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MECHANISM

**THE CASES OF THE  
OMBUDSMAN  
and  
HUMAN RIGHTS AND  
EQUALITY INSTITUTION  
OF TURKEY**

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## Foreword

National Human Rights Institutions (NHRIs) are recognised as fundamental mechanisms for the protection and promotion of human rights at a national level. While they differ from country to country, NHRIs can generally be categorised as Equality Bodies or the Ombudsman which might also have different mandates. However, these differences do not mean that there are not universal standards which NHRIs must meet. United Nations General Assembly resolution 48/134 of 1993 sets out universal standards regarding the status of NHRIs. This criteria, also known as the Paris Principles, states that NHRIs must be established by a constitutional or legislative text, have a broad mandate, be independent administrative and financially, be pluralistic in composition and should guarantee safeguards for its members.

The Ombudsman Institution (KDK) was established through Law No. 6238 in 2012 to “examine, investigate, and submit recommendations concerning all sorts of acts and actions as well as attitudes and behaviours of the administration within the framework of an understanding of human rights-based justice and legality and conformity with principles of fairness, through creating an independent and effective mechanism of complaint concerning the public services”. Law No. 6332, which entered into force the same year, established the Human Rights Institution of Turkey but it was abolished through Law No. 6701 in 2016. In its place, the Human Rights and Equality Institution (TIHEK) was established to “protect and improve human rights on the basis of human dignity, ensure the right of individuals to be treated equally, prevent discrimination against the exercise of rights and freedoms which are determined by law and behave accordingly, combat torture and ill-treatment effectively and to fulfil its duty as a national preventive mechanism”. Legislation mandates TIHEK as a national preventive mechanism to eliminate torture as well as task it with preventing discrimination.

The ability of everyone to enjoy fundamental rights and freedoms as guaranteed in international human rights treaties, runs parallel to the effectiveness of legislation on the prohibition of discrimination and preventive mechanisms. Prevention of discrimination requires increasing awareness among society, strengthening respect for human rights and diversity among all sections of public life, broadening legal protection towards groups at risk of discrimination as well as the existence and improvement of effective investigative and redress mechanisms. Human rights and equality institutions are mechanisms which arose from these particular necessities. From this perspective, these institutions should especially focus on protecting the human rights of the most vulnerable groups.



Currently, NHRIs which have been established in accordance with Paris Principles are important elements in national protection regimes whereby they undertake significant roles in ensuring that governments respect human rights and fulfil obligations arising from human rights treaties. NHRIs' independence and safeguards afforded to their members are crucial criteria for them to be able to fulfil this role. Independence, in addition to being the basis of their legitimacy, is also pivotal for their credibility and effectiveness. While legislation in Turkey concerning these bodies does underline independence, that is not the case in practice. Adherence of both bodies to universal principles is dubious. This report which was prepared by independent academics focusing on the two institutions is the first of its kind in Turkey.

The report aims to bring to light the role the Ombudsman (KDK) and TİHEK plays, or fails to do so, in protection and promotion of human rights. Should our report be a guiding light for both institutions as well as the legislative branch, it will have reached its aim.

Dr. D. Çiğdem Sever has prepared the part on the Ombudsman and the part on TİHEK has been prepared by Assoc. Prof. Ulaş Karan. We would like to thank both authors for all their work.

Association for Monitoring Equal Rights



# REPORT ON THE HUMAN RIGHTS AND EQUALITY INSTITUTION OF TURKEY

Ulaş Karan<sup>1</sup>

## INTRODUCTION

This report examines the compliance with international standards of the Human Rights and Equality Institution of Turkey (hereinafter referred to as "TIHEK" or "Institution"), the first institution established in Turkey as an equality institution for combating discrimination, as well as its performance during the first four years. Equality institutions can be considered as the type of institutions that are called "*national human rights institutions*", vary from one country to another and defined as organizations other than the public institutions stipulated by the constitution or laws to fulfill certain duties on human rights<sup>2</sup>. The characteristics intended for equality institutions are largely identical to the characteristics set for national human rights institutions. Aims of these institutions are to express opinions or recommendations, evaluate and settle the complaints lodged by individuals or groups. Institutions may generally public non-binding resolutions as a result of such complaints. In addition, these institutions may issue decisions about complaints, investigate them and refer applications to judicial bodies. Complaints are free of charge unlike judicial procedures, thereby minimizing problems with access to justice.<sup>3</sup> Fight against discrimination is an integral part of the fields of activity for national human rights institutions. As seen below, institutions may be equipped with powers regarding the acts and actions of not only public institutions, but also real persons and private legal persons.<sup>4</sup>

TIHEK was established in 2016 as both an equality institution and a national human rights institution through the Law on the Human Rights and Equality Institution of Turkey No. 6701 (hereinafter referred to as "TIHEK Law" or "Law").<sup>5</sup> The study focuses on evaluating TIHEK's role as an equality institution. During the ratification process of the law, it was claimed that the law was compliant with the "Paris Principles", the global standard for such institutions, as specified below. Although it is observed that the Institution complies in form with such standards in certain aspects, the resulting organization seems to be quite distant from fulfilling such international standards in general terms.

TIHEK Law was adopted on April 6, 2016 as a result of political negotiations between the EU and Turkey with regard to the civil war going on in Syria for long years and the ensuing migration problem. Establishment of equality institutions in the fight

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2 *National Human Rights Institutions, A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, United Nations, New York-Geneva, 1995, p. 6, para. 9, <http://www.ohchr.org/Documents/Publications/training4en.pdf> (accessed: July 31, 2020)

3 Linda C. Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection", *Harvard Human Rights Journal*, Vol. 13, 2000, p. 7.

4 Reif, p. 10.

5 The Law on the Human Rights and Equality Institution of Turkey (No. 6701), the Official Gazette No. 29690 of April 20, 2016.

against discrimination is a legal obligation, especially for EU member states. With that being said, activities regarding equality institutions have gained pace across the world for preventing victim-oriented and discriminatory treatment or quickly and effectively eliminating the consequences of discriminatory treatment. It is possible for well-functioning equality institutions that are compliant with applicable standards to eliminate instances of discriminatory treatment in a shorter period of time and relieve the judicial bodies and international mechanisms overwhelmed with heavy workload. As seen below, it is observed that TIHEK does not fulfill these functions.

During the enactment process of TIHEK Law, opinions were not sought from any civil society organization (CSO) working in the fight against discrimination and the draft version was enacted without any amendment. CSOs made rightful criticisms against TIHEK Law such as the absence of sexual orientation among the bases of discrimination, the failure to regulate the bases of discrimination in an open-ended fashion, the failure to include the principle of pluralism in the selection of members for the Board of Human Rights and Equality of Turkey (hereinafter referred to as "TIHEK Board" or "Board") formed under the Institution, the failure to prescribe qualifications for Board membership in parallel with the Institution's fields of activity, the relatively problematic nature of the Institution's independence and the publication of Board resolutions only if "deemed necessary". As seen in the evaluation below, all criticisms made by the civil society proved to be real considering the first four years of implementation by the Institution.

It is possible to interpret that the failure to apply for accreditation before the Sub-Committee on Accreditation<sup>6</sup> of the *Global Alliance of National Human Rights Institutions* (GANHRI) although more than four years have passed over the establishment of the Institution<sup>7</sup> is an implicit acceptance by the Institution that the existing legal framework and the Institution's activities do not comply with international standards. Considering the current standards implemented by GANHRI, TIHEK can be accredited by "B" status (partially compliant with the Paris Principles) as "C" status (non-compliant with the Paris Principles) is no longer granted. This should be seen as a result of both the legislation and the practices of the Institution.

The report consists of three sections. Section one aims to set forth the international standards that will form the basis for the evaluation of TIHEK and create a set of indicators based on them. Section two evaluates the compliance of TIHEK with international standards over these indicators. This section also evaluates the resolutions published by TIHEK until July 31, 2020 with regard to its duty of fight against discrimination. It should be noted that both the number of applications lodged before the Institution and the number of resolution issued and published by the Institution are quite low. Therefore, it has only been possible to perform a limited evaluation in this area. The study finally covers the determinations made in previous sections.

Sections in the "Principles Relating to the Status of National Institutions"<sup>8</sup>, the "Paris Principles" in brief, adopted by the UN in 1993 are taken into account for the evaluation of TIHEK within the report. The Paris Principles are not a legally binding document, but it is a guide for equality institutions. The Paris Principles are composed of sections titled

6 For more information, see <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Pages/default.aspx> (accessed: July 31, 2020)

7 See <https://www.tihe.gov.tr/bm-ve-ulusal-insan-haklari-kurumlari/> (accessed: July 31, 2020)

8 *Fact Sheet No.19, National Institutions for the Promotion and Protection of Human Rights*, United Nations, Geneva, p. 3, <http://www.ohchr.org/Documents/Publications/FactSheet19en.pdf> (accessed: July 31, 2020)



"Competence and Responsibilities", "Composition and Guarantees of Independence and Pluralism", "Methods of Operation" and "Additional Principles Concerning the Status of Commissions With Quasi-Jurisdictional Competence". Considering that the Paris Principles were adopted in 1993, the report also takes into account other documents created at international level from that date onwards. These documents are the Model National Legislation for the Guidance of Governments in the Enactment of Further Legislation Against Racial Discrimination adopted in 1996 as a result of the activity initiated upon the request of the Secretariat General of the United Nations for the purpose of creating a model for use by states as a guide or basis for drawing up legislation against racial discrimination (hereinafter referred to as "UN Model Legislation");<sup>9</sup> General Policy Recommendation No. 2 of 1997 revised by the European Commission against Racism and Intolerance (ECRI) in 2017<sup>10</sup> (hereinafter referred to as "ECRI GPT2"), Article 13 of the Directive No. 2000/43/EC of the European Union imposing the liability of establishing an equality institution,<sup>11</sup> Article 12 of the Directive No. 2004/113/EC,<sup>12</sup> Article 20 of the Directive No. 2006/54/EC,<sup>13</sup> Article 11 of the Directive No. 2010/41/EU,<sup>14</sup> Article 15 of the Directive No. 2019/1158<sup>15</sup> and the Recommendation of the European Commission of June 22, 2018.<sup>16</sup> A number of standards covered in these documents and not covered in the Paris Principles are also included in the evaluation. It should be noted that the most detailed regulations are covered by ECRI GPT2 out of these documents. While the EU directives referred to in the study introduce obligations for equality institutions, they seem to be quite superficial for the issue.

After putting forth the international standards for equality institutions, the study makes an evaluation regarding the international standards by also making use of the indicators prepared by the European Network of Equality Bodies (EQUINET)<sup>17</sup>. The following matters touched upon by the Paris Principles, a text regarding national human rights institutions, must also be taken into consideration for equality institutions. Therefore, it will be appropriate to interpret references made by the study to national institutions in a way to include equality institutions.

9 *Model National Legislation for the Guidance of Governments in the Enactment of Further Legislation Against Racial Discrimination*, UN Office of the High Commissioner for Human Rights, 1996, HR/PUB/96/2, [www.ohchr.org/Documents/Publications/Discrimination962en.pdf](http://www.ohchr.org/Documents/Publications/Discrimination962en.pdf) (accessed: July 31, 2020)

10 *ECRI General Policy Recommendation No2 revised on Equality Bodies to combat racism and intolerance at national level*, <http://rm.coe.int/ecri-general-policy-/16808b5a23> (accessed: July 31, 2020).

11 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22–26, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0043&from=EN> (accessed: July 31, 2020).

12 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, p. 37–43, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004L0113&from=EN> (accessed: July 31, 2020).

13 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, p. 23–36, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32006L0054&from=EN> (accessed: July 31, 2020).

14 Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180, 15.7.2010, p. 1–6, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32010L0041&from=EN> (accessed: July 31, 2020).

15 Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 188, 12.7.2019, p. 79–93, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L1158&qid=1596972173675&from=EN> (accessed: July 31, 2020).

16 Commission Recommendation of 22.06.2018 on standards for equality bodies, European Commission, Brussels, 22.6.2018, C(2018) 3850 final, [https://ec.europa.eu/info/sites/info/files/2\\_en\\_act\\_part1\\_v4.pdf](https://ec.europa.eu/info/sites/info/files/2_en_act_part1_v4.pdf) (accessed: July 31, 2020).

17 European Network of Equality Bodies, EQUINET Project on Standards for Equality Bodies, Mandate-Indicators, [https://equineteurope.org/wp-content/uploads/2020/02/NEB\\_Mandate\\_indicators.pdf](https://equineteurope.org/wp-content/uploads/2020/02/NEB_Mandate_indicators.pdf) (accessed: July 31, 2020).

# I. INTERNATIONAL STANDARDS FOR EQUALITY INSTITUTIONS

## A- Competence and Responsibilities

The first section of the Paris Principles titled "Competence and Responsibilities" touches upon the competence and responsibilities of national institutions. In this context, it is possible to create these indicators by considering the Paris Principles, ECRI GPT2 and the Recommendation of the European Commission.

- Are the composition and sphere of competence of the equality institution clearly set forth in the constitution or laws? (Paris Principles)
- Is the equality institution given as broad a mandate as possible? (Paris Principles)
- Is the equality institution authorized to submit to the government, legislative body and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights and to publicize them if deemed necessary? (These authorities may include: Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to prevent and eliminate discrimination; any situation of violation of non-discrimination which it decides to take up; the preparation of reports on the national situation with regard to non-discrimination in general, or on more specific matters; drawing the attention of the government to situations in any part of the country where non-discrimination is violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the government.) (Paris Principles)
- Is the equality institution authorized to promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the state is a party, and their effective implementation? (Paris Principles)
- Is the equality institution authorized to ensure that the state becomes a party to international human rights conventions and ensure the implementation thereof? (Paris Principles)
- Is the equality institution authorized to contribute to the reports which the state is required to submit to UN bodies or regional intergovernmental organizations pursuant to their obligations arising out of human rights treaties and, where necessary, to express an opinion on the subject, with due respect for its independence? (Paris Principles)
- Is the equality institution authorized to cooperate with the UN and any other organization in the UN system, the regional institutions and the national institutions of other countries that are competent in the areas of the prevention and elimination of discrimination? (Paris Principles)
- Is the equality institution authorized to assist in the formulation of programmes



- for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional organizations? (Paris Principles)
- Is the equality institution authorized to publicize efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs? (Paris Principles)
  - Does the mandate of the equality institution cover the promotion and achievement of equality, prevention and elimination of discrimination and intolerance, including structural discrimination and hate speech, and promotion of diversity and of good relations between persons belonging to all the different groups in society? (ECRI GPT2, para. 4(a))
  - Does the mandate of the equality institution cover the discrimination grounds covered by ECRI's mandate, which are "race", color, language, religion, citizenship, national or ethnic origin, sexual orientation and gender identity, as well as multiple and intersectional discrimination on these grounds and any other grounds such as those covered by Article 14 of the European Convention on Human Rights while also integrating a gender perspective covering additional grounds such as sex, gender, age and disability? (ECRI GPT2, para. 4(b))
  - Does the mandate of the equality institution cover all areas in both the public and private sectors, in particular: employment, membership of professional organizations, education, training, housing, health, social protection and social advantages, social and cultural activities, goods and services intended for the public, whether commercially or freely available, public places, exercise of economic activity and public services including law enforcement and hate speech? (ECRI GPT2, para. 4(c); Recommendation of the European Commission, para. 1.1.1(2))
  - Can the equality institution provide personal support and legal advice and assistance to support the victims of discrimination and secure their rights before institutions and adjudicatory bodies? (ECRI GPT2, para. 14(a))
  - Can the equality institution have recourse to mediation procedures? (ECRI GPT2, para. 14(b))
  - Can the equality institution have recourse to administrative and judicial procedures by representing, with their consent, the victims of discrimination before administrative and judicial bodies? (ECRI GPT2, para. 14(c))
  - Can the equality institution bring cases of individual and structural discrimination and intolerance in its own name before administrative and judicial bodies? (ECRI GPT2, para. 14(d))
  - Can the equality institution intervene as *amicus curiae*, third party or expert before administrative and judicial bodies? (ECRI GPT2, para. 14(e))
  - Is the equality institution authorized to monitor the execution of decisions of administrative and judicial bodies? (ECRI GPT2, para. 14(f))
  - Can the equality institution raise public awareness on the legislation for equality, diversity, equal treatment, non-discrimination and mutual understanding? (ECRI GPT2, para. 13(a))
  - Does the mandate of the equality institution cover the creation of a continuous dialogue with groups experiencing discrimination and intolerance and their representative organisations, and with organisations working more generally on human rights and equality issues? (ECRI GPT2, para. 13(b))

- Is the equality institution authorized to develop standards and provide information, advice, guidance and support to individuals and institutions in the public and private sectors on good practice for promoting and achieving equality and preventing discrimination and intolerance? (ECRI GPT2, para. 13(g))
- Does the mandate of the equality institution cover the promotion of and support for the use of positive action to remedy inequality in the public and private sectors? (ECRI GPT2, para. 13(h))
- Does the mandate of the equality institution cover support for the implementation of the general duty on all authorities to promote equality and prevent discrimination in carrying out their functions as recommended in ECRI's General Policy Recommendation No. 7 and the establishment of standards for its implementation and, where appropriate, enforcement of them? (ECRI GPT2, para. 13(i))
- Is the equality institution authorized to monitor the implementation of its recommendations? (ECRI GPT2, para. 13(l))
- Is the equality institution responsible for tracking decisions made by courts and other decision-making bodies? (ECRI GPT2, para. 13(m))
- Does the mandate of the equality institution cover the development of a communications strategy to shape and guide its awareness raising? (ECRI GPT2, para. 34)
- Does the mandate of the equality institution cover carrying out independent surveys regularly? (Recommendation of the European Commission, para. 1.1.1.(7))
- Does the mandate of the equality institution cover conducting independent research and collecting data on the number of complaints or cases filed per discrimination ground, the functioning and outcome of administrative and judicial proceedings for the purpose of obtaining independent reports of high quality? (Recommendation of the European Commission, para. 1.1.1.(9))

## **B- Composition and Guarantees of Independence and Pluralism**

Section two of the Paris Principles titled "Composition and Guarantees of Independence and Pluralism" touches upon the identification of persons to be assigned in the national institution and the composition of members. In this context, it is possible to create these indicators by considering the Paris Principles, ECRI GPT2 and the Recommendation of the European Commission.

- Are the composition of the national institution and the appointment of its members, whether by means of an election or otherwise, established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces and civil society involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of civil society organizations responsible for human rights and efforts to combat discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists; trends in philosophical or religious thought; universities and qualified experts; legislative bodies and public institutions? (Paris Principles)
- Is the equality institution equipped with an infrastructure which is suited to the



- smooth conduct of its activities and in particular adequate funding to enable it to have its own staff and premises, in order to be independent of the government and not be subject to financial control which might affect its independence? (Paris Principles)
- Are the members of the equality institution assigned by an official act which shall establish the specific duration of the mandate in order to enshrine their independence? (Paris Principles)
  - Is it possible to renew the assignment of the members of the equality institution provided that the diversity of members is ensured? (Paris Principles)
  - Do the leadership, advisory bodies and staff of the equality institution reflect, as far as possible, social and geographical diversity and are they gender balanced? ((ECRI GPT2, para. 38; Model National Legislation, para. 18)
  - If the equality institution is established as a part of multi-mandate institutions, is the equality mandate of the institution clearly set in the legislation, does it have appropriate human and financial resources to ensure an appropriate focus on the equality mandate and do the reporting arrangements give adequate prominence to its function as an equality institution as well as relevant issues? (ECRI GPT2, para. 7)
  - Are not only *de jure*, but also *de facto* independence ensured for the equality institution? (ECRI GPT2, para. 2)
  - Can the equality institution function without any interference from the state, political parties or other actors? (ECRI GPT2, para. 22)
  - Are the persons holding leadership positions in the equality institution appointed by a transparent, competency-based and participatory procedure and does the executive body have any decisive influence in any stage of the assignment process? (ECRI GPT2, para. 23)
  - Do the directors of the equality institution benefit from functional immunity, are they protected against threats and coercion and do they have appropriate safeguards against arbitrary dismissal or the arbitrary non-renewal of an appointment? (ECRI GPT2, para. 24)
  - Are any activities and affiliations which are compatible and incompatible with holding leadership positions in the equality institution clearly set out in the legislation? (ECRI GPT2, para. 25)
  - Do the directors of the equality institution have clearly defined responsibilities in the legislation, are they remunerated at a reasonable level, and appointed for an appropriate time period? (ECRI GPT2, para. 26)
  - Can the equality institution decide independently on its internal structure and how to manage its resources, recruit and appoint its own staff and have its own premises, which should be adequate for its needs? (ECRI GPT2, para. 27)
  - Does the equality institution have sufficient staff and funds to implement all its functions and competences in an effective way, is its budget annually set by the legislative body, is it possible to make any arbitrary and disproportionate reduction in its budget and where its mandate, functions and competences are expanded, is its budget increased accordingly? (ECRI GPT2, para. 28)
  - Does the equality institution have the right to raise additional funds for the carrying out of its functions in an open and transparent manner from sources other than the state in or outside the country while ensuring that this does not compromise its independence? (ECRI GPT2, para. 29)

- Does the equality institution have the right to make public statements and produce or publish research and reports without prior permission from, approval by or notification to the government or any other institution? (ECRI GPT2, para. 30)
- Is the equality institution subject to public service law and to the financial accountability and expenditure rules that apply to public authorities as an institution offering public services? (ECRI GPT2, para. 32)

## C- Methods of Operation

Considering the matters covered by section three of the Paris Principles titled "Methods of Operation", it is possible to create these indicators on the basis of the Paris Principles, ECRI GPT2 and the Recommendation of the European Commission:

- Can the equality institution freely consider any questions falling within its competence, whether they are submitted by the government or taken up by it on the proposal of its members or of any petitioner? (Paris Principles)
- Can the equality institution hear any person and obtain any information or documents necessary for assessing situations falling within its competence? (Paris Principles)
- Can the equality institution address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations? (Paris Principles)
- Can the equality institution meet on a regular basis and whenever necessary in the presence of all its members? (Paris Principles)
- Can the equality institution establish working groups from among its members as necessary, and set up local or regional units to assist it in discharging its functions? (Paris Principles)
- Does the equality institution maintain consultation with other public bodies, whether jurisdictional or administrative, responsible for the promotion and protection of human rights (in particular ombudsman and similar institutions)? (Paris Principles)
- Does the equality institution develop relations with the civil society organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees and disabled persons) in view of the fundamental role played thereby in expanding its work? (Paris Principles)
- Does the equality institution build a continuous dialogue not only with the CSOs representing groups experiencing discrimination and intolerance, but also with these groups? (ECRI GPT2, para. 13(b))
- Does the equality institution continuously involve CSOs in its work for the planning and execution of its activities and has it already established the structure intended for this purpose? (ECRI GPT2, para. 37)
- Is the equality institution authorized to conduct on-site inspections within the scope of its authority to obtain evidence and information and apply for an enforceable court order or impose administrative fines if the information and documents requested thereby are not provided, individuals do not comply with a call



- and it is not allowed to conduct on-site inspections? (ECRI GPT2, para. 21)
- Does the equality institution perform its operations based on the relevant international or national legal framework, standards, and case-law and are its reports and recommendations are based on expertise and evidence built upon the use of research, investigation, documentation, and impartial and independent information? (ECRI GPT2, para. 31)
  - Does the equality institution have easily accessible premises, online, email and telephone services, and flexibility in meeting the time constraints of those seeking access to the services of the institution? (ECRI GPT2, para. 40(a))
  - Does the equality institution have local outreach programs and local and regional offices? (ECRI GPT2, para. 40(b))
  - Does the equality institution meet groups experiencing discrimination and intolerance at key moments and build sustained links with them? (ECRI GPT2, para. 40(c))
  - Does the equality institution offer the possibility for people exposed to discrimination or intolerance to contact and engage with the equality institution in a confidential way and in a language in which they are proficient, to have face-to-face contact, and to submit complaints orally, online or in written form, with a minimum of admissibility conditions? (ECRI GPT2, para. 40(d))
  - Is confidentiality offered also to witnesses and whistleblowers? (Recommendation of the European Commission, para. 1.2.3(3))
  - Are the premises, services and practices of the equality institution adjusted to take account of all forms of disability? (ECRI GPT2, para. 40(e))
  - Does the equality institution use easy-to-read language in publications, in particular those providing information on rights and remedies, and translate them into all languages commonly used in the country? (ECRI GPT2, para. 40(f))
  - Are the functions and services of the equality institution free of charge to complainants and respondents? (ECRI GPT2, para. 40(g))
  - Are the regulations of the equality institution publicized for accessibility and availability? (ECRI GPT2, para. 40(h))
  - Is regular and effective coordination ensured between the equality institution and other institutions assigned for the same issue? (Recommendation of the European Commission, para. 1.3(1))
  - Can the equality institution set its own priorities and does it concentrate to a disproportionate extent on some tasks to the detriment of other tasks? (Recommendation of the European Commission, para. 1.3(1))

## D- Quasi-Jurisdictional Competence

Section four of the Paris Principles titled "Additional Principles Concerning the Status of Commissions With Quasi-Jurisdictional Competence" prescribes quasi-jurisdictional competence in a "selective" way.<sup>18</sup> It is possible to authorize national institutions to review and decide on complaints. Cases may be brought before it by individuals, their

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<sup>18</sup> Anna-Elina Pohjolainen, *The Evolution of National Human Rights Institutions: The Role of the United Nations*, The Danish Institute for Human Rights, 2006, p. 7, [https://www.humanrights.dk/sites/humanrights.dk/files/media/migrated/evolution\\_of\\_nhris.pdf](https://www.humanrights.dk/sites/humanrights.dk/files/media/migrated/evolution_of_nhris.pdf) (accessed: July 31, 2020)

representatives, third parties, civil society organizations, trade unions or any other organization representing the victims. In this context, it is possible to create these indicators by considering the Paris Principles, ECRI GPT2 and the Recommendation of the European Commission.

