



An (Insider's) Look at the Legal Agenda of LGBTI+ People

2019-2020

S P O D



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Social Policy, Gender Identity and Sexual Orientation Studies Association

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About Us

The Social Policy, Gender Identity and Sexual Orientation Studies Association (SPoD), founded by a group of academics, lawyers, and activists in 2011, works to reduce the oppression, violence, social exclusion, and discrimination that LGBTI+ individuals are exposed to, and to produce permanent and comprehensive solutions to their problems. Within this framework, SPoD supports lesbian, gay, bisexual, trans, intersex, and "+"s, which is the umbrella identification of other identities and sexual orientations, for their self-actualization materially and morally. Addedly, SPoD supports LGBTI+ people's self-education to contribute to the development of social peace, tranquility, and well-being through individual, social, and cultural life behaviors.

SPoD provides free legal and psychosocial counseling to LGBTI+ individuals with its employees and volunteers. In addition, SPoD provides training to key occupational groups such as mental health professionals, social workers, and lawyers on working with LGBTI+ individuals. SPoD also follows up cases in the LGBTI+ field, organizes academic meetings and seminars, monitoring studies, panels, politics and activism schools, advocacy meetings.

In addition, SPoD provides consultancy on issues such as coming out, violence and discrimination based on gender identity and sexual orientation, gender adjustment process, HIV and sexually transmitted infections, gender identity and sexual orientation-based issues through its Social Service Hotline, which is active every weekday. On Sundays, between 14.30 and 16.30, all issues affecting the LGBTI+ community, including coming out, sexual orientation, relationships with the family, and difficulties in romantic relationships, are discussed at "Sunday Talks" meetings.

SPoD Access to Law and Justice Field

SPoD conducts lawsuits and consultancy services through its Coordinator for Access to Law and Justice, Legal Team and Lawyer Network. Activities within this scope are divided into three:

Consultancy Services and Campaign Cases

SPoD provides free verbal and written legal consultancy services to LGBTI+ individuals through its employed Coordinator of Access to Law and Justice. Those who are subjected to a violation of rights by being LGBTI+, those who have been subjected to a violation of rights because they are thought to be LGBTI+, those who have difficulties in accessing justice because they are LGBTI+ even if the source of the violation of their rights is not based on being an LGBTI+, and LGBTI+ individuals living with HIV, can benefit from this service.

Also, the association, through the lawyers it employs, can subject, and campaign the violation of rights; particularly the cases on freedom of expression and association, and the discrimination based on sexual orientation and gender identity. For instance, the 3rd Queer Olympic sports competitions, which were planned to be held on 23-24-25 August 2019, started on August 23 in Heybeliada, but on the morning of August 24, it was notified to the organizers in Kalamış Park that the event was banned by the District Governorship. The SPoD Access to Law and Justice Network filed an annulment action against this ban and campaigned for this case, and the court ultimately ruled in SPoD's favor. This decision has been announced to the LGBTI+ community. For another instance, again in 2019, when the Istanbul Pride Parade was banned by the Istanbul Governorship, a lawsuit was filed against this ban by SPoD. This case is still at the stage of appeal and the trial continues.

SPoD executes and intervenes in campaign cases. Besides, to win the case, SPoD cooperates with lawyers, civilians, also with the Grand National Assembly of Turkey, and the course of action is carried out for this purpose.

Over and above, SPoD performs PR works of selected cases. The aim is to ensure that the homophobic / transphobic language of the media does not once again victimize the victims, and to ensure correct and effective information flow to the public. Thus, the "language of hate" produced by the media is also fought through law.

Therefore, only the legal aspects and execution of the cases are not dealt with; efforts are made to reduce actions that cause violations of rights.¹

¹ For the campaign cases followed by SPoD, see. <http://www.spod.org.tr/TR/sayfalar/2/kampanya-davalar>.

Legal Support Services Through Lawyer Network

SPoD has a network of lawyers and is always in contact with them via an email group, consisting of lawyers participating in the "National and International Legislation and Case Laws on LGBTI+ Rights" organized by SPoD every year since 2012. Through this network, SPoD cooperates and exchanges information with expert lawyers, from various provinces of Turkey, mainly in Istanbul.

When the applicants request legal information, if they request both consultancy and follow-up of the case by a lawyer to whom they will give power of attorney, the above-mentioned lawyer network is informed about the lawsuit. In this way, the applicant is brought together with the lawyer who may deal with the case. A private attorney-client relationship is established between the lawyer and the counselee. Also, the counselee is informed that the relevant lawyer will charge a given fee for the lawsuit.

Work of the Legal Team

SPoD works with a legal team consisting of lawyers, academics, and law faculty students organized under the moderation of Coordinator of Access to Law and Justice and Legal Team Supervisor. The legal team works voluntarily on lawsuits in which the association is a party or involved, association trainings, campaigns, and strategic cases. Also, the team contributes to the output of legal content on LGBTI+.

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■ Getting Started

When it comes to LGBTI+ individuals in Turkey in the field of law, it is possible to debate in a broad spectrum, from legal recognition requests to requests for sanctions against discrimination and rights violations. Therefore, law and justice are always on the agenda of LGBTI+ individuals. However, in 2019 and 2020, this agenda was more active than ever. In the past two years, we have struggled with dozens of discrimination, stigmatization, and rights violations. Freedom of expression have been impeded by bans on marches and events. The civilian area has been narrowed with the changes made by the government in the legislation of associations and increased association inspections. LGBTI+ rights defenders and organizations have been targeted by high-level bureaucrats themselves. Smear campaigns have been conducted against the Istanbul Convention. Trans exclusionary radical feminism has increased transphobia through so-called academic and philosophical arguments. There have been attempts to criminalize people with HIV. Even on social media, hate speech has increased and people have been deliberately targeted. There have been many more problems that we cannot count here, but we have uttered a word regarding all of them.

With this publication, we wanted to look at the legal agendas of LGBTI+ individuals by presenting the social and political backgrounds of these agendas. As legal issues concerning LGBTI+ people are frequently conveyed in both mainstream media and social media with discriminatory discourses and misinformation; we aim to convey an inside word on these issues. In this publication, we requested articles from both SPoD Legal Team network on their fields of work and from lawyers working on issues/cases that have been frequently raised in the last two years regarding LGBTI+. With this publication, we also aimed to help the lawyers, who take the legal agendas of LGBTI+ individuals in 2019 and 2020 with a rights-based perspective, to make a trace in history. Therefore, this publication, which is set out with a different purpose than the conventional legal publications, aims to address not only lawyers, but also LGBTI+ subjects and rights defenders.

Unfortunately, the legal agenda of LGBTI+ individuals is not limited to the topics covered in this publication; like any other, this review has its own limits. The human rights of LGBTI+ individuals are not always on the agenda. As a matter of fact, besides LGBTI+ individuals being among the groups most frequently subjected to rights violations, LGBTI+ people face many difficulties in accessing justice in their applications regarding these violations. Regrettably, the topics covered in this publication are only the tip of the iceberg.

We should thank all the authors for their contributions to this publication and their efforts in the field.

As SPoD, we wish for 2021, where we all can say loudly "LGBTI+ rights are human rights!" and show solidarity.

SPoD Access to Law and Justice Field

■ Every June, Istanbul is Under a Ban:

Overview of 2019

Hatice Demir¹ - Özge Nur Kara²

Istanbul is one of the milestones in the collective journey of Turkey's LGBTI+ movement, which started in the stairs of Gezi Park in the 1980s, in terms of the struggle for visibility and publicization. The queer footprints in known places of the city and the image of Istanbul in the memory of queer people are full of struggle practices that contribute to the mainstreaming of the LGBTI+ movement. Once again in 2019, the public administrations of Istanbul tried to exclude LGBTI+ people from the city community with ban decisions, then the LGBTI+ movement responded to these bans by expanding its struggle with law.

History of Istanbul Pride Parades

History of Istanbul Pride Parades, which have been held since 2003, were held with the participation of tens of thousands of people in 2013 and 2014 with the effect of the Gezi protests. However, Istanbul Pride Parade, which took place with great participation until 2015, was banned by the Istanbul Governorship in 2015, on the grounds that the march coincided with the holy month of Ramadan. Although no prohibition decision was announced before, law enforcement officers banned entry to Istiklal Avenue. LGBTI+ community and LGBTI+ rights defenders who gathered in Taksim on June 29, were intervened by using pressurized water, tear gas, and plastic bullets. As a result of the meetings of lawyers, MPs, and international parliamentarians with law enforcement and the resistance of the mass, the march was eventually carried out, albeit partially.

In 2016, while it was announced by the Pride Week Committee that the parade would be held on June 28, it was announced that the parade was banned with a press release on the Istanbul Governorship website on June 17. The justification of the ban was stated as: "We will not be allowed to organize a meeting or demonstration in this direction on the days mentioned, considering the safety of our citizens and public order. The places where such events can be held are also announced in advance as required by law."

1 Lawyer, Istanbul Bar Association; SPoD Access to Law and Justice Field Coordinator.

2 Intern Lawyer, Istanbul Bar Association; SPoD Legal Team Volunteer.

In 2017, it was announced by the Pride Week Committee that the parade would be held on June 25, and on June 24, that is, exactly one day before the parade, it was announced that the parade was banned with a press release, again on the website of the Istanbul Governorship. The justification given this time was stated as follows: *“Taksim Square and its surroundings, where the said parade is called, are not among the meeting and demonstration areas announced by our Governorship. In addition, a proper application was not made to our Governorship in accordance with the provisions of the law numbered 2911. In the meantime, it is seen that there is a very serious reaction from different segments of the society against this call on social media platforms.”*

In 2018, the Pride Week Committee waited for the end of the month of Ramadan to prevent the prohibition of the parade and the date for the parade was announced as July 1. Despite this, the security forces intervened with the participants in Taksim Mis Street, without waiting for the end of the press release, which had been given permission, and many people were detained.

LGBTI+ people are not Only Banned From Taksim, But All of Istanbul:

2019 Istanbul Pride Parade Ban and Litigation Process

In 2019, the Pride Week Committee decided to notify the Istanbul Governorship for the march to be held in Bakırköy. The main motivation for this decision is this: One of the foundations of the bans made for years is that Taksim is not one of the meeting and demonstration areas announced by the Istanbul Governorship. Taksim has been closed not only to queer people, but to all opponents of the government. On the other hand, Bakırköy Saturday Market Area is an area that hosts various rallies, especially the May Day rallies, and communities from all segments of the society, and has been designated as a meeting area by the governorship. There is no reason why this area, which is open to everyone, should not be open to LGBTI+ people and LGBTI+ rights defenders.

However, as the Istanbul Pride Week Committee had predicted from the very beginning, it was revealed in the meeting with the Governorship of Istanbul that the process would not proceed in accordance with such logic, fairness, and law. Before the written notification was made about the march to be held in Bakırköy, an appointment was made with the governorship for a verbal meeting and the representatives of the committee and volunteer lawyers met face to face with the Deputy Governor Responsible for Human Rights. During this meeting, the Deputy Governor clearly stated the following sentences to

the interviewees. "You can do whatever you want indoors, but you are a group that cause hesitation for open spaces. It probably will not be allowed, but you should still submit a written application."

Ultimately, within the scope of the 27th Istanbul LGBTI + Pride Week, the petition containing the requests for permission and security measures required to hold a rally in Bakırköy Saturday Market Area on Sunday, June 30, was submitted to the Governorship of Istanbul on 18.06.2019. On 21.06.2019, the decision that the request for a meeting was not deemed appropriate by the governorship was notified to the Organization Committee. The reason for the decision of the Governorship of Istanbul is as follows:

"Since provocative acts and events may occur, the peace and security of the public, including those attending the meeting, may be impaired, personal immunity and safety could be harmed, general health and public morals may deteriorate and to protect the rights and freedoms of others and to prevent possible violence and terrorism, the organization of the said open meeting within our provincial borders is not approved by the Istanbul Governorship."

A lawsuit was filed at the administrative court by SPoD in cooperation with the Istanbul Pride Week Committee for the annulment of the ban decision. In this lawsuit, it was emphasized that the current prohibition decision would cause the supporters of discrimination to legitimize violent acts and increase hate crimes, and the unlawfulness of the administrative act was explained through national and international judicial decisions, and the annulment of the ban was requested. The case was rejected by the court of the first instance on the grounds that the prohibition decision was in accordance with the law, and the decision of the first instance court was appealed. Shortly before the completion of this publication, the Istanbul Regional Administrative Court found it unlawful to prevent the exercise of the right to assembly and demonstration and revoked the decision of the court of the first instance and annulled the ban decision.³

The Second Big Ban of 2019:

Queer Olympix and Litigation Process

Queer Olympix is an event that takes place in various competitions in different sports, initiated in 2017 by Atletik Dildo, a football team consisting mainly of LGBTI+'s, with the participation of different sports teams from Turkey and

³ Tar, Y. (2020). "The court annulled the Bakırköy ban for the 2019 Istanbul Pride Parade". Kaos GL, <https://kaosgl.org/haber/mahkeme-2019-istanbul-onur-yuruyusu-icin-bakirkoy-yasagini-iptal-etti> (Last Date of Access: 22.12.2020).

foreign countries. The event, which is Turkey's first queer Olympics, includes various workshops and forums against sexism and LGBTI+ phobia in sports. The event took place with participants and audience in Heybeliada and Kalamış in 2017 and 2018, but it was banned by the Kadıköy District Governorship in 2019. The legal justification for the ban by the District Governorship was as follows: *“Regarding the groups and individuals who will participate in the desired activity; to prevent provocations that may arise due to social sensitivities, the relevant event has been banned to ensure public order, to prevent crime, and to protect general health and public morality.”*

The ban decision given under the Law on Meetings and Demonstrations, was clearly missing a legal basis, since sports competitions are not evaluated within the scope of this law. The content of the ban decision also includes information that some provocations will be carried out against the persons participating in the event. However, the content of the decision does not specify who will create the provocative acts and events mentioned in the decision, whether there is a concrete threat to the Kadıköy District Governorship or the Police. In the process brought to the judiciary, Kadıköy District Governorship did not provide any information and documents regarding where and how it obtained the intelligence documents indicating that provocative actions could be taken. Moreover, prevention of crime by protecting event participants and taking necessary security measures is already among duties of the administration. Even in the presence of a concrete threat of any provocation to the event, the only way to prevent such a provocation should not be to prevent an event announced weeks in advance. The provocations that may occur against LGBTI+ people and women, who adopted sports as a form of expression, were described in the ban decision as “social sensitivities”. This is one of the indicators that the administration justifies acts of violence by the advocates of discrimination, and that the public authority is biased.

“Decisions by various large and small-scale administrations of Istanbul in 2019 are, in fact a proof that, as the Deputy Governor of Istanbul said, Istanbul administrators do not want to see LGBTI+ people in public places.”

Also, “protection of general health and public morality” has been shown as one of the aims of the said ban decision. It is very difficult to understand how a sports event that has been held for two years, including activities such as long jump, beach volleyball, and soccer training, will spoil “general health and public morality”.

A lawsuit was filed at the administrative court by SPoD, in cooperation with the Queer Olympix team, demanding the annulment of the ban decision. As a result, Istanbul 5th Administrative Court also found the decision of Kadıköy District Governorship to ban Queer Olympix activities unlawful, decided to annul the ban decision and the decision was finalized without appeal.

After the Bans:

Where There is Power, There is Resistance!

