



Right to Vote-National Report Turkey

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About ETHOS

ETHOS - Towards a European Theory Of Justice and fairness, is a European Commission Horizon 2020 research project that seeks to provide building blocks for the development of an empirically informed European theory of justice and fairness. The project seeks to do so by:

- a) refining and deepening the knowledge on the European foundations of justice - both historically based and contemporary envisaged;
- b) enhancing awareness of mechanisms that impede the realisation of justice ideals as they are lived in contemporary Europe;
- c) advancing the understanding of the process of drawing and re-drawing of the boundaries of justice (fault lines); and
- d) providing guidance to politicians, policy makers, advocacies and other stakeholders on how to design and implement policies to reserve inequalities and prevent injustice.

ETHOS does not merely understand justice as an abstract moral ideal, that is universal and worth striving for. Rather, it is understood as a re-enacted and re-constructed "lived" experience. The experience is embedded in firm legal, political, moral, social, economic and cultural institutions that are geared to giving members of society what is their due.

In the ETHOS project, justice is studied as an interdependent relationship between the ideal of justice, and its real manifestation – as set in the highly complex institutions of modern European societies. The relationship between the normative and practical, the formal and informal, is acknowledged and critically assessed through a multi-disciplinary approach.

To enhance the formulation of an empirically-based theory of justice and fairness, ETHOS will explore the normative (ideal) underpinnings of justice and its practical realisation in four heuristically defined domains of justice - social justice, economic justice, political justice, and civil and symbolic justice. These domains are revealed in several spheres:

- a) philosophical and political tradition,
- b) legal framework,
- c) daily (bureaucratic) practice,
- d) current public debates, and
- e) the accounts of the vulnerable populations in six European countries (the Netherlands, the UK, Hungary, Austria, Portugal and Turkey).

The question of drawing boundaries and redrawing the fault-lines of justice permeates the entire investigation.

Alongside Utrecht University in the Netherlands who coordinate the project, five further research institutions cooperate. They are based in Austria (European Training and Research Centre for Human Rights and Democracy), Hungary (Central European University), Portugal (Centre for Social Studies), Turkey (Boğaziçi University), and the UK (University of Bristol). The research project lasts from January 2017 to December 2019.

Executive Summary

This working paper was written within the framework Work Package 3 (Law as or against justice for all?) for Deliverable 3.4 (Right to Vote-National Report Turkey) of the ETHOS Project. It feeds into the fourth WP3 report: Theuns, Tom (2019) 'A comparative report on the legal rules and practices regulating the exercise of the right to vote (eligibility and representation) in local, national and EU elections of marginalised groups', ETHOS deliverable D3.4. This paper focuses on right to vote of two groups, namely convicted prisoners and persons with mental disabilities in Turkey in a strict sense. It mainly elaborates on the existing legal framework without addressing its application or interpretation by the relevant organs.

The provisions of the Constitution of Republic of Turkey (CRT) are fundamental legal rules binding upon the legislative, executive and judicial organs, and administrative authorities and they also have horizontal effect on other private institutions and individuals. The article 67 of the CRT serves as a general basis for political rights in Turkish law, which allows for an enhanced recognition of different aspects of right to vote and provides protection for political rights. Article 10 also encompasses principle of equality and prohibition of discrimination which is also closely related with the right to vote. The Constitution, on the other hand, leaves a wide discretion for the regulation of the said right by the legislature. In Turkish law restrictions for right to vote are based on age, citizenship, conscripts, cadets, convicted and interdicted persons. Currently convicted persons in penal institutions that sentenced for an intentional crime are not eligible to vote in elections or referendums without any distinction based on the duration of the sentence or type of the crime committed and applied in an indiscriminative way. Both the Turkish Criminal Code and Turkish Civil Code provide restrictions to right to vote of convicted persons serving their sentence in a penitentiary institution.

There are also restrictions for persons with mental disabilities with regard to right to vote. Citizens declared legally incompetent or banned from public service by a court cannot be regarded as a voter. Despite explicit reference to positive obligations in CRT, the only measure put in practice is applicable to the physically disabled persons in order to ensure their participation to the elections. In recent years, cases came before the judicial bodies have been related with the right to vote of convicted persons which enabled some of the former convicts to vote. To date, the existing legal framework for the persons with mental disabilities has not been interpreted by the judiciary which hinder the effectiveness of the relevant norms.

The total number of voters registered in the last presidential elections that was held on June 24, 2018 was nearly 60 million. The restrictions for convicted persons in a penal institution and interdicted persons are mainly temporal and following a release from a penal institution, the execution of a sentence or a decision of a civil court for lifting interdiction they will reacquire right to vote. Therefore, despite persons with permanent mental incapacity, the current situation in Turkey do not rise a major issue in the context of justice as representation. However, the absence of a framework mental health law leaves the PwMDs in an insecure position to exercise their rights or provides an adequate protection in case of an interference to their rights.

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List of Abbreviations

Art./Arts.	: Article/Articles
CRPD	: Committee on the Rights of Persons with Disabilities
CRT	: Constitution of Republic of Turkey
ECHR	: European Convention on Human Rights
ECtHR	: European Court of Human Rights
EU	: European Union
HRC	: Human Rights Committee
ICCPR	: International Covenant on Civil and Political Rights
p	: page
para./paras.	: paragraph/paragraphs
PwMDs	: Persons with mental disabilities
SBE	: Supreme Board of Elections
TCC	: Constitutional Court of the Republic of Turkey
TİHEK	: Turkish Human Rights and Equality Institution
UDHR	: Universal Declaration of Human Rights
UNCRPD	: United Nations Convention on the Rights of Persons with Disabilities

1) National Legal Framework

1.1) Constitutional Protection

Does national constitutional law protect the right to vote, and if so, in which terms (as elaborated through judicial interpretation, where relevant)? Please report on any corresponding state obligations to enable the exercise of the right to vote. If not protected under national constitutional law, which national legal framework (eg legislation, case law) grants protection to the right to vote and lay down any corresponding state positive obligations to enable the right to vote.

This report focuses on right to vote of prisoners and persons with mental disabilities (PwMDs) in Turkey. The existing Turkish Constitution is the fourth one that has been adopted after the fall of the Ottoman Empire and is still in force since 1982 with major amendments mostly inspired by the EU accession process.¹ Art. 2 of the Constitution describes the State as “a democratic, secular and social state governed by the rule of law... respecting human rights”. Art. 2 of the Constitution describes the State as “a democratic, secular and social state governed by the rule of law... respecting human rights”. The provisions of the Constitution of Republic of Turkey (CRT) are fundamental legal rules binding upon the legislative, executive and judicial organs, and administrative authorities and they also have horizontal effect on other private institutions and individuals.

CRT was adopted two years after the coup d'état staged in 1980 and designed directly by the members of military council, explicitly set forth the right to vote comprehensively. According to the first subsection of the Article (Art.) 67 of the CRT, which can be serve as a general basis for political rights in Turkish law, “in conformity with the conditions set forth in the law, citizens have the right to vote, to be elected, to engage in political activities independently or in a political party and to take part in a referendum.” The text of the article both allows for an enhanced recognition of different aspects of right to vote and provides protection for political rights. On the other hand, leaves a wide discretion for the regulation of the said right by the legislature.

As can be traced from the text, political rights are valid for only Turkish citizens, thus persons do not retain Turkish citizenship cannot exercise any of the rights specified in the afore-mentioned subsection. This restriction prevails for all the elections and referendums without any exception. Since Turkey is not a member of the European Union (EU), non of the citizens of the any EU member states have right to vote in any of the elections or referendums except for those who have dual citizenship. Turkey is also not party to the Convention on the Participation of Foreigners in Public Life at Local Level as of 2018 which was adopted in 1992, thus foreigners cannot vote in any of the elections or referendums without any exception.²

Art. 67 of the CRT also set forth the criteria to be applied for the enfranchisement in a strict sense: “All Turkish citizens over eighteen years of age shall have the right to vote in elections and to take

¹ For the official text of the Constitution of Republic of Turkey in English see, http://www.constitutionalcourt.gov.tr/inlinepages/legislation/pdf/constitution_en.pdf (Last accessed: 01.10.2018)

² As of 01.10.2018, only nine members of COE has ratified the convention. See, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/144/signatures?p_auth=99awVlvk (Last accessed: 01.10.2018)

part in referendums.” The first criterion as regards the right to vote besides Turkish citizenship is based on age and set the age limit as 18, which is also the age of majority and capacity to act provided in Turkish Civil Code (Law No. 4721). When the CRT first adopted in 1982, the age limit was 21. In the course of time respectively it was reduced to 20 in 1987³ and to 18 in 1995.⁴ The rationale behind the first amendment in 1987 was purported as “it has been deemed appropriate by the social situation of the country”.⁵ As the legislative intention of the second amendment in 1995 was uncertain, the rationale of the second amendment was unknown.⁶

There are also further restrictions stipulated in Art. 67 as with respect to right to vote which involves conscripts (namely privates and corporals) and cadets: “Privates and corporals at arms, cadets... shall not vote.” Military service is obligatory for every male Turkish citizen above the age of 20 and according to the official figures, the number of conscripts in 2018 is circa 360.000 and it is expected that this number will be 345.000 in 2019.⁷ Thus, in the last presidential and parliamentary elections that held in June 2018, most of those persons have been disenfranchised. The number of cadets enrolled in a military college or academy in 2018 is circa 9.500. Although the total number is unknown, the number of disenfranchised persons in consequence of their military status hundreds of thousands. Apart from the above-mentioned criteria there are also two groups additional to conscripts and cadets. These are convicted prisoners which is explicitly mentioned in Art. 67 of TRC and interdicted persons that introduced by Law No. 298. These groups will be focused upon below.

