ANTI-DISCRIMINATION RULES AND POLICIES IN TURKEY

Nurhan Süral†

Workers have the non-absolute “fundamental right to equal treatment.” Employment discrimination is a violation of this fundamental right. Employment discrimination occurs when workers or applicants are treated less favorably and such a conduct by the employer is contrary to certain specified rights or civil liberties. Otherwise, the workers are not generally protected from discrimination, however unfair or unethical the employer’s conduct may seem. For example, if the employer or his representative adversely singles out or is much harder on a worker than the others for no apparent reason, this does not constitute discrimination unless such a behavior is on the basis of sex, race, religion, and a variety of other legally specified reasons. Protection against discriminatory behavior as well as rights to unionize, gender equality at work, decent work, industrial action, etc. are aspects of the expansion of human rights system into the domains of work life. The Labor Act 2003 and other acts prohibit discrimination on the basis of:

- race, sex, language, religion and sect, political opinion, philosophical belief, or any such considerations;
- disability;
- age (contentious);
- union membership and/or involvement in trade union activities; and,
- fixed-term or part-time nature of work.

To protect workers from discrimination and other unfair employment practices, Turkey turns to regulation. The International Labor Organization has established a set of fundamental principles and rights at work covering freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labor, the effective abolition of child

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labor, and the elimination of discrimination in respect of employment and occupation. Turkey is a State Party to all of these fundamental conventions.

I. DISCRIMINATION ON THE BASIS OF RACE, SEX, LANGUAGE, RELIGION AND SECT, POLITICAL OPINION, PHILOSOPHICAL BELIEF, OR ANY SUCH CONSIDERATIONS

Article 5 of the Labor Act is the most extensive provision on the prohibition of discrimination. This article regulates the principle of equal treatment prohibiting discrimination on the basis of race, sex, language, religion and sect, political opinion, philosophical belief, or any such considerations. The article does not prohibit discrimination only on the basis of fundamental rights but also on the basis of part-time or fixed-term nature of work. “Any such considerations” implies that the listing is non-exhaustive. For example, gender reassignment and sexual orientation have not been specified in the article but upon a possible validation of a claim of discrimination on such a basis, the judiciary will, most probably, consider the case as falling under “sex discrimination,” “any such considerations,” or the “right to equal treatment.”

In an employment relationship, excluding selection, such acts of discrimination are reasons to justifiably claim wrongful treatment or termination. Proof of discrimination shall suffice, and a consequent loss or suffering shall not be sought. A worker, be it one with regular or increased job security, who considers himself discriminatorily treated during the course of employment or dismissed may pursue his claims and demand a pay amounting to his four months’ basic wages.

1. There is a decision of the Appeals Court validating dismissal due to continuous insults and fights in the workplace between two male partner workers. The Appeals Court defines the situation as beyond the “right of sexual orientation.” O. GÜVEN ČANKAYA ET AL., TÜRK İŞ HUKUKUNDA İŞE İADE DAVALARI 576 (2d ed. 2006).

2. There are labor lawyers stating that a claim of discrimination not specified in the law or not considered to be of a nature similar to the specified ones may be found justified by the courts on the basis of the equal treatment principle stemming from principles of equity and good faith. Devrim Uluçan, Yeniden Yapılanma Sürecinde İş Hukuku Açısından Eşitlik İlkesi ve Uygulanması, in TURHAN ESENER’E ARMAĞAN 191, 193 (2000).

3. ČANKAYA ET AL., supra note 1, at 59.

4. Workers with increased job security enjoy greater protection against dismissal on notice. A worker who has been working for more than six months under an open-ended labor contract at a workplace where at least thirty (fifty in agriculture) workers are employed benefits from increased job security if he is not in the position of an employer’s representative managing the whole undertaking or workplace with the authority of making recruitments and dismissals (LA, Art. 18).
This is the so-called “discrimination pay.” Introduction of a ceiling to the amount of discrimination pay contradicts the Community acquis: The Court of Justice of the European Communities (ECJ) has ruled that fixing a prior upper limit may preclude effective compensation. The case law of the ECJ is upheld by the Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. Besides discrimination pay, the employer shall pay an administrative fine of 88TL (about $73.30) for each discriminated worker (Art. 99a).

The ECJ has held that the rules on the burden of proof must be adapted when there is a prima facie case of discrimination and that, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. Council Directive 97/80/EC of December 15, 1997, on the burden of proof in cases of discrimination based on sex, adapted rules conforming to the decisions of the ECJ. If in the case of discrimination based on sex the worker proved prima facie that there may be discrimination, it is up to the employer to prove the contrary. The last paragraph of Article 5 of the Labor Act is a mere translation of the said Directive.

There are shortcomings of Article 5 of the Labor Act when viewed under Article 141 TEC (Treaty on the European Community) and Directives 2002/73/EC and 2000/78/EC:

1. To specify prohibition of discrimination on the basis of age, disability, ethnic origin, sexual orientation, and gender reassignment.

2. To provide a more effective level of protection, associations, organizations, and other legal entities should also be empowered to engage in proceedings.

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5. Whether this ceiling is absolutely or relatively binding is debated in the doctrine but so far there has been no court decision to this end. ÇANKAYA ET AL., supra note 1, at 59; SARPER SUZEK, İŞ HUKUKU 368 (2d ed. 2005).

3. To have an employee defending or giving evidence on behalf of the discriminated person be entitled to the same protection.

4. To promote dialogue between social partners to address different forms of discrimination based on gender in the workplace and to combat them.

5. To establish a body or bodies for the promotion, analysis, monitoring, or support of equal treatment.

Under Article 70 of the Constitution, every Turkish citizen has the right to enter the public service. No criteria other than the qualifications for the office concerned shall be taken into consideration for recruitment into the public service. A central examination system for recruitments secures equal treatment in the practices relating to conditions of access and selection to jobs or positions in the public sector. For private sector, ISKUR, the Turkish Employment Office, issued a notice in April 2006 outlawing discriminatory job advertisements. Requests including statements or specifications in job notices or advertisements of preferences and limitations constituting discrimination shall not be put into effect by employment offices. Large companies in the private sector generally opt for a central examination system. In small and medium enterprises there is the widespread belief and practice that selection is purely a matter of an employer’s prerogative.

Article 5 does not prohibit discrimination on the basis of race, language, religion and sect, political opinion, or philosophical belief at the time of recruitment, but according to Article 122 of the Criminal Code on discrimination, one who makes employment or non-employment conditional on discrimination on the basis of language, race, sex, disability, political opinion, philosophical belief, religion, sect and similar cases shall be sentenced to six months to one year imprisonment or a fine.