The decisions taken by various large and small-scale administrations of Istanbul in 2019, which we tried to summarize above, are, in fact a proof that, as the Deputy Governor of Istanbul said, Istanbul administrators do not want to see LGBTI+ people in public places. As it is known, in 2019, ban decisions were notified to the organizers through governorships and district governorships not only in Istanbul, but also in Izmir, Mersin, Antalya, METU (Ankara) and all cities, where the parade could be done. Although there is no official ban decision covering the whole city, as in Ankara, or country, the systematic prohibition of collective activities of LGBTI+ people in public areas in practice, shows that this issue is not limited to Ankara and Istanbul.

The LGBTI+ movement, in which the political power tries to end its visibility in the public places by its appointed bureaucrats, continues its struggle against the ban decisions, both by law and by all kinds of legitimate methods.

■ Are the Bans Over in Ankara?

Kerem Dikmen¹

Declaration of the Charter of Alliance (Tr: Sened-i İttifak) of 1808 is cited as the beginning of the constitutionalization, in other words, the restriction of state power in the Republic of Turkey which was built on the state practice of the Ottoman Empire and has ensured its continuity by adapting the Ottoman Empire's rules and institutions and, the Ottoman Constitution (Tr: Kanun-i Esasi), adopted in 1876, is known as the first modern constitution.

One of the aspects that distinguishes the 1982 Constitution from the previous ones as the fifth constitution, which was created in the wake of a military coup, was the State of Emergency Law, which was published after it entered into force.² It is not possible to answer the question of whether Kenan Evren designed that this text, which was enacted in 1983, when the strict administration that would end on 19.07.1987, would turn into the most important tool of military tutelage or today's state practice. When we look back, taking advantage of our experiences, it would not be wrong to say that what is seen is a river of pressure that accelerates or slows down, forms meander from time to time, but still has plenty of water.

Today, the portrayal of what is happening is different than what is experienced. The reality is left aside, and the definitions of the truth have surpassed the truth. This rationality of those, who look at the issues from the perspective of universal values, such as the rule of law, human rights, separation of powers, and independent judiciary, has also been the main reason for not comprehending what is really happening. We are in a surreal state.

One of the important cornerstones of this situation for LGBTI+ people in Ankara is undoubtedly the Ankara Bans, which were passed on 17.11.2017 and announced on the website of the Governorship the next day.³ The state of emergency declared on 20.07.2016 was not extended again after the end of 17.07.2018, which eliminated the basis of the general prohibition decision. Upon this, although the Ankara Governorship did not officially announce the general ban dated 03.10.2018, it put it into effect through internal correspondence. This is how the concepts of "First Ankara Bans" and "Second Ankara Bans" emerged.

1 Lawyer, İzmir Bar Association; Legal Coordinator, Kaos GL.

2 RG: 18204, T. 27/10/1983.

3 Governorship of Ankara. (2017). Press Release Regarding the Ban Decision. <http://www.ankara.gov.tr/yasaklama-kararina-iliskin-basin-duyurusu-19112017> (Last Date of Access: 24.11.2020).

On the one hand, this article briefly explains that what is actually happening is a permanent state of emergency and a permanent ban, rather than the first or the second ban. The pressure, applied by the state in Ankara, which has turned into a test laboratory for violations of rights, has adapted to the whole population and the country in time. The Ankara ban still continues, despite the law and the annulment decisions of the system's own courts. On the other hand, this article tries to answer the question of "What about the law?"

The Constitution of Turkey and the European Convention on Human Rights (ECHR) Article 15 contains that the state may take measures contrary to the convention, under the conditions of state of emergency, provided that the essence of the right is not damaged. On the other hand, it states that every right could be restricted in the ordinary regime, in the presence of certain conditions. The concept of "certain conditions" here is actually the key to the matter and responds to whether the decision taken by the state is a violation of rights, depending on its interpretation.

The Ankara bans, which have been ongoing since 17.11.2017, in the most general sense, prohibit the collective activities of LGBTI+ rights organizations or the subjects coming together. Several public events, from the press release to the demonstration, from painting exhibitions to movie screenings, have been prohibited for the LGBTI+ people with this ban. Many rights protected by the Constitution and / or the ECHR expressly or indirectly, such as the right to assembly, freedom of expression, organization, art, and science, have been rendered inaccessible, and civil life has been paralyzed. So why should this disabling act of the state should be considered as a violation of rights?

As it is known, some of the rights may be restricted, but some others cannot. For example, the right to a fair trial and the prohibition of torture are among the guarantees that cannot be restricted. The fundamental rights listed in the above paragraph may be restricted under certain conditions.

First of all, restrictions must have legal basis. In other words, the state must announce to its citizens that it can issue the ban, with the competent nationwide legislative authority – as in Turkey –, the public should be informed about the conditions of restrictions and the conditions must be foreseeable. From this point of view, it can be argued that the Ankara ban has legitimacy. From 16.11.2017 until the end of 17.07.2018, when the state of emergency ended, the ban has at least a so-called legal basis; because the state of emergency was in effect, albeit controversial.

“Governorship did not ban activities; but banned the act of doing any activity, regardless of what it is and what it involves.”

On 03.10.2018, Ankara Governorship "formatted" the ban decision, removed the state of emergency from being a basis, but continued the ban according to the Law on Meetings and Demonstrations and the Law on Provincial Administration. However, neither the Law on the State of Emergency nor the laws mentioned above give the governorships the authority to prohibit the activities as a whole. In other words, the governorship took this decision, even though the legislature did not give it this authority, and this is the first answer to the question of why the bans are against fundamental rights. The restriction should pursue a legitimate aim. The criterion to be considered for legitimacy is that it is compatible with the purposes listed in the articles of the ECHR and the Constitution regarding the conditions under which the relevant rights can be restricted. These are often the protection of national security, public order, prevention of crime, protection of health or morals or the rights and freedoms of others. It is clear that none of the activities banned by the Ankara Governorship are compatible with the above and disrupt the established order. On the contrary, the justification of "threats to activities", which later turned out to be a lie, is not a legal justification. In any case, the governorship did not ban activities; but banned the act of doing any activity, regardless of what it is and what it involves.

The restriction should be proportionate. As an example to the foregoing, a measure to prevent crime is considered proportionate when it is sufficient to serve the purpose of preventing crime. This necessitates the evaluation of the ban to be made separately for each activity, as well as to evaluate what is aimed at. For example, if an event is being held, the duty of the governorship, which is aware of any group of people who say that it will harm the event, is not to ban the event, but to ensure the constitutional rights of the event organizers by using the power to use force, if necessary. Within this framework, the governor's decision is, in fact, not proportionate.

Finally, intervention must be necessary in a democratic society and aim to serve a need of the democratic society. Ban decisions should serve the constitution and the established order. Compliance with the requirements of democratic society order should be evaluated separately for each right. However, the above-mentioned disproportionate measures are essentially one of the main indicators that intervention is not necessary in a democratic society. On the other hand, the ban must meet a pressing social need targeted by the ECHR. Moreover, when reviewing an allegation on Turkey's violation of freedom of assembly and association under Article 11, ECtHR established that democracy is a fundamental element of the European public order and that an intervention, not based on the demand for a democratic society, would constitute a violation.⁴ In other words, the governor's decision should also be a decision establishing democracy.

4 ECHR, Altinkaynak and the others/Turkey Application, Application No: 12541/06, D. 15/10/2019.

As it can be seen, the bans can never meet these conditions and are overturned by the courts within the system. However, despite being clearly against conventions, constitution, laws, and court decisions, how have these bans come into effect and remain in effect? Firstly, it is necessary to explain why we say that the bans are still in effect. The criterion for the annulment of a ban is not the existence of a judgement that overturns it, but whether this right can be exercised in practice. If it is asked, "When was the last time a public LGBTI+ event was held in Ankara?", most readers will think too long to answer. Courts' decisions to annul the ban are valuable, not because they ensure the exercise of the rights, but only because they acknowledge that the ban is unlawful. On the other hand, the main purpose of the state is to extend the time the reader spends to answer the above question. Bans are not limited to events or activities; it means an attack on the civil sphere, social memory, intellectual pursuit, and awareness of rights. In the case of LGBTI+ people or their organizations, this aggression has not been successful because the LGBTI+ rights struggle is a struggle for being a subject against being ignored and being visible in the public spaces. LGBTI+ rights struggle is a struggle to create and maintain their own public spaces, when barred from public spaces. In other words, LGBTI+ people are familiar with this oppressive side of the state, and this is what shaped their past experiences.

The state has implemented this method, developed specifically for Ankara, in LGBTI+ activities in different provinces, and changed its motivation at the current stage and disrupted all civil life by citing the COVID-19 pandemic as a reason, and paralyzed all non-governmental organizations including associations, foundations and bar associations. In this sense, it is possible to say that Ankara bans are not over, its functional and spatial scope continues by expanding. Despite its semi-public nature, even bar associations were rendered unable to hold their own meetings.

We are no longer in a state that continues the usual but substitutes the extraordinary of the previous period to the usual of the new period. We are in a process of transformation that places precarity, such as the abolition of the Constitutional Court or execution, which were not mentioned even in the extraordinary conditions of the previous period, within its own anomaly. The evolution of this process, which resembles an endless movie scene, is undoubtedly in the scope of politics, not law.

■ Human Rights and Equality Institution of Turkey (HREIT) and the Case of Cinnah Hotel

Emrah Şahin¹

LGBTI+ people are exposed to discrimination in all areas of life in Turkey, either directly or indirectly. While this discrimination is ignored by the state organs and the judiciary, there are also discourses and decisions that encourage discrimination. The hate speech by bureaucrats and politicians representing state institutions about LGBTI+ community makes LGBTI+ people a target and increases the existing discrimination even more. The silence of the judiciary against these violations also causes the discrimination and violence cases to be seen as legitimate. Discrimination against LGBTI+ people is followed by impunity due to the distant approach of lawmakers when it comes to the issues regarding sexual orientation and gender identity in every legislative process concerning discrimination.

When international organizations criticize the lack of any legal legislation and impunity regarding discrimination against LGBTI+ people in Turkey, state representatives allege the provision of "All individuals are equal without any discrimination before the law, irrespective of language, race, color, sex, political opinion, philosophical belief, religion, and sect, or any such grounds", which is regulated in Article 10 of the Constitution, and defend themselves by saying that the phrase "any such grounds" also covers LGBTI+ people and is interpreted as such. The purpose of this article is to draw inferences from what happened in a small part of the years-long struggle of those, of whom the expression "any such grounds" includes. It reveals the discrimination against LGBTI+ people by HREIT, which was originally established to prevent discrimination, based on "any such grounds".

The Subject of the HREIT Application

The applicant, who declared himself as a trans woman, via a phone call to Pink Life Association's legal unit on 10.08.2018, stated that after making a reservation at Cinnah Hotel in Ankara, the hotel staff did not give the room key when they went to the hotel with a friend, as the applicant was a trans woman. The counselee stated that they took them out of the hotel by literally saying

¹ Lawyer, Ankara Bar Association.

"We do not give a room to trans people". In line with our guidance upon this notice, a report was prepared about the incident of discrimination by taking the signature of the other witness.

Purpose of Application

Despite the indifferent and political attitude of the public institutions and the judiciary to the statements regarding the claims of discrimination, such claims must be supported by concrete and unquestionable evidence. Otherwise, no application or notice is taken seriously. Especially in the business or service sector, the fact that these cases are usually experienced behind closed doors has also caused the difficulty of proving the cases. In this case, the fact that there were a witness and a report, the discrimination was made not by implication but by directly selected words, was the main factor for us to make an application on this matter.

As the method of application, we preferred to make an application through HREIT and to find out the reaction of HREIT, whose founding purpose is to combat discrimination and to create equality, on this issue. However, a small number of applications were made to this institution, and there was no known application until then due to the discrimination against LGBTI people. To learn the view of HREIT on discrimination on the basis of gender identity, the process was initiated with the application of HREIT. Having a negative result for the application, would enable the judicial mechanism to discuss whether "gender identity" can be considered in the discrimination category in the HREIT establishment law, and in the next stage whether there is a violation in the context of the constitution and human rights.

First Application and First Case

In the discrimination application made to HREIT, it was stated that the application could not be reviewed, on the ground that "gender identity" is not among their discrimination categories. Thereupon, the lawsuit we filed for the annulment of the decision at the Ankara 23rd Administrative Court was won. However, this gain was not exactly in line with our target. The reason for this is the following justification of the decision: "It is against the procedure for HREIT to answer the applications with a single signature, while it should be evaluated with the decision of the board." As in this case, the ground for discussion we aimed was not attained. However, we had the right to re-apply to HREIT, and it was ensured that HREIT took our application more seriously.

Second Application and Second Case

Following the annulment decision rendered by the court of first instance, the same application was made again. And again, HREIT rejected the application, this time with the decision of the board and with the same reason. After this rejection decision, the annulment case we filed at the Ankara 2nd Administrative Court was filed with a hearing, but the court still has not set a hearing date and the case is still ongoing.

Notes from the Defense of HREIT For the Second Case

HREIT expresses sexual orientation as a preference in its defense and quotes President Recep Tayyip Erdoğan's speech at the 7th Family Council organized by HREIT in 2019. In his speech, President Erdoğan briefly said, "Deviant relationships that are contrary to human nature are deliberately tried to be legitimized by certain groups. This is among the main threats to the family institution. Unfortunately, this immoral lifestyle, in which a hedonist and egoist type of human being who is constantly in pursuit of pleasure is glorified, has more and more impact in our country every year."

Besides, HREIT claims that sexual orientation and gender identity statements were not deliberately included in the HREIT Law, which entered into force at the time the Istanbul Convention was in effect. In the defense, there are unfounded determinations that the laws consider only two genders, that the subjects are required to be male or female, and that gender is a structural feature that serves to determine whether a living organism is male or female. It has been argued that allowing an understanding and interpretation that is not accepted in the Turkish legal system would mean consenting to a practice that would cause chaos in the society and law. HREIT argued, fact that the phrase "sexual orientation or gender identity" is not mentioned in any general or specific provisions applicable in Turkey, clearly means that the lawmakers did not

“HREIT made it clear that the lawmaker does not show the will to protect these rights, arguing that these groups do not need to be protected by resorting to the method of comparison, but that they are not protected by law.”

intend to protect these categories, therefore they cannot be considered under protection by resorting to analogical reasoning. The institution, tried to create a perception of threat around the concepts of sexual orientation and gender identity by claiming that they are not similar to gender, but rather opposite, because the notion of gender protects the male and female genders while the concepts of sexual orientation and gender identity undermine gender identities, make gender insignificant and cause chaos in the conception of men and women.

HREIT has commented on behalf of the legislator and stated that Turkish Law does not consider "sexual orientation" and "gender identity" as a value to be protected under human dignity, does not accept approaches that dismiss, assimilate and disregard the gender of women and men, otherwise the law and public order would fall into chaos.

According to HREIT, the Constitution and the legislation protect only the biological sex, that psychological gender definitions conflicting with biological sex are not protected, their protection will result in not protecting the biological sex, otherwise men who perceive themselves as women may enter women's bathhouses, women's toilets and this situation may make women psychologically victimized. HREIT claimed that men who perceive themselves as girls can get the pension of their father until they get married, that the whole social structure would deteriorate, and that all legitimate grounds and concepts such as public order, general health, morality and public security would be disturbed.

HREIT claimed that the legal protection of LGBTI+ people cannot be accepted, and asserted that the rest of the world, also, do not legally protect LGBTI+'s. Besides, HREIT made a baseless interpretation that the counselee is not subjected to violence, against the article stating that nobody can be subjected to violence due to their gender identity, in the Istanbul Convention. Besides, HREIT quoted the following statement made by President Erdogan at the Presidential Cabinet Meeting on 29.06.2020: "They seek to poison the young minds by normalizing the cursed perversions throughout human history. Those who support such marginals contrary to our beliefs and culture are, in our eyes, partners of the same perversion..."

