

**TRANSPOSING THE EU GENDER EQUALITY NORMS INTO  
THE TURKISH LABOUR LAW:  
WHERE DO WE STAND?**

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**ABSTRACT**

"Gender equality" emerging under the principle of equal treatment and non-discrimination in the European Community (EC) law, currently, is one of the European Union's (EU) objectives to guarantee equal opportunities and equal treatment for men and women. The EU policies on gender witnessed a long history dating back to the introduction of provisions with regard to equal opportunities policies in the founding treaties towards the acceptance of a recently and commonly agreed approach of "gender mainstreaming". This corresponds to a process of which the initial and limited aim of increasing participation of women to labour market paved the way to the adoption of gender equality perspective in all activities of the EU. Turkey, as a candidate country for full membership to the EU undertakes the obligation of transposing the EU norms of gender equality into its domestic law. This study, after providing a detailed examination of the EU *acquis communautaire* on gender equality, focuses on the relevant provisions of the Turkish Labour Law. Therefore, the emphasis will be put on the assessment of the harmonization process of national laws and practices. The paper is concluded with an analysis of some lacking points in the Turkish Labour Law. The harmonization process of Turkish laws will correspond to a period in which the gender aspect of Turkish economic and social policies will need to be integrated with those policies of the EU through a strong awareness raising of citizens and key economic and social players on gender policies.

**Keywords:** *Gender Equality, Equal Treatment, Non-discrimination, EC Law, Turkish Labour Law*

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## TRANSPOSING THE EU GENDER EQUALITY NORMS INTO THE TURKISH LABOUR LAW: WHERE DO WE STAND?

### INTRODUCTION

"Equality" as a human right, is the subject of numerous binding legal sources of the European Community (EC) Law. "Gender equality" emerging under the principle of equal treatment and non-discrimination, was initially provided within the narrow scope of the economic considerations of the internal market. Currently this concept is regarded to be one of the European Union's (EU) objectives to guarantee equal opportunities and equal treatment for men and women and to combat any forms of discrimination on grounds of sex.

Turkey, as a candidate country for full membership to the EU undertakes the obligation of transposing the EU norms of gender equality into its domestic law. In this study, firstly the *acquis communautaire* on gender equality will be analysed. Secondly, the focus will be put on the relevant provisions of the Turkish Labour Law and the assesment of the harmonization process of national laws and practices with the EC Law. This paper aims to make a contribution to the literature through the detailed examination of the gender equality provisions of the Labour Laws of both the EU and the Turkish side and the critics made in terms of some crucial missing points in the Turkish Labour Law.

### HISTORICAL BACKGROUND OF THE CONCEPT OF GENDER EQUALITY

The introduction of the concept of "gender equality" in the EC law dates back to the foundation of the European Community. Article 119 of the Treaty of Rome (now Article 141 EC) included the general principle of equal pay for men and women for equal work. The relevant Article was included in the Treaty, under the strong pressure of France<sup>1</sup>, due to the necessity of regulating the fair competition among the Member States in the internal market and preventing social dumping. The Community till the early 1970s, was rather concerned with the economic aspects of gender equality which was indeed parallel to the purpose of its integration. However, the European Court of Justice (ECJ), within *Case Defrenne*<sup>2</sup> in 1975, took the social dimension of equality one step further and, recognized the principle of equality for the first time within the

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<sup>1</sup> During the negotiations of the Treaty of Rome, France argued for the necessity of including the principle of equal pay for women and men for preventing the distortions of the fair competitiveness of the Member States in the internal market since, at that time, its domestic law already included equal pay norms. For more details see, Fredman, S. (2002). *Discrimination Law*. New York: Oxford University Press, p. 25.

<sup>2</sup> See ECJ Case C-43/75, *Defrenne v. Sabena*, [1976], ECR 455, paras. 26-28.

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status of a fundamental human right. (Barnard, 2006: 299; Schiek, 2002: 292)

During the 1970s and 1980s, the principle of gender equality was expanded to cover equal treatment for men and women workers concerning their access to employment including recruitment, promotion, vocational training, working conditions, pensions and social welfare. (Bruun, 2004: 83) In the early 1990s the shifting of the EU gender policies from a "prohibitive approach" to a "promotive" one, led to several Treaty amendments and to the creation of new secondary legislation in this field.

