

# PERSPECTIVES:

## LGBTI+ RIGHTS IN TURKEY

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**Translation**

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Publisher: Kaos GL Cultural Research and Solidarity Association (Kaos GL)

First edition: December 2018, Ankara

Ayrıntı Basımevi, Ostim-Ankara, Sertifika No: 13987

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# CONTENTS

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<b>Prohibitions: Strategies of Delegitimization and Exclusion From the Public Space.....</b>	<b>5</b>
Prof. Dr. Melek Göregenli	
<b>The Great Segregation of LGBTI Movement.....</b>	<b>10</b>
Lawyer Oya Aydın	
<b>LGBTI Restrictions in Ankara: Time-Lapse Summary of the New Era.....</b>	<b>15</b>
Kerem Altıparmak	
<b>The Misdemeanor of the Warden .....</b>	<b>22</b>
Lawyer Senem Dođanođlu	
<b>Work Life and Discrimination against LGBTIs in Turkey .....</b>	<b>26</b>
Dr. Reyda Ergün	
<b>Evaluation of the Article 122 of the Penal Code of Turkey on the Context of Hate Crimes.....</b>	<b>38</b>
Lawyer Emrah Şahin	



# Prohibitions: Strategies of Delegitimization and Exclusion From the Public Space

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Prof. Dr. Melek Göregenli

It seems important to understand which is universal, practically unalterable, relatively persistent and which does change in accordance with the context, era, and even with the culture while the things going on in the intervention and control mechanisms on the body and generally sexuality is tried to be understood by using notions relative to the historical and contextual conditions like gender, gender identity, and sexual orientation. It seems necessary, not just to understand the hegemonic means of intervention to the body or everything related to the body, thus to comprehend the sociality of the body and sexuality but it seems necessary for developing new policies in order to take back *the individual's control on their body and sexuality* too. Every year, reports of LGBTI and other human rights-based organizations, particularly Kaos GL, reveals what is going on in Turkey about discrimination based on gender identities and sexual orientations with an ever-increasing amount of objective data. Numerous reports on discriminatory practices in workplaces, discourses of hate in media and the actual consequences which are affecting many people and sometimes threatening their life, i.e. the hate crimes. Maybe, in order to understand the daily and periodic notions and to create a contemporary discourse, a closer look to the changing things in the qualitative context, rather than the quantitative or at least a closer look to the more perceivable things is needed. Even if it would exceed the limits of an article, as a long-term intent to think and to understand, I want to share my gender identity and sexual orientation based introductory questions about the growing nationalist-conservative ideology intending towards building a systematical hegemonic approach.

First of all, the Emergency State period, as it is addressed as a starting and a turning point by the hegemon, is important in the sense of the increased visibility of these policies. The Emergency State, which is declared right after the coup attempt of July 15th, has been rescinded after 730 days, namely two years, on July 15th, 2018. In the Emergency State period, a variety of regulations has been made from

shutting down military schools and hundreds of foundations, associations, etc. to the expulsion of hundreds of thousands of public employees, to marriage shows, and application of snow tires. After the rescindment, every emergency state law has been legislated as permanent laws, therefore became legal. Practices of the Emergency State period, even it doesn't have any significant differences from the pre-Emergency State policies in a qualitative sense, has abolished the ability to discipline the realm of political organization and to say the least, the ability to include dissident-alternative-critical opinions to the education process in both public and private educational institutions, by giving the government the ability to legislate and to execute new laws without following the usual legislation processes; in a sense, the standardization of the ideology of the hegemon has been ensured, especially in the public institutions. The expulsion of a part of the Eğitim-Sen (a union of teachers) members and the Academicians of Peace cannot be addressed as just a violation of rights and an unlawful action. In the same time, every feminist, critical and anti-LGBTI-discriminatory academic curricula and activity on the subjects of gender and body politics has been removed from every educational process. All student activities, club events in the LGBTI field have been either banned or substantially limited, even in the universities like METU and Bogaziçi, which have traditionally hosted leading events in this scope. Expulsion of both academical and critical practices in the field of gender and LGBTI studies from the field of education shows, besides its characteristic as a mechanism of *social discrimination*, the purpose of the hegemon; the *expulsion from the public space* of the certain social groups, notably the LGBTI citizens, therefore *delegitimizing* them. But in fact, education process and the school itself are the universally most important means of reinforcing discriminatory ideologies and the socialization of the idea that being a part of the majority and similarity to others is a virtue and the only way to be socially approved.

Numerous studies show that the school life reinforces the ideology that strengthens homophobia, transphobia and as their counterpart, the "mandatory heterosexuality", which cultivates the threat of violence based on masculinity and endurance, or actual violence. Many studies have revealed the importance of the language-ideology relation on the prediction of homophobia and violence. Heterosexuality and prejudiced discourse may not be revealed by studying the attitudes and ascriptions of individuals; even when the real patterns of communication have been studied, it is possible that the discourse might be built with the fear of being labeled as prejudiced. Therefore, it has been stated that practices of prejudice-based discourses can be revealed only as an *ideological phenomenon* within the relatively static, daily practices of communication. This ideology points to an intergroup perspective which is related to all kinds of discriminatory thought like

authoritarianism, conservatism, nationalism or the belief of the national hierarchy between individuals or groups. Hence, excluding the production of anti-heterosexual academic knowledge and practices from the formal education system is not a new practice, but the legislation of these practices based on the Emergency State as it shows the ideological determination of the hegemon is a new one and it seems what kind of social change process has been aimed by these is needs to be studied. While the socialization of standardized gender and gender ideology is being institutionalized through educational processes, in the meantime the practices to solidify and to ensure the control and the transformation of the streets and public space is getting diversified, and the ideological preferences of the official ideology are becoming more and more visible. Especially the criminalization and the shutdown of the film theaters and public baths, which facilitated as historical and cultural meeting points, by police raids have resulted in the presentation of these operations as prevention of the immoral activities and delegitimization, criminalization and labelization of the private life other than the mandatory heterosexualism. Thus the institutionalized social discrimination is supervised by the public through locational control. This system of control and supervision is being conducted on social media and the internet too; access to a variety of websites has been banned.

The increase of LGBTI visibility through the organization of LGBTI, anti-heterosexism activities, and the struggle of people to be as they are in the public space have great importance in sense of increased liberties and tackling the violence, but it also induces the promotion of every kind of discrimination and violence since it threatens the established ideology of masculinity. Numerous studies show that presenting the target group as a threat serves a great function in generating prejudice against these groups and gathering public support against the policies in favor of these groups. This collective phobia, and consequently the prejudices, emerge from these emotions: (a) the sense of supremacy of a group over another (b) being different and privileged than the disadvantaged groups (c) having the claim over certain privileged territories as they belong to the privileged individuals (d) fears and doubts about rights of dominant groups will be violated by the discriminated groups. Moreover, the occurrence of further consolidation of discrimination through the attitude favoring the inner group when the symbolic threats that reinforces the prejudices reach to a level that it becomes intimidating to the inner group's value system have been emphasized by many theoreticians. Fear and anxiety are fueled by many sources; prejudice, negative stereotypes, essentialist beliefs, intergroup anxiety, the relation between factual and symbolic threats.

At this point, let's look at a different example of the LGBTI activities' expulsion from the public space which began in the Emergency State period but its practices have been carried on via the extensive authorization invested in governors. German LGBT Film Days that was planned for November 16-17 2017 at Ankara, was banned. As I have summarized above, the process of creating a perception of threat - and in this example, an imminent threat - against the target group, in the delegitimization process is clearly constructed in a *nationalist* and *religious* ideological framework. In the statement of the governorate, this event described as an activity that *will overtly incite* grudges and enmity between groups which are not clearly defined. Below, the news article that includes the Governorates statement has been presented.

**“It has been stated that ‘Intelligence on the organization of a film screening that involves a variety of social sensitivities scheduled for the dates of November 16-17, 2017, at Büyülü Fener Movie Theater under the name of German LGBT Film Days, has been acquired from several written and visual media outlets’. In the statement, ‘Considering the aforementioned posts, as they will publicly incite grudges and enmity towards a part of society from another part which is different in sense of social class, race, religion, sect, and region, therefore an imminent threat against public safety could occur, and considering the intelligence reports that terror organizations are seeking to attack dissident groups or individuals, it is evaluated that this film screening could be provocative and draw reactions from certain parts of society due to a variety of public sensitivities.’”**

By social and traditional media, the countercampaign that took place in social media has been presented as one of the reasons that caused the Governorate of Ankara to declare this ordinance. Keeping the dilemma of how social media campaigns are shaping the judgment of public authorities or how public authorities shaping the social media campaigns in mind, let's point to the fact that this is a perfect example of the nationalism-conservatism-homophobia ideology set. Some social media users started a campaign by writing down a text aimed to threaten the German LGBT Film Days with the headline of #İstiklalimizeKaraLeke (a disgrace to our independence). The campaign text is presenting a “mini film festival” as a national threat, by utilizing a wide spectrum of notions varying from the “German” imperialism to moral invasion, from questioning the intention of why the event was free to resisting by “spilling blood” if needed. The text and related messages deserve a thorough analysis but within the limits of this article, let us settle with the last sentence of the campaign text, which refers to a verse from the Quran:

**And Lot! (We sent him as a prophet to his folk,) when he said unto his folk: Will ye commit that abomination knowingly?**

**(Surah Al-Naml, Verse 54th) #DisgraceToOurIndependence**

Discrimination is fueled in a discursive sense by arguments that legitimize or deny the existence of discrimination that are aimed at creating the perception of the discriminated group as a threat to the common lifestyle. Hegemonic discursive structures created for reinforcing the legitimacy of the system and hierarchies are named as “legitimizing myths” by the social psychology literature. Those in power do not just legislate the arguments that say the current system is natural and legitimate and which groups can be ruled and be subjected, and the laws that enable their dominance over them; but in the meantime, they also produce *legitimizing myths that solidify the hierarchy* in order to ensure the widespread legitimization of these legislations. After the labeling and categorizations are completed through these measures, the only thing left to do is to point to the target group as “dangerous”. Indubitably, the construction of heterosexuality which is universal in theory, but in sense of its actualization practices, has contextual and cultural qualifications, is one of the most important means of social transformation by conservatism in these lands, especially recently in a “nationalist and religious” context. This paradigm of hegemony is actualizing itself in broad masses of society and by getting beyond being abstract ideological constructs, creates psychological and social consequences and discriminatory policies which are affecting the daily lives of millions of people that should have equal rights in sense of being a citizen: Social discrimination, isolation and discrimination on a personal level which can induce negative incidents and mental problems (denture and fragmentation of personality, feeling degraded, self-shame, self-blame, feeling sinful, being subjected to violence, exposition to open or symbolic violence in verbal, physical forms or by ignoring, etc.) through lowered self-esteem through practices like; being partially or wholly kept of from certain institutions, institutional discrimination; unemployment, unregistered employment, hindrance or partially revocation of visibility, etc.

As a conclusion, the socialization of heterosexual manhood, and consequently, the construction of the identity of the male should be understood as a social transformation process. Ideologies of manhood, beyond endogenized personal beliefs and tendencies, reshapes the entire society based on gender and sexuality and involves manners of normative interactions, religious-cultural traditions, and social practices; it is a call of *national* duty that is fueled by popular nationalism that pampers the ordinary man with the promise of making him a hero and *blessed* by more and more religious motives.