- Can the equality institution seek an amicable settlement through mediation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality? (Paris Principles)
- Does the equality institution inform the party that filed the petition of its rights, in particular the remedies available thereto and promote its access to them? (Paris Principles)
- Does the equality institution transmit complaints to any other competent authority within the limits prescribed by the law? (Paris Principles)
- Does the equality institution make recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights? (Paris Principles)
- Does the equality institution apply the principle of shared burden of proof during the decision-making process? (ECRI GPT2, para 17(a))
- Does the equality institution issue legally binding decisions or recommendations that require action to put an end to discrimination, achieve full equality, and avert future discrimination and impose effective, proportionate and dissuasive sanctions including payment of compensation for both pecuniary and non-pecuniary damage, fines and the publication of the decision and the name of the perpetrator? (ECRI GPT2, para. 17(c))
- Does the equality institution publish its decisions and perform any monitoring activity to ensure the execution and implementation of its decisions? (ECRI GPT2, para. 17(d))
- Is there a right to appeal before the courts against the decisions of the equality institution? (ECRI GPT2, para. 19)
- Are the victims offered the right to choose whether they first initiate proceedings before the equality institution or whether they proceed directly to the courts? (ECRI GPT2, para. 20)
- Are the time limits for the initiation of subsequent court proceedings suspended in the event that the victims apply before the equality institution? (ECRI GPT2, para. 20)
- Do the government and other public authorities consult and cooperate with the equality institution and take its recommendations on legislation, policies, procedures, programmes, and practices into account? (ECRI GPT2, para. 36)
- Does the legislation provide that the government and other public authorities must reply to or take action to implement the equality institution's recommendations within a certain timescale? (ECRI GPT2, para. 36)



## II. TIHEK and COMPLIANCE WITH INTERNATIONAL STANDARDS

### A- Competence and Responsibilities of TIHEK

#### 1. TIHEK and Its Legal Basis

In terms of the legal basis of equality institutions, the priority choice would be a constitutional regulation.<sup>19</sup> It can be said that a constitutional regulation will provide the most robust assurance for the equality institution in terms of resolving the legitimacy issue.<sup>20</sup> Constitutional basis is fundamental in securing the independence of institutions from the executive body and ensuring the continuity of the institution. Besides, regulation of the institution's status with the highest legal norm within the hierarchy of norms will prevent the amendment of its status with the simple majority of the legislative body. Any debate that will be raised on whether the institution will work under the legislative or executive body will be rendered meaningless with a constitutional regulation setting forth that the institution is not affiliated to any of such bodies.

TIHEK does not have any constitutional basis. A clear constitutional basis is granted to the Ombudsman Institution (OI) in accordance with Article 74 of the Constitution although it is a problematic article while this was not preferred during the establishment of TIHEK and TIHEK was established with the Law No. 6701. Although this does not pose any problem by itself, the mere existence of a legal basis for the Institution calls to mind the question of whether sufficient assurance is granted or not as detailed below by considering that TIHEK is associated with the executive body and all of its members are designated by the executive body. Nevertheless, it can be assumed that there is no problem in this regard since most of such institutions have legal basis.

#### 2. Duties and Authorities of TIHEK

Equality institutions must be given as broad a mandate as possible. Duties of TIHEK are specified in Articles 9(1) and 9(3) of TIHEK Law and its duties regarding the principle of equality and fight against discrimination are as follows:

- a) Carrying out activities on the prevention of discrimination;
- b) Raising public awareness on the fight against discrimination through information and training using mass media;
- c) Contributing to the preparation of units related to non-discrimination in the national education curriculum;
- ç) Engaging in joint activities with universities in order to eliminate discrimination and improve the understanding of equality in the society, contributing to

19 Kutsal Yeşilkağıt; Berend Snijders, *Between Impartiality and Responsiveness: Equality Bodies and Practices of Independence*, EQUINET, 2008, p. 6, [https://www.archive.equineteurope.org/IMG/pdf/EN\\_-\\_Between\\_Impartiality\\_and\\_Responsiveness.pdf](https://www.archive.equineteurope.org/IMG/pdf/EN_-_Between_Impartiality_and_Responsiveness.pdf) (accessed: July 31, 2020).

20 Mohammad-Mahmoud Mohamedou, "The Effectiveness of National Human Rights Institutions", *National Human Rights Institutions: Articles and Working Papers*, Birgit Lindsnaes; Lone Lindholt; Kristine Yigen (eds.), Danish Centre for Human Rights, Denmark, 2005, p. 51. See op. cit. p. 51-52 for potential legitimacy problems experienced by the equality institution and potential solution recommendations.

- the establishment of equality-related departments of universities and preparation of the curriculum on equality teaching under the coordination of the Council of Higher Education;
- d) Contributing to the identification of the principles of pre-service and in-service equality training programs of public institutions and organizations and the execution of these programs;
  - e) Monitoring and evaluating legislative work on non-discrimination and conveying its opinions and proposals regarding this to the relevant authorities;
  - g) Examining, investigating and deciding on the violations of non-discrimination on an ex officio fashion or upon application and following the consequences thereof;
  - ğ) Guiding those applying to the Institution on the ground that they are victimized by the violations of non-discrimination about potential administrative and legal remedies for the redressal of their victimization and helping them to follow their applications;
  - k) Drawing up annual reports on the fight against discrimination for submission to the Office of the President and the Office of the Speaker of the Grand National Assembly of Turkey;
  - l) Informing the public and drawing up special reports on its mandate apart from regular annual reports where deemed necessary;
  - m) Monitoring and evaluating international developments on the fight against discrimination and cooperating with the relevant international institutions within the limits prescribed by the law;
  - n) Cooperating with public institutions and organizations, civil society organizations, professional organizations and universities engaging in the fight against discrimination;
  - o) Supporting the activities of other institutions intended for preventing discrimination;
  - ö) Monitoring the implementation of international human rights conventions, to which Turkey is a party, expression opinions also by making use of the relevant civil society organizations during the preparation of the reports that must be submitted by the State to the examination, monitoring and inspection mechanisms established as per these conventions and attending the international meetings during which such reports will be submitted by sending representatives and
- 3) Informing the Human Rights Examination Committee and the Committee on Equality of Opportunity for Women and Men of the Grand National Assembly of Turkey on its duties and authorities at least once a year.

Article 11 of TIHEK Law designates the duties and authorities of the Board established under TIHEK. Duties and authorities of the Board on discrimination are as follows:

- b) Deciding on the examinations conducted on an ex officio fashion regarding the applications filed concerning the violations of non-discrimination, finalizing the process of reconciliation regarding these applications and examinations where necessary and deciding on the administrative sanctions prescribed in TIHEK Law with regard to the violations of non-discrimination;
- c) Monitoring and evaluating the problems concerning the implementation of court verdicts concerning the violations of non-discrimination;



- d) Submitting opinions to judicial bodies, public institutions and organizations and relevant persons, upon request, with regard to non-discrimination;
- e) Deciding on the membership of the Institution before the international organizations working in the field of discrimination and the establishment of cooperation with such institutions where necessary;
- f) Deciding on the examinations, investigations, reports and similar activities performed by the Institution in the fight against discrimination;
- g) Deciding on the strategic plan of the Institution and identifying its purposes, objectives, service quality standards and performance indicators;
- ğ) Discussing and deciding on the budget proposal prepared in line with the Institution's strategic plan, purposes and objectives.

Considering Articles 9 and 11 of TIHEK Law, it is observed that the Institution has a broad mandate, such powers and duties are regulated in a broad and clear way within the law, the powers and responsibilities set forth in international standards are stipulated and the Institution is granted significant powers in tackling with discrimination. Although the powers and responsibilities of the Institution largely match with those stipulated in the Paris Principles, TIHEK Law seems to remain silent on "ensuring that states become party to international human rights conventions and the implementation thereof" and "submitting to UN bodies or regional intergovernmental organizations pursuant to the states' obligations arising out of human rights treaties and, where necessary, expressing an opinion on the subject, with due respect for its independence".

On the other hand, there are incompatibilities in terms of ECRI GPT2. TIHEK Law does not have any provision on "fight against hate speech" and "the promotion of diversity and of good relations between persons belonging to all the different groups in society". Besides, it is observed that Article 3(2) of TIHEK Law does not adopt an open-ended approach in terms of discrimination grounds and does not mention the grounds of gender, sexual orientation and sexual identity. In addition, the Law's wording does not comply with the perspective of gender.

The aforementioned powers and duties are solely related to discrimination, and the Institution also has duties intended for the protection and development of human rights and the fight against torture and ill-treatment and the Institution's mandate seems to be too broad for the Institution to carry out an effective activity. As a matter of fact, it is seen that the aforementioned duties were not fulfilled to a certain extent considering the Institution's activities performed during the first four years. Although it is not the only reason for this situation, one of the important reasons is that the mandate of the Institution has been kept broad.

TIHEK's work shows that no significant activity is conducted in the context of Articles 9(1)(a), 9(1)(b), 9(1)(c), 9(1)(ç), 9(1)(d), 9(1)(e) and 9(1)(o). The data published on the work carried out under Article 9(1)(ğ) of TIHEK Law (guiding those applying to the Institution on the ground that they are victimized by the violations of non-discrimination about potential administrative and legal remedies for the redressal of their victimization and helping them to follow their applications) shows that the Institution informed 481 persons on this issue during 2019.<sup>21</sup> This figure is quite low compared to the population of Turkey.

21 TIHEK, 2019 Activity Report, p. 53, [https://www.tihe.gov.tr/upload/file\\_editor/2020/02/1582925332.pdf](https://www.tihe.gov.tr/upload/file_editor/2020/02/1582925332.pdf) (accessed: July 31, 2020).

Three reports covering 2017, 2018 and 2019 have been prepared up to know under Articles 9(1)(k) and 9(3) of TIHEK Law and submitted to the Office of the President, GNAT, the Human Rights Examination Committee and the Committee on Equality of Opportunity for Women and Men of GNAT.<sup>22</sup>

There is only one report that has been prepared and published in an ex officio fashion within the scope of Art. 9(1)(l) of TIHEK Law.<sup>23</sup> No step has been taken up to now regarding TIHEK's duty as specified in the Paris Principles "drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government" and TIHEK has not made any critical statement on the Government with regard to any human rights problem in the country.

It is observed that a cooperation policy limited to the Independent Permanent Human Rights Commission of the Organization of Islamic Cooperation that has not conducted any considerable activity on human rights and tries to introduce local or regional standards that could be contrary to human rights instead of universal standards is adopted by the Institution in terms of cooperation with international organizations under Article 9(1)(m) of TIHEK Law.<sup>24</sup> Cooperation with the United Nations and the Council of Europe has proved to be very limited and is unlikely to be considered as effective cooperation.

It is seen that no cooperation is established with any public institution and professional organization performing activities towards fight against discrimination under Article 9(1)(n) of TIHEK Law. The only university with which cooperation has been established is Uskudar University, which does not have any activity related to the mandate of the Institution.<sup>25</sup> Collaboration with CSOs remained very limited and the CSOs with which cooperation has been established are composed of the CSOs with no experience and knowledge on fight against discrimination. Activities of the Institution do not provide any transparent information on cooperation with CSOs.<sup>26</sup>

The Institution has not performed any activity for monitoring the implementation of international human rights conventions under Article 9(1)(ö) of TIHEK Law. On the contrary, the social media accounts of the Chairman of the Institution and the Board members frequently share posts against the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention)

22 TIHEK, 2017, 2018 and 2019 Activity Reports, <https://www.tihek.gov.tr/kategori/faaliyet-raporlari/> (accessed: July 31, 2020)

23 TIHEK, Report on the Right to Education of Autistic Children and Non-Discrimination, March 2020, [https://www.tihek.gov.tr/upload/file\\_editor/2020/04/1585822889.pdf](https://www.tihek.gov.tr/upload/file_editor/2020/04/1585822889.pdf) (accessed: July 31, 2020).

24 For instance, see: TIHEK, "As TIHEK, We Represented our Country at the Symposium Held in Morocco on the "Role of the Media in the Fight Against Hate Crime"", October 23, 2017, <https://www.tihek.gov.tr/fast-a-duzenlenen-nefret-soylemiyle-mucadelede-medyanin-rolu-konulu-sempozyumda-tihek-olarak-ulkemizi-temsil-ettik/>; "National Human Rights Institutions of the Member Countries of the Organisation of Islamic Cooperation Met in Istanbul", October 24, 2018, <https://www.tihek.gov.tr/islam-isbirligi-teskilati-uye-ulke-ulusal-insan-haklari-kurumlari-istanbulda-biraraya-geldi/>; "TIHEK Delegation attended the 6th International Seminar of the Organisation of Islamic Cooperation.", October 15, 2019, <https://www.tihek.gov.tr/tihek-heyeti-islam-isbirligi-teskilatinin-6-uluslararasi-seminerine-katildi/>; "A Panel on 'Human Rights Protection Mechanisms' Was Organized at SETA (Foundation for Political, Economic and Social Research)", December 13, 2019, <https://www.tihek.gov.tr/seta-da-insan-haklari-koruma-mekanizmalari-baslikli-panel-duzenlendi/> (accessed: July 31, 2020)

25 See, TIHEK, "TIHEK Signed a Cooperation Protocol with Uskudar University", February 27, 2020, <https://www.tihek.gov.tr/tihek-uskudar-universitesi-ile-isbirligi-protokolu-imzaladi/> (accessed: July 31, 2020)

26 For instance, see: TIHEK, "TIHEK Organized the Third Provincial Consultation Meeting in Sakarya.", February 26, 2020, <https://www.tihek.gov.tr/tihek-il-istisare-toplantilarinin-ucuncusunu-sakaryada-gerceklestirdi/>; "TIHEK's Konya Provincial Consultation Meeting Was Organized.", <https://www.tihek.gov.tr/tihek-konya-il-istisare-toplantisi-gerceklestirildi/>; "TIHEK's Istanbul Provincial Consultation Meeting Was Organized", <https://www.tihek.gov.tr/turkiye-insan-haklari-ve-esitlik-kurumu-istanbul-il-istisare-toplantisi-gerceklestirildi/> (accessed: July 31, 2020)



adopted by the Council of Europe of which Turkey is also a member in Istanbul in 2011 and ratified by Turkey.<sup>27</sup> It is observed that many presentations were made in contrary to the universality of human right during the two symposia held by TIHEK up to now, opinions that could not be considered in the context of human rights were frequently expressed and a right not existing in the law of human rights (the right to protection of the family) was put forth to seek for the complete elimination of nearly all applicable international standards on the rights of women through a conservative approach.<sup>28</sup>

In these respects, the Institution not only fails to fulfill the duties assumed thereby regarding human rights, but also places in the center of its activities the elimination of current achievements concerning human rights. This situation is explicitly contrary to the requirements of "promoting and ensuring the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation" as set forth in the Paris Principles and "carrying out the activities of an equality institution based on the relevant international or national legal framework, standards, and case law" as specified in para. 31 of ECRI GPT2.

In addition, no information is available as to the effect that the Institution contributes to the preparation of the reports that must be submitted by the state to the examination, monitoring and inspection mechanisms established as per international human rights conventions. Although the Institution assigned representatives for attending the international meetings where such reports would be submitted, this attendance proved to be symbolic and the Institution did not contribute to or influence any of the evaluation processes for the reports of contracting states.

A similar situation is in place for the implementation of Article 11 on the duties and powers of TIHEK Board. The Board does not perform any activity intended for monitoring and evaluating problems concerning the enforcement of judicial verdicts on the violations of non-discrimination under Article 11(1)(c).

It is not known whether or not any request for opinion has been submitted to judicial bodies, public institutions and organizations and from relevant persons concerning its mandate under Article 11(1)(d) of TIHEK Law and, if any, whether or not any opinion has been submitted.

As for membership with international organizations regulated in Article 11(1)(e) of TIHEK Law, it is observed that the Institution is only a member of the European Network of National Human Rights Institutions (ENNHRI), which does not have any accreditation practice in place. TIHEK is not a member of the European Network of Equality Bodies (EQUINET).

The strategic plan prescribed in Article 11(1)(g) of TIHEK Law was prepared in 2018 although it was not shared with the public.<sup>29</sup> The statement by the Institution regarding this plan shows that the aim regarding discrimination was expressed in general terms (taking and implementing relevant measures for staging an effective fight against discrimination in

27 See also, "Chairman of TIHEK stated that the Istanbul Convention did not have any aim of protecting the family in contrary to the United Nations Universal Declaration and the Law No. 6284 adopted based on this Convention has turned into a punishment mechanism going beyond the Istanbul Convention.", "Chairman of TIHEK Arslan Attended the Meeting of the Committee on Equality of Opportunity for Women and Men", <https://www.tihek.gov.tr/tihek-baskani-arслан-kefek-toplantısına-katıldı/> (accessed: July 31, 2020).

28 Proceedings of TIHEK I. Human Rights Symposium - Rethinking the Human Rights, [https://www.tihek.gov.tr/upload/file\\_editor/2019/04/Sempozyum1.pdf](https://www.tihek.gov.tr/upload/file_editor/2019/04/Sempozyum1.pdf); Proceedings of the Right to Protection of the Family Under I. Human Rights Symposium, [https://tihek.gov.tr/upload/file\\_editor/2020/04/Sempozyum2\\_2.pdf](https://tihek.gov.tr/upload/file_editor/2020/04/Sempozyum2_2.pdf) (accessed: July 31, 2020).

29 TIHEK, 2018 Activity Report, p. 90, [https://www.tihek.gov.tr/upload/file\\_editor/2019/2018\\_faaliyet\\_raporu.pdf](https://www.tihek.gov.tr/upload/file_editor/2019/2018_faaliyet_raporu.pdf) (accessed: July 31, 2020).

cooperation with all parties) and the objectives were to "improve corporate effectiveness to prevent/mitigate the violations of non-discrimination" and "engage in activities intended for raising institutional and public awareness on the fight against discrimination" in a similar vein.<sup>30</sup> It is obvious that the aim and objectives in question prove to be insufficient.

No separate evaluation is made in this section for the duties of the Institution as specified in Article 9(1)(g) and of the TIHEK Board in Article 11(1)(b) of TIHEK Law "examining, investigating and deciding on the violations of non-discrimination on an ex officio fashion or upon application and following the consequences thereof, executing and finalizing the process of reconciliation and deciding on administrative sanctions" as it will be covered in the relevant section below.

Equality institutions can contribute to the fight against discrimination by engaging in judicial procedures as well as quasi-jurisdictional functions. Since jurisdictional procedures can be more effective than quasi-jurisdictional procedures as they may result in legally binding decisions, it is of great importance that equality institutions have some authority in this field. In this context, first of all, equality institutions must be vested with the authority to recourse to legal remedies on behalf and instead of victims where they are not identifiable and the authority to recourse to legal remedies upon their consent where they are identifiable. The institution's ability to recourse to legal remedies on its own behalf is considered an important opportunity for the development of regulations related to discrimination. Another important advantage is the ability to mobilize legal remedies based on the consent of the persons that do not have the opportunity of recouring to legal remedies or are reluctant to do so for various reasons. This proves to be very advantageous for the victims of discrimination especially in cases of working in the same workplace or studying in the same school.<sup>31</sup>

Secondly, an equality institution must be allowed to intervene in jurisdictional procedures upon the consent of the victim. It is possible for an equality institution to intervene in a case in different ways and intervention is used in a way to cover all different situations. It is possible for an institution to intervene in a case alongside a party, as well as a third party.<sup>32</sup> If an institution intervenes in a case alongside a victim, the prerequisite is the recourse of the victim to legal remedies beforehand. Authority of equality institutions to intervene in this way is an obligation explicitly stated in all EU Directives outlined above. An explicit recognition of this authority of equality institution in laws may prevent judicial bodies to act in a reluctant or hesitant way during the exercise of this authority. In cases where an institution intervenes in proceedings as a third party, consent of the victim is not required. This procedure allows an institution to make available its expertise on non-discrimination to judicial bodies.<sup>33</sup>

Currently, TIHEK has neither the authority to recourse to legal remedies on behalf and instead of victims where they are not identifiable nor the authority to recourse to legal remedies upon their consent where they are identifiable. Besides, it is not possible for the Institution to intervene in judicial procedures upon the consent of the victim. Since there is no *amicus curiae* or third party intervention procedure in Turkish law, it is not possible for TIHEK to intervene in the cases pending before judicial bodies.

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30 TIHEK, 2019 Activity Report, p. 42.

31 Bjorn Dilou Jacobsen; Peter Reading, *Influencing the Law Through Legal Proceedings, The Power and Practises of Equality Bodies*, EQUINET Report, the place of publication not known, 2010, p. 16.

32 Jacobsen; Reading, p. 19.

33 Jacobsen; Reading, p. 21.



Article 11(1)(d) of TIHEK Law lists "submitting opinions to judicial bodies, public institutions and organizations and relevant persons regarding its mandate upon request" among the duties and authorities of the Board. This statement reveals that the Board, the decision-making body of the Institution, can only submit an opinion upon request. Therefore, it is not possible for TIHEK to act as an expert before judicial bodies on its own initiative. This issue was also criticized by the ECRI.<sup>34</sup>

No provision is available regarding conducting awareness-raising activities in the society for promoting diversity and mutual understanding, engaging in activities intended for ensuring that the groups exposed to discrimination have trust in the institution and promoting and supporting positive actions although this issue is also covered in ECRI GPT2. Although the absence of legislation on this issue is not an obstacle to the conduct of such activities, the Institution's activities performed during the first four years show that nearly no activity was conducted regarding these issues.

Finally, as for carrying out independent surveys and collecting data on certain subjects, Article 24 of TIHEK Law provides that it is not possible for the Board to collect statistical data to fight against discrimination where necessary. In fact, TIHEK can decide in which areas to collect formal statistics for this purpose only together with the relevant institutions and organizations. The Turkish Statistical Institute is held responsible for the collection of statistical information deemed necessary. As seen, TIHEK Law does not contain any provision on the liabilities of regularly carrying out independent surveys and gathering a sufficient amount of sound quantitative and qualitative data on discrimination as stipulated in para. 1.1.1.(7) of the Recommendation of the European Commission. Practices of the Institution show that no such activity was performed during the first four years. Besides, the Institution does not gather any data in particular on the number of complaints or lawsuits per discrimination ground, the exercise and outcome of administrative and judicial proceedings, either.

## B- TIHEK's Composition and Guarantees of Independence and Pluralism

As examined in detail through separate sections below, the composition of TIHEK seems to be totally non-compliant with international standards in terms of the guarantees of independence and pluralism.

### 1. Composition of TIHEK, Board Members and the Selection Thereof

International standards put forth that equality institutions may be established as separate structures while they may also be formed as the part of an ombudsman institution or human rights institutions authorized in multiple respects. Para. 7 of ECRI GPT2 stresses that if the equality institution is established under a structure authorized in multiple respects, the mandate of the relevant institution as an equality institution must be set forth in the legislation in a clear way. TIHEK was constituted to be competent in more than one respect. It is observed that the Institution's powers regarding discrimination as detailed above are clearly indicated in TIHEK Law although there are deficiencies.

