Compatibility of Turkey’s Legal Rules on Pregnancy and Maternity with the EU Acquis

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1. Introduction


Turkey has one of the lowest overall employment rates, particularly for women, in the OECD.\(^3\) As stated in ‘Female Labor Force Participation in Turkey: Trends, Determinants, and Policy Framework,’ a report prepared jointly by Turkey’s State Planning Organization and the World Bank,\(^4\) the share of women holding or looking for jobs in 2008 was below 22 % as compared to an average of 62 % in OECD countries and to an average of 33 % in a group of selected comparison countries with similar levels of economic development. The report reveals that pregnancy and childcare are important constraints to women’s employment. Women interviewed in Istanbul stated that they would have to pay between 500 and 600 TL (between approx. 205 and 246 EUR) per month for childcare only if they decided to work, and more for other extra costs of additional household help. These costs would use up most of their additional earnings.

Under the scope of the ‘Promoting Gender Equality Project – Strengthening Institutional Capacity Twinning Project’, implemented jointly by the General Directorate on the Status of Women\(^5\) and the Directorate of International Affairs of the Ministry of Social Affairs and Employment of the Netherlands, the National Action Plan - Gender Equality 2008-2013 has been prepared with the participation of all parties.\(^6\) The Action Plan cites ‘low educational level, low wages for women with low levels of education, migration from rural to urban areas, lack of adequate qualifications, the inadequacy of childcare facilities and/or the need to take care of the elderly and disabled individuals in the family as well as traditional ideas about

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\(^1\) OJ L 204, 26 July 2006, p. 23.
\(^5\) kadın Statısu Genel Müdürlüğü established by Law no. 5521 (Official Gazette, 27 October 2004).
women’s social roles and responsibilities’ as reasons for the very low labour force participation of women.7

2. Legal rules on pregnancy and maternity

General
The rules on pregnancy and childbirth in the Labour Act and the By–law8 on the Working Conditions for Pregnant or Nursing Workers, and Nursing Rooms and Day Nurseries,9 are almost completely drawn on Directive 92/85/EEC.

Ante-natal rights and requirements
A pregnant worker shall mean a pregnant worker who informs her employer of her condition with a document to be obtained from any health institution; a worker who has recently given birth shall mean a worker who has recently given birth and who informs her employer of her condition; a worker who is breastfeeding shall mean a worker who is breastfeeding her 0-1 year old child (By-Law, Article 4).

Pregnant workers are entitled to time off, without loss of pay, in order to attend ante-natal examinations, if such medical examinations have to take place during working hours (By-Law, Article 12). If the pregnant/recently given birth/breastfeeding worker’s physician asks for 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 safety and health of the worker (By-Law, Article 8). Also, a pregnant worker, a worker who has recently given birth or a breastfeeding worker cannot perform work beyond 7.5 hours a day (Article 10).

Maternity leave
In Turkey, there is a compulsory maternity leave of 16 weeks (LA, Article 74). The eight-week ante-natal resting period may be reduced to three weeks by request of the worker and the approval of the doctor, and the unused period is added to the eight-week post-natal resting period. If there is multiple pregnancy, two more weeks are to be added to the ante-natal leave. These ante-natal and post-natal resting periods may be increased with a medical report on the basis of the worker’s health and the nature of the work to be performed. If there is an early birth as a result of which part of the ante-natal leave is not used, this part cannot be added to the post-natal rest period.

The total period of maternity leave in Turkey is compulsory. An employer who requires a woman to work during this period is guilty of an offence. Maternity leave is considered as worked hours in the calculation of the annual leave (LA, Article 55b). Directive 92/85/EEC envisages a maternity leave of at least 14 weeks allocated before and/or after delivery. The maternity leave has to include compulsory maternity leave of at least two weeks allocated before and/or after delivery. The Proposal for a

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8 The Prime Ministry, the ministries and public corporate bodies may issue by-laws to ensure application of laws related to their particular fields of operation.

Directive of the European Parliament and of the Council of 3 October 2008 amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding extends the maternity leave from 14 to 18 weeks. This corresponds to 12 non-compulsory weeks that women can choose to take before or after delivery and six compulsory weeks after delivery. If the actual date of delivery differs from the presumed date, the period of leave before the birth can be extended without having an effect on the post-natal period. Moreover, additional leave may be granted in the event of premature childbirth, children hospitalized at birth, the birth of children with disabilities and multiple births. Also, any period of sick leave, up to 4 weeks before delivery, in the event of illness or complications during pregnancy or childbirth shall not shorten the period of maternity leave in the interest of women’s health. Where childbirth occurs after the due date, the prenatal portion of the leave shall be extended to the actual date of birth, without any reduction in the post-natal portion of the leave. When the Proposal is given effect, Turkey has to reconsider the duration of maternity leave and its compulsory/non-compulsory nature.