Therefore, *still*, every argument on gender identity and sexual orientation is political and directly associated with the whole of society and a whole futurity envisagement of society.

# The Great Segregation of LGBTI Movement

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Lawyer Oya Aydın

**W**hen we will look back to these years, we will remember that one of the first agenda of the populist state policies of conservationist, right-wing governments' was a new wave of hatred against the LGBTI movement. From the United States of America to Russia, from Hungary to Poland, when the authoritarian right-wing regimes' activities against humanity, human dignity are listed, surely Governorate of Ankara's ban ordinances will take its place on the first lines on Turkey's list.

LGBTI movement, which started to socialize in the 1990s, even never supported by the government in Turkey, has formally associationalized in Ankara and Istanbul with the influence of membership process to the European Union in the early years of 2000s when the AKP has come into power. Even though the Governorate of Ankara has applied for the shutdown of Kaos GL upon the declaration of the establishment of the association, the persecution office has declined this request. Later, the notions of sexual orientation and gender identity have not been accepted by AKP in any sense, neither in the process of the European Union's "Harmonization Laws" nor in the legislation process of a new Constitution. On the contrary, constant discrimination and abasement policies continued. From the Minister of Interior to the Minister of Family and to their advisors, discriminatory and degrading comments towards LGBTIs came from every level of government. Yeni Akit newspaper (formerly Vakit), the representative of the subconscious discourse of the government, nowadays the flagship news outlet, has pioneered the attacks against LGBTI individuals and groups. Nevertheless, Pride Marches, which have a very important role in increasing the visibility of people with different sexual orientation and gender identity, continued to grow every year with the participation of thousands. With its rainbow flags, the LGBTI movement had taken its place as a major party of Turkey's opposition movement with other social groups in the Gezi Park demonstrations of 2013.

The AKP, which saw its power shaken after the Gezi demonstrations and the elections of June 7th, 2015, mounted a full-on attack. May 17 International March Against Homophobia and Transphobia, which celebrated in Turkey since 2006, and the Pride March were firstly defacto prevented and subsequently banned. With the right-wing neo-fascist rulers coming into power all around the world and proliferation of policies against the gender, also known as “anti-gender” policies, provided transnational support for attacks and bans against LGBTI individuals in Turkey. Homophobic policies, as Türker put it, once again began to “tattoo the fascism into the spirit of masses”.

The intelligence on a possible attack of ISIS to Kaos GL in Ankara which leaked by military sources prior to the coup attempt and the refusal of the security forces when resorted were the first signs of the threat of “*get lost, or else...*”. It hasn’t seemed enough and Alperens, the paramilitary force of the last twenty years has released. Provincial Chairman of Istanbul Alperen Ocakları Foundation Kürşat Mican, who made a statement before the 2016 Istanbul Pride March, addressed the government authorities for the prevention of the march: “*Dear state authorities, do not trouble us with them. Do what needs to be done or we will do it. We will prevent it.*”<sup>1</sup>

The dear state authorities have done what needed to be done. Not just prevented the march; this ban exceeded the extent of a regular meeting and demonstration prohibition. The German LGBTI Film Days, planned to be held in Ankara with the cooperation of the German Embassy, QueerFest and Büyülü Fener Movie Theaters, was banned on November 15, 2017 following a wave of hate attacks launched on the social media, with a notification sent by the Governorate of Ankara to Büyülü Fener Movie Theaters. The statement of the Governorate, which was also published on their website, indicated that *Intelligence report on the organization of a film screening event under the name of German LGBT Film Days which involves certain social sensitivities* has been acquired.<sup>2</sup>

What did they mean by social sensitivities? Was there anything that could be interpreted as discrimination against women, children, minorities, the elderly, the hand-capped, animals or a call for violence? Of course not. The government determined the sensitivities of people by itself. The sensitivity announced by the governor and approved by the judges was the sensitivity of the government which represented by Yeni Akit newspaper. If a group of people were to come together and watch

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1 <https://www.haberturk.com/gundem/haber/1254002-alperen-ocaklari-lgbt-onur-yuruyusunu-yap-tirmayaca-giz>

2 <http://www.pembehayat.org/haberler/detay/1578/alman-lgbti-film-gunleri-etkinliginin-yasaklan-masina-dair-basin-aciklamasi>

movies, and have conversations about different sexual orientations and gender identities, they would openly incite enmity and grudges among a group of people with different characteristics in terms of social class, race, religion, sect and region towards another group of people. Working class versus bourgeoisie or vice versa? People from the Black Sea Coast and Aegeans? Alevites and Sunnis? No matter which group was to provoke the other, ultimately public security in the country would be in danger. And the intelligence reports on terror organizations' plans on attacking the dissident groups had to be considered. Bless the Lord, we have been saved from the things that would happen if the film festival hadn't been banned by the governorate!

Information on *a part of society which has different social class, race, religion, sect or religion characteristics will be incited enmity and grudge towards another part*, has been announced by the Governorate of Ankara in order to ban the screening of LGBTI+ film anthology which was planned for May 29 at Education Center of Bar of Ankara by the Bar of Ankara Human Rights Head Office.<sup>3</sup> The lawyers who couldn't relate the planned event to the differences in social class, race, religion and region watched films from their cellphones together in the street. Fortunately "the terror organizations" must be missed this event so there were no provocations while the lawyers were watching films.

In November 2017, came the indefinite and unlimited ban ordinance from the Governorate of Ankara. The justification was the same as before:

*"Intelligence on the; cinema, cinevision, theater, panel discussion, exhibition, etc. events, which involve certain social sensitivities, are being planned by non-governmental organizations under the names of LGBTT and LGBTI in various places of our county has been gathered from a variety of social media and various written and visual media outlets."*

Certain places of our county!!! Certain intelligence has been gathered!!! What they are telling is; the homosexuals are going to watch movies, have panel discussions through mysterious phrases that remind the music from the horror movies. The Governorate, which didn't take any precautionary action against the intelligence of Train Station Massacre of Ankara, had taken action upon receiving an important intelligence, and now warning us with the same words: *"has different social class, race, religion, sect or regional characteristics... publicly incite enmity and grudges... public order... certain social sensitivities..."*

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<sup>3</sup> <https://www.yeniakit.com.tr/haber/ramazanda-ortaligi-karistirmak-isteyen-lgbtli-sapkinlara-valilik-dur-dedi-473858.html>

There was no positive outcome from the legal processes applied against the banning ordinances which are declared with the same old tune. We didn't expect anything from the jurisdiction as a human rights movement. We are not in a situation to console ourselves with a court decision which says the ban will be active within the Emergency State process; which is also not true as the segregation still continues.

In none of these cases, we could not even discuss the wording of the law, let alone discussing equality or prohibiting discrimination for the sake of justice and human dignity. The laws were not including the sexual orientation and gender identity expressions, and even the segregative ordinances of the Governorate could not involve them. Applying LGBTI activities to the people that were not different in terms of social class, race, religion, sect or region was odd; LGBT events couldn't be banned on these premises. The courts should have been acted at least in accordance with the wording of the law.

The court should have been rescinded the Governorates ordinance because, the claim of the cinema, theater, conference, panel discussions and meetings held by *"a part of society that has different sexual orientation and gender identity"*, incites enmity and grudges within another part of society (probably heterosexuals or homophobes) has not regulated by the law and let alone proving such an immediate threat, the Governorate even did not openly claim such a situation.

Of course, the courts didn't take part in such a discussion. And even in many cases, there was no need for justification. In the court session against the ordinance of the indefinite and unlimited ban, the 4th Administrative Court of Ankara found the justification of *"there could be reactions against the groups and individuals who will participate in the planned events by some groups because of certain social sensitivities, therefore mass reactions and provocative actions could take place"* reasonable, right and constitutional.<sup>4</sup>

The only difference of this last ordinance of the Governorate of Ankara, which was found compatible with the Constitution by the court, from the other restraints and bans against the social opposition movements during and after the Emergency State was not its indefinite and unlimited characteristics. The fact is, there was not a precaution, not a ban but a punishment. The punishment was segregation. The ordinance was aiming not just to isolate LGBTIs from the rest of the society but to distance them from each other too. Because of that, every kind of meeting, seminar, conference, theater, cinema events, which does not affect social visibility and the streets, were to be banned.

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4 Ankara's 4th Administrative Court, EN: 2017/3255 DN: 2018/2623.

Yıldız Tar from Kaos GL stated “*LGBTIs do not give up their existence when banned*”<sup>5</sup> in their interview with İrfan Aktan but in fact, Pride Marches, events held by associations, conferences, cinema screenings are almost the only places where people with different sexual orientations can express themselves, feel their own existence and socialize.<sup>6</sup> People with different sexual orientation and gender identity are on their own, divergently from the other discriminated structures such as race, class, religious, sect, gender; most of the time it takes time to meet their own selves and it is a rough process. Thus, the freedom to organize and to get together, the right to organize common events carries particular importance for LGBTIs than anyone else. Thus, the courts, especially the Constitutional Court must be aware of the particular importance of the freedom of assembly and expression rights for the LGBTIs and make their decisions accordingly. Otherwise, they will be the collaborators of this segregation.

Isolation is not a practice of enforcement and punishment applicable only in the prisons; it aims to isolate and erode the existence of the individual by segregating them from everyone and everything, by extracting them from their community. And it has been practiced in every part of history, in every community. For instance, Islamic Law professor Hayrettin Karaman, who is known for his close relations with Tayyip Erdoğan, says that in Islam the punishment for homosexuality without the act of sodomy is banishment in order to prevent others to take an example, i.e. segregation. But if there is adultery, an act of sodomy, then execution by stoning, burning, bringing down a wall on them, pushing from somewhere high can be issued.<sup>7</sup>

All of the genocides in history starts with segregation, banishment; ends with a massacre. Therefore, the only way to prevent future deportations, massacres is to stand against all kinds of segregation practices.

5 <https://www.gazeteduvar.com.tr/yazarlar/2018/02/23/lgbtiler-yasak-konunca-varliklarindan-vaz-gec-mez/>

6 Although social media is an important tool of communication, it does not have the function of gathering together and collective activity due to virtuality and individual level of relationship.

7 <http://www.hayrettinkaraman.net/makale/0430.htm>

# LGBTI Restrictions in Ankara: Time-Lapse Summary of the New Era

Kerem Altıparmak

The typology of human rights violations is changing all around the world. 20 years ago, the prototype of human rights violation was via “smuggling the case from the law”. Denied cases of people who were lost in detention, custodies, tortures were typical examples of that situation. There is no doubt that these kinds of violations are still happening. But the prototype has been changed. Nowadays, systematical, structural and widespread violations are not being done by stepping out of the laws reach or by bracketing out the law. They are being done through legal means. It is impossible to reach justice on a way which is paved by legal texts, judicial decisions and appeals.

Turkey has become one of the most important actors on this methodology after the experiences it has acquired following its participation to international mechanisms and the European Human Rights Convention. For example, hundreds of thousands of web content are banned by judicial decisions; hundreds of journalists, politicians and opposition members being deprived of their freedom by the means of law. After then, the never-ending legal process starts. This process takes decades and does not forgive even one mistake. It is not important how shallowly the judicial authorities have made their decisions, the victims have to do everything right.

