



**Onurhan Solmaz and Black Pink Triangle Izmir Association of Sexual  
Orientation and Gender Identity Studies and Solidarity against  
Discrimination**

**v.**

**Turkey**

**(Application No. 42711/13)**

---

**WRITTEN SUBMISSIONS ON BEHALF OF THE SOCIAL POLICY,  
GENDER IDENTITY AND SEXUAL ORIENTATION STUDIES  
ASSOCIATION (SPoD LGBTI+)**

**INTERVENER**

**pursuant to the Section Registrar's notification of 9 September 2020**

---

**8 December 2020**

## **Introduction**

1. This written submission is presented on behalf of the Social Policy, Gender Identity and Sexual Orientation Studies Association (SPoD LGBTI+) (hereinafter “the intervener”), pursuant to the permission of the President of the Second Section of the Court notified in a letter dated 9 September 2020 by the Section Registrar and addressed to SPoD LGBTI+.
2. The present case concerns defamatory and offensive press remarks directed against trans persons;<sup>1</sup> more specifically trans sex workers<sup>2</sup> in Izmir, Turkey, and the consequent refusal to investigate, as well as continuing lack of legal protection afforded to the applicants regarding these remarks. This case appears to be the *first case* from Turkey in connection with extreme forms of hate speech or other types of expression (hereinafter “hate speech”) that is of a homophobic or transphobic nature. Therefore, it raises several human rights issues of relevance beyond this individual case.
3. As will be explained in detail below, this case arises in the context of widespread discriminatory and hostile speech and practices against the LGBTI+<sup>3</sup> community in Turkey, oftentimes supported by the highest Government officials. Combined with the complete lack of legislative protection and persistent legal precedent rejecting to afford such protection, the situation in Turkey puts LGBTI+ persons in a particularly vulnerable situation. For this reason, the present case provides the Court with an important opportunity to set a landmark for LGBTI+ rights in Turkey, and to identify the scope of the Turkish Government’s positive obligations under the Convention with respect to discrimination on the basis of sexual orientation and gender identity.
4. In order to support our argumentation, this written submission will focus on the following:
  - i. The particular vulnerability of trans sex workers;
  - ii. The domestic context in Turkey on LGBTI+ rights and Turkish judicial authorities’ attitude and practices regarding homophobic or transphobic hate speech; and
  - iii. The legal standards and relevant case-law on the Member States’ positive obligations in responding to homophobic or transphobic hate speech
- I. The particular vulnerability of trans sex workers**
5. The present case mainly relies on the examination of discriminatory and hateful speech directed at trans sex workers. Therefore, this section describes vulnerabilities specific to trans sex workers arising from transphobia, deep-seated societal stigma against sex work, and their intersection. With this section

---

<sup>1</sup> The concept of “trans” is used as an umbrella term to describe people whose gender identity/expression is different from the gender they were assigned at birth. The term presupposes a spectrum of gender identities which shows endless variations and *inter alia* includes transsexuals and transvestites, the terms referred in the statement of facts prepared by the Registry. The term “trans” is used as a shorthand for transgender.

<sup>2</sup> The Joint UN Programme on HIV/AIDS (UNAIDS) Advisory Group on HIV and Sex Work describes sex work as “Sex worker organisations globally, and locally, understand sex work as a contractual arrangement where sexual services are negotiated between consenting adults, with the terms of engagement having been agreed upon between the seller and the buyer of sexual services. By definition, sex work means that adult female, male and transgender sex workers who are engaging in commercial sex have consented to do so (that is, are choosing voluntarily to do so), making it distinct from trafficking.” UNAIDS. (2012). Guidance Note on HIV and Sex Work, Annex. [https://www.unaids.org/en/resources/documents/2012/20120402\\_UNAIDS-guidance-note-HIV-sex-work](https://www.unaids.org/en/resources/documents/2012/20120402_UNAIDS-guidance-note-HIV-sex-work), p.7. The Special Rapporteur on the right to health also noted that “no single term adequately covers the range of transactions worldwide that involve sex work”, and that “the term ‘sex worker’ is increasingly used within the sector, as it is considered less stigmatizing and a better descriptor of workers’ experiences than the word ‘prostitute’.” UN Human Rights Council. (2010). Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover. A/HRC/14/20, p.10.

<sup>3</sup> Acronym for lesbian, gay, bisexual, trans and intersex persons. The ‘+’ suffix is used in order to include all other forms of human variations in sex, gender and sexuality.

and other explanations below, the intervener respectfully asks the Court to clarify whether the principles developed in its case-law under Article 14, in relation to hate speech perpetrated on other grounds such as ethnicity, religion or sexual orientation, also apply in relation to discrimination on the basis of gender identity. Even if the Court has previously established that gender identity is a protected ground under Article 14 of the Convention, it is yet to find a violation in that respect.<sup>4</sup> The intervener also invites the Court to integrate the concepts of intersectional discrimination and institutional bias into its analysis, in order to properly determine the shortcomings of investigation and proceedings carried out at domestic level.

