Physical and Non-Physical Obstacles on the Way: Non-discrimination in Health Services in Turkey

Aslı Arda¹*, Berna Arda²

¹MPH Law, LLM, University of Exeter, UK; Attorney, Bar of Ankara, Turkey; ²MD, Med Spec, PhD; Ankara University School of Medicine, Turkey.

Abstract

Turkey, conformably with the dynamic and up-to-date nature of the Turkish law, has a comprehensive legislation on health services. However, having a broad legislation on a subject matter does not necessarily indicate that the implementation of such legislation is flawless. This article will essentially give weight to the legislation on health care in Turkey and an examination of discrimination on accessing health services mainly based on sexual orientation, gender and governmental policies.

Keywords: health services, discrimination, non-discrimination, medical law, medical ethics

LEGISLATION IN TURKEY: BROAD BUT SUFFICIENT?

Following the establishment of the Turkish Republic in 1923, the whole legal system was converted from Ottoman sharia system to a secular structure. This approach is observed both in the establishment laws of the Republic and in the legal arrangements particularly made for medical areas and health.


First of all, according to the current 1982 Constitution, as the third one after 1924 and 1961, Art.17 [1]: ‘everyone has the right to life and the right to protect and develop his or her material and spiritual entity. The physical integrity of the individual shall not be violated except in the case of medical necessity and in cases prescribed by laws and shall not be
subjected to scientific or medical experiments without his or her consent.’ With the amendment in 2004, an additional part was inserted into the Constitution.

Turkish Criminal Code Art.90 [2] ‘stipulates conduct of research on condition such as not violating human well-being and dignity.’ Turkish Civil Code Art.23 [3] “Nobody can give up her his/her legal capacity to have rights even partially. Nobody can give up his/her freedoms or limit them in a way against law or morals. On written consent it is possible to get, inoculate and transplant human-originated biological materials. However, those who owe biological materials cannot be required to meet their act; any material or spiritual compensation cannot be required from them”.

Also, according to Art.24 “Somebody, whose right to personality has been attacked in a way against law, can require protection from judge against those who have committed offense. Unless consent of the person, whose right to personality has been injured, is justified with one of the reasons of the existence of a superior private or public benefit or usage of authorization given the public, any kind of offense committed against rights to personality is illegitimate.

Last but not least, Patients’ Rights Regulation Art.32 [4] indicates ‘the interest of the subject, concerning the living and the physical entity of the individual, should be considered above other concerns such as medical benefits expected from the research or societal interests and obtaining patients’ consent prior to medical applications and medical researches.’ It is questionable if the article is sufficient in providing a clear definition. As long as the terms such as ‘interest of the subject, other concerns, medical benefits and societal interests’ do not defined explicitly, the implementation of the Art.32 would stay inefficient and the regulation would be open to exploitation.

According to the principles of the indicated regulation, Art.5 states that, it must to be regarded in every stage of the providing of the health service that, the right of living in a total well-being in physical, mental and social aspects is the most fundamental human right. Furthermore, race, language, religion, gender, political views, philosophical thoughts and economical and social statues or another differences would not be regarded during the provide of the health services. Also, health services must be planned and regulated in properly that everyone can reach easily.

Moreover, Art.44 and the following articles of the same regulation govern the liability of the government officers/officials and other public servants. According to the regulation, the personnel who prevents the de facto exercise of the patients’ rights or violate those rights in another way, shall be liable for punitive, fiscal and disciplinary sanctions. However, legal liability of the government officers/officials and other public servants does not come into existence following a direct lawsuit against them as an individual person. According to the Art.40 and Art.129 of the Constitution, Government Officers Act Art.13 and other regulations, for the legal liability of the government officers/officials and other public servants to become exist, such actions first must be brought against the government. As to the judgement in such a lawsuit it shall be determined whether the government officer/official or other public servant have legal responsibility. Even though burden of compensation falls on the government, after the payment of reimbursement in such cases, government has the right to recourse to the government official/officer conformably with the proportion of the harm given by him.