The general basis for positive obligations regarding rights and freedoms enlisted in CRT is Art. 5 which states that “The fundamental aims and duties of the State are [...]to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law...” In order to secure exercising the right to vote by detainees and convicted persons, Art 67 of the CRT implies that “The necessary measures to be taken to ensure the safety of voting and the counting of the votes in penal execution institutions and prisons shall be determined by the Supreme Board of Elections; such voting is held under the on-site direction and supervision of authorized judge.” Despite this explicit reference for the imprisoned persons there is no direct emphasis for positive obligations stem from right to vote beyond general obligation of the state set forth in Art. 5 of the CRT.

Along with the Art. 5 of the CRT which constitutes a general legal basis for positive obligations, CRT provides a general positive obligation as regard to persons with disabilities. Art 61, subsection 2 of the CRT states that “The State shall take measures to protect the disabled and secure their integration into community life.” Wording of the subsection explicitly provides duties for the state which should also embraces right to vote of the disabled persons.

Another provision related with the right to vote is Art. 10 of the CRT which encompasses principle of equality and prohibition of discrimination: “Everyone is equal before the law without distinction as to

³ Law No. 3361, 17.05.1987.

⁴ Law No. 4121, 23.07.1995.

⁵ Turkish Grand National Assembly, Report of the Constitution Committee, Term: 17, Legislative Session: 4, Ordinal No: 564, 1987, p. 1.

⁶ Turkish Grand National Assembly, Report of the Constitution Committee, Term: 19, Legislative Session: 4, Ordinal No: 861, 1995, p. 8.

⁷ “5.5 milyonun askerlik sorunu çözüm bekliyor”, Hürriyet, 04.06.2018, <http://www.hurriyet.com.tr/gundem/5-5-milyonun-askerlik-sorunu-cozum-bekliyor-40856762> (Last accessed: 01.10.2018)

language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such consideration.” As can be seen from the wording, the protection afforded is not limited to the grounds enlisted in the provision. The assertion of “any such considerations” potentially empowers the Turkish judiciary to widen the protection to the groups that have not been expressed in the article. The material scope of the Art. 10 is not limited to specific rights, therefore directly covers right to vote in the strict sense. Accordingly, Art. 10 of the CRT can be served as a basis to provide protection to both PwMDs and convicted persons for an intentional offense in a penal institution.

The amendment made in Art. 10 in 2010 annexes a new subsection to the provision as “Measures to be taken for ... disabled people ... shall not be considered as violation of the principle of equality.” The new subsection both obliges state to take special measures as well as provides that those measures would not constitute a breach of principle of equality. Although the former version of the provision implicitly recognizes the need for special measures and their conformity with the principle of equality, the 2010 amendment fosters this approach by way of emphasizing the disadvantage groups such as PwDs and adding indirectly the disabled persons to the list of prohibited grounds of discrimination. As a consequence, Art. 10 of the CRT enhanced the protection provided for right to vote for persons with disabilities. Nevertheless, to date, there is no case that reviews the conformity of the legislation or acts of judiciary or public bodies with the Art. 10 of the CRT.

1.2) General National Rules

Please summarise the national legal framework determining who has the right to vote (franchise) in which local/state, national/federal (legislative, as well presidential if relevant), and European elections, as well as, where relevant, in referenda, according to national constitutional or legislative/executive/administrative provisions, and relevant judicial interpretation? Please also include any exclusion rules (e.g. disenfranchisement, voting bans, etc.).

In Turkey, aside from Art. 67 of the CRT, further regulations dealing with the right to vote also exist within domestic law:

- Law on Basic Provisions of Elections and Voter Registers (Law No. 298)
- Law on Parliamentary Elections (Law No. 2839)
- Law on Elections of Local Administrations and Neighbourhood Mukhtars⁸ and Board of Aldermen (Law No. 2972,
- Law on Referendums on Constitutional Amendments (Law No. 3376) and Law on Presidential Election (Law No. 6271)
- Law on Persons with Disabilities (Law No. 5378)
- Turkish Human Rights and Equality Institution Law (Law No. 6701)
- Turkish Civil Code (Law No. 4721)
- Turkish Penal Code (Law No. 5237)

The prominent regulations regarding the elections can be found in Law on Basic Provisions. According to Art. 1 of the law “In the elections of Presidency, member of parliaments, membership of provincial councils, mayors, membership of municipal council, mukhtars, membership of council of elders and in presenting laws related with amendments in constitution to referendum, provisions of this Law are implemented.” The law also defines in Art. 6 the voters as Turkish citizens over the age of 18.

⁸ Head of a village or neighborhood elected by the local inhabitants.

Apart from a specific provision focused on principle of equality and prohibition of discrimination, for the first time a general definition of different types of discrimination provided in Art. 2 of the Turkish Human Rights and Equality Institution Law (TİHEK) (Law No. 6701). The types of discrimination set forth in the Law are segregation, direct discrimination, indirect discrimination, multiple discrimination, instruction to discriminate, mobbing, denying reasonable accommodation, harassment, discrimination on an assumed ground and victimization. The TİHEK Law also obliges both public and private bodies or natural persons to eliminate discrimination in public and private sector. The Law prohibits discrimination confined to selected grounds including disability in Art. 3/1.

Last but not least, person with disabilities are sometimes subjected to mistreatment and harassment of a discriminatory nature. In 2016, the TİHEK Law defined harassment in Turkish law for the first time and recognized it as a form of discrimination.⁹ The Art. 3/3 of the TİHEK Law stipulates that with regards to cases of harassment, public institutions and organizations as well as occupational organizations of a public nature must take the necessary precautions to eliminate infringements, redress infractions, prevent the repetition of such acts, and ensure that legal and administrative steps are carried out to follow up on such matters. Together with the TİHEK Law, the Turkish Penal Code (Law No. 5237) forbids physical violence within the scope of crimes such as wilful injury, and it is possible for administrative sanctions to be carried out within the context of the Art. 125 of the Law on Public Servants (Law No. 657). Despite the fact that the legislative framework provides protection against discrimination to PwMDs, there is no case available that depicts the relevant national anti-discrimination laws have been used to counter discrimination of disabled voters.

1.3) Specific Rules Targeting Selected Groups

Provide details on any specific rules targeting our selected groups, namely refugees/asylum-seekers, foreign residents, citizens living abroad, persons living with disabilities (including mental disabilities), and criminals/prisoners. Does national law impose particular obligations on the state in order to guarantee the exercise of the right to vote to those who are entitled to vote? Pay particular attention to measures aiming at guaranteeing the exercise of the right to vote of disabled persons, citizens living abroad, prisoners, older persons, etc.

1.3.1) Prisoners

The original text of the Art. 67 of the CRT which was adopted in 1982 stated that incarcerated persons in penal institutions as not eligible to vote in elections or referendums and made no distinction between convicted prisoners and detainees. Following the first amendment in 1987 with regard to minimum age requirement, a second amendment had undergone in 1995 in Art. 67 which excludes remand prisoners from the scope of the restriction because disenfranchising a person detained in prison pending the outcome of the criminal proceedings against him was considered incompatible with the principle of presumption of innocence.¹⁰

⁹ TİHEK Law, Art. 2/1-j: Harassment is defined in the following terms: "Every kind of behaviour that seeks to harm human dignity or is intimidating, derogatory, insulting, and/or intends to cause embarrassment and thus results in harm to human dignity, on the grounds stipulated in this law, including those of a psychological and sexual nature".

¹⁰ ECHR, *Söyler v Turkey*, Appl. No. 29411/07, 17.09.2013, para 30.

The third and the last amendment recast in 2001 in Art. 67 set forth that only persons convicted with an intentional crime who are incarcerated in a penal institution are deprived right to vote and removed the restriction for detainees which extended the scope of the holders of the said right. There is no specific referral to the rationale behind the amendment, however the primary motive laid down in the general preamble was stated as harmonization of provisions of the CRT to the political criteria come to the fore in EU accession process and fostering democratic standards, human rights and rule of law in conformity with universal norms.¹¹ It should be noted that the above-mentioned restriction is valid for all convicted persons with an intentional crime without mentioning any specific crime, thus applicable in an indiscriminate way. As is seen, the law focuses the moral element of a crime instead of make a distinction based on the severity or type of the crime. There is no discretion left to the judges and disenfranchisement is the direct consequence of the sentence which resulted with a blanket ban.

