

Human Rights Violations of Lesbian, Gay, Bisexual and Transgender (LGBT) People in Turkey: A Shadow Report

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EXECUTIVE SUMMARY

This report is a joint submission by the Social Policies Gender Identity and Sexual Orientation Studies Association (SPoD), Kaos GL Association, International Gay and Lesbian Human Rights Commission (IGLHRC) to the United Nations Human Rights Committee (“the Committee”) on the occasion of its consideration of the first periodic report of the Government of Turkey on the implementation of the International Covenant on Civil and Political Rights (“the Covenant”). The purpose of this report is to highlight the widespread and systematic human rights violations experienced by lesbian, gay, bisexual, and transgender (LGBT) people; in Turkey despite the country’s international obligations under the Covenant. In particular, SPoD, KaosGL, and IGLHRC draw the attention of the Committee to the following human rights violation:

- In the Republic of Turkey, LGBT people do not enjoy legal protection from discrimination and abuse. During the recent drafting of Turkey’s new Constitution, the Justice and Development Party (AKP), which currently controls the government and is a member of the Constitutional Committee, defied calls by other political parties & NGO’s and refuses to make any references to sexual orientation and gender identity (SOGI) in the Constitution.
- Not only does the State fail to promote the rights of LGBT persons but there has been a number of high-profile State actors speaking out directly against the LGBT community in recent years in their official capacity. In March 2010, the State Minister responsible for Woman and Family issues, Mrs. Selma Aliye Kavaf, stated that homosexuality is a “biological disorder” and a “sickness.” Despite international condemnation, Mrs. Aliye Kavaf refused to retract her comments.
- In December of 2011, Interior Minister Idris Naim Sahin described homosexuality as a contributing factor to “an environment in which there are all kinds of dishonor, immorality, and inhuman situations.”
- Turkey not only lacks specific hate crime legislation to protect the LGBT community, but the State’s skewed interpretation of the penal code has practically allowed legal justification of hate crimes against LGBT victims. Under Article 29 of the Turkish Penal Code, sentences for offences committed “with affect of anger or asperity” caused by an “unjust act” are reduced from life imprisonment to 12 to 18 years.
- Many LGBT asylum seekers and refugees entered Turkey from Iran due to the torture and maltreatment they suffered as a result of their sexual orientation and gender identity. These asylum seekers were resettled in the satellite cities. Many of these refugees report physical and psychological harassment, violence and discrimination by police officers and citizens because of the fact that they were LGBT.
- The government of Turkey limits the freedom of expression for LGBT-related materials - including artwork, novels, and magazines - by arguing that gay relationships are “obscene and against the morality”. The government is able to limit publications that discuss sexual orientation and gender identity because Turkey does not have a clear definition of “public morality” in the national law.
- Turkey has made legality of LGBT association conditional on not “encouraging lesbian, gay, bisexual, transvestite and transsexual behaviour with the aim of spreading such sexual orientations.” This, along with Article 56 of the civil code, quoted above (on the formation of association, which says groups can’t engage in activities that violates morality), is a constant threat against LGBT group’s activities and outreach.

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The Right to Non-Discrimination (Articles 2.1, 3 and 26)

Articles 2(1), 3 and 26 of the Convention provide for the respect, equality and non-discrimination of all individuals on the grounds of, inter alia, race, colour and sex. In the landmark decision of *Toonen v Australia* in 1994, the Committee found not only that the reference to “sex” in Articles 2(1) and 26 must be taken to include sexual orientation, but also that laws which criminalize consensual homosexual acts expressly violate the privacy protections of Article 17.¹ In the past twelve months alone, the Committee has called upon states on at least five separate occasions to take affirmative measures to end national prejudice and discrimination against lesbian, gay, bisexual and transgender (LGBT) people.²

In the Republic of Turkey, the LGBT people do not enjoy legal protection from discrimination and abuse. Although the current Constitution of Turkey guarantees that all individuals are “equal without any discrimination before the law”³, and “everyone possesses inherent fundamental rights and freedoms which are inviolable and inalienable.”⁴ There is no language in the Constitution, or other legislations, that specifically protects LGBT individuals from discrimination based on their sexual orientation or gender identity.

As the European Commission pointed out in its review of Turkey in 2011, the government “removed all references to discrimination on grounds of ‘sexual identity’ or ‘sexual orientation’ (SOGI) from the draft law establishing an anti-discrimination and equality board.”⁵ The report goes on to document discrimination, intimidation and violence against LGBT persons in Turkey that will be discussed in greater detail later in this report.