In the final analysis, human rights violation is an act of segregation in every single case. In the act of violation of human rights, an individual or a group is treated in a discriminatory way, by opposing a principle or a rule. Because of this, it is not surprising to encounter the new prototype of violation on the cases where discrimination is common.

Governorate of Ankara’s decision that bans all kinds of LGBTI-related activity all around the province without a time limit and the period following that is a perfect example of the new prototype of human rights violation. Since November 19th of

2017, in other words for at least 14 months, any LGBTI-related event cannot take place in the capital city of Turkey. It is unclear when this ban will come to an end. When you apply to the Constitutional Court of Turkey or to the European Court of Human Rights, you are reminded that the case is not eligible for a precautionary decision, and in order to apply for these higher courts, you need to apply to every local legal path first. If everything goes as expected, the ECHR can issue a “harsh” decision on this subject in 2032.

Of course, neither the Governorate nor the judicial authorities use homophobic statements. They do not say, “We don’t like LGBTIs, we assume them as lesser citizens and that’s why we don’t approve any kind of activity of them. And if they insist, we won’t hesitate to use violence to stop them”. These kinds of hateful statements are made by newspapers like Yeni Akit. Governorate and judicial authorities put what Yeni Akit thinks into a legal document, it leads to the same end but it spares the authorities’ image of being not discriminatory. It is all according to the new typology of human rights violation.

### **Ambiguous Subjects, Ambiguous Actions**

This new legal system has a dual character by the fact that the law is a mean to violate human rights, and it is impossible to get in touch with justice within its boundaries. When it is about the government, it’s asked if there is a concrete rule that enforces a restraint. For example, when it’s asked if Binali Yıldırım, the president of the Turkish Parliament has to withdraw from his office in order to be a candidate for the mayorship of Istanbul, it’s asked if there is a provision that openly forbids it. Because of such tangible situations has not been predicted, there are no such concrete rules on that either, naturally.

But when the subject is from the opposition or anyone that the government doesn’t like, the solid positivism is replaced by ambiguous, abstract, confusing rules. A typical example of this practice that became especially frequent in the “emergency state” is the Governorate of Ankara’s ban on LGBTI activities.

The justification of the ordinance dated 19.11.2017 is as follows:

*“Some information has been gathered from various social media and visual media outlets that a variety of non-governmental organizations under the name of LBGT and LGBTI will conduct activities involving cinema, cinevision, theatre, panel discussions, exhibitions, etc. subjecting socially sensitive issues.*

*Our assessment of the relevant information showed that the planned activities can openly provoke the part of the society that has different social, economic, racial,*

*religious, denominational or regional differences, therefore there can be open and close threats to public safety; also when it is considered that it can threaten public order, prevention of crime, protection of common health and morals or the protection of the rights and freedom of others, it can lead to some part of society can react to or can be provoked by the groups or individuals that will attend to the planned events.”*

Now, if you carefully look into it, it's ambiguous what this process will do, by whom, to who and how. First of all, the subjects of this decision are completely unclear. Which socially, economically, racially, religiously, denominationally and regionally different part of the public is being provoked against which another part of the society? Because of the impossibility of naming a group which is different in the context of economic, racial and regional values, is the relevant group is different in religion and denomination? To name it more concretely; is one part of this conflict consists of Sunni Muslims? And what about their opponent? LGBTIs? Which group does LGBTIs represent in this text? Do this group is being accepted as a social group? Which we cannot object, but until now which discriminatory, aggressive, hostile attitude against them has been evaluated in this context? And after this, will the complaints of LGBTIs be accepted in this context?

Let's assume that one of the sides is LGBTIs and the other one is Sunni Muslims, which action of the first group has the characteristics interfering the second group's rights? Are these actions the cinema screenings, cinevision, theatre plays, panel discussions, exhibitions, etc. that involve **several public sensitivities**? What is meant by cinema, theatre plays that involve public sensitivities? Are emotional movies fall into this category? Or exhibitions that involve sexuality? What is the criterion that enables to foresee a not yet happened panel discussion will involve socially sensitive subjects? Is everything that doesn't involve heterosexuality can be treated in the same way? If that is the case, should we presume every sexual orientation that isn't heterosexual as against the public sensitivity and therefore forbiddable?

Which activity they are trying to ban actually? Do they want to ban these activities and protect Sunni Muslims or stop Sunni Muslims that may attack to these activities?

Even the usage of ambiguous notions like; “Several public sensitivities”, “some parts of the society”, “etc.”, “threaten” and the ambiguity of the activities that are being banned has made administrative court to nullify this ordinance. The arguments of the suing association, questioning which LGBTI activity has disturbed public authority, how the Governorate has ended up with the conclusion in the

justification and therefore questioning the cause of the whole ordinance has been left unanswered. Because the problem is not an isolated case, but a structural one.

The ambiguity of the ordinance is not limited with the parties involved or the scope but the duration and the times that it will be practiced are undetermined too. Ordinance issued on November 17th, 2017 states that the ban is “**indefinite**”. In other words, an indefinite number of activities has been forbidden for an indefinite time. Although the Ankara’s 4th Administrative Court has dismissed the nullity suit that has been sued by Kaos GL, the court has stated the following on the related ruling: “On the other hand, the ordinance which is the subject of this case is based on the Emergency State Law no:2935, when the ordinance of ending the emergency state is issued, hereby ordinance will also be null and void in accordance to the end of the emergency state.” and therefore stating the infinity of this ordinance is valid only during the emergency state<sup>1</sup>; the ban hasn’t been lifted after the end of the emergency state. Actually, this time, The Governorate of Ankara has sent the same ordinance without the reference to the emergency law to the Police Directory of Ankara at 03.10.2018, notifying all LGBTT/LGBTI activities has been banned.

### **Ambiguous Rules of Law**

Governorate of Ankara has banned all LGBTI activities first during the emergency state (11.17.2017), and later after the end of the emergency state (03.10.2018). During the nullity suit for the first ordinance of the ban; at first, the request for suspension of execution, and then the request for annulment has been dismissed. The nullity suit for the second ordinance has been dismissed on the grounds that the procedure not being an executable administrative act. Article 11/C of Regional Administration Law 5442 and Article 17 of Meetings and Demonstrations Law 2911 has been stated as the legal bases for these two proceedings. But as for the first proceeding has been concluded in the emergency state process, it has a different legal base from the second one and that one is Article 11/f of the Emergency State Law no 2935.

It would be appropriate to examine firstly this and after the other legislative intentions because both Ankara’s 4th Administrative Court, which denied the nullity suit for the first proceeding and the Governorate of Ankara that defended the proceeding in that trial has based their proceedings to the emergency state.

Ankara’s 4th Administrative Court has stated the following: “It is possible to limit fundamental human rights and freedoms as long as it is in line with the 15th Article

<sup>1</sup> Ankara’s 4th Administrative Court E.2017/3255, K. 2018/2623, k. t. 15.11.2018.

of the constitution and it is also possible to issue an ordinance for indefinite suspension as it is on the hereby case.” The 15th Article of Turkish Constitution is : “In times of war, mobilization, a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures derogating the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated.”

Constitutional Court states that two prerequisites are necessary for suspension of fundamental human rights and freedoms in accordance with this article: a) The existence of the emergency state, b) Direct relation between the precaution and the emergency state. In accordance with the first prerequisite, Constitutional Court has stated that “It will be considered when issued precautions are investigated if they are limited to what ‘the situational necessity’ demands under the scope of the 15th article of the constitution”.<sup>2</sup> After the decision has been made on implementing the 15th article, the following aspects will be investigated: i) If there are any precautions that are against the guarantees projected by the constitution or not, ii) If the precaution that is against the guarantees is legitimate under the context of emergency state or not. The second point is also needed to be investigated of two points within itself: 1) If it is about core rights of the constitution or not, 2) If it is against the obligations under international law or not.<sup>3</sup>

But in fact, the Administrative Court has decided that the government can freely limit and suspend fundamental rights and freedoms without consulting to these elements within the state of emergency. Even the Administrative Court has read the prerequisites of the 15th article and stated that “enjoyment of fundamental rights and freedoms can be suspended within the emergency state without conflicting with the obligations under the international law and balanced to the situational necessity, in other words, this suspension can be issued **in accordance with the principle of proportionality**” but the court never argued what these proportions are about and which international laws will be considered.

It is obvious that this suspension, which is unrelated to the emergency state conditions, is unacceptable when the criterions are followed. It is a reality that this precaution is unrelated to the emergency state in any way. Even when it is accepted for a moment that the tension, which the Governorate has never proved by evidence nor was able to explain, really exists, it is obvious that this tension is not

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2 Constitutional Court, Decision on Aydin Yavuz and Others, no. 2016/22169, D.D. 20.6.2017, para. 188-191.

3 Same Decision, para. 192-195.

related with the coup attempt or the counterterrorism campaign. The principle of proportionality is explained as the following: “The precaution must be suitable for the threat or the cause of the annihilation of that threat, and must be necessary for the actualization of this cause; furthermore the public good that aimed by this precaution and the negative effect on the individuals caused by this precaution that suppress fundamental rights and freedoms must be balanced”.<sup>4</sup> This indefinite ban that is not related to the emergency state in any way, is neither suitable, nor mandatory and also it is not balanced at all.

In the end, like the defendant administration, Ankara’s 4th Administrative Court alleged that this decision is not conflicting with the international law. On the contrary, many international laws like the European Convention on Human Rights (ECHR), forbid indefinite precautions in the emergency state. According to ECHR, precautions can be issued within the emergency state under these conditions: “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”. It is impossible to argue that the activities of LGBTIs threaten the life of the nation and they need to be banned. Furthermore, the ban on discrimination is considered as one of the guarantees that can not be violated even under the emergency state conditions by the Human Rights Committee, the interpretation outlet of International Covenant on Civil and Political Rights.<sup>5</sup> This activity ban that motivated by discrimination of sexual orientation is obviously against international law.

As the emergency state is over, it is obvious that this excuse does not exist anymore, and as it stated in the ruling of the Administrative Court, this ban cannot be continued with this justification. But this time the Governorate of Ankara is in the opinion of that this ban can continue in accordance with the Article 11/C of Regional Administration Law 5442 and Article 17 of Meetings and Demonstrations Law 2911. But it is impossible to interpret such a conclusion from neither the Article 11/C of Regional Administration Law 5442, which authorizes the Governor with a general authority to keep the public order nor the Article 17 of Meetings and Demonstrations Law 2911 which authorizes the issue an ordinance for **just a single specific meeting**. If Governorate is able to issue an order like this with such general verdicts, that means it is able to ban every fundamental right and freedom within the region indefinitely. It can close down shops, ban having fun, stop the traffic

4 Constitutional Court, AYM, E.2013/57, D.2013/162, 26/12/2013

5 HRC, General Interpretation no 29, Article 4, 31.08.2001, para 8-17; General Interpretation no 32, Article 14, 23.08.2007, para 6.

with the allegation of these are posing a threat to public order. These things are as acceptable as the indefinite ban on LGBTI activities within the legal system.