In the light of all this background information, it is evident that Turkey has a comprehensive legislation. However, the impacts of the physical and non-physical obstacles on the way of non-discrimination in daily medical practices can clearly be seen.

How the regulation in Turkey can be evaluated in a right sense? Firstly, it can be evidently argued that, vague terms such as ‘prevention of de facto exercise of the patients’ rights’ or ‘violation of such rights in another way’ are way too far from providing a clear definition.
Regarding the regulation’s nature on governing the patients’ rights, the initial and most crucial issue here must be to govern ‘how to access them.’ Although considering a Regulation’s characteristics is largely based on the procedural law, a Regulation which fails to provide a clear definition for terms such as ‘de facto exercise of patients’ rights’ and ‘violation of such rights in another way’ considering the accessibility must be the first aim to achieve.

Furthermore, in the authors’ opinion, the term ‘prevention’ deserves to be explained. The term, prevention, can exist in so many ways. As it can be clearly seen in Turkey, sexual orientation, gender and governmental policies play a huge role in discrimination on the access of health services. So, it can be evidently argued that, the prevention may not be a physical one.

**EXPLICIT ISSUES WHICH TURKISH REGULATION FAIL TO PROVIDE DEFINITE SOLUTIONS**

Turkey has a well-structured and comprehensive law in terms of the accessibility of health services. On the other hand, there are so many factors, which deeply effect the application of the law. For instance, governmental policies in an undeniable way, have a considerable influence on the practice in Turkey. As the exhibits of such effect are time to time become visible clearly, the following chapter will focus on firstly the regulation in Turkey in terms of termination of pregnancy. Secondly, LGBT rights and accessibility of health services will be examined. Last but not least, the third chapter will evaluate that what Gezi Protest in 2013 changed in Turkey in terms of accessibility to health services and the position of the medical personnel.

**Legal Regulation on Termination of Pregnancy and Current Situation**

Abortion in Turkey was legalized in 1983 to decrease the high number of women dying from risky, self-induced terminations. According to the Turkish Medical Association (TMA) Women’s Health Branch, only 2% of pregnancy-related deaths are the result of unsafe abortion methods today, while the number stood at 50% in the 1950s [5].

In Turkey, family planning and discretionary evacuation of uterus legislation is regulated by the Population Planning Act [6] and the relevant regulations. Concerned legislation is supported and secured initially by Art.56 of the Constitution, which puts ‘Right to Health’ into words, followed by relevant international conventions, national legal regulations and ethical declarations. In this context, regulations such as Council of Europe Convention on Human Rights and Biomedicine 1997 [7], World Medical Association (WMA) Declaration of Lisbon on the Rights of the Patient 1981 [8] and Regulation on Patients’ Rights 1998 put forward that health services must be conducted considering the principle of respect to human rights and dignity and obliged the government to provide relevant services.

According to the current regulation in Turkey, abortion in unwanted pregnancies is legal up to 10 weeks. Population Planning Act Art.5 regulates that, unless there is a medical inconvenience relevant to the mother’s health, until the expiration of the tenth week of pregnancy, uterus may be evacuated on request. Furthermore, Art.5 also states the situations compatible for evacuation if the 10 weeks time bar has been passed. According to the relevant regulation, whether the mother’s life has been or would be threatened by the pregnancy or if the pregnancy would cause the unborn and the following generations to face serious disability, evacuation is possible after the first 10 weeks of pregnancy. As it can be seen, the regulation neither seek for a further requirement nor explanation on the mother’s side nor request any coherent affirmance from a third party.
In 2012, a draft law proposed by the Justice and Development Party (AKP) government, intended to introduce the right for doctors to refuse performing a termination of pregnancy operation in terms of their conscience. Furthermore, draft was also aiming to bring a compulsory ‘consideration time’ for women requesting the abortion. The bill, which evidently far from reflecting the contemporary mind, was not signed and consequently dropped. However, the broad influence of the draft law across the country was beyond dispute. After the draft has dropped, the number of public hospitals refusing to perform abortion increased excessively and accessibility of contraception methods prevented explicitly. Furthermore, as from the statement of Ministry of Health including ‘instead of family planning services, more weight will be given to reproductive health’ in 2007 [9], free supply of modern contraception methods to public has been held back consciously. Additionally, almost all of the contraception methods are being used by women and even the protection methods for men are being told to the women. In this point, termination of a pregnancy can be considered as a price only woman pays when the accessibility of the partners to contraception methods cannot be carried out.