6. In their report titled *Human Rights and Gender Identity*, the former Human Rights Commissioner for the Council of Europe, Thomas Hammarberg stated:

“... many transgender people live in fear and face violence in the course of their lives. This violence ranges from harassment, bullying, verbal abuse, physical violence and sexual assault, to hate crimes resulting in murder. Transphobia – understood as the irrational fear of, and/or hostility towards, people who are transgender or who otherwise transgress traditional gender norms – can be considered as one of the main causes of violence and intolerance that many transgender persons face. Some people seem to have a problem with the mere existence of human beings whose outer expression of their inner gender identity is not the same as their gender determined at birth.”<sup>5</sup>

7. These statements were also supported by the Parliamentary Assembly of the Council of Europe, in their Resolution 1728 (2010) which noted that “Transgender persons face a cycle of discrimination and deprivation of their rights in many Council of Europe member states due to discriminatory attitudes and to obstacles in obtaining gender reassignment treatment and legal recognition of the new gender. [...] Discrimination on the basis of sexual orientation and gender identity can be magnified on the basis of sex and gender, with lesbian, bisexual and transgender women, in particular, running an increased risk of violence. The LGBT community itself is also not immune to sex discrimination.”<sup>6</sup>
8. As for sex workers, a study on the prevalence and factors shaping sexual or physical violence against sex workers globally found that approximately 80% of sex workers experienced violence in the course of their work.<sup>7</sup> The sex work sector poses a high risk for the physical and mental integrity of sex workers in almost all countries in the world due to several reasons including the lack of legal frameworks that offer protection from violence while furthering stigma and marginalisation and the lack of political will to create programmes to support sex workers.<sup>8</sup>
9. With regard to the context in Turkey, both Human Rights Watch and Amnesty International pointed to the domestic legislation that is giving law-enforcement officers wide powers to detain trans sex

---

<sup>4</sup> *Identoba and Others v. Georgia*, no. 73235/12, 12 May 2015, §96; *P.V. v. Spain*, no. 38305/97, 14 November 2000, §30.

<sup>5</sup> Human Rights Commissioner for the Council of Europe. (2009). *Human Rights and Gender Identity*. <https://rm.coe.int/16806da753>, p.14.

<sup>6</sup> Parliamentary Assembly of the Council of Europe. (2010). Resolution 1728 (2010) Final version, Discrimination on the basis of sexual orientation and gender identity, §4-5.

<sup>7</sup> Deering, K.N. et al. (2014). A systematic review of the correlates of violence against sex workers. *American Journal of Public Health* 104(5), 42-54. For the forms and contexts of violence experienced by sex workers, see also, World Health Organization. (2013). *Implementing Comprehensive HIV/STI Programmes with Sex Workers, Practical Approaches From Collaborative Interventions*. [https://www.who.int/hiv/pub/sti/sex\\_worker\\_implementation/en/](https://www.who.int/hiv/pub/sti/sex_worker_implementation/en/), p.19-38.

<sup>8</sup> Global Network of Sex Work Projects. (2014). *The Needs and Rights of Trans Sex Workers: Briefing Paper No. 09*. <https://www.nswp.org/resource/briefing-paper-the-needs-and-rights-trans-sex-workers>, p. 2. See also, UN Human Rights Council. (2010). Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover. A/HRC/14/20; UN Human Rights Council. (2017). Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. A/HRC/35/36.

workers, sometimes even amounting to harassment.<sup>9</sup> These findings were more recently corroborated by the local civil society organization Red Umbrella Sexual Health and Human Rights Association's report, which held that "Sex worker trans women are being targeted continuously and systematically through various methods by both individuals and groups and the state authorities within the society. [...] Stigmatized, othered, pushed to the margins of the society, impoverished, faced with discriminative treatment, victimized by hate speech, and having to experience hate crimes as well as all kinds of forms of violence, sex worker trans women are also forced to be 'disciplined' or 'purged' through public and collective lynching practices within this vicious circle. This effort triggers a process that ends up with murder in some cases."<sup>10</sup> For these reasons, the intervener suggests that violence faced by trans sex workers is worsened based on the intersection of transphobia and stigma against sex work.

