

Sabriye Beste Kabaçam¹

Contemporary Applications of Prohibition of Discrimination in Turkish Constitutional Court Decisions

Summary: It is clear that the prohibition of discrimination and the principle of equality are one of the most important principles of human rights. Today, since the number of discrimination issues has increased in the usual flow of life, the matter of how far the valid law can protect individual, who constitutes the core of the society from discrimination is controversial. In Turkish Constitution, there is no independent article which orders the prohibition of discrimination. Cases which relate to the discrimination are considered with the principle of equality in Article 10. The scope of the present paper is to show how the prohibition of discrimination is embodied in Turkish Constitutional Court's approach and its historical background. Secondly, the Turkish Constitutional Court's approach regarding these issues are emphasized and to what extent the decisions given by the Turkish Constitutional Court are similar to the decisions given by ECHR are argued. Comparative and historical method will be used in this paper.

Keywords: human rights, prohibition of discrimination, principle of equality, Turkish Constitutional Court, Article 10 of 1982 Turkish Constitution, ECHR Article 14

¹ MS Sabriye Beste Kabaçam, Department of Public Administration of Muğla Sıtkı Koçman University, e-mail: bestekabacam@hotmail.com, ORCID: 0000-0002-7846-1718.

Introduction

Generally, the prohibition of discrimination and the principle of equality are used interchangeably in the same meaning, and the terms of equality and discrimination are not only legal subjects but also they are related to moral values (Oostland, 2016, p. 16). It is clear that it is morally wrong, if someone or a group of people come up with unequal treatment. But does this treatment also violates the legal rules if it becomes a legal subject, which has a sanction against that illegal treatment. Prohibition of discrimination is a very complex subject and also conducted within different disciplines.

There is no consensus in doctrine about the definition of discrimination, thus this term is abstract and includes subjective meaning. Due to this lack of definition, protecting individuals against discriminatory and unequal treatments and the prohibition of discrimination became one of the general principles of law. The term ‘discrimination’ was on the legal platform when Universal Declaration of Human Rights was declared on 10 December 1948 by United Nations General Assembly and Member States of European Council signed European Convention on Human Rights on 4 November 1950.

The aim of this article is to focus on the background of the anti-discrimination principle in Turkish legal system and to analyze the interpretation of Turkish Constitutional Court (herein after “TCC”) in the light of its recent decisions. Moreover, it is aimed to outline the principle of prohibition of discrimination based on ECtHR’s approach with its current understanding.

Historical Background of Prohibition of Discrimination and Principle of Equality in Turkey

Up to the middle of the 19th century, the Ottoman Empire stayed out of the Western intellectual development (Mardin, 2000, p. 3). Thus, to be able to catch up with the contemporary world, considerable number of reforms, especially related to socio-political area were carried out in the *Tanzimat* period.

In Turkish history, principle of equality was mentioned for the first time in Edict of Gülhane (in Turkish *Tanzimat Fermanı*) in 1839. Edict of Gülhane had the shape of constitutional document which included right to live, right to property and equal treatment for tax issues and soldiership duties, etc. Principle of equality was not described clearly but Edict of Gülhane ruled that no arbitrary decision and no discriminatory treatments would be enforced all over the state. Edict of Gülhane aimed to provide equality between Muslim and non-Muslim (in Turkish *zimmî*) citizens. However, in social life, non-Muslim citizens were subjected to completely different rules based on their religious rules especially on civil law issues. On the contrary, in public law related cases, they were subjected to Islamic rules (in Turkish *şer'i hukuk*). Due to the dualist structure of law, it is certain that understanding of the principle of equality couldn't find a field properly for that society.

Actually, the answer was profound to why the Edict of Gülhane could not be as effective as desired. It is remembered that the subtle intent of the Edict of Gülhane was to protect the Empire from dismemberment. However, extensive commercial relations between European countries and the Ottoman Empire, the growth of missionary activities on the Ottoman lands, as well as influence of the nationalist ideas and political consciousness of the non-Muslim community prevented the desire of involving 'the Ottoman citizenship' (Mardin, 2000, p. 14). Also, non-Muslim minority's new interests were manipulated easily by the European Great Powers in order to protect Christian community in the Ottoman Empire (Mardin, 2000, p. 14).