Currently, the EU has reached to the point of eliminating inequalities and promoting equality between men and women in all its activities, which is referred as "gender mainstreaming". The introduction of this approach was advocated strongly by the EU at the Fourth World Conference on Women (Beijing 1995). In that context the principle of "gender mainstreaming" was provided in the Beijing Platform for Action. (Arribas & Carrasco, 2003: 25) In 1996 the Commission issued a Communication on "Incorporating Equal Opportunities for Women and Men into All Community Policies and Activities" in which it introduced the definition of "gender mainstreaming".<sup>3</sup> Currently, "gender mainstreaming" is recognized as the most modern approach to "Gender Equality".<sup>4</sup> (Daly, 2005: 433)

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<sup>3</sup> "Gender mainstreaming is the integration of the gender perspective into every stage of policy processes -design, implementation, monitoring and evaluation- with a view to promoting equality between women and men." See Communication from the Commission on "Incorporating Equal Opportunities for Women and Men into All Community Policies and Activities", COM (96) 67 final, 1996. In that context, "gender mainstreaming" refers to the evaluation of the gender implications of policy making across in all EU activities. See also Millns, S. (2007). Gender Equality, Citizenship, and the EU's Constitutional Future. *European Law Journal*, Vol.13, No.2, p. 218.

<sup>4</sup> The importance of "gender mainstreaming" is also emphasized in the Commission's Framework Strategy (2001-2005). The Framework Strategy has been followed up by the Roadmap for Equality between Women and Men (2006-2011) which includes six priority areas for action: (i) Achieving equal economic independence for women and men; (ii) Enhancing reconciliation of work, private and family life; (iii) Promoting equal participation of men and women in decision-making; (iv) Eradicating gender-based violence and trafficking; (v) Eliminating gender stereotypes in society; (vi) Promoting gender equality outside the EU. See Communication from the Commission to the Council, the Parliament, the Economic and Social Committee, and the Committee of Regions, A Roadmap for Equality between Women and Men 2006-2010, {SEC (2006) 275}, COM/2006/0092 final p.7.

## **EU LEGISLATION ON GENDER EQUALITY**

### **Primary Legislation**

As mentioned earlier, Article 141 EC (ex. Article 119 EC) regulates the principle of equal pay for equal work or work of equal value.<sup>5</sup> The phrase of "work of equal value" was added into the Treaty, within the Amsterdam Treaty in light of the case law of the ECJ.<sup>6</sup> This basic provision was merely restricted to the scope of the EC employment law and social policy considerations. However, the introduction of Article 13 EC within the Treaty of Amsterdam changed this circumstance and for the first time the EC institutions -notably the Council- have been conferred the powers to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation outside the field of employment. (Masselot, 2007: 152-153) Within that provision, the general "principle of non-discrimination" was inserted into the primary legislation and it contained some additional specific grounds other than sex, such as race and religion.

The Treaty of Amsterdam introduced the equality between men and women as one of the main tasks of the EU in Article 2 of the EC Treaty. In that context, the Community is given the task of promoting this equality throughout the Community besides its other principal tasks. Under the second paragraph of Article 3 EC, the Community undertakes the aim to eliminate inequalities, and to promote equality, between men and women. With the insertion of this new paragraph to the Treaty, the principle of "gender mainstreaming" was for the first time introduced in the primary legislation. (Arribas & Carrasco, 2003: 23) Hence it becomes clear that the concept of gender equality goes a step further than the prohibition of discrimination into a broader sense of reaching and promoting gender equality. Therefore, it can be considered as an expansion of a negative obligation of the EC into a wider positive one. (Masselot, 2007: 154) This perception is also revealed within Article 141(4) EC provided by the Treaty of Amsterdam which introduces the concept of positive discrimination in the EC Treaty. The paragraph puts the emphasis on ensuring full equality in practice between men and women in working life, by stating that the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. Declaration No. 28

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<sup>5</sup> For the purpose of Article 141 EC, Equal pay without discrimination based on sex means that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement; that pay for work at time rates shall be the same for the same job.

<sup>6</sup> See ECJ Case 96/80, *Jenkins v. Kingsgate*, [1981], ECR 911.

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on Article 141(4) attached to the Treaty of Amsterdam, articulates that the Member States shall primarily aim the improvement of the situation of women in employment and occupation while adopting such measures. (Blanpain, 2006: 479) On the other hand, Article 141(3) provides for a new legal basis to adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value. Furthermore, Article 137 under the Title XI of the EC Treaty appoints the Community with the task of supporting and complementing the activities of the Member States in a limited number of fields including the equality between men and women with regard to labour market opportunities and treatment at work.