The particulars of discrimination on the basis of sex and part-time or fixed-term nature of labor contract will be analyzed separately.

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7. ISKUR is an incorporated, administratively and financially autonomous public body mainly to maintain, develop, and increase employment, involve in activities to prevent unemployment and to conduct unemployment insurance scheme. Act no. 4904, OFFICIAL GAZETTE, July 5, 2003. Private employment offices are to be established upon permission by ISKUR and they are under ISKUR’s surveillance.

II. DISCRIMINATION ON THE BASIS OF SEX

A. Background Information

Labor laws need to be modernized to meet the challenges of the 21st century. Turkey’s labor laws are also evolving, but whether this evolution leads to the creation of adaptable workforce and a labor market responsive to the challenges of globalization is the key issue. Factors such as unemployment, efficient functioning and competitiveness of the undertakings, and the low rate of female labor challenge the logic of existing working-time arrangements and modalities of employment in Turkey. In June 2001, the Ministry of Labor and Social Security formed a tripartite commission composed of nine university professors, three appointed by the Government, three by the Turkish Confederation of Employers’ Association (TISK), and one by each of the three labor confederations (TURK-IS, HAK-IS, and DISK). This technical commission had the task of preparing a new Labor Act. The Labor Act 2003, trying to follow European patterns, constituted a drive toward flexibility. There has been a diversification in forms of employment in terms not only of legal status, but also of hours, periods and rates of work.

Turkish women entered the labor market in large numbers in the early years of the Republic following the War of Independence to counter shortages in the labor supply of men. Subsequently, the presence of women at all levels in society and the growing importance of equality to middle-class women gave rise to the adoption of gender neutral laws. While there has been important legal progress in Turkey in this respect, there still exist perceptions and stereotypes heavily influenced by factors such as cultural background, and historical, economic and social situations. Labor force participation of women is too low: 26.7% compared to 75.5% of men in 2006. Women’s share in part-time employment (58.6%) is higher than the men’s share. Women’s unemployment rate (10.6%) is relatively higher than men’s (9.9%). However, this unemployment rate of women is somehow misleading because, when compared with the men, a great number of women declare themselves as non-job-seeking, mainly due to domestic responsibilities.
### Table 1
**Employment/population Ratios, Activity, and Employment Rates**
**Persons Aged 15–65 Years (Percentages)**

<table>
<thead>
<tr>
<th>Years</th>
<th>Employment/population Ratios</th>
<th>Labor Force Participation Rate</th>
<th>Unemployment Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1994</td>
<td>52.4</td>
<td>57.5</td>
<td>8.8</td>
</tr>
<tr>
<td>2002</td>
<td>46.7</td>
<td>52.3</td>
<td>10.6</td>
</tr>
<tr>
<td>2003</td>
<td>45.5</td>
<td>51.1</td>
<td>10.8</td>
</tr>
<tr>
<td>2004</td>
<td>46.1</td>
<td>51.5</td>
<td>10.6</td>
</tr>
<tr>
<td>2005</td>
<td>45.9</td>
<td>51.3</td>
<td>10.5</td>
</tr>
<tr>
<td>2006</td>
<td>45.9</td>
<td>51.1</td>
<td>10.1</td>
</tr>
</tbody>
</table>

### Table 2
**Employment/population Ratios, Activity, and Employment Rates**
**Men aged 15–65 Years (Percentages)**

<table>
<thead>
<tr>
<th>Years</th>
<th>Employment/population Ratios</th>
<th>Labor Force Participation Rate</th>
<th>Unemployment Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1994</td>
<td>74.6</td>
<td>82.0</td>
<td>9.0</td>
</tr>
<tr>
<td>2002</td>
<td>66.9</td>
<td>75.1</td>
<td>11.0</td>
</tr>
<tr>
<td>2003</td>
<td>65.9</td>
<td>74.0</td>
<td>11.0</td>
</tr>
<tr>
<td>2004</td>
<td>67.9</td>
<td>76.1</td>
<td>10.8</td>
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<tr>
<td>2005</td>
<td>68.2</td>
<td>76.2</td>
<td>10.5</td>
</tr>
<tr>
<td>2006</td>
<td>68.0</td>
<td>75.5</td>
<td>9.9</td>
</tr>
</tbody>
</table>

### Table 3
**Employment/population Ratios, Activity, and Employment Rates**
**Women Aged 15–65 Years (Percentages)**

<table>
<thead>
<tr>
<th>Years</th>
<th>Employment/population Ratios</th>
<th>Labor Force Participation Rate</th>
<th>Unemployment Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1994</td>
<td>30.4</td>
<td>32.2</td>
<td>8.3</td>
</tr>
<tr>
<td>2002</td>
<td>26.6</td>
<td>29.5</td>
<td>9.8</td>
</tr>
<tr>
<td>2003</td>
<td>25.2</td>
<td>28.1</td>
<td>10.5</td>
</tr>
<tr>
<td>2004</td>
<td>24.3</td>
<td>27.0</td>
<td>10.0</td>
</tr>
<tr>
<td>2005</td>
<td>23.7</td>
<td>26.5</td>
<td>10.6</td>
</tr>
<tr>
<td>2006</td>
<td>23.8</td>
<td>26.7</td>
<td>10.6</td>
</tr>
</tbody>
</table>

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10. Id. at 247.
11. Id. at 248.
Table 4
Incidence and Composition of Part-time Employment (Percentages)\textsuperscript{12}

\begin{tabular}{|c|c|c|}
\hline
Years & Men & Women \\
\hline
1994 & 4.9 & 18.5 \\
2003 & 3.6 & 12.3 \\
2004 & 3.7 & 14.8 \\
2005 & 3.2 & 13.4 \\
2006 & 4.4 & 17.8 \\
\hline
\end{tabular}

Table 5
Incidence and Composition of Part-time Employment (Percentages)\textsuperscript{13}

\begin{tabular}{|c|c|c|}
\hline
Years & Part-time Employment as a Proportion of Total Employment & Women’s Share in Part-time Employment \\
\hline
1994 & 8.8 & 61.0 \\
2003 & 6.0 & 56.9 \\
2004 & 6.6 & 59.4 \\
2005 & 5.8 & 59.4 \\
2006 & 7.9 & 58.6 \\
\hline
\end{tabular}

B. The Principle of Equal Treatment

Turkey is a party to the ILO C100\textsuperscript{14} and 111,\textsuperscript{15} two of the eight core conventions and the UN Convention on the Elimination of All Types of Discrimination Against Women [CEDAW]. The principle of equal treatment with regard to sex means that there shall be no discrimination whatsoever on grounds of sex, either directly or indirectly, by reference to sex or pregnancy as regards conclusion,\textsuperscript{16} content, implementation, and termination of labor contracts. Those occupational activities for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor are excluded. These issues are stated in Article 5 of the Labor Act. The principle of “equal pay for equal work or work of equal value” is also openly expressed in Article 5 of the Labor Act.

