

# ACCESS TO JUSTICE FOR LGBTI+ PERSONS

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# INTRODUCTION

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The effectiveness and accessibility of current mechanisms for achieving legal remedies for lesbian, gay, bisexual, transgender, intersex and plus identities is often debated. The general perception, supported by court decisions, is that access to mechanisms is difficult and costly, that accessible mechanisms are dysfunctional, and that decisions of legal mechanisms considered functional are often not enforceable.

Beyond the impact of this general opinion, this study was carried out with the aim of monitoring what access to justice means for LGBTI+ persons, what methods come to mind when it comes to access to justice and the effectiveness of these methods, and to share the results with the public.

The results of the study, which simultaneously used the methods of legislative review, decision review and stakeholder interviews, are presented to the reader in the form of a report.

## EXECUTIVE SUMMARY

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The study found that in Türkiye, it is not feasible to speak of an access to justice system that is within reach and affordable, with effective mechanisms that satisfy the rights holders. This is because of the overall framework of the justice access mechanisms. However, the current system excludes those who identify as LGBTI+ and brings limitations. This makes it harder for LGBTI+ persons to have access to the system and the ineffectiveness of the system is felt much more by them.

When judges, prosecutors, and law enforcement officers are trained to exclude LGBTI+ persons, and their mindsets are influenced by the heteronormative infrastructure, combined with the climate of homophobic and transphobic hate speech produced by politicians and decision-makers, the use of the justice mechanism itself becomes a process that produces violations. This makes police stations, courthouses and other public authorities that accept administrative complaints unwelcome to LGBTI+ people.

It's better to turn to other organizations like the equality institution or the ombudsperson that don't use criminal law mechanisms, but sometimes they also discriminate and violate human rights.

Lawyers and their professional organisations, bar associations, do not adequately fulfil the functions prescribed by laws and historical changes in the legal profession to ensure LGBTI+ access to justice. Except for a few isolated cases, LGBTI+ persons are not recognised as "right holders" who need positive action from bar associations and lawyers.

The unfair justice system makes people doubt its trustworthiness and it fails to provide justice, especially to LGBTI+ persons. This demonstrates that changes must be made to both the legal and administrative systems.

# ACCESS TO JUSTICE IN GENERAL

In a narrow sense, the concept of access to justice is interpreted as accessing to a court. The elimination of the violation by means of legal remedies is one of the main indicators of this interpretation. In the decisions of the Constitutional Court of the Republic of Turkey (AYM) on individual applications, it is observed that the Constitutional Court avoids making a definition that would outline the concept of "access to justice", and even if it does, such a definition is not included in the decisions. Nevertheless, in the Constitutional Court judgments or minority votes, we see that the concept of access to justice is addressed through sub-elements. Failure to complete the proceedings within a reasonable time; failure to deposit the costs of appeal to the court's cashier within the strict time limit

- the right to go to court
- the existing judicial remedy offering the right holder a reasonable chance of success
- limitations arising from the time limits for filing a lawsuit and notification law
- and the high costs of the proceedings

are the sub-headings that draw attention in the Constitutional Court's decisions discussing access to justice. In its opinion letter submitted to an individual application, the Ministry of Justice stated: *The right of court access, i.e. the permission to file legal claims, also encompasses the authority to approach the court. Also, based on the jurisprudence of the ECtHR, the right to access the courts is not an absolute entitlement and can be restricted under certain circumstances. Nevertheless, such restrictions must not go so far as to impair the subject of the right to access justice.*

The judgments of the European Court of Human Rights (ECHR) interpret this framework more broadly in the context of access to justice, particularly in relation to the right to a fair trial as enshrined in Article 6 of the European Convention on Human Rights (ECHR). Access to the preliminary stages of proceedings before a court, such as access to legal aid or legal assistance, or the execution or enforcement of a judgment obtained, also fall within this interpretation.

Access to justice refers mainly to access to justice mechanisms. In addition, negative obligations, which require states to refrain from interventions that prevent or limit access to the right, as well as positive obligations, which require states to

take active measures and actions to enable individuals to access the right, reveal the need to approach the issue of access to justice from a broader spectrum. For instance, the landmark *Opuz & Turkey* case - in which for the first time the ECHR has held that gender-based violence is a form of discrimination under the European Convention - reveals that state has positive obligations to provide and promote preventive and protective mechanisms against potential

Access to justice is "a fundamental element of the rule of law and good governance, together with the independence, impartiality, integrity and reliability of the judiciary; the fight against impunity and corruption; and the equal participation of women in the judiciary and other law enforcement mechanisms. The right to access to justice is multidimensional. It encompasses fairness, availability, accessibility, good quality, the provision of remedies for victims and the accountability of justice systems."

*From Recommendation 33 of the UN Committee on the Elimination of Discrimination against Women (CEDAW)*



violations; and this should not be considered separately from access to justice.<sup>1</sup> In this judgment, the Court assessed whether the public authorities had sufficient reason to foresee the possibility of an attack on the victim by the perpetrator ( §133 et seq.); whether the public authorities had exercised due diligence to prevent the killing of the victim ( §137 et seq.); the effectiveness of the prosecution of the perpetrator ( §150 et seq.); and the relationship of the perpetrator's action to gender equality in relation to domestic violence ( §199 et seq.). It concluded that there had been violations of Article 2 of the European Convention on Human Rights on the right to life, Article 3 on the prohibition of torture and Article 14 on the prohibition of discrimination.

This study will specifically address LGBTI+ access to justice, the motivation of the subjects in applying to judicial mechanisms, including the application to the judicial police, and judicial processes as a whole. In doing so, after briefly taking a general picture of the situation in the legislation, an evaluation will be made in the light of the experiences of rights holders and lawyers before and during judicial processes.

## GENERAL FRAMEWORK

The Constitutional Court recently published its latest quarterly statistics on 01.08.2023<sup>2</sup>. These indicate that 79.3% of issued violation decisions relate to the right to a trial within a reasonable period, with 4.9% relating to the right to a fair trial. It is important to note that a violation decision can encompass multiple rights. However, the rate of 79.3% alone highlights a clear systematic issue regarding access to justice.



