The claimant can also ask the civil court to prevent a threat of wongdoing, to order the cessation of an ongoing wrongdoing or to establish the unlawfulness of such an infringement even where it has already ceased. In addition to such actions, the claimant may also request that the rectification or the judgment be published or served on third parties (Civil Code, Articles 24-25; OA, Articles 49, 56 and 58).

Sex discrimination and sexual harassment by a civil servant may result in disciplinary action against the perpetrator (CSA, Articles 124-145), and/or compensation through the administrative courts.

Criminal sanctions are provided by the PC against discrimination stemming from hate, sexual assault, sexual exploitation of children, sexual intercourse with an under-aged person, sexual harassment etc. Article 216/2 of the PC also states that anyone who publicly insults (degradates) a segment of population on the basis of social class, race, religion, sect, gender or regional differences shall be sentenced to imprisonment. Moreover the penalty to be imposed will be increased by half under Article 218 of the act, if these offences are committed through the press or media. However, 'the expression of thought in the form of criticism and the expression of thoughts which do not go beyond news reporting shall not constitute an offence' (Article 218). In this context, 'public incitement' under the PC comprises both 'public dissemination' and 'public distribution'.

In the case of stalking, the claimant may ask the family court to make a restraining order prohibiting the perpetrator from doing anything described in the order under the Act on protection of the family and the prevention of violence against women (Article 5). If the perpetrator acts contrary to the restraining order, he can be subject to preventive imprisonment from 3 to 10 days. In each repeat action contrary to the decision, the period of the preventive imprisonment can be from 15 to 30 days. However, the period of the preventive imprisonment cannot be more than six months (Article 13).

Reconciliation (including the termination of the practice claimed to be discriminatory, solutions leading to the termination of such a practice, or the payment of a certain amount in compensation), fines or warnings have been provided under the HREIA (Article 25).[313]

11.6.2 Effectiveness, proportionality and dissuasiveness

There are no adequate special remedies against discrimination based on sex, pregnancy and/or maternity, family responsibilities, victimisation or sexual harassment.

[313] See section 11.7, below.

Existing remedies are not dissuasive. For example the EA provides remedies only on 'discrimination, (exercised) in the conclusion, conditions of employment contract or in the termination of the relationship due to the employee's sex or pregnancy' (Article 5), but not on discrimination in job advertisements, job interviews etc.[314] Also, the reinstatement of employees unlawfully dismissed during pregnancy or maternity leave should be the rule and, where this is not possible (e.g. if the enterprise has closed down or the employee concerned does not wish to be reinstated), adequate compensation must be available.

Not enough protection is provided for employees on fixed-term contracts or with fewer than six months' service or those working for a company with fewer than 30 employees.

There is no adequate protection against stalking. Although stalking is deemed a crime in many EU countries, it is not defined as a crime in the PC and men who are on trial due to a violation of the right to privacy, threatening, and blackmailing – all acts that can be considered as part of stalking – are not dissuasively punished. Therefore it needs to be established as a separate offence resulting in an effective and dissuasive punishment, having due regard to its possible manifestations in the digital sphere. Temporary injunction orders for the protection of women and temporary debarment of the perpetrator cannot prevent stalking. There are many cases where temporary injunction orders are constantly violated, insistent meeting demands turn into threats and bring forward other types of violence. It has been observed that temporary punishments for the violation of temporary injunction orders are not dissuasive in cases where perpetrators of this crime are on trial for crimes such as actual bodily harm and intimidation[315] (Act on protection of the family and the prevention of violence against women, Article 13).

The EA prevents courts from awarding a level of compensation that is sufficient both to deter the employer and fully compensate the victim of dismissal.

Moreover, in practice, lawsuits take a long time, sometimes to the extent that a 'delay in justice is no justice.'

11.7 Equality body

As stated above (see section 2.2) in 2016, an equality body, the Human Rights and Equality Institution of Turkey,[316] was established under the Prime Minister's Office to discharge the duties and use the authority vested in it by the HREIA and other relevant legislation. The Institution is a legal entity and has administrative, financial autonomy and a private budget. The Institution is comprised of the board and chairmanship (HREIA, Article 8).