10. According to the well-established case-law of the Court, "if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, [...], then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question."<sup>11</sup> The prejudice and stigma experienced by a particular group within society have been indicators that have crucially informed the Court's evaluation of group vulnerability. The Court already used the concept of vulnerable groups for, amongst others, women who experienced gender-based violence,<sup>12</sup> the Roma,<sup>13</sup> people living with HIV,<sup>14</sup> and asylum seekers.<sup>15</sup> In this regard, the intervener respectfully invites the Court to apply the concept of vulnerable group to trans sex workers, due to the discrimination, stigmatization and stereotyping they deeply suffer.
11. The Court already recognized the social stigmatization and othering of trans persons in its case-law, in relation to legal recognition of gender identity. In its landmark case *Christine Goodwin v. United Kingdom*, the Court found that, "the stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of **vulnerability**, humiliation and anxiety."<sup>16</sup> As for sex workers, in *B.S. v. Spain*, concerning a sex worker of Nigerian origin who complained about the ill treatment of police officers, the Court particularly recognized the intersectional discrimination the applicant was subjected to and noted that "the domestic courts failed to take account of the applicant's **particular vulnerability inherent in her position** as an African woman working as a prostitute," and found a breach of Article 3 and 14 of the Convention.<sup>17</sup> In light of the above, the intervener respectfully invites the Court to take into consideration these two grounds in tandem, and find that the State's margin of appreciation in cases regarding trans sex workers is narrow.

---

<sup>9</sup> Human Rights Watch. (2008). "We Need a Law for Liberation": Gender, Sexuality, and Human Rights in a Changing Turkey. <https://www.hrw.org/reports/2008/turkey0508/>, p. 65-66; Amnesty International. (2011). 'Not an Illness nor a Crime': Lesbian, Gay, Bisexual and Transgender People in Turkey Demand Equality. <https://www.amnesty.org/en/documents/EUR44/001/2011/en/>, p. 14-15.

<sup>10</sup> Red Umbrella Sexual Health and Human Rights Association. (2014). Violence Directed Towards Sex Worker Trans Women In Turkey: A Struggle For Existence Caught Between The Crossfire Of Invisibility And Impunity. <http://www.kirmizisemiye.org/SourceFiles/pdf-2018525135952.pdf>, p. 73.

<sup>11</sup> *Alajos Kiss v. Hungary*, no. 38832/06, 20 May 2010, §42.

<sup>12</sup> *Opuz v. Turkey*, no. 33401/02, 6 June 2009, §160.

<sup>13</sup> *D.H. and Others v. Czech Republic* [GC], no. 57325/00, 13 November 2007, §182.

<sup>14</sup> *Kiyutin v. Russia*, no. 2700/10, 10 March, 2011, §64.

<sup>15</sup> *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, 21 January 2011, §251.

<sup>16</sup> *Christine Goodwin v. United Kingdom* [GC], no. 28957/95, 11 July 2002, §77. See also, *A.P., Garçon, Nicot v. France*, nos. 79885/12, 52471/13 and 52596/13, 6 April 2017, §138.

<sup>17</sup> *B.S. v. Spain*, no. 47159/08, 24 July 2012, §§62-63.

## II. The domestic context in Turkey on LGBTI+ rights and the Turkish judicial authorities' attitude and practices regarding homophobic or transphobic hate speech

### a) General context on LGBTI+ rights in Turkey

12. LGBTI+ persons, especially trans persons in Turkey experience severe isolation, discrimination, prejudice and exclusion on the basis of their sexual orientation or gender identity, almost in every aspect of life. According to the Trans Murder Monitoring project of Transgender Europe (TGEU), Turkey has the highest trans murder rate in Europe, with 54 murders between 2008- September 2020.<sup>18</sup> Also, as reported by the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), Turkey ranks 48th out of 49 countries in the Rainbow Map and Index 2020, with 4% achieved for overall LGBTI+ rights (the average score achieved in Europe is 38%).<sup>19</sup> In the case of hate crimes against LGBTI+ persons, in a detailed report for the year 2019, Kaos Gay and Lesbian Cultural Research and Solidarity Association (Kaos GL) reported seven attempted homicides, 47 cases of physical violence (three of which involve injuries by weapons), four cases of rape, 46 sexual assaults, 126 cases of insults or verbal attacks and 54 threats of violence. Very few victims reported these offences to the authorities as they not only lacked trust in the police and judiciary, but were even very afraid of them.<sup>20</sup>
13. Every year since 2015, annual pride marches and other events organized by the LGBTI+ community have been banned in various cities of Turkey, including Istanbul, Ankara, Izmir, Antalya and Mersin, even to a degree that constitutes indiscriminate blanket bans.<sup>21</sup> Non-governmental organizations and human rights defenders advocating for LGBTI+ rights have been targeted and suppressed via various measures imposed by the authorities.<sup>22</sup> In the Report Following Her Visit To Turkey From 1 To 5 July 2019, the Commissioner for Human Rights of the Council of Europe Dunja Mijatović observed “severe restrictions imposed on the day-to-day functioning of NGOs, including, for example, an indiscriminate and indefinite ban declared in Ankara on all public events focusing on the human rights of LGBTI persons during the state of emergency. This, in addition to being an unacceptable interference with the right to freedom of peaceful assembly guaranteed under the ECHR, severely restricts the possibility of LGBTI organizations to carry out their legitimate activities.”<sup>23</sup> These findings on intense restrictions on LGBTI+ persons, organizations and human rights defenders provide a useful illustration for the patterns on violence and inequality in Turkey.

