



Third Party Intervention

**In the Case of ONURHAN SOLMAZ AND THE BLACK ROSE
TRIANGLE ASSOCIATION OF İZMİR FOR RESEARCH ON
GENDER IDENTITY AND SEXUAL ORIENTATION AS WELL
AS SUPPORT AGAINST DISCRIMINATION IN THIS MATTER v.
TURKEY (App. No. 42711/13)**

by

İFADE ÖZGÜRLÜĞÜ DERNEĞİ (İFÖD)

An independent non-governmental organization specialized in defending and promoting freedom of expression

Introduction

1. İFÖD will address in its intervention in the case of *Onurhan Solmaz and the Black Rose Triangle Association of İzmir for Research on Gender Identity and Sexual Orientation as well as Support Against Discrimination v. Turkey* (App. No. 42711/13) the issue of hate speech used against sexual minorities.
2. It is understood from the Court's communication that the applicants lodged a complaint before the İzmir public prosecutor's office against a journalist who published an article in a local newspaper allegedly inciting hatred against transvestites and transgender people. The applicants condemned certain comments made by the journalist who they said had called the presence of transgender people in İzmir an abomination, accusing them all, without distinction, of having engaged in prostitution and proposed to the police forces to eradicate and eliminate this "bad image" inflicted on the city. For the applicants, the journalist had thus committed the crimes of defamation and openly degrading treatment as well as of incitement to hatred and violence subject to article 216 of the Turkish Criminal Code, all of which implied discrimination based on the sexual orientation and gender identity of the individuals targeted.
3. The public prosecutor's office dismissed the complaint on the ground that the applicants were not targeted personally by the article and the impugned article did not contain hate speech or incitement to violence. The applicants appealed unsuccessfully against the dismissal decision of the public prosecutor's office. Onurhan Solmaz' individual application to the Constitutional Court was found inadmissible by the Court on the grounds of incompatibility rationae materia. The European Court qualified the facts of the main complaint under Article 8 of the Convention, taken in isolation and/or taken in conjunction with Articles 13 and 14 and asked whether the lack of judicial action constitute a failure by the State to a) its obligations enshrined in Article 8 of the Convention, under its substantive and procedural aspects, taken together with Article 14 and b) its obligations enshrined in Article 13 of the Convention, taken together with Article 8.
4. İFÖD's intervention will initially provide the relevant European standards concerning hate speech targeting sexual minorities. The submission will then discuss the recent two-tier hate speech classification approach developed by the European Court of Human Rights. As will be suggested in this part, one of the elements that needs to be taken into consideration whilst deciding whether speech/content which amounts to hate speech must attract criminal prosecution and criminal sanctions, is the general situation of minorities in the relevant jurisdiction. Therefore, it is considered that treatment of hate speech and hate crimes by the judiciary in general is a crucial factor when balancing the competing interests of the applicants' right not to be discriminated on the basis of their gender identity on the one hand and the journalist's freedom of expression and freedom of the press on the other hand. It is therefore necessary for İFÖD to provide an assessment of the Turkish legal framework involving the crimes of incitement to violence and discrimination on the basis of sexual orientation and gender identity. In this third part, the intervention will assess information concerning discrimination based on grounds of sexual orientation and gender identity in Turkey.

The response of the Turkish judicial authorities to homophobic/transphobic speech will also be evaluated in this final part.