Resource: Constitutional Court website, [https://www.anayasa.gov.tr/media/8839/bb\\_2023\\_2\\_tr.pdf](https://www.anayasa.gov.tr/media/8839/bb_2023_2_tr.pdf)

1 <https://l24.im/u4Yt3z>

2 [https://www.anayasa.gov.tr/media/8839/bb\\_2023\\_2\\_tr.pdf](https://www.anayasa.gov.tr/media/8839/bb_2023_2_tr.pdf)



good quality, the provision of remedies for victims and the accountability of justice systems." This framework on access to justice is also a reference for the concept of access to justice for LGBTI+ persons. There are also approaches that define access to justice as "individuals who make up the society reaching the legal solutions they need by making use of appropriate legal mechanisms in the easiest, fastest, most effective and least cost-effective way, without compromising human rights, fundamental freedoms, and justice quality."<sup>9</sup>

During interviews with rights holders in the study's scope, it was noticed that the justice system operates rapidly in cases where LGBTI+ persons are accused or suspected. However, in cases where they report offenses by third parties who have harmed them, seeking justice takes a long time. If you think about it, when the Constitutional Court or ECtHR declines the applications of those with victim, complainant, or participant status in criminal law mechanisms due to lack of jurisdiction, it is noteworthy that there is a huge body of invisible violations in terms of access to justice.<sup>10</sup>

According to Article 90 of the Constitution of the Republic of Turkey, "International treaties duly put into force shall have the force of law. They cannot be applied to the Constitutional Court with the claim of unconstitutionality". International treaties on human rights provide a broader protective provision and expressly state that in the event of a difference between the provisions of national law and those of these treaties, the treaty provision shall prevail.<sup>11</sup> Yet, this cannot offer any understanding of the content of national laws. It is worth noting that legal provisions giving broader safeguards for individual rights and freedoms than treaties cannot be circumvented by citing this article of the Constitution. Essentially, countries cannot use treaty provisions to restrict the scope of rights.

Although it is not directly related to access to justice, the structure of the education system that does not provide information about citizenship rights leads to a lack of motivation in subjects to access justice, albeit indirectly.

## LEGISLATIVE SITUATION

From the outlined framework, it is evident that social groups may face systemic discrimination by the state or be left without sanctions due to inaction by public authorities. Through positive actions in certain laws, these groups can achieve equal rights and freedoms, placing them on par with general society.

The aforementioned analysis of individual case decisions made by the Constitutional Court highlights that access to justice is problematic for all societal groups in Türkiye. Additionally, the discrimination faced by LGBTI+ persons by state institutions in access to employment, access to social security, access to property and related inheritance rights reveals the systematic background of LGBTI+ poverty. It is worth noting that Constitutional Court decisions on individual applications do not result in changes to policies and laws. This systematic backdrop highlights that persons who identify as LGBTI+ have a greater need for qualified legal aid, defence counsel assistance, and exemption from judicial fees, both in terms of numbers and proportions.

<sup>9</sup> <https://hukuk.deu.edu.tr/wp-content/uploads/2015/09/MERAL-SUNGURTEK%C4%B0N.pdf> ( Sf. 402 )

<sup>10</sup> Victims who do not have the right to a fair trial because they have not been accused of an offence and therefore do not have the right to a fair trial may, of course, lodge individual applications in relation to other rights.

<sup>11</sup> At this point, two issues should not be overlooked. All international human rights treaties to which Turkey is a party, whether bilateral or multilateral, fall into this category. On the other hand, states cannot, on the grounds of human rights treaties, refrain from implementing provisions of national legislation that provide broader protection than those treaties.



LGBTI+ persons generally believe that the judiciary lacks independence and impartiality. Based on the interviews conducted, it is concluded that rights holders and judges cannot isolate themselves from the political climate and political pressure in their decisions and judgments. One contributing factor is the absence of norms that ensure the independence and impartiality of judges. It is evident that during times when hate speech targeting LGBTI+ persons is on the rise, those in positions of power with influence over judicial promotions and appointments – such as the President and ministers – prioritise their own professional and personal interests over upholding a fair legal process. However, it is noteworthy that similar decisions can be made at times when the climate of hate is not dominant, showing that the homophobic and transphobic attitudes of judicial officials are essentially independent of politics. The interviewee's take on the issue is particularly noteworthy: *"The judge in my current case refuses to make eye contact. He is peculiarly quiet and often talks to himself, leaving me unable to comprehend what he's saying. Fortunately, I can follow what he says on the screen when the clerk writes it down. In my experience with other judges, they haven't been proficient listeners. These hearings are very formal. The trials are often pointless, carried out for the sake of being done. It's possible that the decision has already been made in most cases, and a certain number of hearings are just redundant procedures. During the trial of the homophobic doctor, the doctor appeared without a lawyer. He spoke without permission, saying "they targeted me, what if transvestites on the beaches pull a knife on me, Sir?" The judge scolded him for speaking out of turn. The judge was young. The physician was elderly and would become irate and distressed. Then again, the people in the courthouse are all very strange. From the clerk to the prosecutor."*

**Legal aid** is a system that allows those who cannot afford it to have access to a lawyer free of charge. It is governed by the Code of Civil Procedure (CPL) and the Law on Advocacy (LA). Generally, individuals apply to bar associations and request a lawyer's appointment due to financial constraints. The appointed lawyer's fee is paid from a budget created by a portion of the judgement fees. The CCP and the EC do not have provisions for positive action. In criminal investigations or trials, legal aid is available for suspects or accused persons upon request. However, positive action is only provided for minors and persons who are in a state of incapacity to express themselves if the person is a victim in a criminal investigation or trial. It is not yet commonplace to mandatorily require lawyers, who are assigned to support the applications of LGBTI+ persons benefiting from these systems, to attend training or workshops, including basic gender equality training. During the interviews, it was notable that a lawyer's affiliation with a relevant centre or commission within a bar association focusing on LGBTI+ rights strengthens the communication between the lawyer and the LGBTI+ person, even if the lawyer is appointed by the bar association. At present, the Ankara Bar Association is the sole provider of a system assigning lawyers to subjects from relevant centres, indicating that only a minuscule segment of the population has access to this service.