Additional maternity leave

The worker, if she so requests, has to be granted unpaid leave of up to six months (one year for public officials) following the post-natal period (LA, Article 74). The two periods, compulsory and additional, run consecutively, to give an entitlement to 16 weeks (18 in case of multiple pregnancy) plus 6 months leave. There can be no gap between the two periods.

Maternity leave and additional maternity leave are limited to women. This reflects the traditional division of responsibility prioritizing the relationship between a woman and her child. In Hofmann10 and Italy,11 the ECJ, under the previous Equal Treatment Directive 76/207,12 ruled that national provisions could legitimately confine additional maternity leave and compulsory adoption leave to mothers.

Other forms of family-related leaves

The Community Resolution of 29 June 2000 on the balanced participation of women and men in family and working life13 leaves it to the Member States whether or not to grant paternity leave. According to Directive 96/34/EC,14 male and female workers must have an individual, non-transferable right to at least three months' parental leave for childcare purposes (as distinct from maternity leave) after the birth or adoption of a child until a given age of up to eight years. On 30 July 2009, the European Commission adopted a proposal15 to increase the existing right to take parental leave from three to four months per parent and apply it to all employees, regardless of their type of contract. The European Commission’s proposal would also allow three of each parent’s four months to be transferred to the other.

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In Turkey, there is no parental leave, paternity leave, adoption leave or filial leave for the workers but the social partners may agree upon such family-related leaves through collective labour agreements. So far, no other types of leave have been agreed on apart from paternity leave.

**Nursing periods**

Breastfeeding workers are allowed 1½ hours a day to breastfeed their children below one year of age. It is up to the woman worker to decide about the time and divisibility of this nursing period that will constitute part of the worked period (LA, Article 74). In practice, nursing periods are used in a way that contradicts its underlying idea: Nursing workers prefer using nursing periods collectively to have one workday off per week.

**Night work**

Article 9 of the By-Law on the Working Conditions for Pregnant or Nursing Workers, and Nursing Rooms and Day Nurseries conforms to Article 7 of the Directive 92/85/EEC. There will be temporary inability of a woman worker to perform night work: A pregnant worker cannot be obliged to perform night work during the period starting from the time that her pregnancy is specified in a medical certificate until delivery. Night work may be performed after maternity leave or for a nursing worker, after a six-month period following delivery leave if she is fit to resume night work. If the worker presents a medical certificate stating that it is necessary for her safety or health, she will not perform night work for the period specified (Article 9). The six-month night work prohibition may be extended to one year upon a medical certificate according to the By-Law on Working Conditions for Women Workers in Night Shifts. A female civil servant cannot perform night work starting from the 26th week of her pregnancy until one year after her delivery.

**Childcare**


Under the By–law on the Working Conditions for Pregnant or Nursing Workers, and Nursing Rooms and Day Nurseries, workplaces employing between 100 and 150 female workers are to establish nursing rooms while those employing more than 150 female workers have to establish day nurseries consisting of a nursing room and a day nursery (Article 15). The fact that it is not the total number of workers but the number of female workers in the workplace being considered points to the norm that women are mainly responsible for the rearing of children. 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 (Article 16). The establishment, conduct, and functioning of such facilities are entirely at the expense of the employers. The employers under the legal obligation of establishing day nurseries were also burdened to establish pre-school classes complying with the programmes of the Ministry of Education. These

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16 A civil servant is entitled to a leave of three days upon request on the occasion of his wife’s delivery (Civil Servants Act [Devlet Memurları Kanunu, Law no. 657, Official Gazette 23 July 1965], Art. 104).
legal burdens were eased by the so-called ‘employment package’, Law no. 5763, aiming at employment promotion. The employers are not obliged to establish preschool classes any longer and outsourcing became possible for childcare services (Article 6, 37).

**Protection against dismissal**

Article 10 of Directive 92/85/EEC prohibits dismissal during the period from the beginning of their pregnancy to the end of the maternity leave except under exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, to which the competent national authority gives consent. If the worker is dismissed during the period from the beginning of their pregnancy to the end of the maternity leave, the employer must cite duly substantiated grounds for her dismissal in writing. Under the new proposal, employers would also have to justify, in writing, the dismissal of a worker within six months of the end of her maternity leave.