### b) Homophobic or transphobic hate speech in Turkey

14. Based on available information, Turkey does not collect or record official data on hate speech. In connection with the Organization for Security and Co-operation in Europe (OSCE/ODIHR) hate crime reporting system, Turkey only provides data on incitement to hatred (Article 216 of the Criminal Code), but not on other forms of criminal hate speech, such as racist, homophobic or transphobic insults.<sup>24</sup> Even if there are no available official data on hate speech, OSCE 2019 statistics show that

---

<sup>18</sup> TGEU. (2020). Trans Murder Monitoring Absolute Numbers (2008 – Sept 2020).

<https://transrespect.org/en/map/trans-murder-monitoring/>.

<sup>19</sup> ILGA-Europe. (2020). Rainbow Map and Index 2020. <https://www.ilga-europe.org/rainboweurope/2020>.

<sup>20</sup> Kaos GL. (2020). 2019 Yılında Türkiye’de Gerçekleşen Homofobi ve Transfobi Temelli Nefret Suçları Raporu. <https://kaosgldernegi.org/images/library/2020nefret-suclari-raporu-2019-kucuk.pdf>, p. 11.

<sup>21</sup> ILGA Europe. (2020). Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe and Central Asia 2020. <https://www.ilga-europe.org/annualreview/2020>, p. 119.

<sup>22</sup> Human Rights Watch. (2019). Turkey: End Ankara Ban on LGBTI Events. <https://www.hrw.org/news/2019/02/14/turkey-end-ankara-ban-lgbti-events>.

<sup>23</sup> Commissioner for Human Rights of the Council Of Europe Dunja Mijatović. (2020). Report Following Her Visit To Turkey From 1 To 5 July 2019. <https://rm.coe.int/report-on-the-visit-to-turkey-by-dunja-mijatovic-council-of-europe-com/168099823e>, §146.

<sup>24</sup> European Commission against Racism and Intolerance (ECRI). (2016). ECRI Report on Turkey (fifth monitoring cycle). <https://rm.coe.int/fifth-report-on-turkey/16808b5c81>, §28.

there have been 57 officially recorded violent attacks on the basis of sexual orientation or gender identity.<sup>25</sup>

15. Extensive data is available on hate speech in Turkish media. As annually reported by Kaos GL, there has been a sharp increase in hateful, discriminatory and bias-motivated media coverage of LGBTI+ persons in recent years. According to their Media Monitoring Report 2019, 50% of the news reports and texts about LGBTI+ persons used discriminatory language, 56% were bias-motivated content, and 28% of the news content used hate speech.<sup>26</sup> It is noted in the report that in 2018, those figures were recorded as 34%, 49%, and 17% respectively. As the report observes, it is a common and widespread practice for various media outlets to target LGBTI+ persons and LGBTI+ rights, to mount smear campaigns, and depict LGBTI+ identities and existence as a “crime.”<sup>27</sup> A similar pattern is also demonstrated in the latest annual media watch report of the Hrant Dink Foundation, Hate Speech and Discriminatory Discourse in Media 2019 Report. Accordingly, 5515 hate speech content targeting 80 different groups were found, and LGBTI+ persons are included as one of the frequently targeted groups by the media.<sup>28</sup>
16. It is highly note-worthy that homophobic or transphobic hate speech is expressed increasingly by officials and other public figures, including senior representatives of the state and some members of the opposition. In its fifth monitoring cycle report on Turkey, European Commission against Racism and Intolerance (ECRI) also pointed to the prevalent use of hate speech narrative directed at LGBTI+ persons by public officials and strongly recommended that officials and political leaders at all levels stop using hate speech.<sup>29</sup> On this point, even if numerous early and recent examples can be given for this long standing situation, the intervener finds it necessary to point out a recent public official statement in order to show the material effects of these remarks to LGBTI+ persons. In his Friday sermon (khutbah), read in all mosques across the country on 24 April 2020, the President of Religious Affairs Ali Erbaş targeted LGBTI+ persons and people living with HIV by stating, "Islam condemns adultery as one of the greatest harams. It curses the people of Lot, the homosexuality. What is the wisdom of this? The wisdom here is that it brings diseases and degenerates the generation. Hundreds of thousands of people a year are exposed to the HIV virus caused by this great haram, which passes as adultery in the Islamic Literature. Let's come and fight together to protect people from this kind of evil."<sup>30</sup> Following these statements, several violent attacks against LGBTI+ persons were recorded and hateful remarks significantly increased. According to SPoD LGBTI+'s Pandemic Report: LGBTI+'s In The First Three Months of Covid-19, calls and applications to the association's LGBTI+ hotline on discrimination based on sexual orientation or gender identity and violence increased by 100 percent.<sup>31</sup>

c) Judicial authorities' attitude and practices regarding homophobic or transphobic hate speech in Turkey