At this juncture, it is important to mention the process of accessing legal aid. To be granted a legal aid lawyer, right holders must apply at the front offices situated in courthouses or, in some cases, in Bar Association centres during working hours. These offices are staffed by lawyers who are registered in the legal aid system, trainees, and bar association personnel. Lawyers do not receive any internal training on gender equality, and there is no valid justification to imply that they approach cases differently than the heteronormative structure of society. Therefore, accessing the legal aid office, making the initial application, communicating during the application, and meeting with the lawyer after the assignment is often a time-consuming process. This can result in further violations of rights for LGBTI+ persons seeking judicial relief to reduce or eliminate the impact of previous rights violations. Particularly for LGBTI+ persons who have information about phobic attitudes, condescending remarks, degrading treatment by judges, prosecutors, clerks, bailiffs, party lawyers in courtrooms, based on the experiences of third parties, the motivation to apply to the legal aid mechanism is quite low. Therefore, it is essential to view access to justice

not only as legal aid or exemption from charges and judicial expenses but also through the lens of LGBTI+ persons' encounters with all elements of the justice system, including the execution or enforcement phases. In this regard, it is clear that accessing justice is a systemic issue with multifaceted challenges, particularly for out and visible LGBTI+ persons.

The requirement for lawyers to charge a fee renders it unfeasible for lawyers practising in Türkiye to conduct pro-bono social litigation without charging a fee. Similarly, lawyers who specialise in LGBTI+ rights face the same inequalities as LGBTI+ persons and often have to deal with similar economic inequalities. Therefore, it is accurate to state that while pro-bono advocacy holds a legal status, it only serves a symbolic purpose in regard to meeting the current social need for access to justice.

During the interviews with the rights holders, the crisis of confidence with the lawyers assigned by the bar association emerged. For the subjects, the support of lawyers provided by associations that work in the field of LGBTI+ rights is of great importance, despite some limitations. Some interviewees, however, raised concerns about the lack of public awareness surrounding the provision of free legal services by the bar association. They asserted that bar associations should take a more proactive stance in disseminating this information.

**Exemption from court fees** is only available if preliminary requests are accepted. In criminal cases, fees are waived. The law pertaining to administrative proceedings also cites the CCP. In accordance with the CCP, the court receiving the application will decide on the legal aid request. If the decision is to reject it, there is the possibility of an appeal, however, the decision made upon appeal is final. Nevertheless, the CCP does not contain any provision for positively regulating for LGBTI+ persons.

During the interviews, an important observation was made regarding the impact of judicial fees on the willingness to initiate a lawsuit. Given the systematic discrimination prevalent against the LGBTI+ community in terms of accessing and maintaining employment in a dignified manner, resulting in increased poverty rates, the significance of this factor becomes more apparent. As expressed by one of the interviewees, the situation is concerning: *"As a deprived society, we cannot afford to hire a solicitor. Nevertheless, if an NGO backs us and we feel obligated, we put forward our plea. To illustrate, I had a previous incident where a police officer hurt me, and I neglected to take action. Notwithstanding, a group offered assistance in pursuing my case."*

This scenario has two outcomes. Firstly, the impartiality of the justice system deters individuals from pursuing legal proceedings even in cases of suspected torture. Secondly, cases in which no complaint from the victim is necessary for an investigation or prosecution are not automatically investigated by law enforcement or the prosecutor's office. This is particularly prevalent in instances where the suspect is a law enforcement officer.

There are no regulations in the procedural laws to ensure that LGBTI+ persons can express themselves comfortably, especially during the hearing or in moments of encounter with the authorities, including law enforcement officers during the investigation phase. During the interviews with rights holders, it became apparent that judges, prosecutors, and law enforcement officers working within the judicial system tend to view the pursuit of LGBTI+ rights as a futile and time-wasting endeavor. A particular interviewee expressed this stance as follows: *"He didn't write certain parts of the statement as I instructed. Despite repeated corrections, he toned down some of my statements, and even excluded areas where instances of violence, discrimination and homophobia occurred. I don't know why he omitted them."* Another interviewee described their experiences as follows: *"You can't express yourself well. If you're on trial, you can't properly exercise your right to defence. The judge frequently intervenes. He documents in the hearing minutes that you didn't say something." You have to correct it many times. Occasionally, he can be moody. He ignores you.*

In addition, the violence used by law enforcement officers against marches and press statements expressing demands for gender rights, drawing strength from the banning decisions of the governors or district governors who are their superiors, is an indication that LGBTI+ persons will be reluctant to access justice in law enforcement proceedings, especially as long as police officers working as judicial police are not trained in the field of gender equality and are not informed that their indiscipline on this issue will be recorded in their personal records. If the systemic problem on this issue remains unresolved, any numerical data regarding LGBTI+ persons' access to justice mechanisms will be meaningless. For these people, access to justice is often not about accessing the mechanism, but about the public power removing the motivation to turn to this mechanism, whose procedures are in themselves a violation of rights.

Complexity of legal language contributes to LGBTI people's lack of knowledge of access to justice mechanisms, even at a conceptual level. The interviews with respondents show that legal literacy increases as their engagement with civil society increases. This demonstrates the impact of LGBTI+ rights organisations in improving the understanding and awareness of access to justice amongst LGBTI+ people, but it also shows that the state-constructed education system and curriculum do not contribute to citizenship awareness. The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence was terminated by the Republic of Türkiye on 19.03.2021<sup>12</sup>, representing a significant setback in terms of law and policy. The Council of State Board of Administrative Appeals, the authorized judicial authority, definitively rejected the lawsuits challenging this termination.<sup>13</sup> Unfortunately, there is presently no effective means of addressing instances of domestic violence experienced by LGBTI+ individuals at the hands of their families, partners, or third parties. Although a lack of documentation system on hate crimes poses challenges for developing effective criminal policies, the absence of criticism by higher judicial bodies towards the non-LGBTI+ inclusive interpretation of Article 216 of the Turkish Penal Code (TCK), which criminalises insulting segments of the population, is concerning. The discriminatory nature of the laws is evident due to provisions such as the deliberate exclusion of discrimination based on sexual orientation, gender identity, and expression in Article 122 of the TCK, as seen in the Law on the Human Rights and Equality Institution of Türkiye, alongside the decisions of the Constitutional Court. Furthermore, criminalising discrimination in certain situations does not negate the overall discriminatory character of the laws.