\begin{itemize}
\item \textsuperscript{12} Id. at 261.
\item \textsuperscript{13} Id. at 262.
\item \textsuperscript{14} Equal Remuneration Convention, 1951, ILO 100.
\item \textsuperscript{15} Discrimination [Employment and Occupation] Convention, 1958, ILO 111.
\item \textsuperscript{16} When analyzed under Directive 2002/73/EC, access to all types and to all levels of “vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience” have to be added to the article.
\end{itemize}
Application of certain protective measures on the basis of sex does not justify payment of a lower wage. There are no exclusions from the equal pay principle based, for example, on the size of a company, on reasons linked to the health and safety of workers, on national security, on religion, or on benefits under statutory social security schemes. However, this article does not prohibit payment of wages at lower rates to one sex for equal work when the wage differential is based on a justifiable ground such as seniority or quantity or quality of production.

C. Reconciliation of Family and Professional Life

Labor market inequalities make it rational for many women, rather than their male partners, to give up employment to care for children or others. Pressures of combining paid work and domestic responsibilities are evident. Maternity leave, parental leave, pregnancy dismissals, and child-care provision constitute different aspects of reconciliation of family and professional life.

There are protective provisions on maternity. First, there are detailed rules on accommodating pregnancy. Pregnant workers are entitled to time off, without loss of pay, in order to attend ante-natal examinations. If the woman worker’s physician asks that the female employee be switched to a position that is less strenuous or hazardous, the employer has to transfer her to another position if there is one or if he can provide one without being “unduly burdened,” without a reduction in wage. If such a transfer is not possible, then the worker shall be granted a leave without pay upon request for a period necessary for the safety and health of the worker.

There is a maternity leave of sixteen weeks (LA, Art. 74). This is higher than the fourteen weeks set by international instruments. The eight-week ante-natal rest period may be reduced to three weeks by the request of the woman worker and the approval of the doctor. In such a case, the remaining period is to be added to the eight-week post-natal rest period. These ante-natal and post-natal rest periods may be increased with a medical report on the basis of the woman worker’s health and the nature of the work to be performed. If there

18. The ILO C183 on Maternity Protection, 2000, the Revised Social Charter of the Council of Europe and the Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers, those who have recently given birth or are breastfeeding have all extended maternity leave from twelve to fourteen weeks.
is a multiple pregnancy, two more weeks are to be added to the ante-natal leave. The labor contract is suspended during maternity leave. The worker, if she so requests, has to be granted unpaid leave of six months (one year for public officials) following the post-natal period. Breastfeeding workers shall be allowed one and one-half hours a day to breastfeed their children below one year of age. It will be up to the woman worker to decide about the time and divisibility of this nursing period that will constitute part of the worked period. Weekly statutory hours of work in Turkey is forty-five. The daily hours of work is 7.5 in workplaces operating on a five-day basis. In practice, nursing workers prefer adding up these hours and taking one full day off per week.

Under the By-law of the Working Conditions for Pregnant or Nursing Workers, and Nursing Rooms and Day Nurseries, workplaces employing between 100 and 150 women worker are to establish nursing rooms while those employing more than 150 women workers have to establish day nurseries consisting of a nursing room and a day nursery. The fact that law considers the total number of workers but the number of women workers in the workplace that is considered points to the norm that women are mainly responsible for the rearing of children. As a general rule, the children of working women shall benefit from such facilities without any fee or deduction from wages. The children of the working men are to benefit if the mother has died or if parental authority has been given to the father by a court decision. The 1997 Regulation on Principles of Education and Functioning of the Pre-School Education Institutions to be Established by the Employers of Workplaces Subject to the Labor Act burdened employers under the legal obligation of establishing day nurseries to also establish pre-school classes. All educational services have to comply with the programs of the Ministry of Education. The establishment, conduct, and functioning of such facilities are entirely at the expense of the employers.

Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE (now Business Europe), CEEP and the ETUC has not yet been transposed into Turkish legislation. The Community Resolution of 29 June 2000 on the balanced participation of women and men in family and working life leaves it to the Member States to decide whether or not to grant paternity leave. Paternity leave does not exist in Turkey but the social

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19. Parental leave is a total of three months’ leave granted to the parents until the child reaches eight years of age.
partners may agree upon paternity leave and/or parental leave through collective labor agreements.

The Labor Act restricts the right of an employer to dismiss a pregnant worker. A fixed-term labor contract cannot be terminated before the expiration of a specified period without a just cause clearly indicated in Article 25 of the Labor Act. Pregnancy does not constitute a just cause. The employer is entitled to terminate the fixed-term or open-ended labor contract for a just cause, excessive absenteeism for health reasons, in the case of a woman worker who fails to report to work for reasons of health for more than six weeks beyond the prescribed notice period following her confinement leave of 16 weeks (LA, Art. 25/1). In such a case, the worker shall be entitled to severance pay if she has been employed in that particular workplace for at least one year.

If a woman worker employed under an open-ended labor contract is dismissed due to her pregnancy, the types of pay will differ according to being a worker with regular or increased job security. Where a worker with regular job security is dismissed due to her pregnancy, this will be deemed an abusive dismissal entitling the worker to the so-called “bad-faith pay,” equaling thrice the amount of pay corresponding to the worker’s notice period. Article 18 of the Labor Act on increased job security states that sex, marital status, family obligations, pregnancy, confinement, and absenteeism due to maternity leave shall not constitute valid reasons for contract termination. If the worker dismissed due to pregnancy is one with increased job security, she shall be entitled to reinstatement, and if not reinstated by the employer, she shall be entitled to the so-called “job security pay,” equaling to 4–8 months’ wages. Severance pay shall also be paid to such a worker with regular or increased job security if she has completed at least one year of service at the concerned workplace.

D. Sexual Harassment in the Workplace

Under the relevant European Community directives, harassment and sexual harassment constitute discrimination on the grounds of

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20. If the length of employment at the workplace concerned is less than six months, the corresponding notice period is two weeks, four weeks for employment between six months to one and one half years, six weeks for employment between one and one half years and three years, and eight weeks for employment of more than three years (Art. 17, Labor Act 2003) (Turk.).

21. Supra note 4.
Sex. “Sexual harassment” is deemed to exist “where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.”

