

PROHIBITION OF DISCRIMINATION IN THE FIELD OF CONTRACT SPECIFIC TO SYRIANS IN TURKEY

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Abstract

The number of the Syrians who had to leave their country due to the civil war conditions since March 2011 has reached up to 4.862.778. According to the data provided by the United Nations, there are 2.814.631 Syrians in Turkey in January 2017. Not considered as “refugees” according to the Turkish regulations, Syrians are accepted in the status of “temporary protection”. Some of the Syrians within this status try to pursue their lives in the refugee centers whereas a high number of them try to continue their lives in the places other than refugee centers, under challenging conditions.

The Syrians who try to pursue their lives and meet their needs in Turkey are required to place private law contracts with Turkish citizens from time to time. Despite the general hospitality and tolerant nature of our society, it is sometimes observed that incidents of direct or indirect discrimination have occurred in the contracts made within the free economic market between Syrians and Turkish people.

The rule in Turkish private law is freedom of contract. Freedom of contract includes to conclude or not to conclude a contract, to assess the terms of contract and to choose the party of contract. No freedom of contract can violate the prohibition of discrimination. However, there is no specific arrangement related to the prohibition of discrimination in Turkish private law. Thereby, the prohibition of discrimination could be utilized regarding the general provisions in the Turkish private law. In this context, the provisions of protection of personality (TCC Article 23 etc.), provisions regarding causing loss or damage to another in an immortal manner (TCC Article 49/II) and unfair advantage should be taken into consideration. Besides this, the provisions of the Law no. 6701 on Human Rights and Equality Institution of Turkey which entered in force on April 20, 2016 can apply indirectly, if not directly. Because any discrimination in the means of race, ethnicity, religion, language etc. within all contracts including the ones entitled to private law result in administrative fines.

This paper analyzes and reviews the types of legal action which the Syrians live in Turkey may take within the contracts of private law (excluding labor law) in case of discrimination.

I. Legal Status of Syrians in Turkey

According to the latest figures of the United Nations, the war in the region has displaced almost 7.7 million Syrians internally and created more than four million refugees. The same figures indicate that, as of December 2016, there are 2.790.767 registered Syrian refugees in Turkey (United Nations Refugees Agency Data Bank, 2017). Also influenced by our historical and cultural bounds, Turkey adopted the *open door policy* towards the Syrians who reached the border and asked to enter the country, enabled their arrival and by pursuing the non-refoulement principle, welcomed all Syrians, without discrimination of religion, language, ethnicity etc. (Kaya, 2016, p. 179; Kap, 2014, p. 30). In accordance with the Law No. 6458 Law on Foreigners and International Protection; Syrians in Turkey do not meet the refugee requirements. They are under temporary protection. Temporary protection may be provided for foreigners who have been forced to leave their country, cannot return to the country that they have left, and have arrived at or crossed the borders of Turkey in a mass influx situation seeking immediate and temporary protection (Law No. 6458 Article 91/I). Temporary protection is a status which was provided for people who arrived at the borders of a country in a mass influx situation and who cannot benefit from the Convention Relating to the Status of Refugees dated 1951. It is aimed to transfer the people who had to

leave their country to safe zones and protect their basic human rights (Ergüven/Özturanlı, 2013, p. 32). A person who applies for or granted temporary protection status must provide their own accommodation (Law No. 6458, Article 95/I). However, Turkish government tries to provide all the support possible by establishing accommodation centers where the accommodation, food, healthcare, social and other needs of applicants and international protection beneficiaries are met. The Syrians whose applications for temporary protection status were approved may accommodate in the cities determined by the Directorate General of Migration Management in accordance with the Temporary Protection Regulations (Temporary Protection Regulations, Article 24). Foreigners under this Regulation may be provided with health, education, access to labor market, social assistance, interpretation and similar services. Free of charge translation services are provided in case communication with the foreigner cannot be had at the desired level in the absence of an interpreter (Regulations, Article 26-31). The Syrians under the status of temporary protection either stay in the temporary accommodation centers established by the Ministry of Internal Affairs and directed by the offices of governor or live outside the centers.