Conclusion

The point that is desired to draw attention in the defense of HREIT, which is the announcement of the known, is that; their defense reveals the point of view not only of HREIT but also of the state institutions that it refers to. It has been demonstrated that the reason for this refusal decision is not only related to the procedure and the law but also to have a political basis. As a matter of fact, the discrimination phrases in HREIT Law Art. 3/2 are counted through exemplification contrary to the claims of the other party, and the absence of sexual orientation and gender identity expressions in this order does not mean that these rights will not be protected. According to the social state principle and Article 10 of the Constitution, the state should treat its citizens equally. Again, in the Istanbul Convention to which we are a party, the expression of gender identity is included among the categories of discrimination, and the state must take the necessary measures to prevent discrimination in this respect. Also, the state parties are obliged to prevent discrimination against sexual orientation and gender identity in line with the principles and directives that are the basic basis of HREIT and other human rights and equality institutions.

As a result, although the legislator avoids these phrases in the relevant law, the universal legal principles clearly reveal that discrimination against every person should be prevented in practice. While HREIT is expected to fight against discrimination, it also reveals that it discriminates based on policy, ideology, and morality. As a result, a legal struggle ground has been created, which we think will be useful in measuring the historical level of the debate rather than who will win the case. We hope that this initiative, which is a drop in the ocean, will make a small contribution to the LGBTI+ rights advocacy.

■ I Was Not Born to be Forced, I Will Breathe After My Own Fashion:

Evaluations on the Discourse

Produced by High-Profile Political

Figures on LGBTI+ People¹

Polat Yamaner²

The year of 2020 was surrounded with very complicated politics, and LGBTI+ rights and LGBTI+ community were amongst the main highlights of the year. As it is explained in detail in other articles of this publication, increasing and diversified violence against LGBTI+ people, and declining gender equality which has a direct effect on LGBTI+ people, has drastically intensified with the COVID-19 pandemic. These headlines were amongst the prominent issues circulating around civil society, human rights movement, and in mainstream politics.

Discrimination and hatred against LGBTI+ people, based on sexual orientation and gender identity are, of course, not new. However, this year it gained a different dimension, as as a very hostile social and political climate was created, and manifested itself in very concrete, cumulative, and repetitive ways. One of the main reasons for this situation was generated from the public statements on LGBTI+ people, made by the public officials and politicians throughout the year. These statements directly affected the lives of the LGBTI + people, due to their content and source and enhanced the negative perception of LGBTI+ people across the country.

The situation after the statements of the President of Religious Affairs Ali Erbaş can be given as a a clear example for this. In his Friday Sermon on April 24 2020, the President of Religious Affairs targeted LGBTI+ people, people living

1 This work is an extended version of another article I prepared for the Speak Up (Susma) Platform and published there. For the Turkish article in question: Yamaner, P. (2020). "LGBTI+ in the Middle of Current Politics: A Brief Assessment of High-Level Public Officials' Statements". Susma Platform, <https://susma24.com/guncel-siyasetin-ortasinda-lgbtilar-ust-duzey-kamu-yetkililerinin-aciklamalariyla-ilgili-kisa-bir-degerlendirme/> (Last Date of Access: 01.11.2020).

2 Lawyer, Istanbul Bar Association; SPoD Legal Team Volunteer. I would like to thank Ela Yezdan for the editorial contribution to this article.

together without marriage, and people living with HIV. According to SPoD's Pandemic Report, there has been a 100% increase for the applications made to the SPoD LGBTI+ Social Service Hotline, regarding the cases of discrimination and violence based on gender identity and sexual orientation following the 45 days of the statement.³ Based on the report, it was also stated that after the public officials' statements targeting LGBTI+'s, there was an increase in violent incidents and the counselees did not feel safe.

After the statements of the President of Religious Affairs, it was observed that high-profile political figures and public officials at various levels and fields made statements about LGBTI+ people. For example, the Mayor of Istanbul Metropolitan Municipality, Ekrem İmamoğlu, stated that the society was not ready to allow same-sex marriages⁴. Kerem Kınık, President of the Red Crescent, accused LGBTI+ people of pedophilia⁵. The Presidential Communication Director Fahrettin Altun supported Kınık's statements and stated that "LGBT propaganda" is a great threat to freedom of expression⁶. The President and AKP Chairman Recep Tayyip Erdoğan encouraged public to take a stand by the perversion of the LGBTI+ people⁷. Meral Akşener, Chairman of the İYİ Party, stated that she did not want her child to be gay⁸. All these statements are examples from the very recent past.

“Although it is essential to evaluate each statement about LGBTI+ people separately, it is substantial to determine that even in a situation where the expressions cannot be considered as hate speech, it may be perceived as a discriminatory discourse and contribute to the construction of a wider negative speech.”

3 Social Policy, Gender Identity and Sexual Orientation Studies Association. (2020). Pandemic Report: LGBTI+'s in Three Months of COVID-19 <http://spod.org.tr/SourceFiles/pdf-2020623151720.pdf> (Last Date of Access: 01.11.2020), s. 7.

4 Kaos GL. (2020). "İmamoğlu Answered the Question of 'Gay Marriage'" Kaos GL, <https://www.kaosgl.org/haber/imamoglu-escinsel-evlilik-sorusunu-yanitladi> (Last Date of Access: 01.11.2020).

5 Aktan, S. (2020). "Red Cross Reaction to Red Crescent President Accusing Pedophilia Against LGBT Individuals, Support from Ankara". euronews, <https://tr.euronews.com/2020/06/30/lgbt-bireylere-pedofili-suclamas-yapan-k-z-lay-baskan-na-k-z-lhac-tan-tepki-ankara-dan-des> (Last Date of Access: 01.11.2020).

6 Tar, Y. (2020). "Balance Sheet of Hate towards LGBTI+ people in Pride Week". Kaos GL, <https://www.kaosgl.org/haber/onur-haftasi-nda-lgbti-lara-nefretin-bilancosu> (Last Date of Access: 01.11.2020).

7 Republic of Turkey Presidency. (2020). "Turkey Will Be One Of The Star Countries Of The World That Will Be Reshaped After Pandemic", <https://www.tccb.gov.tr/haberler/410/120507/-turkiye-salgin-sonrasi-yeniden-sekillenecek-dunyanin-yildiz-ulkelerinden-biri-olacak-> (Last Date of Access: 01.11.2020).

8 Demirbilek, G. (2020). "I Do Not Want My Child To Make Such A Choice, But I Will Not Beat The Ones". Kaos GL, <https://www.kaosgl.org/haber/cocugumun-boyle-bir-tercihte-bulunmasini-istemem-ama-tercihte-bulunani-da-dovmem> (Last Date of Access: 01.11.2020).

Evaluation of High-Profile Political Figures' Statements on LGBTI+ People Under Human Rights Law

Considering the impact area of these statements, it is obvious that they have a special significance in terms of conveying the general standing on LGBTI+ policies.⁹ These statements, when reviewed within the framework of the national and international human rights law regime, in which Turkey is included, make it possible to carry out a comprehensive assessment on LGBTI+ rights. This assessment may pave the way for determining the legal, criminal and political responsibilities of the high-profile political figures and public officials, and for the use of these types of responsibility as a tool in the political and judicial advocacy regarding LGBTI+ rights.

Before making this assessment, it needs to be emphasized that the well-established case-law on freedom of expression provides a safeguard¹⁰ for expressions that are shocking, hurtful and disturbing to a certain extent, and that such statements will benefit from a higher level of protection¹¹, especially when it comes to political debate. However, in order to determine the limits of this protection, it is also necessary to make an assessment as to whether the expressions in question have characteristics outside the field of protection such as hate speech, incitement to violence or incitement to riot.

Within the scope of these categories, the concept of "hate speech" in statements made about LGBTI+ people, has political and social uses in more than one dimension. There is no legally accepted definition of hate speech and the fact that the concept has different dimensions makes it difficult to recognize above-mentioned statements as hate speeches.¹² However, as stated by the scholars, hate speech can be roughly described as follows:

"Expressions that incite hatred or hostility against a person or group, spread intolerance through exaggeration, distortion or slander, or that symbolize a natural identity element as an element due to religion, sect, skin color, language, national or ethnic origin,

9 Regarding the President's statements, see. Constitution art. 104.

10 ECHR, Handyside / United Kingdom Application, Application No: 5493/72, T. 07/12/1976, p. 49.

11 ECHR, Application Lingens / Austria, Application No: 9815/82, 08/07/1982, p. 42.

12 Türoy, A. (2018). "A Brief Evaluation of Views on the Relationship Between Hate Speech and Freedom of Expression". *Crime and Punishment* (2018/2), 139-160. https://www.tchd.org.tr/Uploads/Suc_ve_Ceza_2018_2.pdf (Last Date of Access: 24.11.2020), p.140.

gender, sexual orientation, gender identity, or that deny, simplify or legitimize historical events in which certain groups were harmed.”¹³

There are three basic constitutive elements for hate speech to be formed. These are; the discourse should be directed to one of the mentioned groups, the discourse should target the characteristics of the group, and the existence of the group being characterized should not be welcomed and should be subjected to hostility.¹⁴ This review will be evaluated in every aspect, in accordance with the standards of freedom of expression, due to the context, audience, speaker itself, and events occurred due to the discourse in question. In this sense, although it is essential to evaluate each statement about LGBTI+ people separately, it is also important to determine that even in a situation where the expressions cannot be considered as hate speech, it may be perceived as a discriminatory discourse and contribute to the construction of a wider negative speech.

As a basis of this review, when the case-law of the European Court of Human Rights concerning the statements of high-level figures and public authorities is evaluated, *Erbakan v. Turkey* judgement stands out with useful findings.¹⁵ The facts of this judgement are related to the criminal proceedings held in the State Security Courts with the allegation that the speech of Necmettin Erbakan about the Refah (Welfare) Party through religious affiliations and references, leading the public to hatred and hostility. In its judgment, the Court stated that, as a general principle, any expression that encourages and legitimizes hatred, including intolerance in democratic societies, should be sanctioned, and prevented. It was stated that “formalities”, “conditions”, “restrictions”, or “sanctions” could be foreseen in proportion to the legitimate aim, pursued in this direction.

After the evaluation of the statements, it was decided that freedom of expression of the applicant was violated, since there was no “existing risk” or “an imminent danger” for social turmoil, and the penal sanction was imposed four years and five months after the speech was made. However, the decision in question is significant in terms of setting the limits of the responsibility of high-level politicians and public officials stemming from their public statements.

Another important judgement regarding hate speech, which can lead to humiliation, exclusion, consolidation of stereotypes, and criminalization of relevant identities before the public, is the judgement of *Vejdeland and others*

¹³ *ibid*, p. 142.

¹⁴ *ibid*, p. 142-143.

¹⁵ ECHR, Necmettin Erbakan / Turkey Application. Application No. 59405/00, 06/07/2006, p.

v. Sweden.¹⁶ The facts subject to application are about the brochures intended to be distributed in a high school building, claiming that homosexuality was a "deviant sexual orientation", "had a morally destructive effect on the foundation of society" and was "responsible for the increase of HIV and AIDS". After the domestic proceedings were exhausted, an application was filed complaining that their freedom of expression was violated. In the judgement, it was emphasized that "discrimination based on sexual orientation is as serious as discrimination based on race, ethnic origin or color" and it was stated that "provocation made to incite hatred is not necessarily a call to another act that constitutes violence or a crime". As the attacks carried out by insulting, ridiculing, or defaming a certain segment of the society have the nature of using the freedom of expression in an irresponsible manner, and it was found that there were sufficient reasons for the authorities to interfere with these expressions and that freedom of expression was not violated in the present application.¹⁷ Thus, the Court clearly found that hate speech based on sexual orientation or gender identity is not considered within the scope of the protection of freedom of expression. There seems to be no reason these standards regarding hate speech should not be applied to the high-profile political figures and public officials.

Conclusion

The year 2020, while the statements of high-profile political figures and public officials on LGBTI+ people steadily continued, is a year that builds a whole discourse about LGBTI+ people which has negative effects on LGBTI+ advocacy and its subjects in different dimensions. Considering the influence of the persons making these statements, and the consequences that may be caused or potentially caused by them, it is evident that anti-LGBTI+ rhetoric cannot be seen as ordinary value judgements, and in this sense, individuals have varying degrees of obligations. As a matter of fact, these standards have been put forward especially for hate speech or discriminatory speech.

Despite all the difficulties, the statement of "LGBTI+ rights are human rights" was steadfastly repeated with a louder voice this year. In spite of all the hatred, LGBTI+ people will continue to exist and advocate for themselves, and they will continue to make their voices heard with courage and pride.

¹⁶ ECHR, *Vejdeland and Others v. Sweden* Application, Application No: 1813/07, 09/02/2012, p. 55. For the Turkish translation of the decision, see. Kaos GL. (2020). "The ECHR's Decision on Hate Speech is in Turkish". Kaos GL, <https://kaosgl.org/haber/aihm-in-nefret-soylemi-karari-turkce-de> (Last Date of Access: 24.11.2020).

¹⁷ See also. Dikmen, K. (2020). "Fact Sheet: Expression or Hate Speech?" Kaos GL, <https://www.kaosgl.org/haber/bilgi-notu-ifade-mi-nefret-soylemi-mi> (Last Date of Access: 01.11.2020).

■ “I Demand My Lawyer!”:

LGBTI+ Activism of Bar Associations and Investigations Against Bar Associations in Turkey

Onur Sezen¹ - Umut Rojda Yıldırım²

In this article, the situation of the bar associations in LGBTI+ activism and the challenges they face in Turkey will be discussed, as the bar associations have been investigated within the scope of Article 216 of the Turkish Penal Code, which is on degrading the religious values of a section of the public, after the statements of support to the LGBTI+ community who were targeted with the hateful remarks³ of the President of Religious Affairs Ali Erbaş during the COVID-19 outbreak.

Bar associations are the professional organization of lawyers and are thus considered among public institutions. They have had a pioneering stance within professional organizations in LGBTI+ activism in Turkey in recent years. LGBTI+ people, who often occupy the agenda of the legal system as “victims”, are now also on the field as actors. The bar associations that are the only defenders of the attorneys -who are one of the founding elements of the

judiciary- and the right to defense, are taking firm steps forward in support of both LGBTI+ lawyers and the LGBTI+ community, although they are a little late and outnumbered. The bar associations which stood with LGBTI+ people who were targeted by Erbaş’s statements during the COVID-19 pandemic were subjected to serious accusations for this reason. In fact, the “Multiple Bar Association” legislation, which is the greatest blow struck by the government on defense, was enacted by the Parliament on 15.07.2020 and entered into force. As we write these lines, it was decided by the Constitutional Court to reject the annulment application for the regulation of multiple bar associations.⁴

“Bar associations supporting individuals, activists and lawyers in the field of LGBTI+ rights, actually faced unfounded investigations after their statements against Erbaş’s hate sermon, particularly because of their support.”

1 Lawyer, Istanbul Bar Association; SPoD Legal Team Volunteer.

2 Intern Lawyer, Istanbul Bar Association; SPoD Legal Team Volunteer.

3 Kaos GL. (2020). “Hate in Friday Sermon:” Islam Denounces Homosexuality”. Kaos GL. <https://kaosgl.org/haber/diyamet-in-cuma-hutbesinde-nefret-islam-escinselligi-lanetliyor> (Last Date of Access: 11.10.2020).

4 Cumhuriyet Newspaper. (2020). “The ‘Multiple Bar’ Decision from Constitutional Court”. <https://www.cumhuriyet.com.tr/haber/aymden-coklu-baro-karari-1770293> (Last Date of Access: 11.10.2020).

So how did this vital issue concerning defense come to be presented to us by combining LGBTI+ individuals with it? To answer this question, first, it is necessary to look at the recent history of the bar associations.