Ottomanism became a key reformist concept after the Reform Edict (in Turkish *Islahat Fermanı*) was issued in 1856 (Karpas, 2001, p. 12). The Reform Edict had subsidiary qualification to the Edict of Gülhane. Also, the Reform Edict emphasized that the rules of Edict of Gülhane would involve everyone, no matter what their religious beliefs are nor sects they belong to. Besides, the Reform Edict abolished *cizye*, which was a special tax that non-Muslim citizens had to pay. Ottomanism set forth the equality between Muslims and non-Muslims and was willing to achieve political unity in Ottoman citizenship. The theory of Ottomanism was aimed to depersonalize

authority and shift it to institutions based on variety of administrative reforms. However, this theory could not gain enough support at the society (Karpaz, 2001, p. 12).

Despite achieving equality in the society at those times, it was *de facto* quite impossible to adopt all equality rules in the society. Thus, the Ottoman Empire divided citizens according to their religion. Also, the State had a theocratic structure. Therefore, Islam was the backbone of the Ottoman moral system and there was also loose area provided for several ethnic and religious groups which lived together (Gönenç, 2006, p. 5). So it was certain that it could not achieve the goal of Edict of Gülhane which required equality principle without exception. But no matter what, the philosophy of equality of both the Edict of Gülhane and the Reform Edict was very progressive step considering those times.

Kanun-i Esasi, enforced in 1876, was the first modern written constitution of Ottoman Empire. Equality under the law was delineated in Article 17. According to the article, all citizens of Ottoman Empire were equal under the law, including citizenship rights and responsibilities regardless of social status, faith and language. The aim of this article is to build understanding of *de jure* equality. However, equality understanding which had already been situated in the society was completely different than formal equality. Because of that difference, that article could not be effective.

After establishing and spreading constitutional courts all over the world, equality under the law principle has become an applicable principle in the 20th century. The principle has found a place in international conventions that supported and guaranteed equality (Üçok, Mumcu & Bozkurt, 2008, p. 334).

Turkish women's status was radically changed and transformed after the Turkish Republic was established on 29 October 1924. Self-confident citizens were the main goal of the Kemalist ideology. Moreover, Atatürk cherished the principle of equality between sexes, equal opportunity for education and family life. Thus, Kemalist reforms mainly focused on the elimination of polygamy, sex differentiated legislation and traditional Islamic moral values (Abadan-Unat, 1981, p. 5).

In the Republican period, according to the first form of the 1924 Constitution, women did not have the right to vote and stand for election. So there was no equality between men and women based on political rights. Due to amendments to related articles, women finally gained the right to vote and stand for election. As a result, women derived the right to vote and stand for election on 3 April 1930 in local elections, on 26 October 1933 in local authority elections and finally 5 December 1934 in general elections for the TGNA (Turkish Grand National Assembly). The first general elections after this regulation were held on 8 February 1935, and 17 women deputies received the right to represent public in the TGNA (Yüceer, 2008, p. 146). Gaining the right to vote and stand for elections for women was a good example of showing the Kemalist reform's ideology on the social structure. Under the lead of Atatürk, reforms regarding social and economic rights were a milestone for this new regime and new country.

Atatürk was eager to show to the world a modern face of the Turkish Republic. Therefore, significant regulations were done to eliminate the unequal treatment in public life (Abadan-Unat, 1981, p. 12). On 17 February 1926, the Swiss Civil Code was codified. Thus, it was an important step to provide equality law between men and women. Also, it was a symbol that highlighted how determined new Turkish Republic was to reach a level of contemporary civilization (Abadan-Unat, 1981, p. 13).

The TCC was established by the 1961 Constitution which was drafted and adopted after a military coup (Algan, 2011, p. 810). The 1961 Constitution introduced judicial review together with a bill of rights and measures to strengthen the judicial independence (Bâli, 2013, p. 669). Although the Court had some changes after its establishment, it sustained its entity without break. The TCC played a crucial role in Turkish political life since its establishment on 22 April 1962 and was accepted as a legitimate and *sine qua non* institution by Turkish people (Özbudun, 2006, p. 223). Thus, the TCC is considered to Turkey's commitment to the rule of law and rights-based government (Bâli, 2013, p. 668).