It can clearly be seen that government has a lot to say when it comes to women, pregnancy and contraception methods. Furthermore, it is not unknown that Turkish government has a solid stance against the abortion. The selection of words relevant to abortion such as ‘murder’ that the President, creates an extremely terrifying and intimidating atmosphere. Also, it is known that for years, at every turn, he urged couples to have at least three children. Women were increasingly made to feel guilty and ashamed of the idea of abortion as a result of such inflammatory speeches and men started to consider their partner as a sexual object who has no saying on a termination of pregnancy. Furthermore, some public hospitals introduced a messaging system, which informs fathers about the pregnancies of their unmarried daughters. Besides being explicitly against The Constitution Art.20 ‘Privacy of Private Life’ [10] such absolute-inadmissible application was adding a great deal of pressure on women and abolished in a heartbeat after this scandal has been heard on media.

As to the current situation, Turkey has a comprehensive and clear legislation on termination of unwanted pregnancy, which is coherent with international conventions and regulations. However, it is undeniable that the draft law in 2012 has changed the application in everyday life. It cannot be said that there is a physical obstruction from the side of the law but on the other hand, government’s solid stance and Presidential wrongful inflammatory speeches, which are clearly violating women rights, have changed the attitudes of many doctors and health staff. In other words ‘what we now have is a de facto abortion ban’ [11]. Furthermore, it must be bear in mind that attempts on creating obstructive regulations on abortion will not put an end to the everyday life practice of it, but most likely will only increase the number of women dying from risky, self-induced terminations as it has been in the 1950s.

**LGBT Rights and Accessibility of Health Services**

In Turkey, there is an obvious positive escalation relevant to the protection and development of LGBT rights. From day to day, much more people understand the cruciality of providing an equal environment and lastly, Gelincik Project of the Bar of Ankara, which is an organisation providing pro bono consultancy and legal support to women and children, who are domestic violence victims, expressly announced that individuals of LGBT community will be more than welcomed for such protection [12]. Needless to say that, such applications have not been turned down by the Bar before the relevant announcement, but when it comes
to a delicate issue like LGBT rights, explicit statements would evidently increase the number of applications and help the Bar to develop its practice on LGBT rights. On the other hand, it must be taken into consideration that Bars of Turkey are independent associations and constitutes Union of Turkish Bars Associations [13], which is also an independent organisation. It can be understood that, Bars’ regulations and actions relevant to the protection of LGBT rights do not reflect the opinion on the side of the government. As long as the government refuses to take necessary steps for the formation of a regulation, which provides equal protection for LGBT community and brings influential sanctions against the perpetrator of the hateful crime, the efforts of independent organisations will be effective restrictedly.

Furthermore, besides the violence LGBT individuals may encounter to in their everyday lives, it is also still not possible to mention about an ensured and equal health care system for the LGBT community. Firstly, since LGBT individuals have a higher risk to be stigmatized in society, sociological reality is one of the factors, which limit the accessibility to health services [14]. Such limitation might be considered as an endogenous one. Even in the first place, socially stigmatized individual may be timid of to be found in a health facility which probably full of people from different economical and cultural statutes, most likely to be look up and down to the stigmatized individual. The individuals mostly get disturbed and harrested relevant to their appearance. Secondly, because of the discrimination LGBT individuals face to in society, they pushed out of registered employment system so they have been wave aside the social security. Individuals, who find it hard to find jobs, have been supplied to labour market as low-priced and unregistered workers. As a result of the discrimination encountered within society and labour market, LGBT individuals are easily or out of necessity head towards to become a sex worker and the health risk they face increase infinitely in comparison with average individuals.