LGBTI+ Commissions and Studies of Bar Associations

Currently, only five of the 81 bar associations in Turkey have a commission or a sub-committee aimed at protecting LGBTI+ rights: İzmir, Ankara, Diyarbakır, İstanbul, and Eskişehir.

The first LGBTI Rights Commission in Turkey was founded in October 2018 under the auspices of the İzmir Bar Association.⁵ In addition to holding dozens of events, conferences, and trainings to date, the Commission has fulfilled its rights advocacy duties to the fullest by intervening in cases concerning violations suffered by LGBTI+ individuals. By being involved in the Hande Buse Şeker case, which we are all familiar with, the Commission conceivably changed the course of the case. The Commission also supported LGBTI+ people to march on November 20, on Transgender Day of Remembrance, which the Governorship of İzmir tried to ban, just like the Ankara Governorship which banned LGBTI+ activities.

LGBTIQ+ Rights Center, which was established in December 2018 within the Ankara Bar Association,⁶ once again demonstrated the unlawfulness of bans against LGBTI+ activities by fighting together with NGOs in the trials concerning the two bans imposed by the governorship in 2017 during and after the state of emergency in Ankara.⁷ Ankara Bar Association LGBTIQ+ Rights Center led the campaign "I am your lawyer, I stand with you!", and during Pride Month, published the "Lawyers' Statement on LGBTIQ+ Rights and Dignity" signed by nearly 1000 lawyers.⁸

On 22.09.2019, the Diyarbakır Bar Association Women's Rights Center announced the establishment of the LGBTI+ Rights Commission.⁹ Diyarbakır Bar Association, which follows the footsteps of the murdered Bar Association President Lawyer Tahir Elçi in being at the forefront of the human rights struggle, declared

5 Demirbilek, G. (2020). "İzmir Bar Association LGBTI+ Rights Commission was established". Kaos GL, <https://kaosgl.org/haber/izmir-barosu-lgbti-haklari-komisyonu-kuruldu> (Last Date of Access: 11.10.2020).

6 İzmir Bar Association LGBTI+ Rights Commission was established". Bianet, <https://m.bianet.org/bianet/lgbti/203349-ankara-barosu-nda-lgbtiq-haklari-merkezi-kuruldu> (Last Date of Access: 11.10.2020).

7 See. In this publication Dikmen, K. (2020). "Are the Bans Over in Ankara", s. 7.

8 "I am your Lawyer, I am with you!". (ty.). <http://xn--avukatnmyanndaym-fqabee.com/> (Last Date of Access: 08.10.2020).

9 Diyarbakır Bar Association Women's Rights Center. (2019). <https://twitter.com/dbkadinhaklari/status/1175828932618272769> (Last Date of Access: 08.10.2020).

that it stands in solidarity with local associations and LGBT+ individuals who are subjected to rights violations with the establishment of this commission. LGBTI+ 101 Training was delivered in the Gender Concept Workshop, which is a compulsory class for intern lawyers. In accordance with the legal support provided to applications, the Commission also received requests for protection measures within the scope of Law No. 6284 on the Protection of the Family and the Prevention of Violence Against Women.

Istanbul Bar Association established the LGBTI+ Sub-Working Group within the Human Rights Center in 2020.¹⁰ Before the sub-working group was established, the Human Rights Center brought together experienced lawyers working in the field, association officials and lawyers with the seminar on the Training Program on Cases Concerning Discrimination Based on Sexual Orientation and Gender Identity.¹¹ Within the scope of the seminar, SPoD Law and Access to Justice Coordinator, Lawyer Hatice Demir also presented a paper and delivered a workshop on the attorney-client relationship.

Last but not least, Eskişehir Bar Association established the Anti-Discrimination Commission on 08.09.2020 "to protect individuals who are subjected to discrimination under our robe, which is the honor of the profession, and to take part in the legal struggle of individuals who have been subjected to discrimination and marginalization due to their gender, orientation etc."¹² As one of the first activities of the commission, LGBTI+ 101 Basic Concepts Seminar was organized in cooperation with Kaos GL.¹³

Apart from the ones outlined above, we know that our colleagues are also working in other bar associations. For example, colleagues from Antalya and Mersin bar associations continue their commission establishment processes.

Bar associations supporting individuals, activists and lawyers in the field of LGBTI+ rights, actually faced unfounded investigations after their statements against Erbaş's hate sermon, particularly because of their support. In this geography where human rights advocacy is becoming increasingly more difficult, bar associations have become clear targets by supporting LGBTI+ people.

10 Istanbul Bar Association. (2020). Istanbul Bar Association Executive Board Working Report 2018-2020. <https://www.istanbulbarosu.org.tr/files/docs/ISTANBUL-BAROSU-CALISMA-RAPORU-2018-2020.pdf> (Last Date of Access: 18.11.2020).

11 Istanbul Bar Association. (2019). "Training Program for Cases of Discrimination Based on Sexual Orientation and Gender Identity". <https://www.istanbulbarosu.org.tr/HaberDetay.aspx?ID=14585&Desc=Cinsel-Y%C3%B6nelim-ve-Cinsiyet-Kimli%C4%9Fi-Temelli-Ayr%C4%B1mcu%C4%B1k-Konulu-Davalara-Y%C3%B6nelik-E%C4%9Fitim-Program%C4%B1> (Last Date of Access: 08.10.2020).

12 Eskişehir Bar Association. (2020). "To the Press and to the Public". <http://www.eskisehirbarosu.org.tr/haber/basina-ve-kamuoyuna-08092020> (Last Date of Access: 08.10.2020).

13 Kaos GL. (2020). "Eskişehir Bar Association Anti-Discrimination Commission Met at LGBTI + 101 Basic Concepts Seminar". <https://kaosgl.org/haber/eskisehir-barosu-ayrimcilikla-mucadele-komisyonu-lgbti-101-temel-kavramlar-semineri-nde-bulustu> (Last Date of Access: 08.10.2020).

The “Hate Sermon” by Erbaş, Statements by Bar Associations and Subsequent Investigations

Erbaş made the following statement in his Friday Sermon on 24.04.2020, during days in which the COVID-19 outbreak worried us all the most and created an even darker picture every day:

“O, people! Islam accepts adultery as one of the greatest harams. It condemns Sodomy and homosexuality. What is the wisdom of this condemnation? It is the wisdom of the fact that it brings diseases with it and spoils the generation. Hundreds of thousands of people each year are exposed to the HIV virus, which is caused by an illegitimate and unmarried life, and this great haram, whose name is adultery in the Islamic literature. Let us fight together to protect people from this kind of evil.”

With this statement, Erbaş not only incited hatred to the public, but also incompletely and incorrectly informed them based on unscientific claims. As a matter of fact, as stated in the report¹⁴ prepared by SPoD for the first three months of the pandemic (11 March - 11 June 2020), LGBTI+ people experienced difficulties in accessing health services during this period, risk of being exposed to domestic violence increased, their needs for psychological support increased during social isolation, and they were victimized by the increasing hate speech after Erbaş's statement.

Following this statement, statements were issued by the Ankara, Diyarbakır, İzmir, and Istanbul Bar Associations, reminding that Erbaş was under the obligation not to make statements targeting a section of the public and treating all citizens equally because he is a public official.¹⁵ Upon this, the Office of the

¹⁴ Social Policy, Gender Identity and Sexual Orientation Studies Association. (2020). Pandemic Report: LGBTI+ people in Three Months of COVID-19. <http://spod.org.tr/SourceFiles/pdf-2020623151720.pdf> (Last Date of Access: 25.07.2020).

¹⁵ Istanbul Bar Association Human Rights Center. (2020). “Our Statement About the Sermon of the Directorate of Religious Affairs with Hate Speech”. <https://www.istanbulbarosu.org.tr/HaberDetay.aspx?ID=15707> (Last Date of Access: 27.09.2020); Ankara Bar Association. (2020). Press Statement on the Speech of the President of Religious Affairs Ali Erbaş Despising a Part of Humanity with Hate and Targeting the Masses”. http://www.ankarabarosu.org.tr/HaberDuyuru.aspx?DIYANET_ISLERI_BASKANI_ALI_ERBAS%E2%80%99IN_INSANLIGIN_BIR_KESIMINI_NEFRETLE_ASAGILAYIP_KITLELERE_HEDEF_GOSTERDIGI_KONUSMASIYLA_ILGILI_BASIN_ACIKLAMASI&-4986 (Last Date of Access: 27.09.2020); Diyarbakır Bar Association. (2020). “Our Press Release on Hate Speech of the President of Religious Affairs. <https://www.diyarbakirbarosu.org.tr/haberler/diyamet-isleri-baskaninin-nefret-soylemi-hakkinda-basin-aciklamamiz> (Last Date of Access: 27.09.2020); İzmir Bar Association. (2020). “Resist the Hate, Cherish the Life”. <https://www.izmirbarosu.org.tr/HaberDetay/2032/nefrete-inat-yasasin-hayat> (Last Date of Access: 27.09.2020).

Chief Public Prosecutor in Ankara and Diyarbakır announced that investigations were launched against the Ankara and Diyarbakır Bar Associations. However, despite all the distortions and targeting accusations, the statement of the Ankara Bar Association merely reminds that in a secular state, no public official has the privilege of not being subject to the Turkish Criminal Code, which regulates hate speech as a crime, and the European Convention on Human Rights, which regulates the prohibition of discrimination. Meanwhile, the statement of the Diyarbakır Bar Association consists of declaring that they will remain in solidarity with LGBTI+ people.

The Ankara Bar Association, which did not remain silent vis-à-vis the investigation, issued another statement stating that the investigations were a manifestation of the anti-Istanbul Convention movement.¹⁶ There were statements from other bar associations, even if only a small number, to support the bar associations that were announced to be under investigation.¹⁷

Investigated Crime:

“Degrading the Religious Values of a Section of the Public”

The charge faced by the bar associations after defending the rights of LGBTI+ persons was the crime of “publicly degrading the religious values of a section of the public” as per Article 216, paragraph 3 of the Turkish Penal Code. However, according to the text of the article in the law of this crime, only acts that are “capable of disturbing public peace” may constitute this crime.

An accusation of publicly degrading religious values is classified as a *concrete danger crime*. Readers who are interested in law will understand from this definition that to speak of a crime here, it must be investigated whether the statement or action is indeed sufficient to have a negative consequence great enough to disrupt public peace. Besides, in a decision rendered in 2005, the Court of Cassation pointed out that it should be taken into consideration

16 Ankara Bar Association. (2020). “Press briefing”. http://www.ankarabarasu.org.tr/HaberDuyuru.aspx?BASIN_ACIKLAMASI&=4987 (Last Date of Access: 27.09.2020).

17 Izmir Bar Association. (2020). “Stop Hate Speech, Not Bar Associations”. <https://www.izmirbarosu.org.tr/HaberDetay/2033/barolari-degil-nefret-soylemini-durdurun> (Last Date of Access: 27.09.2020); Izmir Bar Association. (2020). Penal Sanction Threats to Bar Associations Advocating Equality Cannot Be Accepted. <https://www.izmirbarosu.org.tr/HaberDetay/2034/esitligi-savunan-barolara-cezai-yaptirim-tehdidi-kabul-edilemez> (Last Date of Access: 27.09.2020); Van Bar Association. (2020). “Ankara Bar Association Is Not Alone”. <http://www.vanbarosu.org.tr/ankara-barasu-yalniz-degildir-h-583.html> (Last Date of Access: 27.09.2020); Van Bar Association. (2020). “Diyarbakir Bar Association Is Not Alone”. <http://www.vanbarosu.org.tr/diyarbakir-barasu-yalniz-degildir-h-584.html> (Last Date of Access: 27.09.2020).

whether *the way the thought is expressed, not the thought itself*, will cause imminent danger leading to social events. The Court of Cassation explained that *for danger to occur, fear alone is not enough, it has to be capable of creating a concrete danger*.¹⁸ Again, in its decision dated 2015, the Court of Cassation stated that to render a conviction it is necessary to ask the question whether the act of humiliation could disturb public peace or not.¹⁹

When the statements of the bar associations are evaluated in the light of the decisions of the Court of Cassation, to claim that the bar associations committed this crime, it should have been very possible that a social event or confusion would occur after the statement. Also, the statements made by the bar associations against Erbaş's statement should have had a strong impact on this level. However, it is obvious that the statements of the bar associations do not have such an effect. Besides, it is seen in the statements that there is a reaction against a public official delivering such remarks. Just as Erbaş himself or the expressions he used are not "religious values", it does not seem possible for any element of the crime to occur in terms of the law. For this reason, it can be concluded that the investigations were initiated as a political reaction against the bar associations reminding the public of LGBTI+ rights.

Conclusion

Bar associations are at the very beginning, we are aware of this. However, in this political climate, it is very empowering to know that LGBTI+ people, who are constantly subjected to hate crimes, have their lawyers with them; that the lawyers receive trainings on LGBTI+ rights, monitor rights violations against LGBTI+ people, initiate the transformation of the heterosexist legal system based on the gender binary, and perhaps most importantly, make LGBTI+ individuals feel that they are not alone, that we are not alone.

Bar associations fulfill their advocacy duty, are indispensable for a democratic constitutional state and are the founding elements of the judiciary. Investigations initiated against bar associations in relation to LGBTI+ people obviously reflect a political attitude rather than a legal one. However, despite everything, LGBTI+ people will continue to exist and struggle as long as they exist. LGBTI+ rights are human rights and the pursuit of the human rights struggle in solidarity with bar associations will only carry us forward.

¹⁸ The Court of Cassation, ACC, E. 2004/8-201, K. 2005/30, T. 15/03/2005.

¹⁹ The Court of Cassation 8th Criminal Chamber, E. 2014/35434, K. 2015/22535, T. 12/10/2015.

■ Review of Three Investigations Against LGBTI+ Subjects in 2019-2020

Onur Sezen¹

In this article, you will find three investigations that attracted public attention in 2019 and 2020 as well as review of the events related to them. All three investigations were opened following the reporting by biased media organizations accompanied by intense insults, emphasizing that the individuals are LGBTI+.

Even though the relevant laws were rarely invoked in the history of the country, the fact that all three investigations were carried out in such a short period, and that all of them 'coincidentally' concern LGBTI+ individuals, called for further examination.

B.B. and U.Ş.

Investigation on Queer Performance

In January 2020, an investigation has been initiated against the artists of a drag performance video, that was shot to be exhibited within the scope of the Queer Art Project in the UK. The artists were charged with paragraph 3 of Article 216 of the Turkish Penal Code (TPC) - publicly degrading the religious values of a section of the public). Since we have covered in detail the technical review of the accusation clause in another article², the case will be discussed here only within the scope of the standards set by high court judgments.

The investigation was initiated immediately following the examples of aggressive journalism that was made by revealing the artists' clear credentials and served with open insults against LGBTI+'s. The artists stated in law enforcement and prosecution statements that they deleted the video from their social media accounts when they saw that it was deflected from the purpose of the shooting. However, the authorities stated that the video was recorded by other accounts apart from their knowledge and wishes, and the video continued to be served by interpreting in completely different directions than the purpose of the shooting and the message it carried.

¹ Lawyer, Istanbul Bar Association; SPoD Legal Team Volunteer.

² See In this publication, Sezen, O. & Yıldırım, U.R. (2020). "I Demand My Lawyer!": LGBTI+ Activism of Bar Associations and Investigations Against Bar Associations in Turkey, p. 21.

It should be mentioned that the crime of publicly degrading the religious values of the public could be committed if the action is capable of causing intense popular movements.³ In this article, we would like to review whether B.B and U. Ş. have committed this crime from an objective legal perspective by referring to the relevant court judgments.