<sup>34</sup> ECRI, Report on Turkey, Fifth Monitoring Cycle, June 29, 2016, CRI(2016)37, para. 25, <http://rm.coe.int/fifth-report-on-turkey/16808b5c81> (accessed: July 31, 2020)

As stated in the Paris Principles and ECRI GPT2, a participatory selection method must be preferred to reflect the social diversity of an institution's members so as to guarantee its pluralistic structure. At this point, no model is proposed related to the selection of members. As underlined in the Paris Principles, no matter how the members are selected, it is emphasized that civil society organizations responsible for efforts to combat discrimination, trade unions, associations of lawyers, doctors, journalists and eminent scientists, trends in philosophical or religious thought, universities and qualified experts, the legislative body and ministries must be represented under the institution. The lack of a pluralistic structure for the institution and the inclusion of only people with similar identities, thoughts, etc. (academicians) may end up addressing a narrow circle of people for the institution.<sup>35</sup> Pluralistic structure is also important for guaranteeing the independence of the institution from the executive body or any political, religious and ethnic group.<sup>36</sup>

The qualifications required for appointment must be set forth objectively in the form of qualifications such as the merit and education level required by the institution's mandate<sup>37</sup> and no qualification must be prescribed other than those required by the mandate.<sup>38</sup> Studies previously conducted towards the aims of establishment for the institution must take precedence in terms of the merit. Of course, the experience in this field must contain activities performed in both the public sector and CSOs and trade unions. Appointment must be a fixed and long-term one and be equal to the term of office of the legislative body in cases where the legislative body is envisaged to conduct this appointment.<sup>39</sup> A regulation providing that some of the initially-appointed members will be replaced after a certain period of time will be instrumental in both continuity and adaptation to current developments. It is stated that the establishment of an appointment commission under the body that will appoint the members of the institution for the designation of people to be appointed as members for the institution will ensure that it will help with selection of these members, candidates will be brought to the attention of the public beforehand so that their reliability and merits will be questioned, resulting in positive outcomes for transparency.<sup>40</sup> It is also emphasized that transparency will contribute to the independence of the institution.<sup>41</sup> It is stressed that the announcement of candidates prior to appointment and allowing CSOs and trade unions to express their opinions are of importance for the institution's independence, its legitimacy before the public and the society's support.<sup>42</sup> Of course, the members of this board must also be designated in a way to encompass different segments of the society.

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35 Morten Kjaerum, *National Human Rights Institutions Implementing Human Rights*, The Danish Institute for Human Rights, Martinus Nijhoff, Denmark, 2003, p. 8.

36 Kjaerum, p. 12.

37 Janet Cormack; Jan Niessen, "The Independence of Equality Bodies", *European Anti-Discrimination Law Review*, Human European Consultancy, Migration Policy Group, No. 1, 2005, p. 27.

38 For different forms of appointment, see. Birgit Lindsnaes; Lone Lindholt, "National Human Rights Institutions: Standart Setting and Achievements", *National Human Rights Institutions: Articles and Working Papers*, Birgit Lindsnaes; Lone Lindholt; Kristine Yigen (eds.), Danish Centre for Human Rights, Denmark, 2005, p. 18-19.

39 Gabriele Kucsko-Stadlmayer, *European Ombudsman Institutions: A Comparative Legal Analysis Regarding the Multifaceted Realisation of an Idea*, Springer, Wien-New York, 2008, p. 14-15.

40 Kristene Yigen, "Guarantees of Independence of National Human Rights Institutions: Appointment and Dismissal Procedures of Leading Members", *National Human Rights Institutions: Articles and Working Papers*, Lindsnaes Birgit; Lone Lindholt; Kristine Yigen, Danish Centre for Human Rights, Denmark, 2005, p. 67.

41 Rachel Murray, "The Relationship Between Parliaments and National Human Rights Institutions", *Judges, Transition, and Human Rights*, John Morison; Kieran McEvoy; Gordon Anthony (eds.), Oxford University Press, Oxford, New York, 2007 p. 362.

42 Anne Smith, "The Unique Position of National Human Rights Institutions: A Mixed Blessing?", *Human Rights Quarterly*, Vol. 28, No. 4, The Johns Hopkins University Press, 2006, p. 923.



According to Article 12(2) of TIHEK Law, TIHEK Board consists of 11 members. Members are directly appointed by the President instead of election through a procedure affording all guarantees required for the pluralistic representation of CSOs operating in the fight against discrimination. Article 12(3) of TIHEK Law on the procedure of selection provides that the circumstance will be announced by the Institution to the public by appropriate means of communication prior to the expiry of the term of office of the members and applications as well as candidate notifications will be lodged before the Office of the President. However, the amendment made by the Decree Law (DL) No. 703 to Article 10(6) of TIHEK Law in 2018 removed the four-years of term of office from the text of the Law.<sup>43</sup> Therefore, the post of membership is not conditional upon any term of office anymore and a member can only be appointed as per Article 12(3) to replace a resigning member or a member dismissed by the executive body on certain grounds.

The current regulation shows that the Office of the President is the only decision-making body for the selection of Board members. The Decree Law No. 703 removed the provision "Seven members to be selected by the Council of Ministers (...) shall be designated from among the members of civil society organizations, trade unions, social and professional organizations performing activities on human rights, academicians, lawyers, members of visual media and press, the candidates to be nominated by the experts of the field or those applying for membership." from Article 10(2) of TIHEK Law and CSOs were completely left out of the process of member appointment by not even nominating candidates.

11 people who are currently the members of TIHEK Board were appointed on March 16, 2017.<sup>44</sup> As there is no transparent appointment process in place, it is not known how many people applied for membership, how many people were nominated, which criteria were taken into consideration while designating the members and the attention paid to the pluralistic representation of those knowledgeable and experienced about the subjects falling into the mandate of the Institution while designating the members. In the light of the aforementioned issues, affiliating the Institution to the legislative body and the development of an election process requiring qualified majority with the participation of both the governing party and opposition parties for the selection of members will render the process more compliant with international standards.

It is not possible to consider the qualifications required for being a member of TIHEK Board as the objective criteria suitable for being the member of an equality institution. Selection is of great importance as the members to be appointed will work as full-time employees in the Board acting as the decision-making body of the Institution and decide on the applications filed before the Institution. Three qualifications are envisaged in Article 12(4) of TIHEK Law for being a member of the Board: fulfilling the qualifications of being a public servant, having graduated from a four-year university program and not being assigned in the management bodies of political parties. The aforementioned article envisaged the following two separate qualification before it was amended by the DL No. 703 in 2018: "Being knowledgeable and experienced on the subjects falling into the mandate of the Institution" and "Having worked for a minimum total period of ten years in public institutions and organizations, international organizations, civil society organizations or professional organizations holding the status of a public institution or the private

43 Article 149 of the Decree Law No. 703 Amending Certain Laws and Decree Laws for Adaptation to the Constitutional Amendments, the Official Gazette No. 30473-3 of July 9, 2018.

44 See the Official Gazette No. 30009 of March 16, 2017.

sector". Although these qualities were insufficient also in the past in terms of securing pluralism and diversity, the qualities sought in the current version of the article are quite insufficient and do not guarantee pluralism and diversity.

In addition, the DL No. 703 also removed the following text from Article 12(5) of TIHEK Law, which was the only regulation on pluralism: "Attention shall be paid to the pluralistic selection of those knowledgeable and experienced on the subjects falling into the mandate of the Institution while electing members." In addition, no emphasis is made on the equality of women and men in terms of the composition of members. This version of the article grants the executive body to designate members of the Board without limiting its discretion. It should also be added that the amendment in question was not related to the constitutional amendment issued in 2017 and the possibility of a pluralistic Board was completely eliminated through the DL No. 703 issued for this purpose.

In the case filed for the annulment of certain articles of TIHEK Law upon the entry into force of the Law, the Constitutional Court indicated that the conditions for selection were set in an objective manner by way of seeking certain conditions for selection as a Board member and a pluralistic approach was adopted for the composition of Board members by allowing the members to be selected by the executive body to come from different segments of the society and accordingly stated that it could not be put forth that the members of the Board would lose their impartiality and independence by being affiliated to the executive body.<sup>45</sup> However, the relatively-low standard applied by the Constitutional Court regarding independence got worse following the amendment made with the DL No. 703.

Article 10(4)(a) of TIHEK Law provides that the persons to be appointed must fulfill the conditions of being a public servant and expects the members to act as a public servant. As a matter of fact, it is observed that nine of the 11 members within the TIHEK Board were serving in public institutions before their appointment and only two of them (lawyers) were not previously working as public servants. Although it seems that six of the members are experienced about human rights, only four of these members have actually such experience in connection with their public duty and have not any specific background regarding human rights and the victims of discrimination. The number of members who previously worked as volunteers in civil society organizations is only three. Five of the members have no experience and knowledge on civil society and human rights. Only one of the members is female and disabled.

As can be seen, the member composition of the Institution is quite inadequate in terms of fulfilling the duties it undertakes. Members are completely distant from reflecting social diversity, and its member composition is completely contrary to gender equality. It is observed that there is complete contrariety to the requirement of the persons holding leadership positions in the equality institution being designated and appointed by a transparent, competency-based and participatory procedure and the executive body not having any decisive influence in any stage of this process.

The principle of pluralism is valid not only for the members of the Board, but also for the employees of the Institution as per para. 38 of ECRI GPT2. It is known whether or not the directors of TIHEK, its advisory bodies and employees reflect social diversity. It is observed that the distribution of employees is not balanced in terms of gender equality and the number of male personnel is much higher than that of female personnel (74-46).<sup>46</sup>

45 Constitutional Court, E. 2016/132, K. 2017/154, November 15, 2017, para 31-32.

46 TIHEK, 2019 Activity Report, p. 30.



## 2. Assurances Granted to the Members of the Board

In equality institutions, the regulations required for the independence of members must be issued at the level of constitution or law. In this context, the criteria of appointment, the duration of appointment, the procedure of reappointment, the procedure of dismissal, the privileges of the members of the institution and their immunity come to the fore.<sup>47</sup>

According to international standards, members of the institution must be appointed for a certain period of time and not be dismissed. It is possible to reappoint the members. Prior to the amendment made through the DL No. 703, Article 10(6) of TIHEK Law provided that the term of office of the members was four years and the members serving for two subsequent terms could not be elected again before the expiry of one term. The aforementioned regulation was abolished by the DL No. 703 and no regulation was issued to replace it. Therefore, the members appointed to the TIHEK Board were appointed for an indefinite period of time and will be able to remain in office in theory until the age of mandatory retirement, which applies to public servants. This seems to eliminate the reappointment of members.

The procedure of dismissal must be based on objective and detailed conditions just like those valid for the procedure of appointment for those appointed in an equality institution and must be put into practice in accordance with the system proposed for the procedure of appointment. Appointment of the members of the institution by the legislative body through qualified majority and the implementation of the procedure of dismissal in the same way seem to be the most appropriate method and will constitute a positive step for the reputation, reliability and independence of institutions.<sup>48</sup>

Members of the equality institution must also have criminal and legal immunity.<sup>49</sup> It may even be the case that the other personnel employed in the institution benefit from similar types of immunity. This protection may enable the members to work without being under pressure. For example, the immunity granted to the members of parliament may be valid for the members in cases where the institution is affiliated to the legislative body<sup>50</sup> while the assurances afforded to judges may be valid for them if the institution is affiliated to the executive body. Immunity must be granted to the members of the institution against measures such as arrest, detention, the seizure of personal documents, the interception of communications and the seizure of personal belongings and legal immunity must also be granted to them due to the legal actions taken thereby and the statements made thereby due to their posts. The resolution for the lifting of immunity must be issued with the qualified majority of the members of the Institution. Finally, a reasonable salary must be paid to those serving in the equity institution.

Article 10(8) of TIHEK Law regulates the guarantee of membership and provides that members cannot be dismissed prior to the expiry of their term of office. However, as membership is no longer subject to a duration following the amendment made by the DL No. 703 as mentioned above, the provision "members cannot be dismissed prior to the expiry of their term of office" is not valid any more. Article 10(8) also regulates that members can be dismissed under certain conditions upon the approval of the President or the minister to be assigned thereby. Such conditions are as follows: if the members do not fulfill the conditions sought for appointment or fail to fulfill them later on; they do

47 *National Human Rights Institutions*, p. 11, para. 78.

48 Kucsko-Stadlmayer, p. 13.

49 *National Human Rights Institutions*, p. 11, para. 80-81.

50 Kucsko-Stadlmayer, p. 15.

not sign the resolutions of the Board in due time; they do not attend a total of five Board meetings within a calendar year without any excuse acceptable by the Board; their incapacity to work is certified due to severe illness or disability through a medical board report; the conviction issued on them due to the crimes committed thereby in association with their positions becomes final; the temporary state of incapacity to work lasts longer than three months and they are convicted of a crime preventing them from being a public servant and the execution of their sentence actually starts. The aforementioned regulation assures a certain level of protection regarding the dismissal of members.

It is observed that the responsibilities of the members of the TIHEK Board are regulated in the legislation. Article 10(9) of TIHEK Law sets forth the activities that consort and do not consort with the status of Board members. Accordingly, members of the Board are banned from assuming an official or special post other than their duties in the Board, acting as directors and auditors in associations, foundations, cooperatives and similar organizations, engaging in trade, engaging in self-employment activities and acting as arbitrators and experts unless such assignment is based on a special law. Ties of the members with their former assignments are severed as long as they remain to be members.

Article 10(3) of TIHEK Law provides that the investigation of the Chairman and members is subject to the permission of the President or the minister to be assigned thereby and, in this case, the provisions of the Law No. 4483 on the Trial of Civil Servants and Other Public Officials. It is possible to appeal before the Council of State against resolutions on granting or not granting permission for investigation. However, it seems more appropriate to offer a number of privileges and immunity to the board members so as to ensure independence and autonomy. This issue is crucial for the board to function independently and effectively. At this point, it is of importance to grant immunity against the arrest or detention of the board members or the seizure of their personal belongings, the seizure or examination of their papers and documents and the interception of their communications and correspondence during their term of office and in association with their posts as well as legal immunity against the legal actions taken against their statements, written statements or actions within the scope of their posts during and after their term of office. The current regulation authorizing the executive body to grant permission for trial poses a significant problem for the institution's independence to be covered in more detail in the following section.

Article 15(2) of TIHEK Law provides that the Board members are paid the same amount of salary paid to senior public directors as per the provisions of the DL No. 375 of June 27, 1989 and, in this regard, it can be accepted that they are paid a reasonable salary.

### 3. TIHEK and Independence

Independence of equality institutions is the most important issue that comes to the fore in terms of the criteria related to such institutions and must be considered to have fundamental importance for the effectiveness and success of the equality institution.<sup>51</sup> Problems with the *de facto* independence of an institution emerge depending on factors that may vary from one country to another such as political culture and power relations beyond the legal framework. This study focuses mainly on *de jure* independence as it mostly focuses on regulations.

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51 Roy Gregory, "Building an Ombudsman Scheme: Statutory Provisions and Operating Practises", *The International Ombudsman Anthology*, Linda C. Reif (ed.), Kluwer Law International, The Netherlands, 1999, p. 132.



The issue of independence creates a relatively contradictory situation for equality institutions in theory. The requirement of independence for the institution despite its duties, authorities and financial resources being set by the state symbolizes this conflict.<sup>52</sup> Independence of equality institutions means the autonomous operation of such institutions without any intervention by any real or legal person other than the institution or public bodies.

Independence requires the possession of sufficient financial resources annually set by the legislative body for the effective fulfillment of its duties and responsibilities, the announcement of its opinions to the public and independence from the executive body and government in terms of using its financial resources and selecting its own personnel. The procedures intended for the appointment and dismissal of members of the institution also constitute a subject that can be evaluated in this context, but this issue will not be covered in this section as it is covered under a separate heading above.

After assuring the independence of the institution on the aforementioned matters, whether or not the institution is affiliated to the executive or legislative body has secondary importance.<sup>53</sup> However, considering that the equality institution is also authorized to review the acts and actions of the government, it is more appropriate that it is affiliated to the legislative body the actions of which are not reviewed by the institution rather than the executive body.<sup>54</sup> However, affiliation to the legislative body is limited to the appointment and dismissal of the members of the institution. Prescription of qualified majority during the process of appointment will ensure the minimization of political pressure. Apart from this, it is also recommended that the term of office of the members of the institution be different from that of the parliament.<sup>55</sup> Another bond with the legislative body is the introduction of an obligation for institutions to submit reports to the legislative body at certain intervals. This does not pose any problem with regard to independence, either. In fact, it makes it possible to present legislative amendment proposals to the attention of the legislative body.<sup>56</sup> However, content of the report must be determined by the institution and be submitted directly to the legislative body. The aforementioned matters will pave the way for the institutional independence and autonomy of the institution from legislative, executive and judicial bodies to a great extent.

Independence does not mean the absence of any bond with the state, but the legal definition of the bond with legislative, executive and judicial bodies and the independent fulfillment of its duty in this respect.<sup>57</sup> Emphasis on legal arrangement points to matters such as the failure to easily change the legal status of the institution, allowing for the discussion of such attempt at the legislative body and enabling various actors within the country or at international level to contribute to the relevant process.<sup>58</sup>

The manual prepared by the UN on national human rights institutions draws attention to four topics on independence. These topics are independence through operational autonomy, independence through financial autonomy, independence through the

52 Smith, p. 912.

53 Andrea Krizsan, "Ombudsmen and Similar Institutions for Protection against Racial and Ethnic Discrimination", *European Yearbook of Minority Issues*, Vol. 4, Martinus Nijhoff Publishers, Leiden, Boston, 2006, p. 171.

54 Roy Gregory, "Building an Ombudsman Scheme: Statutory Provisions and Operating Practises", *The International Ombudsman Anthology*, Linda C. Reif (ed.), Kluwer Law International, The Netherlands, 1999, p. 136.

55 Kucsko-Stadlmayer, p. 10.

56 For the various functions of the legislative body's obligation of submitting reports, see Kucsko-Stadlmayer, p. 48.

57 *National Human Rights Institutions*, p. 10, para. 68.

58 Smith, p. 914.

procedures of appointment and dismissal and independence through member composition.<sup>59</sup> As can be seen, the issue of independence is mainly considered as administrative and financial independence.

In terms of administrative independence, independence must be ensured against other potential interventions from the executive body. Considering that some of the discrimination cases emerge through the acts and actions of public authorities, administrative independence gains more importance.<sup>60</sup> Another issue that stands out here is to ensure the independence of these institution from the administration although they are regulated through "administrative" arrangements. Equality institutions can sometimes be formed under the executive body. In such a case, independence must be secured even more. Institutions that are not independent of administration may face reputational loss as they may not be perceived as independent institutions in the eyes of the victims of discrimination. In this case, the equality institution can withstand potential pressure from the executive body and administration only if its independence is secured. This situation is directly related to the emphasis on the existence of a constitutional and legal basis for the aforementioned institution. Ensuring the legal basis of the equality institution preferably through the constitution or laws and abstaining from administrative regulations will strengthen its independence.<sup>61</sup>

In contrast to the EU Directives, independence must be guaranteed not only at the level of activities, but also at institutional level. In cases where independence is not secured by law, it is difficult to achieve actual independence. Although matters such as the personal efforts of the members of the institution, the specific support of CSOs and trade union and the overall support of the public to the institution actually ensure independence to a certain extent, an additional legal assurance constitutes a guarantee.

Article 8(1) of TIHEK Law provides that TIHEK enjoys administrative and financial autonomy and has the status of a public legal person. However, the same paragraph prescribing the association of the Institution with the minister to be assigned by the President shows that the Institution is constituted not under the legislative body, but under the executive body. Currently, this relation is already established with the Ministry of Justice. Article 10(1) of TIHEK Law regulates that the Board will act independently and no body, authority, organ or person will give orders or instructions to the Board or indoctrinate it. However, there is an uncertainty about the sanctions the organ, person, authority or body acting in this way will face. Therefore, it does not seem possible to mention that the members are strongly protected against threats and oppression. A regulation introduced by the DL No. 703 added to Article 8(1) the following new sentence: "The President can exercise its authorities concerning the management of this organization through a minister if s/he deems necessary." This sentence implies that the President has powers also regarding the management of TIHEK.

Issues such as the requirement of applying to the Office of the President for those wishing to be selected as Board members, the appointment of all Board members by the President, the possibility of dismissing members upon the approval of the President or the minister to be assigned thereby and subjecting the investigation of the Chairman and members to the permission of the President or the minister to be assigned thereby show that TIHEK is not actually an independent institution. As a matter of fact, this

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59 *National Human Rights Institutions*, p. 10-11, para. 68-85.

60 Gregory, p. 133.

61 Cormack; Niessen, p. 24.



determination was accepted in the *Concluding Observations* recently published by the Committee on the Rights of Persons with Disabilities regarding Turkey's first contracting state report.<sup>62</sup> The most recent Turkey report by ECRI also criticizes the association of the Institution with the executive body and the appointment of all its members by the executive body in terms of independence.<sup>63</sup>

Acting independently for its activities and setting its own procedures come to the fore as regards the operational autonomy of an equality institution. In this sense, the reports prepared by the institution, the examinations conducted thereby and the opinions submitted thereby must not be subject to the review and acceptance of another body.<sup>64</sup> For example, the reports prepared by the institution must be submitted directly to the relevant authorities and not be subject to any acceptance procedure.<sup>65</sup> Besides, it is recommended that laws prescribe various sanctions against acts such as preventing the institution from engaging in its activities and the failure to submit the information requested by the institution.<sup>66</sup> Moreover, the employees of the institution must be appointed by the institution itself.<sup>67</sup>

It is observed that TIHEK is autonomous to a certain extent in terms of setting its own procedures. The reports prepared by the institution, the examinations conducted thereby and the opinions submitted thereby are not subject to the review and acceptance of another body or authority. First of all, the first version of TIHEK Law's Article 10(7) provided that the Chairman and Vice Chairman of the Board would be selected by the Board from among the members of the Board. This regulation was abolished by the DL No. 703. Although it is possible to interpret this situation as to the effect that the Chairman and Vice Chairman of the Board will be selected by the Board, it will be observed whether or not the new chairman and vice chairman will be directly appointed by the President in case of any potential appointment for the members of the Board. Secondly, although Article 27 stipulates that the regulations on the implementation of TIHEK Law will be put into force by the Institution, the authority to decide on the opening of any new office outside Ankara upon the request of the Institution rests with the President as per Article 14(5). It is not known whether or not any step was taken by the Institution to open offices in provinces other than Ankara, whether or not any proposal was previously submitted to the Council of Ministers or is currently submitted to the President and, if such proposal was submitted, the outcome of the request is not known, either.

Article 14(6) of TIHEK Law provides that the working procedures and principles of service units and offices will be set in a regulation brought into force by the President upon the proposal of the Institution in line with its field of activity, duties and authorities set out in TIHEK Law. Since these two issues can be easily decided by TIHEK itself, it is not possible to understand why a regulation is in place to the effect that the President is authorized to decide on these issues. This approach is considered very problematic in terms of both the accessibility of the Institution and its ability to conduct activities independently. Apart from this, TIHEK can determine its service units itself and there are 10 service units designated in this way.<sup>68</sup>

62 Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Turkey*, CRPD/C/TUR/CO/1, 01.10.2019, para. 35, 67, <https://undocs.org/en/CRPD/C/TUR/CO/1> (accessed: 31.07.2020).

63 ECRI, *Report on Turkey, Fifth Monitoring Cycle*, para. 26.

64 *National Human Rights Institutions*, p. 11, para. 71-72.

65 Murray, p. 369.

66 Smith, p. 917.

67 Kucsko-Stadlmayer, p. 17.

68 TIHEK, 2019 Activity Report, p. 20.

Article 19(4) of TIHEK Law requires the submission within thirty days of any information and document requested by the Institution on its own field of examination and research by specifying the reasons therefor while Article 25(3) prescribes an administrative fine of five hundred Turkish Liras to two thousand Turkish Liras for the persons and institutions acting in contravention of this obligation and provides that these administrative fines will be recoured to public officials. However, amounts of the aforementioned administrative fines are quite low and ineffective. Chairman of the Institution is authorized to appoint the personnel of the Institution as per Article 13(2)(c) of TIHEK Law.

In terms of financial independence, it is stated that an equality institution must have an infrastructure allowing for the continuation of its activities in a seamless way and its own personnel and facilities to ensure that it has especially own sufficient financial resources, is independent from the executive body and is not under a financial control mechanism that may influence its independence. An equality institution must have full control over financial issues. A bond to be established with the executive body may make it difficult for the institution to act independently from the executive body. For instance, it is possible for the relevant ministry to have an indirect impact on the activities of an institution to which financial resources are offered under the budget of that ministry. The executive body should not have the authority to decide on the use of the budget, either and, in this regard, the institution must be fully autonomous. Identification of the financial resources of the institution by the legislative body on annual basis is considered as the most appropriate solution.<sup>69</sup> It may be recommended that a budget proposal be prepared by the institution and directly submitted to the legislative body. Thus, financial resources will be identified at least on annual basis, which will ensure that the institution will perform its activities. In addition, such assurance enables the institution to perform regular activities within an annual plan.