17. In Turkey, no legislative or policy measures ensure that hate crimes and hate speech, including those on grounds of sexual orientation and gender identity, are systematically and thoroughly investigated and taken into account in prosecution and sentencing.<sup>32</sup> As reported by the Council of Europe Sexual

---

<sup>25</sup> OSCE/ODIHR. (2020). Hate Crime Reporting – Turkey. <https://hatecrime.osce.org/turkey>.

<sup>26</sup> Kaos GL. (2020). Medya İzleme Raporu 2019. <https://kaosgildernegei.org/images/library/2020medya-izleme-raporu-2019web.pdf>, p. 35.

<sup>27</sup> *Ibid*, p. 13-15.

<sup>28</sup> The Hrant Dink Foundation. (2020). Hate Speech and Discriminatory Discourse in Media 2019 Report. <https://hrantdink.org/attachments/article/2727/Hate-Speech-and-Discriminatory-Discourse-in-Media-2019.pdf>, p. 11.

<sup>29</sup> ECRI. (2016). ECRI Report on Turkey (fifth monitoring cycle), §§32 and 38.

<sup>30</sup> Bianet English. (2020). Reactions Against President of Religious Affairs' Hate Speech. *Bianet*. <https://bianet.org/english/lgbti/223485-reactions-against-president-of-religious-affairs-hate-speech>.

<sup>31</sup> SPoD LGBTI+. (2020). Pandemi Raporu: Covid-19'un Üç Ayında LGBTI+'lar. <http://spod.org.tr/SourceFiles/pdf-202062315910.pdf>, p. 7.

<sup>32</sup> Steering Committee For Human Rights (CDDH). (2013). Report on the implementation of the Committee of Ministers' Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, Annex - Contributions by Amnesty International, ILGA Europe and the European

Orientation and Gender Identity Unit, Turkey does not fulfil any of the hate speech standards under Recommendation CM/Rec(2010)5 of the Committee of Ministers.<sup>33</sup> Article 216 of the Turkish Criminal Code criminalizes incitement to hatred based on social class, religion, race, sect, or ethnicity, however does not afford any protection to LGBTI+ persons. Penal laws and the current criminal justice system in Turkey do not protect LGBTI+ persons from homophobic or transphobic hate speech.<sup>34</sup> Even if the principle of equality is integrated to multiple legislations and protected on constitutional level, these regulations do not include sexual orientation or gender identity as protected grounds. The complete lack of legislative framework aggravates the already existing climate of discrimination, and prevents LGBTI+ persons to benefit from the equal protection of the law.

18. LGBTI+ persons or organizations are not afforded protection from hate speech through the case-law of domestic courts either. Including the present case before the ECtHR, the Constitutional Court of Turkey did not find any violations for any of the individual applications regarding homophobic or transphobic hate speech. Although the Constitutional Court recognizes sexual orientation as one of the protected grounds under the principle of equality enshrined in Article 10 of the Constitution as falling under the phrase “any such grounds”, it consistently ignored applying this ground through incoherent and discursive reasons. In the *Sinem Hun Application*, Attorney Sinem Hun’s application to the Constitutional Court concerned a news article that appeared on the website Habervaktim.com, which involved hate speech referring to her and her position at the Kaos GL Association as “the attorney of the perverts” (*sapkenlerin avukatı*). The Constitutional Court acknowledged that calling LGBTI+ persons “perverts” is hate speech. However, it did not find a violation since the hate speech in question was directed at the Kaos GL Association and not the applicant, therefore her right to respect for honour and dignity was not breached.<sup>35</sup> Four years later, in the *Kaos GL Cultural Research and Solidarity Association Application*, Kaos GL Association exhausted the judicial remedies and applied to the Constitutional Court with the exact same subject matter of *Sinem Hun Application*. With its judgement in 2018, this time the Constitutional Court overruled its own earlier finding, and held that the word “pervert” does not constitute hate speech due to its dictionary meaning.<sup>36</sup> Currently, there are four pending applications regarding homophobic or transphobic hate speech before the Constitutional Court lodged by the Kaos GL Association.<sup>37</sup>
19. Criminal complaints regarding homophobic or transphobic hate speech are not effectively investigated and almost always end up with decisions of non-prosecution. Kaos GL, after having numerous decisions of non-prosecution about their criminal complaints against various media outlets, stopped continually filing criminal complaints, and instead started only filing one criminal complaint on hate speech per year, in order to report the ongoing inefficiency of the remedy.<sup>38</sup> ECRI also pointed to this situation, stating:

“Hate speech is on the rise and its increasing use by officials, including senior representatives of the state, is of major concern. The huge negative impact of such mediated hate speech has damaged social cohesion. There is no strong official reaction to such rhetoric and most hate speech goes unpunished. There is even reason to conclude

---

Union Agency for Fundamental Rights.