Furthermore, acts of discrimination might not only come from other patients but time to time also from health staff and doctors on duty at the health facility. Unfortunately, sometimes we still hear some doctors refusing to hospitalize or give physical examination to a LGBT individual. In a recent event, a doctor refused to examine a female patient, who recently had a sex reassignment surgery and needed medicine, also rejected to write a prescription on the basis of ‘not approving her situation’[15]. Unfortunately the examples may vary. Such discriminatory attitude might be exhibit by the doctors and health personnel, who do not internalize human rights and ethical values. Indicated attitude may lead to delay on treatments and might cause irrecoverable conditions.

Gezi: Medicine Cannot be Put on Trial

The moderate Islamist oriented Justice and Development Party (AKP) came to the power in 2002 and since then an evident authoritarian approach has been adopted to suppress the opposition. AKP, with an explicit disregard of environmental preservation and protection, granted numerous unlawful construction permits, which led to the destruction of incalculable protected historical and natural areas and buildings. When such permits were not granted by some reasons, suspicious sourced fires were occurred and such permits were given under the guise of renovation. One of the recent examples of this obviously unlawful situation can be seen in the event of fire in the historical Haydarpaşa train station in November 2010 [16]. After the fire, applications for a renovation licence were made and the Mayor of Kadıköy, defined Haydarpaşa train station as a ‘cultural facility, tourism and accommodation area’ [17]. De facto, the possible formation of the beautiful and historical Haydarpaşa station into a hotel was expressed by The Mayor. Furthermore, the Supreme Court of Appeal on August 20, 2015, The Court reversed the judgement on appeal and decided that 10 months
imprisonment of the defendants was excessive even though the crime was committed against a historical building [18]. The Turkish Criminal Code regulates that, in the commitment of qualified form of damage to a property, which includes damaging buildings or premises allocated to public service or places used for public interest, the offender will be punished with imprisonment from one year to six years [19]. The constant unlawful approach of the courts in terms of the damages occurred in the historical premises and buildings, which are generally end up turning into a hotel or a shopping mall under a renovation licence received by persons or entities close to the government, explicitly impaired the trust in the legal system. In spite of the legal protests, the key historical buildings and public premises have been destroyed, such as the Ottoman-era ‘İnci’ pastry shop and the old beloved ‘Emek’ cinema in favour of malls or mosques [20].

On May 31, 2013 a peaceful demonstration started in Istanbul, Taksim Square against the government’s plan to demolish the last remaining green area in the region, Gezi Park, to replace the park with a shopping mall housed in a replica Ottoman-era army barrack, which was a renovation project pushed through without public consultation [21]. The peaceful sit-in protest spread nationwide and transformed into an anti-governmental movement as the news on the social media of police burning the protesters’ tents [22] at the middle of the night and attacking the demonstrators with tear gas, plastic bullets and water cannons. The communication was provided on social media as a result of the wide censorship in the mainstream media as one of which of the mainstream companies for instance, preferred showing a documentary on penguins rather than covering the protests [23].

Among winking at the extreme violence of the police forces with civilian brutality, emergency medical aid has tried to be prevented physically by the police forces. It was rare that the access of the ambulances to the protest areas and gas capsules were being fired deliberately to the first aid stations [24] (tents, cafes, restaurants etc. with volunteer doctors and medical students). The injuries that the medical personnel came across were especially depressed fractures to the skull and thoracic injuries from shooting of gas capsules from close range [25], extradural haematoma and as it could evidently be seen that, they were serious injuries, which had the risk of death. The immediate medical aid during the Gezi, undoubtedly saved so many lives as a result of the volunteer work of brave doctors and medical students, who in fact were targeted by the police and worked in almost war-like conditions. Numerous of medical personnel have been arrested by the police, solely because they were providing first aid to the people in need, which was a matter of life and death in such conditions.