Article 8(1) of TIHEK Law provides that TIHEK is a special-budget institution with financial autonomy. Article 11(ğ) stipulates that a proposal on the budget of the Institution will be prepared by the Board. As Article 116(3) of the Constitution provides that the budget proposal will be drawn up by the President, it seems that the said proposal will be submitted to the President. Therefore, although the budget of the Institution will be set through the budget proposal approved by GNAT, the authority to propose budget acts rests with the President as per the Constitution and thus, it can be said that the budget of the institution will be actually set by the executive body.

Budget of the institution is of great importance in terms of employing a sufficient number of personnel and having sufficient premises for the Institution to perform its activities. As stated by the Chairman of the Institution, the Institution does not have sufficient working space, budget and staff.<sup>70</sup> The Institution does not have sufficient personnel to fulfill three different duties assumed thereby. As of the end of 2019, the number of staff positions for the Institution is 168 but 50 of these positions are occupied and the number of career experts fulfilling the essential duties of the Institution is just 15. The number of people actually employed in the Institution is a total of 119 persons including 50 permanent staff, 33 temporary staff and 36 workers.<sup>71</sup> This number rose to 162 as of June 2020.<sup>72</sup>

69 Murray, p. 368; Smith, p. 922.

70 Journal of Minutes of the Human Rights Examination Committee of GNAT, Period: 26, Year: 3, Meeting 4, April 18, 2020, [https://www.tbmm.gov.tr/develop/owa/komisyon\\_tutanaklari.goruntule?pTutanakId=2148](https://www.tbmm.gov.tr/develop/owa/komisyon_tutanaklari.goruntule?pTutanakId=2148) (accessed: July 31, 2020).

71 TIHEK, 2020 Performance Program, p. 6, [https://tihek.gov.tr/upload/file\\_editor/2020/02/1581596638.pdf](https://tihek.gov.tr/upload/file_editor/2020/02/1581596638.pdf) (accessed: July 31, 2020).

72 TIHEK, 2020 Corporate Financial Situation and Expectations Report, p. 4, [https://tihek.gov.tr/upload/file\\_editor/2020/08/1596542711.pdf](https://tihek.gov.tr/upload/file_editor/2020/08/1596542711.pdf) (accessed: July 31, 2020).



Staff positions are released upon the approval of the Presidential Strategy and Budget Office. Since its establishment, the Institution has been operating in a small building in Ankara, which was previously used by the Human Rights Institution of Turkey. It is observed that the budget for 2019 stood at TRY 12,972,000 and the budget for 2020 at TRY 17,122,000 and this figure proves to be quite insufficient for an institution assuming the aforementioned duties. Moreover, nearly TRY 9 million of the 2020 budget is envisaged to be used for the payment of personnel expenditures and SSI (Social Security Institution) premiums.<sup>73</sup> All these deficiencies are also recognized by the institution.<sup>74</sup>

Besides, the budget is allocated under the supervision of the Treasury and the Ministry of Finance. While there is no direct financial control over TIHEK, the creation of the budget proposal by the President and the allocation of the budget by the Office of the President implies an indirect financial control. As a matter of fact, the 2018 Activity Report of the Institution states that a special heading was included in the 2019 Annual Program of the Presidency to meet the needs of the Institution in 2019, but it is observed that the needs of the Institution are yet to be met as of 2020.<sup>75</sup>

Article 23 of TIHEK Law lists the revenues of the Institution as treasury grants from the general budget, the revenues generated out of the movable and immovable property of the Institution, the revenues generated by the use of such revenues and other revenues. It is possible to interpret the phrase "other revenues" in Article 23(1)(ç) as to the effect that equality institutions have the right to raise additional funds for the carrying out of its functions in an open and transparent manner from sources other than the state in or outside the country while ensuring that this does not compromise its independence.

As a final remark regarding financial independence, Article 28(3) of TIHEK Law provides that the Institution executes its financial transactions as per the recognition and reporting rules set by the Public Finance Management and Control Law No. 5018 and the Institution is subject to the audit of the Council of State as per Article 4(1)(a) of the Council of State Law No. 6085. Therefore, it is observed that TIHEK is subject to public service law and to the financial accountability and expenditure rules that apply to public authorities as an institution offering public services.

Another subject that comes to the fore in terms of independence is independence from organizations such as CSOs and trade unions other than the executive and legislative bodies. Equality institutions must be perceived as impartial as well as independent in terms of combating discrimination. This is also important in terms of improving the reputation and legitimacy of the institution. Otherwise, the Institution may end up being perceived as a pressure group such as a CSO and trade union, resulting in the emergence of prejudice against the activities of the institution. A method that may be functional in preventing this situation is the inclusion of representatives from CSOs as well as labor and employer organizations within the institution as specified above. This approach will promote the adoption of pluralism and also strengthen the impartiality of the institution.<sup>76</sup>

73 Presidential Strategy and Budget Office, <http://www.sbb.gov.tr/wp-content/uploads/2019/01/3-a3-2019-2021-D%C3%96NEM%C4%B0-D%C4%B0C4%9EER-%C3%96ZEL-B%C3%9CT%C3%87E-EKONOM%C4%B0K.pdf> and <http://www.sbb.gov.tr/wp-content/uploads/2020/01/2-c-2020-Y%C4%B1l%C4%B1-Di%C4%9Fer-%C3%96zel-B%C3%BCt%C3%A7eli-%C4%B0dareler-Ekonomik-Kod-%C4%B0cmali-ile-2021-2022-Gider-Tahminleri.pdf> (accessed: July 31, 2020).

74 TIHEK, 2019 Activity Report, p. 89.

75 TIHEK, 2018 Activity Report, p. 93.

76 Rikki Holtmaat, *Catalysts for Change: Equality Bodies According to Directive 2000/43/EC*, European Commission, Belgium, 2006, p. 35.

## C- TIHEK and Working Methods

### 1. Powers of TIHEK

According to international standards, TIHEK can act freely on all issues falling under its mandate and freely conduct investigation. There is no regulation in place preventing TIHEK from taking into consideration lodged thereto in an ex officio fashion or conducting investigation on an issue falling under its mandate in an ex officio fashion. However, Article 17(4) of TIHEK Law that reads as "No application can be lodged regarding actions concerning the exercise of legislative and judicial powers, resolutions of the Supreme Council of Judges and Prosecutors as well as the actions that are exempted from judicial review by the Constitution." prevents the Institution from conducting investigation on some issues. This regulation will make it impossible to file a complaint on the ground of discrimination regarding any law enacted or resolution adopted by GNAT; resolutions of the Council of Judges and Prosecutors apart from those concerning dismissal; the promotion actions of the Supreme Military Council and its superannuation actions due to the lack of staff positions; resolutions of the Supreme Board of Elections and resolutions of sports federations on the management and discipline of sports activities.

Article 20(3) of TIHEK Law stipulates that the Board and authorized Institution employees can hear witnesses or relevant persons concerning the issue of examination and investigation if they deem necessary while Article 19(4) requires that the information and documents requested by the Institution concerning the issue of examination and investigation be provided within 30 days and otherwise, an administrative fine will be imposed as per Article 25(3). Therefore, it can be said that it is possible for TIHEK hear any person and obtain any information or documents necessary for assessing situations falling within its competence. However, it is not possible to consider effective the administrative fine imposed in case of the failure provide information and documents (Lower limit of the administrative fine was set as TRY 899 and upper limit as TRY 3,602 for 2020)<sup>77</sup>. Although such sanction is positive, there is no regulation for filing a criminal complaint about the persons and institution failing to provide the information and documents requested.

Although the law prescribes that the Board will file a criminal complaint about the culpable human rights or non-discrimination violations detected thereby, such explicit provision is not stipulated for hiding information and documents. It is not possible to consider prescribed sanctions as effective, either. In this regard, it is necessary to issue regulations that would make it possible to impose a sanction within criminal law. It is not known whether or not TIHEK has encountered any difficulty while requesting any information and document from public institutions and organizations as well as other real and legal persons, requesting to examine them and take copies of them or wishing to receive written and oral information from relevant authorities within the examinations conducted by TIHEK up to now and, if and when it encounters such difficulty, whether or not TIHEK has recoured to any legal remedy and imposed any administrative fine.

Article 9(1)(l) of TIHEK Law entrusts the Institution with the duty of "informing the public". It is possible to interpret the relevant provision as to the effect that TIHEK is granted the authority to address the public directly or through press organs so as to express its opinions and recommendations. Besides, Article 12(11) of TIHEK Law stipu-

77 See, TIHEK, Administrative Fines for 2020, <https://www.tih.gov.tr/2020-yili-idari-para-cezalari/> (accessed: July 31, 2020).



lates that the Board can also announce its resolutions by appropriate means on the condition that it abides by the principle of the confidentiality of personal data, if it deems necessary. All resolutions of the Board must be made public and the Board should not be granted an ambiguous authority implied by the phrase "if it deems necessary". As a matter of fact, the total number of resolutions published by the Institution as of July 31, 2020 is just 43. The institution does not have a transparent policy regarding the publication of resolutions. This suggests that TIHEK does not sufficiently exercise the authority vested thereon and does not inform the public enough about its resolutions. Resolutions issued by the Board while fulfilling its duties are not bindings apart from the resolutions on administrative fine. Although this is normal, the absence of any requirement to publish all board resolutions will reduce the impact of resolutions even further as specified below.

## **2. TIHEK and Working Method**

As for the gathering of equality institutions with the participation of all its members at regular intervals and where deemed necessary, Articles 12(1) and 12(3) of TIHEK Law provides that it is possible for the Board to be convened with at least seven members upon the call of the Chairman of TIHEK and to issue resolutions with the votes of at least six members in the same direction. Similarly, the Board can also be convened upon the request of at least five members other than the Chairman as per Article 12(1). The Paris Principles require that TIHEK performs its activities on a full-time basis and convenes at regular intervals and where deemed necessary. The law's failure to specify a minimum period of time for the interval of meeting regarding the Board is considered a shortcoming. In addition, the Chairman is granted the authority to set the agenda, date and time of the meeting as per Article 13(2)(a) of TIHEK Law. Thus, the interval of meetings is not set and the initiative for meeting is left to the Chairman to a great extent, too. It is not possible to evaluate the performance of the Board as it is not known how many times the Board convenes a year and the resolutions issued during these meetings are not published.

Article 12(4) of TIHEK Law stipulates that TIHEK Board can form commissions of three members for each field of activity from among its own members. However, it is not known whether such commissions have actually been formed or not. As specified above, a Presidential resolution is required as per Article 14(5) for the establishment of local or regional units by the Institution.

## **3. TIHEK and Cooperation with Other Institutions**

According to international standards, TIHEK must consult with other judicial and administrative public institutions dealing with the prevention of discrimination such as the Ombudsman Institution. Established before TIHEK, the Ombudsman Institution (OI) can review the claims of human rights violations against the administration including non-discrimination in an ex officio fashion or upon application. Article 9(1)(f) of TIHEK Law provides that TIHEK is not authorized to review the violations of human rights upon application and the Institution can review such violations only in an ex officio fashion. This requires that such claims of human rights violations must be brought before the OI. However, the OI can only review such claims put forth against the administration and in this case, it seems that Turkey does not have any quasi-judicial institution reviewing the

human rights violations of real persons and private legal persons. This regulation implies that there is a division of labor between the OI and TIHEK.

On the other hand, TIHEK can review the claims of violation on non-discrimination against both the administration and real persons and private legal persons in an ex officio fashion or upon application while the OI can only review the claims of violation on non-discrimination against the administration in an ex officio fashion or upon application. Thus, both institutions can receive applications on the discriminatory practices of the administration and act in an ex officio fashion. Due to this characteristic, the OI is also considered an equality institution. It is observed that there is no regulation to fulfill the requirement of setting up regular and effective coordination in order to ensure that multiple equality institutions apply non-discrimination principles in a consistent way where there are more than one equality institution as specified in para. 1.3(1) of the Recommendation of the European Commission.

Articles 9(1)(n) and 9(1)(o) stipulate that it is possible for the Institution to cooperate with public institutions and organizations dealing with the protection of human rights and fight against discrimination and support the activities of other institutions for the prevention of discrimination. Besides, the Board can express opinions relevant to its mandate to public institutions and organizations upon their request as per Article 11(1)(d) and form an advisory committee with public institutions and organizations so as to discuss problems on non-discrimination as well as solution suggestions and exchange information and views on these matters as per Article 22(1). However, it seems that the Board can only express opinions upon request as Article 11(1)(d) contains a phrase reading as "expressing opinions upon their request".

Implementation reveals that TIHEK does not establish any regular and comprehensive cooperation with judicial or administrative public institutions responsible for the improvement and protection of human rights. In this regard, the equality units formed within some municipalities in recent years are also among the institutions with which TIHEK can establish cooperation. However, no cooperation has been established in this respect. Likewise, it is not known whether or not the parties to a lawsuit has requested from TIHEK constituted as the institution specialized in non-discrimination any opinion for the relevant lawsuit pending before judicial authorities and, if yes, what the outcome of this request is.

Article 14(4) of TIHEK Law provides that the Institution can form temporary committees standing for a period of six months with public institutions and organizations to engage in activities on subjects falling under its mandate. However, no information has been obtained from open sources on whether nor not any temporary committee has been formed with the participation of public institutions and organizations and which criteria have been taken into consideration while identifying such institutions and organizations. Considering the activities of TIHEK, it is observed that only some consultation meetings were held as per Article 22(2) of TIHEK Law to discuss human rights problems and exchange information and views on the subjects of human rights.<sup>78</sup>

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78 For instance, see: TIHEK, "TIHEK Organized the Third Provincial Consultation Meeting in Sakarya.", February 26, 2020, <https://www.tihek.gov.tr/tihek-il-istisare-toplantilarinin-ucuncusunu-sakaryada-gerceklestirdi/>; "TIHEK's Konya Provincial Consultation Meeting Was Organized.", <https://www.tihek.gov.tr/tihek-konya-il-istisare-toplantisi-gerceklestirildi/>; "TIHEK's Istanbul Provincial Consultation Meeting Was Organized", <https://www.tihek.gov.tr/turkiye-insan-haklari-ve-esitlik-kurumu-istanbul-il-istisare-toplantisi-gerceklestirildi/> (accessed: July 31, 2020)

#### 4. TIHEK and Cooperation with CSOs

International standards establish that the cooperation of equality institutions with CSOs engaging in fight against discrimination is of great importance. TIHEK Law stipulates that the institution can cooperate with CSOs in more than one instance. Article 9(1) (n) provides that one of the duties of the Institution is to cooperate with CSOs dealing with fight against discrimination. As per Article 9(1)(ö) of TIHEK Law, it is necessary to benefit from CSOs while monitoring the implementation of international human rights conventions, to which Turkey is a party, and preparing the reports that must be submitted by Turkey to the examination, monitoring and inspection mechanisms established as per these conventions. Article 14(4) ascertains that the Institution can establish temporary commissions standing for a maximum period of one year with the participation of CSOs in order to engage in activities on the subjects falling under its mandate. As per Article 22, an advisory committee can be formed with the participation of CSOs so as to discuss problems on non-discrimination as well as solution suggestions and exchange information and views on these matters and besides, consultation meetings can be held by the Institution with the participation of CSOs at the headquarters and in provinces to discuss human rights problems and exchange information and views on the subjects of human rights. Finally, Article 19(3) of TIHEK Law provides that a delegation can be formed with the participation of representatives from relevant institutions and organizations under the presidency of the Institution personnel to be designated by the Chairman so as to conduct on-the-spot examinations and inspections on the subjects falling under the mandate of the Institution. In this case, if CSOs are to be a part of delegations, such CSOs will be designated by the Chairman. Before Article 10(2) was amended by the DL No. 703, it was possible for CSOs to nominate candidates for seven members of the Board while it was abolished by the amendment.

As can be seen, there are a series of provisions regarding cooperation with CSOs in TIHEK Law. Although the dimensions of cooperation with CSOs are considered as comprehensive, the Law does not stipulate how many CSOs can be a part of these activities and how these CSOs will be designated and the Institution is granted wide discretion over this matter. Article 87(3) of the Regulation on Procedures and Principles for the Implementation of the Law on the Human Rights and Equality Institution of Turkey<sup>79</sup> (Hereinafter referred to as "TIHEK Regulation" or "Regulation") provides that the Board is authorized to identify which CSOs will send representatives to the advisory committee as well as the number of members within the committee. In designating the members of the committee, priority will be given to those who have theoretical or practical studies on issues related to the field of activity of the Institution. As can be seen, the criterion stipulated for designating CSOs is far from being objective. Article 90(1) of TIHEK Regulation stipulates that the Advisory Committee must normally convene twice a year (every six months) but only two advisory committee meetings have been held up to now and no information has been provided on the representatives of CSOs attending those meetings.<sup>80</sup> The aforementioned criterion is also prescribed for the advisory committee meetings to be held in Ankara and other provinces as per Article 91(3) of TIHEK Regulation.

79 Regulation on Procedures and Principles for the Implementation of the Law on the Human Rights and Equality Institution of Turkey, Official Gazette No. 30250 of November 24, 2017.

80 TIHEK, "Meeting of the Consultation Commission on Fight Against Discrimination Held", October 22, 2018, <https://www.tihek.gov.tr/ayrimcilikla-mucadele-istisare-komisyonu-toplantisi-gerceklestirildi/> (accessed: July 31, 2020). TIHEK, 2019 Activity Report, p. 68.

But, as specified above, it is of great importance that the CSOs with which cooperation will be established are those devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees and disabled persons). This collaboration is expected to cover not only CSOs but also the related groups themselves and establish a sustainable dialogue with these groups. Practices of the Institution for the first four years reveal that the aforementioned requirements have been completely ignored. The Institution does not have any policy document on cooperation with CSOs and has a tacit policy not to cooperate with groups frequently exposed to discriminatory treatment up to now.

### **5. TIHEK and Accessibility**

Finally, accessibility will be covered regarding working methods. As mentioned above, equality institutions must be accessible for the persons for whom they are established to protect their rights. Evaluated based on this liability embodied in para. 40 of ECRI GPT2, TIHEK does not meet international standards in terms of accessibility. Firstly, the Institution does not have any office outside Ankara. The institution does not have any local outreach program or local or regional office. As a public institution, the Institution must be accessible to people with disabilities in accordance with Article 7 of the Law on Persons with Disabilities No. 5378. Although Article 44 of TIHEK Regulation stipulates that the Institution will take measures required for the persons with disabilities to file an application, it seems that the Institution does not perform any special activity to either fulfill its liability arising out of the Law on the Persons with Disabilities or to achieve accessibility as per the relevant provision of the Regulation and harmonize the services offered thereby for the persons with disabilities.

The Institution's website contains summary information about the means of application but it is observed that the Institution's website is only published in Turkish and in English though in a limited sense and it is not possible to access any information in any other common language in Turkey such as Kurdish and Arabic etc. In addition, although TIHEK Law does not contain any provision stipulating that applications must be filed in Turkish, Article 33 of TIHEK Regulation provides that any application will be filed in Turkish but it is also possible for the Institution to admit an application filed in another language through which the applicant can express himself/herself better if the Institution considers it justified and reasonable. In practice, it is not known whether or not the Institution allows for the filing of an application in a language through which the victims of discrimination feel themselves sufficient.

The information obtained through open sources shows that the Institution does not offer any flexibility to respond to the time restrictions of those wishing to access to its services. During the first four years, the Institution did not meet either the CSOs dealing with non-discrimination or the groups exposed to discrimination and did not stand by the persons or groups exposed to discrimination in any of the significant discrimination cases causing public resentment. As a final remark on accessibility, it is observed that the procedural rules on applications are too complex to be lodged without seeking any legal assistance.

Three positive aspects stand out regarding accessibility. These positive points are the Institution's provision of services through online channels, e-mail and phone, the



lodging of applications on the claims of non-discrimination violations free of charge as per Article 17(1) of TIHEK Law and the fact that the identity information of those under custody or protection as well as children and of victim or victims is kept confidential upon their request as for the applications to be lodged to the Institution as per Article 17(7). However, such confidentiality only covers the victims and does not cover witnesses and whistleblowers as required by para. 1.2.3(3) of the Recommendation of the European Commission.

## 6. TIHEK and Legal Assistance

Recoursing to or intervention in legal remedies as well as providing information on legal remedies are important duties of equality institutions. International standards also deal with the provision of information about other means of application, the facilitation of access to these means, the admission of applications or the referral thereof to other authorities within the limits prescribed by law with regard to the rights to those applying to equality institutions. Article 9(1)(ğ) of TIHEK Law lists the following duty among the duties of the Institution: guiding those applying to the Institution on the ground that they are victimized by the violations of non-discrimination about potential administrative and legal remedies for the redressal of their victimization and helping them to follow their applications. Legal advice to be offered in this regard can only be offered by lawyers and must be offered by these persons in order not to cause any forfeiture. TIHEK Law allocates three staff positions for lawyers within the Institution. According to the Institution's 2019 Annual Report, there is no lawyer appointed to these staff positions of the Institution. The scarcity of allocated staff positions requires that the Institution works jointly with the Union of Turkish bar associations or bar associations to fulfill this duty. The law does not grant the Institution any authority to intervene in a case where the victims of discrimination recourse to legal remedies. Granting such authority is of importance for strengthening the position of victims regarding legal remedies and offering due legal and financial assistance to victims.

## D- TIHEK and Quasi-Judisdictional Competence

The existence of quasi-judisdictional competence for equality institutions leads to the emergence of a more advantages application procedure for the victims from disadvantaged groups due to reasons such as the facility of lodging a free application without paying any fee, the execution of a procedure that is faster when compared to legal remedies, the prescription of a less formal procedure and the facility of sharing the burden of proof. Besides, recursing to alternative means of dispute resolution, the mechanisms of redress specific for the situation of victims and, accordingly, the resolution of disputes without being reflected in the public sphere prove to be advantageous for the victims.<sup>81</sup> Moreover, judicial bodies are obliged to settle any and all legal disputes while an equality institution engages in quasi-judisdictional activities only on the matters falling into its mandate, leading to the expertise of the body settling the dispute in terms of the subject.

81 Krizsan, p. 175; Lone Lindholt; Fergus Kerrigan, "General Aspects of Quasi-Judicial Competence of National Human Rights Institutions", *National Human Rights Institutions: Articles and Working Papers*, Birgit Lindsnaes; Lone Lindholt; Kristine Yigen, Danish Centre for Human Rights, Denmark, 2005, p. 95-96.

There are also a number of disadvantages of the quasi-jurisdictional functions of equality institutions. Resolutions of equality institutions create questions in terms of legal-bindingness. For this reason, the complementarity function can be achieved by the effective use of alternative means of dispute resolution such as mediation. Another disadvantage is the liability of acting in an impartial way imposed on the institution liable to offer assistance to victims when it turns into a decision-making body regarding a dispute brought therebefore. In this case, different departments can be established within the institution, these departments can assume different functions or when the equality institution becomes a body evaluating the applications of complaint in this way, a separate institution must be made responsible for offering legal assistance to victims regarding both legal remedies and the equality institution's procedures for the review of complaints. There is also a risk for the emergence of case-law differences when more than one institution with the quality of an equality institution are formed. Supreme judicial bodies can eliminate case-law differences for judicial bodies in this case while there is no such mechanism for equality institutions. In fact, this also supports the idea of creating a single equality institution instead of multiple institutions.

International standards require that the legislation stipulates that the resolutions of an equality institution are subject to judicial review, victims are granted the right to apply firstly to the equality institution or directly to judicial bodies and the foreclosure prescribed for application to legal remedies stays if an application is lodged before the equality institution.