European Standards Concerning Hate Speech Targeting Sexual Minorities

5. Racist hate speech is directly prohibited by the UN human rights treaties. Indeed Article 20 of the International Covenant on Civil and Political Rights states that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination declares illegal all propaganda activities which promote and incite racial discrimination.
6. Although the Council of Europe treaties do not include UN style general provisions, general obligations might be drawn from provisions prohibiting discrimination. The revised European Social Charter prohibits any discrimination on grounds such as race, colour, religion or national extraction in the enjoyment of the rights it recognizes. Moreover, the Additional Protocol to the Convention on Cybercrime, requires the prosecution of acts of racist and xenophobic nature albeit only with regards to the Internet.
7. However, obviously, this does not mean that the Council of Europe is irrelevant to other types of hate speech. The Committee of Ministers’ Recommendation (97)20 on “hate speech” defines hate speech as all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.
8. This definition **does not include sexual orientation and gender identity** as basis for hate speech. There is also no separate treaty provision that prohibits hate speech against sexual minorities. However, as in Recommendation (97)20, standards concerning hate speech have been developed mostly by soft law materials at the Council of Europe level. As sensitivity to discrimination based on gender identities has grown in the organisation, new legal instruments targeting discrimination against sexual minorities have been drafted. These legal instruments provide a framework on how to treat discriminatory behaviour against LGBTI+ individuals, including hate speech.
9. The Recommendation adopted by the Council of Europe’s Committee of Ministers on 31.03.2010 (CM/Rec(2010)5) on measures to combat discrimination on grounds of sexual orientation or gender identity provides that:

“Member states should take appropriate measures to combat all forms of expression, including in the media and on the Internet, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against **lesbian, gay, bisexual and transgender** persons. Such “hate speech” should be prohibited and publicly disavowed whenever it occurs. All measures should respect the fundamental right to freedom of expression in accordance with Article 10 of the Convention and the case law of the Court.”

10. The Resolution adopted by the Council of Europe’s Parliamentary Assembly on 29.04.2010 (Resolution 1728 (2010)) on discrimination on the basis of sexual orientation and gender identity provides that:

“7. Hate speech by certain political, religious and other civil society leaders, and hate speech in the media and on the Internet are also of particular concern. The Assembly stresses that it is the paramount duty of all public authorities not only to protect the rights enshrined in human rights instruments in a practical and effective manner, but also to refrain from speech likely to legitimise and fuel discrimination or hatred based on intolerance. The boundary between hate speech inciting to crime and freedom of expression is to be determined in accordance with the case law of the European Court of Human Rights.

16. Consequently, the Assembly calls on member states to address these issues and in particular to:

16.4. condemn hate speech and discriminatory statements and effectively **protect LGBT people** from such statements while respecting the right to freedom of expression, in accordance with the European Convention on Human Rights and the case law of the European Court of Human Rights...”

11. European Commission against Racism and Intolerance (“ECRI”), General Policy Recommendation No 15 on “hate speech” describes the concept as “the use of one or more particular forms of expression – namely, the advocacy, promotion or incitement of the denigration, hatred or vilification of a person or group of persons, as well any harassment, insult, negative stereotyping, stigmatization or threat of such person or persons and any justification of all these forms of expression – that is based on a non-exhaustive list of personal characteristics or status that includes “race”, colour, language, religion or belief, nationality or national or ethnic origin, as well as descent, age, disability, sex, gender, **gender identity and sexual orientation.**”
12. The EU has also developed standards to prevent hate speech expressed against LGBTI+ individuals and community. The European Parliament has called upon Member States “to ensure that **LGBT people are protected from homophobic hate speech and violence,**” and recommended the adoption of educational measures, such as campaigns against homophobia in schools, in universities and in the media; as well as through administrative, judicial and legislative means.¹

The European Court’s Jurisprudence on Hate Speech Targeting Sexual Minorities

13. In line with legal instruments drafted by other Council of Europe organs, the European Court has widened the scope of its hate speech jurisprudence to include speech that targets LGBTI+ individuals. The Court has recalled that discrimination based on sexual orientation is as serious as discrimination based on “race, origin or colour”.²
14. Hate speech used against LGBTI+ individuals are brought to the attention of the Court under two different scenarios. In cases lodged with the Court under Article 10,

¹ European Parliament resolution of 18 December 2019 on public discrimination and hate speech against LGBTI people, including LGBTI free zones (2019/2933(RSP)), available at https://www.europarl.europa.eu/doceo/document/TA-9-2019-0101_EN.html

² *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 97, ECHR 1999 VI.

applicants claimed that their right to freedom of expression had been violated due to criminal sanctions imposed upon them for using hate speech. In the second scenario, in cases lodged with the Court under Article 8, individuals who alleged to have been victimised by the use of hate speech against them claimed that their right to respect for private life had been violated.