In the past few months, when the opportunity arose for Turkey to include protection against discrimination of LGBT individuals in the drafting of Turkey’s new Constitution, the drafters chose to actively deny inclusion and protection of LGBT individuals. In the current drafting process, two of the four some members of the Constitution Reconciliation Committee, from Peace and Democracy Party (BDP) and the Republican People’s Party (CHP), proposed to add SOGI as a ground of discrimination in the “Fundamental Rights and Freedoms” chapter of the Constitution. These attempts remain unsuccessful. The Justice and Development Party (AKP), which currently controls the government and is a member of the Constitutional Committee, refuses to make any reference to SOGI in the Constitution as well as international agreements. AKP’s deputy in Istanbul and member of the committee in Istanbul, Mustafa Sentop, stated “the Committee does not “find it right to have an expression concerning gays in any part of the constitution.”⁶

¹ *Toonen v. Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994, *available at*: <http://www.unhcr.org/refworld/docid/48298b8d2.html> [accessed 14 September 2012]

² CCPR/C/GTM/CO/3 March 19, 2012 at para. 11, CCPR/C/DOM/CO/5 Mar. 12, 2012 at para. 16, CCPR/C/JAM/CO/3 October 19, 2011 at para. 8, CCPR/C/KWT/CO/2 October 20, 2011 at para. 30, CCPR/C/ARM/CO/2-3 July 16, 2012 at para. 10.

³ Constitution of Turkey at Art. 10 (1981).

⁴ *Id.* at Art. 12.

⁵ European Commission, *supra* note 7.

⁶ Omer Akpınar, *The New Constitution in Turkey: Not for Gays!*, KAOS GL (September 15, 2012) <http://kaosgl.org/page.php?id=12282>; *see also* Goksel Bozkurt, *Protection for Gay Rights Vetoed*, HURRIET DAILY NEWS (September 14, 2012), <http://www.hurriyetdailynews.com/protection-for-gay-rights-vetoed.aspx?pageID=238&nID=30096&NewsCatID=339>

Similarly, the State has refused to incorporate protection for LGBT persons rights in other legislation. On 8 March 2012, Turkey passed Law No. 6284 on Prevention of Violence against Women and the Protection of the Family, Women's rights organizations. LGBT groups demanded the inclusion of the terms "sexual orientation" and "gender identity" in the law, however the government refused.

In the absence of any anti-discrimination legislation to protect LGBT people and with the intentional efforts of the government of Turkey to obstruct LGBT individual's access to legal protections by not including them in the new Constitution, the LGBT individuals in Turkey continue to be deprived from legal protection against discrimination, as demanded by Articles 2(1), 3 and 26 of ICCPR.

Recommendations

- The State should explicitly include protection of sexual orientation and gender identity in the new Constitution in the "Fundamental Rights and Freedoms" chapter of the Constitution as well as all other provisions involving equality and anti-discrimination. The State should also ensure that LGBT voices are heard during the drafting and decision-making process of the Constitution.
- The State should ensure –through measures such as providing trainings and setting up monitoring and evaluation systems- that judges and prosecutors comply with Article 90 of the Constitution, which requires the state to adhere to international law over domestic law when the two are in conflict. The State to be particularly diligent that the provision is followed when dealing with issues regarding sexual orientation and gender identity (SOGI) given the lack of protections for LGBT individuals in domestic legislation.
- The State should take legislation and administrative measures –both on national and local levels- to prohibit and prevent discrimination on the basis of sexual orientation and gender identity in order to provide effective protection to LGBT people in Turkey.

The Right to Equality Between Men and Women (Article 3)

Article 3 of the ICCPR requires State parties, "to undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

Turkey fails to protect LGBT men and women from crimes committed on the basis of their sexual orientation and gender identity. Violence against LGBT men and women is prevalent and the state is unresponsive. Article 216 of the Turkish Penal Code criminalizes incitement to hatred. Under Article 216, a person who "provokes a group of people belonging to different social class, religion, race, sect or coming from another origin to be rancorous or hostile against another group" may be punished with one to three years of imprisonment and a person who "humiliates" other persons for the aforementioned reasons may be imprisoned

for six months to one year.⁷ LGBT persons are not named as a protected class under this article. Furthermore, Article 216 gives the judiciary broad discretion of interpretation for implementation of the law, which has proven to result in discriminatory implementation of the law by choosing not to punish those who incite violence and harass members of the LGBT community.