When examining access to justice as a whole, it is possible to make the following assessments. The education system is LGBTI+ exclusionary, so it would not be wrong to say that LGBTI+ students are systematically prevented from learning their citizenship rights in a scientific system during pre-school education and primary education. LGBTI+ students are squeezed between peer bullying, administrator and teacher pressure. This is only possible if people do not share their statements or expressions about their existence with others in the same environment, in other words, the only way to avoid being oppressed is to manage to disappear among the crowds. The lack of mainstreaming of gender equality and, moreover, the criminalisation of gender equality on non-existential grounds such as religion, nationality, morality and culture are concrete obstacles to people's awareness of their rights.

LGBTI+ persons are excluded from decision-making processes, so the principles of good governance do not even apply to LGBTI+ persons. They are certainly not involved in the drafting of laws, implementation documents or policies.

LGBTI+ visibility within the justice mechanism is "0". The homosexuality of judicial law enforcement officers is a reason for dismissal<sup>14</sup> from the profession, and the homosexuality of judges is a

<sup>12</sup> <https://www.resmigazete.gov.tr/eskiler/2021/03/20210320-49.pdf>

<sup>13</sup> <https://m.bianet.org/bianet/toplumsal-cinsiyet/272297-danistay-a-gore-istanbul-sozlesmesi-nden-cekilmek-hukuka-uygun>

<sup>14</sup> <https://www.cumhuriyet.com.tr/haber/escinsel-polis-ihrac-edildi-1277727>

reason for disciplinary punishment.<sup>15</sup> In police vocational schools or law faculties, the curriculum is LGBTI+ exclusionary, and in a way that has intensified in the current period, people's gender expressions and carrying symbols related to this are justified for disciplinary investigations opened by rectorates<sup>16</sup>. As a whole, these educational processes appear as obstacles to LGBTI+'s access to justice, the preparation of which is based on the past.

Access to justice includes access to the execution of the law. The way prisons and detention centres are structured in Türkiye causes problems for LGBTI+ persons. This includes the design of the buildings themselves, which can lead to violations, and issues around examination rights, transitioning processes, access to hormones or gender expression items, and in-house practices. There are also problems with visitation processes, which require partners to be legally married in order to meet, and transgender persons who haven't completed the transition process being forced to live with people of their birth gender. Additionally, transgender persons are only allowed to ride in segregated vehicles and are subjected to many other similar public actions. All of these factors contribute to a problematic system of access to justice.

The state's systematic effort to curtail the financial and human resources of LGBTI+ rights groups, who provide restricted assistance to LGBTI+ persons incapable of obtaining qualified legal support, by subjecting them to administrative and criminal probes, leads to a steady erosion and eventual dissolution of the alternatives available to LGBTI+ persons seeking legal recourse. Public institutions failing to meet their obligations towards LGBTI+ persons' access to justice have introduced legislative changes that endanger the existence of non-governmental organisations attempting to offer limited support. Meanwhile, journalists striving to serve as public watchdogs encounter mounting challenges regarding gender-based reporting. Journalists facing censorship laws encounter significant difficulties accessing resources. Official institutions in media and press restrict<sup>17</sup> rights-based newspapers from funding mechanisms financed by taxpayers. They transfer substantial budgets to centres promoting homophobic and transphobic hate<sup>18</sup>, and impose fines<sup>19</sup> on publications that include the emotional dimension of same-sex relationships, and use public service announcements to promote the meetings of hate centres that spread homophobic hatred in society in breach of human rights law<sup>20</sup>.

It would therefore not be wrong to conclude that the state of justice mechanisms pertaining to LGBTI+ access to justice is abysmal, as evidenced by the absence of LGBTI+ inclusive legal frameworks, decision-making processes, the existence of legal aid or the quality of existing legal aid, and the empowerment of LGBTI+ persons in accessing justice.

## Procedural Safeguards in Judicial Proceedings:

The Constitutional Court rejects applications from victims, complainants or participants in criminal law mechanisms regarding the violation of the right to a fair trial. Such applications are rejected with a decision of inadmissibility, citing lack of jurisdiction in terms of subject matter. Interestingly, the first precedent decision of the Constitutional Court on this issue is the inadmissibility decision given in an application of a trans woman regarding the non-prosecution of her criminal complaint on hate speech, including calls for violence.<sup>21</sup> The Constitutional Court, which stated that the

<sup>15</sup> <https://www.ahaber.com.tr/yasam/2022/09/26/hakimin-rezaleti-ortaya-cikti-escinsel-uygulamasindan-dosyasina-baktigi-zanliyla-mustehcen-gorusmeleri-ifsa-oldu?paging=3>

<sup>16</sup> <https://kaosgl.org/haber/odtude-gokkusagi-bayragina-da-sorusturma>

<sup>17</sup> <https://www.gazeteduvar.com.tr/basin-ilan-kurumu-evrenselin-reklam-yayimlama-hakini-tumden-iptal-etti-haber-1578365>

<sup>18</sup> <https://www.gazeteduvar.com.tr/iktidar-destekcisi-medyaya-akan-kamu-kaynagi-1-yazili-basinda-kamu-bankalari-reklamla-ri-dagilimi-haber-1526532>

<sup>19</sup> <https://www.cumhuriyet.com.tr/haber/rtukten-tlcy-escinsel-iliski-cezasi-1759570>

<sup>20</sup> <https://www.birgun.net/haber/rtuk-ten-skandal-kamu-spotu-lgbti-lari-hedef-alan-mitingin-propagandasini-yaptirdilar-401996>

<sup>21</sup> (Onurhan Solmaz, B. No: 2012/1049, 26/3/2013 )



victim trans woman could not apply for violation of the right to a fair trial, used this first precedent-setting decision as a justification for the inadmissibility decision in 801 separate applications.<sup>22</sup> The matter is still before the IHAM<sup>23</sup>. However, it would not be wrong to say that the result of Article 6 of the IHAS, which is the product of an equation that will put the defendants, who are assumed to be weak against the prosecutor, on an equal level with the prosecutors, considering that the prosecutors are generally prejudiced against the victims, is to render LGBTI+ victims weak against heterosexual defendants. As a matter of fact, the finding that draws attention in the interviews with the right holders is the reluctant, slow and discriminatory attitude of the judicial system in criminal law processes whose complainants are LGBTI+ persons. The fact that LGBTI+ victims, participants or complainants do not have the guarantees that defendants have leads to inequality, not equalisation. The following statement of a right holder during the interviews clearly summarizes the issue: *"When I see the police, the prosecutor and the judge, I think that something might happen to me and I might leave the place I entered with handcuffs on my hands. This kind of situation exists. I have also noticed that other LGBTI+ persons have similar experiences. The courthouse becomes a scary building."* Another right holder expressed the same feeling as follows: *"The police ignore us. They won't take the application. Even if we go as victims, we suddenly become criminals in their eyes"*.