II. Issues Face by Syrians in Turkey in terms of Contract

Only a small number of the Syrians in Turkey have the opportunity to accommodate in the temporary accommodation centers established by the Ministry. By December 12, 2016, a total number of 258,333 Syrians live in 26 temporary centers founded as tent city or container city in 10 cities (Turkish Prime Ministry Disaster and Emergency Management Presidency Report – Syria, 2015). Other Syrians live in other places. The temporary accommodation centers where health, education, food, clothing, social activities and similar services are provided are regarded as the centers with the highest service quality compared to their counterparts in other regions of the world, by the International Crisis Group's report (Kaya, 2016, p. 186; Examples of Temporary Protection in Europe, 2015, p. 29; Orsam, 2014, p. 13). Nevertheless, due to the disciplinary rules and isolated life style, the temporary accommodation centers may not be preferred (Examples of Temporary Protection in Europe, 2015, p. 30). Furthermore, the individuals who illegally entered and are not registered or wish to get registered or who once lived in the temporary accommodation centers and could not adjust the conditions and left, who are in good conditions financially and prefer to live outside the accommodation centers based on personal or private reasons, who have to wait due to the limited capacity of centers and individuals who wish to live in the regions recommended by their relatives in Turkey are among the Syrians who pursue their lives outside the accommodation centers (Orsam, 2014, p. 15).

The Syrians who live outside the accommodation centers mostly accommodate in the cities near the Syria border. However, a high number of them also prefer to live in the big cities of Turkey, primarily Istanbul, Ankara and Izmir (Orsam, 2014, p. 15; Examples of Temporary Protection in Europe, 2015, p31).

The Syrians who reside in the places other than the temporary accommodation centers have to meet their daily needs, such as accommodation, food, clothing themselves. It is revealed that from time to time, the Syrians face discrimination in the contracts which they must make in order to meet daily basic life requirements (Amnesty International, 2014, p. 30). They suffer from the employment contracts by which they are paid low wages, renting inadequate or unfit dwellings by unreasonably high prices, being rejected by the landlords only because they are Syrians or especially the high market prices in the cities near the borders (Amnesty International, 2014, p. 36; Orsam, 2014, p. 16; Examples of Temporary Protection in Europe, 2015, p. 32 et al.) Furthermore, the Syrians who managed to rent a place to live usually have to share their places with a huge number of others and a significant number of them have to rent basements where they face respiratory disorder due to the high level of humidity and some do not even have a written rental agreement (Amnesty International, 2014, p. 30).

The Syrians need to make numerous private law contracts in order to pursue their living, however, they are rejected. In this context, they also have the opportunity to enjoy protective rights to avoid the discrimination in accordance with the Turkish law. In fact, in accordance with the Turkish private law, reserving the exceptional limitations within the code, every person is entitled to a vested right and

accordingly, all the persons are equal in using rights and fulfilling obligations within the legal limits regardless their race, language, religion, ethnicity etc. (Turkish Civil Code, Article 8). Likewise, the person having capacity to act may possess any right by his/her own will and may undertake any obligation thereof (Turkish Civil Code, Article 9). Being a Syrian does not play any role in the general right to make a contract and undertake any obligation within. However, the Syrians in Turkey do not take legal action in Turkey due to various reasons. Foremost among these reasons, they are not informed of their rights, they cannot speak our mother tongue fluently, and they are reluctant to take legal action because they do not feel secure of their legal status (Amnesty International, 2014, p. 31). At this point, it is to be stated that the bar associations and non-governmental organizations in Turkey have to play a more efficient role against the discriminations.

III. Freedom of Contract and Prohibition of Discrimination

Freedom of contract enables individuals to determine their legal relations in the way they wish. In this scope, freedom of contract includes freedom to enter or not to enter into a contract, freedom to choose the parties to the contract, freedom to assess the terms and form of the contract, and freedom to modify or terminate the contract (Kocayusufpaşaoğlu, 2014, p. 503; Eren, 2015, p. 300 et al.). Freedom of contract is not an absolute principle and cannot be against the prohibition of discrimination. Discrimination refers to the treatment or consideration of, or making a distinction in favor of or against, a person or thing based on the group, class, or category to which that person or thing belongs rather than on individual merit. In this context, treatment of the individuals under the same conditions differently based on their certain features or treatment of the individuals under different conditions identically despite necessity of different treatment or consideration is considered discrimination (Karan, 2012, p. 139). Prohibition of contract is significant for contract law especially based on the aspects of freedom to enter or not to enter into a contract, freedom to choose the parties to the contract, freedom to assess the terms and form of the contract, and freedom to modify or terminate the contract. Although there is no special sanction against prohibition of discrimination in the Turkish private law regulation, the individuals who are subject to discrimination may be protected by the Law no. 6701 on Human Rights and Equality Institution of Turkey and various regulations.