Until the enactment of the HREIA, anti-discrimination (including harassment), victimisation or violence cases were infrequently addressed through the complaints-led

[314] See Bakirci, K., Karadeniz, O., Yilmaz, H., Lewis, E.N. and Durmaz, N. (2014), *Women in the World of Work* (*İş Dünyasında Kadın*), Volume 2, Turkonfed Yayini, Istanbul; Bakirci, K. (2012), *Searching for Gender Equality and the Non-Discrimination Principle Based on Gender in Employment in International, European Union, United States and Turkish Law* (*Uluslararası Hukuk, AB ve ABD Hukuku İle Karşılaştırmalı Çalışma Yaşamında Kadın Erkek Eşitliği Arayışı, Cinsiyet Ayrımcılığı Yasağı ve Türkiye*), Seckin Yayinlari, Ankara, June; Bakirci, K (2010-2011), 'Gender Equality in Employment in Turkish Legislation with Comparisons to EU and International Law', in *Journal of Workplace Rights*, Vol. 15, No. 1-2; Bakirci, K., Budak, G., Ozkaya, M., Yılmaz, H. and Karadeniz, O. (2007), *Women in the World of Work* (*İş Dünyasında Kadın*), Turkonfed Yayini, Istanbul; Bakirci, K. (2007), 'Gender Equality in Employment and the Necessary Reforms in Legislation and Public Policy' (*İstihdamda Cinsiyetler Arası Eşitlik ve Mevzuatta ve Kamusal Politikalarda Yapılması Gereken Değişiklikler*), *Sicil Is Hukuku Dergisi*, p. 8, December.

[315] See Istanbul Convention Monitoring Platform of Turkey (*Istanbul Sozlesmesi Turkiye İzleme Platformu*), (2017), *Shadow NGO Report on Turkey's First Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence for submission to the GREVIO Committee*, September. Available at: https://rm.coe.int/turkey-shadow-report-2/16807441a1.

[316] See https://www.tihek.gov.tr/.

model, requiring the victim to identify a discriminatory act and bring a complaint to a court. However, as stated above, the legislation lacked adequate protection.

Turkey needed a comprehensive law on anti-discrimination that was based on EU law and an equality body according to the EU law. The democratisation package of 30 September 2013 included confirmation of the establishment of an anti-discrimination equality body. The HREIA was adopted by Parliament on 6 April 2016 and became effective with its publication in the Official Journal on 20 April 2016.[317]

The HREIA attempted to improve the significant gaps and shortcomings of the anti-discrimination law. The purpose of the act is:

- to protect and improve human rights on the basis of human dignity;
- to ensure the right of individuals to be treated equally, prevent discrimination against the exercise of rights and freedoms which are determined by law and behave accordingly;
- to combat torture and ill-treatment effectively; and
- to establish the Human Rights and Equality Institution of Turkey to fulfil its duty of preventing discrimination nationally and regulate principles about its organisation, duties and authorities (Article 1).

The main purpose of the Human Rights and Equality Institution is to observe, investigate, intervene and follow up discrimination complaints, to provide guidance to victims about administrative and judicial processes and to prevent discrimination by other institutions (Articles 9/g-ğ and 11/b).

The Human Rights and Equality Board, the decision-making body of the Human Rights and Equality Institution, convenes upon a call by its chairman (Article 12/1). The board convenes with at least seven members with at least six votes in the same direction. There cannot be votes of abstention (Article 12/3). It is possible for the board to establish chambers of three members for each of its functions (Article 12/4). The board can also establish a five-member chamber to discuss and arrive at decisions on complaint applications.

The Human Rights and Equality Institution is able to investigate discrimination upon a complaint or ex-officio.

Under the act, natural persons and legal entities can file complaints of discrimination to the Human Rights and Equality Institution. Applications can be made directly to the Institution or through governors in towns and sub-governors in sub-towns. Applications are free of charge (Article 17/1).