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045fdb>, p. 3.

<sup>33</sup> Council of Europe Sexual Orientation and Gender Identity Unit. (2019). Turkey – Country Factsheet on Sexual Orientation and Gender Identity. <https://rm.coe.int/090000168097ab04>.

<sup>34</sup> ECRI. (2016). ECRI Report on Turkey (fifth monitoring cycle), p. 9.

<sup>35</sup> Constitutional Court of Turkey, Sinem Hun Application, Application no. 2013/5356, 8 May 2014.

<sup>36</sup> Constitutional Court of Turkey, Kaos GL Cultural Research and Solidarity Association Application, Application no. 2014/18891, 23 May 2018.

<sup>37</sup> Kaos GL. (2020). LGBTİ+ların İnsan Hakları 2019 Yılı Raporu.

<https://kaosgldernegi.org/images/library/2020lgbtilarin-insan-haklari-raporu-2019-web.pdf>, p. 23.

<sup>38</sup> SPOD LGBTI+. (2020). Türkiye’de LGBTİ+ Hakları için Stratejik Davalama: Deneyimler, İlgörüler, Sonraki Adımlar. <http://spod.org.tr/SourceFiles/pdf-2020831181313.pdf>, p. 13-14.

that hate speech legislation is used to silence vulnerable groups. Numerous media do not comply with ethical standards and also spread hate speech.”<sup>39</sup>

20. Despite this outline of LGBTI+ rights in Turkey, the Deputy Minister for Foreign Affairs of Turkey responded to the recommendations and criticisms of 16 countries at the UN Universal Periodic Review in January 2020, stating that the legislation regarding hate crimes was developed in 2014 and "since then they have been fighting hate crimes."<sup>40</sup> However, according to the criterion developed by the UN, Council of Europe and OSCE, there is no primary or secondary legislation regarding hate crimes in Turkey and the legislation implied by the Deputy Minister does not include statements of sexual orientation and gender identity.<sup>41</sup>

### III. The legal standards and relevant case-law on the Member States’ positive obligations in responding to homophobic or transphobic hate speech

21. This section begins by outlining regional and international standards underpinning the States’ positive obligation to ensure the effective protection of individuals from homophobic or transphobic hate speech. Next, it briefly enumerates selected judgments from the Court on the subject matter of the case.

#### a) Legal standards

22. Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity highlighted the need for “tak[ing] appropriate measures to combat all forms of expression, including in the media and on the Internet, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against lesbian, gay, bisexual and transgender persons.”<sup>42</sup> The Committee of Ministers also underlined the necessity of “raising awareness among public authorities and public institutions at all levels of their responsibility to refrain from statements, in particular to the media, which may reasonably be understood as legitimising such hatred or discrimination.”<sup>43</sup> Additionally, the first ever legal document including the internationally agreed definition of sexism, Recommendation CM/Rec(2019)1 of the Committee of Ministers to Member States on preventing and combating sexism, stressed that sexism is a manifestation of “historically unequal power relations” and expressed that trans persons face additional challenges with regard to sexism, therefore explicitly acknowledging that trans persons fall under the scope of the Recommendation.<sup>44</sup> Recommendation CM/Rec(2019)1 further invited the governments of the Member States to “implement legislative measures that define and criminalise incidents of sexist hate speech and are applicable to all media, as well as reporting procedures and appropriate sanctions.”<sup>45</sup>
23. With Resolution 1728 (2010), the Parliamentary Assembly of the Council of Europe called on Council of Europe Member States to “condemn hate speech and discriminatory statements and effectively protect LGBT people from such statements.”<sup>46</sup> By Resolution 2048 (2015), the Parliamentary

---

<sup>39</sup> ECRI. (2016). ECRI Report on Turkey (fifth monitoring cycle), p. 9.

<sup>40</sup> Tar, Y. (2020). Oppressor in Turkey denier in the UN!. *Kaos GL*, <https://kaosgl.org/en/single-news/oppressor-in-turkey-denier-in-the-un>.