Besides the EC Treaty, the principle of equal treatment is also recognized as a fundamental social right within the Community Charter of Fundamental Social Rights for Workers adopted in 1989. Paragraph 16 of the Charter within the title of equal treatment for men and women, provides that equal treatment for men and women must be assured and equal opportunities for men and women must be developed. In that respect, action should be intensified to ensure the implementation of the principle of equality for men and women as regards, in particular, access to employment, remuneration, working conditions, social protection, education, vocational training and career development.

Principle of equality is furthermore included in the Constitutional Treaty as one of the Union's values that are common to the Member States in a society in which equality between women and men prevail. (Article I-2) However, it is criticized that gender equality is not mentioned explicitly among the Union's core values within the rhetoric of this article. (Lister, 2005: 4) Another crucial point with regard to the scope of gender equality in the Constitutional Treaty refers to the Third Pillar of the EU which is to become an integral part of Part III of the Treaty. As is known, the Third Pillar includes the area of freedom, security and justice in the EU. Therefore, in case the Constitutional Treaty becomes legally binding for the Member States, the general provisions covering the field of equality between men and women will also be implemented to issues arising under the Third Pillar as well. (Masselot, 2007: 154)

Finally Chapter III of the Charter of Fundamental Rights of the EU (annexed to the Nice Treaty 2000), is dedicated to equality. Article 20 of the Charter provides that everyone is equal before the law. In that context, any discrimination based on any grounds mentioned in Article 21 such as sex shall be prohibited. Furthermore, equality between men and women is ensured in all areas, including employment, work and pay in accordance with Article 23 of the Charter. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex. Hence, the Charter handles the issue of gender equality to the level of a fundamental right by taking into consideration its transformation from

the field of employment and social rights into that of human rights. (Massetot, 2007: 156-157) The importance of being regarded as a human right, lies in the fact that human rights standards provide wider protection both from the point of the variety of situations and from the point of range of persons. Furthermore, human rights standards benefit from special protection in case of competing interests. (Prechal, 2004: 547)

### **Secondary Legislation**

Apart from the Treaty provisions, the principle of equal treatment between men and women is also regulated by means of secondary law instruments by the European institutions particularly through Directives. The oldest one is Directive 75/117/EEC<sup>7</sup> of 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women. The Directive provides that the Member States should ensure the application of the principle of equal pay included in ex. Article 119 EC through appropriate national laws, regulations and administrative provisions. In that regard, they should abolish any discrimination arising from national legislation that is contrary to this principle.

The leading secondary instrument in this field is Directive 76/207/EEC<sup>8</sup> which was afterwards amended by Directive 2002/73/EC.<sup>9</sup> Directive 76/207/EEC was issued with the purpose of implementing the principle of equal treatment for men and women with regard to access to employment, encompassing promotion and to vocational training and with regard to working conditions and social security. Directive 2002/73/EC introduced the definitions of some new concepts regarding sex, such as direct and indirect discrimination, harassment and sexual harassment. In that respect, harassment also became a prohibited discrimination ground on sex. (Athela, 2005: 60) The Directive also provided that the Member States should take into consideration the objective of equality between men and women while formulating and implementing new national legislation, policies and activities in this area. The new provisions regarding sex discrimination in the relevant Directive determine only minimum standards on the protection against discrimination; therefore the implementation of this Directive does not lead to a reduction of the level of this protection. (Athela, 2005: 60)

In 2000, Directive 2000/78<sup>10</sup> was adopted by the Council that established a general framework for equal treatment in employment and

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<sup>7</sup> Council Directive 75/117/EEC; OJ L 45, 19.02.1975, pp.19-20.

<sup>8</sup> Council Directive 76/207/EEC; OJ L 39, 14.02.1976, pp. 40-42.

<sup>9</sup> Directive 2002/73/EC of the European Parliament and of the Council; OJ L 269; 05.10.2002, pp. 15-20.

<sup>10</sup> Council Directive 2000/78; O J 2000 L 303/16, 2.12.2000.

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occupation, which is also referred as the Framework Directive. The legal base for this Directive is aforementioned Article 13 EC. The Framework Directive covers various grounds in terms of prohibition of discrimination including sex. (Prechal, 2004: 535)

The European institutions also adopted Directive 97/80/EC<sup>11</sup> on the burden of proof in cases of discrimination based on sex. The purpose of this Directive is to ensure a higher effectiveness of the measures taken by the Member States to implement the principle of equal treatment and to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to pursue their claims by judicial process after possible recourse to other competent authorities.