### **Ambiguous Enforcement**

There are some differences between the first and second ordinance of the ban. First one is the link with the emergency state that we have referred above. Because the emergency state is over, there is no such link in the second ordinance. Other than that, despite there are the same statements in both the first and the second ordinance, the first one was published on Governorates website, the second one was a text sent to the Police Directorate of Ankara by the Governorate. The lawsuit on this second proceeding has been dismissed without examination by the Ankara's 2nd Administrative Court.<sup>6</sup> Justification of dismissal was that the text was a part of internal correspondence, thus it was not an executable administrative act. In fact, at the end of the second ordinance, it is stated that judicial and administrative actions must be taken in the event of breaching of the stated prohibitions and commandments.

Therefore, the ordinance that is ambiguous by its scope, duration, and subjects is ambiguated on its enforcement aspect too. The ordinance cannot be the subject of a lawsuit because it is not a legal proceeding but this not existing proceeding tell that the violators of the ban will be prosecuted legally and administratively.

### **Conclusion**

As we have explained in the introduction, the law is losing its qualification of being a guarantee against human rights violations. On the contrary, arbitrarily imposed restrictions on the rights are creating a virtual mountain that is unsurpassable for its victims. The legal process on the ban on LGBTI activities in Ankara has most of the operational mechanisms of that mountain. It is a process that ambiguates all terms, activities, and subjects, depriving all of its victims from all kinds of legal guarantees. In consequence, it is not a surprise that one of its targets is the LGBTIs.

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6 Ankara's 2nd Administrative Court, E. 2018/2378, D. 2018/2294, D.D.. 27.11.2018.

# The Misdemeanor of the Warden

Lawyer Senem Dođanođlu

*“ to what purpose did you appoint me, my government?  
just to secure that my citizens sleep like a log and do not fear mischievous ones!”*

Murtaza, Orhan Kemal

Once the news concerning the actual return to the warden system became widespread and wardens began to be recruited through state of emergency decrees (KHK), LGBTI+ organizations began rapidly discussing the situation and research were conducted.<sup>1</sup> In this respect, a lot has been said about what it means in legal or does not mean in social perspective. It has been frequently argued that with the introduction of the warden system; threats, insults and violence have increased; that police force has been solidified as a means of repressing the nights and the streets... And nobody doubts the extensity of the incidences that can be called as “being subject to the warden...” Thus, it is exactly due time to see that this whole process has many similarities concerning the practice of Misdemeanor Law. Rather than being within the framework of crime and punishment system of the police, Misdemeanor Law is the most symbolical illustration of being organized to design and immobilize the public order. At this point, we can briefly remind the practice of this law - once becoming a current issue throughout Turkey as being applied to sex workers and transgender women - in the “pilot region” in Ankara.

For a long time a reference was made to the decision taken by Ankara Governorship Public Health Directorate Anti-Prostitution Commission and administrative fines were given due to “acting against the command”;<sup>2</sup> with the decision being

1 Please see the article series of Kaos GL dated August 15 -21 2017: <http://kaosgl.org/sayfa.php?id=24381>

2 This verdict in brief states that “The report of Ankara Police Headquarters Security Branch Office dated May, 25 2007, numbered 06-2007/716 has been examined and it has been seen that some transvestites and women being on the street for prostitution have caused discomfort for ordinary citizens. However, according to Turkish Criminal Law, prostitution is not a crime, so they have in-

nullified by Administrative Court, objections to administrative fines began to be accepted. However, after a period, administrative fines were imposed again by the article formulated as “causing disturbance” which has been put into practice for years and is still valid. Concerning this issue, the infringement verdict of Constitutional Court in response to the application number 2014/19152 on October 18, 2017 is a proper example to demonstrate the legal background of the present practice.<sup>3</sup>

As far as we can see, the history of warden institution is the premise of misdemeanor law’s practice. The fact that there was no central police service in the Ottoman system until Tanzimat reform era, brought about a multi layered and complex hierarchical structure. Basically, it has been observed that the police force existed according to the principal of “the collective responsibility of local social forces”.<sup>4</sup> Once working under Imams and then getting uniformed and linked up to district police stations, the warden institution rapidly moved towards functioning as a private version of vice squad. The unity of Imam, police officer and wardens are of vital importance within the scope of districts discipline organization both in history and as well as in present times.

In the Ottoman period, it is known that for a long time sex work was subject to decrees concerning the control of sexuality. For instance, in a royal decree issued on May 16, 1571 it was prohibited for “*women who do laundry of single men to pursue this work due to the fact that the met with some of the young men coming to their workplace.*”<sup>5</sup> In his work “16. Asırda İstanbul Hayatı” (Life in İstanbul in 16<sup>th</sup>

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structed General Attorneys to give administrative sanctions.” Chairmanship of Commission Fighting Against Venereal Diseases and Prostitution under Provincial Directorate of Health of Ankara Governorate has been “appointed to take any necessary measure to struggle against venereal diseases” according to the Regulation of Fight Against Venereal Diseases and Prostitution article 4 section a. Thus, it has been unanimously decided to “let the 32. Article of Misdemeanour Law implement in order “to protect public order and general health of the society.”

3 <https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/19152>; with this verdict, the Constitutional Court has so far said its word concerning the ongoing debate of economy politics of sex work. The court stated that “... when looking at the subject from the point of view of ‘acting in order to sell commodity and service’, even if it is not possible to accept that a person who “offers” their body for sexual intercourse in exchange for money is offering a “commodity”, it can be stated that they are offering a “service”. It is not possible to conclude that “...selling commodity or service includes also for human body to be offered for sale with the purpose of prostitution; that this situation is known openly and clearly by everyone or understood or if necessary or that individuals can understand this by taking legal help if necessary. The opposite interpretation of the public authorities is one that goes beyond the purpose of the above-mentioned verdict, being a far-fetched and unpredictable evaluation where there is the implication of the human body to be perceived as commodity. Thus, it does not comply with human pride”. With this perspective, it has in fact revealed its position concerning a probable regulation of sex work in the future. Within the limited scope of this article we should solely mention the issue so far.

4 ERGUT Ferdan: Modern Devlet ve Polis, [Modern State and Police] İletişim Publishing., 2004, p.83

5 Akt: BİRİNCİ İhsan: *Tarihi Konular: Ahlâk Zabıtasının Tarihçesi*, [Historical Subjects: The History of Vice Squad] Journal of Retired Poice Officers, Year 12, Number.161, İstanbul-1981.p17

Century) Ahmet Refik states that with a royal decree issued on May 23, 1573 Selim II banned the women to enter the stores of cream sellers and if acted otherwise he commanded to punish those women severely.<sup>6</sup> Then Murad III forbade on December 1 1580 to board together in the same *caicque*. The royal decree given to the Chamberlain of Boatmen was as follows: “You should strictly hinder young women from boarding the boats with men and go for a jaunt.”<sup>7</sup> It is not a coincidence that the new security of the districts is associated with the wardens in a period where the wardens turned their focus very swiftly to sex workers, where they acted as a new version of Misdemeanor Law, where the state declares the “new security strategy” in a meeting with *mukhtars* (local district authorities). Another similar issue that does not look coincidental is the demonstration bans that started in State of Emergency period and still continue.<sup>8</sup> Especially in Ankara a police activity is going on for more than two years everyday at noon and evening now where all protest demonstrations in front of the human rights monument against the unjust expulsion of people through emergency decrees are suppressed before a single word is uttered, where protesters are violently taken to the custody vehicles and where administrative fine is demanded in pursuance of acting against the command of Misdemeanor Law and people are “released” from hospitals. Once majorly being

6 Akt: BARDAKÇI: *Hürriyet* newspaper dated May 2, 2004. The order given to Kadi (Muslim judge) of Eyüp district is as follows: “You have sent a report to me informing that heathens go on the booze, play music and dance in the shops, bakeries and truck gardens close to the newly built schools in the Cami-i Kebir quarter of Eyüp preventing neighbourhood residents from doing their jobs and devotees from reciting the Quran and listening to the azan. Furthermore, you wrote that some women came to cream sellers’ shops under the pretext of eating cream and then meeting men only to be found in conditions against the sharia law. The situation which is totally against our religion should be abolished and its negligence is unacceptable. Thus I order that you be more careful in the future and do not allow these instances to happen in the cream seller shops and truck gardens. Warn the shop owners to not let the women be there under the pretext of eating cream and act like that and ban the women specifically from entering these shops. If women continue to come to these shops and shop owners continue to not prevent them entering these place after your warnings, punish all of them severely. Show utmost care to carrying out the order and avoid any kind of negligence. If the issues you brought up to my attention with a petition do not end up according to my esteemed command, not a single excuse of yours will be accepted. You should know all these and do not refrain from displaying caution even for a single second.”

7 Akt. ŞAHİN: *ibid*. Likewise, BARDAKÇI also quotes the order from Mühimme Defteri [Register of Importance] number 32 in the Ottoman Archives of the Prime Ministry: “We had previously warned the boatmen to not let the young women and men to board the same boat. Furthermore we have learned that poor and old women were hindered from boarding the charter boats to cross over by some people and that these women were offended by them... I have been informed about all these instances and this is my order; Once you receive my royal decree, pay particular attention on this issue, do not let poor and old women who want to cross over with charter boats be offended, prevent young women boarding the boats with young men and stroll around in a way contrary to the law. Make the boatmen aware of my command and be alert while reminding them of my previous royal decrees.” *Hürriyet* newspaper dated May 2, 2004.

8 It should be not forgotten that there are specific governorate rulings banning solely LGBTI+ activities and that this practice is still proceeding. See: <https://www.bbc.com/turkce/haberler-turkiye-42043386>, <http://kaosgl.org/sayfa.php?id=27067>

the problem of nights, transgender women and sex workers, the Misdemeanor Law that was applied only in limited amount concerning mass protest demonstrations, is now in practice in all places of the city at all hours.

Jess Wells who defines herself as a “lesbian separatist writing novels solely sold to women”<sup>9</sup> evaluates “prostitution”, not as a work or a kind of male sexual power but a pressure institution and traces the relation of it with other institutions in the periphery in history. *“The threat of prostitution always empowers the men because they put down everything from our psychological responses to our social status and all the myths encompassing violence under control.”*<sup>10</sup> Then she adds: “If the prize of protecting a virgin is a prostitute, it means that we will never be virgin anymore.”<sup>11</sup>

While looking at this whole picture and keeping in mind that the first application of these guarding practices - assuming a function of suppression of cities and especially nights - have been towards sex workers, it can be foreseen what kind of a future the society will face. Orhan Kemal’s Warden Murtaza is eager to clean up the place from “mischievous citizen”. When do you think it will be time for our enthusiasm of standing together to revoke?

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9 WELLS Jess: *Fahişeliğin Tarihi*, [The History of Prostitution], Pencere Publishing, August 1997, p.9

10 WELLS, *ibid.*, p. 93

11 WELLS, *ibid.*, p. 93

# Work Life and Discrimination against LGBTIs in Turkey

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Dr. Reyda Ergün

Employment in today's societies is at the heart of life; a subject related to every aspect of life, for various reasons whose analysis would exceed the extent of this article. Therefore, working life is one of the areas that should be taken into consideration while the effects of discrimination and its reproduction mechanisms against disadvantaged groups in the society are being studied. The discrimination that prevents disadvantaged groups from enjoying the first generation of rights; civil and political rights, has serious effects in terms of access to second-generation rights too, namely social and economic rights. Individuals with limited access to social and economic rights are also not able to benefit equally from civil and political rights.