The Labor Act specifies sexual harassment in the workplace as a just cause for contract termination. A worker who has been sexually harassed by the employer, a fellow worker, or by a third person in the workplace may instantly terminate the labor contract (Art. 24/IIb, d). Similarly, an employer may instantly lay off a worker who has sexually harassed him, any member of his family, or a fellow worker (Art. 25/IIb-c). These rules on sexual harassment have to be extended to the contexts of access to employment, vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience as stated in Directives 2002/73/EC and 2006/54/EC.

Sexual harassment constitutes a crime punishable by three months to two years of imprisonment or fine (Criminal Code, Art. 105/1). Abuse of a hierarchical, interfamily, educational, or employment relations or benefiting from being in the same place of work are aggravating circumstances resulting in a 50% increase in punishment. If the victim is obliged to leave employment, education, or family as a result, the imprisonment period cannot be less than a year (Art. 105/2).

Radio and television programs should not in any way promote violence and discrimination against women, children, and the disabled.

E. An Evaluation

There is an important impact of labor law on female labor force participation. Family-friendly policies, such as parental leave, employer provision of child-care, flexible working hours, or leave to


care for sick family members, may help improve parents’ morale and work commitment. This, in turn, may have a positive impact on productivity by making it easier for parents to balance paid work with family responsibilities.\(^{25}\) However, in Turkey, the extent of protection provided by the laws make female labor a lot more costly for employers when compared with male labor and this causes reluctance among formal sector employers to hire women workers.\(^{26}\) Turkey has to leave the “traditional protection rhetoric” behind. A move from “protection” to “promotion” is essential. As noted in Doing Business 2008, “laws created to protect workers often hurt them - especially women, youth, and unskilled workers. Their employment opportunities vanish. They end up in the informal economy. Women are 3 times as likely as men to be hired informally. In these jobs they receive no social benefits. And if they are abused by their employer, they have fewer protections. More flexible labor regulations boost job creation. And they do not mean giving up protections.”\(^{27}\)

Provisions like excessive maternity leave and child care facilities solely at the expense of employers in larger workplaces can backfire, discouraging employers from hiring women workers. Protection of women workers has to be confined to pregnancy and confinement and should not be excessive. Sixteen weeks (eighteen in multiple pregnancies) of pregnancy leave has to be reduced to fourteen weeks. Turkey is not a country where population growth is to be encouraged. The additional six-month (one-year for civil servants) unpaid leave has to be taken only upon mutual consent. Also, the period allowed to breastfeeding workers to breastfeed their children below one year of age has to be cut down.

Protective provisions designed to ensure that women are not exposed to hazardous physical or moral conditions in the workplace may have the unintended effect of restricting women’s job opportunities. Repeal of such provisions, with the exception of reasonable maternity protection, often plays a significant role in changing attitudes toward “suitable women's work.” The Labor Act 2003 lifted the ban on employment of women in night shifts of manufacturing workplaces. The development of atypical types of

\(^{25}\) OECD, \textit{supra} note 9, at 81.

\(^{26}\) For a detailed analysis, see Nurhan Süral, \textit{Legal Framework for Gender Equality at Work in Turkey}, \textit{43 MIDDLE EASTERN STUD.} 811 (2007); \textit{AVRUPA TOPLULUĞUNUN ÇALIŞMA YAŞAMINDA KADIN-ERKEK EŞİTLİĞINE DAIR DÜZENLEMELERİ VE TÜRKİYE (2002); ŞUKRAN ERTÜRK, ULUSLARARASILAR BELGELER VE AVRUPA BIRLIĞI DIREKTLERİ IŞİĞINDA ÇALIŞMA HAYATIMIZDA KADIN ERKEK EŞİTLİĞİ (2008).}

work and the lifted ban on employment of women in night shifts of manufacturing workplaces will hopefully facilitate women’s penetration onto the workforce.

III. DISCRIMINATION ON THE BASIS OF FIXED-TERM OR PART-TIME NATURE OF WORK

A “fixed-term worker” is the one having a labor contract, by which the end of the labor contract is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event (Art. 11). The principle of non-discrimination has been accepted with respect to employment conditions: Fixed-term workers shall not be treated in a less favorable manner than comparable permanent workers solely because they have a fixed-term contract, unless different treatment is justified on objective grounds (Art. 5, 12). Where appropriate, the principle of pro rata temporis shall apply. Period of service qualifications relating to particular conditions of employment shall be the same for fixed-term workers except where different length of service qualifications are justified on objective grounds (Art. 12/2).

The term “comparable permanent worker” means a worker with an open-ended labor contract in the same workplace engaged in the same or similar work. Where there is no comparable permanent worker in the same workplace, the comparison shall be made by reference to a worker engaged in the same or similar work in a similar workplace in the same industry (Art. 12/3).


A part-time worker is the one whose normal hours of work, calculated on a weekly basis are substantially less than the normal hours of work of a comparable full-time worker (Art. 13/1). In the reasons to the Article and the Working Time By-Law (Art. 6), “substantially less” is interpreted as “less than 2/3 of the contracted weekly hours of work.” As the statutory weekly hours of work is forty-five, one who works for less than thirty hours a week shall be deemed a part-timer. “Comparable worker” is the full-time worker engaged in the same or similar work in the same workplace. Where there is no comparable full-time worker in the same workplace, the comparison shall be made by reference to a full-time worker engaged in the same or similar work in a similar workplace in the same industry (Art. 13/3). The article also considers the question of the
movement of workers from full-time to part-time work, and vice versa: Employers should give consideration to such requests by workers if there is an availability in the workplace.

Part-time workers shall not be treated in a less favorable manner than comparable full-time workers solely because they work part-time unless different treatment is justified on objective grounds. Where appropriate, the principle of *pro rata temporis* shall apply (LA, Art. 5b, 13/2). This is in conformity with the Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time working concluded by UNICE, CEEP, and ETUC.

IV. DISCRIMINATION ON THE BASIS OF DISABILITY

There are binding quota rules for the social integration of the disabled. An employer employing fifty or more workers has to employ the disabled, ex-convicts, and terror victims in his workplace; the number to be thus employed has to be 6% of the total employed (LA, Art. 30). For a disabled worker to be covered by this provision, there has to be at least 40% loss of working capacity. Distribution of the 6% is different for private and public sectors. Starting January 1, 2006, the figures are 3% disabled, 2% terror victims, and 1% ex-convicts in the private sector and 4% disabled and 2% ex-convicts in the public sector. The state tries to encourage employers to employ these socially disadvantaged groups beyond binding quota figures: For each disabled, ex-convict, and terror victim employed beyond the quota rules or for each disabled worker employed by an employer who is not bound with the quota rules or for each employed disabled with more than 80% loss of working capacity, the State shall undertake 50% of contributions (social security premiums) to be paid by the employer. The By-law on Employment of the Disabled, Terror Victims and Ex-convicts provides for reasonable accommodation for the disabled (Art. 14). There is a heavy administrative fine for employers who do not comply with the binding quota rules.