Among the physical prevention of the first aid services by the police, also a serious psychological pressure was created on the medical personnel. For instance, high level decision makers have repeatedly alleged that the protesters were entered a mosque with their shoes on and were consuming alcoholic beverages inside, which in fact the injured protesters were taken shelter and tried to be treated by medical volunteers in hard conditions. The ‘muezzin’, who denied claims that protesters were consuming alcohol or behaving inappropriately inside the mosque, where he worked, has discharged from his work and questioned by the Istanbul Police Department’s anti-terrorism unit [26]. In other words, a smear campaign against the volunteer medical personnel has tried to be formed and anyone, who obstructs the way was removed, even the muezzins, apparently.

Furthermore, a controversial law, which requires prior authorisation from the Ministry of Health in order to provide medical assistance has been brought to create intimidation in terms of volunteer medical personnel. The law suggested that the offender would be punished with imprisonment up to 3 years and a fine about US $1 million [27]. The doctors and medical personnel, who worked as volunteers at Gezi, have seen as ‘favouring’ criminals and some personnel faced lawsuits. Furthermore, Ministry of Health field a lawsuit against the Turkish
Medical Association requiring the Association to turn over the names of all volunteer medical personnel and their patients [28]. TMA, indeed, refused the share the names of any medical volunteers or any patients. Evidently, it is the duty of Ministry of Health to provide the necessary health services in the case of such protests, which evidently the police forces use excessive force. On the other hand, as the protests had a nationwide and anti-governmental character, the Ministry deliberately avoided to make the services available. So, TMA and members of every chamber of medicine from every city, felt the humanitarian duty as doctors to provide it.

Furthermore, Art.98 of the Turkish Criminal Code requires all Turkish citizens to ‘help a person who cannot manage his/herself due to age, illness or injury or whatever other reason within the situational context and to inform the relevant authorities of the situation.’ If anyone does not help or bring attention to the person in this circumstance, he or she ‘shall be punished by imprisonment of up to one years or a monetary fine.’ As it can be seen, there is an obvious absence of sense and unlawfulness as even the ordinary citizens are being legally required to help the ill or the injured, criminalization of physicians, whose ethical obligation is to treat the injured and ill, specifically in large-scale situations without satisfactory health services [29], can be considered nothing but absurd.

Indeed, the reason of existence of a governmental body on health should be to provide adequate health services to all of the citizens at the first place, disregarding the gender, political view, ethnicity, age or religious beliefs. Thus, the liability of the authorised bodies in terms of occurred injuries and deaths in an anti-governmental protest cannot be separated from the general responsibilities. It should not have any right to avoid providing health services to the people solely because they form an opposition to the government.

Unfortunately, considering the bombing in Ankara on October 10, 2015, it can be seen that the governmental bodies have not taken any lessons from the Gezi protests and not entirely felt the sorrow for the young lives, which had lost as a result of excessive police force. Two explosions were occurred in front of the main train station of Ankara during a peace rally and at least 99 people were killed [30]. After the attack, protesters have clashed with the police, as the police forces were blocking a road being used by the ambulances [31]. In addition, meanwhile the volunteers and the members of TMA were trying to help and carry the injured away, police fired tear gas [32]. Unfortunately, the government was and is showing lack of sense in terms of ordering the priorities, as currently providing the civil authority seems the ultimate goal for the government’s part (October 16th 2015).

ACKNOWLEDGEMENTS
This article is mainly based on a presentation in the 20th World Congress on Medical Law. Arda B, Arda A: Nondiscrimination in Health Care and Ethics; A Glance to Turkish Legislation in the Light of Unesco Universal Declaration on Bioethics and Human Rights, oral presentation, WAML 20th World Congress on Medical Law, Bali- Indonesia, 21-24 August 2014.

REFERENCES
2. Turkish Criminal Code; 2004, No 5237.
3. Turkish Civil Code; 2001, No 4721.


10. *Constitution of The Republic of Turkey;* 1982, No 2709, Art 20 ‘Everyone has the right to demand respect for his/her private and family life. Privacy of private or family life shall not be violated.’