We see that the idea of actualization of economic and social rights, which are inseparable from human rights, is playing a major role in the ability to use the civil and political rights has gained much gravity in the international human rights law. In this context, especially the right to work has been guaranteed by the human rights mechanisms of securing civil and political rights too, such as the European Court of Human Rights (ECHR). In addition, the right to work and as its complementary, the rights related to work-life are guaranteed by the international documents that directly regulate economic and social rights, such as the UN International Covenant on Economic Social and Cultural Rights and the European Social Charter. International Labour Organization (ILO) plays a leading role in the further improvement of standards of human rights in this context. Among the relevant human rights control mechanisms, these rights are also interpreted in conjunction with the prohibition of discrimination, not only in terms of the ability to get a job but also in the elimination of discrimination throughout the work life.

In this framework, it is clear that the right to work, which guarantees the public demand for full employment, securing their right to live with a job that they freely found, employment institutions, employment guidance and training services and also the rights related to work life such as fair, safe and healthy working environment, fair wages, union and collective labor negotiations, social security, social and medical support must be considered separately in context of disadvantaged groups.

With the empowerment of LGBTI rights advocacy on the subject, steps have been taken in various human rights protection mechanisms to focus on the elimination of discrimination based on sexual orientation, gender identity and intersexuality in employment, even if not on a sufficient level or effect. For example, within the ILO, international and country-based projects and reporting activities are being carried out to promote and improve human rights, diversity and equality in the context of gender identity and sexual orientation in the work-life.<sup>1</sup> In the information note of the Pride Project of 2016, after it was stated that equality and discrimination ban were the core of the ILO's goal of achieving social justice, it has been determined that some employee groups, including LGBTIs, have a higher risk of discrimination in employment.<sup>2</sup>

In the booklet with the theme of sexual orientation and gender identity in the international human rights law, published by the UN Human Rights High Commissioner in 2012, tackling sexual orientation and gender identity based violence and discrimination have been identified as a human rights struggle; within the framework of this struggle, the obligations of the states have been manifested and the work life has been determined as one of the struggle fields.<sup>3</sup> In the report that the UN Human Rights High Commissioner submitted to the UN Council of Human Rights in 2015, it has been determined that national legislation in most of the countries did not include adequate and effective protection mechanisms against discrimination on the basis of sexual orientation and gender identity in employment, and related norms are not applied effectively in some countries where legal regulations exist. It has also been pointed out that certain research shows that

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1 For example see: International Labor Organization, *Gender identity and sexual orientation: promoting rights, diversity and equality in the world of work, Results of the ILO's PRIDE Project, Briefing note*, Gender, Equality and Diversity Branch, 16 May 2016

2 Op. cit., p.1.

3 United Nations Human Rights Office of the High Commissioner, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, New York and Geneva, 2012 (<https://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>; Last Date of Access: 22.01.2019)

discrimination and harassment based on sexual orientation and gender identity in the workplace is a common phenomenon.<sup>4</sup>

The decision no: 32/2 and dated 30 June 2016 of the UN Human Rights Council, which was established in 2006 with the ordinance of the United Nations General Assembly, is based on the prevention of violence and discrimination based on sexual orientation and gender identity. It also involves a decision to appoint an independent specialist who will work in coordination with the UN Human Rights High Commissioner.<sup>5</sup> In this framework, it is clear that cooperation between states and related institutions in order to monitor and eliminate discrimination based on sexual orientation and gender identity in employment is within the scope of the duty of the independent expert. As a matter of fact, in the report of the independent expert which was discussed at the UN Human Rights Council meeting held in June 2017, it was stated that special measures should be taken for the elimination of discrimination based on sexual orientation and gender identity in all areas of life, including employment.<sup>6</sup>

The United Nations' publication of 2016 on the prevention of violence and discrimination against LGBTIs indicates that the awareness on this issue has been increased in recent years, but the statement on the significant insufficiency of implementation of United Nations' human rights mechanisms against this situation is also included.<sup>7</sup> The prevention of discrimination in employment has been handled under a separate heading in the article referring to the examples of positive legal regulations and implementations of the domestic law of various countries on the prevention of violence and discrimination against LGBTI people. In the article, it was put forth that sexual orientation, gender identity, gender perception and sexual characteristics based discrimination should be explicitly banned on legal basis in the context of the right to work. However, it has been underlined that legal regu-

4 The Office of the United Nations High Commissioner for Human Rights, Report on Discrimination and Violence Against Individuals Based On Their Sexual Orientation and Gender Identity (A/HRC/29/23), 4 May 2015, s. 15, 16 (<https://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNReports.aspx>; Last Date of Access: 22.01.2019)

5 Human Rights Council, Resolution on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, 30 June 2016 (A/HRC/RES/32/2), s. 2 (<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/154/15/PDF/G1615415.pdf?OpenElement>; Last Date of Access: 22.01.2019)

6 Human Rights Council, *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity* (A/HRC/35/36), s. 16 (<https://www.ohchr.org/en/hrbodies/hrc/regularsessions/session35/pages/listreports.aspx>; Last Date of Access: 22.01.2019)

7 United Nations, *Living Free & Equal: What States Are Doing To Tackle Violence and Discrimination Against Lesbian, Gay, Bisexual, Transgender and Intersex People*, New York and Geneva, 2016, s. 7 (<https://www.ohchr.org/Documents/Publications/LivingFreeAndEqual.pdf>; Last Date of Access: 22.01.2019)

lation will not be sufficient alone in order to prevent discrimination in employment and execution of an effective policy is needed including raising social awareness, ensuring accountability and taking necessary precautions to eradicate the causes and effects of discrimination.<sup>8</sup>

Within the mechanisms of the Council of Europe, there are numerous opinions, resolutions, recommendations that constitutes the framework of the Council of Europe standards on the combat against sexual orientation and gender identity-based discrimination. In this framework, the advisory recommendation of the Committee of Ministers 2010/5 is especially important. The Committee of Ministers underlining the importance of the states' positive obligations as well as their negative obligations in the protection of rights and freedoms, has stated that special measures must be taken in order to ensure LGBTIs' full and equal enjoyment of human rights as they are subjected to discriminatory discourse, attitude, and practices for centuries and in present. In this context, the Committee of Ministers, which recommends states, has pointed out the importance of creating effective mechanisms in order to prevent discrimination based on sexual orientation and gender identity in both public and private sectors. In particular, the necessity of effective protection of the right to the private life of transgender persons is underlined.<sup>9</sup> The Parliamentary Assembly of the Council of Europe (PACE), in its 2015 resolution on transgender discrimination, stressed the need to operate effective mechanisms to prevent discrimination based on gender identity in access to employment in public and private sectors, while drawing the framework of states' obligations.<sup>10</sup> There are other remarks and reports of the Council of Europe's Commissioner for Human Rights on the subject, including the heading of discrimination in employment.<sup>11</sup>

Discrimination against LGBTIs in employment can occur in many different ways. Discrimination on the basis of sexual orientation, gender identity and intersexual-

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8 Ibid, p 67, 68.

9 Council of Europe Committee of Ministers, *Resolution on measures to combat discrimination on grounds of sexual orientation or gender identity* (CM/Rec (2010)5), 31 March 2010 ([https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805cf40a](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf40a); Last Date of Access: 22.01.2019)

10 Parliamentary Assembly, *Resolution on Discrimination Against Transgender People in Europe* (PACE/Res 2048 (2015)), 22 April 2015 (<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736&lang=en>; Son Erişim Tarihi: 22.01.2019)

11 Council of Europe Commissioner for Human Rights, *Human Rights and Gender Identity* (CommDH/IssuePaper(2009)2), 29 July 2009, s. 12-14 (<https://rm.coe.int/16806da753>; Last Date of Access: 22.01.2019); Council of Europe Commissioner for Human Rights, *Discrimination on grounds of sexual orientation and gender identity in Europe*, October 2011, s. 161-176 (<https://rm.coe.int/discrimination-on-grounds-of-sexual-orientation-and-gender-identity-in/16809079e2>; Last Date of Access: 22.01.2019).

ity which prevents equal access to education is a major obstacle to employment. Heteronormative and cisnormative definition of job eligibility qualifications in recruitment processes, design of the work life as discriminatory to LGBTIs in spatial and miscellaneous aspects, homophobic and transphobic discourse, attitude and behavior; sexual orientation, gender identity and intersex based harassment, mobbing, discriminatory practices arising from heteronormative and cisnormative description of the family, can be listed as the first examples that come to mind for discrimination against LGBTIs in employment.

Indeed, according to the findings of the above-mentioned research of the ILO, LGBTIs are one of the groups that face particularly harsh discrimination and harassment in education. This phenomenon has an effect, which makes it difficult to actualize the expectations regarding employment.

Discrimination suffered by LGBTIs continues throughout recruitment processes and work life. Findings show that LGBTIs who seek a job prefer to be closed about their sexual orientation, gender identity or intersex status as an imperative strategy. This strategy is generally followed throughout work life. However, field studies on the subject show that LGBTIs, who are open at workplace, are less likely to show symptoms of anxiety, depression and burnout syndrome. In order to achieve this, supportive and inclusive policies need to be implemented at workplaces. On the other hand, in countries where marriage equality is not recognized, there are discriminatory practices based on family-gender roles that lead to the inability to benefit equally from certain rights. Another important finding of the study is the fact that economic and social rights of LGBTIs on national level are not a priority issue for the trade unions. For example, these rights are very rarely included in collective bargaining agreements.<sup>12</sup>

There are similar facts in the detailed report of the Council of Europe Commissioner for Human Rights from 2011.<sup>13</sup> One of the most important findings based on the research that conducted within various countries is that the strategy of concealment, which is necessarily developed by LGBTI employees against the risk of discrimination and harassment, along with the low number of cases in which hate crime and discrimination mechanisms of law are operated makes it difficult to analyze the real dimensions of homophobia, transphobia, and discrimination in employment.<sup>14</sup>

12 International Labor Organization, *Gender identity and sexual orientation: promoting rights, diversity and equality in the world of work, Results of the ILO's PRIDE Project, Briefing note*, s. 1, 2, 3

13 European Council Commissioner for Human Rights, *Discrimination on grounds of sexual orientation and gender identity in Europe*, p. 166.

14 Ibid, p. 176.

Investigating the aspects of sexual orientation, gender identity and intersexuality-based discrimination in the work life of Turkey has certain hardships, arising from similar reasons. Before reviewing the assessments on this subject, it would be useful to check the workforce and employment data of Turkey. According to the data of the State Personnel Presidency March 2018; 3,129,304 people are working in a variety of status in the public sector of Turkey, excluding military personnel.<sup>15</sup> According to the Social Security Institution's (SSI) October 2018 data, the number of employees that registered to SSI is 14.695.062.<sup>16</sup> The report of the Confederation of Progressive Trade Unions of Turkey (CPTUT) Research Office, which assesses the Turkish Statistical Institute's (TSI) workforce statistics of April 2018 states the real unemployment rate of Turkey as 17,3 percent.<sup>17</sup> October 2018 report of the TSI shows the unregistered employment rate within the workforce in Turkey as 33.7 percent.<sup>18</sup>

These data reveal that Turkey is far away from reaching its full employment goal. The rate of unemployment and unregistered employment shows that there are major obstacles in Turkey towards employment. It is possible to foresee that these obstacles are much greater for groups at higher risk of discrimination such as LGBTIs. Thus, as one of the first consequences of this data that comes to mind, the prevalence of hiding their sexual orientation and/or gender identity among LGBTIs due to the fear of not to be employed or losing their job can be mentioned. But again, it should be noted that it is not easy to step out of an assumption and thoroughly analyze the situation that the LGBTI workers are living, in this employment map. Because, besides the difficulties mentioned above, in Turkey, the number of studies on the subject is not enough to provide related research data to enable such an analysis. Nevertheless, the research carried out by Kaos GL Association since 2015 provides a significant data pool in order to analyze the LGBTI employees' situation in both public and private sectors of Turkey.