IV. Possible Sanctions against Discrimination

A. Protection within the Law no. 6701 on Human Rights and Equality Institution of Turkey

Law no. 6701 on Human Rights and Equality Institution of Turkey, which aimed a more efficient struggle against discrimination and secure individuals' right of equal treatment entered into force on April 20, 2016. In accordance with the Law, it is set forth that everybody can enjoy the legally vested rights. Any discrimination based on gender, race, color, language, religion, belief, sect, philosophical and political view, ethnic origin, wealth, birth, marital status, health condition, disability, and age is clearly prohibited. (Law no. 6701 Article 3/II). Within the Law, no state or private institution is allowed to discriminate against citizens who use or apply for services such as education, justice, police, health, transportation, communication, social security, social services, social aid, sports, accommodation, culture, and tourism. This provision covers the public domains and access to buildings (Law no. 6701, Article 5/I). For example, it is considered discrimination if a Syrian is not allowed to enter a public transportation vehicle or hotel, if a doctor avoids treating him/her, or he/she is not allowed into a restaurant or a shopping mall. Besides, the Law prohibits any discrimination by public institutions, professional organizations with public institution status, real persons, private law juristic persons, and others authorized by them in renting or selling movable or real estates, providing information on movables or real estates, assessing the terms or termination of a rental contract and in the process of transfer and sale (Law no. 6701, Article 5/II). No discrimination is allowed in any steps of a contract including contract negotiations, establishment of a contract, and assessment of terms of the contract, execution and termination of the contract before the contract within the contracts related to the listed service activities and publicly announced rental and sale

contracts. For example, it is prohibited to restrain a Syrian from shopping from a store. Again, it is prohibited to use the expression “Not for Syrians” in a house for rent ad. A rent contract cannot be assessed according to the tenant’s ethnicity. It is not allowed to charge him extra deposit, irrationally high rents, asking for an annual sum instead of regular monthly payments. However, to consider an act discriminative, the party must prove that all the charges or demands are put forward based on the fact that the potential tenant is Syrian. Any objective reasons to reject to enter into a contract are not considered discriminative. For example, it makes sense when a landlord who rents a two bedroom apartment does not want to rent his/her estate to the family of 10-15 people.

Different treatments due to the arrival and accommodation conditions and legal status of the people who are not citizens are not included in the scope of the law. However, this covers only the exclusive situations based on the arrival and legal conditions and legal status (Law no. 6701 Article 7/I). The issues apart from these are subject to the protection of the legal provisions of the prohibition of discrimination. Nevertheless, to be protected by the Law, the act of discrimination must be based on race, color, language, religion, belief or sect. Natural persons and legal entities can file complaints of discrimination. Applications can be made directly to the Human Rights and Equality Institution or through governors in towns and sub-governors in sub-towns. Applications are free of charge (Law no. 6701 Article 17/I). The Institution will settle complaints within 3 months following receipt of application or following decision to initiate an ex-officio investigation. This period can be extended for a maximum of 3 months by the President of the Institution (Law no. 6701 Article 18/I). The party claimed to have discriminated will be asked to submit in written form his/her testimony. Upon request, the parties can be called to make oral statements separately before the Board (Law no. 6701 Article 18/II). On its own initiative or upon request, the President of the Institution may bring victim and perpetrator to a settlement to reach a compromise. On its own initiative or upon request, the President of the Institution may bring victim and perpetrator to a settlement (Law no. 6701 Article 18/IV). Applications which are not concluded by a settlement will be submitted to the Board that is authorized to make a decision. In case of violation of prohibition of discrimination, administrative fines can be imposed by the Board (Law no. 6701 Article 25/I).

It is possible to say that Law no. 6701 is the most efficient and facilitating protection method for the Syrians in Turkey because the Institution may make a decision whether there is a violation or not, upon request or ex-officio. In this context, non-governmental organizations or third parties can also file complaints. However, the Law no. 6701 does not impose the perpetrator the obligation of making a contract. Therefore, if the contract is avoided due to the person’s ethnicity, race, color or religion or the person’s access to the required areas and buildings is prevented, the Law no. 6701 cannot offer a protection to the victim within this scope. The Law can only impose administrative fines on the perpetrator. The obligation to make a contract is only possible when there is a case of an assault on his/her personal rights and a legal demand to an action for prevention of assault (Turkish Civil Code, Article 25/I) or in case a person, by his faulty and unlawful behavior, causes damage to another and obliged to provide compensation (Turkish Code of Obligations, Article 49/II). It is required to file a lawsuit in court for the both cases.

