

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Solmaz v. Turkey
(Application no. 49373/17)

WRITTEN COMMENTS
submitted jointly by

Transgender Europe
ILGA Europe
Kaos Gay Lesbian Cultural Research and Solidarity Association (Kaos GL)

13 February 2018

1. These written comments are submitted on behalf of Transgender Europe (TGEU), the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) and Kaos Gay Lesbian Cultural Research and Solidarity Association (Kaos GL), pursuant to leave granted by the President of the Second Section.¹ The present case exemplifies the widespread prejudice facing people who trespass normative conceptions of gender and the authorities' failure to recognize and provide redress for discrimination based on gender identity and/or gender expression. This brief is structured as follows. The first part presents data revealing the extent of discrimination based on gender identity and/or services in relation to access to services, employment or health. The second part examines the emergence of gender identity and gender expression as distinct, but related, protected grounds in anti-discrimination law, as well as looking at selected jurisprudence on discrimination with respect to access to services. The third part briefly reviews several decisions striking down cross-dressing bans based on free speech and autonomy considerations. Finally, the fourth part examines the remedies available under Turkish law to discrimination victims.

I. Discrimination against transgender people in Europe

2. The Parliamentary Assembly reported in 2015 that “discrimination on the grounds of gender identity and gender expression is severe and widespread in Council of Europe member States.” The same report noted that “transgender people are confronted with several forms of discrimination and difficulties in all aspects of life, such as discrimination in access to work, housing and health care, vulnerability to hate crimes, bullying and physical and sexual violence.”² The *Eurobarometer on Discrimination 2015*, which measures general perceptions, opinions on policy measures and awareness of rights in the E.U., found that discrimination on the grounds of gender identity was regarded as one of the most widespread forms of discrimination (56% of respondents).³
3. A large European Union Agency for Fundamental Rights (FRA) survey published in 2015 identified “alarming” levels of perceived discrimination among trans respondents, more than half of who felt discriminated against or harassed because they were perceived as trans in the preceding year.⁴ Over one in three trans respondents felt discriminated against because of being trans when looking for a job (37 %), and a quarter (27 %) reported discrimination at work. On average, almost a half of respondents were never or rarely open about their identity at work. On average, cross dressers (male or female) were more likely to report negative conduct or comments based on LGBT status directed against them or others. Around one in five respondents who accessed healthcare services (22 %) or social services (19 %) felt healthcare or social service personnel discriminated against them because of being trans. Of the trans respondents who accessed services such as shops, cafés, restaurants, bars and nightclubs, at sports and fitness clubs or who were looking for a house during the preceding 12 months,

¹ The interveners gratefully acknowledge the contribution of Constantin Cojocariu in the preparation of this submission.

² Parliamentary Assembly, *Discrimination against transgender people in Europe: Report*, 2015.

³ European Commission, *Eurobarometer on discrimination 2015: General perceptions, opinions on policy measures and awareness of rights*, 2015, p 2.

⁴ EU FRA, *Being Trans in the European Union: Comparative analysis of EU LGBT survey data*, 2014.

around 18 %–23 % felt personally discriminated against because of being trans. One in eight trans respondents experienced discrimination by bank or insurance company personnel. FRA remarked that the relative ‘invisibility’ of the trans group, the avoidance behavior adopted when using these services may have resulted in lower rates of discrimination than if they were more open about being trans. In any event, trans respondents faced markedly more discrimination because of being trans than other LGB groups when using such services.

4. TGEU published in 2017 a survey on the access of trans people to healthcare, which included 885 healthcare users and 888 providers. Trans people scored significantly worse in health status and wellbeing.⁵ More than half of trans respondents (55.8%) reported having delayed going to the doctor for general healthcare because of their gender identity (sometimes, regularly, or all the time). Four out of ten respondents cited fear of prejudice from healthcare providers (44.1%) and not having confidence in the services provided (41.1%) as the reason.