The 1982 Constitution ordered the principle of equality on General Principles of Turkish Republic. It's a conscious choice that

law-maker emphasizes that principle of equality is one of the main pillars of Turkish Republic and democracy. Article 10 orders that “everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds”. According to the 1982 Constitution, the principle of equality includes substantive and formal equality principles and refers to general equality doctrine (Göztepe, 1991, p. 106). With the amendment to Article 10(2) in 2004, the state has shown an affirmative action to guarantee substantive equality in practice. Thus, according to the amendment in 2010, the affirmative action has its place in the Constitution. It includes the words: “different treatments towards to children, the elderly, disabled people, widows and orphans of martyrs shall not be considered as violation of the principle of equality”. With these regulations the law-maker wanted to catch up to the international human rights standards. Moreover, with the amendment to the article in 2004 it is accepted that international law is higher than domestic law. Therefore, if any disagreement happens between these two disciplines, international law shall be accepted. It means that, if the domestic courts confronted claims about unequal and discriminatory treatments and there is no consensus between international law and domestic law orders, the courts have to follow international law rules rather than domestic ones.

Turkish Constitutional regulations and Article 10 do not contain the principle of prohibition of discrimination independently. However, Article 10 includes both principle of equality and prohibition of discrimination.

On 30 March 2011, individual application has come into force in Turkish law system with Law No. 6216 on Establishment of Constitutional Court and System of Procedure. The variation of subjects on the Court’s decisions increased rapidly with individual applications. The Court’s decisions which related to new discrimination grounds like sexual orientation, ethnicity, and disability belonged to the individual application term.

Prohibition of Discrimination under ECtHR's Interpretation

The ECHR (*European Convention on Human Rights*) contains a large range of civil-political rights e.g. the right of life, the prohibition of torture and of inhuman or degrading treatment or punishment, the prohibition of slavery and forced labour, the right to liberty and security, the right to fair trial, the principle of no punishment without law (*nullum crimen, nulla poena sine lege*), the right to respect privacy and family life, freedom of speech, conscience and religion, freedom of expression, freedom of assembly and association and right to marry (De Schutter, 2005, p. 5). Individuals have access to all of the rights which are set forth in ECHR without discrimination. The prohibition of discrimination has *jus cogens* status in international human rights law. According to Article 14 of ECHR:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

As it is seen, Article 14 is not designed as *numerus-clausus* to provide protection also to new distinction grounds and prevent discriminatory treatments. The discrimination based on health, disability, age, etc. is considered in other status. The ECtHR is aware of the field of discrimination and is spreading and applying to a larger population in the society.

The ECtHR respects the Member States' margin of appreciation which is an unknown and limitless area for the states. Therefore, the ECtHR restricts the meaning of the term. It means that, if the state's defense is based on margin of appreciation, it has to convince the ECtHR that the treatment claimed as discriminatory is based on very important reasons. The ECtHR is especially severe with respect to suitability, necessity and proportionality of the difference in treatment. The ECtHR probes rather deeply into the reasonable-

ness and legitimacy of the objectiveness themselves (Gerards, 2004, p. 141).

The ECtHR does not have strict criteria to define margin of appreciation. The term is mostly placed in a grey area and generally the ECtHR's case-law is considered base of concrete case. Also, the ECtHR respects national powers and national sovereignty of the Member States. As a conclusion, because of complex body and sensibility of the cases which are related to Article 14, it is not easy to detect discriminatory treatment.

According to the ECtHR's jurisprudence, certain grounds of discrimination are more suspect than other grounds e.g. on the basis of birth out of wedlock, sex, sexual orientation, race and ethnic origin, nationality and disability. These grounds are justified only by existence of particularly convincing and important reasons (Tobler, 2014, p. 535). The hierarchical structure of disadvantaged groups is also related to the substantive equality approach of the ECtHR. According to Rory O'Connell (2009), substantive equality does not have colour blind or gender neutral approach against discrimination. Mostly, it has more favorable approach toward disadvantaged groups (p. 215).