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31. For each unemployed and for each month of non-compliance, the employer has to pay 1.357TL (about $1,130) in 2008. This is the highest administrative fine envisaged by the Labor Act.
fines imposed upon non-complying employers have to be spent on projects aiming at employment, self-employment, vocational training, and rehabilitation of the disabled and ex-convicts.\textsuperscript{32} Whether the employers should be bound with such obligatory rules or be promoted to employ disadvantaged people has to be considered carefully.

Apart from the rules inherent in the Labor Act, there is a special Law on the Disabled.\textsuperscript{33} Article 5 of the Labor Act on equal treatment principle does not cover the disabled but the Law on the Disabled clearly prohibits discrimination against the disabled (Art. 4). Combating discrimination against the disabled is defined as the underlying principle of policies as regards the disabled. The right of the disabled to opt for a career within his capabilities and the right to education and vocational training cannot be limited (Art. 13, 15). The law tries to promote “protected workplaces” (Art. 3, 14). Protected workplaces meeting the legal requirements shall have the status of “enterprise for the disabled.”\textsuperscript{34} Upon acquisition of this status, there shall be technical and financial support by the State. To be defined as a protected workplace, there has to be at least thirty employed in the workplace within a municipality or at least fifteen workers outside the municipality with at least 70% disabled workers. Protected workplaces shall have barrier-free facilities and aim at providing vocational rehabilitation and employment for the disabled for whom integration into the normal labor market is difficult.

According to the Law on Payment of Salaries to the Needy,\textsuperscript{35} the State is (1) to pay salaries to the disabled who cannot survive without the physical support of another and who at the same time is without anyone with the duty of legal care; (2) to the disabled without an income or with an income less than the one envisaged by the law and who at the same time is without anyone with the duty of legal care; and, (3) also to those under the duty of legal care if the income is less than the legally prescribed one (Art. 8). Under certain circumstances, care shall be provided by the State at the public or private care centers or at the residence of the disabled.\textsuperscript{36}

The Convention on the Rights of Persons with Disabilities and its Optional Protocol were adopted by the United Nations General

\textsuperscript{33} Law no. 5378 of 1 July 2005, OFFICIAL GAZETTE, July 7, 2005, No. 25868.
\textsuperscript{34} By-law on Protected Workplaces, art. 17, OFFICIAL GAZETTE, May 30, 2006, No. 26183.
\textsuperscript{35} Law no. 2022 of 1 July 1976, OFFICIAL GAZETTE, July 10, 1976, No. 15642.
\textsuperscript{36} See also Social Services and Child Protection Act, Law no. 2828 of 24.5.1983, OFFICIAL GAZETTE, May 27, 1983, No. 18059, additional, art. 7.
Assembly on December 13, 2006, and opened for signature on March 30, 2007. On March 30, eighty-one Member States (including Turkey) and the European Community signed the Convention, the highest number of signatures of any human rights convention on its opening day.  

V. DISCRIMINATION ON THE BASIS OF AGE

Article 5 of the Labor Act, the most extensive provision on the prohibition of discrimination in employment relations, and no other in any other act openly prohibits discrimination on the basis of age. So far, there has not been a court decision specifying a contested discrimination as one on the basis of age. The courts may consider such a case as falling under “any such considerations” implying that the listing in Article 5 of the Labor Act is non-exhaustive or under the “right to equal treatment.” Turkey, in its transposition of the Directive 2000/78/EC, has to lay down explicit rules on age discrimination.

A. Prohibition of Discrimination against Children

The Law on the Protection of the Children\(^\text{38}\) prohibits discrimination of any kind against children (Art. 4c). “Discrimination of any kind” is to be interpreted as including age discrimination but there are no other explicit rules or court decisions on the issue.

Article 71 of the Labor Act intends to prevent abuse of young people’s labor while allowing some flexibility in schemes providing both work experience and training. There are two categories of young workers: first, children, defined as those less than fifteen years old, and second, adolescents, defined as any young person who is at least fifteen years old, but younger than eighteen, who is no longer subject to compulsory full-time schooling. Work by children is prohibited and work by adolescents is strictly regulated by the Labor Act. In the case of children, there is the option to derogate from the basic prohibition in a single circumstance; children over fourteen can perform light work, defined to mean work that is not likely to either harm the health and safety or development of young people or harm their attendance at school. Hours of work for children who have completed compulsory schooling\(^\text{39}\) cannot exceed seven hours a day and thirty-
five hours a week. These periods may be extended to eight hours a day and forty hours a week for adolescents who have completed fifteen years of age. However, these periods cannot exceed two hours a day and ten hours a week outside the hours fixed for school attendance for those children who have not completed compulsory schooling. Given the vulnerability of young people, general obligations are imposed on employers to take the necessary measures to protect the safety and health of all young workers permitted to work. Young workers are prohibited from underground and underwater work (Art. 72) and work at night in industrial works (Art. 73). Workers who are not at least eighteen years of age cannot perform overtime work.\textsuperscript{40} These norms align with the Council Directive 94/33/EC of June 1994 on the protection of young people at work.

\textbf{B. Retirement Age}

The contingency covered by old-age insurance is survival beyond legally prescribed ages. The social security system has frequently been misused as a means of political propaganda especially prior to the general elections. Political parties promised loosening eligibility criteria, including early retirement entitlements, for political gains, mainly to increase their votes. The result was an excessively generous system that endangered and caused great losses for the national economy. The cumulative value of these deficits between 1994 and 2004, plus their debt servicing cost (calculated using the Treasury bill rate), was 475 billion YTL in 2004 prices, equal to approximately 110\% of GDP and 1.5 times the total consolidated debt stock as at the end of 2004. Thus, the unsustainable social security system deserves a large part of the blame for Turkey’s fiscal challenges over the past decade.\textsuperscript{41}

The retirement age was first introduced in 1950 as sixty for both men and women. This was reduced to fifty-five for women in March 1965. In March 1969, the age limit was lifted and only the requirements of an insurance period of twenty-five years and 5,000 premium (contribution)-paid days\textsuperscript{42} (thirteen years, ten months, and