Despite the restrictions set forth in Art. 67 of the CRT, as stated above, the phrase “the exercise of these rights shall be regulated by law” provides for further restrictions for right to vote in Turkey. The statutory law, namely Law on Basic Provisions (Law No. 298) which was adopted in 1961 also allows for additional restrictions and leaves out some groups from the scope of the right. Art. 7 of the Law on Basic Provisions provides that the following persons, stated as well in Art. 67 of the CRT, cannot vote:

- “(1) Privates, corporals and sergeants performing their military service (this provision is applicable also to those on leave, whatever the reason for their leave),
- (2) Students in military schools,
- (3) Convicts in penitentiary establishments.”

As can be easily seen in the text of the article, there is an incompatibility with the Art. 67 of the CRT. This sentence suggests that there is an indiscriminate disenfranchisement for all convicted persons in prisons. In contrast to Art. 7 of the Law on Basic Provisions, Art. 67 of the CRT clearly stated that only persons convicted for an intentional offense disenfranchised. Accordingly, the former is no longer applicable following the amendment in Art. 67 of the CRT in 2001, thus needs to be disregarded. The reference to the convicted persons for neglected offenses in the Art. 87 of the Law No. 298 (voters who are in penal institutions or have been convicted from neglected offenses, document delivered by administration of penal institution, are accepted as identification document) backwards the above-mentioned argument that there is no restriction provided in Law No. 298 for the convicted persons for negligence. As to Art. 8. of the Law on Basic Provisions (Law No. 298), persons being disqualified to hold public office cannot be accepted as voter also.

In addition to the above-mentioned laws concerning elections and referendums, there exists also other restrictions derive from relevant laws. The first law is Turkish Criminal Code (Law No. 5237) that was adopted in 2004 and entered into force in 2005, which also restricts right to vote of convicted persons. Relevant provisions of Art. 53 of the Turkish Criminal Code provide as follows:

“(1) As the statutory consequence of imposition of a prison sentence for an offence committed intentionally, the person shall be deprived of the following [rights]:

...

b) Voting, standing for election and enjoying all other political rights;

...

¹¹ Turkish Grand National Assembly, Report of the Constitution Committee, Term: 21, Legislative Session: 3, Ordinal No: 737, 2001, p. 5.

(2) The person cannot enjoy the [above-mentioned] rights until the completion of execution of the prison sentence to which he or she has been sentenced as a consequence of the commission of the offence.

...

(4) Sub-section 1 above shall not be applicable to persons whose short term prison sentence is suspended or to persons who were under the age of eighteen at the time of the commission of the offence.

(5) Where the person is sentenced for an offence committed by abusing one of the rights and powers mentioned in sub-section 1 above, a further prohibition of the enjoyment of the same right shall be imposed for a period equal to between a half and the whole length of the prison sentence..."

According to the Explanatory Report of the Criminal Code, the rationale behind Art. 53 of the Turkish Criminal Code is as follows:

"Society's trust in the person is damaged on account of the offence committed by him or her. For that reason, the convicted person is prevented from exercising certain rights which necessitate a relationship of trust...This deprivation cannot be indefinite. Since the rationale behind punishment is to ensure that the criminal comes to regret committing the offence and that he or she is reintroduced into society, deprivations imposed for the commission of the offence shall continue until the end of the execution of the punishment. Thus, the person will be behaving in accordance with the needs of the execution of his punishment and, when he has done so, he will be declaring to society that he has once again become a trustworthy person..."

The restriction for the convicted persons as regards right to vote is only valid during their presence in prisons. Convicted persons on conditional release, stay of execution or on probation can exercise their right to vote in elections and referendums.¹²

As to Art. 407 of the Civil Code, any adult sentenced to an imprisonment for a period of one year or more is interdicted and appointed a guardian. The Art. 471 of the Turkish Civil Code prescribes that the interdiction and therefore being under a guardianship ends after the imprisonment. Thus, Turkish Civil Code makes no difference between convicted persons for negligence or intentional offences. On the other hand, considering that the Art. 67 of the CRT restricted the right to vote for only convicted persons for an intentional offense, convicted persons for negligence, even interdicted following a verdict of an imprisonment for one year or more, are not been disenfranchised. Not only the CRT but also the practise of the Supreme Board of Elections also confirms the above-mentioned argument.

With regard to the specific legal provisions for the security and safety of voting in prisons, Art. 67 of the CRT explicitly set forth that "the necessary measures to be taken to ensure the safety of voting and the counting of the votes in penal execution institutions and prisons shall be determined by the Supreme Board of Election; such voting is held under the on-site direction and supervision of authorized judge." Therefore, the circulars and decisions of the SBE, is the main source of law that regulate and ensure the security and safety of voting in prisons. Those circulars and decisions are accessible through the Official Gazette and the official web-site of the SBE.

¹² Decision of Supreme Board of Elections No: 337, 01.05.2018, p. 3.

1.3.2) Persons with Mental Disabilities

There exists an official database, although not so reliable, that comprise PwDs. Even though the Turkish Government stated that a “National Disability Database” was established in 2006 with the objective of ensuring efficiency of disability services,¹³ no information has been given on the number of registered persons with disabilities on the database, as well as the distribution of gender, province, type of disability, in which public service planning the registered data is used or the results of these activities etc.¹⁴

The total number of persons with disabilities still unknown in Turkey. An official study carried out in 2002 indicated that the total number of disabled people was 8.4 million which amount to 12.29% of the general population. However, another study conducted in 2011 demonstrated this figures as 4.9 million and which amount to 6.6% of the general population.¹⁵ The researches done by the state presenting different figures leads to a complicated depiction of the situation.¹⁶ It was submitted to the Committee on the Rights of Persons with Disabilities (CRPD) that there is no official statistics or analysis, which focus on the convicted prisoners, health, employment, access to rights and participation of women and girls with disabilities, or any disaggregated data in overall statistics system.¹⁷

Apart from the above-mentioned restrictions, Art 67 of the CRT also allows for further restrictions regulated by laws which served as a basis for a restriction to right to vote of PwMDs. Along with the ones stated in Art. 7 of the Law on Basic Provisions, according to Art. 8, citizens declared legally incompetent or banned from public service by a court cannot be regarded as a voter.

Disabled is defined as “the person that affected by attitudes and environmental conditions that restricts full and active participation to the society on an equal basis with other individuals due to the loss of physical, mental, psychological and sensory capabilities at various levels” in Art. 3/c of the Law on Persons with Disabilities (Law No. 5378). The same definition was repeated in Art. 2/1-e of the Turkish Human Rights and Equality Institution Law (Law No. 6701) adopted in 2016.

According to the Art. 4/b of the Law on Persons with Disabilities (Law No. 5378), discrimination based on disability is prohibited and stated that the combating discrimination is the basic principle of the policies for disabled. Art 4/A, which was adopted in 2014 also provides that special measures taken for the persons with disabilities cannot be regarded as discrimination in parallel with Art. 10 of the CRT. However, the law does not directly refer to right to vote in anyway.

Although, the Turkey claims that the Constitution guarantees the right of persons with disabilities to participate in political and public life based on equality principle,¹⁸ the existing legislation provides

¹³ CRPD, Initial report submitted by Turkey under article 35 of the Convention, CRPD/C/TUR/1, 04.10.2017, p. 55.

¹⁴ CRPD, Proposal of List of Issues from Association for Monitoring Equal Rights in relation to the Government report of the Republic of Turkey for the 10th Pre-Sessional Working Groups, p. 20.

¹⁵ Engelli ve Yaşlı Bireylere İlişkin İstatistik Bilgiler, Engelli ve Yaşlı Hizmetleri Genel Müdürlüğü, October 2018, p. 32.

¹⁶ CRPD, Initial Report on the Convention on the Rights of Persons with Disabilities, Turkey, CRPD/C/TUR/1, 04.10.2017, p. 4; ECSR, Conclusions 2016, Turkey, 2016/def/TUR/15/1/EN, Article 15-1, 09.12.2016.

¹⁷ CRPD, Shadow Report Turkey prepared by the coordination of the Confederation of the Disabled of Turkey, 20.08.2018, para 19.

¹⁸ CRPD, Initial Report on the Convention on the Rights of Persons with Disabilities, Turkey, p. 50.

wide restrictions for persons with disabilities with regard to right to vote. Firstly, according to the Art. 76 of the CRT, persons deprived of legal capacity are listed among the persons that cannot be elected as members of the parliament.

Despite the fact that the Turkish Government asserted that the amendment to Art. 10 of the Constitution provides a constitutional basis for social protection to persons with disabilities and is a significant improvement to strengthen the protection of constitutional rights, it was claimed that “as such, the State will be free to take special measures for those in need of protection to ensure equality among all sectors of the society.”¹⁹ However, following the amendment in 2010, there is no special measures that has been taken by the state in that sense.

According to an amendment adopted in 1997²⁰ in Art. 36 of the Law on Basic Provisions of Elections and Voter Registers (Law No. 298), during the writing of electoral roll, if any disability is determined related with voter, this information should be recorded in the form. Art. 74 of the said law also provides that necessary measures shall be taken disabled voters to attend elections. Thus, the state is responsible to record the existing disabilities of each citizen in order to enable the exercise of right to vote of persons with disabilities. There is no data related to the distribution of persons with disabilities by type of disability, recorded in the election registry.