B. Protection within the Provisions to Protect Personality

In all relations of contract, if there is a discrimination in the process of contract negotiations, conclusion of the contract, assessing the terms of the contract, execution and termination of contract or there is a case of rejection of starting contract negotiations or prevention of access to the building or area where the contract is to be made, a person can enjoy the protective provisions of the Turkish Civil Code (Turkish Civil Code, Article 24-25). The party who suffers from an assault to his/her personality due to discrimination may demand from the judge to take an action for prevention of assault, elimination of such threat and determination of unlawful consequences of the assault (Turkish Civil Code, Article 25/I). The discrimination against the Syrians in Turkey based on race, religion, language, ethnicity, color and sect can be considered a personal right infringement. To reject a person’s request to conclude an contract

solely based on the person's specific feature which is not sine qua non within the contract or related to the subject and scope of the contract, is a personal right infringement (Ayrancı, 2003, p. 246). To claim a personal right infringement, the identity of the addressee must be clear. The scope of the provision as a person covers all natural persons including Syrians. Within the provisions to protect personality, the victim may ask to conclude a contract (Kocayusufpaşaoğlu, 2014, p. 509-510; Schmidt-Räntsch, 2007, p. 16). It is not important if the person who has been discriminated can provide the good and service by other channels or not (Kocayusufpaşaoğlu, 2014, p. 509). However, if it is no more possible to discharge of conventional obligations, the person cannot demand to make a contract and has to settle by compensation (Kocayusufpaşaoğlu, 2014, p. 513). For example, in a rental contract, if the rented estate bears the quality of a nonfungible good and has been rented to another person, it is not possible to demand to conclude a contract.

Within an action to order that an existing infringement ceases, the victim may ask the consequences of the transaction or the act which consists of discrimination to be rearranged in a way that it no more leads to an infringement on personality, such as adjusting the consideration decided within the contract, modification of the terms of the contract or termination of the contract, based on the aspects of the discrimination. For example, if a Syrian who was charged annual rental value, instead of monthly payments files a claim to bring an action to order that an existing infringement cease and the judge decided that the infringement is a violation of personal rights, the perpetrator will have to return the deferred liabilities or the overcharged deposit. Likewise, if an unfit dwelling whose condition threatens human health is rented to the Syrians, the landlord will be responsible for the defective good. There is no way the liability of the landlord is discharged just because the tenant approved the contract in its poor condition. The non-liability contract must be considered invalid based on the personality protection provisions if the defectiveness causes a serious threat to the health of the tenant or the people who live with him/her (Zevkliler/Gökyayla, 2014, p. 265). Furthermore, the person who is discriminated may claim for damages depending upon the fault of the person who refuses to conclude a contract (Turkish Civil Code, Article 25/III).

C. Protection within the Provisions of Tort

According to Turkish Code of Obligations, Article 49/II a person who wilfully causes loss or damage to another in an immoral manner is likewise obliged to provide compensation (Kocayusufpaşaoğlu, 2014, p. 510. Ayrancı, 2003, p. 246). The judge may decide that the damages are to be paid in specie or in cash (Turkish Code of Obligations, Article 51/II). A person, who suffered loss because of the discrimination of a person in an immoral manner in the process of pre contract and establishment of the contract, has right to indemnity (Naturalrestitution) (Eren, 2015, p. 306-307; Ayrancı, 2003, p. 248). If the person who suffered loss still wishes to make a contract with the person who acted in an immoral manner, the judge may decide that the contract will be concluded by the parties within the compensation in kind principle. For example; if a person was not accepted in a hotel just because he/she is Syrian, the hotel owner's apology will not be sufficient, compensation in kind will be provided when the victim is served in the way the other customers of hotel are (Schmidt-Räntsch, 2007, p. 15).

D. Other Opportunities Inflicted by Contract Law

1. Protection within Unfair Advantage Provisions

In Turkish law, as a rule, the parties can decide on the acts which are subject to the obligations and assessment of the contract in the way they wish. In principal, it is not possible to interfere in the consideration which has been determined by the parties within the contracts in which the act of one party forms the value. Exceptionally, it is possible to change the consideration by the decision of the judge within the contracts in which the parties are obliged. One of the exceptional cases is the unfair advantage provisions in the Turkish Code of Obligations (Turkish Code of Obligations, Article 28). To talk about an unfair advantage, there should be a clear discrepancy between performance and consideration and this discrepancy must be created because of the person's thoughtlessness, inexperience or the straitened circumstances and the perpetrator must have taken the advantage of weak condition of the other party