It's known that the Member States keep the competence of regulating within the area of social security in accordance with their own national laws. However, the EU, intervening indirectly, required them to guarantee the principle of equal treatment for men and women with regard to the formulation of national social security schemes. In that context, Council Directive 79/7/EEC<sup>12</sup> was adopted on the progressive implementation of the principle of equal treatment for men and women in matters of social security. This Directive applied to the working population encompassing workers whose activity was interrupted (by illness, accident or unemployment), persons seeking employment, retired and invalided workers. Consequently, Directive 86/378/EEC<sup>13</sup> was issued on the implementation of the principle of equal treatment for men and women in occupational social security schemes which was amended by Directive 96/97/EC<sup>14</sup>.

The secondary sources of the EC law regarding the equal treatment of men and women also cover Directive 92/85/EEC<sup>15</sup> on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, and Directive 96/34/EC<sup>16</sup> on the framework agreement on parental leave which was concluded as the result of the social dialogue and the negotiations between the social partners UNICE, CEEP and the ETUC.<sup>17</sup> Another instrument in this field is Directive 86/613/EEC<sup>18</sup> on the application of the principle of equal treatment

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<sup>11</sup> Council Directive 97/80/EC; OJ L 14, 20.01.1998, pp. 6-8.

<sup>12</sup> Council Directive 79/7/EEC; OJ L 6, 10.01.1979, pp. 24-25.

<sup>13</sup> Council Directive 86/378/EEC; OJ L 225, 12.08.1986, pp. 40-42.

<sup>14</sup> Council Directive 96/97/EC; OJ L 46, 17.02.1997, pp. 20-24.

<sup>15</sup> Council Directive 92/85/EEC; OJ L 348, 28.11.1992, pp. 1-8.

<sup>16</sup> Council Directive 96/34/EC; OJ L 145, 19.6.1996, pp. 4-9

<sup>17</sup> Union of Industrial and Employers' Confederation of Europe (UNICE); European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP); European Trade Union Confederation (ETUC).

<sup>18</sup> Council Directive 86/613/EEC, OJ L 359, 19.12.1986.

between men and women engaged in an activity, including agriculture, in a self-employed capacity and in the protection of self-employed women during pregnancy and motherhood. Council Directive 2004/113/EC<sup>19</sup> implementing the principle of equal treatment between women and men in the access to and supply of goods and services can be regarded among the most recent secondary instruments.

The recent secondary legal instrument issued by the European institutions is Directive 2006/54/EC<sup>20</sup> on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. The emergence of significant amendments made to most of the above mentioned Directives, led to the acceptance of this Directive which aims to bring together in a single text the main provisions existing in this field as well as certain developments deriving from the case law of the ECJ. This Directive is also known as the "Recast Directive", since it was functionally provided with the purpose of improving the quality and cohesion of the EU legislation. While it is expected that the Recast Directive should have integrated all areas of gender equality, it has been criticized on the ground that it excludes some gender equality Directives concerning pregnant workers, parental leave and the self-employed and their assisting spouse in an activity including agriculture and the concept of reconciliation between work and family life. Therefore, it is questionable whether this arrangement is compatible with the EU commitment to further all aspects of equal opportunities (Masselot, 2007: 162). In that context, the Recast Directive can be regarded as a missed opportunity towards both the simplification and clarification of the law and the reconciliation of the difficult case law of the ECJ. (Burrows & Robinson, 2007: 194)

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Turkey, as a candidate country for full membership to the EU, has been under the monitoring process conducted by the European Commission with regard to bringing its national legislation into line with the *acquis* on employment and social affairs. Although the Commission noted that Turkey had made some progress in terms of the transposition of Community Law in field of labour law; the process was regarded still to be incomplete within the regular reports issued between 2000-2004. The Commission focused on the need of Turkey further to pursue its efforts notably in areas regarding labour law and specifically gender equality. The 2000 Regular Report did not mention any further transposition of the

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<sup>19</sup> Council Directive 2004/113 EC, OJ L 373/37, 21.12.2004.

<sup>20</sup> Directive 2006/54/EC of the European Parliament and of the Council, OJ L 204/23, 26.7.2006.