As to Art. 93 of the Law on Basic Provisions (Law. No. 298), Persons visually impaired, apoplectics, or those who have physical disability, may use their votes in company of their relatives in same precinct, and if not with the company of another voter of their choice. There is no legal requirement for ballots to be available in braille nor possibility of postal ballots. The only option for visually impaired persons along with a company of their relatives is using a stencil which should be made and brought by the relevant person to the polling station.²¹ The law implies a distinction with regard to types of disability. The option set forth in Art. 93 of the Law No. 298 is only valid for persons with physical disabilities and leave out PwMDs.

Pursuant to Art. 8. of the Law on Basic Provisions, persons interdicted cannot be accepted as voter. According to the OSCE report concerning the referendum held in 16 April 2017, circa 195.000 persons declared mentally incompetent by a court decision and thus could not vote in the said referendum.²²

Interdiction is mainly defined in the Turkish Civil Code (Law No. 4721) and according to the Art. 405, 406 and 407 is applicable for mental disorder, mental infirmity, prodigality, alcoholism, drug addiction, unsavoury life style, misconduct or custodial sentence. Turkish Civil Code, Art. 405 provides that any adult who cannot handle his affairs due to “mental illness” or “mental impairment” or who needs assistance for protection and care or who jeopardizes the safety of others shall be restricted and a guardian should be appointed. Considering the relevant legislation with regard to PwMDs, those who are interdicted and assigned a guardian cannot vote in the elections and

¹⁹ HRC, Initial Reports of States Parties, Turkey, CCPR/C/TUR/1, 13.04.2011, para 18.

²⁰ Decree in Force of Law No. 572, Art. 26, 30.05.1997.

²¹ Decision of the SBE No. 1103, 12.12.2018, <http://www.ysk.gov.tr/doc/karar/dosya/77913/2018-1103.pdf> (last accessed: 20.02.2019)

²² OSCE, Office for Democratic Institutions and Human Rights Limited Referendum Observation Mission Final Report, Turkey, 22.06.2017, p. 9, footnote 27.

referendums.²³ There is an exception allowed for the persons who are interdicted by their request on the basis of their inability to properly manage their work due to their disability, elderliness, inexperience or serious disease. According to the Art. 5/I of the Circular No. 140/I of the SBE, those persons are entitled to vote in the elections.²⁴

The patients in mental hospitals can also face with the same situation depending on their type of admission to the hospital. In case of a compulsory hospitalization, the decision is taken by a civil court which results with a decision of interdiction as well and disenfranchisement of the patient. On the other hand, if the hospitalization is voluntary and there is no decision of interdiction of a civil court, the patient will maintain his/her right to vote. In all cases, patients in mental hospitals cannot vote in the hospital premises. The only option for the patients is, pursuant to the Art. 14 of the Law No. 298, to submit a petition to the relevant election board with annexing a medical report in order to be able to vote in “mobile ballot box”. However, this option is only applicable for the bedbound patients, thus needs to be interpreted broadly in order to apply to hospitalized PwMDs. In any case it is only applicable persons living in city or district centres, in other words excludes persons living in rural areas as well as visually or hearing impaired persons.

The situation with regard to interdicted persons is not compatible with international obligations stemmed from treaties Turkey is party to. Art. 12 of the 2006 UNCRPD provides for the equal recognition of persons with disabilities before the law. Art. 29 of the 2006 UNCRPD requires States to “guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others”.

With regard to right to vote of PwMDs OSCE recommended that the election legislation should be harmonized with the objectives of the CRPD, to ensure the full voting rights of persons with mental disabilities, including the right to request assistance to vote from a person of their choice.”²⁵

1.4) Constitutional Challenges

Have national/local rules set out in legislation, regulations or other binding legal measures been challenged for incompatibility with national constitutional norms? If so, which ones, and with what effect? [If information is easily accessible, can you also indicate who were the parties challenging those rules? Have certain national rules contested by societal actors but not challenged before courts?]

In Turkey, since 1962, there has been a constitutional court with a broad mandate. According to the Art. 148 of the CRT, the Constitutional Court of the Republic of Turkey (TCC) shall examine the constitutionality, in respect of both form and substance, of laws, presidential decrees and the Rules of Procedure of the Grand National Assembly of Turkey, and decide on individual applications. Thus, both the relevant laws in this field can be subject to constitutional review and allegations concerning violations of right to vote can be submitted by individual application process to the TCC. The third

²³ Nalan Erkem et al, Country Report on Legal Capacity-Turkey, EU-Person Project, Date of issue unknown, p. 18.

²⁴ SBE, Circular No. 140/I, Decision No. 2018/1134, 28.12.2018, <http://www.ysk.gov.tr/doc/genelge/dosya/77944/2019Mahalli-Yici-GuncellestirmeGenelgesi.pdf> (Last accessed: 20.02.2019)

²⁵ OSCE, Office for Democratic Institutions and Human Rights Election Observation Mission Final Report, Turkey, Early Presidential and Parliamentary Elections, 21 September 2018, s. 10.

subsection of the Art. 148 set forth that “Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities.” As the ECHR only covers elections for a legislative body, the text of the subsection reveals that only parliamentary elections can be subjected to an individual application.

Although there is a vast number of judgments as regards elections and referendums, the number of judgments concerning is so limited. However, the TCC has ruled on some aspects of the right to vote in recent years. Having looked at the database of the TCC, as of October 1st of 2018, circa 10.000 judgments ruled in both processes are accessible. The database asserted that there exists no judgment with regard to PwMDs and the number of judgments concerning convicted persons is only three.

In one of its judgment regarding the constitutionality of a restriction on right to vote of the convicted persons, the TCC stated that democratic society calls for a system where the citizens enjoy their right to elect to the greatest extent possible as a means of measuring national will. The State shall not interfere with the right to elect unless it is compulsory for the democratic order of the society. The Art. 67 of the CRT prescribes that convicts in penal institutions excluding those convicted of negligent offences shall not vote. As the said provision regulates that only convicts in penal institutions due to an intentional offence shall not vote, there is no constitutional provision which prevents the convicts who are not in penal institutions from casting their votes. When the provision of law subject to constitutionality review is examined, it prescribes that, regardless of whether they are in penal execution institutions or not, those who are sentenced to imprisonment due to a felonious intent shall be disqualified from use of right to elect. The restriction, this provision of law imposes on the right to elect, goes beyond the borders of “right to vote” which is clearly defined the constitution as a manifestation of right to elect. It restricts the right to elect categorically in cases of sentence to imprisonment due to a felonious intent without taking into account whether the convict is in penal execution institutions or not. Consequently, the Constitutional Court annulled the provision of law containing the phrase subject to constitutionality review in its relation to the phrase “Use of right to elect and...” in sub-paragraph (b) of the same paragraph by finding it contrary to Arts. 13 and 67 of the Constitution as the said provision of law constitutes an unmeasured restriction which is not necessary in a democratic social order.

The same provision subjected to constitutionality review also prescribes that a person may not use his rights cited under Art. 53 of the Turkish Criminal Code until the punishment of imprisonment is fully executed. In the Constitutional Court’s opinion, the provision of law subject to constitutionality review is unconstitutional as it prescribes that a person may not use his right to elect until the punishment of imprisonment due to a felonious intent is fully executed and, thereby, the said provision contradicts an explicit provision of Constitution by restricting the right to elect for a time period which exceeds the actual execution period in penal institutions.²⁶

TCC in two cases ruled that deprivation of right to vote for convicted prisoners who are incarcerated in a penal institution is the result of the Art 67 of the CRT which stipulates explicitly said prohibition.²⁷ Thus the Court declared its incompetence to rule about two applications regarding right to vote. The main reason behind this approach is that, the legal basis of the above-mentioned

²⁶ TCC, E. 2014/140, K. 2015/85, 08.10.2015.

²⁷ TCC, *Musa Kaya*, B. No: 2014/19397, 25.03.2015; *Hakan Tezel*, B. No: 2014/16988, 08.09.2015.

restriction is directly the CRT, thus individual applications with regard to right to vote of convicted persons for an intentional offense in a penal institution cannot be subject to a review by the Court.²⁸ The case law suggested that TCC opt for finding applications inadmissible instead of discussing the proportionality of the restriction.

1.5) Relevant Institutional and Procedural Aspects

If certain institutional aspects (eg judicial review) or procedural rules (eg standing) are important in order to understand how the right to vote is protected under domestic law, please provide relevant details (200 words or a reference to accessible English language material presenting it in a relevant, synthetic and concise manner).

According to Art. 67 of CRT, “the elections and referendums shall be held under the direction and supervision of judiciary” which is repeated in Art. 79 with a different wording. The text gives the impression that a judicial body carries the authority in matters regarding elections. However, Art. 79 of the CRT names the official body as the “Supreme Board of Election” (SBE) which is an administrative body rather than a judicial body: “The Supreme Board of Election shall execute all the functions to ensure the fair and orderly conduct of elections from the beginning to the end, carry out investigations and take final decisions, during and after the elections, on all irregularities, complaints and objections concerning the electoral matters, and receive the electoral records of the members of the Grand National Assembly of Turkey and presidential election. No appeal shall be made to any authority against the decisions of the Supreme Board of Election.” The last sentence of the subsection precludes judicial review of the decisions of the SBE.