knowingly and on purpose (Kocayusufpaşaoğlu, 2014, p. 483 et al.). Thanks to the unfair advantage provisions, the injured party will not honor the contract and demand restitution of any performance already made. It is known that the Syrians in Turkey face the risk of being harmed especially in the employment and rental contracts due to their difficult situation, thoughtlessness or inexperience (Amnesty International, 2014, p. 36; Orsam, 2014, p. 16; Examples of Temporary Protection in Europe, 2015, p. 32 et al.). They are under the risk of being exploited since they do not speak Turkish, know a little about the market prices or they have to meet their daily needs and find housing and they are forced to accept the offers without considering enough. Occasionally, the terms of the contract and especially the price are determined based on the fact that the other party is Syrian so that they have to work on very low wage or pay rents much over the market price. Under such conditions, the injured party may demand restitution of any performance already made or ask for the elimination of discrepancy based on the contract (Kocayusufpaşaoğlu, 2014, p. 497-498). Moreover, the injured party who terminated the contract may ask for damages in accordance with the *culpa in contrahendo* provisions or the injured party who has not terminated the contract although the period of prescription was over and still did not perform an obligation may ask for the removal of the unfair advantage when the obligation is demanded (Kocayusufpaşaoğlu, 2014, p. 498). Within this context, the person who was discriminated has a right to use the right within the five years after the conclusion of the contract in every situation and one year after he/she found out the result of his/her thoughtlessness and inexperience and the situation perished (Turkish Code of Obligations, Article 28/II).

2. Obligation to Contract within Consumer Transactions

According to Consumer Protection Law No. 6502 goods that are unrolled on a showcase, shelf, electronic media or any other clear visible place may not be avoided from selling unless there is a clear statement that those are not for sale (Consumer Protection Law No. 6502 Art. 6/I)and it cannot be avoided to provide service without a legitimate cause (Consumer Protection Law No. 6502 Art. 6/II). This provision applies only based on the consumer transactions. In other words, prohibition of abstain from sale and providing service will only find a field of practice within the contracts where the trader or supplier acts on commercial or occupational purposes and the consumer does not act on commercial or occupational purposes. For the obligation to contract within consumer transaction, publicly promised remuneration is not required (Kocayusufpaşaoğlu, 2014, p. 523). To be considered a consumer, it is not important if the transaction party is Syrian or not. The law accepts everyone as a consumer who fits the description. Therefore, people who publicly announce their goods or services on commercial or occupational purposes are required to make a contract with the parties who are qualified as a consumer. An action of performance can be filed for the person who does not want to make a contract in order to force him/her to make one. Nonetheless, the trader and supplier may avoid a contract due to a reason other than discrimination. An administrative fine for the contract or each transaction may be imposed on the ones who violate this and refuse to provide service or sell goods (Turkish Consumer Protection Act, Article 77). The injured party's right to ask for an administrative sanction punishment in accordance with the Law No 6701 is also reserved.

3. Conclusion of a Contract within the Display of Merchandise with an Indication of its Price

The sending of tariffs, price lists and the like does not constitute an offer. By contrast, the display of merchandise with an indication of its price does generally constitute an offer (Turkish Code of Obligations, Article 8/II). According to this, when the buyer accepts the offer, the contract is concluded and obligation to contract is naturally beside the point (İnceoğlu, 2000, p. 412). In this situation, the discriminated person may ask the other party to perform an obligation based on the provisions of the contract after the offer was accepted (Turkish Code of Obligations, Article 112 et al.). However, if the injured person is a consumer, he/she can apply to the Human Rights and Equity Institution of Turkey in accordance with the Turkish Consumer Protection Act, Article 77/I and Law No. 6701 for asking administrative sanction on the person

who refuses to perform the obligation due to the discrimination. For example; if the trader refuses the deliver a good in a grocery store where its price is indicated, the victim may both ask for the delivery of the good based on the concept of performing an obligation and apply to the Institution due to the discrimination. The act may also result in infliction of an administrative fine sanction in accordance with the Turkish Consumer Protection Act, Article 77/I. However, in the cases of the service presentations other than product display, the contract is not considered concluded by the approval of the person who wishes to benefit from the service (Kocayusufpaşaoğlu, 2014, p. 189; Eren, 2015, p. 249) Then, the provider may be obliged to a contract with the victim based on the infringement on the personality rights and loss or damage caused by an immoral manner.

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