15. As a matter of principle, rights protected under articles 8 and 10 deserve equal respect.³ Therefore, it is important to remember that the balance to be struck by national authorities between those two rights must seek to retain the essence of both.⁴ As a result, it is considered that the Court’s assessment made in cases lodged with under Article 10 should also inform the interpretation of the scope of right to respect for private life in cases brought under Article 8.

16. ‘Hate speech’, as this concept has been construed in the Court’s case-law, falls into two categories. The first category of the Court’s case-law on ‘hate speech’ is comprised of the gravest forms of ‘hate speech’, which the Court has considered to fall under Article 17 and thus excluded entirely from the protection of Article 10.⁵ The second category is comprised of ‘less grave’ forms of ‘hate speech’ which the Court has not considered to fall entirely outside the protection of Article 10, but which it has considered permissible for the Contracting States to restrict.⁶

17. The Court has so far decided in two second category homophobic hate speech related cases. In *Lilliendhal v. Iceland*, the Court explained how this second group differs from the first one:

“Into this second category, the Court has not only put speech which explicitly calls for violence or other criminal acts, but has held that attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for allowing the authorities to favour combating prejudicial speech within the context of permitted restrictions on freedom of expression. In cases concerning speech which does not call for violence or other criminal acts, but which the Court has nevertheless considered to constitute ‘hate speech’, that conclusion has been based on an assessment of the content of the expression and the manner of its delivery”.⁷

18. In *Vejdeland and Others v. Sweden*⁸ and *Lilliendhal v. Iceland*, the applicants claimed that their right to freedom of expression was breached due to criminal sanctions imposed on them for the homophobic speech they used. In the *Vejdeland* case, the applicants’ conviction for distributing in an upper secondary school approximately 100 leaflets considered by the courts to be offensive to homosexuals. The statements in the leaflets were allegations that homosexuality was a “deviant sexual proclivity”, had “a morally destructive effect on the substance of society” and was responsible for the

³ *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, 10.11.2015, § 91.

⁴ *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, 27.6.2017, § 123

⁵ *Witzsch v. Germany* (no. 1) (dec.), no. 41448/98, 20 April 1999; *Schimanek v. Austria* (dec.), no. 32307/96, 1 February 2000; *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX; *Norwood v. the United Kingdom* (dec.), no. 23131/03, 16 November 2004; *Witzsch v. Germany* (no. 2) (dec.), no. 7485/03, 13 December 2005; *Molnar v. Romania* (dec.), no. 16637/06, 23 October 2012.

⁶ *Féret v. Belgium*, no. 15615/07, 16.07.2009, §§ 54-92; *Vejdeland and Others v. Sweden*, no. 1813/07, 09.02.2012, §§ 47-60; *Delfi AS v. Estonia*, no. 64569/09, 16.06.2015, §§ 153 and 159.

⁷ *Lilliendhal v. Iceland* (dec.), no. 29297/18, 12.5.2020, para. 36.

⁸ *Vejdeland and Others v. Sweden*, no. 1813/07, 09.02.2012.

development of HIV and AIDS. The European Court found that these statements had constituted serious and prejudicial allegations, even if they had not been a direct call to hateful acts.⁹