As the resolutions of TIHEK are administrative resolutions, these resolutions can be appealed before administrative jurisdiction as per Article 125 of the Constitution. Article 22(3) of TIHEK Regulation specifies the legal remedies to be resorted to by the relevant persons against such resolutions as well as their due periods. As a matter of fact, the administrative court issued an annulment judgment in the action for annulment filed by Pembe Hayat (Pink Life) LGBTTT Solidarity Association against a resolution of the Institution.<sup>82</sup> Article 17(3) of TIHEK Law provides that the applications to be filed by the victims of discrimination before the Institution stay the due period for filing a case, fulfilling this requirement. However, Articles 76(1) and 76(3) of TIHEK Regulation stipulates that if the Institution issues a resolution of non-evaluation, reasoned inadmissibility, dismissal, compromise or non-resolution about an application or the Institution fails to finalize its review and investigation within three months following the date of application, this circumstance is notified to the application together with its reason and the suspended due period for filing a case will resume to count from the date of notification of the resolution to the relevant party. Besides, if the application is found to be appropriate and admitted by the Institution and a resolution of violation is issued thereon, the suspended due period for filing a case will resume to count also in the event that the person or institution against which the application is lodged fails to take any action or act within 30 days following the resolution of TIHEK. The aforementioned provisions regulating when the due period for filing a case will start, when it will stay, when it will resume to count and when it will come to an end are too difficult to understand for applicants who are not lawyers and it is of great importance to provide detailed information to applicants on this matter and offer legal assistance so as to prevent any potential forfeiture.

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82 See, Pembe Hayat (Pink Life) LGBTTT Solidarity Association, "Pembe Hayat Association won the lawsuit against TIHEK", <http://www.pembehayat.org/haberler/detay/2284/pembe-hayat-dernegi-tiheksquoe-actigi-davayi-kazandi#:~:text=Cinnah%20Hotele%20al%C4%B1nmayan%20trans,gerek%C3%A7esiyle%20oy%20birli%C4%9Fi%20ile%20kazan%C4%B1ld%C4%B1>. (accessed: July 31, 2020)



## 1. TIHEK and the Authority to Review Applications

One of the prominent functions for equality institutions is to receive complaint applications as a quasi-jurisdictional institution. Through complaint applications, the institution can implement the legislation on non-discrimination and contribute to the development of regulations in this area.<sup>83</sup> There are a number of issues that should be considered when equality institutions review complaint applications. First of all, the procedure to be prescribed for complaint applications is very important. Prescribing limited conditions as much as possible regarding the procedure of application is of great importance for the institution to fulfill its duty regarding discriminatory treatment and be accessible.

Article 9(1)(g) of TIHEK Law lists "examining, investigating and deciding on the violations of non-discrimination on an ex officio fashion or upon application and following the consequences thereof" among the duties of the Institution. Article 11(1)(b) assigns TIHEK Board to decide on the applications lodged concerning the violations of non-discrimination and the examinations conducted on the violations of human rights or non-discrimination in an ex officio fashion and decide on the administrative sanctions prescribed in this Law with regard to the violations of non-discrimination. The procedure of application is primarily regulated in Article 17 of TIHEK Law. According to Article 17(2), as a general rule, there is a requirement to apply to the person or institution responsible for discriminatory treatment prior to any application before the Institution. However, this requirement may not apply "in cases where irreparable or unrepairable damage may occur". The Institution will decide whether or not an application is covered by this exemption.

On the other hand, Article 17(5) stipulates that applications regarding the claims of discrimination falling under Article 5 of the Labor Law No. 4857 can only be lodged in cases where no sanction is imposed following the execution of the complaint procedures stipulated in the Labor Law and the relevant legislation. Both provisions are open to interpretation even for lawyers and too hard to interpret for the victims of discrimination and are quite problematic in terms of predictability, one of the qualities to be fulfilled by a legal provision. For example, it is uncertain whether a lawsuit claiming damages for discrimination will be required as per Article 5 of the Labor Law or an administrative fine will be requested due to contrariety to this article before filing an application to TIHEK. It is not possible for a victim of discrimination to decide without seeking the help of a lawyer and recourse to the legal remedies in question about whether this case is subject to the Labor Law and the person in question can file an action for damages under Article 5. There is no information published by the Institution to guide applicants in this respect.

Besides, it is possible to file a complaint application against both public authorities and real persons and private legal persons. In other words, the institution is authorized to review all persons or institutions responsible for discriminatory treatment. Moreover, a liability must be introduced for both public authorities and real persons and private institutions to submit the information requested by the equality institution concerning complaint applications.

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83 Jacobsen; Reading, p. 23.

Article 3(4) of TIHEK Law stipulates that public institutions and organizations<sup>84</sup> and professional organizations with the status of a public institution as well as real persons and private legal persons are under responsibility for non-discrimination. For this reason, there is no problem concerning the review authority of the Institution. As mentioned above, Articles 19(2) and 19(4) provide that all public institutions and organizations as well as other real and legal persons must provide the information and documents requested by the Institution with regard to the subject of investigation and examination by specifying its justification within 30 days following the date of notification of this request.

In addition, Article 17(9) stipulates that applications that cannot be taken into consideration, the resolutions of justified inadmissibility and other procedures and principles concerning application will be set out in the regulation. This means that TIHEK may add by the regulation other conditions to the requirements already stipulated in TIHEK Law. As a matter of fact, other conditions were added by TIHEK Regulation to those already specified in the Law.<sup>85</sup> In these respects, it is observed that the procedure of application before TIHEK was made subject to some conditions difficult to fulfill and they must be simplified.

The procedure of application before equality institutions must be free of charge. No fee is charged for applications as per Article 17(1) of TIHEK Law. In the event that a foreclosure is prescribed with regard to applications, this period must be kept as long as possible. TIHEK Law prescribes no foreclosure with regard to applications before the Institution.

The condition of becoming a victim for filing an application must also cover not only existing victimization, but also potential victimization.<sup>86</sup> There is no separate provision in TIHEK Law and the Regulation with regard to this issue. However, Article 17(1) of TIHEK Law provides that persons can apply to the Institution "with the claim that they are harmed by the violation of non-discrimination". A similar provision is also stipulated in Articles 4(1)(g), 30(1) and 32 of the Regulation. The expression "damage" specified in the legislation infers that it is not possible to file an application in case of victimization.

It is quite important that the procedure of complaint also allows for the institution to be a party in legal remedies and for CSOs and trade unions to be a part of the procedure instead of or together with the victim upon the permission of the victim.<sup>87</sup> It is observed that TIHEK Law does not contain any such provision. Article 17(9) of TIHEK Law stipulates that applications that cannot be taken into consideration, the resolutions of justified inadmissibility and other procedures and principles concerning application will be set out in the regulation. Also present in the Law on the Human Rights Institution of Turkey No. 6332<sup>88</sup>, this limitation was eliminated by the Regulation No. 2014<sup>89</sup>

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84 Article 4(1)(n) of the Regulation stipulate that public institutions and organizations consist of public administrations affiliated to the central government as well as social security institutions, local administrations, incorporations constituted through special laws with direct or indirect public share in their capital, other public administrations, any and all administrations, institutions, enterprises, unions, establishments and companies which are affiliated to these administrations or are established by these administrations or in which they are direct or indirect partners.

85 Regulation on Procedures and Principles for the Implementation of the Law on the Human Rights and Equality Institution of Turkey, Official Gazette No. 30250 of November 24, 2017.

86 Kucsko-Stadlmayer, p. 19.

87 Kucsko-Stadlmayer, p. 20.

88 The Law on the Human Rights Institution of Turkey (No. 6332), the Official Gazette No. 28339 of June 30, 2012.

89 Regulation on Procedures and Principles for the Review of Applications on the Claims of Human Rights Violations, Official Gazette No. 29003 of May 17, 2014.



published by the Human Rights Institution of Turkey and CSOs and professional organizations with the status of a public institution were enabled to lodge an application on behalf of the victims. A similar provision must be introduced through a regulation to be issued as per Article 17(9) of TIHEK Law, but TIHEK Regulation does not contain any such provision.

Another issue regarding individual applications is whether not only victims, but also the institution finding out about the discriminatory treatment in a way can initiate the procedure of complaint in an *ex officio* fashion or not. Granting such an authority may bring the victimization of victims abstaining from filing an application before the institution. It is stated that this issue is especially important for the institutions considered as sensitive institutions for human rights such as prisons, psychiatric hospitals, refugee camps and orphanages.<sup>90</sup> Article 9(1)(g) of TIHEK Law enables the Institution to review, investigate, decide on the violations of non-discrimination and follow their consequences in an *ex officio* fashion. TIHEK Board assumes the responsibility for deciding on the reviews initiated in an *ex officio* fashion as per Article 11(1)(b). However, Article 17(6) requires that the express consent of the victim himself/herself or his/her legal representative is received with regard to the reviews to be initiated in an *ex officio* fashion concerning the violations of non-discrimination in cases where the victim is identifiable. No consent is sought in cases requiring the child's best interest. Seeking such consent as a rule for the reviews to be initiated in an *ex officio* fashion may lead to the failure to conduct any review as the victims abstaining from filing an application in certain cases do not granting consent due to a similar reason. For this reason, not seeking the consent as a condition in each case seems to be a more appropriate solution.

A high number of individual applications may pose risks such as an elevated workload and rendering the institution unfunctional for equality institutions. In this case, the problems experienced by judicial bodies when they are under heavy workload may occur in the same way. For instance, finalizing applications after a long period of time may lead to the perception of the equality institution as an ineffective body in the eyes of the victims of discrimination. Reliability of the equality institution will be on decline in the event that the number of applications is low or the institution admits a low number of applications. In case of a decline in trust, the institution may receive a lower number of applications and its reliability may plummet.

According to TIHEK, the number of applications lodged on the claim of non-discrimination violation is 371 and 70 in 2018 and 2019, respectively. These figures seem to be quite low considering the country's population and the prevalence of discrimination cases.<sup>91</sup> The number of applications stood at 51 during the first six months of 2020.<sup>92</sup> 337 out of 371 applications lodged before TIHEK in 2018 were dismissed on the ground that they were not justified based on the discrimination grounds stipulated in TIHEK Law and failed to fulfill the conditions of application set out in TIHEK Regulation. Three of the applications were referred to other institutions due to their relevance and violation review was initiated about 31 applications. Out of the applications subjected to violation review, eight were dismissed on the ground of inadmissibility, 11 on the ground of non-evaluation, two were found to be violations while nine were concluded to be not violations. Besides, an *ex officio* investigation was initiated by the Institution in 2018,

90 Kucsko-Stadlmayer, p. 21.

91 TIHEK, 2019 Activity Report, p. 51.

92 TIHEK, 2020 Corporate Financial Situation and Expectations Report, p. 8.

resulting in a resolution of violation. The Institution stated that the review of seven applications was pending as of the end of 2018.<sup>93</sup> As can be seen, the number of applications about which a resolution of violation was issued out of 371 applications lodged before the Institution is only three.

Merits review was initiated for 28 out of 70 applications lodged before the Institution in 2019 and 18 of them were finalized while the number of finalized applications for which a resolution of violations was issued is only three. It was stated that most of the files reviewed on the merits were relevant to mobbing. Apart from these, it was stated that two reviews were initiated on an ex officio fashion, one of them resulting in a resolution of violation while the other one's review was pending.<sup>94</sup> The number of applications filed before TIHEK shows that the Institution is not under a heavy workload and is perceived as an ineffective institution before the public opinion.

The resolutions issued by equality institutions as a result of applications or ex officio review are generally recommendations that are not legally binding.<sup>95</sup> Recommendations can be directed towards the relevant institution or person.<sup>96</sup> Although recommendations are not binding in contrary to the judgments of judicial bodies, in the event that the resolutions issued by the Institution in this way are not complied with, it is possible for the Institution to report this circumstance to the supreme institution to which the relevant public institution is affiliated or to the legislative body and announced this circumstance to the public.<sup>97</sup> However, in some cases, sanctions can also be ruled by equality institutions, and such sanctions may occur in the form of compensation or fines to a large extent.<sup>98</sup> Equality institutions must have the authority to recourse to legal remedies after the resolutions issued thereby regarding discriminatory treatments are not enforced.<sup>99</sup>

Another issue concerning the quasi-jurisdictional authorities of equality institutions is the sharing of the burden of proof regarding the applications filed on non-discrimination. The aforementioned EU Directives require that a regulation must be in force for the sharing of the burden of proof. This liability with regard to the sharing of the burden of proof is valid for not only judicial bodies, but also equality institutions. This approach is quite important for judicial bodies as well as the equality institutions constituted so as to fight against discrimination.

Article 21 of TIHEK Law provides that the burden of proof will rest with the other party if the applicant "puts forth the presence of strong indications concerning the accuracy of his/her claim and of the facts resulting in presumption" with regard to the applications lodged before the Institution with the claim of non-discrimination violation and, in this case, the person or institution against which the application is filed must prove that s/he/it has not violated non-discrimination and the principle of equal treatment.

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93 TIHEK, 2018 Activity Report, p. 38-39.

94 TIHEK, 2019 Activity Report, p. 59-60.

95 Gay Moon, "Enforcement Bodies", *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Dagmar Schiek, Lisa Waddington; Mark Bell (eds.), Hart, Cornwall, 2007, p. 874.

96 Kucsko-Stadlmayer, p. 45.

97 Kucsko-Stadlmayer, p. 46.

98 Margit Ammer; Niall Crowley; Barbara Liegl; Elizabeth Holzleithner; Katrin Wladasch; Kutsal Yeşilkağıt, *Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC, Synthesis Report*, Human European Consultancy, Ludwig Boltzmann Institut für Menschenrechte, 2010, p. 96, <http://ec.europa.eu/social/BlobServlet?docId=6454&langId=en> (accessed: July 31, 2020).

99 *National Human Rights Institutions*, p. 7, para. 50.



Finally, the resolutions that may be rendered and the sanctions that may be imposed by equality institutions are discussed. As mentioned above, the following matters come to the fore in this sense: issuing legally binding decisions or recommendations that require action to put an end to discrimination, achieve full equality, and avert future discrimination and impose effective, proportionate and dissuasive sanctions including payment of compensation for both pecuniary and non-pecuniary damage, fines and the publication of the decision and the name of the perpetrator and making sure that the decisions are published, enforced and implemented. The legislation is expected to provide that the government and other public authorities must reply to or take action to implement the equality institution's recommendations within a certain timescale.

Article 18(1) of TIHEK Law prescribes a period of three months for the applications filed before TIHEK or the reviews initiated by the Institution in an *ex officio* fashion and it is possible for the Chairman of the Institution to extend this period by three months only for once. As per Article 18(2), a controversial procedure is introduced by the Institution at this stage and periods of 15 days are granted to the parties to submit their written statements. It is also possible for the parties to deliver oral statements before the Board upon request. Similarly, Article 20(3) provides that the Board is authorized to hear witnesses or relevant persons. The Board decides whether or not non-discrimination is violated at the end of the process.

In the event that TIHEK establishes a violation of non-discrimination, the only sanction to be imposed by the Board is administrative fine. Article 25(1) of TIHEK Law authorized the Board to impose an administrative fine of TRY 1,000 to TRY 15,000 when it was enacted. Considering the yearly rates of rise for 2020, the lower limit of administrative fine was set at TRY 1,800 and the upper limit at TRY 27,037.<sup>100</sup> While deciding on the administrative fine to be imposed, severity of the impact and consequences of the violation, the perpetrator's economic situation and the aggravating impact of multiple discrimination will be taken into consideration. Besides, the Board is authorized to convert the administrative fine into a caution only for once and increase the fine by 50% if the person or institution about which a caution is issued commits the discriminatory act again. Although the administrative fine can be increased in this way, it is not possible to impose a fine exceeding the aforementioned upper limit. Administrative fine can be imposed on both public institutions and professional organizations with the status of a public institution and real persons and private legal persons. Article 25(2) provides that the administrative fine will be recoured to the persons causing the violation if it is imposed on public institutions and organizations and professional organizations with the status of a public institution. As administrative fines are transferred to the Treasury, pecuniary and non-pecuniary damages of the victims are not compensated and, as criticized by ECRI, the Institution is not authorized to issue a resolution in this sense.<sup>101</sup>

Apart from the administrative fines of TIHEK, Article 18(5) requires that the Board must file a criminal complaint when it detects criminal non-discrimination violations. If the said crime is a crime requiring public investigation and prosecution and the members of the Board are negligent of or are in delay in notifying to competent authorities

<sup>100</sup> See, TIHEK, Administrative Fines for 2020.

<sup>101</sup> ECRI Conclusions on the Implementation of the Recommendations in Respect of Turkey Subject to Interim Follow-up, April 3, 2019, CRI(2019)27, para 1, <https://rm.coe.int/interim-follow-up-conclusions-on-turkey-5th-monitoring-cycle-/168094ce03> (accessed: July 31, 2020)

this crime they have found out in association with their duties, they will commit the crime of "the failure of a public official to notify a crime" as per Article 279 of the Turkish Criminal Code No. 5237.<sup>102</sup>

It is not possible to consider as effective, proportional and deterrent the sanction imposed by TIHEK. Moreover, it is not possible for TIHEK to impose sanctions such as deciding for the prevention of a future case of discrimination, deciding on the payment of pecuniary and non-pecuniary compensation or announcing the decision or the persons committing discrimination other than issuing an administrative fine. In addition, the legislation in force does not provide that the government and other public authorities must reply to or take action to implement TIHEK's recommendations within a certain timescale. While the current legal framework for the execution of the administrative fine is sufficient, there is a loophole in the execution of recommendations. Besides, no information is available as to whether or not any activity is performed to monitor the consequences of the resolutions issued by the Institution. The rate of the fulfillment of the resolutions rendered by the Institution is not known.

## 2. TIHEK and the Authority of Mediation

Another authority discussed for equality institutions is the authority of mediation. The procedure of mediation comes to the fore especially in cases where the victims of discrimination are withdrawn from recouring to legal remedies and do not want to face the phenomenon of victimization.<sup>103</sup> Owing to the mediation, one of the alternative dispute resolution methods, the risk of victimization disappears to a certain extent and it is possible to reach a conclusion in relatively shorter period of time when compared to adjudication.<sup>104</sup>

In accordance with international standards, Article 11(1)(b) of TIHEK Law provides that one of the duties of the Board is to initiate and finalize the process of reconciliation with regard to the applications lodged and ex officio reviews concerning the violations of non-discrimination where necessary. Article 18(3) grants the Chairman of the Institution the authority of inviting the victim applying with the claim of non-discrimination violation and the persons responsible for this violation upon request or in an ex officio fashion. Preferring the concept of "reconciliation" over mediation in the law suggests that it is inspired by the mechanism of reconciliation in criminal jurisdiction. The phrase "Determinations, statements or explanations during reconciliation negotiations cannot be used as evidence within any investigation and prosecution or lawsuit." within the text of the law strengthens this possibility. However, it is not very likely that discriminatory treatments constitute a crime. Discriminatory treatments may predominantly cause private law liability and it seems possible through the text of the article that determinations, statements or explanations during reconciliation negotiations can be used as evidence during an action for damages.

Article 18(3) of TIHEK Law expects that reconciliation be finalized within a month at the latest. The action to be established in case of successful reconciliation may be in the form of finalizing the act claimed to be a violation of non-discrimination or paying a certain amount of compensation to the victim or another act. As the information

102 Turkish Criminal Code (No. 5237), the Official Gazette No. 25611 of October 12, 2004.

103 Moon, p. 897.

104 Moon, p. 897. For information on the alternative dispute resolution methods applied by equality institutions, see Lindholt; Kerrigan, p. 104-105.



published by TIHEK does not contain any information as to the number of successfully-finalized applications or reviews referred to reconciliation during the first four years and which procedure of compensation or redress is agreed upon regarding successfully finalized reconciliation procedures, if any, it is not known whether the aforementioned regulations create an impact or not.

### 3. Evaluation of TIHEK Resolutions

The number of resolutions published by TIHEK on the website of the Institution since 2018 is 43. Out of these resolutions, the number of those relating to non-discrimination is 12 and evaluation within the report is performed over the few resolutions published by the Institution. It is observed that one of the resolutions was a resolution of inadmissibility, three resolutions did not find any violation and eight resolutions found a violation. It is seen that nearly all of the resolutions published by TIHEK were resolutions where a merits review was performed for the application. It is not known why the other resolutions of the institution were not published. The abundant number of unpublished resolutions prevents a qualified evaluation of the Institution's performance.

The resolutions show that TIHEK Board asks for the opinions of third parties although this is rare. Opinions of various public institutions were sought in some of these resolutions. In an application filed against two private legal entities (tourism companies), the Association of Turkish Travel Agencies (TURSAB) and the Ministry of Culture and Tourism were asked for opinions.<sup>105</sup> Acting Provincial Director of Migration Management was heard in an ex officio review conducted concerning the hanging of placards on the display window of a shop "Customers from Iran, Syria and Afghanistan cannot enter into this shop and make shopping. Otherwise, they will get a beating" and "People from Syria, Afghanistan and Iran will get a beating if they enter into this workplace. Otherwise, we refuse any responsibility!".<sup>106</sup>

It is observed that the opinions of CSO representatives were sought in a review initiated by TIHEK in an ex officio fashion. Within an ex officio review, the Aegean Region Coordinator of the Association for Solidarity with Asylum Seekers and Migrants (SGDD/ASAM) and a Member of the Board of Anatolia Youth Association were heard. The resolution does not explain why the information of CSOs was sought this time in contrary to other applications or reviews and how the CSOs to be consulted were identified.<sup>107</sup> Asking the opinions of CSOs regarding any application lodged therebefore or any ex officio review is important for TIHEK to make use of the expertise of civil society and be aware of the different dimensions of the relevant issue. Intervention of CSOs in the review of application alongside the victim or as a third party through the publication of applications as in the case of the European Court of Human Rights will improve the quality of resolutions by the Institution and contribute to the visibility of discrimination in the society.

Article 66 of TIHEK Regulation provides that a resolution of non-evaluation will be issued concerning the applications lodged regarding the disputes that are pending before judicial authorities or finalized by judicial authorities. It is observed that TIHEK acted in contravention of this provision in one resolution and initiated an ex officio review

<sup>105</sup> TIHEK, Resolution No. 2019/22, April 9, 2019, para. 24-25.

<sup>106</sup> TIHEK, Resolution No. 2019/29, May 7, 2019, para. 4.

<sup>107</sup> TIHEK, Resolution No. 2019/29, May 7, 2019, para. 4.

concerning an act against which a criminal case was filed, resulting in a resolution of violation.<sup>108</sup> In another resolution, although it is not possible for the Institution to review human rights violations upon application as per Article 9(1)(f) of TIHEK Law, TIHEK initiated an ex officio review upon application without dismissing this application.<sup>109</sup>

It is striking that resolutions frequently refer to international law. However, there is no overall approach for acting in line with international law considering the activities of the Institution in general. It is observed that international legal standards are used in a "selective" way in the Institution's resolutions.

It is observed that the members gave dissenting votes on the merits in only one of the resolutions published by TIHEK.<sup>110</sup> In the application filed by an applicant claiming that he could not rent any house because he was male, a resolution was issued on direct discrimination on the ground of gender and three members gave dissenting votes against this resolution. Two of the dissenting opinions by the Chairman of the Institution and one member stated that the application needed to be considered inadmissible as the relevant parties did not fulfill the condition of requesting from the respective party to correct the practice claimed to be in contravention of this Law before applying to the Institution as specified in Article 17(2) of TIHEK Law.<sup>111</sup> Requiring that the person to whom the house was not rented because he was male apply again to the landlord refusing to rent the house to him in the present case and expecting that this application be proven within the applications to be lodged before the Institution will decrease the already-low number of applications lodged before the Institution and is also a condition quite difficult to be fulfilled by victims. Considering that discriminatory treatments mostly occur in verbal form, it is uncertain how to file a request to the person committing such treatment. It is not possible to accept that "the claimed statements do not pursue the aim of discrimination", the second justification specified in one of the dissenting opinions, just on the ground that the aim of the person committing the discriminatory treatment is not important.<sup>112</sup> Moreover, those committing the discriminatory treatment mainly defend themselves that they do not pursue such an aim. Validating such arguments as valid brings about the danger of making impossible the proving of discrimination claims, which are already hard to prove.

The third dissenting opinion expressed by the Vice Chairman of the Institution indicates that considering women more meticulous than men is an "assessment for reflecting the situation" and this situation cannot be considered as discrimination. In the subsequent sections of this dissenting opinion, it is suggested that sexist stereotype arguments will not constitute any discrimination through the statement "Otherwise, it would be necessary to consider as discrimination the argument of 'women being more sensitive than men' expressed on all occasions and by everyone".<sup>113</sup>

An evaluation for the resolutions of TIHEK based on the grounds of non-discrimination shows that no resolution of violations has been issued up to now with regard to "language" and "race", two of the grounds of discrimination stipulated in Article 3(2) of TIHEK Law. The only resolution of violation issued regarding "ethnic origin"<sup>114</sup> is an

108 TIHEK, Resolution No. 2019/29, May 7, 2019, para. 9.

109 TIHEK, Resolution No. 2018/83, July 18, 2018, para. 4-6.

110 TIHEK, Resolution No. 2019/64, November 19, 2019.

111 TIHEK, Resolution No. 2019/64, November 19, 2019, Dissenting Votes of Süleyman Arslan and Dilek Ertürk.

112 TIHEK, Resolution No. 2019/64, November 19, 2019, Dissenting Vote of Süleyman Arslan.

113 TIHEK, Resolution No. 2019/64, November 19, 2019, Dissenting Vote of Mesut Kınalı.

114 TIHEK, Resolution No. 2019/54, September 10, 2019.



appropriate and significant resolution while it is not relevant to the ethnic groups living in Turkey, but to refugees. The Institution has issued two resolutions on gender discrimination so far and both resolutions are relevant to discrimination towards men.<sup>115</sup> It is quite surprising that the Institution has not initiated an ex officio review and issued any resolution concerning discrimination towards women in a country where discrimination against women is so widespread.