<sup>41</sup> Kaos GL. (2019). 2018 Yılında Türkiye’de Gerçekleşen Homofobi ve Transfobi Temelli Nefret Suçları Raporu. <https://kaosglderneği.org/images/library/2019nefret-suclari-raporu-2018-web.pdf>, p. 5.

<sup>42</sup> Committee of Ministers of the Council of Europe. (2010). Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity, Section I.B.6.

<sup>43</sup> *Ibid.*, Section I.B.7.

<sup>44</sup> Committee of Ministers of the Council of Europe. (2019). Recommendation CM/Rec(2019)1 of the Committee of Ministers to Member States on preventing and combating sexism. Appendix to Recommendation CM/Rec(2019)1, Guidelines for preventing and combating sexism: measures for implementation, p. 12.

<sup>45</sup> *Ibid.*, p. 18, Section II.B.1.

<sup>46</sup> Parliamentary Assembly of the Council of Europe. (2010). Resolution 1728 (2010) Final version, Discrimination on the basis of sexual orientation and gender identity, §16.4.

Assembly also called on Council of Europe Member States to “explicitly prohibit discrimination based on gender identity in national non-discrimination legislation” as well as “enact hate crime legislation which affords specific protection for trans people against transphobic crimes and incidents.”<sup>47</sup> Notably, 27 Council of Europe Member States currently prohibit hate speech based on sexual orientation, and 16 Member States apply this prohibition for gender identity as well.<sup>48</sup>

24. The Convention on Preventing and Combating Violence against Women (“the Istanbul Convention”), which obliges State Parties to take comprehensive measures to prevent violence against women, protect victims from all kinds of violence including verbal forms of violence and prosecute perpetrators, defines gender as “socially-constructed” and is to be implemented without discrimination based on gender identity or sexual orientation.<sup>49</sup> Also, the Explanatory Report to the Istanbul Convention explicitly notes that LGBTI+ persons are protected under this Convention.<sup>50</sup>
25. At the UN level, in 2016 the Human Rights Council established a mandate of Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.<sup>51</sup> As of 2017, the Independent Expert presented annual thematic reports to both the Human Rights Council and the General Assembly, and frequently touched upon the issue of hate speech on the basis of sexual orientation and gender identity. In their report for the 73rd session of the General Assembly in 2018, the Independent Expert stated that “[t]he mandate holder considers that some of the anti-rights discourse warrants examination under the parameters of hate speech and will develop the theme in future outputs, including reports”<sup>52</sup> and in relation to legislative measures, recommended States to “[e]nact hate crimes legislation that establishes transphobia as an aggravating factor for the purpose of sentencing; and adopt legislation in relation to hate speech on the grounds of gender identity.”<sup>53</sup>
26. On 18 June 2019, UN Secretary-General Antonio Guterres launched the United Nations Strategy and Plan of Action on Hate Speech, following the objectives of enhancing UN efforts to address root causes and drivers of hate speech and enabling effective UN responses against the impact of hate speech on societies.<sup>54</sup> The Detailed Guidance on Implementation for United Nations Field Presences prepared for this strategy stated that they should focus on those groups in situations of vulnerability and marginalization, and included sexual orientation and gender identity as protected grounds under this strategy.<sup>55</sup> As for UN treaty-based bodies, the Human Rights Committee has not stated whether or not sexual orientation and gender identity are protected grounds under Article 20(2).<sup>56</sup> However in 2009, for its concluding observations on Poland, the Human Rights Committee recommended the criminalisation of “hate speech” based on sexual orientation.<sup>57</sup> There have been no communications before any of the UN treaty bodies regarding hate speech on the basis of sexual orientation or gender

---

<sup>47</sup> Parliamentary Assembly of the Council of Europe. (2015). Resolution 2048 (2015) Discrimination against transgender people in Europe, §6.1.1. and §6.1.4.

<sup>48</sup> ILGA-Europe. (2020). Rainbow Map and Index 2020. <https://www.ilga-europe.org/rainboweurope/2020>; see also, TGEU. (2020). Trans Rights Europe & Central Asia Index & Maps 2020. <https://tgeu.org/trans-rights-europe-central-asia-index-maps-2020/>.

<sup>49</sup> Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Articles 3 and 4§3.

<sup>50</sup> Council of Europe. (2011). Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence. <https://rm.coe.int/16800d383a>, §§53, 87 and 313.

<sup>51</sup> UN General Assembly. (2016). Resolution adopted by the Human Rights Council on 30 June 2016, 32/2. Protection against violence and discrimination based on sexual orientation and gender identity. A/HRC/RES/32/2.

<sup>52</sup> UN General Assembly. (2018). Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. A/73/152, §27.

<sup>53</sup> *Ibid.*, §78(c).

<sup>54</sup> UN Secretary-General. (2019). United Nations Strategy and Plan Of Action On Hate Speech, p. 2.