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EC legislation in the area of equality of treatment for women and men.<sup>21</sup> However, in the 2001 Regular Report, the preparatory work undertaken with respect to maternity leave was regarded as a development in the field of equal treatment.<sup>22</sup> Similarly to previous reports, the 2002 Report mentioned about the limited progress made in transposing the EU acquis. The Report provided that the Job Security Act, which was adopted in August 2002, included a provision regarding the burden of proof in cases of discrimination based on sex.<sup>23</sup> The 2003 Report stated that the new labour act introduced certain provisions, some of which were in line with the Directives on equal pay, equality of opportunity and burden of proof. The Report emphasized that the new law contained provisions on maternity leave and protection of pregnant workers and workers who recently gave birth or were breastfeeding which had been a positive progress.<sup>24</sup>

In October 2004, the law establishing the Directorate General for the Status of Women was adopted whose task was to strengthen the position of women in social, economic, cultural and political life. However, as provided in prior reports of the Commission, the 2005 Report reiterated that there was little progress made in terms of the transposition of legislation concerning gender equality and prohibition of discrimination on employment.<sup>25</sup> Yet, the transposition process is still regarded to be insufficient and further efforts are needed especially with regard to parental leave, equal pay, equal access to employment, burden of proof, as well as statutory and occupational social security as stated in the latest 2006 Report of the Commission which also emphasizes the necessity on the establishment of the Equality Body.<sup>26</sup>

## **Gender Equality in The Turkish Constitution**

The Turkish Constitution, as the supreme law of the country, constitutes the main source of the Turkish Labour Law. The Republic of Turkey is defined as a "social state" by the Constitution which recognizes ensuring the welfare, peace, and happiness of the individual and society; striving for the removal of political, social and economic obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by the rule of law; and providing the conditions required for the development of the individual's material and spiritual existence

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<sup>21</sup> See 2000 Regular Report From The Commission On Turkey's Progress Towards Accession, 08.11.2000.

<sup>22</sup> See 2001 Regular Report on Turkey's Progress Towards Accession, 13.11.2001.

<sup>23</sup> See 2002 Regular Report on Turkey's Progress Towards Accession, 9.10.2002.

<sup>24</sup> See 2003 Regular Report on Turkey's Progress Towards Accession, 8.11.2003.

<sup>25</sup> See Turkey 2005 Progress Report, {COM (2005) 561 final}, 9.11.2005.

<sup>26</sup> See Turkey 2006 Progress Report, {COM (2006) 649 final}, 8.11.2006.

among fundamental aims and duties of the State. Principal social rights are introduced by the Constitution as the requirements of being a social state, such as the freedom to work and to conclude contracts; the right and duty to work; the right to social security. Furthermore; the state is charged with taking the necessary measures and establishing the necessary organisations to ensure the peace and welfare of the family, especially where the protection of the mother and children is concerned; providing women the enjoyment of special protection with regard to working conditions.

Gender equality, is already guaranteed in Article 10 of the Constitution regulating the principle of equality before law. Men and women are equal as individuals without any discrimination before the law irrespective of sex, and with the amendment of May 2004 to this provision, it is also stated that men and women have equal rights and the State shall have the obligation to ensure that this equality exists in practice. In that regard, no privilege shall be granted to any individual, family, group or class. State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings.

Furthermore, the provisions of the international treaties in the area of fundamental rights and freedoms shall prevail over the domestic laws in case of a conflict caused by the differences in provisions on the same matter. (Article 90 as amended on 7 May 2004)

### **Gender Equality Norms in Labour Legislation**

The principle of equal treatment is included in Article 5 of the Turkish Labour Act (LA. No: 4857) promulgated in 2003. According to this article, sex discrimination is banned in the employment relationship, as well as any discrimination based on language, race, sex, political opinion, philosophical belief, religion or similar reasons. This arrangement was provided in order to comply with both the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) adopted by the United Nations General Assembly in 1979, and the EU Acquis as mentioned in the legal ground of the relevant Article. (Çelik, 2003: 157) However, Article 26 of the former Labour Act, (LA. No: 1475) already prohibited gender discrimination on equal pay. In Article 5(1) of the new LA, sex discrimination is banned in the employment relationship within a wider context than the former Act. Nevertheless, as mentioned earlier, Article 10 of the Turkish Constitution also guaranteed the principle of equality before law and banned any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations.

Principally, the prohibition of discrimination does not cover the period prior to the establishment of the employment relationship (access to work) since the wording of the article refers merely to the period after

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this relationship is founded although the period of access to work is included within the scope of the prohibition in the legal ground of the article. However, Article 5(3) LA provides that the employer must not make any discrimination, either directly or indirectly, against an employee in the conclusion, conditions, execution and termination of one's employment contract due to the employee's sex or maternity except for biological reasons or reasons related to the nature of the job.