19. In *Lilliendhal v. Iceland* the applicant was convicted for homophobic comments he had made in response to an online article. As aptly noted, in this case the European Court has adopted even a stricter position. Firstly, unlike in its *Vejdeland* decision, the Court regarded the homophobic speech as “hate speech”. Secondly, the application was struck out as inadmissible, for being manifestly ill-founded, rather than been examined on merits. Thirdly and most importantly, the content of the speech alone was enough for the Court to reach its conclusion, although the speech did not call for violence or for the commission of criminal acts.¹⁰ As noted by Fedele, “Mr. Lilliendahl was ‘just’ “a member of the general public” expressing himself via the internet, and not a public figure speaking “from a prominent platform likely to reach a wide audience”, as it was in the *Féret v. Belgium* case¹¹; moreover, Mr. Lilliendahl replied publicly to an online article, thus not imposing his comments upon anyone, as was the case in the *Vejdeland* case, where the fact that the applicants forced their anti-homosexual opinions on vulnerable young people at school played a decisive role in the judgement.”¹²
20. Following these recent decisions, it can be concluded that the scope of the second category hate speech now includes speeches insulting, holding up to ridicule or slandering LGBTI+ people regardless of the way they have been delivered.
21. However, this new approach of the Court cannot be understood as obliging states parties to punish all homophobic/transphobic statements regardless of the context it was used. The Court has stated that criminal sanctions, including against the individuals responsible for the most serious expressions of hatred, inciting others to violence, could be invoked only as an *ultima ratio* measure.¹³ **İFÖD is of the opinion that one important consequence of the two-tier classification of hate speech in the Convention jurisprudence is that whilst State parties have a certain degree of margin of appreciation to criminalise the second category hate speech, they are obliged to punish the first group hate speeches.**
22. It is necessary, therefore, to determine what brings a hate speech within the first category of speech that requires a criminal sanction. The Court in previous cases held that where acts that constitute serious offences are directed against a person’s physical or mental integrity, only efficient criminal-law mechanisms can ensure adequate protection and serve as a deterrent factor.¹⁴ Criminal-law measures are therefore

⁹ *Vejdeland and Others*, paras. 54-58.

¹⁰ Giulio Fedele, “No Room for Homophobic Hate Speech Under the ECHR: Carl Jóhann Lilliendahl v. Iceland” available at <https://strasbourgobservers.com/2020/06/26/no-room-for-homophobic-hate-speech-under-the-ehcr-carl-johann-lilliendahl-v-iceland/>.

¹¹ *Féret v. Belgium*, no. 15615/07, 16.07.2009

¹² Giulio Fedele, “No Room for Homophobic Hate Speech Under the ECHR: Carl Jóhann Lilliendahl v. Iceland” available at <https://strasbourgobservers.com/2020/06/26/no-room-for-homophobic-hate-speech-under-the-ehcr-carl-johann-lilliendahl-v-iceland/>.

¹³ *Beizaras and Levickas v. Lithuania*, 41288/15, 14 January 2020, para. 128.

¹⁴ *Identoba and Others v. Georgia*, no. 73235/12, § 86, 12 May 2015,

required with respect to direct verbal assaults and physical threats motivated by discriminatory attitudes.¹⁵

23. The European Court, in its recent *Beizaras and Levickas v. Lithuania* decision,¹⁶ provided further guidance for the application of this jurisprudence to homophobic statements. Unlike in the *Vejdeland* and *Lilliendhal* cases, *Beizaras and Levickas* is not an Article 10 case. In the latter, the applicants, two young men who were in a relationship, alleged that they had been discriminated against on the grounds of sexual orientation because of the authorities' refusal to launch a pre-trial investigation into the hate comments published on the Facebook page of one of the applicants. One of the applicants had posted a photograph of them kissing each other on his Facebook page, which led to hundreds of online hate comments. The Court held that there had been a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private life) of the Convention, finding that the applicants had suffered discrimination on the grounds of their sexual orientation.
24. In reaching this conclusion the Court observed that the hateful comments including undisguised calls for violence by private individuals directed against the applicants and the homosexual community in general were instigated by a bigoted attitude towards that community and that the very same discriminatory state of mind was at the core of the failure on the part of the relevant public authorities to discharge their positive obligation to investigate allegations.¹⁷
25. The Court also noted that in other cases in Lithuania, comments made towards ethnic and religious minorities, even without calling for violence, had been treated by the Lithuanian authorities as falling under Article 170 of the Criminal Code that criminalises hate speech.¹⁸
26. Finally, the Court discussed whether the general treatment of sexual minorities in the state party should be taken into consideration whilst deciding the scope of the duty of the government. Relying on the methodology the Court developed in *D.H and Others v. the Czech Republic*,¹⁹ the Court stated that in cases involving the question of discrimination in which the applicants allege a difference in the effect of a general measure or de facto situation, statistics produced by the parties to establish a difference in treatment should be taken into consideration.²⁰
27. It follows then, the factors to be taken into consideration whilst deciding whether a discriminatory statement might be called as first category hate speech and draws criminal sanctions are: **a.** Whether the speech incites violence or verbally assaults a group of people, **b.** Whether the public authorities fail to investigate allegations due to same discriminatory state of mind, **c.** Whether general tolerance to this type of speech in the respondent state might be illustrated by statistics.