\textsuperscript{40} By-law on Overtime Work, art. 8, OFFICIAL GAZETTE, Apr. 6, 2004, No. 25425.
\textsuperscript{41} OECD, \textit{supra} note 28, at 134.
\textsuperscript{42} In the Turkish system, the insurance period and premium-paid periods are not equivalent. The insurance period starts when one enters employment for the first time and expires at the time of final exit from the workforce. During the total insurance period, there may be periods of employment and unemployment. Premium-paid periods are the time premiums are paid to the state social security organization(s) during periods of employment.
twenty days) for men and women remained. In May 1976, the insurance period was lowered to twenty years for women. At that period, thirteen was the minimum age for light work, making it possible for women to retire at the age of thirty-three and men at the age of thirty-eight. With an amendment in April 1981, long-term insurances (disability, old-age, and survivors’ insurances) were made to have effect from turning eighteen years of age, meaning that from April 1981 onward, women could retire at the age of thirty-eight, and men at the age of forty-three. In April 1985, fifty-five and sixty became age limits for women and men, respectively. In April 1992, there was the return to the previous system where women could retire at the age of thirty-eight, and men at the age of forty-three, with 5,000 premium-paid days. An increase was made in retirement ages and the number of premium-paid days in September 1999, by the so-called 1999 reform. Of the OECD countries, Turkey is among those paying pensions for the longest periods; the increase made in retirement ages in 1999 did not reverse the situation.43

Starting in September 1999, the prescribed retirement ages are now fifty-eight and sixty for female and male workers, respectively, with at least 7,000 premium-paid days (nineteen years, five months, ten days) (SIA, Art. 60). Another reform, the so-called 2006 reform, followed the 1999 reform. The 2006 Social Insurances and General Health Insurance Act44 that was to become effective on June 1, 200845 (effective date then postponed to October 1, 2008), was designed with the aim of tightening the eligibility criteria and eliminating the widespread abuse of the system, expecting to make the system more efficient and sustainable.

In 1999, there was great outcry within labor circles and opposition parties against the increase in retirement ages. “Work till you drop” and “retirement in the grave” were the most used slogans. There was the recurrence of such reactions and demonstrations in 2008, as the effective date of the 2006 reform (then June 2008) neared. Neither

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44. Law no. 5510, OFFICIAL GAZETTE, June 16, 2006, No. 26200.
45. This was the third postponement of the effective date of the Act. Budget Law, Law no. 5724, art. 28, OFFICIAL GAZETTE, Dec. 28, 2007, No. 26740bis.
the 1999 nor the 2006 reforms made an instant imposition of the newly introduced terms upon the existing workforce with political constraints, and the idea of “protectionism,” emasculating the reforms. Those entering employment for the first time on September 8, 1999, the effective date of the 1999 reform, had to fulfill the new terms for qualifying for old-age pensions, retirement ages fifty-eight/sixty and the 7,000 premium-paid days. There is a second option for the new entrants: Workers may retire at the ages of fifty-eight (women) and sixty (men) following an insurance period of twenty-five years and completion of 4,500 premium-paid days.\(^{46}\) The 1999 reform introduced a gradually increasing minimum age scale that largely preserved the early-retirement rights of the existing workforce. Following appeal to the Constitutional Court by the opposition party against the 1999 reform law, the Court annulled the transition periods on the basis that they fell too short to protect those in the system. The new transitional chart was introduced on May 2002. This chart takes the effective date of the law (May 23, 2002) as a basis for those who have already completed specified insurance periods, premium-paid days and ages (SIA, provisional Art. 81). In 2008, according to the transitory retirement scale, a female worker can retire at the age of forty-four and a male worker at forty-seven. Average life expectancy at birth is 71.4 years, 68.9 for men and 73.8 for women.

\(^{46}\) Previously, the conditions for this early retirement scheme were simpler. A worker could retire at the age of fifty (women) or fifty-five (men) after fifteen years of insurance and 3,600 premium-paid days. There is also a transitory retirement scale for this option taking May 23, 2002, as the basis.
Table 6
Transitory Retirement Scale (1999 Reform)

<table>
<thead>
<tr>
<th>Insured women</th>
<th>Number of premium-paid days</th>
<th>Insured men</th>
</tr>
</thead>
<tbody>
<tr>
<td>Insurance period completed on May 23, 2002 (yrs)</td>
<td>Total insurance period</td>
<td>Age</td>
</tr>
<tr>
<td>18 and above</td>
<td>20</td>
<td>40</td>
</tr>
<tr>
<td>17-18</td>
<td>20</td>
<td>41</td>
</tr>
<tr>
<td>16-17</td>
<td>20</td>
<td>42</td>
</tr>
<tr>
<td>15-16</td>
<td>20</td>
<td>43</td>
</tr>
<tr>
<td>14-15</td>
<td>20</td>
<td>44</td>
</tr>
<tr>
<td>13-14</td>
<td>20</td>
<td>45</td>
</tr>
<tr>
<td>12-13</td>
<td>20</td>
<td>46</td>
</tr>
<tr>
<td>11-12</td>
<td>20</td>
<td>47</td>
</tr>
<tr>
<td>10-11</td>
<td>20</td>
<td>48</td>
</tr>
<tr>
<td>9-10</td>
<td>20</td>
<td>49</td>
</tr>
<tr>
<td>8-9</td>
<td>20</td>
<td>50</td>
</tr>
<tr>
<td>7-8</td>
<td>20</td>
<td>51</td>
</tr>
<tr>
<td>6-7</td>
<td>20</td>
<td>52</td>
</tr>
<tr>
<td>5-6</td>
<td>20</td>
<td>53</td>
</tr>
<tr>
<td>4-5</td>
<td>20</td>
<td>54</td>
</tr>
<tr>
<td>3-4</td>
<td>20</td>
<td>55</td>
</tr>
<tr>
<td>2 years, 8 months 15 days - 3</td>
<td>20</td>
<td>56</td>
</tr>
</tbody>
</table>

Table 7
Conditions for Qualification for Retirement for Those Employed after May 23, 2002 (1999 Reform)

<table>
<thead>
<tr>
<th>Age</th>
<th>No. of premium-paid days</th>
<th>Total insurance period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Option 1</td>
<td>58</td>
<td>60</td>
</tr>
<tr>
<td>Option 2</td>
<td>58</td>
<td>60</td>
</tr>
</tbody>
</table>

Similarly, the 2006 reform envisages slow transition periods. The retirement ages remain the same until 2036. The 2006 reform gradually increases the minimum pension eligibility age (fifty-eight/sixty) after 2036. Following a quite gradual increase, retirement ages for men and women will be equalized at sixty-five in 2048. The current 7,000 premium-paid days will be increased to 9,000 in a total of twenty years by adding 100 days each year starting from the effective date of the 2006 reform.
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Table 8
Minimum Pension Eligibility Ages (2006 Reform)