All victims of right to vote in domestic law who do not receive any result in any judicial manner or in case of non-existence of an applicable judicial remedy and feel that they have been victimized have the right to submit application to the TCC within 30 days beginning from the exhaustion of legal remedies or from the date when the violation is known if no remedies are envisaged, regarding the allegation that one of the rights set forth in both CRT and ECHR has been violated. The fact is that, the applications regarding local elections, presidential elections and referendums are constantly found inadmissible due to incompetence of the TCC on *ratione materiae*. According to the TCC the legislator aims not to apply to any authority including the TCC against the decisions of the SBE. The reason of the Art. 79 of the CRT also stated that “since the finality of the decisions of the Supreme Board of Election and abiding by those decisions lead to hesitations, such a basis was introduced in this article that no appeal shall be made to any authority against the decisions of the Supreme Board of Election.”²⁹ In conclusion, the TCC finds the applications regarding the decisions of the SBE inadmissible due to lack of jurisdiction *ratione materiae*.

Therefore, the only remedy available to the disputes stem from the elections which is formerly subjected to the supervision of the SBE is the European Court of Human Rights (ECtHR). It is also possible to lodge an application to EctHR, following decision of the SBE in six months. Nevertheless, the scope of the Art. 3 of the First Protocol limits the applications to only parliamentary elections, therefore excludes local or presidential elections. Besides, the Court applies similar conditions regarding the admissibility of the application and the material scope of the rights and freedoms

²⁸ TCC, *Musa Kaya*, para 21; *Hakan Tezel*, para 18.

²⁹ TCC, *Muhammet Emin Karapaça*, B. No: 2015/15762, 27.10.2015.

set forth in the CRT and ECHR is quite similar. Thus, possibility of finding a violation of right to vote by the EctHR is so low following a judgment of the TCC founding the application inadmissible or non-violation of the said right.³⁰

In addition to that, TCC consistently ruled that “For the examination of merits of an individual application to the Constitutional Court, the right alleged to be intervened by public authorities should be guaranteed by the Constitution and secured under the European Convention on Human Rights and its additional protocols signed by Turkey. In other words, it is not possible to give admissibility decision for an application led for alleged violation of a right that is not jointly covered by the Constitution and the Convention.”³¹ In a case directly related with the right to vote “[...]pursuant to the well-established case-law of the EctHR, the safeguards afforded by the right to free elections enshrined in the above-mentioned article are, in essence, limited to the elections of the organs having legislative power, and referendums do not fall into the scope of Article 3 of the Additional Protocol no. 1 to the Convention.”³² This approach leads to a lack of protection to right to vote in elections except parliamentary elections.

The SBE is composed of 11 members (7 regular and 4 substitutes) which are elected by the main two high courts, Court of Cassation and Council of State. The members are elected by the general boards of each court among their members so that all the members are judges. Notwithstanding that, the terms used in Art 79 as “administration” and “supervision” leads to a conclusion that the SBE is an administrative body which lacks any judicial review. This phenomenon suggested a contradiction with regard to Art. 67 and 79 of the CRT whether the elections and referendums are held under the direction and supervision of the judiciary.

Along with the SBE located in Ankara, there are one provincial election board in each province and one district election board in each district. There are also a ballot box committee for each ballot box. For the citizens abroad an overseas district election board has been constituted associated to Ankara provincial election board. The duties and mandate of the SBE is determined by the Art. 14 of the Law on Basic Provisions (Law No. 298). In addition to administration of elections and referendums, the SBE is entitled give final decisions about objections related with candidacy in competence with relevant legislation; to immediately examine and decide the objections related with voting day transactions raised by provincial election boards; to examine and give final decisions on claims raised against written proceedings arranged by provincial election boards and to examine and give final decisions on any objections and claims raised within defined period of time, which may have a significant effect on the results of elections and may require the cancellation of election of that area or cancellation of written proceedings of one or more elected persons without considering the sequence and duration of the objections.

The SBE, in consequence of its authority to take final decisions during and after the elections take decisions and concretize the relevant legislation in election disputes or general administration of elections. As stated by the OSCE, the regulations and decisions of SBE complement the legal framework for the elections; however, the SBE did not clarify remaining shortcomings and the new

³⁰ In the first six years of individual application process, the number of judgments that EctHR found a violation of rights set forth in the ECHR is just two. Based on this example, it is unlikely for the EctHR to find a violation in an application duly reviewed by the TCC.

³¹ TCC, *Onurhan Solmaz*, B. No: 2012/1049, 26.03.2013.

³² TCC, *Nurullah Efe ve Halkın Kurtuluş Partisi*, B. No: 2017/20127, 07.06.2017.

regulations adopted to supplement the recent legislative amendments often simply repeated the legislation. This left some matters open to inconsistent or arbitrary application and thus according to the OSCE the legislation should be amended in line with the OSCE recommendations.³³

With respect to access to justice, current legal aid scheme is also worth to be focused upon. The right to free legal assistance in civil law, criminal law and administrative proceedings is regulated by the statutory law and is provided by the legal aid offices established by the bar associations. However, due to the low amount of allowances, relatively few people have access to free legal aid and there are few applications to legal aid offices. Most lawyers prefer not to work in legal aid offices because of lack of sufficient funds and low fees. Victims and the general public, especially the most disadvantaged groups, do not know their rights or possible legal remedies. In civil and administrative proceedings, victims are required to demonstrate that they have no financial means to hire a lawyer and that legal representation will serve the interests of justice. This is also valid for individual applications to the TCC.

There is no explicit reference to the vulnerable groups or preference for providing legal aid to those groups in any law. The services provided by legal aid offices can reach quite a small part of the disadvantaged groups and mostly victims of domestic violence, despite all good intentions. Therefore, in the context of right to vote, comprehensive measures should be taken in order to provide legal assistance to victims, particularly to the prisoners as well as PwMDs.

Along with the judicial means, there are also quasi-judicial institutions which may provide remedy for the disadvantaged groups such as the TİHEK and the Ombudsman Institution. TİHEK was established in 2016 by the Law No. 6701 as a national human rights institution, an equality body and a national preventive mechanism against torture and ill-treatment. Ombudsman Institution was established in 2012 with the Ombudsman Institution Law (Law No. 6328) and together with TİHEK entrusted with applications concerning human rights violations. However, the Art. 17/4 of the TİHEK Law states that “The actions that the Constitution has excluded from judicial review cannot be the subject of the application.” which excludes the decisions of the SBE from the monitoring of the TİHEK. On the contrary, Ombudsman Institution Law does not declare that the decisions of the SBE or the actions that the Constitution has excluded from judicial review cannot be subjected to a review of the Ombudsman. Thus enables another remedy against the decisions of the SBE. Hence, in a decision dated 27 October 2015, the Ombudsman stated that the decisions taken by the SBE should not be considered as a judgment given by the judiciary, on the contrary should be regarded as an administrative action.³⁴

However, as the Chief Ombudsperson and the ombudspersons have been elected just by the votes of ruling party in Parliament since the beginning, the lack of independence is a major issue that affected the efficiency of this institution. Its capacity, financial resources, lack of public awareness, non-binding nature of their decisions are other aspects of concern for their effectiveness. Despite these efforts, apart from the judiciary, still there exists no proper quasi-judicial human rights protection

³³ OSCE, Office for Democratic Institutions and Human Rights Election Observation Mission Final Report, Turkey, Early Presidential and Parliamentary Elections, 21 September 2018, p. 5.

³⁴ Decision of Ombudsman Institution, Complaint No. 2015/2608, 27.10.2015, paras. 4 and 10, <https://www.ombudsman.gov.tr/contents/files/Türkçe%20Bilmeyen%20Ve%20Okur%20Yazar%20Olmayan%20Tüm%20Seçmenlere%20Sağlıklı%20Şekilde%20Oy%20Kullanabilmeleri%20İçin%20Eğitici%20Çalışmalar%20Yapılması%20Talebiyle.pdf> (Last accessed: 01.10.2018)

mechanism which satisfies the Paris Principles. The present quasi-judicial bodies still far from being compatible with the international standards and provide no effective means for the victims of right to vote, particularly for the groups focused upon in this study. To sum up, the existing legislative framework provides no effective and accessible means of judicial or quasi judicial remedies, redress or compensation to the victims of right to vote. It seems that there is a need for judicial and quasi-judicial protection mechanisms that are easily accessible to disadvantaged groups who have suffered from violation of right to vote can apply and acquire reparative outcomes.

2) Impact of International/European law

2.1) Challenges to National Rules Based on international Instruments

Have rules on the right to vote set out in national constitutional documents, legislation, regulations or other binding legal measures been challenged by reference to international instruments (notably the ICCPR and CRPD). With what effect? Please refer to background paper (Deliverable 3.3), Section 4) Justice in the Rights to Vote, Housing and Education in International Law for relevant information.

Have international monitoring bodies adopted opinions/decision on the compatibility of those rules with international law? Did it result in changes in national law?

It is worth to mention the status of international law in Turkish law. Turkey has been party to nearly all the major human rights treaties adopted by the UN. The Art. 90 of the CRT set forth that “International agreements duly put into effect have the force of law.” Considering the status of international treaties in Turkish law, the treaties duly ratified should be implemented as in the case of laws adopted by the legislature. Moreover, as pointed out in the last sentence of Art. 90, “In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.” Thus, the self-executing provisions of the international treaties are directly applicable in a conflict with a Turkish law. Other provisions should also be taken to interpret Turkish law in order to comply with the obligations derive from the treaties.