Applications concerning allegations that are under the scope of Article 5 of the EA[318] may be lodged only if no sanction is imposed after reviewing the procedures of complaint stated under the EA and the relevant legislation (HREIA, Article 17/5). This exception is open to criticism.

Claimants must first apply to the perpetrator for correction. If the application is rejected or not responded to within a period of 30 days, they can then apply to the Institution. The Institution can accept a claim of discrimination without requiring this first step only if there is the possibility of damages that are impossible or very difficult to compensate (Article 17/2). Applications to the Institution suspend the terms of litigation and prescription (Article 17/3). In individual applications, the identities of children, of people under guardianship or protection, and of victims who make such a request, will be kept confidential (Artcle 17/6).

[317] See section 10.7, above.
[318] See section 4.3, above.

To initiate an ex-officio investigation the approval of the victim or the victim's representative has to be sought in cases where the victim can personally be determined (known) (Article 17/5).

The Institution will settle complaints within three months following the receipt of an application or following a decision to initiate an ex-officio investigation. This period can be extended by at most three months by the chairman of the Institution (Article 18/1). The party alleged to have discriminated will be asked to submit, in written form, his/her testimony. Upon request, the parties can be called upon to make oral explanations separately before the board (Article 18/2).

On its own initiative or upon request, the board can first guide the victim and the perpetrator towards a settlement and, if this fails, it will arrive at a decision based upon the testimony of the parties and the accounts of witnesses. A settlement can include the termination of the practice claimed to be discriminatory, solutions leading to the termination of such a practice, or the payment of a certain amount in compensation.

If the applications and reviews cannot be concluded through reconciliation, the minutes regarding the relevant report will be submitted to the board within 20 days. Afterwards, the board must decide whether there is violation of human rights or prohibition of discrimination (Article 18/4).

In order to provide for effective, proportionate and dissuasive penalties in cases of breaches of the discrimination prohibition, administrative fines can be imposed by the board. When imposing a fine, the gravity of the violation, the perpetrator's economic status, and multiple discrimination, if any, will be considered as aggravating factors. The board can convert the administrative fine into a warning. If a warning is issued and there is a recurrence of the violation by the same perpetrator, then the administrative fine to be determined will be increased by 50 % (Article 25/4). Perpetrators have recourse to the relevant court to challenge the administrative fine (Article 25/6).

If the board determines that the discriminatory act/action involves a crime, it will report this crime (Article 18/5).

According to the HREIA, it is possible for the Human Rights and Equality Board to invite those concerned (interested parties) to the board meeting to benefit from their views/considerations (Article 12/9).

Declarations, explanations and statements made during the settlement process cannot be used as evidence in legal proceedings (Article 18/3).

11.8 Social partners

Trade unions and confederations are obliged to observe the principle of equality and prohibitions of discrimination among its members in their enjoyment of its activities. Unions must consider gender equality in their activities (Employee Trade Unions and Collective Bargaining Act, Article 26/3 and Public Personnel Trade Unions and Collective Bargaining Act, Article 19/2).

Sound social dialogue between the social partners may foster the principle of equal treatment. However in Turkey, a well-institutionalised social dialogue has yet to flourish. Numerous mechanisms have been implemented, especially as part of the EU accession process, but their weaknesses inhibit the creation of genuine social dialogue.[319]

[319] Dinler, D.S. (2012), *Trade Unions in Turkey*, Friedrich Ebert Stiftung, https://www.igmetall.de/download/FES_Laenderbericht_Tuerkei_d59ec85d3b1af938695d17f0fc28f8a5cadabc63.pdf; Bakirci, K. (2013), 'Labour Union (Women's Participation in)', in *Encyclopedia of Women in Today's World*, Second Edition, Sage Publications, USA.