First decision we can reach on the subject is a 2005 judgment of the Court of Cassation. The judgment is not directly related to the Article 216 (3) of the TPC, but related to the crime of "violating the integrity of the state", pursuant to the former Turkish Penal Code. However, in its judgment the Court of Cassation made abundant references to the Article 216(3) of the TPC, including a criteria to be followed. criteria. The judgment concerns a columnist, who wrote in a national newspaper describing people with secular beliefs as "an irreligious and shrewd minority", "Thessaloniki converts, "vile" and "dishonorable". In the judgment the board composed of all the Criminal Chambers of the Court of Cassation stipulated that the action in question should be sufficient to make people enemies against each other.⁴ In the light of this judgment it is against the ordinary course of life to mention that the performance video, that is taken to be sent to competition that a limited number of people are aware of and watched in England, is "sufficient to make the people enemies to each other".

“The fact that the incident subject to the investigation did not cause a reaction other than the biased media organizations, shows the unrelatedness of the allegation to the incident.”

The second decision we will review is the judgment of the 8th Criminal Chamber of the Court of Cassation, dated 2015, on the trial of a person who stated "... all the prick, vile, petty, exposer, thief, cheater people are all, so-called worshippers of Allah ..." in a post over a social media account.⁵ In the judgment, it was emphasized that the post made by the individual did not contain a call for social violence and was not capable of disturbing public peace. It was stated that the publicity principle sought for the realization of the crime did not exist, since it was not planned beforehand.

3 For detailed information about danger crimes such as publicly degrading the religious values against freedom of thought and expression, see. Yılmaz, A.E. (2020). "An Evaluation Regarding the Regulation of Danger Crimes in the Context of Freedom of Expression". Yeditepe University Faculty of Law Journal (XVII), Special Issue, 155-176.

4 Court of Cassation, Assembly of Criminal Chambers, E. 2004/8-201, K. 2005/30, T. 15/03/2005.

5 Court of Cassation, 8th Criminal Chamber, E. 2014/35434, K. 2015/22535, T. 12/10/2015.

All statements were evaluated within the scope of freedom of expression. If we get back to the investigation of the B.B. and U.Ş., it is clear that the video shared by them does not call for violence. It is also clear that B.B. and U.Ş deleted the video upon the reaction, to avoid publicity.

In a judgment dated 2019, 8th Criminal Chamber of the Court of Cassation changed its opinion,⁶ stating that the judgments of the European Court of Human Rights, seeks "contribution to a public debate" in articles and posts on religion with regard to the freedom of expression cases. However, criticizing this judgment of the Court of Cassation, that is clearly contrary to its previous decisions, is not the subject of this article.

In the investigation, B.B. stated that the purpose of the video was to draw attention to the condition of the Ottoman tombstones that were left idle and neglected. In that case, despite the change of opinion of the Court of Cassation, that is contrary to the regulations to allow the restriction of freedoms, the incident can be defended on the grounds that it may contribute to the conducting of a public debate beneficially (action may be taken to restore tombstones). In line with the two earlier decisions, it can be said that it is a debate to be carried out, because the accusation is the "drag performance", given that the video is not likely to have an effect that could disturb public peace.

The Investigation against Boğaziçi University LGBTI+ Studies Club

In October 2019, in an e-mail group that is only open to its own members, one of the group members shared a quatrain which is similar to the words of the Turkish National Anthem. his post was leaked out of the closed mailing group. Following the incident, after the news with headlines containing insults to all LGBTI+'s, an investigation was initiated. The investigation was carried out through Article 300(2) of the Turkish Penal Code (the crime of publicly degrading the National Anthem).

The word "publicly" legally means that every person is aware of the action taken. Public actions, public posts, and blog posts are examples of this. However, is it possible that a text, written in a closed mail group that consists of a certain number of people, be public? The question answers itself. For a text to be public, following the 2015 judgment of the Court of Cassation Criminal General Assembly it should be processed in places where everyone or many people

6 Court of Cassation, 8th Criminal Chamber, E. 2019/10194, K. 2019/11813, T. 03/10/2019.

can read and see it.⁷ In a 2018 judgment the 17th Criminal Chamber of the Court of Cassation stated that if "degrading the signs of the national sovereignty" is at stake, the act must be evaluated in the light of the condition of 'publicity'.⁸ The continuation of the investigation, although the condition of "publicity", which is the founding element of the crime, was not met, brought along concerns that it was not carried out solely with legal concerns.

B.K.

The Investigation of Disturbing Peace and Tranquility in the Genderless Toilet

Boğaziçi University put genderless toilets into service on 8 February 2016 as a result of the students' campaign.⁹ Last year, when B.K., a student of the university, wanted to use one of these toilets, the student was subjected to an investigation pursuant to 123 of the TPC.(disturbing the peace and tranquility of the people) as a result of the complaints of the students who entered the toilet afterwards.

It should be noted that the crime of disturbing the peace and tranquility of the people reads as "for the sole purpose of disturbing peace and tranquility".

Article 123 therefore has the purpose element - that is to create disturbance. The fact that the incident subject to the investigation did not cause a reaction other than the biased media organizations shows the unrelatedness of the allegation to the incident. In all of the news reports, B.K. was given clear identity information and photographs, all LGBTI+'s were targeted in the news, and some of the news texts included the statements of "insisting on using the genderless toilet" because of being an LGBTI+ activist. Article 123 of the TPC carried out by the prosecution on this matter, is an accusation that is familiar to every individual subject to persistent pursuit by their partner or ex-spouse, and the complaints on this issue are often ignored by the prosecutors. In this case, the fact that the investigation has been initiated so easily from this article justifies the possibility of a political move. There are dozens of high court decisions on the accusation and it is seen that there are stable criteria (which are used in almost every decision in the same way) in these decisions. The Court of

7 Court of Cassation, Assembly of Criminal Chambers, E. 2004/8-201, K. 2005/33, T. 15/03/2015.

8 Court of Cassation , 17th Criminal Chamber, E. 2016/10357, K. 2018/1508, T. 12/02/2018.

9 Yolculuk (Journey) Newspaper. (2016). "The Demand for Genderless Toilet at Boğaziçi University Has Its Results". Yolculuk Newspaper. <https://www.gazeteyolculuk.net/bogazici-universitesinde-cinsiyetsiz-tuvalet-talebi-sonuc-verdi> (Last Date of Access: 08.10.2020).

Cassation calls for the intention of disturbing the victim to be very clear¹⁰, and states that it is not enough to act against the law once and that the actions should be repeated persistently and be continuous.¹¹ It is understood from the way the incident occurred that the door of the cabin was not locked, that is, it is clearly seen that entering the toilet cabin once to use the genderless toilet is not continuous.

Upon providing the clear identity information of the B.K. in the news, as mentioned above, SPoD and B.K. applied to the Criminal Judge of Peace, and news content were removed. Despite the decision of the judge, a news channel within the biased media groups refused to recognize the decision and refused to remove the news. The fact that not recognizing the decision of the judge is disregarding the law is not the subject of this article; nevertheless, this situation is remarkable in terms of showing us that the same law is not applied to everyone.

¹⁰ See for an example of decisions where the inadvertent intention is the cause of the cassation. Court of Cassation, 18th Criminal Chamber, E. 2019/10552, K. 2020/6738, T. 09/06/2020; Court of Cassation, 18th Criminal Chamber, E. 2019/9719, K. 2020/8117, T. 24/06/2020.

¹¹ Court of Cassation, 18th Criminal Chamber, E. 2019/11033, K. 2020/8321, T. 30/06/2020; Court of Cassation, 18th Criminal Chamber, E. 2019/11527, K. 2020/6740, T. 09/06/2020; Court of Cassation, 18th Criminal Chamber, E. 2019/10759, K. 2020/6251, T. 02/06/2020.

■ Projection of HIV in Criminal Proceedings:

“Recommendations 101”

Enes Salar¹ - Erkin Akbay²

Our main purpose in this article is to touch upon the reflection of HIV transmission in criminal law and to provide introductory-level suggestions that support the possible judicial processes. At the intersection of HIV and the judiciary, there is a total criminalization, not by the judicial texts, but by the actors within the judiciary. The purpose of the judiciary, especially the criminal proceedings, is to reach the truth. In this case, judicial actors (judges, prosecutors, lawyers, etc.) must keep their views leading to this intersection in line with human rights, law, and material reality. For this, the same actors should use the information appropriate to current developments, stay away from prejudice, and not reproduce stigma and hatred.

What Has Happened?

Due to the duty of law to regulate the relations between persons, almost all human issues remain within the sphere of law. One of these issues is undoubtedly HIV. The “I Do Not Have to Share My HIV Status” poster, shared by two associations active in the field of sexual health, on World AIDS Day (December 1) last year, had a great impact on social platforms.³ The discussion, which continued especially on Twitter after the post, unfortunately caused a hate and discrimination campaign with the contributions of reckless comments of experts.

The fact that people involved in the matter as soon as lawyers made statements that incited hatred and discrimination even if this was not their main intention, brought a legal dimension to the issue. Despite the fact that they lacked current and even any knowledge about HIV in the discussion, some lawyers made comments on this issue based on only their legal knowledge and thus, they misevaluated the decision of people living with HIV to share their HIV status only in accordance with the criminal law.

1 Lawyer, İstanbul Bar Association; SPoD Legal Team Volunteer.

2 Lawyer, İzmir Bar Association; SPoD Legal Team Volunteer.

3 Kaos GL. (2019). “We hope that prejudice and discrimination against HIV + people will be reviewed”. Kaos GL. <https://kaosgl.org/haber/hiv-bireylere-yonelik-onyargi-ve-ayrimciligin-gozden-gecirilmesini-umut-ediyoruz> (Last Date of Access: 25.10.2020).

The unfounded intersections of HIV and the Turkish Penal Code did not appear for the first time on December 1. These discourses, which were produced regarding the crimes of wounding and killing and criminalizing HIV on this occasion, were expressed before 1 December and continued to be expressed afterwards. The fact that this ambitious claim is expressed by lawyers unfortunately does not comply with the terminology, nor the reality and current developments regarding HIV. At this point, we have written this article to make a few suggestions at the introductory level in order to contribute to a prosecution process that complies with the principles of criminal justice and human rights, contains updated and accurate information on HIV, and thus does not reproduce stigma and hate.

For Starters: What is HIV?

The current concrete reality, which plays a key role in the overall article, namely HIV treatment and current developments, should be explained briefly before moving on to the main subject. Basically, if the necessary precautions are not taken, the following situations pose a risk for HIV transmission:

"Unprotected sexual intercourse with an HIV-infected person who is unaware of their HIV status or who is not at the Undetectable = Untransmittable level because they have not started HIV treatment yet, common use of needles, syringes and other injection equipment with an HIV-positive person, and not following universal infection rules, babies born from HIV-positive pregnant women who are not under treatment before the birth, at birth or during breastfeeding, injuries of healthcare workers with needles or sharp objects containing HIV-infected blood, blood donation"⁴

The ways to prevent HIV transmission can be listed as "having safe sexual intercourse, using pre-exposure prophylaxis (PREP), having regular tests and starting HIV treatment, not using shared syringes, using post-exposure prophylaxis (PEP) ..."⁵

The Undetectable = Untransmittable (U = U) concept, which has perhaps the most powerful impact on today's reality and all scientific authorities agree on⁶, is explained as follows:

4 Pozitif-iz Association. (ty.). "Transmission and its Risks". <https://www.pozitifiz.org/bulasi-ve-riskleri> (Last Date of Access: 25.10.2020).

5 For further information, see. Pozitif-iz Association (ty.). "Prevention of Transmission". <https://www.pozitifiz.org/bulasmayi-onleme> (Last Date of Access: 25.10.2020); for access to treatment, see also. Pozitif-iz Association (ty.). "Starting Treatment". <https://www.pozitifiz.org/tedaviye-baslamak> (Last Date of Access: 25.10.2020).

6 Centers for Disease Control and Prevention (CDC), Joint United Nations Program on HIV / AIDS (UNAIDS), World Health Organization (WHO).

"HIV-positive individuals who have the regular treatment and use their medications can lead a healthy and long life as anyone else. The amount of HIV circulating in the blood decreases to an undetectable level with the regular use of antiretroviral (HIV suppressing) drugs every day. It is aimed to continue the treatment regularly and to keep the HIV amount at this level. The undetectable level of viral load (that is, the amount of HIV in the blood) not only keeps the person healthy but also eliminates the possibility of HIV sexual transmission. In sum, HIV-positive individuals who receive regular treatment cannot sexually transmit HIV to others. Besides, U = U contributes significantly to public health."⁷

How is HIV Reflected in Criminal Law?

If HIV status is the subject of criminal proceedings, acting with the latest scientific developments is a must to reach the material truth. Therefore, developments in the field of health will constitute the backbone of these judgments. In cases where the subject of criminal proceedings is a criminal charge related to HIV transmission, it will be fair to reach the material truth by asking various questions. This part of the article contains related questions.

Being infected with HIV and reaching the AIDS stage are different situations. When a person infected with HIV gets the necessary treatment, they can continue their lives without any decrease in their quality of life. For this reason, a possible infection situation will not constitute the subject of wilful murder, but an evaluation can be made on the crime of willful injury or reckless injury. Since the subject of the article is not suitable for the crime analysis method, it will not be mentioned about the elements of the crime and which paragraph should be taken as a basis in potential possibilities. However, it is worth noting that the probability of transmission in one-time sexual intercourse is between 1/100 and 1/1000.⁸ This ratio should always be kept in mind for considering the connection between the person and the action. The probability of a crime occurring after one-time sexual intercourse cannot be considered as high.

Various criteria must be set forth to link the person with the act in a possible judgment. The first of these criteria is to answer the question of whether the person has sufficient viral load.⁹ If the person does not have sufficient viral load

7 For further information, see. Pozitif-iz Association. (2018). "What Does U=U (Undetectable=Untransmittable) Mean". <https://www.pozitifiz.org/post/b-b-belirlenemeyen-egittir-bulasmayan-ne-demek> (Last Date of Access: 25.10.2020).

8 Erdem, M.R. (2004). "The Problem of the Punishment of Transmitting HIV to Someone Else Through Sexual Intercourse". Atatürk University Erzincan Faculty of Law Journal (Volume: VIII, Issue: 1-2), p. 73.

9 Demir, H. (2019). "Diving into HIV Debates with the Turkish Penal Code". Kaos GL, <https://kaosgl.org/gokkusagi-forumu-kose-yazisi/hiv-tartismalarina-tck-yla-dalmak> (Last Date of Access: 17.10.2020).

or the viral load is at an undetectable level (Undetectable = Untransmittable) due to treatment, the possibility of transmission will be eliminated. For this reason, there will be an uncommittable crime and criminal proceedings will be terminated.

Another question is whether the person knows their HIV status.¹⁰ If the person does not know their HIV status, the crime of wilful injury will not occur, as there will be no intent. Unless it is proven that the person knows their HIV status before sexual intercourse, it should be accepted that there is no intent according to the principle "in dubio pro reo".¹¹

All doubts should be removed to reach the material truth. One of the things that needs to be done to eliminate the suspicion is to answer the question of whether the transmission occurred from the person on trial. In presence of people with multiple partners, in case whom it is transmitted from cannot be determined, the principle "in dubio pro reo" still applies.¹²

Another question to be asked in the judicial procedure is whether during the intercourse, safe sex practices are followed or not, and the issue of intent/negligence. If the parties have given consent for unprotected sexual intercourse, there will be no crime due to the concept of "permissible risk".¹³ Unprotected sexual intercourse with the consent of both parties means accepting the risk. If there is a transmission after protected sexual intercourse, there will be no crime due to the concept of permissible risk. In this case, the necessary protection method was applied, but the transmission occurred against the will of the parties. Another possibility is that although the person living with HIV wants to have protected sexual intercourse, the other parties prevent this protection against the consent of that person, or in sexual intercourse that begins with protection, the other partner's unilateral decision to end the protection method.¹⁴ In this case, as the intent or negligence of the person cannot be mentioned, the judgment will be devoid of essence.