Article 14 does not have an autonomous function, which means that applications must be done with the combination with other articles that are mentioned in ECtHR or its additional Protocols. However, the ECtHR's interpretation is flexible and depends on a concrete case. For instance, *the Belgian Linguistic Case*², the ECtHR noted that if the main subject of the conflict is based on an unequal, discriminatory treatment, Article 14 could be applied to the case by itself.

It is worth mentioning that the Protocol No. 12 to the ECHR, which provides for general prohibition of discrimination for the Member States, that was entered into force to the Protocol. Protocol No. 12 guarantees a self-standing non-discrimination principle, which Arti-

² *ECHR case of „relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium*, app. no: 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 23.07.1968.

cle 14 does not have (Besson, 2012, p. 152). Protocol No. 12 opened for signing on 4 November 2000 and entered into force on 1 April 2005. It has been ratified by only 15 Member States so far. Nine Member States, including Poland, neither signed or ratified it. Turkey signed the Protocol on 18 April 2001, but has not yet ratified. Therefore, cases against Turkey are only considered under Article 14.

Article 14 has restrictive understanding of discrimination and it cannot cover all discriminatory treatments by state or public authorities (Baker, 2006, p. 714). Thus, the protection of Article 14 is limited with the rights regulated in the ECtHR and its protocols; however, the Article 1 of Protocol No. 12 secures all rights set forth by law. The ECHR relies on Protocol No. 12 in order to extend its jurisdiction to grounds of discrimination which are not covered under Article 14 (De Schutter, 2005, p. 24).

The Scope of Turkish Constitutional Court's Approach

Turkey joined the Council of Europe on 13 April 1950. Then Turkey signed the ECHR on 4 December 1950 and announced it in the Official Gazette (in Turkish *Resmi Gazete*) on 19 March 1954. After that, the ECHR entered into force on 18 May 1954. According to the Article 1 of the ECHR, Member States guaranteed that fundamental rights and freedoms of everyone were protected by the state which regulated in the ECHR and its protocols within their jurisdiction. The ECtHR established to oversee the Member State's obligation is being fulfilled or *vice versa* based on the ECHR with its jurisdiction (Aybay, 2017, p. 157).

The Article 90 of the 1982 Constitution orders that international agreements have the force of law. Also, there is no appeal to the Constitutional Court based on the grounds that they are unconstitutional. Therefore, Article 90 emphasizes the effects of international agreements in domestic law. So, the matter of the ECHR's value in Turkish legal system could be listed as below:

- i. The ECHR is the part of Turkish domestic law, and the ECHR even has privileged position.

- ii. The ECHR enters into force *de facto*. In other words, there is no need to make additional regulation (direct effect of the ECHR).
- iii. No possibility of appeal to the Constitutional Court against the ECHR.
- iv. Based on the ECHR's international agreement status, it cannot be changed based on domestic law. So, the ECHR's legal consequences are effecting both domestic and international area (Gözübüyük & Gölcüklü, 2016, p. 23).

According to the Member State status, Turkey recognizes legislative authority of the ECtHR (*European Court of Human Rights*). Due to the membership of the Council of Europe, decisions of the ECtHR are binding for Turkey like for other Member States.

The TCC (Turkish Constitutional Court) makes effort to follow international level of human rights. As mentioned, Turkish law system was introduced to individual application on 30 March 2011. But before the individual application procedure, it is worth to mention the decision which is one of the milestones of Turkish law given by the TCC during the Norm Control System. The Article 443 of the former Turkish Civil Code (Law No. 743) had different treatment of people based on birth out of wedlock. A child born out of wedlock had to be recognized by the father to be his heir. According to the article, inheritance rights from the paternal side of children born out of wedlock entitled them to receive only half of the inheritance of 'legitimate' children. This discriminatory treatment created the disadvantageous position for 'illegitimate' children. This article was codified from the Swiss Civil Code (*Zivilgesetzbuch*) before the amendment in 1976 (Oğuzman, 2014, p. 303). The TCC found the application³ was admissible and Article 443, which included the discriminatory treatment, violated the principle of equality and decided to removed that article. Moreover, the TCC emphasized that there was no point punishing children born out of wedlock; instead of this, set to find a solution for current problems. After cancelling this article, the Court of Cassation (in Turkish *Yargıtay*) tried to fill

³ Turkish Constitutional Court judgement of 11 September 1987, app. no. 1987/1.

the gap in law with case-laws. As conclusion, new Turkish Civil Code (Law No. 4721) came into force on 1 January 2002 and abolished the difference between children born out of wedlock and 'legitimate' children and orders equal rights for both of them.