According to Article 5(6) LA, in case of the violation of the above mentioned provisions, the employee may demand compensation up his (her) four months' wages plus other claims of which he (she) has been deprived during the execution or termination of the employment relationship. As it is clear, the above mentioned sanctions are not applied to the discrimination occurring within the conclusion of the contract. (Süzek, 2005: 363) Nevertheless, the doctrine holds the view of recognizing this situation within the framework of *culpa in contrahendo*; so that the employer can be held liable. (Centel, 2005: 195)

Equal pay for equal value work is guaranteed under the provision relating to the principle of equal treatment. Differential remuneration for similar jobs or for work of equal value is not permissible. The Constitution lays down the guarantee for the achievement of fair wage and imposes on the state to take the necessary measures to ensure that workers earn a fair wage commensurate with the work they perform and that they enjoy other social benefits in Article 55. In that context, Article 5(4) of the Turkish Labour Act states that lower wage can not be decided for an equal or equivalent job on the ground of sex. Moreover, the implementation of special protective provisions due to the sex of the worker does not justify the application of a lower wage (Article 5(5) LA). The By-law on Minimum Wage prohibits any discrimination to be made on grounds of sex in determining the minimum wage. (Article 5) This principle is also secured in Collective Agreements, Strikes and Lock-outs Act which provides that no stipulation shall be put into collective labour agreements that is contrary to any binding provisions of laws or secondary legislation. (Article 5)

In accordance with the sanctions for the infringement of the principles and obligations set forth in Article 5 LA, (principle of equal treatment, including the principle of equal pay), employers or employer representatives are fined to a certain amount for each worker. (Article 99(a) LA) In that respect, if the employer violates Article 5 of the LA, in terms of the execution or termination of the employment relationship, the employee may demand compensation up his (her) four months' wages plus other claims of which he (she) has been deprived. Furthermore, according to Article 18 LA related to the justification of termination with a valid reason, grounds such as sex, marital status, family responsibilities and pregnancy and absence from work during maternity leave can not be regarded as a valid reason for termination of the contracts of employees engaged for an indefinite period, employed in

establishments with thirty or more workers meeting a minimum seniority of six months. Gender discrimination in employment is subject to imprisonment or judicial fine regarding persons who make the employment of a person contingent on one of the discriminatory grounds mentioned above in accordance with Article 122 of the Turkish Penal Code.

The burden of proof with regard to the violation of the aforementioned equal treatment provision by the employer rests on the employee; if the employee shows a strong likelihood of such a violation, the burden of proof that the alleged violation has not materialised shall rest on the employer. However, the burden of proving that the termination was based on a valid reason shall rest on the employer while the burden of proof shall be on the employee if he (she) claims that the termination was based on a reason different from the one presented by the employer (Article 20 LA).

One has to note that Article 5(3) LA providing an exception to the prohibition of non discrimination with regard to biological reasons or reasons related to the nature of the job in employment relationship, is based on Article 50 of the Constitution, which expresses that no one is to be required to perform work unsuited to his age, sex, and capacity and that women shall enjoy special protection with regard to working conditions as well as minors and persons with disabilities. In terms of working conditions, men below the age of eighteen and women at any age are prohibited to be employed in underground or underwater positions such as mine galleries, cabling, sewerage and tunnel construction (Article 72 LA). In case this provision is breached, the employer or his representative shall be liable to a fine regulated under Article 104 LA. The By-law on Arduous and Dangerous Work defining the works in which women can not be asked to work and the By-law on the Working Conditions of Female Workers at Night Shifts prohibiting the working of women older than eighteen years more than seven and a half hours at night shifts, are compatible with the aforementioned arrangements of Articles 72 and 73 LA.

Regarding the maternity protection, one has also to refer to Article 41(2) of the Constitution which imposes on the State the duty of taking the necessary measures to ensure the welfare of the family notably the protection of the mother and children. As known, pregnancy, childbirth and breastfeeding are biological functions peculiar to women, and constitute part of their basic rights. Nevertheless, the reasons why women are protected during pregnancy and childbirth by the Constitution and legislation providing social and economic support for maternity, lie not only on the fact that women suffer in working life due to a biological function, or they are subject to sex discrimination in working life, but also on fact that the continuity of the family and the raising of healthy children are been given importance. (Bakırcı, 2006: 616) Furthermore, biological and sexual differences are circumstances which are not