One example of the police failing to prosecute individuals who incite violence against the LGBT community can be seen in events of a demonstration on August of 2006. On Sunday August 6, 2006, the Rainbow Association of Bursa called for a pro-LGBT demonstration but before the group could hold the march, approximately five hundred counter-demonstrators gathered around the association's headquarters. They chanted and threw stones, forcing the activists to seek shelter inside a building. The activists remained trapped in the building for hours. Following this incident, the police cancelled Rainbow Association's planned demonstration claiming that they were incapable of protecting the group from the counter-demonstrators. In February 2007, a criminal case was filed against Fevzinur Dündar, the individual who led the counter-demonstrators. The charges were brought under Article 216. Mr. Dündar's was acquitted, despite the fact that his homophobic comments had been well-documented and recorded in the media. The Bursa Criminal Court of First Instance stated that there was a "lack of evidence" to support the charges.⁸

Another incident occurred on June 24 2012 when members of an nationalist group tried to attack the trans Pride march in Istanbul's Taksim Square. None of the aggressors were taken into custody demonstrating a lack of sincere investigation of hate crimes towards LGBT individuals by the state.⁹

Not only does the State fail to promote the rights of LGBT persons, but there has been a number of high-profile State actors speaking out directly against the LGBT community in recent years in their official capacity. In March 2010, the State Minister responsible for Woman and Family issues, Mrs. Selma Aliye Kavaf, stated that homosexuality is a "biological disorder" and a "sickness." Despite international condemnation, Mrs. Aliye Kavaf refused to retract her comments. Then in December of 2011, Interior Minister Idris Naim Sahin described homosexuality as a contributing factor to "an environment in which there are all kinds of dishonor, immorality, and inhuman situations."¹⁰

The State has failed to protect the LGBT community from discrimination and violence by excluding them from protection within criminal legislation and refusing to adequately prosecute crimes committed against them. The State also fails to address the State-sponsored homophobia against the LGBT community by its own officials. As a result members of the LGBT community continue to be a target for discrimination and violence.

Recommendations

- The State party should take all necessary legislative, administrative and other measures to eliminate and prohibit discrimination on the basis of sexual orientation

⁷ Criminal Code, Law No. 5237, Article No. 216 (Turk.), *available at* http://www.justice.gov.tr/basiclaws/Criminal_Code.pdf.

⁸ "Yürüyoruz" [We Are Marching], documentary film, more information available at: <http://www.lambdaistanbul.org/s/etkinlik/akbank-3-kisa-film-festivali-yuruyoruz/>

⁹ Interview with eye-witnesses by Kaos GL (July 2012) (on File with Kaos GL).

¹⁰ İçişleri Bakan'ndan yeni terör tarifleri [Minister of Interior, the new terrorism recipes], RADIKAL (December 26, 2011 15:24), <http://www.radikal.com.tr/Radikal.aspx?aType=RadikalDetayV3&ArticleID=1073629>

ensure that individuals of different sexual orientation or gender identity are protected from violence and social exclusion within the community.

- The State should clarify the language contained in Article 216 of the Turkish Penal Code to prevent its use as a legal justification for violence committed against members of the LGBT community.
- The State should include LBT women in the new Law No. 6284 on Prevention of Violence against Women and the Protection of the Family.

Right to Life (Article 6)

Article 6 states that “every human being has the inherent right to life” and “this right will be protected by law.”

Turkey not only lacks specific hate crime legislation to protect the LGBT community, but the State’s skewed interpretation of the penal code has practically allowed legal justification of hate crimes against LGBT victims. Under article 29 of the Turkish Penal Code, the sentences of offences committed “with affect of anger or asperity” caused by an “unjust act” are reduced from life imprisonment to twelve to eighteen years.¹¹ It may be used to lower prison sentences in cases where the notions of family honor provided a motivation to kill. Article 29 contains reference to “provocation” or “incitement” as possible grounds for a lower punishment for murder¹² and at times has been invoked to lower sentences for murders of lesbian, gay, bisexual, and transgender people. This misuse of the law should be addressed.¹³ The following example elicits one of the many gruesome realities LGBT individuals face and remain unable to seek retribution for through the criminal justice system.

On February 22, 2006 Abdülbaki Koşar, a gay journalist, was stabbed to death.¹⁴ At trial the defendant stated that he had committed the crime after Mr. Kosar had propositioned him for sex. The Court found that Mr. Kosar’s proposition constituted “unjust provocation” therefore the court reduced the ultimate sentence from life imprisonment to fifteen years incarceration.¹⁵

In 2004 Yelda Yildirim, a lesbian, was murdered. Her girlfriend’s husband killed her by stabbing her 13 times. The perpetrator Huseyin Yardimci was tried for killing Yelda Yildirim and the court acknowledged that the murder was committed with homophobic

¹¹ *Id.* at Art 29.

¹² *Id.*

¹³ Penal Code *supra* note 10.