Furthermore, people who have died as a result of hate crimes, referred to as 'deceased' in criminal justice mechanisms, are represented in legal proceedings by appointed family members who are the heirs. If the victim is LGBTI+, especially a transgender person, their families may not participate in the case or can even be suspected of committing the hate crime. In these situations, it's crucial for civil society groups to participate in the case. Unfortunately, the legal system regularly turns down participation requests from organisations focused on LGBTI+ rights. This is because it only handles these requests concerning inheritance rights or uses that as an excuse. This is yet another hurdle for LGBTI+ people looking to access justice. However, the ECtHR interprets the law in a way that broadens the rights of non-governmental organisations to request participation.<sup>24</sup>

## Non-judicial Mechanisms

**Human Rights and Equality Institution of Türkiye:** TİHEK was founded by a 2016 law in the Official Gazette to safeguard and advance human rights based on human dignity; ensure people are treated equally and prevent discrimination in the use of legally recognised rights and freedoms. It acts in accordance with these principles, combats torture and mistreatment, and operates as a national prevention mechanism. The founding law prohibits discrimination on the basis of sex, race, colour, language, religion, belief, sect, philosophical or political opinion, ethnic origin, property, birth, marital status, health status, disability or age. The law prohibits discrimination only based on specific identity characteristics. Thus, the current version of the law fails to meet Article 10 of the Constitution, which establishes that "Everyone is equal before the law without discrimination on the grounds of language, race, colour, sex, political opinion, philosophical belief, religion, sect and similar reasons." The leading opposition party has raised a legal challenge against a law passed by the Turkish Grand National Assembly on 6th April 2016<sup>25</sup>. However, the constitutionality aspect has not yet been assessed because there hasn't been any claim that the third article - which outlines specific forms of discrimination that are prohibited - is unconstitutional. The board of the institution, along with its chairman, oversees its operation.

<sup>22</sup> <https://kararlarbilgibankasi.anayasa.gov.tr/Ara?KelimeAra%5B%5D=onurhan+solmaz>

<sup>23</sup> <https://hudoc.echr.coe.int/?i=001-202813>

<sup>24</sup> <https://hudoc.echr.coe.int/?i=001-153633>

<sup>25</sup> (AYM, E.2016/132, K.2017/154, 15/11/2017 )



TIHEK, on the other hand, systematically meets the applications of LGBTI+ persons with inadmissibility on the grounds of this limited expression<sup>26</sup>, and the lawsuits filed against these decisions are rejected by the administrative courts. Therefore, TIHEK does not have the quality of an application mechanism for LGBTI+ persons, let alone its effectiveness. According to the most recent evaluation report of the Global Alliance of National Human Rights Institutions<sup>27</sup>, which was established to monitor and classify national human rights and equality institutions in the light of the Paris Principles, TIHEK is not a Class A application mechanism as it does not fully fulfil the criteria that national human rights institutions should meet. Eight out of ten members of the board, whose first and second chairmen are men, are male.

**Ombudsperson Office:** Unlike TIHEK, the Ombudsperson's Office cannot impose administrative fines or conduct unannounced visits. Its role is to review and determine the administrative requests brought forth by interested parties, including infringements on rights due to the actions, transactions or inactions of public institutions and organisations, and issue recommendations to the relevant public entity if necessary. The Board's decisions are not legally enforceable and it lacks the power to impose penalties on those accountable. Therefore, KDK is an ineffective institution for LGBTI+ persons. In a recent complaint regarding an individual's HIV status, it was reported that the physician disclosed the applicant's medical information to their girlfriend. It is important that physicians do not share confidential information with third parties as patients value the privacy of their personal lives. People who receive healthcare services expect their personal information to remain private. This is in accordance with the relevant articles of the KVKK, the Patient Rights Regulation, the Code of Professional Ethics of Physicians, and other legislation. It has been determined that it is acceptable for a physician to share their patient's diagnosis and treatment information with third parties if they are infected with an infectious disease and there is a risk of transmission<sup>28</sup>.

**Audit mechanisms in the TGNA** include the Human Rights Inquiry Commission, Commission on Equal Opportunities for Women and Men<sup>29</sup>, and Petition Commission<sup>30</sup>. The newest activity report from the Human Rights Inquiry Commission is from 2020<sup>31</sup>. Upon analysis, the commission appears to have limited effectiveness in promoting human rights. Upon analysis of the applications, it is apparent that either there are no applications pertaining to sexual orientation, gender identity, gender characteristics or expression, or they are categorized differently. The activity reports published by these commissions do not suggest that the other commissions have any discernible function with regards to impacting human rights.

From this perspective, it could be argued that LGBTI+ persons do not have access channels to non-judicial human rights mechanisms.

<sup>26</sup> <https://kaosgl.org/haber/tihek-cinsel-kimlik-ayrimcilik-temeli-sayilamaz>

<sup>27</sup> <https://www.ohchr.org/sites/default/files/Documents/Countries/NHRI/StatusAccreditationChartNHRIs.pdf>

<sup>28</sup> <https://kaosgl.org/haber/kamu-denetcligi-kurumu-ndan-hiv-le-yasayan-kisilerin-mahremiyet-haklari-ihlal-eden-skandal-karar>

<sup>29</sup> <https://www.tbmm.gov.tr/ihlas-komisyoni/icerik/ihlas-komisyoni-kadin-erkek-firsat-esitligi-komisyonu-hakkinda/kadin-erkek-firsat-esitligi-komisyonu/f72877d1-b499-037b-e050-007f01005610>

<sup>30</sup> <https://www.tbmm.gov.tr/Komisyoni/Dilekce-giris>

<sup>31</sup> [https://www.tbmm.gov.tr/Files/Komisyoni/insanHaklari/docs/2021/faaliyet\\_raporu\\_27.\\_donem\\_1.\\_%20devre.pdf](https://www.tbmm.gov.tr/Files/Komisyoni/insanHaklari/docs/2021/faaliyet_raporu_27._donem_1._%20devre.pdf)

## THE PERSPECTIVE OF RIGHT HOLDERS AND LAWYERS

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Within the scope of the study, structured interviews were conducted with eight beneficiaries and eight lawyers working in the field, using standardised questions. The questions were asked in a uniform manner, and participants were interviewed separately to prevent any influence from each other's responses. The uniformity of the statements provided and the occasional examples highlight the systemic nature of the challenge faced by LGBTI+ persons in accessing justice. The report can be made more understandable by presenting a complete picture of the interviews, which includes the perspectives of both rights holders and lawyers.