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comparable in nature; so that the provisions derived from the need of the protection of women, health and safety measures at working environment, especially maternity protection constitute the implicit exclusions of the principle of equality. (Gören, 1991: 35) Working during maternity and nursing leave is regulated under the LA in terms of the protection of working women before and after childbirth. Article 74 LA includes the right to take leave for a total of sixteen weeks period, corresponding to eight weeks before and eight weeks after childbirth. If the female employee so wishes, she shall be granted an unpaid leave of up to six months after the expiry of the maternity leave that is not to be considered in determining the employee's one year of service for entitlement to annual leave with pay. The right to time off for antenatal examinations and breastfeeding is also secured by law. The female employee shall be granted leave with pay for periodic examinations during her pregnancy and shall be allowed a total of one and a half hour nursing leave that is to be treated as a part of daily working time in order to enable them to feed their children below the age of one. Regarding the occupational health and safety measures, the pregnant employee may be assigned to lighter duties with no reduction in her wages if deemed necessary in a physician's report (Article 74 (4) LA). It is also regulated with the By-law on Working Conditions of Pregnant or Breastfeeding Women, Breastfeeding Rooms and Child Nursing Homes in which periods and in what types of jobs the employment of pregnant and nursing women is to be prohibited, and what conditions and procedures they shall abide by while working on jobs in which they may be employed as well as how the nursing rooms and child care centers are to be established. (Published in the Official Gazette, No: 25522, dated 14 July 2004)

Concerning the dangerous effects of chemical, physical and biological agents and industrial processes which are considered as dangerous for the security and health of the pregnant workers, workers recently have given birth and breastfeeding workers, general and special measures to be taken are described in the By-law and provided that the worker shall inform her employer about the periods of the pregnancy and breastfeeding, and the employer shall assess the situation of the worker. (Article 5 of the abovementioned By-law)

Regarding reconciliation of work and family life measures; Turkish legislation is considered to be insufficient particularly on parental leave arrangements. Although a draft statute amending the Law on Civil Servants and Labour Act exists, it is not enacted yet. In that respect, the Draft Act envisages six months unpaid parental leave right for mother and father (for workers) and at most twelve months unpaid parental leave right, which may be taken in two consecutive periods for mother or father (for civil servants) in cases of birth or adoption of a child up to three years of age. ("Screening Chapter 19": 54)

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Another specific issue concerning the gender equality agenda of the EU is harassment. Although the Labour Act does not cover any explicit definitions concerning harassment and sexual harassment, those concepts are considered to be included within the scope of the Labour Act. In that context, the employee may lawfully terminate the contract without notification, in case the employer sexually harasses him/her. (Article 24 LA) Likewise, the employer may lawfully terminate the contract without notification, if the employee sexually harasses another employee. (Article 25 LA) Sexual harassment is also sanctioned with imprisonment or imposition of a fine in the Penal Code.

Equal treatment in social security field constitutes another crucial issue both within the EU and Turkish gender policies. It has to be noted initially that the right to social security is provided for everyone under Article 60 of the Constitution which imposes on the State to take the necessary measures and to establish the organisation for the provision of social security. Concerning the implementation of the principle of equal treatment for men and women in matters of social security, the Turkish social security legislation covers separate statutes on basis of types of the employment relationships that are Social Insurance Law, Social Insurance Law for Agricultural Workers, Social Insurance Law for Craftsmen, Artisans and Other Self-employed, Social Insurance Law for Self-employed at Agricultural Sector, Law on Civil Servants and Law on Pension Funds for Civil Servants and Law on Unemployment Insurance. All provisions of these statutes are in parallel with the prohibition of direct or indirect discrimination on grounds of sex on scope, access to schemes, obligation to contribute, calculation of contributions, benefits except for the retirement age, which is 58 for women and 60 for men. However, the provisions with reference to the protection of women on grounds of maternity, are reserved.

## **ASSESSMENT AND CONCLUSION**

As a candidate country to join the EU, Turkey is currently under the process of bringing its labour law legislation in line with the EU acquis on the way to full membership. Indeed, Turkey prior to its candidacy to the EU, has transposed many of the ILO Conventions (including C100 Equal Remuneration Convention, C111 Discrimination (Employment and Occupation) Convention, C118 Equality of Treatment (Social Security Convention, C158 Termination of Employment Convention) with regard to equal treatment into its domestic law since it has been an ILO member country like the many EU member countries.

The principle of equality that has been guaranteed as a fundamental right arising from the constitutional tradition of Turkey within the Constitutions of 1924, 1961 and 1982, constitutes a principal legal source of national legislation. Currently, the main problem in terms of the progress that has been achieved, lies in the fact that the mere

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transposition of the EU acquis does not bring a newly added value to the Turkish law, since most of the adopted norms already had existed in the Labour legislation. What is more important goes further than the adoption processes to the harmonisation of national laws with the EU norms. In that respect, the emphasis is required to be put on issues lacking in the Turkish labour legislation.