¹⁴ *Gazeteci Abdülbaki Koşar'ın Öldürülmesi Davasında Karar* [Journalist Murder Case Decision Kosar Abdülbaki], DOĞAN HABER AJANSI [Dorgan News Agency](February 28, 2007 14:19), <http://www.haberler.com/gazeteci-abdulbaki-kosar-in-oldurulmesi-davasinda-haberi/>

¹⁵ There has been documentation of a court in Turkey articulating that “unjust provocation” cannot be used as a defense against violence of an LGBT individual. On April 11th 2009, Melek K, a transsexual woman, was stabbed to death in her house in Ankara. During the subsequent trial, the defendant argued that the victim had offered him sex and that he therefore had committed the crime in response to an “unjust provocation”. The Court held that homophobia cannot serve as the basis for a claim of unjust provocation. The case is the first instance where the perpetrator of a transphobic act received the maximum punishment provided by the law. The State should follow this court ruling and no longer permit “unjust provocation” to be used to justify violence against LGBT individuals. *Transsexual Melek’s Killer Arrested*, ILGA http://trans.ilga.org/trans/welcome_to_the_ilga_trans_secretariat/news/transsexual_melek_s_killer_arrested

motivation. The court ultimately found that the homophobic motivation was sufficient to plead the defense of “unjust provocation.”¹⁶

There have been several more cases documented where the Turkish criminal justice system reduces the sentences of criminals by reducing the sentence of those being punished for these crimes.¹⁷ By permitting the perpetrators of violent attacks against LGBT people to claim “unjust provocation” as a justification for their violence

Recommendations

- The State should amend Article 29 by expressly stating that the SOGI status of individuals does not constitute adequate “provocation” or “incitement” as grounds for a lower punishment of crimes committed against LGBT individuals.
- The State should provide training for judges and prosecutors on SOGI issues in order to prevent future discrimination and human rights violations against LGBT people in the judicial system.

The Right to be Recognized as a Person Before the Law (Article 16)

Article 16 guarantees all people “shall have the right to recognition everywhere as a person before the law.”

Many LGBT asylum seekers and refugees entered Turkey from Iran due to the torture and maltreatment they suffered as a result of their sexual orientation and gender identity. These asylum seekers were resettled in the satellite cities. Many of these refugees report physical and psychological harassment, violence and discrimination by police officers and citizens because of the fact that they were LGBT. This Committee has recognized the systematic discrimination and violence against LGBT individuals in Iran as recently as October 2011.¹⁸

The problems LGBT asylum seekers and refugees face are ever increasing due to the heterosexist structure of society.¹⁹ The difficulty of attaining labour right in a legal way pushes LGBT asylum seekers and refugees to illegal work. Most of them cannot get their money and are exposed to verbal or physical harassment and violence in their work settings.

¹⁶ Istanbul 2nd High Criminal Court (İstanbul 2. Ağır Ceza Mahkemesi), Amnesty International, p 48, <http://www.amnesty.org/en/library/asset/EUR44/001/2011/en/aff47406-89e4-43b4-93ed-ebb6fa107637/eur440012011en.pdf>

¹⁷ In 2006 attack against transgender and sex workers neighborhood, perpetuated by civil gang members who were supported by the police (40 trans people had to move out), law suit was filed at the criminal court in Ankara, the court ruled that the attacks were systematic and motivated by hate + on a monthly basis, there are murders and hate-violence against trans individuals. In these cases, the Turkish court mostly gave reduced sentences to the perpetrators, based on the assessment that it is an “unjust provocation” and the victim was trying to sexually assault the perpetrator of the crime. “We need a law for liberation” Human Rights Watch page 76, <http://www.hrw.org/sites/default/files/reports/turkey0508webwcover.pdf>

¹⁸ CCPR/C/IRN/CO/3, October 17, 2011 para. 10.

¹⁹ See “Unsafe Haven: The Security Challenges Facing Lesbian, Gay Bisexual & Transgender Asylum Seekers & Refugees in Turkey,” Helsinki Citizens’ Assembly—Turkey Refugee Advocacy and Support Program and Organization for Refugee, Asylum & Migration (ORAM), June 2009; see also “Lesbian, Gay, Bisexual, Transsexual Asylum Seekers and Refugees in Turkey,” Kaos GL (2011).

LGBT refugees in Turkey enjoy very limited access to social support, employment and medical care. There are worrying omissions where police are called upon to investigate violence and harassment against these individuals. Most persons reported consistent, often violent harassment from local community members.

According to the current arrangement, asylum seekers and refugees are responsible for their own treatment expenditures. If they cannot afford these expenditures, then, the State will supply a portion of them. Government assistance with treatment expenditures of asylum seekers and refugees are provided by the Social Assistance and Solidarity Foundations, two programs situated within the governorships in every city. In order to benefit from health assistances, asylum seekers and refugees must be checked into Foreigners Department and pay the residence permit fee and ID fee. The ones who cannot afford the ID fee cannot benefit from this very limited health service.