The TCC does not stick to *verba legis*. On the contrary, the Court is aware that the Article 10 of Turkish Constitution must adapt to changing socio-political values. However, the TCC's approach toward the non-autonomous characteristic of Article 10 is stricter than the approach of the ECtHR. According to the case-law, the TCC's approach has not got any exceptions. It means that the applicant who alleged violation of equality principle (Article 10), has to connect the claims with other fundamental rights and freedoms that are regulated under 1982 Constitution or international agreements ratified by Turkey. The Court stresses that Article 10 is a complementary article that does not have independent existence. Because of this problematic approach of the TCC, the number of victims who suffer from discriminatory treatments increases. In addition, the TCC's current interpretation is falling behind universal regulations. Therefore, TCC immediately has to change its approach and get flexibility to the applications which are related to Article 10.

The TCC uses the criteria of proportionality to detect a discriminatory treatment. The Court requires that the differential treatment has to have objective and reasonable justification. Also, the Court applies a proportionality test with alleged discrimination cases. The Court underlined the distinction treatment must be sufficient, fundamental and proportional. In application no. 2013/158⁴, the Court held that "law-maker's orders are legally binding with the principle of proportionality which is also one of the principles of the state of law". This principle includes three subordinate principles which are the principle of suitability, the principle of necessity and the principle of proportionality. The principle of suitability means that the aim sought and current precaution should be suitable; the principle of necessity means that precaution should be necessary to the aim sought and finally the principle of proportionality refers to

⁴ TCC app. no. 2013/158, judgment of 27 March 2014.

reasonable balance of proportionality between the means employed and the aim sought to be realized. If the precaution does not require all these principles, it violates the principle of equality under Article 10. So, the TCC cleared the definition of the principle of proportionality with case-law. However, the case-law of the ECtHR has not developed a precise definition for the principle of proportionality yet. Also, the ECtHR tends to use different terms to describe proportionality and it causes to increase the possibility the applications might be found inadmissible because of unclearness and complexity of the ECtHR's interpretation. In addition, the ECtHR tends to conflate the assessment of the legitimate aim with the principle of proportionality (Besson, 2013, p. 167).

The TCC's case-law, the equality principle (Article 10) refers to equality under law rather than *de jure* equality. So, the TCC pointed out that people who have the same or similar legal status, should be treated alike under the law⁵. According to the case-law, it is clear that the the TCC refers to *de facto* equality in the doctrine. In *Remezhan Orak*⁶ case, the Court pointed out the development of democracy and pluralism depend on equality on the society. In its own words: "democracy will [be] getting stronger when differences were perceived as not a threat, [but] on the contrary, [as] a value of wealth by the society".

The TCC expects from the applicants to objectify their claims. If the applicant could not bring enough evidence to objectify alleged discrimination, the Court found the applicant's complaints were inadmissible⁷. According to the case-law, the Court expected from

⁵ TCC application of *Hüseyin Kesici* app. no. 2013/3440, judgment of 20 April 2014; app. no. 2009/47, judgment of 17 March 2011; app. no. 1998/10, judgment of 20 May 1998; app. no. 2004/54, judgment of 4 May 2005; app. no. 2014/99, judgement no. 4 December 2014; application of *K.A* app. no. 2014/11014, judgement of 16 April 2015.

⁶ TCC application of *Remezhan Orak* app. no. 2013/2229, judgment of 3 February 2016 §46.

⁷ TCC application of *Billur Güzide Balyemez, Recai Alper Tunga* app. no. 2014/5909, judgment of 25 March 2015; *Ahmet Baysal* app. no. 2015/2089, judgment of 4 July 2018.

the applicant to explicate the discriminatory treatment or at least to clarify with reasonable justification why his/her knowledge is limited. Thus, the burden of proof is heavier against the applicant. Because of the TCC's approach toward burden of proof, most applications were found inadmissible. All in all, this narrow interpretation of the Court also prevents the development of the case-law on the basis of principle of equality and anti-discrimination principle.