“Demanding people living with HIV to share their status in all circumstances, in any relationship, and without limit, is essentially a desire to put the responsibility of implementing safe sex practices on someone else.”

¹⁰ Erdem, *ibid.*, p. 80.

¹¹ *ibid.*, p. 81.

¹² *ibid.*, p. 78.

¹³ For the concept of "Permissible Risk" see. Ünver, Y. (1996). Permissible Risk in Criminal Law. Istanbul University Institute of Social Sciences PhD Thesis. (Thesis advisor: Prof. Dr. Kayıhan İçel).

¹⁴ For the concept of "stealthling" see. Association for Struggle Against Sexual Violence (t.y.). Glossary. <https://cinselsiddetlemucadele.org/kavramlar-sozlugu/> (Last Date of Access: 25.10.2020).

In Lieu of Conclusion

After all these explanations, the most important thing that can be recognized is the key role played by the judicial process in that the claim to be HIV-infected can be directed and grounded on a person. The purpose of the law, and especially criminal law, is not creating reckless crimes and criminal groups. Demanding people living with HIV to share their status in all circumstances, in any relationship, and without limit, is essentially a desire to put the responsibility of implementing safe sex practices on someone else. It is not possible to accept the generalization that people living with HIV in any relationship are de facto superior in knowledge. Nowadays, few and inadequate policies produced for HIV are dealt only with treatment and prevention issues, and people living with HIV are blamed and even criminalized. Therefore, the totalitarian¹⁵ side of demanding disclosure of HIV status in relationships needs to be questioned again.

¹⁵ Vassaf, G. (1999). Prisoners of Ourselves-Totalitarianism in Everyday Life. Istanbul.

■ Field Observations on Sex Work: A Profession where the act is declared as a “crime”

Kardelen Yılmaz¹

As a lawyer who has been working in the field of sex work for more than 3 years, there is a sentence I hear from everyone, whether they are in the field or not: “Sex work is one of the oldest professions in the world.” So what do we know about this profession that we accept as the oldest profession in the world and working conditions? When we search for an answer to this question, we encounter a series of rights violations that are accepted and taken for granted. People agree on these by saying “Yes, the situation is not good, but these are the conditions of this profession.” While accepting this series of rights violations, it is sometimes argued that subjects do not have any awareness, or that there are survival methods in their own culture and living conditions that everyone does not approve of. Therefore, these violations of rights are no longer questioned as if they are a necessary part of this profession, and this state of not questioning contributes to the continuity of a cycle of violence and exploitation desperately accepted by the subjects themselves.

In addition to all these, we consolidate the loneliness of the sex work field with unrealistic questions and discussions that we cannot (or do not really want to) answer, such as, “Is sex work a profession or should it be”, “Do sex workers do this job willingly/nobody can do this job willingly” etc. In the meantime, we ignore how difficult it is to trust justice and how sex workers are obliged to establish their own defense mechanisms, and even present these facts to ourselves as a reason to denigrate the field. We think that if the subject really wants to fight for their rights, we are with them. However, as underlined in the women’s struggle, in cases where there are unequal relationships or cycles of violence in areas such as family, marriage, work-life etc., the conditions under which free will is given are examined. Also recognizing that the woman’s choice for what is best for her is also related to her social, vital, or cultural survival drive, expecting a superior consciousness and willpower performance from sex workers is clearly an indication that we underestimate something.

When we look at the legislation, we see that the most common word is “prostitution”. According to Article 227 of the Turkish Penal Code titled prostitution, the person who encourages a person to prostitution, facilitates

¹ Lawyer, Ankara Bar Association.

prostitution, acts as an intermediary, and provides a place is punished. In this context, encouragement to prostitution is also defined as the partial or complete subsistence of a person by benefiting from another person's earnings. Again, in the continuation of the same article, the person who distributes or spreads products such as images, sounds, texts etc. in order to facilitate or mediate prostitution is punished.

In fact, the Turkish Penal Code, punishes not the parties involved in prostitution, but the third parties who prepare the environment for this prostitution and gain from the sexual intercourse of two people. This is even supported by the *raison d'être* of the article stating that the third person will be punished even if the person engaged in prostitution is consenting. In other words, according to the legislation, the party engaged in sex work is the victim, and the intermediaries are the perpetrators.

Most of the raids carried out under the name of "prostitution operations" and what is shown in the images reflected in the media are a lot of sex workers whose faces are covered. However, we never know how many of them do sex work themselves and how many of them act as intermediaries; whereas most of them are sex workers, not intermediaries. That is, they are "victims" according to the law. However, when we look at the images reflected in the media, it is reflected as if they are covering their faces because they are perpetrators of crimes. This reflection is as far from the truth as it is bitter.

What is even more bitter is that sex workers detained for prostitution also feel as if they have committed a crime and have to choose the way of agreement and compromise. For example, let's say you agreed to provide sexual services to a person in exchange for money. You received your money before your service and then you provided the service. The customer asked for your money back. In this case, hostility will certainly arise. But because you took your money, you find yourself in the middle of a threat at the police station that an investigation will be launched for extortion (plunder). This is a common implementation issue. It is clearly a violation of rights, a fabrication of a crime, and it is against the law. However, this is so common in practice that no one who witnesses this situation speaks up. For this reason, sex workers are forced to return the money that is in exchange for the sexual service they performed so that no case will

“... we ignore how difficult it is to trust justice and how sex workers are obliged to establish their own defense mechanisms, and even present these facts to ourselves as a reason to denigrate the field.”

be filed for extortion. On the other hand, the client who receives sexual services is not tried for prostitution. I would also like to emphasize that I have not seen any other legal issue where men are described as so innocent and victimized.

Another problem frequently encountered in practice is providing a place for prostitution. If a raid is made to a house where the person both lives and works, a case is filed for providing a place against the person named in the lease agreement. But what could be more usual than making a contract to stay in a house? Sealing the house is the only sanction of the legislation regulating sex work. If there is prostitution in a place without a permit, that place is sealed. Permitted places are the brothels where we cannot work unless "woman" is listed in the gender section of the identity card. Moreover, apart from the social security it provides, brothels are not places with good conditions for sex workers. These brothels, where the working hours are uncertain, are places where the spiritual, physical and mental health of the sex worker is not prioritized, and they do not aim to protect the sex worker. I can say that it is a kind of prison, where going out is prohibited and freedom of travel is restricted even at the end of working hours.

Another "workplace", not regulated under the Turkish Penal Code, is the street. When the sex worker waits for clients on the street, administrative fines are imposed according to the Misdemeanor Law. By imposing more than one fine on the same person during the day, a policy of intimidation is implemented against sex workers through economic violence.

At the point where the sex worker cannot be discouraged by economic violence, the sex worker is kept at the police station for hours so that their working hours pass at the police station. This is also a widespread and accustomed practice, although it is illegal. We should not forget about the systematic discrimination, hate speech, threats, and insults that take place while all this is happening. In these cases, legal remedies are often not used, as they may cause further difficulties for the subjects. The only thing a sex worker wants in this cycle is not to spend their working hours at the police station, to leave the police station and return to work. In this case, the person has no belief that they will not be dealing with the police station again. This may be because it is the oldest profession in the world, or maybe sex workers have always been forgotten, even if awareness on human rights increases. Perhaps the subjects have also forgotten themselves now.

While it is obvious that working on the street is not safe, sex workers who use their social media accounts to find customers are subject to investigations for spreading prostitution. Here it is important to determine who the third parties,

that is, the intermediaries, are. Some intermediaries mediate through social media accounts, monopolize hashtags, or own an escort site and advertise sex workers for a certain fee, thus creating a business line. Investigations are not initiated against these intermediaries, there are no investigations about intermediaries who advertise in exchange for a fee. As a result of statements given at the police station under pressure and threat and customers who testify due to fear of disclosure, sex workers are once again left carrying the bag and sex work is criminalized in unison. In this sense, we can say that sex work has become a field of struggle where the criminalization effort has an effect. Neither the written law alone causes this, nor the sex worker. This is caused by an established social perception against sex work.

In addition to all this, there is a practice of stigmatization that creates a firm conviction that a person is doing sex work because they are trans. However, should we approach the prevalence of sex work among trans people like this? Could it be that there are few employment options for trans people? Could it be that a trans person never thought of applying to one of the alternative professions for fear of being even more discriminated against outside of the field of sex work? What if sex work is the best solution for one's survival and less abuse? Should trans people also be responsible for the fact that the field of sex work that we are biased against is a safer area for trans people? We did not generate these questions today. However, since we do not offer a sustainable solution, it is necessary to remind the recurring problem of employment and equal opportunities. It is necessary to ask the question of how we can improve the profession for sex workers without discrimination and under safe working conditions. But as we talk about whether the will can be free without understanding the reasons and the life that pushes the person to this profession, we guarantee that all these series of rights violations will continue to increase at the same speed.

One must see that sex work has become the intersection point for violations of rights due to gender-based discrimination, stigmatization, and marginalization. Our primary goal should be to build this area as a non-violent, non-exploitative, non-necessity, freely preferable area. Sex work is a field of labor; from my point of view, it is a feminist struggle for life. If only we could see it all together from the same perspective.

■ Istanbul Convention Discussions

Ezel Buse Sönmezocak¹

One of the issues that marked the 2020 agenda of feminist and LGBTI+ rights advocates, was the discussions on the Istanbul Convention. The dose of smear campaigns, which were followed by feminists with concern about the convention, and the increasing dose of smear campaigns reached its climax, when AKP Deputy Chairman Numan Kurtulmuş was asked about his ideas about the Istanbul Convention, in a television program he participated in at the beginning of July (as if he was waiting for this question), and when he said that withdrawal from the Istanbul Convention is possible.²

While the Istanbul Convention was suddenly at the top of the country's agenda, women and LGBTI+ rights defenders embarked on an action that would last for weeks. Numerous contents have been produced in order to eliminate the lack of information in the public about what the Istanbul Convention is, social media actions that spread almost every day and exceed the borders of the country, women and LGBTI+ people all over the country took to the streets despite the pandemic to claim the convention. The attack on the convention has also led to a broad social unification that we have not been accustomed to seeing for a long time. Political parties published press statements, dozens of municipalities prepared billboards that spread the content of the convention, many non-governmental organizations, bar associations, professional organizations, and artists made statements that claimed the convention on different occasions, especially on social media. The support for the contract grew so much that even the private sector could not remain indifferent to this wave, and many companies from different industries from furniture to food shared messages that supported the contract. As a result of the defense that lasted for weeks and was growing day by day, the Central Executive Board Meeting, which was alleged to determine the fate of the contract, was postponed³ and in the following days, Erdogan stated that "Nobody can deny the achievements of women at this point, which is not hesitating to make positive discrimination in favor of women."⁴ Therefore, for now, the discussions on the Istanbul Convention have been closed.

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2 T24 Independent Internet Newspaper. (2020). "Istanbul Agreement Statement from AKP Deputy Chairman Kurtulmuş: Withdrawal of the Convention by Fulfilling the Procedure". T24, <https://t24.com.tr/haber/akp-genel-baskanvekili-kurtulmus-tan-istanbul-sozlesmesi-aciklamasi-usulunu-yerine-getirerek-sozlesmeden-cikilir,888105> (Last Date of Access: 01.11.2020).

3 T24 Independent Internet Newspaper. (2020). "AKP Central Executive Board Meeting, which is Expected to be Addressed on the Istanbul Convention Issue, has been Postponed Allegation". T24, <https://t24.com.tr/haber/istanbul-sozlesmesi-nin-ele-alinmasi-beklenen-akp-myk-ertelendi-iddiasi,894555> (Last Date of Access: 01.11.2020).

4 T24 Independent Internet Newspaper. (2020). "From Erdogan to Dilipak: We Will Not Allow the Smallest Attack on the Honor and Chastity of Our Women: I Condemn Columnists Who Make Bad Reproaches". T24, <https://www.t24.com.tr/haber/erdogan-dan-dilipak-a-kadinlarimizin-onuruna-iffetine-en-kucuk-saldiriya-musaade-etmeyiz-kirli-yakistirmalar-yapan-kose-yazarlarini-kiniyorum,896625> (Last Date of Access: 01.11.2020).

What Makes the Istanbul Convention Important?

The Istanbul Convention, whose full name is the Council of Europe Convention on the Preventing and Combating Violence Against Women and Domestic Violence, is the most comprehensive international human rights convention focused on violence against women and domestic violence. The contract, which was opened for signature in Istanbul in 2011 and therefore referred to as the "Istanbul Convention", has been signed by 45 countries and the European Union as of July 2020. The Convention has been in force in Turkey since August 2014.

What makes the Istanbul Convention unique for us, feminists, is its perspective of understanding the phenomenon of violence against women and its comprehensive road map on combating violence. The convention starts by identifying that historical unequal power relations and gender inequality between women and men are at the root of violence against women. This is exactly what makes the Istanbul Convention unique not only for feminists but also for international lawyers. For the first time in an international human rights convention, the role of the patriarchy in the emergence of violence against women and domestic violence is pointed out clearly, and it is determined that gender inequality lies at the root of violence. The convention, which focuses on gender inequality, emphasizes that states should implement gender equality not only in their law system but also in social life to eliminate violence against women and domestic violence, and imposes obligations on states in this direction.

The convention does not only protect women from violence. The convention, which focuses on combating domestic violence as well as violence against women, applies not only to women but also to everyone who is subjected to domestic violence, regardless of how the term "domestic violence" is defined in the domestic law of the countries. In the Convention, it is stated that "domestic violence shall mean all acts of physical, sexual, psychological, or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim."

Therefore, the convention also covers individuals who live in the same house without a marital union or who have a partnership relationship, although not living in the same house. In this context, regardless of whether they live in the same house or not, physical, sexual, psychological, or economic violence in same-sex relationships is also within the scope of "domestic violence" that must be prevented and fought within the scope of the Convention.

Who Attacks on the Convention and Why?

Since the Convention, which aims to eliminate violence against women and domestic violence, focuses on gender inequality, points to patriarchy as the perpetrator of violence, reveals that violence should be fought not on an individual incident basis, but through comprehensive and holistic policies, in short, for the fact that it is so clear and radical that we are not used to seeing it in an international law text, it became the target of anti-equality groups. It is observed that these groups have focused on several issues, as a result of not seeing women as equal and free citizens. These issues can be summarized under three headings: the Convention poses a threat to and destroys the family structure, the Convention legitimizes homosexuality, and the Convention does not have a domestic and national character because it wages war on customs and traditions. Anti-equality groups that attack the convention are justified in their concerns. Because the Istanbul Convention protects victims of violence from families surrounded by violence. For example, the Convention protects a young person who is subjected to physical, sexual, psychological, or economic violence by their family because they are gay. The Convention states that no discrimination can be made for any reason, including sexual orientation and gender identity, in the implementation of its provisions. For example, it expresses the obligation to take a trans woman's statement quickly at the police station to report the violence she was subjected to, to provide appropriate preventive protective measures when necessary, and to conduct an effective investigation into her complaint. It guarantees that social facts such as culture, tradition, and custom cannot be an excuse for violence and that violence cannot be ignored for these reasons, for example, that no one can be killed by their father under the name of honor or pride just because they are gay.

“especially worrying is that, at this point, rather than the possibility of withdrawing from the Convention, the avowal of opposition to LGBTI + rights is seen by some groups as a kind of “achievement”.”