The reports of "The Situation of Lesbian, Gay, Bisexual, Transgender and Intersex Private Sector Employees in Turkey, 2018" and "The Situation of Lesbian, Gay, Bisexual, Transsexual and Intersex Public Sector Employees in Turkey, 2018", which are carried out by Kaos GL Association and Kadir Has University Gender and Wom-

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15 <http://www.dpb.gov.tr/tr-tr/istatistikler/kamu-personeli-istatistikleri> (Last Date of Access: 22.01.2019)

16 [http://www.sgk.gov.tr/wps/portal/sgk/tr/kurumsal/istatistik/aylik\\_istatistik\\_bilgileri](http://www.sgk.gov.tr/wps/portal/sgk/tr/kurumsal/istatistik/aylik_istatistik_bilgileri) (Last Date of Access: 22.01.2019)

17 <http://disk.org.tr/wp-content/uploads/2018/07/DISK-AR-is%CC%A7sizlik-ve-istihdam-raporu-Temmuz-2018.pdf> (Last Date of Access: 22.01.2019)

18 <http://www.tuik.gov.tr/PreHaberBultenleri.do?id=30680> (Last Date of Access: 22.01.2019)

en's Studies Research Center show that LGBTI employees in Turkey have developed a mandatory strategy against the risk of being discriminated.

When the findings of the research are evaluated, it can be observed that this mandatory strategy is the consequence of the state of constant perturbation and cautiousness from the job search and application to recruitment and interview processes; and after recruitment, it spreads to every aspect of work life. Perhaps the most striking finding of the research is that LGBTI employees in Turkey cannot live their identity of sexual orientation and gender identity openly while being employed. This state of forced concealment constitutes a major obstacle for LGBTI employees to enjoy economic and social rights equally. The dual life that they are forced to sustain reduces work efficiency and satisfaction and triggers psychological processes that affect their individual and social lives.

According to the private sector report, the rate for the answer of "No, I have not" to the question of whether they had encountered any explicit or implicit discrimination is 96% among the sample group. However, 30 percent of the participants who declared that they have not been subjected to discrimination attribute this to hiding their gender identity and/or sexual orientation in the recruitment process, and 26 percent relate this to their inevident gender identity and/or sexual orientation. Only 16% of the respondents declared that they were completely open in this process. To the question of whether they were exposed to discrimination based on gender identity and/or sexual orientation in the workplace they work in, 84% of the participants had responded as they did not encounter discrimination. However, half of the participants relate this to hiding their gender identity and/or sexual orientation. The percentage of those who declared that they are completely open in the workplace is 22%. Responses of the participants for the open-ended questions show that state of concealment is mainly related to the anxiety of not to be accepted to the job, fear of encountering discrimination or hateful remarks, and the anxiety of not to be taken seriously in their work life.<sup>19</sup>

The outcomes of the survey on the public sector do not differ; it even gets heavier. 96% of people among the sample group had told that they had not encountered any explicit or implicit discrimination during the recruitment processes. However, 43 percent of the participants who told that they had not been subjected to discrimination relate this to hiding their gender identity and/or sexual orientation in the recruitment process, and 15 percent relate to their inevident gender identity

<sup>19</sup> O'NEIL Mary Lou, ERGÜN Reyda, DEĞİRMENÇİ Selma, ERKENGEL Doğançan, *Research on The Situation of Lesbian, Gay, Bisexual, Transsexual and Intersexual Private Sector Employees in Turkey, 2018* (ed. Murat KÖYLÜ), Kaos GL Association and Kadir Has University Social Gender and Women Studies Research Center, Ankara, 2018, p. 23, 32-36, 42-44.

and/or sexual orientation. While 14% of the participants had responded as they were exposed to discrimination in their work life after they were recruited, the total ratio of the participants who stated the reason for them to not encounter any discrimination as hiding their gender identity and/or sexual orientation and their invident gender identity and/or sexual orientation is 64%. Only 7% of the sample group of public sector survey has declared that they are completely open in their workplace.<sup>20</sup>

These rates indicate that LGBTIs in both public and private sectors are forced to hide their gender identity and/or sexual orientation in order not to face discriminatory attitudes, behaviors, and practices, both in recruitment processes and throughout the work life.<sup>21</sup> In this sense, the findings on the perception that directs them to this strategy provides critical data. In the private sector study, we see that as an answer to the question about which reasons can lead employers to not employ LGBTIs, has shown that a high percentage of respondents selected the option of prejudices and ignorance. In line with this finding, among the answers to the question regarding which measures should be taken to combat discrimination against LGBTI employees, the choice of social awareness campaigns stand out.<sup>22</sup> In this sense, it can be concluded that LGBTIs, especially as private sector employees, have a perception that widespread discrimination based on gender identity and/or sexual orientation in the society will reflect on their work life and therefore they develop a mandatory strategy, primarily as concealment, against the discriminatory attitudes, behaviors, and practices that they may face.

It can be said that this state of anxiety and cautiousness among LGBTI employees is consistent with the findings that suggesting the social and cultural norms of Turkey lead to sexual orientation and gender identity based discrimination. The report of Homophobia and Transphobia Based Hate Crimes Committed in Turkey at 2017 of Kaos GL reveals the extent of prejudice and hate among the society of Turkey, shows that these prejudice and hate based violations of rights directly affects the visibility of LGBTIs in social life.<sup>23</sup> Similarly, Sexual Orientation and Gender Identity

20 O'NEIL Mary Lou, ERGÜN Reyda, DEĞİRMENCİ Selma, ERKENGEL Doğançan, Research on the Situation of Lesbian, Gay, Bisexual, Transsexual and Intersexual Public Sector Employees in Turkey, 2018 (ed. Murat KÖYLÜ), Kaos GL Association and Kadir Has University Social Gender and Women Studies Research Center , Ankara, 2018, p. 18, 21, 27.

21 For a similar assessment of the Commissioner of the Council of Europe in its 2011 report for member states of the Council of Europe, see: European Council Commissioner for Human Rights, *Discrimination on grounds of sexual orientation and gender identity in Europe*, p. 168, 171.

22 O'NEIL, ERGÜN, DEĞİRMENCİ, ERKENGEL, *Research on The Situation of Lesbian, Gay, Bisexual, Transsexual and Intersexual Private Sector Employees in Turkey*, 2018, p. 53, 54.

23 Kaos GL Association, *The Report of Homophobia and Transphobia Based Hate Crimes Committed in Turkey*, Ankara, 2018 (<http://www.kaosgldernegi.org/resim/yayin/dl/nefret-suclari-raporu-2017>

Based Human Rights Watch Report 2013-2017 of Kaos GL Association and Pink Life Association reveals the broad extent of discrimination and hate discourse against LGBTIs among the society of Turkey.<sup>24</sup>

On the other hand, when it is considered that working life in today's societies covers a very important part of daily life, time and location-wise, the importance of the struggle against the discrimination and hate discourse that was or can be encountered in employment in sense of peoples' processes of socializing and their material and spiritual development becomes apparent. The aforementioned public and private sector research shows the close relationship between discrimination and job satisfaction and productivity. Research suggests that the anxiety of discrimination based on sexual orientation and/or gender identity is directly effective on LGBTI employees' productivity and job satisfaction, and therefore on their psychological and social processes.<sup>25</sup> Based on the findings of the research, it is possible to conclude that being pushed to concealment in terms of sexual orientation and/or gender identity leads to severe psychological effects on LGBTI employees. The statements of participants show that the lack of sense of belonging to the workplace, the feelings of intense fear, anxiety, anger, and the feeling of burnout caused by having to constantly pretend are very common among LGBTI employees.

*"It affects my whole life. I am psychologically devastated, bored of oppression. Cannot motivate on anything."*<sup>26</sup>

*"I hate my workplace and everyone I work with. They do not see me; if they really knew me they would hate me too, I would not have the chance to get where I am now. [...] How can a person feel good about their life in a place they had to pretend this much."*<sup>27</sup>

*"I'm drifting into an existential crisis. I am almost completely devoid of the feeling of sense of belonging, and I am living with fear and under stress."*<sup>28</sup>

[web.pdf](#); Last Date of Access: 22.01.2019)

24 Kaos GL Association, Pink Life LGBTT Solidarity Association, Sexual Orientation and Gender Identity Based Human Rights Watch Report 2013-2014-2015-2016-2017, Ankara, 2017 ([http://www.kaosgilderneji.org/resim/yayin/dl/rapor\\_web.pdf](http://www.kaosgilderneji.org/resim/yayin/dl/rapor_web.pdf); Last Date of Access: 22.01.2019)

25 O'NEIL, ERGÜN, DEĞİRMENCİ, ERKENGEL, *Research on The Situation of Lesbian, Gay, Bisexual, Transsexual and Intersexual Private Sector Employees in Turkey, 2018*, 2018, p. 49-52. ; O'NEIL, ERGÜN, DEĞİRMENCİ, ERKENGEL, *Research on the Situation of Lesbian, Gay, Bisexual, Transsexual and Intersexual Public Sector Employees in Turkey, 2018*, Ankara, 2018, p. 31-34.

26 O'NEIL, ERGÜN, DEĞİRMENCİ, ERKENGEL, *Research on The Situation of Lesbian, Gay, Bisexual, Transsexual and Intersexual Private Sector Employees in Turkey, 2018*, 2018, p. 50.

27 Ibid p. 50.

28 Ibid p. 51.

*“Severe depression relapses frequently because I am constantly thinking about the insults that I’ve been exposed to or will be exposed to and also my fear of being discharged. This lowers my work efficiency.”<sup>29</sup>*

*“It affects my performance, motivation and naturally my morale. And constantly pretending like someone I’m not tires me out.”<sup>30</sup>*

Despite that, we see that in both the public and private sectors of Turkey, either there are no present empowerment mechanisms for LGBTI employees in Turkey, or the existing ones are not implemented. LGBTI employees do not resort to the complaint mechanisms against the discrimination that they are exposed to, because they think they will probably not get results. Another reason why these mechanisms are not used by LGBTI employees is the fear of experiencing more severe discrimination, especially the fear of losing their jobs.<sup>31</sup>

Unions and professional organizations are certainly the primary institutions that can utilize the empowerment mechanisms for the enjoyment of equal rights of LGBTI people in terms of their right to work and working life. Public sector research indicates that there should be more steps to be taken in this area. We see that more than one-third of the participants declare that they are not members of any trade union or professional organization. There is no union or professional organization member participant who declares that he or she is subjected to any discrimination within the union or professional organization. However, the total rate of the participants who relate this situation with hiding their sexual orientation and/or gender identity or their inevident sexual orientation and/or gender identity is 55% among the sample group. It is also striking that there is only one participant who informed the discrimination incident they exposed to, to the union or professional organization that they are a member of.<sup>32</sup> For the private sector, it is possible to conclude that the lack of openness in working life largely hindered the organization and solidarity among LGBTI employees.<sup>33</sup>

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29 O’NEIL, ERGÜN, DEĞİRMENCİ, ERKENGEL, *Research on the Situation of Lesbian, Gay, Bisexual, Transsexual and Intersexual Public Sector Employees in Turkey*, 2018, Ankara, 2018, p. 31.