The ECtHR's approach to the burden of proof is based on *prima facie*. It means that the applicant only bears to establish *prima facie* discrimination. After that the burden of proof shifts and places the burden on the respondent state to prove the treatment is not discriminatory or has an objective and reasonable justification (Arnardóttir, 2007, p. 38). It is vital that the applicant has to prove the existence of different treatment and discrimination ground clearly. According to Oddny Mjöll Arnardóttir, especially cases involving the non-sensitive discrimination grounds, the Court tends to rely on the margin of appreciation. It causes a heavier burden of proof on the applicant. However, in cases related to 'suspect grounds' e.g. birth, sex, ethnic origin, nationality, etc. the applicant's burden is replaced and the respondent state has to bear the burden of proof (2007, p. 25). It is clear that *prima facie* eases the applicant's burden of proof, even though it is still hard on non-sensitive grounds of discrimination. In Turkish legal system, *prime facie* does not exist. However, the TCC should show flexibility to the burden of proof to protect individuals from discriminatory treatments and build the case-law related to the principle of anti-discrimination.

The TCC does not bind with the applicant's legal definition. The Court makes legal definition of the concrete case. The TCC follows an investigatory model. In other words, the applications could not be found inadmissible on the basis of legal definition. The TCC scrutinizes the concrete case and makes a legal definition *de facto*.

The hierarchical structure of unequal treatment is accepted in Turkish legal system (Karan, 2013, p. 469). Discriminatory grounds which are regulated in Article 10 are accepted to comprise of suspect grounds, e.g. language, race, colour, sex, political opinion, philosophical belief, religion and sects. Based on the former decisions of

the TCC, the definition of suspect ground is not clear. For instance, the Court did not find any violation of discrimination of legal order about married women stating that they can only use their maiden name with husband's surname. In 2015, the TCC has changed the interpretation. In the case of *Gülbu Özgüler*⁸, the Court found it violates Article 10 on the basis of sex to give her husband's surname to a child based on a custody right. The Court pointed out that orders about the child's surname on the circumstances of divorce or annulment of a marriage are a reflexion of former Turkish Civil Code (Law No. 743). Thus, Turkish Civil Code (Law No. 4721) was based on equality between married couples and abolished the status of 'a head of family'. As a result, it is seen that this TCC's interpretation is parallel with the ECtHR's case-law.

However, in the case of discrimination based on disability, the TCC's decisions are completely opposite to the ECtHR's case-law. According to the TCC, disability is not one of suspect grounds. In *Muzaffer Akkanat* case, the Court found alleged discrimination on the basis of disability was abstract and emphasized that Article 10 is not an autonomous article, which means that it needs to be combined with other rights. The TCC's strict attitude toward the issue of burden of proof and non-autonomous structure of Article 10 reduces the impact of Article 10's protection. In the ECtHR's case-law, disability is considered as a suspect ground. In *Enver Şahin*⁹ case, the ECtHR has shown it, Member States have a positive obligation to consider a different treatment in a way to eliminate *de facto* unequal situations.

⁸ TCC application of *Gülbu Özgüler*, app. no. 2013/7979, judgment of 11 December 2015.

⁹ ECtHR *Enver Şahin v. Turkey*, app. no. 23065/12, judgment of 30 January 2018.

Conclusion

When the individual application was introduced within the Turkish legal system, it was expected to decrease the number of cases applied against Turkey to the ECtHR (Kontacı, 2014, p. 109). So, law-maker's primary aim was finding solution to individual applications in a domestic law system hereby, so that as few as possible applications would take to the ECtHR. Jurists have consensus about protecting individuals fundamental rights and freedoms and controlling public authorities about obeying the law was secondarily important issue. Therefore, the main subject of individual applications must be related to fundamental rights and freedoms which are ordered in the 1982 Constitution or the ECHR with its protocols (Göztepe, 2011, p. 15). Law-maker's intent might be arguable, but variety of subjects of case-law and consciousness of the society about fundamental rights and freedoms is increasing rapidly.