### RIGHT HOLDERS

The issue that all subjects agree on is that while the trials of LGBTI+ persons in the justice system progress rapidly, the process of seeking rights progresses extremely slowly. As in the case of the Esat-Eryaman case, the murder case of Ahmet Yıldız or the individual application made to the Constitutional Court in 2015 for the Grindr application, which was banned from access in 2013, has still not been decided as of 2023, LGBTI+ persons are systematically discriminated against at all levels of the justice mechanism. The reluctance of law enforcement, the prosecutor's office, and judges to gather requested evidence from LGBTI+ persons.

Another issue emphasised by the rights holders in the report is that judicial processes whose results are described as successes do not lead to a change in policy or practice. Just as the annulment of the decisions to ban pride parades by the administrative courts does not prevent the governors from taking new banning decisions, or the acquittal of activists after being detained during pride parades does not ensure the safety and security of the next pride parades; it has been clearly demonstrated that even the "successful" results obtained on paper in the justice mechanisms accessed by LGBTI+ persons do not lead to a positive progress in their lives.

This picture leads to the conclusion that the close environment of the rights holders or the community of which they are a part does not encourage them to resort to justice mechanisms. This is because, just like the right holders, the close circle of the right holders share the same well-founded scepticism and concerns about the functionality of justice mechanisms and believe that resorting to these mechanisms would lead to the risk of facing new discriminatory treatment.

Unjust provocation practices in hate-motivated criminal acts against LGBTI+ persons reveal that the penal policy is structured in a way that prevents access to justice.

It was difficult to reach people not linked with civil society, so all interviewees were from civil society organisations. Lawyers in these organisations suggest that the subjects have some knowledge of the law, a basis for a rights-based connection with the lawyer, and basic legal knowledge. However, because the state of the Republic of Turkey puts pressure on civil society and especially LGBTI+ rights organisations and makes the activities of these organisations illegal, the subjects have limited relationship with the organisations. Therefore, it can be concluded that the sample contacted does not represent the majority of LGBTI+ persons.

All the people involved in legal proceedings experienced discrimination based on their sexual orientation or gender identity. They were stopped from making their argument, left out of the process, and made to feel like outsiders. The public officials, particularly during criminal proceedings, were indifferent and ignored their concerns which made them feel even less motivated to pursue justice. None of the interviewees believe the justice system is inclusive of the LGBTI+ community, and some even see it as structurally excluding. They attribute any

exceptions to personal approaches. Consequently, the homophobic and transphobic attitudes of state administrators have influenced the judiciary. As a result, judicial mechanisms have become producers of homophobia/transphobia alongside state administrators. This discourages LGBTI+ persons from resorting to judicial mechanisms.

One right holder used the following expressions for the discriminatory process against trans women: "While men who commit crimes are protected and a normal level of interaction is established with them, transgender people are more criminalised. Trans women are treated unfairly, subjected to a mix of how women and men who cause incidents are treated. They face similar levels of sexual harassment that women face and torture that men face when kept under control".

Efforts are being made by the Ministry of Justice to strengthen the institution of 'conciliators' in criminal proceedings and 'mediation' in civil disputes as alternative resolution methods. Although lacking an LGBTI+ inclusive approach, the narratives of rights holders indicate that conciliators establish a more equal relationship.

One interviewee points out that the positive decision he obtained in the case of discrimination directly targeting gender identity, i.e. the decision to convict the perpetrator, was overturned by the High Court because Article 122<sup>32</sup> of the Turkish Penal Code on discrimination does not prohibit discrimination against LGBTI+ persons. This situation is one of the clearest examples of the fact that LGBTI+ people who are excluded from the legislative process are also excluded from the protection of the law. It is noteworthy that none of the rights holders have applied to this administrative mechanism as a result of the Law on the Establishment of the Institution for Equality and Human Rights, which was created with the same exclusionary understanding, ignoring the applications of LGBTI+ persons.

Bar associations are a long way off establishing an LGBTI+ inclusive system for legal assistance. With few exceptions, they fail to match the organisational structure of professional bodies that promote rights-based advocacy for LGBTI+ persons.

Legal fees divert people from pursuing their rights.

Lawyer help is often available from nearby sources, and civil society's engagement of lawyers means that paying for them need not burden those seeking assistance. But when we consider the facts that there are fewer than fifteen organizations supporting LGBTI+ rights in Turkey and not all of them have lawyers, it becomes clear that LGBTI+ persons are unable to obtain legal representation. This is because only one of those interviewed was able to afford a fee based on the minimum rate, and even then, they noted that the fee was too low. Most of the people who received benefits said that they would not have gone to court if the associations had not given them a lawyer. Some people have said that the expenses of administrative and civil court cases, which the losing side has to pay to the winner together with the solicitor's fee established by the Lawyers' Minimum Fee Tariff, make people less likely to seek justice through these channels.

Access to lawyer support from LGBTI+ rights organisations that employ them can be assumed to result in subjects not being subjected to discriminatory treatment by lawyers. However, the subjects are sceptical about the free legal aid provided by the bar associations due to reasons such as communication problems, discrimination and prejudice, and they do not consider the free legal aid provided by the bar associations as a favourable means of assistance.

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<sup>32</sup> 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, colour, 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.

Most of the rights holders who somehow accessed judicial processes stated that they were not told about their right to benefit from the assistance of a lawyer free of charge. This shows the lack of information about the rights that exist in the law.