In 2005 Progress Report of Turkey, it has been pointed out to the limited progress made towards bringing Turkey's employment and social policies in parallel with the acquis. Furthermore, as mentioned in this study, some critics have been made with reference to the "little progress" achieved on gender equality in the labour legislation. However, in our opinion, those critics on "little progress" are far from being precise and concrete, since the lacking points in the harmonization of this field remains limited. Those lacking points this study seeks to demonstrate with regard to gender equality norms in the national legislation, are as follows.

Firstly, the scope of the labour law still remains to be limited due to the exclusion of the establishments and enterprises employing a minimum of 50 employees (50 included) where agricultural and forestry work is carried out; any construction work related to agriculture which falls within the scope of family economy; in works and handicrafts performed in the home without any outside help by members of the family or close relatives up to 3rd degree (3rd degree included); domestic services in which mostly women are employed. (Article 4 of the Labour Act)

Secondly, another important matter concerns the reconciliation of work and family life. It has to be noted that the Turkish legislation does not cover parental leave; undoubtedly, this matter derives from the division of traditional roles between women and men in family and links closely with social and cultural values of society rather than the matter of legislation. In case of the EU, the statistics reveal that parental leave is mostly used by women.<sup>27</sup> Only 7.4 % of men use parental leave in comparison to 32.6 % that of women. Still, women remain the main carers of children and other dependants. In that regard, men should be encouraged to take up family responsibilities, particularly through incentives to take parental leaves. ("Roadmap 2006-2010": 14) Measures regarding the reconciliation of family and working life in the Member States focus on strengthening the use of parental leaves through financial and social rights, providing the flexibility of the working time and the improvement of the social services related to child care. ("Commission General Report": 14-19)

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<sup>27</sup> For details see, "The EU Parental Leave Agreement and Directive Implications for National Law and Practice", European Industrial Relations Observatory Online. Retrieved June 28, 2007, from Web site: <http://www.eurofound.Europa.eu/eiro/1998/01/study/tn9801201s.htm>.

Last but not least, Turkey has been criticized on the absence of the establishment of the Equality Body. Currently, disputes arising from breaches of the principle of equality fall under the power of judiciary in the Turkish legal system. Hence, the establishment of such a body is disputable within the framework of the Constitution.

The matter goes further than the mere transposition of legislation towards the evaluation of the participation of women in labour market. The ratio of women in labour force in Turkey, is 24,8 %, with 19,3 % in urban and 33,7 % in rural areas according to the 2005 labour market statistics. 51,6 % of the employed women work in the agricultural sector (83,9 % in rural areas) while 14,6 % of them work in the industrial sector, and the 33,3 % are employed in services. In terms of their positions at work, only 14,5 % of working women are employers or business owners, while 43,9 % of them are working for a certain wage or salary, and 41,7 % of them are working as unpaid family workers deprived of social security. As mentioned in the report prepared by the Directorate General on "the Status and Problems of Women", women in Turkey are forced to choose traditional works peculiar to women which correspond mainly to the works that are less paid and with low status due to the traditional segregation and acceptance of some works as works specific to "women" or "men". In that respect, women are more likely to occupy at works that cover fixed term and part time employments that are mostly lacking of social security. Apart from those, the report mentions other difficulties faced by women at working environment such as the unfair treatment within the assignment of tasks, the dismissals of especially women during the periods of economic crisis and the maintenance of low pays in informal economies. The main reasons of the short term employment of women and their inability to demonstrate their full potential at workplace link closely with the problems arising from their responsibilities of reconciling work and family life. The report states that a new approach ensuring the share of responsibilities of child care and care of sick and elderly relatives between parents, the State, and the employer has to be accepted instead of the one imposing those responsibilities merely on women. Nevertheless, the amount of the public and private child care facilities remain at an insufficient level despite of all efforts in Turkey. ("DGSPW Report": 3)

As examined in this study, the EU policies on gender witnessed a long period starting with the introduction of equal opportunities policies through a recently accepted approach of "gender mainstreaming". The introduction of these policies correspond to a process in which the initial aim of increasing the participation of women to labour market paved the way to the adoption of the gender equality perspective in all activities of the EU. Concerning the process of harmonisation of laws from the perspective of Turkey, this will imply to the requirement of which the gender aspect of Turkish economic and social policies are to be



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integrated with those policies of the EU with a strong awareness raising of citizens and key economic and social players on gender policies.

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