In addition, support for the enforcement of anti-discrimination law by trade unions is inadequate. The ratio of women is quite low in trade union membership. Thus, they are almost invisible in the decision-making mechanism.[320]

There are some collective labour agreements establishing a system of disciplinary sanctions, but these rules fall far short of fostering equal treatment. However, public personnel trade unions in Turkey have developed strategies to prevent domestic violence by providing disciplinary measures in collective labour agreements. Some private law employers took preventive measures through individual employment contracts and/or internal regulations.[321]

11.9 Other relevant bodies

The claimant of discrimination/harassment or victimisation in Turkey can resort to the law if they think that their rights are being abused and they can also apply to various authorities in order to have the abuses assessed or corrected.

In line with the provisions of Article 74 of the Constitution on the right of petition, citizens hold the right to submit their complaints through official petitions to Parliament or to competent authorities.

In addition, in accordance with Article 74 of the Constitution, citizens can apply to the Government auditor with complaints about the functioning of public administration bodies.

In this context, the Public Auditing Institution (Ombudsperson) was established on 14 June 2012.[322] This institution is responsible for investigating, researching and making recommendations about the conformity of all kinds of actions, acts, attitudes and behaviours of the administration with law and fairness under the respect for human rights.

Furthermore, the Presidency Communication Centre (CIMER),[323] which was established in 2015, is accessible by anyone via letter, hotline and internet for any kind of complaints or disclosures including the violation of the equal treatment or non-discrimination principles.

Victims can make a complaint to the Committee on Equality of Opportunity Between Men and Women for the Grand National Assembly of Turkey,[324] or the Human Rights and Equality Institution, as well as to the human rights boards of the cities or towns.[325]

The Committee on Equality of Opportunity Between Men and Women for the Grand National Assembly of Turkey is responsible for protecting and promoting women's rights, following international developments in ensuring gender equality, informing the Grand National Assembly of Turkey about these developments and presenting opinions about draft laws, legislative proposals and decree laws.

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[320] Yirmibesoglu, G. (2008), 'Turkish Women in Trade Union Leadership', *Ekonomik Yaklaşım*, Vol. 19, No. 69, pp. 67-88, https://www.researchgate.net/publication/273986840_TURKISH_WOMEN_IN_TRADE_UNION_LEADERSHIP.

[321] Bakirci, K. (2009), 'Can Domestic Violence be Adressed by the Labour Law Mechanisms' (*Aile İçi veya Birlikte Yaşayanlar Arasındaki Şiddete İş Hukuku Araçlarıyla Müdahale Edilebilir mi*?), *Calisma ve Toplum Dergisi*, Mart. http://www.calismatoplum.org/sayi21/bakirci.pdf.

[322] Public Auditing Institution (Ombudsperson) Act (*Kamu Denetçiliği Kanunu*), (No. 6328), *Official Journal* 29.6.2012.

[323] http://cimer.gov.tr.

[324] Act on the Committee on Equality of Opportunity for Women and Men (*Kadın Erkek Fırsat Eşitliği Kanunu)* (No. 5840) *Official Journal* 24.3.2009, No. 2717.

[325] Bylaw on human rights boards of the cities or towns (*İl ve İlçe İnsan Hakları Kurullarının Kuruluş, Görev ve Çalışma Esasları Hakkında Yönetmelik*), *Official Journal* 23.11.2003, No. 25298; Bakirci, K. (2009), 'The Public Mechanisms for Protection of Human Rights' (*İnsan Haklarının Korunmasında Kamu Hukuku Mekanizmaları*), *Eurobirlik*, p. 49, January.

The General Directorate on the Status of Women affiliated to the Ministry of Family, Employment and Social Services is responsible for promoting women's rights, improving women's social, economic, cultural, and political status, and ensuring that women enjoy equal rights and opportunities in all walks of life. It also carries out activities for women, including women and girls with disabilities.