So, the core subject is internalizing the spirit of the regulations and reflecting it to the TCC's decisions. For instance, the prestige of the ECHR comes from the ECtHR's pioneer jurisprudence, not from the detailed regulations, protocols, articles, etc. Moreover, the method of casuistry is unfashioned nowadays; the most part of protecting disadvantaged groups against discrimination belongs to judiciary body rather than legislative power. In conclusion, the TCC has to focus to find realistic solutions and main concern should be protecting individuals' fundamental rights and freedoms rather than other motives.

The TCC's decisions about Article 10 are not at the desired level, but it is seen that the Court is open to development, however, sometimes, the Court could not depart easily from old traditions and unfashioned approaches. For the TCC's decisions, which are related to an anti-discrimination and equality principle, the Court tends to interpret facts, terms, and also a concrete case with a very narrow approach. Then, the complexity of term crises shows up and even the Court falls behind that blurry field, which causes incomprehensible decisions. That is the main cause of lack of stable case-law. However,

the solution is very simple: hold to legal definitions of terms and put enough attention to express it.

Last but not least, the TCC is severe about the burden of proof and tend to find an alleging discrimination is abstract and inadmissible. It causes Article 10's restricting power. Generally, groups which suffer discrimination have very limited access to documents which are the proof of discriminatory treatment. Nevertheless, the TCC's such narrow understanding is preventing development of the case-law related to anti-discrimination law. Also, finding applications inadmissible based on the burden of proof violates individuals' several constitutional rights and is totally against international human rights understanding.

The TCC needs to remember that discrimination is spreading and main concern should be protecting individuals and groups from discriminatory treatments. Achieving this goal also means changing the TCC's interpretation of equality principle.

Bibliography

- Abadan-Unat, N. (1981). *Women in Turkish Society*. Leiden: Brill.
- Algan, B. (2001). Dissolution of Political Parties by the Constitutional Court in Turkey: An Everlasting Conflict between the Court and the Parliament. *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, 60(4), pp. 809–836 DOI: 10.1501/Hukfak_0000000001.
- Arnardóttir, O.M. (2007). Non-discrimination under Article 14 ECHR: the Burden of Proof. *Scandinavian Studies in Law* 51, pp. 13–39.
Retrieved from <http://www.scandinavianlaw.se/pdf/51-1.pdf>.
- Aybay, R. (2017). *İnsan Hakları Hukuku*. İstanbul: İstanbul Bilgi Üniversitesi Yayınları.
- Bâli, A. (2013). Courts and Constitutional Transition: Lessons from the Turkish Case. *International Journal of Constitutional Law*, 11(3), pp. 666–701. DOI:<https://doi.org/10.1093/icon/mot025>.
- Baker, A. (2006). The Enjoyment of Rights and Freedoms: A New Conception of the “Ambit” under Article 14 ECHR. *Modern Law Review*, 69(5), pp. 714–737. DOI:10.1111/j.1468-2230.2006.00607.x.