The right to vote is a fundamental human right that is included in international covenants to which Turkey has ratified.

As stated above, the decisions of the SBE cannot be subjected to a judicial review, thus the challenges to national rules based on national instruments are limited to those given by the SBE. The Board for the first time in 2013, before the local elections was held on March 30th 2014, referred to the EctHR judgment *Söyler v. Turkey* and stated that convicted persons can vote in elections and referendums as long as their confinement ends.³⁵ This decision gives way to right to vote to convicted persons on parole or probation whose sentences are not over yet.

Turkey ratified the International Covenant on Civil and Political Rights (ICCPR) in 2003 and its First Optional Protocol in 2006. The only reservation put by Turkey to the ICCPR is related to the Art. 27 of the treaty in which minority rights are protected. This reservation does not limit the material scope of the ICCPR as regards to right to vote. As of October 2018, there has been only on three individual

³⁵ Decision of Supreme Board of Elections, No: 550, 21.12.2013, p. 3.

communications submitted to the Human Rights Committee (HRC), two regarding conscientious objection and one concerning wearing headscarf in universities. The HRC in all of these communications concluded that Turkey has violated freedom of religion.³⁶ Right to vote of convicted persons and PwMDs has not been review by the HRC yet. Albeit Turkey has put a reservation with regard to communications regarding Art. 26 of the ICCPR, specifically non-discrimination clause of the treaty, which excludes communications concerning rights that has not be covered by the ICCPR. However, since right to vote is explicitly protected by the Art. 25 of the ICCPR, communication concerning allegations of violation of right to vote in conjunction with prohibition of discrimination do not lie outside the scope of individual communication system.

Human Rights Committee (HRC) stated in 1996 that the Art. 25 of the ICCPR recognizes and protects right to vote along with the other political rights whatever form of the constitution or government is in force and requires state parties to adopt such legislative and other measures as may be necessary to ensure effective exercise of this right by their citizens.³⁷ The HRC set forth that exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable, therefore established mental incapacity may be a ground for denying a person the right to vote.³⁸ With regard to convicted persons, “if conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence”.³⁹

Turkey has submitted only one state report to the HRC since 2003⁴⁰ without any reference to the restrictions to the right to vote in details and there were no critical views with regard to right to vote of the focused groups in this study in the concluding observations of the Committee.⁴¹ The only reference was for the conscientious objectors deprivation of political rights such as right to vote.⁴²

The leading instrument as regard to persons with disabilities is the UN Convention on the Rights of Persons with Disabilities (UNCRPD) was ratified by Turkey in 2009 and its Optional Protocol in 2012 without a reservation. Since then, there has been no communications submitted to and concluded by the Committee on the Rights of Persons with Disabilities (CRPD). Since ratification of the UNCRPD, Turkey has submitted only one state report, however, as of October 2018 it has not been reviewed by the Committee yet.⁴³ The country review expected to be carried out during 21st session which will be held in March-April 2019. In order to comply with CRPD the Law on Persons with Disabilities (Law No. 5378) comprehensively amended in 2014, however without a reference to right to vote.

Having looked at the initial report, the Turkish Government, with regard to Art. 29 of the CRPD (participation in political and public life) acknowledged that Law on Basic Provisions (Law No. 298) defined some citizens as non-voters and thus, “persons who were deprived of legal capacity shall not

³⁶ HRC, *Cenk Atasoy and Arda Sarkut v. Turkey*, Communications Nos. 1853/2008 and 1854/2008, CCPR/C/104/D/1853-1854/2008, 19.06.2012; *Şeyma Türkan v. Turkey*, Communication No. 2274/2013, CCPR/C/123/D/2274/2013, 20.09.2018.

³⁷ HRC, General Comment No. 25, CCPR/C/21/Rev.1/Add.7, 27.08.1996, para. 1.

³⁸ para. 4.

³⁹ para. 14.

⁴⁰ HRC, Initial reports of States parties, Turkey, CCPR/C/TUR/1, 13.04.2011,

⁴¹ HRC, Concluding observations on the initial report of Turkey adopted by the Committee at its 106th session (15 October - 2 November 2012), CCPR /C/TUR/CO/1, 13.11.2012.

⁴² See, para. 23.

⁴³ CRPD, Initial report submitted by Turkey under article 35 of the Convention, CRPD/C/TUR/1, 04.10.2017

cast votes in elections or referenda. Persons with intellectual disabilities who were placed under the care of a guardian by judicial authorities are also taken within this scope.”

2.2) Challenges to National Rules Based on European (Council of Europe) Instruments

Have national rules set out in national constitutional documents, legislation, regulations or other binding legal measures been challenged by reference to the Council of Europe’s law, in particular ECHR Article 3 Protocol 1, but also other ECHR provisions.

Have any cases concerning the right to vote in your country been taken to/decided upon by the ECtHR? With what effect? Was national law adjusted to comply with the ECtHR decision(s)? Please refer to background paper (Deliverable 3.3), section 5) Justice in the Rights to Vote, Housing and Education in Council of Europe Law) for relevant information.) for relevant information.

Turkey is one of the founding members of the Council of Europe and is party to ECHR and its First Protocol since 1954. The only reservation put by Turkey to the Convention and its ratified Protocols is the one put to Art. 2 of the First Protocol concerning right to education which does not affect the scope of the protection afforded by the Art. 3 of the Protocol. According to the jurisprudence of the ECtHR, it is considered groups such as persons with disabilities as disadvantaged and vulnerable groups and stated that special protection should be provided.⁴⁴ Such emphasis has not been laid for the convicted persons in prison.

The ECtHR, in recent years (2013 and 2014) ruled that the restriction on prisoners right to vote is too broad and in breach of the right to free elections set forth in Art. 3 of the First Protocol which Turkey has been party to since 1954 without any reservation with regard to right to vote. Apart from these cases, as of October 2018, there has been no cases regarding right to vote of PwMDs as is the case with TCC.

The ECtHR, in *Söyler v. Turkey*, which is the first case handled by it with regard to right to vote, found the restriction for the convicted persons right to vote as “indiscriminate in its application in that it does not take into account the nature or gravity of the offence, the length of the prison sentence – leaving aside the suspended sentences shorter than one year – or the individual circumstances of the convicted persons.”⁴⁵ According to the Court, the Turkish legislation lacks any express provisions categorizing or specifying any offences for which disenfranchisement is foreseen.⁴⁶ The Court maintained its approach in *Söyler v. Turkey*, with its judgment in *Murat Vural v. Turkey* case one year later.⁴⁷

The Court rightfully identified that the restriction for the convicted persons also cover the period when they are on parole or probation and lasts until the end of full sentence handed down by a penal court which is also valid for convicted persons does not serve any time in a penal institution as a consequence of suspension.⁴⁸ The Court finds this situation even harsher than the similar

⁴⁴ See, ECtHR, *D. H. and Others v. Czech Republic*, Appl. No. 57325/00, 13.11.2007, para. 182.

⁴⁵ ECtHR, *Söyler v. Turkey*, Appl. No. 29411/07, 17.09.2013, para 41.

⁴⁶ para 41.

⁴⁷ ECtHR, *Murat Vural v. Turkey*, Appl. No. 9540/07, 21.10.2014, para. 79.

⁴⁸ ECtHR, *Söyler v. Turkey*, Appl. No. 29411/07, 17.09.2013, para. 36.

restrictions applied in other COE member states.⁴⁹ Furthermore the Court “does not consider that the sole requirement of the element of ‘intent’ in the commission of the offence is sufficient to lead it to conclude that the current legal framework adequately protects the rights in question and does not impair their very essence or deprive them of their effectiveness.”⁵⁰

In *Söyler v. Turkey*, the offence committed by the applicant that disenfranchise him was drawing cheques without having sufficient funds in his account. The offence was found relatively minor by the Court and regarded as an indiscriminate application of the restriction.⁵¹ The Court pointed out that taking into account the importance of the rights guaranteed by Art. 3 of Protocol No. 1 to the Convention and their significance in establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law a general, automatic and indiscriminate restriction on the right to vote applied to all convicted prisoners serving sentences is incompatible with right to vote. As a result the Court has concluded that “the automatic and indiscriminate application of the harsh measure in Turkey on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, and that there has been a breach of Article 3 of Protocol No. 1 in the present case.”⁵²

2.3) Challenges to National Rules Based on EU Law

Has EU law (in particular Article 24(3) TEU, Articles 20 and 22(b) TFEU, and Articles 39-40 EU CFR) been invoked before domestic courts to challenge national rules de lege or de facto disenfranchising certain categories of persons (disabled, criminals, prisoners, expats, foreign residents, etc).

Has the right to vote in your country been subject to European Commission investigation under Article 268-269 TFEU procedure or a decision of the CJEU? With what effect? Please refer to background paper (Deliverable 3.3), section 6) Justice in Rights to Vote, Housing and Education in European Law for relevant information.