¹⁵ *R.B. v. Hungary*, no. 64602/12, §§ 80 and 84-85, 12 April 2016; *Király and Dömötör v. Hungary*, no. 10851/13, § 76, 17 January 2017; *Alković v. Montenegro*, no. 66895/10, §§ 8, 11, 65 and 69, 5 December 2017)

¹⁶ *Beizaras and Levickas v. Lithuania*, 41288/15, 14 January 2020.

¹⁷ *Beizaras and Levickas v. Lithuania*, para. 129.

¹⁸ *Beizaras and Levickas v. Lithuania*, para. 125.

¹⁹ *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-IV.

²⁰ *Beizaras and Levickas v. Lithuania*, para. 115.

Treatment of Hate Speech Expressed Towards Sexual Minorities in Turkey

28. İFÖD is of the opinion that the above mentioned criteria is not necessarily cumulative. The first criterion about the nature of the speech should be assessed by a case by case approach and therefore cannot be the subject of this intervention. However, İFÖD aims to inform the Court about the second and third criteria, as the general attitude of the Turkish authorities concerning homophobic/transphobic speech would be critical to understand the context in which the impugned statement was made.

29. It remains the fact that there is no specific hate speech law in Turkey. However, article 216 of the Turkish Criminal Code aims to punish hate speech. Relevant part of the article is as follows:

“Article 216-(1) Any person who openly provokes a group of people belonging to different social class, religion, race, sect, or coming from another origin, to be rancorous or hostile against another group, is punished with imprisonment from one year to three years in case of such act causes risk from the aspect of public safety.

(2) Any person who openly humiliates another person just because he belongs to different social class, religion, race, sect, or comes from another origin, is punished with imprisonment from six months to one year”.

30. Gender identity or sexual orientation are not enumerated as basis for the implementation of this provision. However, the Turkish legislature’s indifference to discrimination against sexual minorities is not isolated to this single provision. Neither Article 10 of the Constitution that provides the principle of equality before the law, nor article 122 of the Criminal Code that prohibits discriminatory behaviour enumerates gender identity or sexual orientation as discriminatory grounds. Recently, Law No. 6701 established the National Human Rights and Equality Institution to combat discrimination. However, definition of discrimination in this law, provided in article 3, does not include gender identity or sexual orientation as a discriminatory ground either.

31. Observing the deficiency in the Turkish law concerning hate speech crimes committed against sexual minorities, the ECRI in its 5th cycle, recommended that the Turkish authorities bring their criminal law, in general, into line with its General Policy Recommendation No. 7. The ECRI called the Turkish government to **(i)** include the grounds of ethnic origin, colour, language, citizenship, sexual orientation and gender identity among the prohibited grounds in articles 122, 125 and 216 and all other Criminal Code provisions aimed at combating racism and homo/transphobia; **(ii)** abolish the restriction in article 216 that which requires the presence of a threat to public order and **(iii)** provide explicitly that racist and homo/transphobic motivation constitutes an aggravating circumstance for any ordinary offence.²¹ The ECRI also recommended that the authorities should bring their anti-discrimination legislation fully into line with ECRI’s General Policy Recommendation No. 7 and in particular they should include the grounds of citizenship, sexual orientation and gender identity in the list of grounds of prohibited discrimination.²²

32. However, it is clear that the Turkish government systematically ignores the calls to bring its legislation in line with international requirements to prevent discrimination

²¹ ECRI Report on Turkey (5th Monitoring Cycle), adopted on 29.06.2016, published on 04.10.2016, para. 11.