The Convention is under attack by opponents of equality in Turkey as well as in other countries. The reasons for these attacks differ among themselves; however, LGBTI+ opposition constitutes the common point of it. Since opposing LGBTI+ rights can ideologically bring many different groups together, the argument often used by opponents of equality to attack the Convention is LGBTI+ opposition.

As a matter of fact, the debates that started in July 2020 with the news saying that “the order has been given for the withdrawal from the Convention” has evolved to the point of “commenting on expressions of sexual orientation and gender identity” as a result of strong opposition from the society.⁵ Beyond the possibility of withdrawing from the Convention, which will have no legal nature and consequence under international law, even if this possibility occurs, what is especially worrying is that, at this point, rather than the possibility of withdrawing from the Convention, the avowal of opposition to LGBTI + rights is seen by some groups as a kind of “achievement”.

Throwing Human Rights Into Question

No international human rights convention, including the Istanbul Convention, has the power to eliminate all human rights problems in a country magically. Although a country technically has the most comprehensive and detailed anti-discrimination and anti-violence legislation, violations of rights may be encountered in that country within the scope of combating discrimination and violence. In short, for citizens and rights defenders, the law is of great importance to remind the state of its obligations, but it should not be forgotten that the law alone cannot be a savior.

Therefore, opening the Istanbul Convention up for discussion, means opening human rights up for discussion. This debate is essentially a motivation problem for the establishment of human rights. It is possible to say that during the period when the convention was discussed, the anti-convention discourse of the politicians has fueled the violence and domestic violence that are already abundant in society. In 2020, in a political atmosphere where attacks on vested rights are now systematic, even if the attacks remain based on discourse, they directly affect the lives of rights subjects and reinforce hatred and violence in society. In this case, the state's obligation is not to discuss the human rights of its citizens, but to develop and implement holistic policies so that they are fully and effectively established.

5 NetHaber. (2020). “AK Party's Istanbul Convention Decision Has Been Announced”. NetHaber, <https://www.nethaber.com/gundem/ak-partinin-istanbul-sozlesmesi-karari-belli-oldu-30476> (Last Date of Access: 01.11.2020).

■ Access to Law and Justice for LGBTI+ Refugees and Migrants in Turkey: Deepening Obstacles

Deniz Yıldız¹

"Are they allowed to wear that outfit in their own country? Ask this first." " These are the first words that an Iranian trans refugee woman heard from a criminal judge of peace, after waiting for countless hours in the courthouse corridors for her interrogation. Or, a first question found appropriate by a criminal judge of peace in Turkey, to start an interrogation.

Refugees and migrants have to spend enormous time in various public institutions due to many reasons, including registration, applying for a residence permit, renewal of identity or fulfilling the signature duty . However, especially for the LGBTI+ people, most of the institutions are fraught with structural and functional obstacles that substantially complicates access to law and justice. Moreover, these obstacles are getting deeper in the absence of preventive regulations.

The security and discrimination problems faced by the refugee and migrant LGBTI+ community in Turkey has been reported in detail by various NGO's over the last years.² By the end of 2020, most problems identified in these reports still remain unsolved. Moreover, refugee and migrant LGBTI+ persons have been disproportionately affected by the public health crisis as well as the massive destruction of the employment since the COVID pandemic.³ On the other hand, increasing use of xenophobic and LGBTI+phobic statements of the high-level public officials⁴, inevitably make refugee and migrant LGBTI+s more vulnerable

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2 Organization for Refuge, Asylum & Migration (ORAM) & Helsinki Citizens' Assembly. (2009). Unsafe Haven: The Gay Bisexual, Security Issues Faced by Transgender Asylum Seekers and Refugees in Turkey. https://oramrefugee.org/wp-content/uploads/2019/12/Unsafe_Haven_TURKISH-2009.pdf (Last Date of Access: 25.10.2020); Kaos GL. (2016). While Waiting to Be Safe: Intermediate stop of LGBT refugees Turkey. <https://www.stgm.org.tr/sites/default/files/2020-09/tekin-olmayi-beklerken-lgbti-multecilerin-ara-duragi-turkiye-raporu.pdf> (Last Date of Access: 25.10.2020); HEVİ LGBTI + Association. (2019). LGBTI+ Association. (2019). Turkey's Exam with LGBTI+ Refugees: Racism. <http://hevilgbti.org/wp-content/uploads/2019/08/HeviRaporu-1.pdf> (Last Date of Access: 26.10.2020); Kaos GL. (2019). "Turkey's Exam with LGBTI Refugees. <https://kaosgldernegi.org/images/library/2019lgbti-multeciler-ile-imtihan-ile-web.pdf> (Last Date of Access: 26.10.2020).

3 Kepenek, E. (2020). "Refugee LGBTI+s Describe The Pandemic: I'm Afraid The Pandemic Will End But Discrimination Will Continue". Bianet, <https://bianet.org/bianet/lgbti/224608-multeci-lgbti-lar-pandemi-yi-anlatiyor-korkarim-pandemi-bitecek-ama-ayrimcilik-surecek> (Last Date of Access: 26.10.2020).

4 Hrant Dink Foundation. (2020). Media Watch on Hate Speech and Discriminatory Discourse 2019 Report. <https://hrantdink.org/attachments/article/2664/Nefret-soylemi-ve-Ayr%C4%B1mc%C4%B1-Soylem-2019-Raporu.pdf> (Last Date of Access: 27.10.2020).

to violence and discrimination.

Amid this insecure climate, LGBTI+ refugee and migrants still continue to apply to public institutions every day, and explain their problems to the personnel for countless hours in the hopes of reaching their rights through these institutions. The aim of this article is to discuss the deepening obstacles faced by LGBTI+ refugees and migrants in Turkey while trying to access law and justice.

Migration Management

“Xenophobic and LGBTI+phobic statements that high-level public officials have expressed even louder recently, makes LGBTI+ people and foreigners more vulnerable to violence and discrimination, by finding its response in practice at no time.”

“Membership of a certain social group” is one of the five grounds for persecution listed in Article 1.A.2 of the 1951 Geneva Refugee Convention, which is accepted to include claims based on sexual orientation and gender identity. The United Nations High Commissioner for Refugees (UNHCR) clearly states in its global reports⁵ and guidelines⁶ that the principles of refugee law should be interpreted in a way to prohibit discrimination on the basis of sexual orientation and gender identity. Council of Europe’s Istanbul Convention also establishes a duty on states parties, including Turkey, to make asylum procedures gender-sensitive, in accordance with the Article 60(7).⁷

Despite the principles in international law, neither Law no 6458 on Foreigners and International Protection,⁸ nor the regulations pursuant to it⁹ does in any way refer to sexual orientation or gender identity within their texts. As the national immigration legislation does not openly

5 UNHCR. (2015). Protecting Persons with Diverse Sexual Orientations and Gender Identities – A Global Report on UNHCR’s Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees. <https://www.unhcr.org/publications/brochures/5e6e6b8d4/protecting-persons-diverse-sexual-orientation-gender-identities.html> (Last Date of Access: 30.10.2020).

6 UNHCR. (2012). UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity. <http://www.unhcr.org/refworld/docid/48abd5660.html> (Last Date of Access: 30.10.2020).

7 Council of Europe Convention on Prevention and Combating Violence Against Women and Domestic Violence. (2011). <https://rm.coe.int/1680462545> (Last Date of Access: 30.10.2020).

8 Foreigners and International Protection Law No. 6458, Official Gazette: 28615, T. 11/4/2013.

9 Temporary Protection Regulation, Official Gazette: 29153, 22/10/2014; FIPL Implementation Regulation, O.G: 29656, 17/10/2016.

protect the LGBTI+ refugee and migrants, violations become chronic through the practices coordinated by the migration management.

The first set of problems a LGBTI+ refugee might face happens during the pre-registration stage. As LGBTI+ individuals are not counted as "persons with special needs" under the Article 3(1)(I) of the Law No. 6458, they cannot reach the priority they need during the pre-registration stage. In the absence of this protective mechanism, most of the refugees are not able to express the violence and discrimination they had faced during the interviews. Majority of the interviews are conducted in crowded rooms, registering only the names and surnames of the applicants. Those who are able to share their experience despite the lack of safe space and trained personnel, report that they were asked about the number of partners, or preferred sexual positions.¹⁰

One of the main problems faced by LGBTI+ refugees who apply for international protection is the obligation not to leave the province where they are registered. According to Article 71 of the Law No. 6458, applicants are subject to reside and fulfil their signature duty within the province that they were assigned. These assignments are decided by the Directorate General of Migration Management according to the city populations, regardless of the applicant's sexual orientation and gender identity. This is a matter of life and death for most of the LGBTI+ refugees, especially those who are directed to small and conservative cities. According to the legislation, it is possible to choose a city or transfer to another, solely on the basis of family relations or health/safety reasons. However, the families of most LGBTI+'s fall outside of a narrowed definition pursuant to the Law No. 6458, which limits family members as "foreigner's spouse, minor child and dependent adult child."¹¹ On the other hand, refugees who wish to be transported to another city due to health/safety reasons are expected to prove that they are subjected to physical violence, life-threats, or pressure that makes life unbearable.¹² Nevertheless, following the COVID-19 outbreak and travel restrictions, these transfers as well as the procedure of resettling vulnerable refugees to a third country has completely stopped.

The absence of sexual orientation and gender identity in immigration legislation also leads to various violations in terms of detention and repatriation procedures. Immigration Authorities sometimes associate LGBTI+'s with prostitution or obscenity, and sometimes decide to deport refugees on the grounds that they pose a "threat to public order, public security or public health" under the Law

10 ORAM & HyD, *op.cit.*, P. 14.

11 FIPL art. 3 (1) a and Temporary Protection Regulation Art. 3 (1) b.

12 See. Uzun, A. (2020). "Efforts for Realization of Existence of LGBTI+'s, immigrating From Syria" Agenda of the Constitution, <https://anayasagundemi.com/2020/06/24/forum-pride-2020-av-ayse-uzun-suriyeden-gelen-lgbtilarin-turkiyede-varoluslarini-mumkun-kilma-cabasi/> (Last Date of Access: 28.10.2020).

No 6458. LGBTIQ+'s, who are taken under administrative detention upon the deportation decision, are subjected to various discriminatory and exclusionary practices in removal centers, which mostly work with male personnel.¹³ On the other hand, trans women are not transferred to these centers and - usually held in police stations during their detention period.

Police Stations, Prosecutor's Office, and Courts

Prevention of violence and complaints mechanisms for LGBTIQ+'s, are already quite inadequate in Turkey.¹⁴ Thus, it is also possible to say that these mechanisms hardly ever work when it comes to foreign LGBTIQ+'s. Law enforcement units are very reluctant to process the complaints of refugee and immigrant LGBTIQ+'s, unless they are accompanied by NGO workers or lawyers.

Since refugees and immigrants are not listed among the categories of victims who will be appointed without a request during the investigation phase in the Criminal Procedure Code,¹⁵ they are not automatically appointed by the state attorneys.¹⁶ This situation continues to make foreign LGBTIQ+'s, who are often victims of fraud, theft, or hate attack crimes, dependent on NGOs to complain about the perpetrators.

Apart from the filing of complaints, foreign LGBTIQ+ suspects in law enforcement units frequently face discriminatory and exclusionary treatment. LGBTIQ+ foreigners, who have been given a judicial control decision in the direction of their signature obligation, are regularly subjected to ridicule and humiliation of officers who know them here, as they fulfill this obligation at the police station

13 On this issue, the European Court of Human Rights (ECHR), in a decision against Hungary in 2016, ruled that the right to freedom and security of a gay refugee applicant, who was kept under administrative detention for 58 days, was violated, regardless of how safe he was among the other persons he was detained. In its justification, the court clearly stated the following duty of the parties: The repetition of the situations that the members of the vulnerable group were exposed to in their countries from which they had to flee should be avoided. See: ECtHR, O.M./ Hungarian Application, Application No: 9912/15, T. 05/07/2016.

14 There are no regulations about the hate crimes directed against LGBTIQ+'s. Also, discrimination based on sexual orientation and gender identity, is not included in Turkey Human Rights and Equality Article 3 is not included in the regulated forms of discrimination in the matter. See: In this publication, Şahin, E. (2020). HREIT and the case of Cinnah Hotel p. 11th.

15 5271 numbered Assembly of Criminal Chambers art. 234 (2) lists a limited number of persons who are "under the age of eighteen, deaf or mute or incapacitated to express themselves".

16 Although it is stated in the Judicial Reform Strategy document published in May 2019 that strengthening the access of foreigners to justice is a goal and that the practice of appointing attorneys to foreign suspects and defendants without asking their request, these targets have not been implemented by the end of 2020. See: Ministry of Justice. https://sgb.adalet.gov.tr/Resimler/SayfaDokuman/23122019162931YRS_TR.pdf (Last Date of Access: 29.10.2020), s. 67.

closest to their residence.

What refugees and immigrant LGBTI+'s experience at the prosecution and court stages is not much different from what happens in the police unit. The difference between people's own names and identity names often causes long polemics in judicial processes. , and the names used can sometimes even be considered as "code names". Besides, LGBTI+'s are asked questions on clothing style, hairstyle, or the purpose of coming to Turkey, all of which are completely unrelated to the file.

Is it Possible to Overcome the Deepening Obstacles?

Xenophobia and LGBTI+phobia are two dangerous doctrines that upset many people's lives, cause them to be excluded from society, deprive them of their rights and freedoms, drag them into depression and expose them to attack. Teach these two dangerous going forward every day with populist policies and the ongoing climate of impunity in Turkey, complicates the daily lives of vulnerable groups. Therefore, it is necessary to protect these groups with concrete legal regulations and open social policies.

The lack of any regulations regarding discrimination based on gender identity and sexual orientation, and that immigration legislation does not have an agenda on LGBTI+'s are the gaps with the Turkish laws. These gaps have vital effects on LGBTI+ refugees and migrants. Filling these gaps in line with the principles of international human rights law, removing the discriminatory and exclusionary regulations within the established legislation, and implementing effective disciplinary mechanisms for the misbehavior of administrative staff are steps that need to be taken urgently in order to overcome the multiple discrimination faced by LGBTI + refugees. Taking these steps is a requirement of the conventions to which the state is a party, the reform strategies it determines, and the building of an honorable and just society.

■ A Subject That Must Be Feverishly Reviewed with Its Moving Agenda: Intersex Diversity v. Civil Status Registry

Ismail Dede¹

In this collective study that deals with the legal agenda of LGBTI+ people in 2019 and 2020, I must express that it is a chance to introduce to the reader an issue that I have had the opportunity to observe the developments that have emerged since 2017. First of all, I would like to thank everyone who made this work possible for this opportunity.

If you are an average reader interested in issues such as gender equality, gender identity, sexual orientation, you must have immediately noticed that one of the least frequently penned topics is intersex diversity.² However, in the Continental Europe legal system, which includes Turkey, intersex diversity has become more visible in the last two years. Undoubtedly, the decision of the German Constitutional Court dated 10.10.2017 has a great effect on this subject.³ For this reason, I plan to explain the developments in Germany and their after-effects, first. Then, I will try to list my suggestions by pointing out where our legal system stands.