The history of EU-Turkey relations goes back to the 1950's. The fluctuating relations have always had a great influence on the democratization process and human rights policy of Turkey. As can be seen above, the main motive behind the amendment made in Art. 67 of the CRT is the close relationship between the EU and Turkey. This can be traced by the Turkey's policy of ratification of international treaties. Despite the ECHR, major international human rights treaties have not been ratified until the early 2000s which was the era when the accession process was accelerated. The acceptance of the jurisdiction of the ECHR in 1989 and the ratification of the core United Nations Human Rights Treaties after 1999 are not a coincidence since all the given dates were the main historic moments in relation to the integration process. It would not be an exaggeration to say that leading law reform packages were the consequences of the close ties between Turkey and EU.

Turkey and EU maintain their relations which they started with “association” in 1963, with full membership process of Turkey. In 1963, the Agreement Establishing an Association Between the European Economic Community and Turkey (Ankara Agreement) establishing an Association between the European Economic Community and Turkey was signed by Turkey and by the Member States of

⁴⁹ para 38.

⁵⁰ para. 42.

⁵¹ para. 44.

⁵² para. 47.

the European Economic Community and the Community. Also in 1987, Turkey submitted a formal request for full membership. The European Commission rejected the request on the grounds that Turkey manifested grave democratic deficiencies in 1989. However, it confirmed that Turkey was still eligible for full EU membership. Both association and status of “candidate state” require harmonization of laws.

The Ankara Agreement builds the association in the frame of an economic integration including customs union and free movement of persons, services and capital.⁵³ It presents a framework for Turkey’s gradual integration into the Community. The instruments that followed, such as the Additional Protocol of 1973, and Decision No. 1/95 of the Association Council, filled this frame. According to the Art. 28 of the Agreement “As soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting Parties shall examine the possibility of the accession of Turkey to the Community.” Hence, harmonization of laws is inherent in the gradual integration model of this association.⁵⁴ As a first instrument, the Additional Protocol of 1973 followed the Agreement and regulated the issues regarding attainment of free movement of goods (customs union) and adjunct free movement of persons and services, approximation of economic policies and approximation of laws.⁵⁵

Decision No. 1/95 of the EC-Turkey Association Council which was established by the Ankara Agreement to ensure the implementation and promotion of the association regime, and was given power to take decisions, is the most detailed instrument referring to the approximation of legislation. In this context, “approximation of legislation” was set out as a separate chapter and protection of intellectual, industrial and commercial property rights, competition, trade defence instruments, government procurement, direct and indirect taxation were regulated under this chapter.⁵⁶ Moreover, this Decision provides a general obligation clause stating “In areas of direct relevance to the operations of the Customs Union⁵⁷ ... Turkish legislation shall be harmonized ‘as far as possible’ with Community legislation.”⁵⁸ Last but not least, the Decision includes a clause regarding “interpretation” stating “The provisions of this Decision, in so far as they are identical in substance to the corresponding provisions of the Treaty establishing the European Community shall be interpreted for the purposes of their implementation and application to products covered by the

⁵³ For the text of Ankara Agreement in English, see, https://www.ab.gov.tr/117_en.html (Last accessed: 01.10.2018)

⁵⁴ İlke Göçmen, “Avrupa Birliği ile Türkiye İlişkileri Çerçevesinde Türk Mahkemelerinin Avrupa Birliği Hukuku Karşısındaki Tutumuna Yönelik Bir Öneri: AB-Dostu Yorum Yöntemi”, Ankara Üniversitesi Hukuk Fakültesi Dergisi, Vol. 63, No.1, 2014, p. 135.

⁵⁵ See respectively Art. 2 and following articles, Art. 36 and following articles, Art. 43 and following articles of the Additional Protocol.

⁵⁶ For instance, Art. 39 (1) of the Decision states “*With a view to achieving the economic integration sought by the Customs Union, Turkey shall ensure that its legislation in the field of competition rules is made compatible with that of the European Community, and is applied effectively.*”

⁵⁷ These areas are commercial policy and agreements with third countries comprising a commercial dimension for, industrial products, legislation on the abolition of technical barriers to the industrial products, competition and industrial and intellectual property law and customs legislation (Decision No. 1/95 of the Association Council Art. 54 (2))

⁵⁸ Decision No. 1/95 of the Association Council, Art. 54 (1)

Customs Union, in conformity with the relevant decisions of the Court of Justice of the European Communities.”⁵⁹

Pursuant to its formal request for full membership in 1987, Turkey obtained the status of a candidate state in the 1999 Helsinki Summit Meeting and started the membership negotiations in October 2005. For full membership every candidate state must fulfil the Copenhagen criteria (political, economic and EU *acquis* criteria) and beside adapting *acquis* it must have the administrative and institutional capacity to implement it effectively.

The negotiations are carried out through the Negotiating Framework.⁶⁰ According to the Negotiating Framework, “Accession implies the acceptance of the rights and obligations attached to the Union system and its institutional framework, known as the *acquis* of the Union. Turkey will have to apply this as it stands at the time of accession. Furthermore, in addition to legislative alignment, accession implies timely and effective implementation of the *acquis*.”⁶¹

Moreover, “In all areas of the *acquis*, Turkey must bring its institutions, management capacity and administrative and judicial systems up to Union standards, both at national and regional level, with a view to implementing the *acquis* effectively or, as the case may be, being able to implement it effectively in good time before accession. At the general level, this requires a well-functioning and stable public administration built on an efficient and impartial civil service, and an independent and efficient judicial system.”⁶²

The Regular Progress Report of 2016 on Turkey states that regarding its ability to assume the obligations of membership, Turkey has continued to align with the *acquis* and with despite the visa liberalization related work, its efforts continued at a limited pace. The report points out that, Turkey is well advanced in the areas of company law, trans-European networks and science and research and it has achieved a good level of preparation in the areas of free movement of goods, intellectual property law, financial services, enterprise and industrial policy, consumer and health protection, customs union, external relations and financial control.⁶³ In areas especially regarding the titles under the political criteria, human rights and protection of minorities⁶⁴ and environment and climate change,⁶⁵ Turkey should ensure legislative alignment with the *acquis*. The political climate in Turkey in recent years caused harsh criticism among EU institutions and member states with respect to human rights and related fields.

The laws adopted in the last three decades show that the influence of the EU law is valid only in certain fields of law, such as intellectual property law, labour law and competition law. This is mainly based on the leading motives behind the relevant laws. Such an influence is the necessity of the EU accession process which requires Turkey to harmonize its laws with the *acquis*. Right to vote or any

⁵⁹ Decision No. 1/95 of the Association Council, Art. 66.

⁶⁰ European Council, Negotiating Framework, Luxembourg, 3 October 2005, https://www.ab.gov.tr/files/pub/2016_progress_report_en.pdf (Last accessed: 01.10.2018)

⁶¹ Negotiating Framework, Art. 10.

⁶² Negotiating Framework, Art. 17.

⁶³ European Commission, Turkey 2016 Report, SWD (2016) 366 final, Brussels, 9.11.2016, p. 18.

⁶⁴ The report namely underlines that the anti-terror law and its implementation, freedom of assembly and non-discrimination in law and practice are not in line with the *acquis*. (European Commission, Turkey 2016 Report, p. 25)

⁶⁵ European Commission, Turkey 2016 Report, p. 86.

other political rights are not at the agenda of EU-Turkey relations thus Turkey receives no harsh critics for lack of harmonizing its legislation in conformity with international standards.

As stated above, pursuant to the art. 90 of the Turkish Constitution “international agreements duly put into effect have the force of law” and “in the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.” The Constitutional Court also interpreted the given article in a way to give precedence to the judgments of EctHR in a conflict with laws. As Turkey is not an EU member and is not party to EU treaties, EU law in general does not have a binding effect in Turkish Law, nor prevail over Turkish Law. Consequently, Turkish judiciary or SBE do not feel themselves under an obligation to follow EU law in general or CJEU jurisprudence as a rule.

1999 is the year in which Turkey was officially regarded as a candidate country and so far EU has published a Progress Report each year in which the human rights and democratization reforms were assessed. Having looked at those reports, one can easily say that ratification policy of the international human rights treaties and realized legal reforms can be regarded as an answer to the criticisms therein. Thus it can be claimed that motivation behind the ongoing harmonization process of the Turkish legislation with the Copenhagen criteria, the EU *acquis communautaire* and the Council of Europe human rights standards has been the aspiration of EU integration. The relationship between EU and Turkey affects the level of conformity with the international human rights standards. In order to illustrate the correlation, the figures regarding the applications that lodged against Turkey before the EctHR can be pointed out. Accordingly, when viewed from this aspect, preserving the relations and enhancing the cooperation with Turkey are closely connected with the promotion of human rights in Turkey as well.

Finally, the legal status of EU law also causes less attention to EU law in comparison with the EctHR or other international instruments. The main underlying reason may be the non-binding rules of EU law in Turkish law. As mentioned above, pursuant to the Art. 90 of the CRT “international agreements duly put into effect have the force of law.” Art. 90 also provides that “In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.” The TCC also interpreted the given article in a way to give precedence to the judgments of EctHR in a conflict with laws.⁶⁶ As Turkey is not an EU member and is not party to EU treaties, EU law in general does not have a binding effect in Turkish Law, nor prevail over Turkish Law. Consequently, by contrast with the executive and the legislature, Turkish judiciary do not feel themselves under an obligation to follow EU law as a rule which affected the positive impact of EU law with regard to convicted prisoners as well as PwMDs.