Draft Law on Foreigners and International Protection has been presented to the National Assembly. In the event the draft gets approved, it will be the first general regulation ever to address the right of asylum in Turkey. Although the draft law is a very significant regulation regarding the demilitarisation of asylum procedure and standardizing of implementation, there are regulations that may work against LGBT asylum seekers and refugees. How the asylum procedure shall proceed following the approval of the draft is left to be defined by the secondary legislation and general judicial discretion of enforcement.

It is of vital importance that the General Directorate of Immigration Administration and the units bound under -to be established after the approval of the draft law- should work in cooperation with LGBT organisations functioning within the asylum field.

The geographical boundary brought to the 1951 Convention is preserved in this draft law. Therefore, Turkey will continue not accepting refugees outside the European Area even after the approval of the draft.

The article banning discrimination was completely removed from the draft. Thus, asylum seekers and refugees are left utterly vulnerable against discrimination.

No new regulation was brought in the draft law regarding work permits. It is nearly impossible for the asylum seekers and refugees to get a work permit. In the draft, “earning one’s living through illicit means” is stipulated as a reason for deportation. This expression in the draft law is of serious threat against asylum seekers and refugees who earn their living as sex workers. Also, the expressions of “threatening public order, public safety and public health” mentioned as another reason of deportation are indefinite expressions that may bear results that are in detriment of LGBT asylum seekers and refugees.

It is stipulated in the draft law that parties may object to the decisions for deportation within 15 days in administrative courts. However, the decision to be made by the court is final and there is no way to appeal court decisions.

The State reserves the authority to extend the administrative custody period up to 6 months and exclude any regulation regarding access of the civil society to detention and deportation centres. This extended custody and isolation from civil society make it impossible to determine the human rights violations, torture and maltreatment LGBT individuals suffer in such centres.

After the draft law is approved, applicants, asylum seekers and refugees will be able to benefit from general healthcare social security. This is a significant step made towards the right to accessing healthcare.

Currently, many refugees have suffered severe physical attacks and have been unable to seek redress through reports to the police:

- On 16 December 2011 evening, a gay refugee was attacked by three citizens in Kayseri. At evening time when he was on his way to home, he found that 3 men were following him. The three men approached him and blocked his way. They spoke violently in Turkish and showed him their genitals. He tried to escape with all of his power, but they would not allow him to leave. They took his coat and then one of the men started to hit him. After he could finally escape one of them continued to follow him along the street for 50 meters until finally giving up.

The next day he went to the local police station in Kayseri, and reported the incident to the police. Police told him that they would check the local cameras and follow-up him later. UNHCR was also informed about the incident.²⁰

- On 12 December 2011 a transgender refugee was directed to Kaos GL by UNHCR. She resided in Adana. She told she had first gender assignment surgery 10 years ago and her last operation 3 years ago in Iran. It was not successful. She had problems with the genital surgery and has bleeding. She was directed to one of Kaos GL's volunteer doctors in Adana. The doctor said that her situation was very serious and she had to have 2 to 3 more operations urgently. She could not afford treatment expenses and no funds could not be found for the surgery.
- A transgender refugee mentioned; when she was going to home one night, two young men threatened her with a knife and rubbed her. She had decided to report the incident to the police and went to the police station to document the incident. However, the police officers told her that in order for her to make a report she must bring a witness. When the woman returned with a witness, the police still did not investigate or prosecute anyone for the attack made against her. Instead, the police told her to call 155, the general police in Turkey, if she had a problem.²¹

Recommendations

- The State should ensure the geographic borders that are brought to the 1951 Convention and 1967 Protocol are removed. Turkey should also take asylum seekers and refugees from places outside of European countries under its protection as well.
- Education on homophobia and gender identity should be given to the police officers, Foreign Branches and employers of General Directorate of Immigration Administration as well as the units and employers of the Office of the Governor and Social Assistance.
- The State should include LGBT Organisation's voices and expertise in developing these trainings and education resources.

²⁰ Documentation on file with Kaos GL

²¹ Interview with Nevşehir/ Kaos GL satellite city visitation April 20, 2011.

Freedom of Opinion, Expression, and Information (Article 19)

Article 19 of the Convention recognizes the rights of free expression and opinion. In its most recently published General Comments, the Committee stated that both of these ideas represent “the foundation stone for every free and democratic society.”²² All domestic laws should uphold freedom of expression, and media within the state must be able to operate without “censorship or restraint.” Freedom of opinion extends to all areas of society, including “political discourse,” “discussion of human rights,” and “journalism.”