Most of the interviewees had encounters with law enforcement officers, especially during procedures such as making a statement, arrest and filing a complaint. A few of them experienced mistreatment by these officers. The actions and professionalism of public figures who participate in legal procedures, including law enforcement, lead LGBTI+ persons to justifiably stay away from legal mechanisms. Even if LGBTI+ people do file a complaint, they stay away from judicial authorities unless it is compulsory and unavoidable as a result of the discriminatory treatment they have experienced.

Another issue agreed upon by the rights holders is that justice mechanisms, which are already systematically exclusionary towards LGBTI+ persons, take on an even more exclusionary, prejudiced and hostile form during periods when hate speech against LGBTI+ persons by state administrators and ruling coalition leaders and presidents increases. This situation clearly reveals the analytical relationship between the increase in hate speech tolerated with impunity or administrative sanctions and the distance of rights holders from justice mechanisms.

## LAWYERS

Lawyers working in the field of LGBTI+ rights interact with their clients mostly in the context of administrative cases or in the context of non-criminal cases and their preliminary investigations. Considering that both types of cases are the product of the hierarchical relationship established by the state with the citizen, it would not be wrong to say that the motivation of rights holders to interact with lawyers is related to the violation of their rights. In this sense, the institution of lawyers and their professional organisation, the bar associations, play an important role in LGBTI+ people's access to justice. Failure of bar associations, which are also public institutions, to fulfil this function and to meet minimum standards also means that the state is not fulfilling its positive obligations. The fact that only nine lawyers participated in the interrogation of the last 150 of the 373 activists detained during the police crackdown on the 2022 Istanbul Pride March, which is a peaceful and non-violent assembly march, draws attention to the non-functioning of bar associations.

Here, the exceptional situation in the cases of LGBTI+ refugees and asylum seekers raises scepticism about whether bar associations see themselves as access to justice mechanisms. At this point, the comment of one interviewee is striking: *"We refer LGBTI+ refugees to legal aid to appeal decisions such as rejection of an application for international protection, deportation, administrative detention. In fact, the result varies from one province to another. Within the framework of the project jointly implemented by UNHCR (United Nations High Commissioner for Refugees) and TBB (Union of Turkish Bar Associations), the legal fees of refugees in certain provinces are covered within the framework of this project. There are, of course, limitations to the scope of the project. In the provinces covered by the project, there is generally no problem in appointing a legal aid lawyer. However, in the provinces that are not included in the project, there are serious problems with the appointment of lawyers and in most cases the application for legal aid is rejected. In fact, when the project was discontinued or suspended, there were problems in the provinces that were included in the project. Even in important cases such as deportation, lawyers were not appointed. However, there were bar associations (such as Ankara Bar Association, Izmir Bar Association) that appointed lawyers from Legal Aid even when there was no project"*.

Meanwhile, for refugees and asylum-seeking LGBTI+ persons, being the subject of a criminal investigation, even as a complainant, can be used as a ground for deportation. This means that

the judicial system is a mechanism of legal access to justice that should be avoided for these people. This situation was expressed by a lawyer as follows: *"I have a very clear example in mind. A refugee trans woman goes to the police because she has been attacked. The police say that if the attacking citizen files a complaint against you, a deportation order will be issued against you, and she drops the complaint. I can't say that the police are being ridiculous, because if a refugee is investigated for any reason, a deportation order can be issued. Even if the investigation results in no charges being brought."*

A significant observation from the discussions with lawyers, reinforcing the exchanges with rights holders, is that justice officials, ranging from security and guidance officers at the building entrances to court presidents, deal with LGBTI+ persons in an aggressive manner. This situation has an impact on the access to justice process at each stage and alters its nature. Many LGBTI+ individuals have been subjected to a variety of forms of harassment, including: provocative and insulting questions or forms of questioning in the process of taking statements; insistent and unnecessary verbal abuse; verbal or psychological harassment; not taking complaints or statements seriously; violent arrest and detention procedures; stigmatisation, prejudice and discrimination in a variety of ways in the process of examination by the forensic doctor during the process of entering and leaving detention; the process of access to justice as a whole takes a form that denies LGBTI+ persons access to it in a manner that respects their human dignity. A lawyer sums up the scene as follows: *"The statements of the clients who are subjected to violence are not taken at the police station, and although not taking their statements is a discrimination, the reason for not taking their statements is usually their appearance, the way they dress, of course I am saying this from the mouths of the police officers. Warnings about the earrings they wear, , stop wearing them, stop being like this. Or, for instance, very close, what is it called, learned helplessness, the best version of the police, there can be dialogues in which they attribute this helplessness."*

The normal-abnormal dualism produced by officials in justice mechanisms through heteronormativist state practices can manifest itself in the form of not opening up the field of action to LGBTI+ persons that they open up to citizens they consider 'normal'. For example, for certain types of offences that can be described as minor, non-LGBTI+ people may be invited to police stations by methods such as telephone and SMS, while in the case of LGBTI+ people, methods such as forcibly bringing them to the police station come to the fore.

Especially the applications of LGBTI+ persons who are not out to their families to judicial mechanisms include the possibility that the correspondence made in the following process will be sent to the addresses in the state's population registration system. This is a factor that reduces the motivation of LGBTI+ persons living with their families to apply to judicial mechanisms.

The lack of trust that LGBTI+ people have in the justice system and how well it works was a significant issue in the interviews with rights holders. The approach taken by the rights holders agrees with what the lawyers have observed. When people lose faith in the possibility of achieving justice or when experience has taught them that justice will not be achieved, the process of providing legal assistance can become difficult for lawyers as well. Some rights holders also see themselves as potential criminals because they are under the influence of the dominant heteronormative structure. This situation, which is particularly evident for transgender sex workers, was expressed by a lawyer who shared their experience from the field through their clients' mouths as follows: *"No matter how many administrative fines you challenge and win, in the normal course of life, if you're a trans sex worker, you go to the police station on a regular basis, you spend two or three hours in the police station, and this is when you lose faith in access to justice."*