<sup>55</sup> The UN Office on Genocide Prevention and the Responsibility to Protect. (2020). United Nations Strategy and Plan of Action on Hate Speech Detailed Guidance on Implementation for United Nations Field Presences, p. 11.

<sup>56</sup> Article 19. (2013). Responding to Hate Speech against LGBTI people. <https://www.article19.org/resources/responding-hate-speech-lgbti-people/>, p. 12.

<sup>57</sup> UN Human Rights Committee. (2009). Concluding observations on Poland. CCPR/C/POL/CO/6, §8.

identity yet. However, rapidly developing case-law of the treaty bodies on sexual orientation and gender identity clearly shows that these grounds are protected under multiple treaties.<sup>58</sup>

b) Relevant Case-Law

27. The Court first applied the principles relating to hate speech in the context of sexual orientation in the case of *Vejdeland and others v. Sweden*.<sup>59</sup> The four applicants in *Vejdeland* entered a secondary school and distributed approximately a hundred leaflets in and on pupils' lockers. The statements in the leaflets were allegations that homosexuality was a "deviant sexual proclivity", had "a morally destructive effect on the substance of society" and was responsible for the development of HIV and AIDS. The applicants were convicted by the Swedish Supreme Court for agitation against a national or ethnic group. They applied to the Court, complaining that their right to freedom of expression had been violated. A unanimous Court ruled that Sweden did *not* violate the right to freedom of expression and that the criminal conviction of the applicants for distributing leaflets that contained offensive statements about homosexuals did not breach the Convention. In its judgement, the Court particularly stressed that "discrimination based on sexual orientation is as serious as discrimination based on 'race, origin or colour.'"<sup>60</sup>
28. In the case of *Beizaras and Levickas v. Lithuania*, the Court held that the State authorities' failure to investigate online hate speech against a gay couple violated the couple's rights under Article 8 and constituted discrimination on the basis of sexual orientation.<sup>61</sup> The applicants in *Beizaras*, a same-sex couple, posted a photo on Facebook of them kissing, and other individuals posted hundreds of homophobic comments in response, including threats of violence. The Court found that the State failed to meet its positive obligation to investigate hate speech that could incite violence, resulting in harm to the applicants' psychological well-being and dignity and constituting a violation of their rights to private life and non-discrimination. The Court also emphasized that State authorities had refused to launch a pre-trial investigation, even though they were aware of the hate comments, in part due to their expressed disapproval of the applicants' sexual orientation.<sup>62</sup> Most recently, the Court added another judgement to its case-law on homophobic hate speech with *Lilliendahl v. Iceland*, finding the applicant's complaint about his conviction on homophobic comments he had made in response to an online article inadmissible.<sup>63</sup> Given the particular importance attached to sexual orientation and hateful remarks in the context of protecting LGBTI+ persons, there seems to be no reason not to apply this approach to the ground of gender identity as well.
29. Additionally, the Court established in various cases that stereotyping may cause negative and harmful consequences. In *Aksu v. Turkey*, the Court noted that "any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group."<sup>64</sup> The Court also considered that stereotyping groups that are historically subjected to prejudice results in their social exclusion and prohibits the individualised evaluation of their capacity and needs, as stated in, *inter alia*, *Alajos Kiss v. Hungary* and *Carvalho Pinto De Sousa Morais v. Portugal*.<sup>65</sup> Therefore, it seems clear that negative stereotyping of LGBTI+ persons will hinder their full enjoyment of rights.

---

<sup>58</sup> International Lesbian, Gay, Bisexual, Trans and Intersex Association. (2019). United Nations Treaty Bodies jurisprudence on sexual orientation, gender identity, gender expression and sex characteristics: Case Digest. <https://ilga.org/Treaty-Bodies-strategic-litigation-toolkit>.

<sup>59</sup> *Vejdeland and others v. Sweden*, no. 1813/07, 9 February 2012, §§47-60.

<sup>60</sup> *Vejdeland and others v. Sweden*, §55.

<sup>61</sup> *Beizaras and Levickas v. Lithuania*, no. 41288/15, 14 January 2020, §§106-130.

<sup>62</sup> *Beizaras and Levickas v. Lithuania*, §§121 and 129.

<sup>63</sup> *Lilliendahl v. Iceland*, no. 29297/18, 14 May 2020, §§32-48.

<sup>64</sup> *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, 15 March 2012, §58; see also, *Levit v. Austria*, no. 4782/18, 10 October 2019, §46.

<sup>65</sup> *Alajos Kiss v. Hungary*, no. 38832/06, 20 May 2010, §42; *Carvalho Pinto De Sousa Morais v. Portugal*, no. 17484/15, 25 July 2017, §46.