<table>
<thead>
<tr>
<th>Time periods</th>
<th>Ages</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Women</td>
</tr>
<tr>
<td>1.1.2036 – 31.12.2037</td>
<td>59</td>
</tr>
<tr>
<td>1.1.2038 – 31.12.2039</td>
<td>60</td>
</tr>
<tr>
<td>1.1.2040 – 31.12.2041</td>
<td>61</td>
</tr>
<tr>
<td>1.1.2042 – 31.12.2043</td>
<td>62</td>
</tr>
<tr>
<td>1.1.2044 – 31.12.2045</td>
<td>63</td>
</tr>
<tr>
<td>1.1.2046 – 31.12.2047</td>
<td>64</td>
</tr>
<tr>
<td>1.1.2048 onward</td>
<td>65</td>
</tr>
</tbody>
</table>

This is usually how the “reforms” are introduced in Turkey—at the margin, mainly due to irrational handling of the issues by polemicizing, politicizing, and even ideologizing them, the attitudes of the stakeholders, and appeasing governments. Reforms are also delayed by constant contesting of the laws by the opposition party(ies) before the Constitutional Court. Unlike most other OECD countries, Turkey does not reduce the pension benefit for workers who retire younger than the official retirement age, leaving little incentive for qualifying early retirees to continue working in the formal sector. Early retirement entitlements served to push the (generally more educated) middle-aged formal sector workforce into the informal sector at a relatively young age. There are two million early retirees in the informal sector.

There is a compulsory retirement age for the civil servants. This age is, in general, sixty-five with exceptions such as sixty-seven years of age for academics. Civil servants cannot continue to work as civil servants after retirement. This is why they prefer the informal market upon re-entry. There is no compulsory retirement age for the workers: Entitlement to retirement or reaching a particular age is not a ground for dismissal, nor is the worker compelled to resign by the employer. According to the decisions of the Appeals Court, a worker

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47. In fact, recently, appeal to the Court against each enacted law has become an established means of opposition to the government party by the opposition parties.
49. OECD, supra note 28, at 134.
51. Retirement Fund Act, Law no. 5434, art. 40, OFFICIAL GAZETTE, July 17, 1949, No. 7235. A civil servant may quit voluntarily after completion of twenty-five years of service and fulfillment of the prescribed age (fifty-eight for women and sixty for men) (Art. 39). The age requirement was introduced in 1999 and made applicable to the new entrants. There is a transitional chart for the civil servants already employed (Art. 205).
may make an instant resignation (quit for just cause) on the basis of retirement at the time of entitlement or at a later date. Retirement is one of the conditions for entitlement to severance pay.

According to the Social Insurances Act covering the workers, a retiree wanting to reintegrate the labor market has an option (Art. 63/A): He may have his old-age pension severed and have an aggregation of periods upon reapplying for an old-age pension or he may continue having his old-age pension in which there shall be no aggregation of periods but a “social security support premium” amounting to 30% of his earnings subject to premiums. Such premiums have to be paid to benefit from health care and occupational accidents and illnesses insurance. The insured is liable for one quarter and the employer for three-quarters of this premium (Art. 78/B). If the retiree restarts working in a public or semi-public body, his old-age pension has to be severed.  

C. Seniority and Social Selection Procedure

Where the employer is to dismiss a certain proportion of the workforce, the redundant labor, how will he make the selection? There are no legal rules to this end. With regard to collective redundancies, there are also no legally provided selection rules. The selection criteria are for management to determine. The Appeals Court rules that the legal court has the right to review the selection and wants to see that the selection has a justifiable basis. In other words, selecting redundancies have to be fair and reasonable. The court shall not only consider whether there is really redundancy or not and whether there would be some way of avoiding the redundancy especially the retraining and redeployment of the worker in another unit of the same workplace or in another workplace belonging to the same employer, but also the selection criteria. The employers have to follow a “social selection procedure” to determine the particular workers to be dismissed. In its rulings, the Appeals Court aims at keeping the workers requiring more social protection in the job, the


55. Cankaya et al., supra note 1, at 102–04, 535, 548.
one(s) “socially least worthy of protection” (the worker being least affected) is to be dismissed.

Individual specifications such as race, sex, language, religion and sect, political opinion, and philosophical belief cannot serve as selection criteria. In various decisions of the Appeals Court, entitlement to old-age pension, seniority, age, dependant obligations (maintenance support obligations), severe disability, productivity, absenteeism, duty of care, or marital status may serve as valid selection criteria. The employer may draw up a points system. There are collective labor agreements envisaging especially that those entitled to old-age pensions should firstly be dismissed. For the purposes of clarity and justification, the employer may refrain from using selection criteria that may be beneficial for the competitiveness of the company such as productivity but that may cause uncertainties and be quite problematic in application. Moreover, there will always be talented shirkers. It may not be easy for management to provide sufficient evidence to rebut unfairness before the court. To overcome difficulties, it is reasonable for the management to agree to this in advance with the signatory or, in default thereof, the authorized trade union.

The Appeals Court ruled for validity of the selection criteria provided by the collective labor agreements or personnel work rules for contract termination of those “who have attained 55 years of age and who have been entitled to retirement.” What if the employer wants to exclude one or more workers who are of special importance to the company from the social selection? Will such an exclusion be a question of equal treatment, employer’s prerogative, or competitiveness? Will the competitiveness of the workplace, a worker needed for his special knowledge or any other justifying business reason, be given a priority? The Appeals Court rules for an all inclusive application of the criteria. Such decisions of the Appeals Court have been criticized on the basis of contradicting the flexibility that tried to be introduced by the Labor Act and contradicting realities of work life. However, the Appeals Court ruled for validity

57. The trade union authorized to conclude the collective labor agreement is called the “authorized union” (majority union; the most representative union). The authorized trade union becomes the signatory trade union with the conclusion of the collective labor agreement.
59. Id., at 120. For similar rulings, see Yenisey, supra note 56.
for a clause requiring exclusion on the basis of “productivity and performance” if the exclusion criteria was also proven. Consequently, for the time being, the Appeals Court may be said to approve of a particular exclusion(s) if provided and justified on objective reasons.60

VI. DISCRIMINATION ON THE BASIS OF UNIONIZATION

International human rights law establishes the workers’ right to organize and the ILO conventions, recommendations, and jurisprudence further elaborate it. In Turkey, freedom of association has a collective aspect in the sense that it is a civil liberty and an individual aspect in the sense that it is recognized as the personal right of each worker. Of the relevant international instruments, Turkey has signed and ratified the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), ILO C87 concerning Freedom of Association and Protection of the Right to Organize, and ILO C98 concerning the Right to Organize and Collective Bargaining.

Anti-union discrimination is deemed a violation of freedom of association. The Unions Act prohibits anti-union discrimination at the time of recruitment, during the course of employment, and at the time of employment termination (Art. 31).