²² Ibid, para. 27.

against LGBTI+ individuals. During the last cycle of Universal Periodic Review before the United Nations' Human Rights Council, a number of governments invited the Turkish government to adopt comprehensive anti-discrimination legislation which includes sexual orientation and gender identity as protection grounds as well as condemn hate speech and hate crimes towards lesbian, gay, bisexual, transgender and intersex individuals and effectively investigate and prosecute such cases.²³ None of these recommendations were supported by the Turkish government.²⁴

33. In the absence of such recognition and improvements in the law a lot of hate crimes are unreported due to indifference of the authorities to homophobic/transphobic discrimination. As a result, according to the most recent report of the Turkish LGBTI NGO Kaos-GL, 118 out of reported 150 incidents were not notified to the security forces. 70 of the victims stated that notification to the authorities were useless, 44 of them stated that they did not want to be discriminated by security forces, 46 of them stated that they did not want their identities to be disclosed.²⁵ Kaos-GL also reported that discriminatory language used against sexual minorities increased from 34% in 2018 to 50% in 2019.²⁶
34. Moreover, according to ILGA-Europe, Turkey ranks 48th amongst 49 European countries in the ILGA's Rainbow Map and Index.²⁷ ILGA's Turkey report includes references to bias motivated speeches made by the Minister of Interior, a speech made by an expert at an event organised by the National Human Rights and Equality Body, and speech made by the President of the Presidency of Religious Affairs.²⁸
35. As noted by ILGA-Europe, rather than protected by state authorities, LGBTI+ individuals and groups have recently been targeted by high level civil servants. There are several examples to illustrate the anti-LGBTI+ position of the government. A recent striking example involves the speech of the head of Turkey's Religious Affairs Directorate at a sermon on 24.04.2020 during which by reference to HIV, he suggested that members of the LGBT community spread the disease, urging people to "join the fight to protect people from such evil". The Ankara Bar Association argued that his remarks appeared to constitute public provocation of hatred and hostility, an offence established in article 216(2) of the Turkish Penal Code and filed a criminal complaint. Several top Turkish officials, including the President of Turkey voiced their support for the head of Turkey's Religious Affairs Directorate remarks.²⁹ President Erdoğan said that an "an attack [on him] is an attack on the state and on Islam". Rather than investigating the complaint lodged by the Ankara Bar Association, prosecutors in Ankara and Diyarbakır launched criminal investigations against the Ankara and

²³ See recommendations of Italy, Iceland, Sweden, Malta, Mexico, Myanmar, Norway, Argentinian, A/HRC/44/14/Add.1.

²⁴ See Matrix of Recommendations in the Third Cycle of UPR, Turkey available at <https://www.ohchr.org/EN/HRBodies/UPR/Pages/TRindex.aspx>

²⁵ Kaos-GL, 2019'da Gerçekleşen Homofobi ve Transfobi Temelli Nefret Suçları Raporu, (Ankara: 2020),

²⁶ Kaos-GL, LGBTİ+'ların İnsan Hakları 2019 Yılı Raporu, (Ankara: 2020), p. 23.

²⁷ For the 2020 Report see <https://www.ilga-europe.org/rainboweurope/2020>.

²⁸ <https://www.ilga-europe.org/sites/default/files/2020/turkey.pdf>

²⁹ HRW, "Turkey: Criminal Case for Opposing Homophobic Speech", available at <https://www.hrw.org/news/2020/05/01/turkey-criminal-case-opposing-homophobic-speech>.