In Turkey, the labour contract is deemed to have been suspended during maternity leave. Therefore, dismissal for any reason during the period of maternity leave is legally impermissible. An exception shall be the automatic expiration of the prescribed period coinciding with the leave in case of a fixed-term labour contract.

Between the employer and the worker there may be a fixed-term or an open-ended labour contract. A fixed-term labour contract cannot be terminated before the expiration of a specified period unless there is a justified cause leading to an immediate dismissal. Excessive absenteeism (beyond 8-14 weeks corresponding to employment period) for health reasons is a justified cause for dismissal. If a female worker fails to report to work for reasons of health following her maternity leave, the employer is entitled to terminate the fixed-term or open-ended labour contract for excessive absenteeism (LA, Article 25/1). This conforms to the ECJ’s rulings in *Hertz*, *Larsson*, and *Brown*. 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.

Where a worker employed under an open-ended labour contract is dismissed for being pregnant, the degree of protection and the consequences will differ according to whether she has regular or increased job security. 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 labour contract at a workplace where at least thirty (fifty in agriculture) workers are employed benefits from increased job security. Where the employer owns more than one establishment in the same industry, the total number of workers shall be considered (LA, Article 18). The 30-worker threshold is to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized enterprises.

If the worker dismissed for pregnancy is one with regular job security, this will constitute an ‘abusive dismissal’ entitling the worker to the so-called ‘bad-faith pay,’

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22 Case C-400/95 Handels- og Kontorfuntionerernes Forbund i Danmark, acting on behalf of Larsson v Dansk Handel & Services, acting on behalf of Fotex Supermarked A/S [1997] ECR I-2757.
equalling to thrice the amount of pay corresponding to the worker’s notice period. The employer has to make such a termination in writing without a legal burden of specifying the reason of dismissal. If the worker has increased job security, the employer is under the legal burden of specifying the reason of dismissal clearly and precisely (LA, Article 18). Where no reason is specified or the reason specified is not a valid one in the particular case, the court will rule for reinstatement (LA, Article 20). If the employer does not reinstate the worker, she will be entitled to ‘job security pay’ corresponding to her four to eight months’ basic 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 workplace concerned.

Article 18 of the Labour Act on increased job security presents, on the basis of the ILO C158, a non-exhaustive list of incidents that do not constitute valid reason for contract termination, inter alia, sex, marital status, family obligations, pregnancy, delivery, and absenteeism due to maternity leave.

Under Article 5 of the Labour Act on prohibition of discrimination at work, in an employment relationship, excluding selection, gender discrimination is a reason to justifiably claim wrongful treatment or termination. If the worker proves prima facie that there may be discrimination, it is up to the employer to prove the contrary. Proof of discrimination shall suffice, a consequent loss or suffering shall not be sought. A female worker, be it one with regular or increased job security, who considers herself discriminatorily treated on the basis of sex during the course of employment or dismissal may pursue her claims and demand pay amounting to four months’ basic wages. This is the so-called ‘discrimination pay.’ Introduction of a ceiling to the amount of discrimination pay contradicts the acquis: the ECJ has ruled that fixing a prior upper limit may preclude effective compensation. The case law of the ECJ is upheld by Directive 2002/73/EC amending Council Directive 76/207/EEC, recast by Directive 2006/54/EC.

**Social security related issues**

In cases of pregnancy and delivery, there are benefits in kind and benefits in cash. Maternity medical benefits cover medical examination, medication, in vitro fertilization, and hospitalization designed to cover care for the insured woman or the uninsured wife of the working man.

Maternity allowance is a short-term incapacity benefit designed to compensate for a worker’s loss of earnings through pregnancy and delivery. Directive 92/85/EC provides for a minimum maternity leave period for employees of 14 weeks and for a minimum payment during this leave at the level of sick pay. As regards maternity allowance, Turkey meets the minimum requirement. Unless there is a provision to the contrary in the individual or collective labour contract, there will be no pay by the employer during maternity leave, the worker will be paid maternity allowance equalling sick pay by the social security organization (Law no. 5510, Art. 18). To qualify for maternity allowance, a female worker has to have made at least 90 days’ contributions during a period of one year before birth.

In some schemes, the worker can make up for any unpaid leave by way of extra contributions. During a period of unpaid maternity leave, neither the worker nor the employer will be expected to contribute. The worker may, if she chooses, pay contributions for the statutory (compulsory) maternity leave but the employer will not

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have a duty to contribute. If the worker pays contributions for the statutory maternity leave period, this period counts as pensionable service. Also, where a worker resigns due to pregnancy (birth has to take place within 300 days following resignation) or delivery, she may, if she chooses, pay contributions for at most the two-year period during which she remains unemployed. This period starts with birth and the worker may benefit from this provision for two separate births (Article 41).