A. Anti-union Discrimination at the Time of Recruitment

Union security practices such as closed shops (the pre-entry closed shop), union shops (the post-entry closed shop), or agency shops that make the employment of a worker conditional upon his membership, either before or after recruitment, or non-membership of a trade union, are regarded as contradictory to the principle of freedom of association (voluntary unionism) and therefore forbidden by both the Constitution (Art. 51) and the Unions Act (Art. 31/1). Everyone holding the title of a worker is free to become a member of or withdraw from membership in a union. No one may be compelled to become a member, remain a member, or withdraw from membership in a union. Freedom to form or join unions is called “positive freedom of association” and the freedom not to form or not to join a union or to withdraw from membership is called “negative freedom of association.” Those provisions of the individual or

60. Id.
collective labor contracts contradicting the freedom of association are null and void (UA, Art. 31/2).

B. Anti-union Discrimination During the Course of Employment

During the course of employment, regarding conditions of work, employers cannot make subject to different treatment or discriminate between unionized and non-unionized workers or between workers of different trade unions (UA, Art. 31/3-5). Here, it does not matter whether the discriminated worker is one with regular or increased job security. Once he is differentiated or discriminated against, he shall be entitled to “unionism pay,” the minimum amount of which corresponds to the basic annual wage of the worker (UA, Art. 31/6).

C. Unionism-based Dismissal

It is unlawful to dismiss a worker for reasons relating to trade union membership, whether it be non-membership, or involvement in union activities outside working hours or during hours of work with the employer’s permission. Unionism-based dismissal is a discriminatory dismissal and therefore a wrongful dismissal against which workers are protected. Where a worker with regular job security is dismissed due to his trade union membership or involvement in union activities he shall be entitled to “unionism pay.” It is the same for a worker with increased job security, but this time it is paid under a different name, “job security pay.” A worker, be it one with regular or increased job security, with a length of employment of at least one year shall also be entitled to severance pay.

Unionism-based dismissal leads to the highest amount of pay. This is why the workers, in general, have the tendency of claiming unionism-based dismissal upon being dismissed, whatever the real cause of dismissal. Resignation on notice does not entitle the worker to severance pay; therefore a worker wanting to resign may join a trade union or try to create incidents to urge the employer to dismiss him on notice so that he can claim unionism pay. A worker expecting to be dismissed may also be involved in similar behavior hoping that it will lead to unionism pay. As a general rule, the employer is under the burden of proof. The employer has to prove that the dismissal is

61. Çankaya et al., supra note 1, at 51.
not a unionism based one. The burden of proof then shifts to the worker if the worker is one with increased job security. Then, the employer is to prove the existence of the valid reason claimed. If the worker claims that there is no valid reason, but a unionism-based dismissal, it shall be the worker to prove.

Sometimes different types of pay may overlap. According to the weighty opinion in the doctrine, unionism pay is to be ruled if the worker is entitled to both the unionism pay and discrimination pay.\(^63\) Where bad-faith pay and discrimination pay overlap, the one requested by the worker shall be ordered according to the decisions of the Appeals Court. If the worker requests both, then the one higher in amount shall be ruled.\(^64\)

The Criminal Code prohibits hindrance of the exercise of unionization rights. The one who uses force or threat to compel a person to unionize or not to unionize, to participate or not to participate in union activities, or to resign from union membership or executive function in a union shall be punished with one to three years of imprisonment (Art. 118/1). Obstruction of union activities by force, threat, or through any other in an illegal manner is also a crime entailing one to three years of imprisonment (Art. 118/2).

VII. CONCLUDING REMARKS

There are universal rights of the workers to equal treatment and protection against discrimination. Combating different forms of discrimination includes better social and economic integration of disadvantaged groups such as women, first entrants, aging people, and the disabled.

Treatment or dismissal may be contrary to certain specified rights of the worker, for example, if it is based on pregnancy, disability, religion, or trade union membership. Such discriminatory treatment or dismissal is prohibited by law to a certain extent and specific dismissal procedures and/or types of pay are established. Protection against discrimination derives mainly from the laws. Individual and collective labor contracts may also have rules to this end, but this is something rare.

Where the discriminated worker proves \textit{prima facie}, that there may be discrimination, the employer is to prove the contrary.

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64. Çankaya et al., \textit{supra} note 1, at 63; Bakırç, \textit{supra} note 63, at 119–21.
The employer can be imprisoned or sentenced to pay a penalty if he makes employment or non-employment conditional on discrimination on the basis of language, race, sex, disability, political opinion, philosophical belief, religious sect, and similar cases. Also constituting crimes are the use of force or threat to compel a person to unionize or not to unionize, to participate or not to participate in union activities, or to resign from union membership or executive function in a union; obstruction of union activities by force or threat or through any other in an illegal manner; and sexual harassment.

Turkey errs on the side of excessive protection, to the detriment of workers and businesses alike. The employers undertake risks in making investments. They will opt for those expected to be most productive at work. Excessive social protection hinders productivity and competitiveness of the companies. There is a delicate balance between the extent of social protection, particularly of women and the disabled, and productivity/competitiveness of the company. Treating workplaces as “charity organizations” by imposing too many burdens with the idea of protectionism ends with employers trying not to reach the thresholds. Besides, what will be the extent of the social selection criteria to be imposed upon employers through laws, agreements, or court decisions as regards recruitments and dismissals? At which point will we be infringing an employer’s prerogatives and his willingness to make investments? To this end, the question as to whether the employers should be “compelled” or “promoted” has to be considered with priority.

In the Turkish system, social security benefits and pension expectations for workers were kept too high for many years for political gains. The excessive generosity of the social security system endangered the country’s economy, but the reforms to reverse the situation are watered down mainly due to the lack of consensus on this very important national problem. Those who entered the labor force under more generous rules view it as their “reserved rights.” The very slow pace of transition to higher minimum pension ages and the approach by the Constitutional Court “guarantee” this right. Political constraints also prevent an immediate increase in the minimum retirement age. If Turkey is seriously committed to reducing informality, prevention of early retirements is one of the major measures to be taken. Accelerating the transition to new rules is essential, but quite difficult due to the understanding of political opposition, stakeholders’ attitudes, and jurisprudence.

Most labor lawyers, in their analysis of labor law, tend to focus on existing rules neglecting the feedback on employers’ ex-ante
incentives to create new jobs and sustain existing jobs. Most economists, on the other hand, focus on incentives to create and sustain jobs, but they do not have sufficient information on the laws and court decisions. The stakeholders are not in search of “greater good for all” but voice only the interests of their social basis. In order to meet the challenges of globalization through increasing investments and attracting foreign investments, Turkey must focus on the productivity and competitiveness of companies and should reconsider the extent of its rules on social protect.