The grounds of non-discrimination stipulated in Article 3(2) of TIHEK Law do not constitute an open-ended, but a non-exhaustive list. Resolutions of TIHEK show that there is no tendency towards expanding this list. For instance, the application filed because of a claim concerning different treatment due to membership in an association was considered inadmissible by the Institution as it was not covered by any of the grounds stipulated in TIHEK Law.<sup>116</sup>

Considering the resolutions of TIHEK by the different forms of discrimination set out in TIHEK Law, it is observed that the Institution has not rendered any resolution on indirect discrimination up to now. Approach regarding the burden of proof constitutes one of the most problematic areas for proving the claims of indirect discrimination. It is an issue of concern how the Board will evaluate such claims by considering the confusion concerning the proof of discrimination in the resolution.

It is observed that four of the eight resolutions which were published by TIHEK and about which a resolution of violations was issued are relevant to access to goods and services (failure to rent a house and not letting refugees into a shop).<sup>117</sup> Two of the remaining four resolutions are relevant to the cases on head-scarf and hasema where the freedom of religion and conscience is intertwined with gender. One of them concerns access to employment<sup>118</sup> while the other is related to the failure to enjoy a right granted to site residents.<sup>119</sup> Last two resolutions are relevant to facing negative treatment (victimization) due to an application filed before TIHEK on non-discrimination<sup>120</sup> and the failure to make appropriate arrangements for access to education.<sup>121</sup> As can be seen, there is no resolution subjected to any merits review with regard to areas of non-discrimination stipulated in Article 5 of TIHEK Law such as membership in the associations, foundations and trade unions of judiciary, law enforcement, transport, communication, social security, social services, social aid, tourism and self-employed professionals and political parties and professional organizations except for the exemptions stipulated in relevant legislation or regulations as well as election for their organs, enjoying the facilities of membership, the termination of membership and attending and making use of their activities/events.

Article 7 of TIHEK Law contains a long list of cases where the claim of discrimination cannot be put forth. Considering the 12 resolutions subject to review, only one of them was not concluded to be a violation of non-discrimination within the scope of "different treatment arising out of the conditions and legal status of non-citizens concerning their entry into force and residence" as stipulated in Article 7(1)(g).<sup>122</sup> Apart

115 TIHEK, Resolution No. 2018/97, October 15, 2018.

116 TIHEK, Resolution No. 2019/55, September 10, 2019.

117 TIHEK, Resolution No. 2018/69, June 27, 2018; Resolution No. 2019/15, March 5, 2019; Resolution No. 2019/29, May 7, 2019; Resolution No. 2019/64, November 19, 2019.

118 TIHEK, Resolution No. 2018/97, October 15, 2018.

119 TIHEK, Resolution No. 2020/26, February 11, 2020.

120 TIHEK, Resolution No. 2019/54, September 10, 2019.

121 TIHEK, Resolution No. 2020/143, June 18, 2020.

122 TIHEK, Resolution No. 2019/22, April 9, 2019.

from this, there is no resolution on the legally-prescribed exemptions of discrimination and therefore, there is yet to be a case for the implementation of Article 7 by TIHEK.

When TIHEK issues a resolution on the violation of discrimination, it may impose an administrative fine of TRY 1,800 to TRY 27,037 for 2020 as per Article 25(1) of TIHEK Law and convert it into a warning only for once as per Article 25(4). It is observed that among the eight applications or ex officio reviews concluded to be a violation of discrimination, an administrative fine of TRY 1,000 to TRY 5,000 was imposed for six resolutions<sup>123</sup> while these fines were converted to warnings in two resolutions.<sup>124</sup> It is not possible to say that the fines imposed were proportionate, effective and deterrent compared to the cases at hand. Addressees of the resolutions are two public officials and a public institution in two of the resolutions for which administrative fine was imposed.<sup>125</sup> It is not known whether or not the public institution on which an administrative fine was imposed resorted to this fine to the relevant public official/officials and whether or not the Institution has taken a step towards the recourse of these fines.

Finally, it is observed that five out of the 12 resolutions published by TIHEK were issued against public institutions and organizations or public officials and seven were issued against real persons and private legal persons. Considering that the applications lodged against public institutions and organizations and public officials also fall under the mandate of the Ombudsman Institution, it is not surprising that the number of these applications is low. However, it can be said that the overall low number of applications points to the fact that the Institution is still not known by the public and may be perceived as an ineffective institution.

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123 TIHEK, Resolution No. 2018/69, June 27, 2018; Resolution No. 2018/97, October 15, 2018; Resolution No. 2019/15, March 5, 2019; Resolution No. 2019/54, September 10, 2019; Resolution No. 2019/64, November 19, 2019; Resolution No. 2020/26, February 11, 2020.

124 TIHEK, Resolution No. 2019/29, May 7, 2019; Resolution No. 2020/143, June 18, 2020.

125 TIHEK, Resolution No. 2020/143, June 18, 2020.



## CONCLUSIONS and DETERMINATIONS

Law on the Human Rights and Equality Institution of Turkey was adopted by GNAT on April 6, 2016 as a result of political negotiations between the EU and Turkey with regard to the civil war going on in Syria and the ensuing migration problem. Criticisms and deficiencies expressed by the representatives of opposition parties at GNAT and CSOs dealing with fight against discrimination through various medial channels as well as past experiences were not taken into consideration during the adoption of the law. The law was adopted at GNAT as rapidly as possible and entered into force upon the approval of the President.

TIHEK Law defined certain forms of discrimination in Turkey at the level of a law for the first time. However, Article 2(1) specifies that these definitions are only limited to the implementation of TIHEK Law. In spite of this limitation, it is possible that relevant authorities may use these definitions with regard to the cases filed or the administrative applications lodged concerning non-discrimination. As a matter of fact, the Court of Cassation referred to the definition of sexual harassment in two of its judgments.<sup>126</sup> It is of special importance that mobbing, harassment, multiple discrimination, segregation, instruction for discrimination, discrimination based on default ground and victimization are defined at the level of laws. Internalization and use of the different forms of discrimination stipulated in the law by judicial bodies and the administration can ensure that the impact of the Law is also felt outside the practices of the Institution.

Articles 3(3) and 3(4) of TIHEK Law hold responsible public institutions and organizations as well as professional organizations with the status of a public organization assigned and authorized to act in case of the violation of non-discrimination to put an end to the violation, redress its consequences, prevent the repetition thereof, take necessary measures to ensure the follow-up of the issue in legal and administrative terms and hold responsible the real and private legal persons liable in terms of non-discrimination to take necessary measures for detecting discrimination regarding the issues falling under their mandate, eliminating it and ensuring equality.

An open-ended approach is adopted regarding the subjects of discrimination instead of a limited approach such as the grounds of discrimination. Articles 5 and 6 of TIHEK Law prohibits discrimination on the basis of education and training, health, housing, employment, self-employment, freedom of association, judiciary, law enforcement, healthcare, transport, communication, social security, social services, social aid, sport, accommodation, culture, tourism, similar areas and services.

In spite of these positive examples stipulated in the law, it is observed that provisions concerning the Institution are quite problematic in contrary to general provisions on non-discrimination. The conclusions reached under the aforementioned review are specified below based on the sections included in this report. As seen below, it is necessary to make comprehensive amendments to both the legislation and practice for achieving compliance with international standards, preventing and eliminating discrimination and achieving a more effective institutional structure.

<sup>126</sup> General Assembly of Civil Chambers of the Court of Cassation, E. 2015/2865 K. 2018/1142, May 30, 2018; E. 2015/3171 K. 2018/1143, May 30, 2018.

## A- Competence and Responsibilities of TIHEK

### Legislation

1. TIHEK Law lists the following duties as the duties of the Institution: "ensuring that the state becomes a party to international human rights conventions and ensure the implementation thereof"; "contributing to the reports which the state is required to submit to UN bodies or regional intergovernmental organizations pursuant to their obligations arising out of human rights treaties and, where necessary, expressing an opinion on the subject, with due respect for its independence"; "fight against hate speech" and "promoting diversity and good relations between persons belonging to all the different groups in society"; "conducting awareness-raising activities in the society for promoting diversity and mutual understanding and engaging in activities intended for ensuring that the groups exposed to discrimination have trust in the institution"; "and promoting and supporting positive actions" and "carrying out regular independent surveys and gathering a sufficient amount of sound quantitative and qualitative data on discrimination".
2. Article 3(2) of TIHEK Law does not adopt an open-ended approach in terms of discrimination grounds and does not mention the grounds of gender, sexual orientation and sexual identity.
3. the Law's wording does not comply with the perspective of gender.
4. Duties and mandate of the Institution are too broad for the Institution to engage in effective activities.
5. The Institutions is not authorized to initiate administrative and judicial proceedings by representing victims before administrative and judicial bodies and intervene in these proceedings in cases where they grant consent, intervene in these proceedings, bring the cases of discrimination before administrative and judicial authorities on its own behalf and intervene in administrative and judicial proceedings in any capacity such as *amicus curiae*, third party or expert.

### Implementation

1. The Institution does not engage in any considerable activity regarding many subjects falling under its mandate.
2. The Institution has not expressed any opinion drawing the attention of the executive body to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, specifying the position of the government and the reaction that must be given thereby and has not made any critical statement on the executive body with regard to any human rights problem in the country.
3. The Institution seems to give prominence to cooperation with the Independent Permanent Human Rights Commission of the Organization of Islamic Cooperation instead of the international organizations setting standards in the field of human rights such as the United Nations and the Council of Europe and the bodies affiliated thereto.
4. Cooperation of the Institution with public institutions, professional organizations, universities and CSOs dealing with fight against discrimination is quite insufficient.



5. The Institution does not perform any activity for monitoring the implementation of international human rights conventions.
6. It is observed that a conservative point of view is prominent in the Institution and it moves away from the principle of universality of human rights.
7. The Institution's activities against some international conventions such as the Istanbul Convention are explicitly contrary to the requirements of "promoting and ensuring the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation" as set forth in the Paris Principles and "carrying out the activities of an equality institution based on the relevant international or national legal framework, standards, and case law" as specified in ECRI GPT2.
8. The Institution does not contribute to the preparation of the reports that must be submitted by the state to the examination, monitoring and inspection mechanisms established as per international human rights conventions.
9. The Institution does not perform any activity intended for monitoring and evaluating problems concerning the enforcement of judicial verdicts on the violations of non-discrimination.
10. The strategic plan drawn up by the Institution in 2018 was not shared with the public as of July 31, 2020. Limited statements by the Institution regarding this plan show that the aims and objectives identified are expressed in very general terms and prove to be insufficient.

## **B- Composition of TIHEK and Guarantees of Its Independence and Pluralism**

### **Legislation**

1. All members of TIHEK Board are appointed by the President and based on a process that is not transparent.
2. Procedure of appointment for the members of TIHEK Board does not enshrine pluralism and diversity and CSOs are completely left outside the process of selection for the members.
3. The qualifications prescribed for being a member of TIHEK Board are not objective and no expertise is envisaged for membership.
4. Term of office for the members of TIHEK Board is indefinite.
5. Members of TIHEK Board do not have sufficient guarantee, criminal and legal immunity.
6. Carrying out an investigation for the Chairman and members of the Board is subject to the permission of the President or the minister to be assigned thereby.
7. As the Institution is prescribed to be associated with the minister to be assigned by the President, it is totally dependent on the executive body in a way to eliminate its independence.
8. Although it is regulated that TIHEK Board will act independently and no body, authority, organ or person will give orders or instructions to the Board or indoctrinate it, no sanction is prescribed for any action to the contrary.

9. If the Institution wishes to open an office outside Ankara, the authority to decide on this issue rests with the President.
10. Working procedures and principles of the service units and offices under the Institution will be set out through a regulation to be put into force by the President.
11. Although the budget of the Institution is set through the budget proposal approved by GNAT, the authority to propose budget acts rests with the President as per the Constitution and thus, the budget of the institution is actually set by the executive body.

### **Implementation**

1. TIHEK Board does not have any pluralistic structure. Members are completely distant from reflecting social diversity, and its member composition is completely contrary to gender equality. It is observed that the distribution of employees of the Institution is not balanced in terms of gender equality and the number of male personnel is much higher than that of female personnel (74-46 for 2019).
2. Experience of the members of TIHEK Board is little if any with regard to human rights, non-discrimination and civil society. Nearly half of its members do not have any experience on the aforementioned areas.
3. Member composition of TIHEK Board is quite inadequate in terms of fulfilling the duties it undertakes.
4. The Institution does not have adequate working space, budget and employees.

## **C- TIHEK's Methods of Operation**

### **Legislation**

1. The sanction (administrative fine) imposed in the event that relevant persons fail to provide within thirty days the information and documents requested by the Institution with regard to its area of investigation and review by specifying the justification thereof is quite ineffective and there is no provision allowing for filing a criminal complaint on the persons and institutions that fail to provide the requested information and documents.
2. Not all resolutions of TIHEK Board can be published, but only the resolutions "deemed necessary" by the Board can be published.
3. TIHEK Law does not stipulate any minimum period with regard to the meeting interval of the Board.
4. TIHEK Law does not contain any provision meeting the requirement of ensuring a regular and effective coordination among the authorities competent in the field of fight against discrimination.
5. The Board can express opinions to public institutions and organizations with regard to its mandate only upon request.
6. Although it is possible for the Institution to cooperate with CSOs in many areas as per TIHEK Law, there is no provision on how to identify these CSOs. The criterion prescribed in the provision of TIHEK Regulation on this subject is distant from being objective.



## Implementation

1. It is not known how many times a year the Board meets and the resolutions issued during these meetings are not published.
2. The Institution does not have any transparent policy regarding the publication of resolutions.
3. The Board does not provide sufficient information to the public regarding its resolutions.
4. The Institution does not cooperate with other public institutions and CSOs dealing with the prevention of discrimination and there is no regular and effective coordination among the institutions. The Institution does not have any transparent policy on how to identify the CSOs with which cooperation is established to a limited extent.
5. The Institution has not formed any temporary commission with public institutions and organizations to engage in activities concerning the areas falling under its remit.
6. The Institution has organized a few consultation meetings in a very limited sense in terms of the attendance of CSOs and other relevant persons.
7. The Institution has an explicit policy on not cooperating with groups frequently exposed to discriminatory treatment up to now.
8. The Institution does not engage in any special activity in terms of accessibility and the adaptation of its services to the persons with disabilities.
9. The Institution does not have sufficient human resources to guide the persons applying thereto for the administrative and legal procedures to which they may recourse for redressing their victimization and help them to follow up their applications.

## D- Quasi-Jurisdictional Competence of TIHEK

### Legislation

1. Legislative provisions on the stay of period for filing a case with regard to the applications to be lodged before the Institution are stipulated in a way that will cause confusion for the applicants in practice and make it compulsory for the applicant to seek legal help on this matter.
2. It is quite ambiguous when and how the requirement of requesting from the relevant party to correct the practice claimed to be unlawful prior to lodging an application before the Institution will be fulfilled with regard to the applications to be lodged before the Institution and is of a quality to deter the victims from exercising the right to apply before the Institution.
3. Procedural rules valid for the applications filed before the Institution are regulated in a very detailed way instead of being simple.
4. The condition of becoming a victim for filing an application before the Institution only cover existing victimization and does not cover potential victimization.
5. CSOs and trade unions cannot lodge an application instead of the victim or alongside the victim upon the consent of the victim.
6. The only sanction that can be imposed by the Institution is administrative fine and the lower and upper limits prescribed therefor are very insufficient in a way to render the sanction ineffective. Fines are not transferred to the victims and cannot be used for redressing the damage.

7. The Board is not authorized to issue a resolution that will redress the pecuniary and/or non-pecuniary damages of victims as a result of the applications lodged before the Institution.

### **Implementation**

1. The number of applications lodged before the Institution is quite low and shows that the Institution is not known by the public and/or is perceived as an ineffective institution.
2. The number of reviews initiated by the Board in an ex officio fashion is quite low.
3. The Board considers a significant portion of the applications lodged as inadmissible and the number of resolutions rendered on the violation of non-discrimination is quite low.
4. The Institution's policy for the publication of Board resolutions is not known.
5. The applications lodged before the Board are not published and thus, CSOs are not enabled to express opinions regarding these applications. The Board does not have any stable policy for seeking the opinions of CSOs concerning applications or ex officio reviews.
6. Although the resolutions of the Board refer to international law, there is no overall approach for acting in line with international law considering the activities of the Institution in general.
7. Most of the violation resolutions issued by the Board are not relevant to the areas where institutional or structural discrimination and the number of violation resolutions issued by the Board on the important problems of disadvantaged groups is quite low. The Board has yet to issue a resolution on discrimination against different groups living in Turkey on the basis of ethnic origin, minority religion and belief groups or on gender discrimination.
8. The Board has yet to issue a resolution on many grounds and areas of non-discrimination or on the exemptions of discrimination.
9. The administrative fines imposed by the Board are quite low and are not proportional, effective and deterrent when compared to the current conditions.



# THE REPORT ON THE OMBUDSMAN INSTITUTION AND ITS DECISIONS ON DISCRIMINATION

D. Çiğdem Sever<sup>1</sup>

## INTRODUCTION

It was first considered in 1980s to establish an Ombudsman Institution and the first law on the Institution was enacted in 2006, however, since this Constitution Court annulled this law, the Institution could only be established in 2012 after the constitution was amended in 2010. During amendment of the Constitution, paragraph four has been added to Article 74 of the Constitution, which provides as follows: “The Institution of the Ombudsman established under the TGNA examines complaints on the functioning of the administration” Following this constitutional amendment, the Ombudsman Institution (KDK) was established in 2012 with Law No. 6328, and started to receive applications in March 2013, and it is a public institution that is structurally affiliated with the TGNA and has a separate legal entity.<sup>2</sup>

Ombudsperson (Ombudsman) institutions are national human rights institutions, since they can receive direct applications regarding any kind of human rights violation that can be associated with the administration. National human rights institutions constitute an effective remedy for human rights violations before litigation, and the fundamental principles of these institutions were regulated by the UN in 1993 with the Principles Relating to the Status of National Institutions, which are called as the Paris Principles<sup>3</sup>. Paris Principles are composed of following sections: a. Competence and Responsibilities, b. Composition and Guarantees of Independence and Pluralism, c. Methods of Operation, d. Additional Principles Regarding the Status of Commissions With Quasi-Judicial Competence. Although there are many documents<sup>4</sup> on national human rights institutions

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2 Law on Ombudsman Institution, Date of Adoption: 14/6/2012, Published in Official Journal: Date: 29/6/2012.

3 Principles relating to the Status of National Institutions (The Paris Principles), Adopted by General Assembly resolution 48/134 of 20 December 1993.

4 Some of these are: e Recommendations of the Committee of Ministers of the Council of Europe R (85) 13 on the institution of the Ombudsman, R (97)14 on the establishment of independent national institutions for the promotion and protection of human rights, R (2000)10 on codes of conduct for public officials, CM/Rec(2007)7 on good administration, CM/Rec(2014)7 on the protection of whistle-blowers and CM/Rec(2016)3 on human rights and business; to the Recommendations of the Parliamentary Assembly of the Council of Europe 757 (1975) and 1615 (2003) and in particular its Resolution 1959 (2013); as well as to Recommendations 61(1999), 159 (2004), 309(2011) and Resolution 327 (2011) of the Congress of Local and Regional Authorities of the Council of Europe; to ECRI General Policy Recommendation No. 2: Equality bodies to combat racism and intolerance at national level, adopted on 7 December 2017; United Nations General Assembly Resolution 48/134 on the principles relating to the status of national institutions for the promotion and protection of human rights (“the Paris Principles”) of 20 December 1993, Resolution 69/168 of 18 December 2014 and Resolution 72/186 of 19 December 2017 on the role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights, Resolution 72/181 of 19 December 2017 on National institutions for the promotion and protection of human rights, the Optional Protocol to the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 18 December 2002;

in general and on ombudsman offices specifically, this study will mainly concentrate on making an assessment in line with the Paris Principles and the 2019 European Commission Principles on the Protection and Promotion of Ombudsman Institution (Venice Principles).<sup>5</sup> Although these principles and standards are not binding, these standards have become more important with the acceptance of accreditation in relation to the Paris principles. Assessments in line with the principles are not included in the analysis of decisions. These assessments are at the end of the sections regarding structural characteristics and functioning of the Institution.

It is possible to apply to the KDK as well as to the Human Rights and Equality Institution of Turkey (TIHEK) regarding discrimination claims. Although the number of applications made to the Institution has increased over the years, the nature of the applications is also an important indicator. Therefore, in addition to structural indicators, statistics related to decision-making process and to the applications will also be provided in this study.

When selecting applications made to the Institution related to discrimination, the response of the Institution to the request for information, the selected decisions published previously, and the decisions included in the decision data bank of the Institution in 2020 (<https://kararlar.ombudsman.gov.tr/Arama/Index>) were all taken into consideration. Furthermore a decision, which was made on an application filed by AMER but was not published, is also discussed here.

## A. STRUCTURAL CHARACTERISTICS OF THE INSTITUTION

The institution consists of a chief ombudsman and five ombudsmen Candidates for nomination that have qualifications stipulated by the law apply for the chief ombudsman and ombudsman positions within the application period announced by the TGNA Speaker's Office. In fifteen days after expiration of the application period, the Joint Commission composed of members of the Commission on Petitions and Human Rights Investigation Commission of the Turkish Grand National Assembly selects three candidates for the Chief Ombudsman position from among candidates for nomination, and notify the Speaker's Office to be submitted to the General Assembly. The Chief Ombudsman is elected with the two thirds of the total number of members in the first voting held in General Assembly, or in the second, if the majority could not be achieved in the first one. In the event the majority cannot be achieved in the second voting, a third voting is held, and the candidate receiving the absolute majority of the total number of members is considered to be elected. The commission selects the ombudsmen in the following fifteen days.

In order to ensure independence and impartiality of the ombudsmen, Article 12 of the Law on the Ombudsman Institution provides that no authority or person can give any order or instruction, send any circular, or make any recommendation or suggestion to the Chief Ombudsman and the ombudsmen related to their duties. In addition, it is stated that the Chief Ombudsman and ombudsmen have to act in accordance with the principle of impartiality when performing their duties and it is stipulated in Article 13

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5 [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)005-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)005-e)



that they will take an oath in this direction when starting their duties.

The term of office of the Chief Ombudsman and ombudsmen is four years and they can serve for a maximum of two terms. During these four years, the Chief Ombudsman and ombudsmen have certain guarantees in relation to dismissal. The termination of their duties, except in cases such as resignation or death, is possible only if it is subsequently determined that they do not have the qualifications specified in the Law or if they lose these qualifications after being selected, or are convicted or restricted because of an offense preventing being elected to such position.

At the end of each calendar year, the institution prepares a report on its activities and recommendations, and submits the report to the Commission. The Commission discusses this report in two months, excluding any breaks and holidays, and sends the report to the Speaker's Office to be submitted to the General Assembly, including a summary of its opinions. The report of the commission is immediately discussed in the General Assembly.

The foremost issue emphasized in both the Paris Principles and the Venice Principles is to ensure the independence of these institutions, although they can be organized in different ways. Both Principles emphasize the importance of the Ombudsman having a legal basis, which should be constitutional preferably. It is stated in the Venice Principles that it is a better method to elect the ombudsman from the parliament with the qualified majority. KDK has constitutional basis, and since it is elected by the parliament, it meets these criteria.

Both Paris Principles and Venice Principles emphasize that objective criteria should be developed for electing individuals that will work in these institutions and the election/appointment process should be transparent as much as possible, and that such individuals should have professional experience, and if possible be experienced in human rights. However, in Turkey, the number of ombudsmen experienced in civil society organizations that work in human rights, is very small. The majority of ombudsmen have political or bureaucratic experience.