The so-called ‘milk money’ (nursing allowance) is a lump-sum payment made to a breastfeeding worker or to the uninsured breastfeeding wife of the male worker for each newborn child provided that the child is alive (Article 16). To qualify for the nursing allowance, a female worker or the working husband of the woman has to have paid at least 120 days’ contributions within a period of one year before delivery.

If a female worker is the mother of a disabled child in need of constant care, she will be entitled to early retirement: 90 extra pensionable days will be added to each year of service (Article 28). It is the Social Security Organization Health Board that determines the child’s condition on the basis of the relevant By-Law.

3. Conclusions

Turkey, being a country eager to join the EU, is going through a phase of adopting the acquis. There is an indisputable impact of EU law on the development of Turkish labour law. The EU dimension of the promotion of gender equality is considered in the preparation of new legislation and amendments. The national starting point is incorporation of the relevant acquis and this has to be followed by effective implementation.

The maternity provisions generally either meet, or are more generous than, the minimum requirements of Directive 92/85. Protective measures are essential in pregnancy-related cases but overprotective provisions like long maternity leave, the legal obligation of the employer to grant six months of unpaid additional leave on the worker’s request, nursing breaks of 1½ hours a day for one year or childcare facilities solely at the expense of employers can backfire, discouraging employers from hiring female workers. Such ‘protective measures’ may make female labour a lot more costly for the employers when compared with male labour. A move from ‘protection’ to ‘promotion’ is essential. Law no. 5763 of May 2008, the so-called ‘employment package’, tries to ameliorate the adverse effects of the global crisis on employment and eases some of the unduly burdens on the employers, lifting of the legal obligation of establishing pre-school classes and providing the option of outsourcing childcare. Barriers for businesses hiring women have to be lifted. Law no. 5763 of May 2008 provides incentives such as lifted or lowered premiums for employers to promote employment of youth and women. These incentives, applicable until 30 June 2010, cover males aged between 18-29 and females above 18 without an upper age limit (Article 20). The Government is to subsidize employers’ social security contributions for newly hired women during up to five years.

The gap in the unemployment rates of men and women has to be reduced. In the National Action Plan – Gender Equality 2008-2013, objectives and strategies for action are developed for the areas of education, economy, poverty, power and decision making, health, media and the environment. In the economic area, strategies

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26 Sosyal Güvenlik Kurumu Sağlıklık Kurulu.
to increase women’s employment in line with the Ninth Development Plan (2007-2013) include:

1. revising the existing Labour Act in order to incorporate definitions based on gender equality;\(^{28}\)
2. taking the necessary measures against all kinds of discrimination faced by women with regard to entry into and performance in employment and working life;
3. expanding care services for children and for sick, disabled and elderly people, and enhancing their accessibility;\(^{29}\)
4. making legal arrangements on parental leave in order to share the childcare responsibilities between mothers and fathers; and
5. providing information to home-based working women about the opportunities to benefit from the social security system.

Family structure has its direct implications on women’s entry into the labour market. The pressures of combining paid work and domestic and care responsibilities are evident. Many women leave the labour market because of difficulties in reconciling work and domestic responsibilities. Labour market inequalities make it rational for many women, rather than their male partners, to give up employment to care for children or others. Longer spells of unemployment to reconcile work and maternity can have negative consequences for experience, skills and motivation for re-entry into the labour market. Reintegration after a long pregnancy-related break is quite difficult. Part-time work is not very developed. Shortage of affordable childcare prevents women in low-paid and lower-skilled jobs from working. Development of public pre-school education/programmes may help women to find work.

The assessment of the compatibility of Turkey’s legal rules on pregnancy and maternity with the EU *acquis* gives us one important conclusion: Turkey is highly responsive to change and it has shown initiative in the adaptation process by developing new legal rules and innovative policies. However, reality at enterprise level points to a second important conclusion: The participation rate by women is very low, and laws and strategies to increase female employment have to be effectively implemented and social partners’ adaptability to change has to be increased. For example, flexible forms of employment and working-time arrangements are provided in the law, but are very difficult to apply in practice due to trade unions’ resistance as a result of a long history with the state being the main employer and with a guarantee of life-long employment especially for public sector workers.

\(^{28}\) For example, terms like ‘direct discrimination’, ‘indirect discrimination’ and ‘sexual harassment’ need to be defined.

\(^{29}\) For example, discrimination is prohibited in the course of work and at termination of employment, but not prohibited in access to employment and in access to all types and to all levels of vocational guidance, vocational training and retraining, including practical work experience.