30 Ibid p. 33.

31 O’NEIL, ERGÜN, DEĞİRMENCİ, ERKENGEL, *Research on The Situation of Lesbian, Gay, Bisexual, Transsexual and Intersexual Private Sector Employees in Turkey*, 2018, 2018, p. 49-52. ; O’NEIL, ERGÜN, DEĞİRMENCİ, ERKENGEL, *Research on the Situation of Lesbian, Gay, Bisexual, Transsexual and Intersexual Public Sector Employees in Turkey*, 2018, Ankara, 2018, p. 31-34.

32 O’NEIL, ERGÜN, DEĞİRMENCİ, ERKENGEL, *Research on the Situation of Lesbian, Gay, Bisexual, Transsexual and Intersexual Public Sector Employees in Turkey*, 2018, Ankara, 2018, p. 29, 35.

33 O’NEIL, ERGÜN, DEĞİRMENCİ, ERKENGEL, *Research on The Situation of Lesbian, Gay, Bisexual, Transsexual and Intersexual Private Sector Employees in Turkey*, 2018, 2018, p. 45-47.

Of course, these researches allow the analysis of the employment status of LGBTI employees who are already enrolled in the registered labor force. As stated in the aforementioned international documents, opinions and decisions, access to employment reveals itself as a whole different struggle area in the situations where the strategy of concealment is hard to use due to sexual orientation, gender identity and sexual characteristics. For example, in the gender transition process and after the legal recognition of gender identity has been achieved, trans people experience major obstacles and difficulties in working life. Unemployment rates are higher among trans people especially in countries where there is no empowering policy on the gender transition and the legal recognition of gender identity. This phenomenon, again for transgender women, results in unregistered and socially insecure employment, as well as non-preferential sex work, which should be investigated in terms of discrimination. Given the close relationship between the right to work and access to healthcare, trans people cannot benefit from the services they need at the intersection of the right to access to healthcare and the right to self-determination.<sup>34</sup> In countries where sex work is not laid out in a legal labor and rights framework as a profession, this situation may have even more severe consequences for human rights violations, particularly violence and discrimination.<sup>35</sup>

In the context of international institutions that Turkey is a member of and human rights conventions that it is participatory of, it is obvious that Turkey has negative and positive obligations to stamp out every kind of discriminatory discourse, attitude and practice which prevents LGBTIs from equally enjoying both right to work and work-related rights and the rights that are in a close relationship with them such as the right of access to education and healthcare. Analyzing legal regulation and practice in Turkey in this aspect would be well beyond the limits of this article. However, as a summary, it can be said that the legal system in Turkey is far away from handling sexual orientation, gender identity and intersexuality within a perspective human rights. On the contrary, it plays the role of regenerating the social and cultural norms towards LGBTIs that marginalize and pathologize them. Therefore, it constitutes the very source of violence, discrimination and hate discourse towards LGBTIs. The same is true for working life too.

34 For example see: European Council Commissioner for Human Rights, *Human Rights and Gender Identity*, s. 12-13; European Council Commissioner for Human Rights, *Discrimination on grounds of sexual orientation and gender identity in Europe*, p. 171.

35 Related, see: ÖRDEK Kemal, *Being Trans in Turkey: Exclusion, Discrimination and Violence*, Red Umbrella Sexual Health and Human Rights Association, Ankara, 2016.

The human rights struggle in the field of employment, of course, requires the pursuit of unified policies. Within this framework, as well as the state organs; civil society organizations, trade unions, professional organizations, academia, and employers have great responsibility too. Improving the status of LGBTI people in employment and paving the way for them to equally benefit from the rights regarding the working life will provide positive results in the fight against discrimination based on sexual orientation, gender identity and intersexuality.

*“When a person is given the right to adopt their own individuality, every little detail about life changes completely without noticing.”<sup>36</sup>*

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<sup>36</sup> O'NEIL, ERGÜN, DEĞİRMENCİ, ERKENGEL, *Research on The Situation of Lesbian, Gay, Bisexual, Transsexual and Intersexual Private Sector Employees in Turkey*, 2018, 2018, p. 55.

# Evaluation of the Article 122 of the Penal Code of Turkey on the Context of Hate Crimes

Lawyer Emrah Şahin

## Core

*The intent of this article is to feature the public debates that played an active role in the creation of “the Crime of Hate and Discrimination”, commission debates on the draft, the justification and the contents of the bill, differences with the requests in this article, application examples of this law and statistics. Additionally, by utilizing both theoretical and practical examples that have been previously encountered, it has been attempted to explain whether the PCT (Penal Code of Turkey) Article 122 is applied to the hate crimes committed against LGBTI+s (lesbian, gay, bisexual, transgender, intersex...) or not and in which legal ways does LGBTI+s that subjected to hate crimes are demanding justice. Purpose of this article is to reveal that the provision under the heading of “Crime of Hate and Discrimination”, regulated within the PCT 122, cannot be used as a mean of justice against the hate crimes which LGBT+s are exposed to, neither in theory nor in practice. Therefore, it has been strived to make suggestions on including the notions of sexual orientation and gender identity into the article on discrimination and regulate the hate crime not as a separate crime but as a punishment-aggravating factor.*

Keywords: Hate crime, discrimination, LGBTI+, Penal Code of Turkey, legislation, homosexual, trans, gay.

## Intro

This article discusses whether or not the public expectations have been met on the formation process of the Hate and Discrimination crime which is a part of the Penal Code of Turkey and whether or not this law is executed on the cases of hate crimes with its reasons, also proposes suggestions on which ideal legal regulations must be done in which scope.

## **I. Public Debates Prior to the Formation of Article 122 of the Penal Code of Turkey**

Hate Crime Platform which organized “The Hate Crime Legislation Campaign” has been formed by a significant contribution from Social Change Association and these non-governmental organizations; “Federation of Alevi Bektasi, Cultural Associations of Alevi’s, White Doves Initiative, Civil Society Association on Legal Execution System, Solidarity Association of Victims of Dikmen Creek Urban Renewal Project, Initiative of Ecological Constitution, Association of Youth Agenda, Engelliler.biz, Helsinki Citizens Association, Hrant Dink Foundation, SayStop to Racism and Nationalism, Human Rights Association, Human Rights Agenda Association, Improvement of Human Resource Foundation, Istanbul LGBTT Solidarity Association, Association of Protestant Churches of Istanbul, Women Writers Association, Kaos GL Association, LGBTT Families-Istanbul Branch, Midyat Assyrian Culture Association, Association of Solidarity with Refugees, Association of People with Disabilities, Pink Life LGBTT Solidarity Association, Positive Life Association, Association of Protestant Churches, Roman Youth Association, Human Rights Initiative on Mental Health, Association of Defence Lawyers, Social Change Association, Social Democracy Foundation, Social Politics, Gender Identity and Sexual Orientation Studies Association, Suryaniler.com, Founding Social Initiative Association, Union of Workers of All Municipalities and Local Governments 1st, 2nd, 3rd, 4th, and 5th Branches of Istanbul (TUMBEL-SEN), Association of Investigating and Confrontation with Social Incidents, Crippled People Association Turkey, Flying Broom Women Studies and Communication Association, Amnesty International Turkey Branch”.<sup>1</sup> The platform that organized by aforementioned non-governmental organizations has stated that “race, ethnical identity, nationality, religious belief or disbelief, political opinion, language, color, gender, sexual orientation, gender identity, medical condition, age, mental or physical disability” must be included in the discrimination article, in the draft they laid out in the process of “Hate Crime Legislation Campaign”.<sup>2</sup> In the present Article 122 of the Penal Code of Turkey (PCT), the notions of “age, ethnic identity, sexual orientation, gender identity, medical condition, disbelief” has been left out and the statement of “mental or physical disability” is included by a mere expression of “being with a disability”.

It can be said that Hate Crimes Platform has shown the ability to organize the non-governmental organizations in order to declare the public opinion on the leg-

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1 <https://www.sosyaldegisim.org/2012/01/basin-toplantisi-nefret-suclari-yasa-kampanyasi/14/01/2019>

2 <https://www.sosyaldegisim.org/belgeler/turkiye-cumhuriyeti-yasalari/nefret-suclari-yasa-taslagi/14/01/2019>

isolation of hate crimes, to the legislator. By acknowledging that, it won't be inaccurate to suggest that the public demands have been concretized by the draft that Hate Crimes Platform has laid out. In the aforementioned draft, it has been stated with its justifications that "Hate Crime" must be legislated as the aggravated version of the certain crime types with the expression of "motive of hate". By the clauses that have been added to these articles, it has been aimed to aggravate the punishment if the crime has been committed with the "motive of hate".<sup>3</sup>

As it is stated in the justification of this draft, regulating the "Hate Crime" as a punishment-aggravating motive rather than a separate crime is more consistent with the quiddity of the notion of "hate crime". Thus, the aforementioned draft describes the "Hate Crime" as; "Hate crime bears dire consequences affecting not only the victim but the whole group the victim identifies themselves with, it hinders their right to participate via sending the message that the victim and the whole group that they belong to are not accepted...", "Hate crimes are crimes that involve violence which arises from the prejudice against the victim or the subgroup that the victim belongs to..." This description is accepted internationally. It indicates the hate crime should not be legislated as a separate crime type but as a punishment-aggravating motive in accordance with its characteristic of victimizing the group that the victim represents.

## II. Commission Debates on the Legislation of TPC Article 122

In the "General Justification" section of the "Draft on Changing Several Legislations In Order to Enhance Fundamental Rights and Liberties"<sup>4</sup> which is laid out by the Prime Ministry in the 24th Legislative Session of Grand National Assembly of Turkey at 05/12/2013, the change on the subject of hate crimes is justified as; "...*hate crime has become one of the most important notions that have to be dealt with on the international agenda. In the cases of hate crimes, the victim is more likely to be the group that the victim belongs to rather than the victims themselves. As for the perpetrator, prejudice constitutes the motive of the crime, implicitly or explicitly. Because it is based on discrimination, hate crime affects the whole society besides the perpetrator and the victim. In this context, hate crime is legislated together with the crime of discrimination in the PCT 5237 in a more relevant manner to the Turkish penal system.*"

As can be seen, it was aimed to legislate the hate crime together with the crime of discrimination from scratch in the general justification part that involves the

<sup>3</sup> <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5237.pdf> 14/01/2019

<sup>4</sup> <https://www2.tbmm.gov.tr/d24/1/1-0869.pdf> 14/01/2019

international description of hate crime and statement on the importance of the prevention of hate crimes. Justification of the 122nd article of the PCT 5237, which is changed by the 15th article of the draft is; “It has been stated that the expression of ‘hate’ has been put into the headline of the article of the crime in order to underline the relevant crime is based on discriminatory hatred. It also has been stated that phrases of “like” and “etc.” which causes analogy has been removed from the previous crime description, in this way the legislation which was against the prohibition of analogy has been made more suitable in accordance with the principles of the penal law. Again, in the justification part, it is stated that the crime has been regulated as a crime type that can be committed only if there is a direct intention and the motive of hate, and the punishment for this crime is also aggravated.