One of the most important problems regarding its formation concerns pluralism. As emphasized in Paris principles, appointment of its members "shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of: (a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists; (b) Trends in philosophical or religious thought; (c) Universities and qualified experts; (d) Parliament; (e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity)."

The Chief Ombudsman/ombudsmen are elected by the TGNA General Assembly and Joint Commission, and they are not directly appointed by the President like it is the case in TIHEK, therefore, the election process seems to be more pluralistic, however, the fact that only one ombudsman is a woman, and the female ombudsman is assigned to cases involving women's rights, children's rights and human rights, is an indication that the institution does not have a pluralistic and egalitarian structure. This also applies to the Constitutional Court and TIHEK, and this structure should be changed in institutions

investigating applications claiming discrimination, to improve the structure and the public perception as well. Therefore, it would be appropriate to make arrangements in these institutions in relation to quota or priorities. On the other hand, there is no indication of an effective cooperation with the civil society in the election process.

In terms of the transparency of the application and election process of the ombudsmen, the KDK process is more transparent than the process of TİHEK.<sup>6</sup> There is also in harmony with the Venice Principles, because an ombudsman cannot be a member of a political party when in office, and the reasons of resignation are clearly regulated by the law. However, the requirement that the purview of the Institution should cover all public administrations at all levels (paragraph 13), is not complied with, because the institution cannot review acts, which are purely of military nature.

Article 23 of the Venice Principles provides that the ombudsmen or decision-making staff should be immune from legal process in respect of activities and words, spoken or written, carried out in their official capacity for the Institution and such functional immunity should apply also after the Ombudsman, or the decision-making staff-member who leave the Institution. The Law does not provide such an immunity, however, Article 31 provides that in the event it is claimed that they have committed an offense because of their duties, a criminal investigation and prosecution against them can be launched only if permitted by the Speaker of the TGNA, and also reference has been made to provisions of the Law on Adjudication of Public Officers and Other Public Servants.

## **B. POWERS AND OPERATION OF THE INSTITUTE AND THE NATURE OF THE INSTITUTION'S DECISIONS**

In the Law, the administration is defined as follows in relation to the purview of the Institution: “the public administrations under the central government, social security institutions, local administrations, affiliated administrations of local administrations, local administrative unions, organizations with the circulating capital, the funds established under laws, public organizations, public economic enterprises, associated public organizations, and their affiliates and subsidiaries, professional organizations with public institution status, and private legal entities providing public services; The Institution is authorized to make examination and investigation into any administrative act, action, attitude and behavior excluding the acts concerning the execution of the legislative power; the acts concerning the execution of the judicial power; and the acts of the Turkish Armed Forces, which are purely of military nature.

Ombudsperson (ombudsman) institutions have been established in many countries and the decisions of the Ombudsperson/Institution constitute recommendations. Although various criticisms have been raised in this regard as a control mechanism, the fact that these institutions constitute a control mechanism on behalf of the public essentially

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6 In the first election, 25 candidates applied for the Chief Ombudsman position, whereas 783 candidates applied for ombudsman positions. <https://www.aa.com.tr/tr/politika/ombudsmanlik-icin-25-basvuru/313806> , In the second election, 106 candidates applied for ombudsman positions, whereas the number of applications made for the Chief Ombudsman position was not reported in the news. <https://www.haberler.com/kamu-deneticiligi-secimi-10375583-haberi/>



forms a link between the administration and the society. Given that it may sometimes be difficult to enforce national and international court decisions in Turkey, the effectiveness of non-binding decisions may be questioned, still, the fact that these decisions constitute recommendations, makes them more comprehensive and flexible. Since the review by the KDK is not limited to review of legality like the courts, but also includes expediency, or as stipulated in the Law review of equity, therefore it is difficult for such decisions to be binding and enforced on an all or none principle. It should be noted that a body that makes a binding decision may not be so active in its assessment of what would be more appropriate in practice.

However, drawing the distinction between equity review and legality review is also extremely important. In this respect, the scrutiny by the Institution aims not only to ensure that the administration acts in accordance with the law, but also to establish a better functioning administration, to correct the mistakes or bad practices of the administration, and to transform the administrative culture. There may be situations in which the Institution deems it sufficient to qualify an act as unfair rather than considering it to be in contradiction with the international legislation. As such, in a situation in compliance with the law, it is possible to qualify such situation as unfair, or to qualify the relevant act as unfair.

The types of decisions and the results of the decisions are not regulated in detail in the Law on the Ombudsman Institution, only expressions towards acceptance and rejection are included in various articles; and in the second paragraph of Article 20, it is stated that “shall notify ... if any, its recommendations to the relevant authority and to the applicant. It is understood from the letter of the law that it does not make binding decisions. On the other hand, according to the first version of Article 31 of the Implementing Regulation of the Law, the Institution can decide that there is no room for a recommendation, a rejection, or a decision.<sup>7</sup> The amicable settlement method was developed with the statement added to the regulation on 2 March 2017. Accordingly, it is possible to decide for an amicable settlement, if the relevant administration takes due action, or the parties notify the Institution that the complaint has been settled. Although it seems to be a method that could be completed in a short period of time and would reduce the workload of the Institution, it should be taken into consideration that this method may have some drawbacks, considering the qualifications of the Institution. In practice, in case of an amicable settlement, no decision is written and these decisions are not published. However, in addition to deciding on applications, the Institution also has the function of ensuring the transparency of the administrations, guiding the administration with its decisions, and fulfills its duty of public scrutiny. In this respect, it should be taken into account that although methods such as amicable settlement or admission of the case seem effective in resolving the application before the ECtHR or national courts, a solution offered to one person may not be a convenient solution for others when considering its effect on other individuals or administrations. According to 2019 statistics, 22% of the cases were concluded with amicable settlement, and for 6.63% of the applications, a decision (rejection, recommendation, partial recommendation) was written. Although this number means that the Institution acts effectively and solves the problems, the low rate of recommendations will undermine the

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<sup>7</sup> Regulation on Procedures and Principles Regarding the Implementation of the Law on the Ombudsman Institution, Official Journal Date: 28.03.2013 Official Journal Issue: 28601 (repeated).

development of the Institution in terms of its decision-making and setting precedents. It is also important that applying to the Institution is easier than applying to judicial review, and it is free of charge. Being able to apply online and free of charge is important, as it can be an alternative solution before engaging in litigation. In this context, the fact that filing an application with the Institution suspends the period for bringing an action is an important guarantee for making applications to the Institution. On the other hand, according to Article 17/4 of the Law, in order to be able to apply to the Institution, it is necessary to exhaust the administrative application remedies stipulated in the Code of Administrative Procedure as well as the mandatory administrative application remedies included in the special laws. However, in cases where there are potential irrecoverable or irreparable damages, applications may be accepted even if the administrative remedies have not been exhausted. At this point, the issue that should be considered is that the application process may become much longer/difficult, because not only compulsory administrative appeal remedies, but the remedy in Article 11 of the Code of Administrative Procedure, which is an optional remedy, has to be exhausted. To explain with an example; when an administrative act is taken against an individual, he/she first has to make an application with the request for withdrawal/removal or amendment of the act according to Article 11 of Code of Administrative Procedure, and he/she may apply to KDK if such application is not rejected either expressly or implicitly by failing to respond within 60 day. The Institution is about to complete its seventh year, and according to 2019 statistics, it was decided to send 41.43% of the applications to the administration, and this shows that these remedies make it difficult to file an application with the Institution.

Law No 6323 does not restrict who can apply to the Institution. According to Article 17 of the Law, "Natural and legal persons can apply to the Institution. The application shall be kept confidential upon the request of the applicant. " On the other hand, Article 7 of the Implementing Regulation provides as follows: "natural and legal persons whose interests are violated can file a complaint with the Institution. However, in case the complaint is about human rights, fundamental rights and freedoms, women's rights, children's rights and general issues concerning the public, no violation of interests is sought". First of all, since such a rule, which is not included in the law, means restricting the freedom to seek rights, it must be brought by law as per Article 13 of the Constitution and it is not possible to do so with a regulation. Moreover, it is not meaningful to restrict applications to an Institution, which is supposed to have the power to make sua sponte reviews.

Another remarkable aspect of applications is that children can directly make applications to the Institution. Especially in terms of violation of rights arising from the parent/guardian or when the parent/guardian is reluctant file an application against the administration (in particular against the school administration or teacher), this method is important for children's rights. Although the number of applications made by children is not much yet, presence of specialists such as social workers and psychologists who can interview children in the Child unit may support the relevant institutions.

According to Article 18 of the Law, it is obligatory to submit the information and documents requested by the KDK regarding the subject of investigation within thirty days from the date of notification of this request. Upon request of the Chief Ombudsman or ombudsman, the relevant authority shall launch an investigation about those who refuse to submit the documents or information requested within this period without any justifiable reason. The statement "shall launch an investigation" in the article is an indication that an investigation must be launched. The information or documents



which are state secrets or trade secrets may not be submitted to the Institution by the highest ranking post or board of the competent authorities by providing justifications for such refusal. However, such information or documents which are state secrets may be examined on site by the Chief Ombudsman or an ombudsman assigned by the Chief Ombudsman. There is no provision on how this information, which is a state secret and reviewed by an ombudsman/the Chief Ombudsman, will be used in the decision.

Article 19 of the Law states that the Institution can consult an expert and hear witnesses. It may be important to resort to this method of proof in order to eliminate the problems that may be caused by the inability to hear witnesses in the administrative judiciary.

The Institution may protect human rights more effectively by cooperating with the civil society, and consulting civil society organizations when making decisions may make a significant contribution to the decisions of the Institution. An example of this is the request for an opinion from the Social Rights and Research Association in the application made for achondroplasia to be included in the Disability Ratio Schedule.<sup>8</sup> The recommendation made in line with the opinion of the Association is important in terms of definition of persons with disabilities in Turkey. Similarly, in the application for taking measures for stray animals, the Animal Protection Association and the Association for Keeping Stray Animals were consulted.<sup>9</sup> On the other hand, these two examples are decisions accessed outside of the database, and no such decision was found in the decisions published in the database. Considering that the decisions in the information bank are more recent, it can be said that this method has not been used recently. In fact, consulting relevant qualified organizations adopting a pluralist approach may support the investigations of the Institution, strengthen the cooperation between the Institution and civil society organizations, make the decisions more legitimate, and pave the way for more qualified applications. Similarly, although the practice of *amicus curiae* (court-friendly - opinion submitted to the court by third parties), which is a common practice in the world, has not yet been implemented, such opinions of human rights organizations may be extremely important in terms of institutional culture.

The Institution can also issue special reports and make on-site inspections. Until now, the Institution has prepared five special reports:

1. Occupational Health and Safety Special Report based on the Soma Mining Accident,
2. Special Report on Problems, Improvement and Increasing Reliability of Our Justice System,
3. Special Report on Violations of Rights in Delivery of Children, and Alimony
4. Syrians in Turkey
5. Turkey's Fight Against Covid-19 Pandemic

These reports are not sufficient quantitatively in our country, where human rights violations are very common, and go beyond the limits of this study, but these reports are important that need to be discussed in terms of their criticality and capacity to have a transformative effect on the administration. For example, in the last report, which is the coronavirus report, despite the fact that the legislation on fighting a pandemic is very old and there are serious legal problems regarding administrative decisions and sanc-

<sup>8</sup> 2016/2600, 24.4.2017.

<sup>9</sup> 2018/9733, 29.1.2019.

tions due to the lack of legal bases, they are not addressed at all, no assessment is made from the perspective of human rights (especially in terms of legality, proportionality, discrimination) and it is noteworthy that there is no mention of the discussions made worldwide. Furthermore, the number of applications in areas where there are extensive human right violations in Turkey (freedom of expression, right to assembly and demonstration) is low, and no special report has been prepared in these areas.

It is observed that the rate of compliance with the decisions of the KDK has gradually increased over the years. It is seen that the rate of compliance, which was 20% in 2013, increased to 75% in 2019. An important factor in this increase is the widespread use of amicable settlements. Worldwide, the administrations who fail to comply with the decisions are disclosed to the public, however, the KDK has done it for once, and has not given any detailed report on to what extent the administrations comply with the decisions since then. Although there is information on the compliance with certain decisions in the annual reports, there is no systematic reporting.

The striking provision in Article 18 of the Venice Principles is that in the framework of the monitoring of the implementation at the national level of ratified international instruments relating to human rights and fundamental freedoms and of the harmonization of national legislation with these instruments, the Ombudsman has the power to present, in public, recommendations to Parliament or the Executive, including to amend legislation or to adopt new legislation. After the 2017 Constitutional amendments, with the removal of the ministries' authority to draft law, if the recommendation requires a legal amendment, sending the decision to the relevant administration will not be sufficient. It would be helpful to include a provision in the law, which would authorize the Institution to send the decision to the parliament or to make a call to that end. According to Article 19 of the Venice Principles, the Ombudsman should preferably have the power to challenge the constitutionality of laws and regulations or general administrative acts before competent courts. According to Paris Principles and Article 16 of the Venice Principles, ombudsmen should have discretionary power, on their own initiative to investigate cases. In Turkey, the Ombudsman Institution is not authorized to apply to the Constitutional Court, and can act only after receiving a complaint, except for writing special reports.<sup>10</sup>

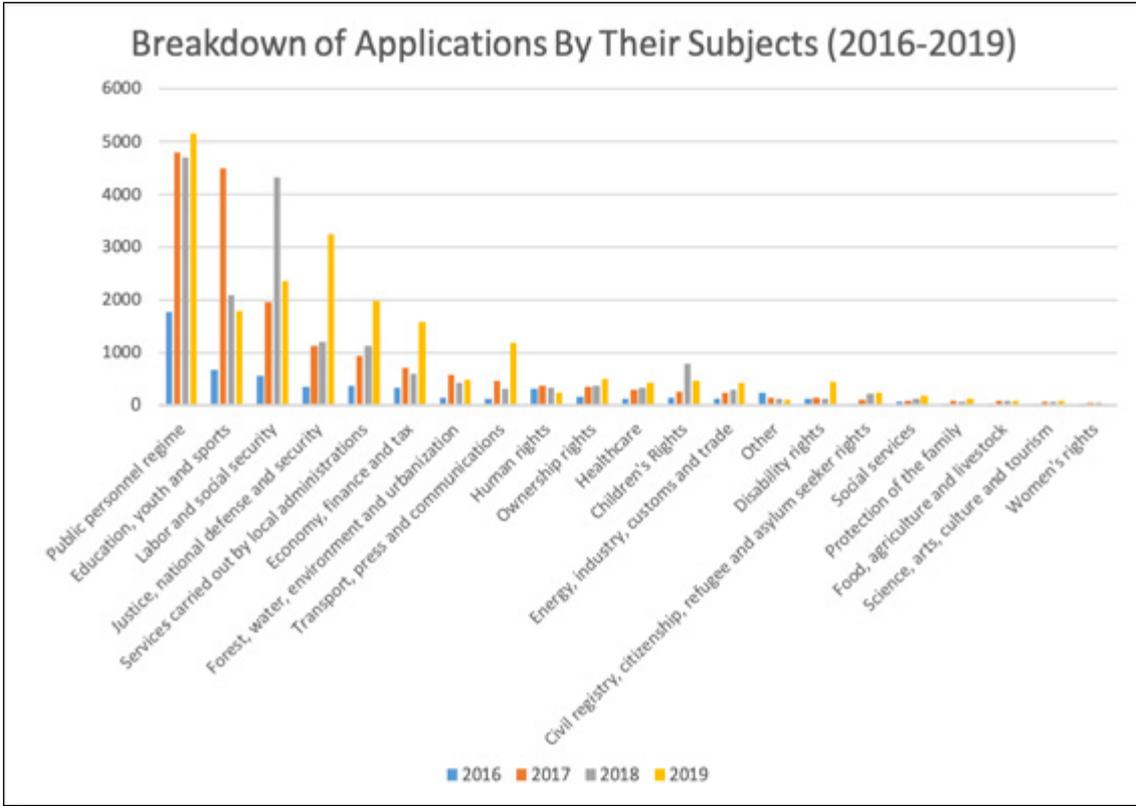
## C. INDICATORS: DECISION STATISTICS

Considering that the KDK was established more than seven years ago, an important indicator of being a national human rights institution is the subject and quality of the applications made to the Institution.

Based on the applications made in the last four years, the number of applications has increased significantly over the years, but the overwhelming majority of the applications is related to the public personnel regime, especially to appointments. These are followed by applications related to education, labor and social security, which constitute almost half of all the applications in 2019. Then there are applications from penal execution institutions, which are grouped in applications related to justice, national defense, and security.

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<sup>10</sup> At the end of the 2019 annual report, in the expectations section, the Institution requested to be authorized to apply to the Constitutional Court and to investigate cases on its own initiative.



Subject or Area of the Complaint	2016	2017	2018	2019
Public personnel regime	1759	4803	4705	5170
Education, youth and sports	669	4480	2079	1782
Labor and social security	556	1953	4319	2366
Justice, national defense and security	338	1126	1202	3250
Services carried out by local administrations	368	927	1122	1971
Economy, finance and tax	326	708	587	1568
Forest, water, environment and urbanization	120	568	427	478
Transport, press and communications	107	457	301	1188
Human rights	303	352	331	234
Ownership rights	155	341	364	493
Healthcare	110	283	313	427
Children's Rights	137	245	786	459
Energy, industry, customs and trade	111	222	274	414
Other	217	133	117	90
Disability rights	104	129	117	435
Civil registry, citizenship, refugee and asylum seeker rights	21	99	208	223
Social services	58	78	106	165
Protection of the family	17	77	59	105
Food, agriculture and livestock	20	68	78	76
Science, arts, culture and tourism	15	56	59	65
Women's rights	8	26	31	9
<b>TOTAL</b>	<b>5519</b>	<b>17131</b>	<b>17585</b>	<b>20968</b>

When the application statistics are examined by their subjects, the fact that human rights, children's rights, disability rights and women's rights are grouped under separate headings alone makes it difficult to analyze these statistics. In 2019, applications related to human rights remained at 1.12%, and those related to rights of women, children and the disability rights remained at 4.3%. It is noteworthy that the number of applications related to human rights has not followed the general increasing trend, and displayed a decreasing trend in 2019. In addition, 58% of applications made in this group are from prisoners and victims of terror and duty.

Human Rights	Number	Percentage %
Applications by prisoners	88	37,61%
Terror and active duty victims	48	20,51%
Right to vote and stand for election	35	14,96%
Right to privacy and protection of personal data	25	10,68%
Prevention of exercise of the Right to Past Information and Right to Petition	11	4,70%
Right to life	11	4,70%
Right to assembly and right to form an association	9	3,85%
Freedom of thought, conscience, and worship	3	1,28%
Other issues involving human rights	2	0,85%
Elimination of all forms of discrimination	1	0,43%
Personal liberty and security	1	0,43%
<b>Total</b>	<b>234</b>	

The majority of decisions on discrimination are related to disability rights, and an overwhelming portion of these applications is related to social benefits.

Disability Rights	Number	Percentage %
Social services and aids for persons with disabilities	305	70,11%
Other issues involving disability rights	113	25,98%
Persons with disabilities that need protection, care and assistance	10	2,30%
Discrimination against persons with disabilities	6	1,38%
Habilitation and rehabilitation services and programs	1	0,23%
<b>Total</b>	<b>435</b>	

Applications related to women's rights do not display an increasing trend, and in fact, the number of these applications has decreased. Although gender discrimination is quite prevalent and systematic in our country, nine applications were made in 2019 and only two of them were related to gender discrimination.

Women's Rights	Number	Percentage %
All forms of violence against women, honor killings, harassment and abuse	4	44,44%
Gender Discrimination	2	22,22%
Social services and assistance for women	1	11,11%
Women that need protection, care and assistance	1	11,11%
Other issues involving women's rights	1	11,11%
<b>Total</b>	<b>9</b>	



The breakdown of applications by their subjects indicates that potential applicants do not perceive the Institution as a mechanism focused on human rights. The concentration of applications in the area of public employees, and the small number of applications related to human rights suggest that the Institution is not as effective as would be expected from a national human rights institution. This also applies to the area of discrimination, and may be related to the recognition or public perception of the Institution.

Although there are some missing indicators in the statistics, when the nature of the applications filed with the Institution and those filed with the Constitutional Court and European Court of Human Rights, and the violations claimed in these applications are compared, a difference can be observed. Although the Ombudsman Institution may receive applications regarding various rights, except for the right to a fair trial, the number of applications related to property rights, right to privacy and family life, freedom of speech, right to assembly and demonstration is quite low. Considering that the applying to the Constitutional Court and the ECtHR is very costly and sometimes ineffective due to the long periods involved, it would be a much more effective way to apply to the KDK for violation decisions. It should also be taken into account that the number of cases opened in 2017 was around 815,000 according to judicial statistics and that this figure was at least 530,000 in the last seven years.

An important indicator for the institutional development of the KDK is the accessibility of its decisions. In the past, the Institution published a limited number of selected decisions on its website, but it started a search engine application in 2020. Although this is a new application, as of 31.08.2020, 2789 decisions of the Authority were accessible. However, these decisions are not all the decisions of the Institution; 1570 of them are related to applications that were filed in 2019. Only two of the applications dated 2016 are accessible through this search engine. None of the applications filed before 2016 are available on this search engine.<sup>11</sup> Of the published decisions, 1021 are recommendations, and 751 are partial recommendations.

## D. ANALYSIS OF APPLICATIONS CLAIMING DISCRIMINATION AND CERTAIN DECISIONS

In response to the information request made by AMER on this matter, the Ombudsman Institution stated as follows: *“Between 1 January 2018 and 15 July 2019, 203 applications claiming discrimination were filed. 151 of these applications were aimed at remedying the grievances resulting from discrimination based on religious belief during the 28 February process, and 127 of the applicants were women. Recommendation-decisions were issued in response to these applications, and these decisions which were made in three different groups due to differences in the situations of the administrations subject to the application as well as the applicants, are hereby attached”*. The reply of the Institution also provides as follows: *“Examination of the applications claiming discrimination reveals that 153 of them are based on religious beliefs, 23 on gender, 15 on disability, 4 on sexual orientation, 3 on political opinions, 2 on discrimination between formal education and remote education, 1 on age, 1 on ethnic origin, and 1 on ex-convictions.”*

<sup>11</sup> Still, it has been possible to access decisions made by the Institution in 2016 and published on its website. For instance, the decision on the application related to attestation of a diploma, discussed below, was accessed from the website, not through the search engine: <https://ombudsman.gov.tr/2016-yili-kararlari/index.html>

Scanning of all decisions in the database of the institution revealed that word “discrimination” was used in 93 decisions. A significant portion of these decisions have extracts from Article 6 of the Implementation Regulation related to good governance principles, or applicable legislation, or contain allegations of the applicant, and do not contain an assessment on discrimination.

Since all decisions were not published, and the breakdown of the published decisions according to their subjects makes it difficult to make an assessment on applications related to discrimination, it is not possible to make a full assessment of all decisions of the Institution on discrimination. 49 of the published decisions are related to requests for appointment; and in general, a recommendation-decision is made for applications filed because of rejection of a request for appointment for reasons of disability or for ensuring the safety of a female civil servant against violence.<sup>12</sup> Among these 49 decisions, there are many applications that are not directly related to discrimination or are not considered within this scope.

Although the reasons of discrimination are not limited, since the decisions were on applications claiming discrimination based on three reasons, the applications in relation to disability, religious belief and gender/sexual identity were examined. When selecting the decisions, previously published decisions were also examined, in addition to the decisions that are in the database of the Institution. When selecting the decisions, similar decisions were not examined separately; and the decisions that are distinctive especially in terms of the characterization of discrimination were selected.

## 1. Applications related to Discrimination Against Persons with Disabilities

The highest number of recommendation-decisions in the area of discrimination is related to discrimination made against persons with disabilities. The Institution made recommendation-decisions not only in relation to discrimination but also in relation to numerous applications filed by applicants with disabilities. Although the number of applications in the category of disability rights does not seem to be very high, an application of a person with a disability regarding taxation may be classified with applications related to financial matters, not with applications involving disability rights, and as such an application made by a civil servant with a disability can be classified with applications related to civil servants. On the contrary, an application, which has been classified together with the applications related to disability rights may be in fact related to ineffective functioning of social services. Although the Institution made many decisions in relation to applications made by applicants with disabilities, it has not conducted an examination in relation to discrimination in many of them. Since the classification is not made on the basis of rights or discrimination, it is extremely difficult to determine the actual number of applications made to the Institution related to disability rights, and it is not possible to make a quantitative analysis of the applications based on disability-based discrimination. We focused on selecting decisions that discussed discrimination, notwithstanding whether the In-

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<sup>12</sup> Request for appointment due to violence threats made by the ex-spouse 2019/17388, 29.11.2019; request for appointment of an employee with a disability 2019/15203, 20.02.2020; 2019/14966, 28.01.2020; 2019/14823, 24.02.2020; 2019/14346, 20.02.2020;



stitution had classified them in the discrimination group. Some of the decisions were related to appointment requests of civil servants with a disability, and all of them were in the form of recommendation-decision, recommending necessary arrangements to be made.