When the history of German law is reviewed, the first legal regulation on intersex diversity is encountered in the Prussian General Country Law of 1794.⁴ According to this regulation, persons born "Hermaphrodites" are free to choose what gender they belong to at the age of eighteen, but the parents decide according to which gender they will be raised until then. These provisions are

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2 This article is written with the assumption that the reader is aware of intersex diversity. But, as in all lump sum admissions, there may be exceptions. For this reason, a general definition of intersex diversity will be included at the back of this sentence and some of the resources that can help you learn about intersex diversity will be pointed out. The intersex situation is an umbrella concept that includes people who cannot be classified according to the reduced medical norms regarding the "male" or "female" body from a binary gender system perspective. The aforementioned classification diversity is carried out by chromosome sequence, reproductive organs, or anatomical gender criteria. For references on intersex diversity, see. Hoenes, J., Januschke, E. & Klöppel, U. (2019). Häufigkeit Normangleichender Operationen "Uneindeutiger" Genitalen im Kindesalter Follow- Up Studie. Ruhr; Council of Europe. (2015). Human Rights and Intersex People (Trans. Işıl Demirkan). <https://kaosglidernegei.org/images/library/2018insan-haklarive-interseksweb.pdf> (Last Date of Access: 24.11.2020); Türker, H. (2015). "Gender and Body in Context of the Problem of Medical Intervention for Intersex Children". Ankara University Institute of Social Sciences Department of Human Rights Unpublished Master's Thesis. Ankara; Greenberg, J.A. (2012).

3 BverfE 1 BvR 2019/16.

4 Allgemeines Landrecht für die preußischen Staaten, ALR p. 19 ve p. 20.

identically included in the law on the registration of marriages enacted in 1875.⁵ As those who know that intersex diversity does not consist of hermaphrodite appearance, we may find these provisions narrow and restrictive. However, this does not eliminate the fact that these provisions bring us to a result. Because, in those years, it was not possible to make a medical intervention to the reproductive organs and to change the appearance of these organs. For this reason, it was required that these people be intellectually assigned to categories in the binary gender system without interfering with their bodies. It should be noted that there was a gender assignment operation at that time. However, medical impossibilities required this operation to be performed intellectually.

The Law enacted in 1875, which stipulates the registration of marriages, was repealed in 1937, and the German Law of Personal Status came into effect instead.⁶ However, in this new Law, intersex diversity was completely ignored. It should be a coincidence that the possibility for people of intersex diversity to be assigned to male or female gender through medical operations almost coincides with these dates.⁷ After three-quarters of a century of silence, an amendment was made to the Personal Status Law. Accordingly, it became possible for people who were found to have no female or male gender at birth to leave the gender field blank in the population registry. Gender assignment surgeries, which have resulted in failure and subsequently caused both psychological and physical devastation, have a great impact on this amendment being introduced.⁸

After the amendment of the law came into force in 2013, a person born with intersex diversity but registered as a woman, applied to the competent authority to deregister them as a woman and demanded the registration be made as "inter/diverse"; if this is not possible, as "diverse". The application was first rejected by

“Following the violation decision of the German Constitutional Court, the relevant provision in the law was amended so that the gender information in birth records of the personal status registers can be left blank or registered as “diverse”.”

5 Gesetz über Beurkundung des Personenstandes und die Eheschließung.

6 Personenstandsgesetz, PStG.

7 Türker, *ibid.*, p. 41: The author states in his study that gender assignment operations were carried out as of 1895.

8 Greenberg, *ibid.*, p. 37.

the administrative bodies and then by the judicial bodies on the basis that it was contrary to the relevant articles of the law. The person whose application was rejected filed a constitutional complaint and brought their demand to the Constitutional Court. According to the decision of the Constitutional Court, if the law requires a gender registration, but at the same time denies persons recognition of their gender identity, this specifically threatens the self-determined development of and respect for one's personality.⁹ Accordingly, it was concluded that the applicant's fundamental rights were violated. Following the violation decision of the German Constitutional Court, the relevant provision in the law was amended so that the gender information in birth records of the personal status registers can be left blank or registered as "diverse" for children who cannot be assigned a female or male gender. This transformation taking place in Germany has also made an impact in Belgium and Switzerland.¹⁰

As indicated between the lines above, these developments should not be considered independent of gender assignment operations. From the Prussian period to the amendment made after the decision of the German Constitutional Court, it was not possible to register intersex diversity. In the Prussian period, gender assignment operations were conducted intellectually, and intersex people were obliged to choose their spouses according to this intellectual assignment. In the version of the Personal Status Law until 2013, there was no other way than to be registered in the registry as man or woman. So those who did not have external reproductive organs that could be recorded on the registry had to undergo physical operations this time. With the revision made in 2013, intersex people were only given the opportunity to leave their gender information blank. It can be said that this regulation partially protects intersex people, as the previous regulation pointed to the medical assignment operation to reflect the gender identity in the registry. In this adventure, I tried to reveal that, until the provision of the law in Germany became what it is now, those who do not conform with and overflow the assumptions pointed out by the registry, had to compromise intellectually or physically in order to mandatorily be included in the registry.¹¹

9 BverfE 1 BvR 2019/16, p. 44-45.

10 In fairness, the decision of the German Constitutional Court has affected the Belgian Constitutional Court's decision dated 19.06.2019 and numbered 99/2019. The Belgian Constitutional Court found that §62bis of the Belgian Civil Code, which is the regulation of the registration of transsexual persons, which entered into force in Belgium in 2017, does not cover the diversity beyond the binary gender structure and found it contrary to the Belgian Constitution; thus, repealed some provisions specific to the binary gender system. The effects of the German Constitutional Court are also observed in the revision debates that are intended to be held in Switzerland. For this, see. Botschaft zur Änderung des Schweizerischen Zivilgesetzbuchs (Änderung des Geschlechts im Personenstandsregister) vom 6.Dezember 2019.

11 Dunne, P. & Mulder, J. (2018). "Beyond the Binary: Towards the Third Sex Category in Germany". *German Law Journal* (19/3), p. 631.

A Subject That Must Be Feverishly Reviewed with Its Moving Agenda:
Intersex Diversity v. Civil Status Registry

In our legal system, there is no regulation regarding intersex diversity. Persons born with intersex diversity and whose reproductive organs do not describe a female or male gender also need to be registered. In practice, our population registries accept only female or male as genders that can be registered. In that case, Turkey's current personal status registration practice is similar to Germany's practice prior to 2013. Accordingly, it would not be wrong to state that people born with intersex diversity are likely to be subjected to a gender assignment operation at the stage where they do not have competence, only because there is no place for them in the registry. These operations, which are generally carried out in the 0-3 age range with the aim of registration to the registry, are already performed before indications such as the hormone balance, identity construction of the person are revealed. It is therefore incompatible with the principle of self-determination.

Being in a phase similar to Germany's period before 2013 should not be described as mere negativity. Germany's experience of creating revisions, the Constitutional Court decision and amending the revision constitutes a source for the revision possibilities that may occur in our legal system.

In order to prevent intersex people subject to Turkish law from remaining in the dilemma of registry and body since birth, a regulation may be introduced that allows the registration of intersex diversity in the registry, or at least allows the gender field in the registry to be left blank, aiming to prevent gender assignment operations up to the stage where the child can form their opinion. Fulfilling this wish is undoubtedly within the the duty of the legislator and again, subject to the legislator's will.

■ Summary Translation of Trans Rights Europe & Central Asia Index 2020: Indicators and Criteria, Published by Transgender Europe, within the Framework of Legal Recognition of Gender Identity

Sevde Avci¹ – Polat Yamaner²

The Trans Rights Europe and Central Asia Index, prepared annually by Transgender Europe (TGEU), is a project that aims to report the current situation on trans rights on a regional scale and to reveal it through indicators. The Trans Rights Europe and Central Asia Index published for the year 2020 provides detailed information on the legal situation of all 47 member Council of Europe member States and five Central Asian countries.³ The index covers a total of 30 indicators in six legal categories: legal gender recognition, asylum, bias-motivated speech and violence, non-discrimination, health, and family rights.

Although there are legal and administrative measures make legal gender recognition available to trans people in 41 of the 54 countries reviewed, of these 41 countries; 31 countries prescribe a mental health diagnosis, 13 demand sterility, 20 still require a divorce, 31 countries impose age limitations, making access to legal gender recognition harder or impossible for minors, 6 countries base legal gender recognition procedures on self-determination of the person. 1 country provides full and 1 provides partial legal recognition to non-binary⁴ people.

This summary translation study includes the data put forward regarding the legal recognition of gender identity, which is one of six separate categories within the scope of the Trans Rights Europe and Central Asia 2020 Index, and the criteria which are taken into account in the creation of the index. The complete indicators, criteria, and index prepared in English are available on TGEU's web page.

1 Lawyer, Istanbul Bar Association; SPoD Legal Team Volunteer.

2 Lawyer, Istanbul Bar Association; SPoD Legal Team Volunteer.

3 Transgender Europe (TGEU). (2020). Trans Rights Europe & Central Asia Index 2020 – Indicators & Criteria. <https://tgeu.org/trans-rights-europe-central-asia-index-2020-indicators-criteria/> (Last Date of Access: 02.11.2020).

4 The concept of non-binary means outside of the binary gender conception, in other words, it does not consist of only two genders. This concept, in the most general sense, expresses that the individual does not traditionally define themselves within the categories of men and women, and the gender identity they have acquired from this point. See, Kaos GL. (2020). "Kaos GL Dictionary: Non-binary". Kaos GL. <https://kaosgl.org/haber/kaos-gl-sozlu-k-non-binary> (Last Date of Access: 02.11.2020).

Reviewed Countries:

Andorra	Denmark	Kosovo	Norway	Switzerland
Armenia	Estonia	Latvia	Poland	Turkey
Austria	Finlandia	Lichtenstein	Portugal	Ukraine
Azerbaijan	France	Lithuania	Romania	The United Kingdom
Belarus	Georgia	Luxemburg	Russia	
Belgium	Germany	Malta	San Marino	MIDDLE ASIA:
Bosnia Herzegovina	Greece	Moldova	Serbia	Kazakhstan
Bulgaria	Hungary	Monaco	Slovakia	Kyrgyzstan
Croatia	Iceland	Montenegro	Slovenia	Tajikistan
Cyprus	Ireland	Netherlands	Spain	Turkmenistan
Czech Republic	Italy	North Macedonia	Sweden	Uzbekistan

TRANS RIGHTS EUROPE & CENTRAL ASIA INDEX 2020 INDICATORS AND CRITERIA LEGAL GENDER RECOGNITION:

Existence of legal measures:

Criteria: There is legislation in place for legal gender recognition and there is a procedure that provides consistent results.

Belarus, Belgium, Bosna-Herzegovina, Croatia, Czech Republic, Denmark, Estonia, Finlandia, France, Germany, Greece, Iceland, Ireland, Italy, Latvia, Luxemburg, Malta, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Spain, Sweden, Switzerland, Turkey, Ukraine, The United Kingdom

MIDDLE ASIA: Kazakhstan, Kyrgyzstan

Existence of administrative measures:

Criteria: There is a clearly established administrative procedure in place for legal gender recognition, or court decisions, and they provide consistent results.

Austria, Belarus, Belgium, Bosna-Herzegovina, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Iceland, Ireland, Italy, Kosovo, Lithuania, Luxemburg, Malta, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Russia, Slovenia, Spain, Sweden, Switzerland, Ukraine, The United Kingdom

ORTA ASYA: Kazakhstan, Kyrgyzstan

Name change:

Criteria: There is a legal or administrative procedure in place that makes name change possible for trans people, and it provides consistent results. This includes deed poll.⁵

Armenia, Austria, Belarus, Belgium, Bosna-Herzegovina, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Iceland, Ireland, Italy, Kosovo, Latvia, Luxemburg, Malta, Moldova, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Russia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, The United Kingdom

MIDDLE ASIA: Kazakhstan, Kyrgyzstan

Name change without age restriction:

Criteria: There is a legal or administrative procedure in place that makes name change possible for trans people under 18, without any age restriction, and it provides consistent results. This includes deed poll.⁶

Austria, Bosna-Herzegovina, Czech Republic, Denmark, Estonia, Finland, France, Iceland, Ireland, Luxemburg, Malta, Montenegro, Norway, Spain, Sweden, Switzerland, The United Kingdom

⁵ Deed poll is a written declaration used in the UK to change one's name. It needs to be signed by the person concerned and two witnesses. <http://www.gov.uk/change-name-deed-poll>

⁶ Deed poll is a written declaration used in the UK to change one's name. It needs to be signed by the person concerned and two witnesses. <http://www.gov.uk/change-name-deed-poll>

Self-determination:

Criteria: A point is awarded if all of the following criteria are met:

- LGR is based exclusively on the expressed wish of the person concerned e.g. by declaration,
- Does not require third party involvement, e.g. judge, medical expert, intercessor,
- Intersex status and/ or sex characteristics are not a contraindication.

Denmark, Iceland, Ireland, Luxemburg, Malta, Norway, Spain (9/17)⁷

No diagnosis or psychological opinion required:

Criteria: Diagnosis (such as Gender Identity Disorder, Gender Incongruence, or similar) or psychological opinion are not required for legal gender recognition.

Belgium, Denmark, France, Greece, Iceland, Ireland, Luxemburg, Malta, Norway, Portugal, Spain (9/17)

No compulsory medical intervention required:

Criteria: Non-surgical medical interventions (such as medical examinations, assessments, hormone therapy) are not required for legal gender recognition.

Austria, Belarus, Belgium, Denmark, France, Germany, Greece, Iceland, Ireland, Luxemburg, Malta, Moldova, Netherlands, Norway, Portugal, Spain (9/17), The United Kingdom (3/4)

No compulsory surgical intervention required:

Criteria: Surgical interventions are not required for legal gender recognition.

Austria, Belarus, Belgium, Croatia, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Lithuania, Luxemburg, Malta, Moldova, Netherlands, Norway, Portugal, Russia, Serbia, Slovenia, Spain, Sweden, Switzerland, The United Kingdom

⁷ Partial indicators (eg 9/17, 1/3) mean that these measures are only available in certain regions (eg in nine of seventeen regions, in one of three regions). Specifically for Denmark, the indicator 1/2 indicates that non-binary gender identity recognition is only possible in passports, but not in identity documents.

No compulsory sterilization required:

Criteria: Sterilization or proof of infertility are not required for legal gender recognition.

Austria, Belarus, Belgium, Croatia, Denmark, Estonia, France, Germany, Greece, Iceland, Ireland, Italy, Lithuania, Luxemburg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Russia, Slovenia, Spain, Sweden, Switzerland, Ukraine, The United Kingdom

MIDDLE ASIA: Kyrgyzstan

No compulsory divorce required:

Criteria: Divorce or single status are not required for legal gender recognition.

Austria, Belgium, Denmark, Estonia, Finland, France, Georgia, Germany, Iceland, Ireland, Luxemburg, Malta, Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, Switzerland, Ukraine, The United Kingdom

LGR without age restriction:

Criteria: The legal or administrative procedures in place for legal gender recognition have no age restriction, and they provide consistent results for minors.

Austria, Croatia, Estonia, Germany, Iceland, Luxemburg, Malta, Norway, Spain, Switzerland

Self-determination based LGR without age restriction:

Criteria: A point is awarded if all of the following criteria are met:

- There is no explicit age restriction for minors to change their legal gender.
- LGR is based exclusively on the expressed wish of the person concerned e.g. by declaration,
- Does not require third party involvement, e.g. judge, medical expert, intercessor,
- Intersex status and/or sex characteristics are not a contraindication.

Luxemburg, Malta, Spain (9/17)

Gender non-binary recognition:

Criteria: A point is awarded if:

- More than two gender marker options ("X", "NB", "other", or other option(s)) are available in the public registry (e.g. Register of Births, etc.); and
- Available for those who seek it (not forced)

OR

- No mandatory recording of gender marker in the public registry (ability to opt out from recording of gender marker available to all, not only trans/intersex people).

Denmark (1/2), Malta

Half a point is awarded if:

- More than two gender marker options (such as "X") are available in passport only, and
- Available for those who seek it (not forced).



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