Although Article 26(1) of the Turkish Constitution guarantees freedom of expression to every citizen,²³ there is no specific legal stipulation to guarantee freedom of expression on issues related to sexual orientation and gender identity (SOGI.) For this reason, the State can and has considered publications on SOGI issues “immoral”, “obscene” and are often censors such materials.

The government of Turkey limits the freedom of expression for LGBT-related materials - including artwork, novels, and magazines - by arguing that gay relationships are “obscene and against the morality”. In limiting publications, which discuss sexual orientation and gender identity, the Turkish government takes advantage of the fact that there is no clear definition of “public morality” in the national law.

- In July 2006, the Press Division of the Ankara’s Public Prosecutor’s office launched a criminal investigation against the editor of Turkey’s only LGBT magazine, published by Kaos GL.²⁴ The Prosecutor’s office stated that Issue 28 contained “immoral” artwork and asked Ankara’s 12th Criminal Court of Peace for authorization to confiscate all copies. The request was based on Article 28 of the Constitution which permits censorship of free press that “tend(s) to incite offence” or if it contains “material which contravenes the indivisible integrity of the state.”²⁵ On July 21st 2006, the Court granted authorization to the Prosecutor, holding that “some articles and pictures from the magazine interfere with the “protection of public morals.”²⁶ In its submissions to the Strasbourg Court, the Turkish Government argued, “freedom of expression is the cornerstone of a democratic society. However, as is stated in Article 10/2 of the Convention the exercise of this right may be subjected to some restrictions.”
- In July 2009, the Prime Minister’s Council of Protection of Children from Harmful Publications decided that the book named “Üçüncü Sınıf Kadın” (Third Class Woman), by the author, Anıl Alacaoğlu, should be distributed in a sealed envelope carrying a warning that it cannot be sold to underage persons (Case Number B.02.0.MNK-572-02/01242). The reason given for the Court’s decision was that the book contained “gay relationships which are not normal according to Turkish customs” and “could harm the sexual health of children”. The author appealed against the decision at the Ankara Criminal Court of First Instance on 17th August 2009,

²² CCPR/C/GC/34, 21 July 2011.

²³ Constitution of Turkey at Art. 26(1) (1981).

²⁴ Kaos GL appealed the Court’s decision, which was upheld on July 28th 2006. The case is now before the European Court of Human Rights (Case No 4982/07).

²⁵ *Supra* note 17 at Art. 28.

²⁶ *Supra* note 18.

claiming that the decision violated freedom of expression. The appeal is currently pending before the Ankara Criminal Court of Peace.

- In 2009, the Press Division of Istanbul’s Public Prosecutor’s Office confiscated copies of the book “Aşkın L Hali” (The ‘L’ Aspect of Love), jointly published by Kaos GL Association and Sel Publications. Subsequently, the Prosecutor’s Office launched an investigation into the publication, arguing that lesbian culture is “an unnatural sexual relation” and “obscene.” The defendants objected to the investigation, arguing that the authorities’ interference was in violation of the Right to Freedom of Expression. The case is still being investigated (Case Number 2009/66795).
- LGBT websites have been blocked in Turkish Grand National Assembly. CHP Ankara deputy Aylin Nazlıaka asked Prime Minister Recep Tayyip Erdoğan the reason for the blockage of internet access of Turkish Grand National Assembly for the web sites of the non-governmental organizations of LGBT. Deputy Aylin Nazlıaka explained that it is needed to fill a special form in order to access the web sites of LGBT associations and asked Prime Minister Erdoğan the reason of this implementation. After a parliamentary question, the access to LGBT websites was possible on the internet system of the Turkish parliament, after having been blocked.²⁷
- On June 2012, High Court ruled that oral and anal sex in movies should increase the penalty against the accused for selling CDs with sexual content. High Court convicted S.K. to one-year of imprisonment for selling movies with sexual content. However, the penalty was then increased because the movies contained displays of oral and anal sex.

The accused S.K. objected to the decision and the trial was carried to High Court. High Court 14th Criminal Division investigated the file and evaluated the decision. The Division put emphasis that the CDs contain images which leads to increasing the penalty. Since the CDs contained anal and oral sex displays, the High Court decided S.K. to be judged from Turkish Penal Code’s Article 226 Item 4 which states that a “person selling products containing writing, sound or images of unnatural sexual behavior can be convicted to from 1 to 4 years and to punitive fine up to 5 thousand days.²⁸ Expressing that it is the responsibility of criminal court of first instance to define the quality of the crime, high court sent the file back.²⁹

Recommendations

- The State should define the terms ‘public moral’, ‘obscenity’, ‘exhibitionism’, ‘unnatural intercourse’, ‘Turkish family structure’ because without definition, the vague terms make LGBT members vulnerable and more likely to be found guilty even if they are not.
- The State should stop the discriminatory implementation of public morality laws and ensure that the simple presence of homosexuality is not criminalized through those laws. Similarly the State should clearly define restrictions freedom of expression,

²⁷ Kaos GL (October 19, 2011), *available at* website www.kaosgl.org.