Although there were overlapping aspects of the applications related to discrimination based on disability, the applications were reviewed under four main groups. The first of these groups contains the requests for reasonable accommodation, the second for special measures, the third claims discrimination among the persons with disabilities, and the last contains requests for amendment of regulations that are discriminatory to persons with disabilities.

An early important decision of the Institution regarding discrimination based on disability is the C.G. decision regarding the failure to make reasonable accommodation in the fine arts high school entrance examination for a student with autism.<sup>13</sup>It is important that the decision emphasizes the rights of children with disabilities, refers to the General Comment No. 9 of the Committee on the Rights of the Child and the decision of the European Social Rights Committee, and that the lack of reasonable accommodation is considered as a discrimination.<sup>14</sup>Later, two more decisions were made, where lack of reasonable accommodation for university students with hearing impairment was considered as discrimination.<sup>15</sup>As such, in the decision recommending the administration to consider the request of an individual with a physical disability for extra time in the Student Selection and Placement exams, analysis of the need for extra time based on question samples may be an indication of an attitude, which is different than the attitude of the courts in proving discrimination.<sup>16</sup>Again, in the application regarding the rejection of the request of a visually impaired individual to use an electronic magnifying glass instead of receiving help from an assistant who would read the questions and mark the answers, a recommendation-decision was made on the grounds that this practice was unfair, because it was possible to take necessary precautions in terms of exam safety and to permit using an electronic magnifying glass.<sup>17</sup>

Recommendation-decisions were made in applications due to discriminatory conduct adopted in education towards students with disabilities. It is important to note that judicial review would probably not be effective for these applications in terms of standards of proof and for changing the practices of the administration. For instance, in one of its decisions, the Institution concluded that an education support room was not provided for an inclusion student in preschool education, the child was not given required education support, necessary staff was not provided, cooperation among the

13 022013/1064, 06.06.2014.

14 However, the administration did not comply with the decision and the applicant filed a lawsuit. Although the administrative court decided for a stay of execution in the case, relevant international references were not included in the decision, and no assessment was made on discrimination. 2nd Administrative Court in Mersin 29.08.2014, E.2014/324 (YD) (Not published. I would like to thank journalist Umay Aktaş, who helped me to access the decision.

15 Applications numbered 2016/4990 and 2017/384.

16 2016/1863, 28.10.2016. (<https://www.ombudsman.gov.tr/contents/files/Engelli%20Adaylara%20Ek%20S%C3%83%C2%BCre%20Verilmesi%20Talebi%20Hakk%C3%84%C2%B1nda.pdf>) Although the Council of State decided in more than one case that rejection of the request for extra time for students with dyslexia was in compliance with the law, and such decisions were referred to in the decision, the Ombudsman Institution has not adopted this approach. (Referred decisions: Decisions of the 8th Chamber of the Council of State numbered 2014/4195 Esas, 2016/3641 Karar and dated 13/04/2016, and numbered 2014/4582 Esas, 2016/3856 Karar and dated 18/04/2016)

17 2014/1275. It was stated that the act was “lawful, however, the decision was made taking into consideration the expert's detailed and reasoned opinion, national and international legislation, and the principles of right, justice and equity” There are also other decisions, where the act is considered to be lawful but national and international legislation are also taken into consideration.

special education services board, guidance and counseling centers, schools, institutions, and family was not sufficient, provision of an educational setting appropriate for the needs of the child was delayed, effectiveness of the inclusion model remained limited according to academic data and then recommended that the time that the child could not receive appropriate education should be compensated, and the family should be provided with counseling services, and problems in the inclusion program should be remedied. Although the decision does not describe the act as discriminatory, this decision can also be considered to provide a reasonable accommodation.

In an application related to accessibility, the applicant who had an accident because of the tactile surface at the metro station, which failed to comply with accessibility standards, requested the tactile surface to be improved to meet the accessibility standards, and claimed compensation of the damages suffered, the Institution concluded that material damages could not be proven, and did not award any non-pecuniary damage, and decided that the administration should apologize.<sup>18</sup> In a situation where the person suffers a bodily harm due to a discriminatory practice, even if material damages cannot be proven, the request for non-pecuniary damages should have been accepted and the amount of the damages should be deterring. The scanned decisions of the Ombudsman Institution, does not include an example, where it awarded damages due to an act or practice which is against law or equity, although the Law authorizes the Institution to recommend payment of damages.

On the other hand, in some of its decisions, the Institution erroneously described requests as a form of positive discrimination or led to victimization of persons with disabilities. For instance, when an application was made requesting an increase in the contribution of the state for preschool educational support given to a student with autism, the Institution made an accurate analysis on the positive impact and necessity of early support education for children with autism, referring to the principle of the best interest of the child, and concluded that this had to be done because of the duty to make positive discrimination, otherwise it would be against equity.<sup>19</sup> However, there is no positive discrimination here, in fact there is a demand for a regulation according to the specific situation of the person.

The Institution uses the concepts of special measures and positive discrimination synonymously in such decisions. Special measures, which are also known as temporary special measures or positive actions, constitute a broader concept than positive discrimination.<sup>20</sup> In order to talk about positive discrimination, there has to be a more direct intervention, and a situation, which creates inequality against others in order to provide de facto equality for the relevant party, however, not all special measures need to lead to an inequality. Treating individuals differently due to their different circumstances does not constitute positive discrimination. In fact measures aiming to remove obstacles in front of persons with disabilities preventing them from enjoying rights and freedoms equally are not positive discrimination, on the contrary, these measures are required to provide equality. In this respect, it should be noted that a significant portion of the applications made by persons with disabilities involve the demand for equality, not positive discrimination.

In some of its decisions on applications made by persons with disabilities requiring a special measure, the Institution made some assessments, which may lead to victimization

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18 Application no. 2018/10289, 1.7.2019.

19 Application no. 2014/4634, 2.4.2015.

20 In its general comment no.5, CEDAW Committee describes positive discrimination as a temporary measure.



of persons with disabilities as a result of a discriminatory conduct, or contain discriminatory statements. For example, the following statements were made in a recent decision: *“Persons with disabilities can be defined as specific groups who constantly face problems in the society due to their bodily functions. Situations that are very easy for normal individuals in every moment of daily life create serious problems for persons with disabilities. Persons with disabilities that start life behind normal people due to obstacles in domestic, education, employment and social settings may experience economic problems since they cannot access employment opportunities sufficiently.”* (par. 14) The definition of a person with a disability is not in compliance with the international or national legislation, and it does not fit a right-based model. On the other hand, the expression “normal individual” is in itself a discriminatory statement.<sup>21</sup> This decision, quoted above, is about the discount made by the Samsun Metropolitan Municipality on the water bills of persons with disabilities more than 40% and have an income below gross minimum wage. The applicant requested the removal of the income requirement and the Institution made a recommendation-decision. The decision provides as follows: *“...the condition imposed by the relevant administration requiring only persons with disabilities who have a monthly income lower than gross minimum wage to receive a discount, undermines the positive discrimination made for persons with disabilities.”* (Par. 18)<sup>22</sup> However, there is a legitimate and reasonable reason for imposing the income requirement for such special measure, and the just cause criterion should be evaluated when taking special measures. It is possible to take various special measures such as incentives, discounts, free of charge services for persons with disabilities to compensate the additional economic burden of their disabilities, to help them to live independently and become a part of the society, enjoy specific rights such as personal mobility, or enjoy fundamental rights and freedoms equally and effectively but it is also necessary to make a connection between the relevant measure and a specific rights, in other words an assessment based on rights. In another decision of the institution, when it comes to the right to free accommodation in Credit and Dormitories Institution’s dormitories for students with disabilities, it is on the agenda to live independently and to be included in the society and to benefit from the right to education effectively, and since students do not have an independent income, this connection can be established. This situation was expressed as follows in the decision: *“Persons with disabilities may have to incur additional economic burdens such as medical equipment expenses, personal self-care expenses, care service expenses, special transportation expenses, expenses related to adjustments for access, education support expenses, physical or psycho-social difficulties. It is also known that persons with disabilities may experience economic deprivation in daily life because of not accessing education and employment opportunities sufficiently due to prejudices and access problems. In order to eliminate these disadvantages, persons with disabilities must be supported by “special measures” or “positive discrimination” practices”* (par. 12).

The decision made on the application requesting a positive discrimination to be made by allowing students with disabilities to bring their car-keys to the exam center when entering Student Selection and Placement Center exams, is an interesting decision related to special measures. In the decision it is stated that in Turkey, certain persons with disabilities still have difficulties in accessing transportation, and this is a request for such a

21 One of the reasons of the difference in the definition of persons with disabilities in this decision is the fact that this application was classified as an application related to local administrations, and as a result was not forwarded to the ombudsman working on disability rights.

22 Application no. 2019/5273, 29.8.2019.

measure to facilitate their transportation, still it is concluded as follows: “No candidate is allowed to bring his/her car-key to the exam center, and allowing candidates with disabilities to bring their car-keys will disrupt equality against the interest of candidates without any disability, therefore it is not possible to consider this as a “positive discrimination” practice that would level the playing field.” (par 24). “ The biggest contradiction in this statement is that positive discrimination is a situation that disrupts equality and it is possible to take such special measures to eliminate inequality in transportation. Although this justification is erroneous, a correct conclusion was reached and a recommendation-decision was made to produce alternative solutions for taking measures to protect the valuable belongings of the candidates.<sup>23</sup> Indeed, choosing this method in cases where it is possible to achieve the desired goal with equal treatment instead of differential treatment has been a more convenient and proportional method in the fight against discrimination. Special measures should also be inherently a differential treatment to eliminate inequality that cannot be eliminated by any other method.

An application claiming discrimination among persons with disabilities is an important example of applications made in Turkey related to discrimination. This application claims discrimination because of a differential treatment meted out to veterans with disabilities and relatives of martyrs with disabilities and other persons with disabilities in relation to providing external prosthesis/orthosis under the Health Implementation Communiqué (SUT) and the applicable legislation. In the application filed by the Association for Monitoring Equal Rights it was claimed that there was no just reason in making a differential treatment to persons with disabilities in relation to the provision of prosthesis/orthosis that persons with orthopedic disabilities have to use for personal mobility, however, in its rejection-decision the Institution concluded that it was possible to make a differential treatment to martyrs and veterans because of their situation and in fact the constitutional obligations related to relatives of martyrs and veterans were more “comprehensive and secured” (par. 23) First of all, it should be noted that the constitutional obligation for taking special measures for relatives of martyrs and veterans or persons with disabilities, in other words the obligation to make regulations for providing equality for these persons, cannot be a justification for making regulation in favor of these persons under all conditions, and a differential treatment should have an objective justification, which will provide equality. Therefore, the criterion that should be met for making a differential treatment, notwithstanding whether it is for categories listed in the Constitution, is the existence of an objective justification. For persons with orthopedic disabilities, it is not possible to find a justification for making a distinction in the use of hands, arms or legs, while some of them have better quality of life, while some of them do not.<sup>24</sup>

In another application claiming discrimination among persons with disabilities, it is argued that granting discounts on Special Consumption Tax and Motor Vehicle Tax only to persons with a disability ratio of 90% and persons with orthopedic disabilities is a discriminatory practice. The Institution made a rejection-decision for the application arguing that: “*persons with disabilities that can drive under the same conditions with persons without disabilities are not exempted from Special Consumption Tax when purchasing cars. This approach in the law is in harmony with the logic underlying positive discrimination.*”<sup>25</sup> Indeed, there is a good reason why such tax exemptions or deductions should be granted to those who have

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23 Application no. 2019/8989, 5.2.2019.

24 Application no. 2015/5496, 27.7.2016.

25 Application no. 2016/102, 13.6.2016.



restricted mobility and cannot use public transport or need to spend money for extra equipment to use their car. However, it is not discussed whether these criteria (90% disability ratio and orthopedic disability) actually reflect this justification. For example, it should be observed that there is no criterion that takes into account the need for separate equipment for people with hearing impairment who may get a driver's license or the fact that all persons with an orthopedic disability are not in the same situation.

Another application claiming discrimination among persons with disabilities is filed against Ankara Metropolitan Municipality and is related to announcements made when a person with a disability embarks on a bus. The audible announcement is “free” for person with a disability, and “accompanying person” for the individual with the person with a disability, and it is requested to replace this announcement with a “beep” sound, as it is emitted for individuals over 65 years old. The Institution explained in its rejection decision that this practice was adopted for controlling purposes, and it had a reasonable justification and did not constitute discrimination.<sup>26</sup> On the other hand, in the decision, it was stated that “*the same outcome can be achieved by applying different methods (such as different signal sounds, lighting or information screen only to be seen by the relevant officer), therefore, it is a requirement of Good Management Principles for the Administration to make a reasonable change in the current practice in time.*” This assessment, which can be considered as a contradiction in the decision, reveals that since it would be possible to achieve the same goal with a less discriminating method, the current method that allows everyone to access this information is discriminatory. A similar matter was brought to the Council of State regarding the fact that the disability ratio persons with disabilities are written in their identity cards, and the 10th Circuit annulled the relevant Regulation provision in 2008, deciding that it could damage rights and freedoms of persons with disabilities.<sup>27</sup>

Another rare decision of the Institution on disabilities was made on an application, where the applicant was claiming that they suffered discrimination because of their son with a disability. In this decision, it was recommended that the regulation which required the applicant to provide a health report for the applicant and the applicant's relatives, and did not allow sending the applicant to a temporary assignment abroad due to the fact that the applicant's son has autism, is discriminatory and should be amended.<sup>28</sup>

## 2. Applications Claiming Discrimination Based on Religious Belief

An early application claiming discrimination based on religious belief, is related to inequality created in the examination for transition from primary education to secondary education (TEOG exam) for non-Muslim students exempted from religious culture and ethics course.<sup>29</sup> With the 2013 TEOG exam guide, the practice of asking alternative questions to students exempted from this course was terminated, and a different coefficient was applied to questions other than the questions related to the religious culture and ethics course. The Ombudsman Institution consulted measurement-assessment experts when assessing this application. In this experts report, it was determined that students exempted from the religious culture and ethics course had a disadvantage up to 10 points compared to students who received

<sup>26</sup> Application no. 2018/6851, 24.10.2018

<sup>27</sup> Council of State, 10th Chamber, E: 2005/8667, K:2008/401, 05/02/2008. The decision became final when approved by the Internal Audit Coordination Board (E. 2008/1763, K. 2012/2340, 28.11.2012).

<sup>28</sup> Application no. 2016/2289, 15.11.2016.

<sup>29</sup> Application no. 2014/3164, 2.10.2014.

87 points or higher from the questions related to this course, whereas, the result was to the disadvantage of the students who were not exempted from the course, if they received less than 87 points. The most important aspect of the decision is that it uses simulation technique to demonstrate how the outcome changes when different number of questions is answered correctly. As a result of adoption of this method, which can be an important proof in applications claiming discrimination, it was concluded that this was an unequal practice not only for non-Muslims but also for those who receive less than 87 points from questions in the religious culture and ethics course. However, in the decision, after applying the simulation, an evaluation should have been made to calculate how many people actually got 87 points from these questions. It would be possible to prove the discrimination argument against non-Muslims if the majority of students got high scores from these questions. The fact that this data has not been used is a deficiency.

The applications claiming discrimination based on religious belief are predominantly for compensation of grievances experienced because of headscarves during 28 February incidents, about which the Institution has published a special report. Although not all the applications made by victims of 28 February do not contain claims or evaluations of discrimination, in the application made by the 28 February Student Association, it was emphasized that in line with the ban on discrimination, a regulation should be made to eliminate the grievances of women applicants wearing headscarves. This application is not directly related to a specific individual, but it contains a request for making a general regulation, and a recommendation has been made to grant these victims the right to take a one-time direct oral examination in the Public Personnel Selection Examination.<sup>30</sup> Similarly, in the decision, the Higher Education Council was recommended to make a regulation for individuals who could not complete their associate degree program because of wearing a headscarf but could not benefit from the 2014 amnesty, and it was also mentioned that this practice was discriminatory.<sup>31</sup>

### 3. Applications Claiming Discrimination Based on Gender and Sexual Identity

There is a tab allocated to woman on the website of the Ombudsman Institution, however, both the number of applications and the number of decisions that were published are strikingly low. It is remarkable that the number of applications on this subject has even decreased. The Ombudsman Woman tab was created on the website of the institution and sample decisions were included. There are a total of eight decisions on the website, and all but one are related to social assistance. These figures and examples point to an important problem, especially when it is considered that the incidents of violence against women are increasing and that discriminatory attitude and hate speech against women is increasing. The joint commission frequently discussed whether the KDK could conduct an investigation if a violence incident against a woman was brought to the court. And, as stated in the meetings of the Commission on this issue, the Institution can conduct an investigation regarding the services for the protection of women from violence, even if they are brought to court. For instance, in one application, the In-

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30 Application no. 2017/403, 11.5.2018 (This was accessed through request for information)

31 Application no. 2019/7853, 1.7.2019.



stitution was asked to assist with the follow-up of legal cases, and since the Institution cannot make an investigation on judiciary power, the issue was directed to Ministry of Family and Social Policies in order to provide an effective consultancy service and the Ministry was involved in the case.<sup>32</sup> In other words, it is possible for the Institution to be effective in cases of violence. Despite this fact, the scarcity of these numbers is an important indicator for the public perception about the Institution.<sup>33</sup>

The most important application on the subject claims that the so-called “pink bus”, which is a public transport bus allocated solely for women in Malatya, is discriminatory. Özlem Tunçak, who is the only ombudswoman, stated that this practice could not be described as positive discrimination, and in fact constituted a discriminatory practice, and suggested that the Institution should make a recommendation-decision, however the Chief Ombudsman’s office made a rejection-decision. In one part of the decision, there is a reference to the following provision of the İstanbul Convention: “*Special measures that are necessary to prevent and protect women from gender-based violence shall not be considered discrimination under the terms of this Convention.*” and it is argued that this practice was adopted to “protect” woman, however, in another part of the decision, it is stated that this method was not developed to protect women from violence but to offer them a “comfortable” travel. The decision also argues that the women are not restricting from taking other vehicles or the quality of service offered to men is not decreased, and similar practices are adopted in various countries. In conclusion the application was dismissed based on such justifications. Although the decision included the expression “comfortable” travel instead of harassment and violence that women experience in transportation, the only reason why women need a different level of “comfort” than men, is the need to protect women from harassment. Anyway, just the reason for a more comfortable journey cannot be justified in terms of this situation created against men. It is argued that the reason of this practice is to protect the women against violence, however, this will lead to separation and exclusion of the victims not the offenders, and legitimize harassment, demonstrate that the state does/can not protect women from harassment sufficiently, and even increase the risk of harassment and discrimination against women who do not use these buses.

In another decision, the applicant, whose gender and name changed with a court decision, and whose civil registry records were amended accordingly, had requested a new high school diploma including the applicant’s current sex and name and duly stamped to replace the one issued on the date of graduation with the applicant’s former sex and name, however, this application was rejected by the Ombudsman Institute.<sup>34</sup> The decision refers to the Sheffield and Horsham vs. United Kingdom decision of 1998, however according to paragraph 21 of the Recommendation CM/Rec(2010)5 of the Committee of Ministers, which was issued more recently, provides as follows: “Member states should take appropriate measures to guarantee the full legal recognition of a person’s gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way; member states should also ensure, where appropriate, the corresponding recog-

32 Application no. 2016/5404. (This decision was not published; it was accessed through Ombudsman Woman tab on the website.)

33 For instance tweets posted and statements made by TİHEK Chairman Süleyman Arslan that are clearly against the İstanbul Convention, and the fact that he described divorce as terror, and statements made by the Ombudsman Şeref Malkoç indirectly mentioning a need for rediscussing the İstanbul Convention, are very important in terms of public perception.

34 Application no. 2016/278, 24.8.2016.

dition and changes by non-state actors with respect to key documents, such as educational or work certificates.” Similarly, the 2009 Council report entitled Gender Identity and Human Rights emphasized the importance of changing the name in a diploma in terms of employment.<sup>35</sup>

Since the data related to the sexual identity of the person may lead to discrimination, the presence of such data in official documents, which must be submitted, may lead to discrimination in the enjoyment of many rights and freedoms (protection of private life, right to work, etc.). In fact, later, various administrative courts cancelled similar procedures and regulations.<sup>36</sup>

When an application was filed because of the governor’s decision not to allow a pride march in İstanbul, the issue was examined entirely related to the location/route of the meeting, and no discrimination assessment was made.<sup>37</sup> However, considering that a group, which is systematically discriminated, made this application the Institution should have looked into other demonstrations that were allowed on similar routes and in similar locations to decide whether this was a discriminatory act.

Although they are few in number, it is clearly seen that the decisions of the Institution diverge from the definition and standards of international discrimination when it comes to gender-based discrimination claims. An important reason for the low number of applications may be the existence of such decisions.

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35 CommDH/IssuePaper(2009)2, <https://rm.coe.int/16806da64d>

36 For instance, a decision made by the Administrative Court in Aksaray were reported by the press, however, it has not been possible to access this decision. (<https://www.evrensel.net/haber/333771/rektorlugun-kararina-idare-mahkemesinden-iptal>) Cancellation of a similar regulation of Ege University was also reported by the press: <https://odatv4.com/turkiyede-translar-in-diplomasinda-kritik-degisiklik-27061824.html>

37 Application no. 2018/8707, 3.1.2019.



## CONCLUSION

The Institution has many more decisions in the field of discrimination compared to TİHEK. However, the basis of discrimination claimed in the applications is also an important indicator. The Institution mainly receives applications claiming discrimination based on disabilities. It is seen that the right to education is at the forefront in these applications and the number of applications for taking special measures has started to increase. In some of the decisions, the rights-based approach and description of discrimination meet international standards, however, in some of them the description of certain concepts such as disability, positive discrimination, and just cause seems to be problematic.

Decisions on discrimination based on religious belief were made for a series of applications made for grievances related to the 28 February process, and therefore, these are related to discrimination cases that are not current. On the other hand, although one would expect a high number of applications related to minority religions/sects claiming discrimination based on religious belief, there is only one application related to this issue. Discrimination claims based on gender are very limited in Turkey on the contrary to actual situation. The absence of any application or decision based on widespread discrimination grounds such as discrimination based on political opinion, sexual orientation, and age is also an important indicator. Similarly, although there are applications claiming discrimination in relation to the right to health and the right to education, especially on the basis of disability, there is a limited number of applications claiming discrimination in relation to many fundamental rights and freedoms such as the right to enter public service, freedom of expression, the right to assembly and demonstration, the right to protect private life, and trade union rights, and no recommendation-decisions have been made in relation to these rights.

There is a single application filed with the Institution claiming discrimination based on ethnicity, which was made by the Association for Monitoring Equal Rights. The application claims that making election propaganda in native language is discriminatory for individuals whose native language is not Turkish, and on 23 October 2015 TİHEK decided that this constituted a violation, whereas, the KDK informed AMER on 20 May 2016 that this application was not in its purview and therefore it could not make an investigation, but later, it has stated that inaccurate information was provided and made a recommendation-decision on 27 October 2015, referring to TİHEK decision.

It is possible to say that the Public Ombudsman Institution, which has completed its seven years now, is much more advanced than TİHEK in terms of institutionalization, know-how and specialization. The consistent increase in the number of applications and better accessibility of the decisions is also an indication of this fact. However, the number and nature of applications claiming discrimination indicate that the Institutions is not effective in the area of discrimination that would be expected from a national human rights mechanism. The scarcity of applications in the field of human rights, not only in the field of discrimination, and the subjects of existing applications are an important indicator in understanding how the public perceives the Institution. In its recommendation-decisions, the Institution recommended the administration to make a new regulation, to conduct an inquiry into the relevant matter, or to develop training programs. On the other hand, since the tendency to make a rejection-decision in compensation claims will lead individuals to go to the court, this tendency may undermine the effectiveness of the Institution as a remedy.

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NATIONAL HUMAN RIGHTS INSTITUTIONS AS  
A HUMAN RIGHTS PROTECTION MECHANISM  
**THE CASES OF THE OMBUDSMAN** and  
**HUMAN RIGHTS AND EQUALITY**  
**INSTITUTION OF TURKEY**

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