Employees also have the right to make complaints to the Labour Inspectorate of the Ministry of Family, Employment and Social Services in relation to the violation of the anti-discrimination provisions of the EA (Articles 91-97). During an inspection, it is the duty of the employer, his/her representatives, the employees and any other person concerned to attend whenever summoned by the authorities or officials responsible for inspection, to give them any information requested, to present for their inspection and, if necessary, to hand over all relevant documents and records, to provide them with every assistance in the exercise of their functions as indicated in the first paragraph, and to comply, without any attempt at evasion, with all relevant orders and requests received in this connection (Article 92). The reports prepared by the authorities and officials empowered to follow up, supervise and inspect working conditions will be held as valid until they are disproven (Article 92). The employer or his/her representative will be liable to a fine if s/he fails to discharge the duties set out in Article 92. Persons who obstruct the performance and conclusion of the labour inspector's supervision and inspection work based on the EA as well as on other legislation are liable to a fine, in addition to any other penalty which may be inflicted by law for a different offence (Article 107).

11.10 Evaluation of implementation

In addition to the complaints-led model, the state, the relevant ministries, public bodies, courts, the Human Rights and Equality Institution, ombudsperson, employers, associations, foundations, trade unions, employers' associations, political parties, public professional organisations and NGOs have the legal burden of supporting the enforcement of anti-discrimination law. However Turkey has a long way to go to take all necessary measures to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished and provisions contrary to the principle of equal treatment in individual or collective labour agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations or any other arrangements will be, or may be, declared null and void or are amended.

11.11 Remaining issues

The lack of reliable data on discrimination complaints/cases hampers effective policy-making. The number of registered discrimination complaints is not accurate, since the data is unconsolidated and there is no exchange of information among different institutions. The establishment of a single database for monitoring and reporting on cases on discrimination is needed in order to ensure results-based outcomes and a harmonised approach.

12 Overall assessment

The following transposition problems were mentioned in this report:

1. Although it is possible to observe important improvements in line with the EU acquis on gender equality in Turkey between 2005-2010, unfortunately since 2011 gender equality has not advanced. Rather than fighting for progress, women are simply trying to hold on to laws that were passed in the previous two decades.
2. Although Turkey was one of the first states to sign and ratify the Istanbul Convention, we have seen a backlash against the Istanbul Convention. Some politicians claim that Turkey should withdraw from the convention.
3. There are problems of harmonisation with EU and international standards in the wording, personal and material scope of the Turkish employment legislation. Different strands of employment legislation and different levels of protection apply to three groups of dependent workers (employees working under a private law employment contract either in the public or private sector; civil servants; and public officials working under an administrative law employment contract in the public sector). Piecemeal amendment of related regulations has resulted in an ill-fitting patchwork of legislation. As a result, Turkish employment law falls short of EU law in relation to discrimination, harassment, sexual harassment and/or victimisation.
4. There are several gaps in or problems with the legislation related to work-life balance:
   - unpaid care leave is only recognised for biological employee mothers and there is no unpaid care leave for biological employee fathers;
   - a leave of absence for employees in the event of the illness of a dependent family member is not recognised;
   - there is no bottle-feeding leave for fathers of newly born children;
   - there is no explicit provision recognising the right to return to work for employees after taking leave; and
   - the right to part-time work and the right to switch from full-time work to part-time work is only recognised for women civil servants but not for male civil servants.
5. The Turkish social security system strongly protects an occupational core, the level of state involvement in the social realm is extremely low and a safety net in the form of a social assistance scheme is lacking. The most significant common trait of the welfare regimes in Turkey is the importance of the family as the main institution of welfare.
6. The lack of reliable data on discrimination complaints/cases hampers effective policy-making.
7. Male-dominated proceedings and institutions, as well as male officers including judges, prosecutors and the police, aggravate the complaints of women or the follow-up process. Therefore it is not sufficient to adopt purely paper measures. To enable the application of these measures by their internalisation by men and even by women, we need a change in mentality, starting from social mobilisation in education.
8. An amnesty has been proposed for men sentenced for child sexual abuse, on the grounds that they were falsely accused and their intercourse with minors was consensual. If passed, the bill will allow for the release from prison of men guilty of assaulting a minor if the act was committed without 'force, threat, or any other restriction on consent' and if the aggressor 'marries the victim'. The proposal would open the door for sexual predators and encourage marriage to minors.

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