²⁸ Criminal Code, Art. 226 (Turk.).

²⁹ On file with Kaos GL (June 22, 2012) *available at* website www.kaosgl.org.

opinion and organizing so as to not leave discretion to the police to censor LGBT members and LGBT-themed content.

The Right to Assembly and Association (Articles 21 & 22)

Articles 21 and 22 of the Convention provide for the right of peaceful assembly and association. Although the Committee has not issued General Comments on these topics, it has used its Concluding Observations to underline the importance of Article 21 and 22. In particular, the Committee has criticized laws which require state sanctioning of assemblies,³⁰ which force people to assemble in inaccessible areas,³¹ and which prolong assembly appeal procedures to the extent that the right is thus void.³²

In 2005, the Special Representative of the Secretary General on Human Rights Defenders, Hina Jilani submitted a report on the situation of human rights defenders in Turkey.³³ In her conclusions and recommendations, she called the government of Turkey, to “further review regulation to ensure that freedom of assembly is fully guaranteed.”³⁴ She also urged the government to “refrain from public statements questioning the legitimacy and aims of human rights organizations.”³⁵

Article 56 of the Turkish Civil Code defines the association and forbids the establishments of association against laws and ethics. Article 41 of the Constitution provides that “the family is the foundation of the Turkish society.” Based on these text laws, there have been attempts for banning LGBT organization (*please see Recent Development, 4 below*). The State has failed to ban the organization and legal existence of at least 6 LGBT organizations in Turkey demonstrating that the usual prejudice employed by the Turkish government (morality, protection of the family, ethics) is not always endorsed by the judges and prosecutors. But, according to the ECtHR, “genuine and effective respect for freedom of association and assembly cannot be reduced to a mere duty on the part of the State not to interfere [...]. There may thus be positive obligations to secure the effective enjoyment of these freedoms [...]. This obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation.”³⁶ There is nowadays a lack of full protection of the right to assembly and association for LGBT movements.

- On May 17 2010, in Ankara, five trans activists were accused by the police of engaging in sex work at night. About 25 human rights activists joined them in support. The assembled human rights observers were beaten up by about 60 police officers and documented as calling the activists “faggots” and threatened “next time we will kill you!” They continued on to say said ““you continuously take to the streets for protests; do it now if you can.” This shows the will to deter transgender human rights defenders from activism, for instance by demonstrating. On 18 June 2010, the five

³⁰ CCPR/C/JOR/C/4, 18 November 2011 at para 15.

³¹ CCPR/C/KAZ/C/1, 21 July 2011 at para 26.

³² CCPR/C/POL/C/6, 15 November 2010 at para 23.

³³ E/CN.4/2005/101/Add.3.

³⁴ *Id.* at ¶111(f).

³⁵ *Id.* at ¶115(b).

³⁶ *Bączkowski and others v. Poland*, n°1543/06, 3/05/2007, § 64

activists were charged with “*Resisting Public Officials and Preventing Them from Performing Their Duty*”.³⁷

- In June 2012, the third trans pride (20-24 June 2012) was attacked by counter-demonstrators. Probably due to the presence of international media, the pride was protected and the violent counter-demonstrators were maintained aside from the pride. This time, the Turkish authorities took positive action to protect freedom of assembly but the counter-demonstrators were not prosecuted.
- Five LGBT organizations were requested closure by the directory of association of their cities. The request was rejected either by the public prosecutor's office (Kaos GL, Ankara, 10 October 2005; Rainbow LGBTTT Association, Bursa, 6 October 2006; Pink Life LGBTTT Association, 1st November 2006; Black Pink Triangle LGBTTT, Izmir, 30 April 2010) or by the Supreme Court³⁸ which set a precedent. Two further organizations benefited from this rule, with no closure case opened against SPoD and Istanbul LGBTTT. This shows that the right of association can be protected in Turkey.
- As the country progress report of European Commission on Turkey for 2009 pointed out about the closure case of Lambda Istanbul LGBTTT Association, “the court’s ruling made the legality of the association conditional on not “encouraging lesbian, gay, bisexual, transvestite and transsexual behaviour with the aim of spreading such sexual orientations”³⁹. This, along with the Article 56 of the civil code, quoted above (on the formation of association, which says groups can’t engage in activities that violates morality), is a constant threat against LGBT group’s activities and outreach. As part of the Council of Europe, by conducting such a policy, Turkey infringes the ECtHR case law by discriminating on the basis of sexual orientation as regards to the right of assemble and association (Article 11, European Convention on Human Rights), with policies against alleged “promotion of homosexuality” (§109-110, case of Alekseyev v. Russia⁴⁰).