- Besson, S. (2012). Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe. *American Journal of Comparative Law*, 60(1), pp. 147–180. DOI:10.5131/ajcl.2011.0018.
- De Schutter, O. (2005). *The Prohibition of Discrimination under European Human Rights Relevance for EU Racial and Employment Directives*. Luxembourg: European Commission.
- Gerards, J.H. (2004). Intensity of Judicial Review in Equal Treatment Cases. *Netherlands International Law Review*, 51, pp. 135–183 DOI: 10.1017/S0165070X04001354.
- Gönenç, L. (2006). Dynamics of Political Reform in Turkey. *Europe-Koleg Hamburg. Institute for Integration Research. Discussion Paper 1/2006*. Retrieved from <http://www.yasayanayasa.ankara.edu.tr/makaleler.html>.
- Göztepe, E. (1999). Anayasal Eşitlik İlkesi Açısından Evlilikte Kadınların Soyadı. *Ankara Üniversitesi SBF Dergisi*, 54(2), pp. 101–130.
- Göztepe, E. (2011). Türkiye’de Anayasal Mahkemesi’ne Bireysel Başvuru Hakkının (Anayasa Şikâyeti) 6216 Sayılı Kanun Kapsamında Değerlendirilmesi. *Türkiye Barolar Birliği Dergisi*, 95, pp. 13–40.
- Gözübüyük, Ş. & Gölcüklü F. (2016). *Avrupa İnsan Hakları Sözleşmesi ve Uygulaması*. Ankara: Turhan.
- Inalcık, H. (1978). Impact of the Annales School on Ottoman Studies and New Findings [with Discussion]. *Fernand Braudel Center*, 1(3/4), pp. 69–99. Retrieved from <http://www.jstor.org/stable/40240774>.
- Karan, U. (2013). Eşitlik İlkesi ve Ayrımcılık Yasağı. W:S. İnceoğlu (ed.), *İnsan Hakları Sözleşmesi ve Anayasa Mahkemesi’ne Bireysel Başvuru Kapsamında Bir İnceleme* (459–494). İstanbul: BETA.
- Karpat, K. (2001). *The Politicization of Islam: Reconstructing Identity, State Faith and Community in the Late Ottoman State*. Oxford: Oxford University Press.
- Kontacı, E. (2014). Anayasa Mahkemesine Bireysel Başvuruda Avrupa İnsan Hakları Sözleşmesi’nin Yorumu. *Ankara Barosu Dergisi*, 4, pp. 106–117.
- Mardin, Ş. (2000). The Genesis of Young Ottoman Thought a Study in the Modernization of Turkish Political Ideas. Newyork: Syracuse University Press.
- O’Connell, R. (2009). Cinderella comes to the Ball: Article 14 and the right to non-discrimination in the ECHR. *Legal Studies: The Journal of the Society of Legal Scholars*, 29 (2), pp. 211–229.
- Oğuzman, K. (2014). Evlilik Dışı Çocukların Babalarına Mirasçılığı Sorunu. *Ankara Üniversitesi SBF Dergisi*, 49, pp. 303–411. Retrieved from <http://dergipark.gov.tr/download/article-file/36529>.
- Oostland, R. (2006). Non-discrimination and Equality of Women A *Comparative Analysis of the Interpretation by the UN Human Rights Committee and the UN Committee on the Elimination of Discrimination Against Women*. Ph.D. Utrecht University. *Utrecht*.

- Özbudun, E. (2006). Political Origins of the Turkish Constitutional Court and the Problem of the Democratic Legitimacy. *European Public Law*, 12(2), pp. 213–223.
- Tobler, C. (2014). Equality and Non-Discrimination under the ECHR and EU law a Comparison focusing on discrimination against LBGTI persons. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 74 (3). pp. 521–561.
- Retrieved from https://www.zaoerv.de/74_2014/74_2014_3_a_521_562.pdf.
- Üçok, C., Mumcu A. & Bozkurt G. (2008). *Türk Hukuk Tarihi*. Ankara: Turhan.
- Yüceer, S. (2008). Demokrasi yolunda önemli bir aşama: Türk kadınına siyasal haklarının tanınması. *Uludağ Üniversitesi Fen-Edebiyat Fakültesi Sosyal Bilimler Dergisi*, 9(14), pp. 131–151.

Obecne zastosowanie zakazu dyskryminacji w decyzjach Sądu Konstytucyjnego Republiki Turcji

Streszczenie: Zakaz dyskryminacji i zasada równości są jednymi z najważniejszych elementów koncepcji praw człowieka. Współcześnie, odkąd liczba przypadków dyskryminacji w życiu codziennym zaczęła się zwiększać, kontrowersyjną stała się kwestia tego, w jakim stopniu prawo może chronić przed dyskryminacją jednostkę będącą rdzeniem społeczeństwa. W tureckiej konstytucji nie występuje zapis, który zabraniałby dyskryminacji. Jej przypadki rozpatrywane są w ramach zasady równości scharakteryzowanej w Artykule 10. Obszar badawczy tej pracy obejmuje prezentację tego, jak do zakazu dyskryminacji odnosi się turecki Trybunał Konstytucyjny oraz w jakim stopniu jego decyzje w tych przypadkach są podobne do wyroków Europejskiego Trybunału Praw Człowieka. Do przeprowadzenia analizy wykorzystano metodę historyczną i porównawczą.

Słowa kluczowe: prawa człowieka, zakaz dyskryminacji, zasada równości, turecki Trybunał Konstytucyjny, Artykuł 10 Konstytucji Turcji z 1982 r., Artykuł 14 Europejskiej Konwencji Praw Człowieka