II. Gender identity as a protected ground in international and comparative law

5. The Yogyakarta Principles (‘YP’), representing an authoritative articulation of human rights standards as applied to LGBTI people, provide a suitable starting point to this section. Gender identity is defined as “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms”.⁶ The YP were updated in 2017 with the stated objective of reflecting among others “the often distinct violations affecting persons on the ground of gender expression.”⁷ Accordingly, that notion was defined as “each person’s presentation of the person’s gender through physical appearance – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioral patterns, names and personal references, and noting further that gender expression may or may not conform to a person’s gender identity.” It follows that whereas gender identity is “deeply felt”, including male, female and people identifying outside the gender binary, gender expression is a sum of essentially changeable personal features that may or may not coincide with one’s gender identity. This section provides some of the evidence backing up the assertions made in the YP, showing that gender identity and/or gender expression came to be protected as stand-alone grounds in anti-discrimination law, or as coming within the scope of other grounds interpreted broadly such as sex/gender.
6. The Court has made some inconsistently worded remarks to the effect that gender identity is

⁵ TGEU, *Overdiagnosed but underserved - Trans Healthcare in Georgia, Poland, Serbia, Spain and Sweden: Trans Health Survey*, 2017.

⁶ *The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity*, 2007. The Yogyakarta Principles were mentioned as persuasive authority by Judges Sajó, Keller and Lemmens in their dissenting opinion, §16, in *Hämäläinen v. Finland* [GC] and the CJEU in Case C-473/16, *F. v. Bevándorlási és Állampolgársági Hivatal* [2018], §62.

⁷ *The Yogyakarta Principles plus 10: Additional principles and state obligations on the application of international human rights law in relation to sexual orientation in gender identity, gender expression, and sex characteristics to complement the Yogyakarta principles*, 2017.

protected under Article 14, although it is yet to identify a violation of Article 14 on this account. In *P.V. v. Spain* (2010), a child visitation case involving a trans parent, the Court stated that Article 14 “undoubtedly” covered “transsexuality”.⁸ In *Identoba and others v. Georgia*, concerning the homophobic harassment that took place during a LGBTI rights event, the Court mentioned in passing that Article 14 “duly covers questions related to sexual orientation and gender identity.”⁹ In *Hämäläinen v. Finland*, a legal gender recognition case, the Court appeared to suggest that gender identity should be encompassed within the grounds of “gender or sexual orientation”, with the consequence that strict scrutiny applied to the differential treatment alleged.¹⁰ Notably, the Court has also stated consistently in its gender-based discrimination jurisprudence that “references to traditions, general assumptions or prevailing social attitudes in a particular country cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment [based on gender].”¹¹

a) United Nations

7. UN Treaty Bodies consistently mention gender identity as a protected characteristic under the anti-discrimination clauses of their respective Treaties.¹² For instance, in 2016, the Human Rights Committee (HRC) urged Azerbaijan to “ensure that discrimination on the basis [...] gender identity is included in its anti-discrimination legal framework, that adequate and effective protection against all forms of discrimination, hate speech or violence on the basis of [...] gender identity is afforded to persons both in law and in practice, that such cases are properly investigated and that perpetrators are held accountable.”¹³ In addition, “gender expression” is increasingly recognised as a separate and complementary protected ground.¹⁴ Increasingly common are recommendations that refer to the need for policies aimed at dispelling harmful stereotypes around gender identity. For example, the CESCR urged the FY-

⁸ *P.V. v. Spain*, no. 35159/09, § 30, 30 November 2010.

⁹ *Identoba and Others v. Georgia*, no. 73235/12, § 96, 12 May 2015.

¹⁰ *Hämäläinen v. Finland* [GC], no. 37359/09, § 109, ECHR 2014. That judgment also contained a dispute between the majority and a minority of the Court around the question of determining an adequate comparator for the situation that the applicant, a trans woman, and her wife, found themselves in, see joint dissenting opinion of judges Sajó, Keller and Lemmens, §17-20.

¹¹ *Konstantin Markin v. Russia* [GC], no. 30078/06, § 127, ECHR 2012 (extracts). In that case, the Court referenced the gender stereotype of women being perceived as primary child-carers (at §143). Also see *Carvalho Pinto de Sousa Morais v. Portugal*, no.17484/15, § 52, ECHR 2017, in which the Court referenced the gender stereotype of “female sexuality being essentially linked to child-bearing purposes.”

¹² CESCR/General Comment No. 23 (2016) on the right to just and favorable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), §11; CEDAW/Estonia – Concluding Observations – 65th session, 9 November 2016, 6th reporting cycle, CEDAW/C/EST/CO/5-6, §29; CRC/France – Concluding Observations – 71st session, 13–14 January 2016, 5th reporting cycle, CRC/C/FRA/CO/5, §23-24; CRPD/ General comment No. 3 (2016) Article 6: Women and girls with disabilities, §4-5. Also see International Lesbian, Gay, Bisexual, Trans and Intersex Association: Kirichenko K, *United Nations Treaty Bodies: References to sexual orientation, gender identity, gender expression and sex characteristics 2016* (Geneva: ILGA, November 2017).