The aforementioned draft has been referred to the Constitutional Committee, the committee has consisted of Idris Sahin, MP of Cankiri; Mustafa Hamarat, MP of Ordu; Ismail Aydın, MP of Bursa; Ali Ozgunduz, MP of Istanbul; Nevzat Korkmaz, MP of Isparta and Idris Sahin, the MP of Cankiri has been assigned to its presidency. In the report<sup>5</sup> that the sub-committee has submitted to the Constitutional Committee at 29/01/2014, the examination of the notes that have been presented by Assoc. Dr. Devrim Gungor from the Ankara University and the Research Center of the Grand National Assembly of Turkey has been stated, in accordance with the legislation of the hate crime, the statement of the members and participants also noted as: *“The hate crime has been generally legislated with regards to the economic criteria, the lack of the clauses on sexual identity and age has been noted as a deficiency.”* The debate of the sub-committee on the 15th article of the draft in accordance with these arguments reported as following; *“ On the debate of 15th article of the draft which legislated hate and discrimination crime, our member from the Republican People’s Party (CHP) stated that the notions of age and sexual identity must be included in the scope; speeches, texts, videos or photographs with the intention of degrading a person or a group must be considered as hate crime via an addition of a new article, also the punishment of this crime must be regulated as unpostponable. Our member from Nationalist Movement Party (MHP) has objected the widening of the scope considering generally accepted values of the society, and in addition demanded inclusion of verbal or physical actions against symbols or monuments that are the common values of the society to the scope of this crime. The hate crime, which is recently being added to the legislation of European countries and expected to be improved within time and practice, has been accepted as it is in the draft by the majority of the votes by our committee.”*

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5 <https://www.tbmm.gov.tr/sirasayi/donem24/yil01/ss5559.pdf> 14/01/2019

These debates show that public demands are not sufficiently considered in the committee process, objections of the opposition were weak and the subject has been considered as less important in comparison to the other agendas of the meeting. Hence, it has been clearly stated in the committee report that *“regarding the hate crime as it is developed in Europe and recently being added to the penal laws, it has been thought that it will improve in time and practice.”*

Consequently, the article debated in the sub-committee has been accepted as it was in the draft at 02/03/2014, despite the objections and statements of its deficiencies from the public and the opposition it has been published and declared effective immediately in the Official Gazette of Republic of Turkey<sup>6</sup> as;

*“Hate and discrimination*

*Article 122 (1) Any person who*

*(a) Prevents the sale, transfer or rental of a movable or immovable property offered to the public,*

*(b) Prevents a person from enjoying services offered to the public,*

*(c) Prevents a person from being recruited for a job,*

*(d) Prevents a person from undertaking an ordinary economic activity*

*on the ground of hatred based on differences of language, race, nationality, color, gender, disability, political view, philosophical belief, religion or sect shall be sentenced to a penalty of imprisonment for a term of one year to three years.”*

### **III. Theory and Practicality of PCT Article 122**

With the addition of the phrase “Hate and” to the draft that is mentioned above in detail, the headline of the article has become “Hate and Discrimination”, and as the legislator has stated in the justification, this legislation is far from being a hate crime legislation but a transition that stipulated the existence of hard-to-prove “motive of hate” notion to the constitution of crime in terms of the contributing causes. In response to the public demand for inclusion of hate crime to the Turkish Penal Justice system, the legislator authority has designated the motive of hate not as the aggravated version of the crime of discrimination but as an absolute requirement; rendering the crime of discrimination practically non-committable, unprovable if it is committed.

<sup>6</sup> <http://resmigazete.gov.tr/eskiler/2014/03/20140313-15.htm> 14/01/2019

On the subject of including hate crime to Turkish Criminal Justice System, Recep Tayyip Erdoğan, the then prime minister, has stated following in the press conference at 30/09/2013:<sup>7</sup> *We are starting an effective struggle against hate, discrimination, interference with private life in this new process. We are aggravating the punishment of crimes that committed with the motive of hate. If certain crimes are committed because of a person's language, race, nationality, color, gender, disability, political view, philosophical belief, religion or sect, the punishment will be aggravated. We are extending this punishments extent to the individuals that prevent people from using certain rights, enjoying certain rights because of victims religious practices. We are aggravating the punishment of the crime committed by this motive from one year to 3 years. From now on, no one in Turkey will suffer discrimination because of his or her language, race, nationality, color, religious belief and religious practice. We are establishing the committee on equality and struggle against discrimination. If there is a breach of the prohibition of discrimination, all public authorities that have related duty and authority will be charged with the responsibility for terminating the breach, eliminating the outcomes and preventing a recurrence."*

It is understood that the motive of hate is addressed as an aggravating factor and crime of discrimination is addressed separately. The statement above induced the public to expect their demands will be met, but the draft and the final version of the legislation let down those expectations. Based upon what is said in the statements of the justification part of the legislation and the speeches of politicians, it is clear that the legislator authority has understood the demands through members and the authorities on the subject that were present at the committee. It can be argued that the reason for this legislation has been laid out like this, is not that the public has not conveyed its demands in a right and complete manner, but it was the political stance of the legislator that determined the characteristics of this law.

Thus, this political stance shows itself in the practicality of this law. Firstly, if we mention the statistics, we can see that there was a total of 15 criminal trials in the scope of PCT 122, in the year of 2017.<sup>8</sup> In addition to that, there were 199236 criminal trials in the same year, on the crime of threatening, which is legislated by PCT Article 106, just one of the many crime types that the public demanded the attachment of the provision that adds the motive of hate as an aggravating factor. Likewise, on another crime type that involves hate crimes, there were 197494 criminal trials in 2017 on the crime of "Insult", which is legislated by the PCT article 125.

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7 <https://www.yenisafak.com/gundem/iste-demokratiklesme-paketinin-tam-metni-56962715/01/2019>

8 <http://www.adlisicil.adalet.gov.tr/Istatistikler/1996/2017TckAcilanDavaSucVeSanikSayisi.pdf15/01/2019>

Besides, these two types of crimes are the most common types of crimes in which hate crime coexist, these two were the most sued crime types in 2017.

According to “The Report of Homophobia and Transphobia Based Hate Crimes Committed in Turkey at 2017”<sup>9</sup> by Kaos GL, between 05/04/2017 - 04/01/2018 the number of only “homophobia and transphobia based” hate crime incidents determined as 117. 15 criminal trials that sued in 2017 points to the “discrimination crime committed with the motive of hate”. The conditions of accepting the crime of discrimination as discrimination have been legislated in a rigid and narrow manner. It is clear that the motive of hate is not an aggravating factor but a primary one in this article, therefore practically rendering the crime of discrimination hard to commit. Hence, the fact that there were only 15 cases in a year in Turkey shows that this thesis might not be that inaccurate.

Besides, it has been stated that there is no legal regulation regarding hate crime in the “Report of Human Rights Watch Based on Sexual Orientation and Gender Identity 2013-2014-2015-2016-2017”<sup>10</sup> which is published jointly by Kaos GL and Pink Life LGBTT Solidarity Association. With this punctuation, it is a fact that PCT 122 is not regarded as a law against hate crimes by the mentioned non-governmental organizations that are working on LGBTI+ field. In the report, many cases reviewed which are happened between years of 2013-2017 that reflected to media and the ones that Kaos GL and Pink Life Association’s came up from their own networks and made their news of.

#### **IV. Can PCT 122 be Addressed as a Legal Mean That Can be Applied Against the Hate Crimes in Turkey That LGBTI+s are Subjected to?**

With the new regulation of PCT 122 that technically made the crime hard to commit by including the condition of “motive of hate”, raises the problem of obligation to prove with concrete evidence that the crime has been committed with the motive of hate in the applications of LGBTI+s to the judicial authorities regarding the hate crimes that they are subjected to just because they are LGBTI+. Even if it is proved that the crime has been committed, because of the phrases of sexual orientation and gender identity has been left out from the rigid categories of “*language, race, nation, color, gender, disability, political opinion, philosophical belief, religion or sect.*”, there is no present regulation within the PCT that protects LGBTI+s from the hate crimes that they are subjected to because they are LGBTI+. In addition

<sup>9</sup> <http://www.kaosgldernegi.org/resim/yayin/dl/nefretsucclariraporu2017web.pdf> 15/01/2019

<sup>10</sup> [http://www.pembehayat.org/uploads/editor/files/cinsel\\_yonelim\\_rapor\\_web.pdf](http://www.pembehayat.org/uploads/editor/files/cinsel_yonelim_rapor_web.pdf) 15/01/2019

to this, in the Article 3/2 of Human Rights and Equality Law of Turkey no 6701 the provision of “Discrimination based on gender, race, color, language, religion, belief, sect, philosophical or political opinion, ethnicity, wealth, birth, marital status, medical condition, disability, and age is forbidden in the extent of this law”<sup>11</sup> excludes “sexual orientation and gender identity” phrases. But the Republic of Turkey, as a signatory party of “The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence”, also known as the Istanbul Convention, has to integrate the provisions of this convention to its legislation according to the Article 90 of Turkish Constitution and also must base the criminal trials on the provisions of this convention. Hence, in the article 4/3 of the aforementioned convention, we see that the prohibition of discrimination is addressed together with the phrases of “sexual orientation and gender identity”; “...*particular measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, gender, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status.*”

## V. Conclusion

The draft that has added the phrase “hate” and the thesis on the origin of this is the political vision and strategy of the legislator has been mentioned above. In practice, we are observing that neither law enforcement nor judicial authorities act according to the provisions of international conventions that we are a member of or the provisions of the Constitution. This situation shows that jurisdictions flexibility is limited under the dominance of politics. For this very reason, there is no doubt about the decisiveness of the current policies of the legislator not just effective on the “legislation”, but in the context of “execution” too. In Turkey, the biggest obstacle against the legislative regulation of “hate crimes” is the current political stance of the legislator on the subject.

Article 122 of PCT, which is introduced as the regulation on hate crime is far away from satisfying the expectations of the public towards the issue. Based on the conceptual structure of the hate crime, it is suggested that instead of legislating it as a separate crime type, it should be regulated as an aggravating factor in the Turkish Penal Code. Besides, these crimes should not be addressed in the scope of crimes that are conditional to reconciliation and complaint, rather than the individuals; these crime types are subjecting a group that constitutes the society and

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11 <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.6701.pdf> 15/01/2019

the group that the individual represents. Besides that, “sexual orientation, gender identity, and intersexuality” must be included in the categories indicated in the scope of PCT 122, which are under protection against the crime of discrimination. The fact that legal regulations are influenced by political dominance cannot be denied. The ability of execution of the law to be handled by the tripartite of lawyer-judge-prosecutor shall be possible by the legislation of these laws in a more concrete and clear manner. Thus, the efforts of lawyers to shape judicial decisions and the policies of legislators would be much more accomplishable.

## **SOURCES**

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