3) Right to Vote, Justice as Representation and Vulnerability

When reviewing the national legal framework and, where relevant, the domestic engagement with international and European norms, could you identify arguments proposing different conceptions of justice as representation. Please specify whether these were part of court’s reasoning or parties’

⁶⁶ TCC, *Sevim Akat Eşki*, B No: 2013/2187, 19.12.2013; *Adalet Mehtap Buluryer*, B. No. 2013/5447, 16.10.2014.

arguments, and if the latter, provide any relevant information that could help evaluate who mobilized the law to achieve greater justice (eg NGOs, etc.).

Please refer to background paper (Deliverable 3.3), section 2) Subsection: Justice as Representation and the Right to Vote for relevant information.

Does the concept of vulnerability play a role in protecting the right to vote or defining who is entitled to vote and how in your country? Please explain how, and provide some representative illustrations.

Please refer to background paper (Deliverable 3.3), section 3) Vulnerability as a human rights law concept for relevant information.

During the research, accessibility of the decisions given by the SBE has been a sincere problem, so the number of cases referred to are so few. Only few cases have published in Official Gazette or in the official web-site of the SBE. With regard to convicted persons' and PwMDs' right to vote, no direct reference to the concept of justice as representation on the side of state institutions or judiciary. Beginning with the adoption of Law on Basic Provisions (Law No.298) in 1961, there is a strict restriction for interdicted persons for legal incapacity and there has been no progress in terms of right to vote of PwMDs since then. The ratification of CRPD and reforming the Law on Persons with Disabilities (Law No. 5378) has not led to any change in the relevant legislation. Even Turkish Government acknowledged that "all persons with disabilities (in Turkey) aside the ones with mental illnesses have the right to vote and to be elected."⁶⁷

Even though the Turkish Government stated that a "National Disability Database" was established in 2006 with the objective of ensuring efficiency of disability services,⁶⁸ no information has been given on the number of registered persons with disabilities on the database, as well as the distribution of gender, province, type of disability, in which public service planning the registered data is used or the results of these activities etc."⁶⁹

As the EctHR also stated in *Söyler v Turkey*, any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of right to vote.⁷⁰ Even though the said judgment was about prisoners' right to vote, the approach put forward by the Court is also valid for PwMDs.

Hence, according to the existing case law of the EctHR, the Court defines PwMDs as a particular vulnerable group which suffers considerable discrimination and social exclusion in the past and is at a risk of being subject to legislative stereotyping. The Court set forth that disenfranchisement of the persons under guardianship pursues a legitimate aim, which ensure that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs. Nevertheless, any restriction that does not distinguish between persons placed under total and those under partial guardianship. Thus, the Court has not accepted an

⁶⁷ "The Republic of Turkey's Responses to the Questionnaire of the Office of the High Commissioner for Human Rights, On the Participation of Persons with Disabilities in Political and Public Life", Communication No. 2011/BMCO/5326749, Permanent Mission of Turkey to the United Nations, September, 2011.

⁶⁸ CRPD, Initial report submitted by Turkey under article 35 of the Convention, CRPD/C/TUR/1, 04.10.2017, p. 55.

⁶⁹ CRPD, Proposal of List of Issues from Association for Monitoring Equal Rights in relation to the Government report of the Republic of Turkey for the 10th Pre-Sessional Working Groups, p. 20.

⁷⁰ ECHR, *Söyler v Turkey*, Appl. No. 29411/07, 17.09.2013, para 34.

absolute bar on voting rights applied to any person under partial guardianship irrespective of his or her actual faculties.⁷¹

The access to right to vote for persons with disabilities is generally considered as access to poll stations with regard to persons with physical disabilities.⁷² Even for this group access to right to vote is a major issue. According to the figures provided by the OSCE Only 55 per cent of polling stations were considered suitable for independent access of voters with physical disabilities.” OSCE recommended that “In line with international obligations, the election administration should consider additional measures to ensure that voters with disabilities, including voters with visual impairments, can vote independently.”⁷³ Due to explicit reference regarding interdicted PwMDs, this matter does not remain in the agenda of governments and gains no popularity even among the disability NGOs. With regard PwMDs, OSCE recommended that “The election legislation should be harmonized with the objectives of the CRPD, to ensure the full voting rights of persons with mental disabilities, including the right to request assistance to vote from a person of their choice.”⁷⁴ It is also stated that, “neither political parties nor independent candidates in Turkey discuss the voting rights of persons with intellectual and psychosocial disabilities. Consequently, neither elections nor the process leading to elections are accessible to them.”⁷⁵

A group of people deprived of right to vote is convicted prisoners, which is also one of the groups focused on in this study along with the mentally disabled people, in a penal institution excluding those convicted for negligence. In discordance with PwMDs, the scope of right to vote of prisoners have gradually broadened.

ECtHR justifiably stated that “an indiscriminate restriction applicable automatically to prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances, must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1”⁷⁶ The same approach also presented by OSCE in several reports prepared following election observation missions held in Turkey: “Blanket disenfranchisement of all prisoners convicted of intentional crimes [...] is at odds with paragraph 7.3 of the 1990 OSCE Copenhagen Document and case law of the European Court of Human Rights.”⁷⁷

The total number of voters registered in the last presidential elections that was held on June 24, 2018 was nearly 60 millions.⁷⁸ As of 02.10.2017, statistics provided by the General Directorate of Prisons and Detention Houses provided that the number of convicted persons serving their sentences for a crime is circa 140.000.⁷⁹ In the last elections held in June 2018, it was stated that

⁷¹ ECHR, *Kiss v. Hungary*, Appl. No. 38832/06, 20.05.2010; *Gajcsi v. Hungary*, Appl. No. 62924/10, 23.09.2014; *Harmati v. Hungary*, Appl. No. 63012/10, 21.10.2014.

⁷² Erkem et al, p. 18.

⁷³ OSCE, Office for Democratic Institutions and Human Rights Election Observation Mission Final Report, Turkey, Early Presidential and Parliamentary Elections, 21 September 2018, p. 24.

⁷⁴ *Ibid*, p. 29.

⁷⁵ Erkem et al, p. 18.

⁷⁶ ECHR, *Söyler v Turkey*, Appl. No. 29411/07, 17.09.2013, para 35.

⁷⁷ OSCE, Office for Democratic Institutions and Human Rights Election Observation Mission Final Report, Turkey, Early Presidential and Parliamentary Elections, 21 September 2018, p. 1-2.

⁷⁸ *Ibid*, p. 11.

⁷⁹ See, <http://cte.adalet.gov.tr/index.html> (Last accessed: 01.10.2018)

85.000 prisoners convicted of non-intentional crimes were registered to vote in 317 prisons.⁸⁰ The number of persons who were ineligible to vote due to their imprisonment in constitutional referendum that was held on April 16, 2017 was declared as 100.950.⁸¹ With regard to PwMDs, in the same referendum the number of legally incompetent persons declared by a court decision was 194.788. Including 276.292 active conscripts and cadets, the total number of persons disenfranchised in 2017 was nearly 570.000 which means that almost 1% of the voters could not vote in 2017 by virtue of Turkish legislation. The ECtHR found in 2010 in a case lodged against Hungary that 0.75% of the Hungarian population of voting age were concerned by disenfranchisement on account of being under guardianship in an indiscriminate manner and regarded it as a significant figure, which could not be claimed to be negligible in its effects.⁸² It has been more than seven years since the judgment against Hungary and 5 years since the ECtHR judgments delivered against Turkey, however there is no government or legislative initiative to harmonize the legislation with the international standards put forward by OSCE or ECtHR.

There is no direct reference to the vulnerability of disabled persons or convicted persons in Turkish legal system with respect to right to vote. As the figures given above are not relatively that high, the issue is not on the agenda of public opinion or media coverage. The disenfranchised groups in Turkish law are limited to mainly age, citizenship, privates and corporals at arms, cadets, and convicts in penal execution institutions excluding those convicted of negligent offences and interdicted persons. The restrictions for convicted persons in a penal institution and interdicted persons are mainly temporal and following a release from a penal institution, the execution of a sentence or a decision of a civil court for lifting interdiction they will reacquire right to vote. Therefore, despite persons with permanent mental incapacity, the current situation in Turkey do not rise a major issue in the context of justice as representation. However, the absence of a framework mental health law leaves the PwMDs in an insecure position to exercise their rights or provides an adequate protection in case of an interference to their rights.

⁸⁰ OSCE, Office for Democratic Institutions and Human Rights Election Observation Mission Final Report, Turkey, Early Presidential and Parliamentary Elections, 21 September 2018, p. 11, footnote 36.

⁸¹ OSCE, Office for Democratic Institutions and Human Rights Limited Referendum Observation Mission Final Report, Turkey, 22 June 2017, p. 9, footnote 27.

⁸² ECHR, *Kiss v. Hungary*, Appl. No. 38832/06, 20.05.2010.

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