Recommendations

- The State should clarify that Article 56 of the Civil Code, which forbids the establishments of association against laws and ethics, is not applicable to the LGBT community and that its terms be specifically defined in the civil code.
- The State should lift the “no homosexual propaganda” stipulation as a condition to legalize LGBT associations since it is a constant threat against LGBT groups’ activities and outreach.
- The State should take steps to systematically prosecute those who incite violent attacks during LGBT events and make sure the participants are in safe in the event that an attack should occur.

³⁷ Joint Letter to Turkish Officials on the Upcoming Trial of Pink Life Activists, October 18, 2010 *available at* <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/1208.html>

³⁸ Case of Lambda Istanbul LGBTTT, November 25 2008.

³⁹ Turkey 2009 Progress Report – European Commission, p.19,

ec.europa.eu/enlargement/pdf/key.../tr_rapport_2011_en.pdf

⁴⁰ Case of Alekseyev v. Russia, nos. 4916/07, 25924/08 and 14599/09, 21 October 2010

RECOMMENDATIONS

- The State should explicitly include protection of sexual orientation and gender identity in the new Constitution in the “Fundamental Rights and Freedoms” chapter of the Constitution as well as all other provisions involving equality and anti-discrimination. The State should also ensure that LGBT voices are heard during the drafting and decision-making process of the Constitution.
- The State should ensure –through measures such as providing trainings and setting up monitoring and evaluation systems- that judges and prosecutors comply with Article 90 of the Constitution, which requires the state to adhere to international law over domestic law when the two are in conflict. The State to be particularly diligent that the provision is followed when dealing with issues regarding sexual orientation and gender identity (SOGI) given the lack of protections for LGBT individuals in domestic legislation.
- The State should take legislation and administrative measures –both on national and local levels- to prohibit and prevent discrimination on the basis of sexual orientation and gender identity in order to provide effective protection to LGBT people in Turkey.
- The State party should take all necessary legislative, administrative and other measures to eliminate and prohibit discrimination on the basis of sexual orientation ensure that individuals of different sexual orientation or gender identity are protected from violence and social exclusion within the community.
- The State should stop permitting use of the vague language of Article 216 of the Turkish Penal Code as a legal justification for violence committed against members of the LGBT community.
- The State should include LBT women in the new Law No. 6284 on Prevention of Violence against Women and the Protection of the Family.
- The State should investigate and prosecute police officers accused of harassing LGBT individuals.
- The State should collect disaggregated data on the number of complaints of violence made by LBT women.
- The State should protect LGBT individuals under Article 29 expressly stating that their LGBT status does not constitute adequate “provocation” or “incitement” as grounds for a lower punishment of crimes committed against them.
- The State should ensure the geographic borders that are brought to the 1951 Convention and 1967 Protocol are removed. Turkey should also take asylum seekers and refugees from places outside of European countries under its protection as well.
- Education on homophobia and gender identity should be given to the police officers, Foreign Branches and employers of General Directorate of Immigration Administration as well as the units and employers of the Office of the Governor and Social Assistance. The State should include LGBT Organisation’s voices and expertise in developing these trainings and education resources.
- Turkey should include “sexual orientation” and “gender identity” in the anti-discrimination draft legislation.

- After the draft law is approved General Directorate of Immigration Administration and the units should be in contact with LGBT NGO's.
- The State should define the terms 'public moral', 'obscenity', 'exhibitionism', 'unnatural intercourse', 'Turkish family structure' because without definition, the vague terms make LGBT members vulnerable and more likely to be found guilty even if they are not. The State should stop the discriminatory implementation of public morality laws and ensure that the simple presence of homosexuality is not criminalized through those laws.. Similarly the State should clearly define restrictions freedom of expression, opinion and organizing so as to not leave discretion to the police to censor LGBT members and LGBT-themed content.
- The State should ensure Article 56 of the Civil Code which forbids the establishments of association against laws and ethics is not disproportionately applied to the LGBT community and that its terms be specifically defined in the civil code.
- The State should lift the "no homosexual propaganda" immediately as it since it is a constant threat against LGBT group's activities and outreach.
- The State should take steps to systematically prosecute those who incite violent attacks during LGBT events and make sure the participants are in safe in the event that an attack should occur.