Diyarbakır Bar Associations on the grounds of “openly disrespecting the religious belief of a group”.³⁰

36. As this example clearly shows, in Turkey, not the hate speeches against LGBTI+ groups, but speech against the hate speakers is under threat. Unfortunately, this threat directly emanates from the very top of the government.
37. Therefore it is submitted that no remedy is available against hate speech against sexual minority in Turkey. While hate speech against sexual minorities goes unpunished, the Constitutional Court is yet to find a violation of the Constitution on this basis.
38. In addition to the current case, the Constitutional Court has had at least four other opportunities to examine anti-LGBTI+ hate speech related applications. In two of them, the Constitutional Court has found applications inadmissible on the ground that the applicants had not exhausted all remedies as they had not initiated civil cases against the speakers.³¹ In a third case, the applicant complained about a report broadcasted nationwide which stated that “Sinem Hun, registered to the Ankara Bar Association, who is representing perverts’ association called Kaos-GL”. However, the Constitutional Court found the application inadmissible on the ground that the lawyer of the LGBTI+ could not be accepted as a victim of slander made against the organisation she represents.³² Finally, in the Kaos GL case, the applicant association claimed that the statement “Kaos GL, association of perverts” on a newspaper headline constituted hate speech targeting the association and LGBTI+ individuals. Although the Constitutional Court recognised that hate speech expressed towards LGBTI+ individuals might breach the constitutional rights of those individuals, the Court concluded that calling them “perverts” cannot be seen as requiring the initiation of a criminal investigation against the newspaper. The Constitutional Court also stated that the statement did not reach to the level that might be called “hate speech”.
39. Considering the level of systematic verbal attacks against LGBTI+ community in Turkey, it is therefore not surprising to see that the Constitutional Court is yet to find a single homophobic speech after 8 years of experience with individual applications.

Conclusion

40. Considering all the above factors, İFÖD would like to emphasize that the current case should be analysed in the light of developing jurisprudence of the Court concerning hate speech used against sexual minorities.
41. There’s no doubt that every statement should be evaluated according to its own conditions. However, as noted by the Court in *Beizaras and Levickas*, background information about whether public authorities fail to investigate allegations due to same

³⁰ See further Bianet, “President Recep Tayyip Erdogan urged to discontinue investigations into Turkish bar associations”, <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=aba4972c-9030-4973-b072-89789f938ba7>

³¹ See Kaos Gey ve Lezbiyen Kültürel Araştırmalar ve Dayanışma Derneği İktisadi İşletmesi Application, no. 2018/34275, 13.11.2020; Kaos Gey ve Lezbiyen Kültürel Araştırmalar ve Dayanışma Derneği Application, no. 2018/10605, 25.9.2019. The second application was about a request to ban Internet content that allegedly targeted LGBTI+ individuals.

³² Sinem Hun Application, no. 2013/5356, 8.5.2014. This case had been brought to the European Court, which later found the application inadmissible on similar grounds. See *Sinem Hun v. Turkey*, 9483/15, 17.10.2017.

discriminatory state of mind and whether general tolerance to this type of speech in the respondent state might be illustrated by statistics should be meticulously examined to reach a fair conclusion.

42. İFÖD is of the opinion that, as noted by other independent observers, anti-LGBTI attitude is rapidly growing in Turkey. It is considered that this attitude does not only emanate from private individuals' personal choices. The government, by ignoring its positive obligations to regulate and adopt comprehensive anti-discrimination legislation which includes sexual orientation and gender identity as protection grounds undoubtedly strengthens this trend. However, even worse remains the fact that high level politicians and public servants also widely use homophobic language to increase the risk of violence against sexual minorities. This also creates a chilling effect on the sexual minorities who cannot express themselves without any legal protection.³³
43. It is considered that the current case should be read against this background. As a result, a speech that might be seen as a second category hate speech, might fall within the first category in countries where LGBTI+ individuals and community are under constant and systematic attack of public actors.
44. Overall, İFÖD believes that this case provides the opportunity for the Court to test its Beizaras and Levickas standards in a country that remains one of the worst performers concerning LGBTI+ rights.

09.12.2020

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İfade Özgürlüğü Derneği (İFÖD) has been set up formally in August 2017 protect and foster the right to freedom of opinion and expression. The new Association envisions a society in which everyone enjoys freedom of opinion and expression and the right to access and disseminate information and knowledge.

³³ The European Court already found in *Kaos GL v. Turkey* that the applicant association's freedom of expression had been breached following the seizure of all copies of a magazine published by Kaos GL. See *Kaos GL v. Turkey*, no. 4982/07, 22.11.2016.