As stated previously, the interactions between rights holders and lawyers typically occur with the aim of gaining access to additional rights. This highlights the inherent link between the right to access justice and other rights. In fact, the judgments of the Constitutional Court and the ECtHR,



which examine individual applications, are closely linked to judicial or investigative processes. These courts attribute a secondary role to themselves and emphasize the importance of rights holders pursuing their rights primarily in national judicial authorities. Based on this observation, there are instances where difficulty in accessing justice directly results in violating human rights. One such case is house sealing or closures, which trans sex workers may have cancelled after an administrative judicial process. A lack of prompt resolution in house closure cases also infringes on the right to proper housing for transgender individuals living in such sealed houses for sex work. During discussions, lawyers summarized the situation as follows: *We tried, but it didn't work. "This is also a living space. Therefore, this intervention is a violation of the right to housing, the right to work, and even during the pandemic, we could not go."*

Regarding legal aid processes, there is significant overlap between the responses of lawyers and the interviews with rights holders. Interviews reveal that access to lawyers for the subjects is predominantly through the legal support programs conducted by organizations advocating LGBTI+ rights. Based on the sample in this study, it is improbable for a lawyer to refer the rights holder to a free lawyer, considering that their interaction predominantly occurs through associations. Consequently, statistical data obtained by bar associations is the appropriate source to gather information on this issue. This applies to legal aid requests made under the Law on Lawyers. However, interviews with lawyers also show that lawyers do not instruct their clients to have their court fees covered by the legal aid budget under the CCP. However, it should be noted that the primary motivation here is to avoid encountering law enforcement during the economic and social status investigation carried out by the court for legal aid application. It is not to gather income-related documents, but rather to prevent further encounters with the intimidating faces of the justice system by pursuing appeal processes in higher courts if the legal aid application is denied. It's worth bearing in mind that rights holders may have already managed to cover the costs of proceedings themselves. Therefore, it was not possible, within the scope of this study, to determine whether the recipients of legal aid had their applications rejected due to homophobic or transphobic reasons.

However, the following should be added There are no statistics on the extent to which legal aid applications are rejected, especially those under Article 40 of the Turkish Civil Code, which is referred to in the law as "gender change". In the interviews with lawyers, it was noted that, as an exception, legal aid applications from students are more likely to be accepted. One lawyer explained this as follows: *"In the case of university students, the legal aid application was generally accepted. However, my legal aid applications were rejected for clients who did not meet the legal aid conditions and who had a salary and income. Recently I had a case of gender affirmation proceedings. The person was a student. The judge made a decision as a justification for rejecting the legal aid application, such as if she could pay money to the lawyer, she should not apply for legal aid. I objected to this and my objection*



*was accepted*". Another noteworthy point in this testimony is that in the legal aid applications of rights-holders who found the right lawyer through NGOs, the fact that they were represented by a lawyer became an obstacle to applying for legal aid because of the fees.

It is observed that the legal knowledge produced by associations can reach the right holders and become widespread to the extent that it moves away from a technical narrative. This shows that civil society organisations fulfil an important function. However, considering that the Ministry of Justice and bar associations, rather than civil society, have the main responsibility for access to justice mechanisms, especially at the moments when information meets with citizens, it is seen that state institutions do not have a specific goal in legal literacy among citizens.

The common opinion of the lawyers is that in an atmosphere where homophobia and transphobia are encouraged, disseminated, and organised by those who govern the country and hate speech is widespread and its impact is increasing, it is very difficult for LGBTI+ persons to access the justice mechanism and justice in a real sense. This is also in line with the feedback received from rights holders. There are no restorative justice mechanisms, the only address for access to justice seems to be the courts, and the fact that the only method of application to the courts, which itself produces violations, means a vicious circle for LGBTI+ persons. Meanwhile, the banning of subsequent pride marches despite the cancellation of pride march bans, or the illegal detention of LGBTI+ persons who were prosecuted for participating in the march in subsequent peaceful, non-violent pride marches despite their acquittal, reveals that the judicial system, which is the only mechanism for access to justice, is actually dysfunctional. The system points to the courts for access to justice, but the decisions of those courts are generally not followed.

Lawyers, who construct the law through the courts due to the absence of legal guarantees and policies for LGBTI+ persons, point out that the jurisprudence produced by the courts under the influence of politics does not create a ground that facilitates LGBTI+ persons' access to justice.

## CONCLUSION

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This study has been prepared in order to identify the subjective difficulties experienced by LGBTI+ persons in accessing justice, unfunctional mechanisms that create obstacles to equal access to rights, and to formulate solutions and recommendations regarding these gaps. As detailed in the report, access to justice, including judicial processes and criminal investigations, is far from being effective and functional for LGBTI+ persons. Bar associations and lawyers as part of the mechanism are also the carriers of this lack of function or deficiency. Especially in cases of hate speech or discrimination, alternative justice mechanisms - including the right to petition, parliamentary commissions, or public mechanisms like TIHEK and KHK - are also ineffective for LGBTI+ community. In addition, as rights holders and lawyers have stated, access to justice is a very costly process. It is not possible to cope with these costs for LGBTI+ persons who are systematically discriminated against in employment or deprived of inheritance rights as a result of not being able to enjoy their rights such as marriage equality and civil union. In addition, access to a lawyer is also a problem in the absence of legal services provided by non-governmental organisations operating in the field of human rights and law. The problem is that LGBTI+ rights organisations providing accessible legal support in Turkey are limited in number and can only operate in a few cities. This means that LGBTI+ persons in cities and regions where there are no LGBTI+ rights organisations, or where existing organisations do not have sufficient resources to provide quality legal support, do not have access to a lawyer. The sad thing is that it is possible to include a very large part of the population of Turkey in this scope.

Access to mechanisms means a process that reproduces violations for LGBTI+ persons. All kinds of public mechanisms related to the judicial mechanism, including law enforcement processes, are difficult to access for LGBTI+ persons. Even when accessed, they are far from producing positive results due to the prejudices and exclusionary approaches LGBTI+ persons face.

As emphasised in the report, the right to access to justice, which we already know to be structurally problematic with the decisions of the Constitutional Court and the European Court of Human Rights, means even more difficult and impossible mechanisms to access when it comes to LGBTI+ persons.

The exclusion and disregard of social diversity by decision-makers, coupled with the targeting of LGBTI+ individuals as objects of hate, leads to the absence of inclusive policies. Moreover, it implies that the decision-makers use the mechanisms as a tool for perpetrating violations.

In conclusion, the provision of justice, ineffective and unqualified for all, results in a process that generates a growing number of intersecting human rights violations against the LGBTI+ community.