¹³ Azerbaijan – Concluding Observations – 118th session, 20–21 October 2016, 4th reporting cycle, CCPR/C/AZE/CO/4, §8-9.

¹⁴ For example, the HRC welcomed the adoption in Sweden of an equality strategy that covered gender expression, along with gender identity, Sweden – Concluding Observations – 116th session, 9–10 March 2016, 7th reporting cycle, CCPR/C/SWE/CO/7, §3.

ROM to “eradicate negative stereotypes about and stigmatization of [...] transgender [...] persons, including by revising textbooks and conducting awareness-raising campaigns for the public, health-care providers, social workers and law enforcement and other public officials.”¹⁵ In 2016, the Human Rights Council established an Independent Expert mandate working on the protection against violence and discrimination based on sexual orientation and gender identity.

8. The HRC dealt with the issue of discrimination based on gender identity in the case *G. v. Australia*, concerning the validity of provisions in Australian law that restricted access to legal gender recognition to people who were not married. On this occasion, the HRC stated that “the prohibition against discrimination under Article 26 [of the ICCPR] encompasses discrimination on the basis of marital status and gender identity, including transgender status.”¹⁶ The HRC noted that the restriction in question differentiated between married and unmarried transgender persons without reasonable and objective justification, constituting discrimination on the basis of marital and transgender status.

b) Regional human rights systems

9. The *Convention on Preventing and Combating Violence against Women* (‘the Istanbul Convention’) defines the notion of “gender” as “the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men.” The Convention must be implemented without discrimination based on gender identity, among other grounds.¹⁷ In 2010, the Committee of Ministers adopted a recommendation urging States to take targeted measures to combat discrimination on grounds of sexual orientation or gender identity in a number of areas including employment, education, health and housing.¹⁸ In 2015, the Parliamentary Assembly adopted the resolution “Discrimination against transgender people in Europe”, urging Member States to take a range of legislative, policy and awareness raising measures to strengthen the protection against discrimination based on gender identity in all areas of life.¹⁹
10. An Inter-American Court of Human Rights advisory opinion published on 24 November 2017 stated among others that gender identity and gender expression were protected grounds

¹⁵ The former Yugoslav Republic of Macedonia – Concluding Observations – 58th session, 13–14 June 2016, 4th reporting cycle, E/C.12/MKD/CO/2-4., §25-26.

¹⁶ HRC, *G. v. Australia*, Communication no. 2172/2012, 17 March 2017, §7.12-7.15.

¹⁷ *Council of Europe Convention on preventing and combating violence against women and domestic violence*, Articles 3 and 4§3

¹⁸ *Rec. CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*, 31 March 2010, Section I.A.

¹⁹ Parliamentary Assembly, *Discrimination against Transgender people in Europe*, Resolution 2048(2015), §6.1.

under the American Convention on Human Rights.²⁰ In relation to gender expression, the Court stated that “the prohibition of discriminating on the basis of gender identity should be understood not only with respect to real or self-identified identity, but that also in relation to identity as perceived externally, regardless of whether that perception corresponds to reality or not.” Differential treatment based on these grounds calls for strict scrutiny. Furthermore, lack of consensus at national level on the issues in question may not constitute a valid ground for discriminating on the basis of gender identity or gender expression.

c) European Union

11. In 1996, the Court of Justice of the European Union (‘CJEU’) held that discrimination against people who intend to undergo, are undergoing and have undergone gender reassignment may amount to sex discrimination.²¹ As a result transgender people are protected under EU gender equality legislation, including Directive 2004/113/EC establishing the right to equal access for women and men to goods and services.²² The notion of “gender reassignment” has not been authoritatively defined, although the European Commission expressed the view that the same approach applied to the ground of “gender identity” more broadly.²³ Beyond gender equality legislation, the notions of gender identity²⁴ and gender expression²⁵ are explicitly referenced in other E.U. legislation.
12. *P. v. S. and Cornwall County Council* concerned a trans person who had been dismissed from work for having proposed to undergo gender reassignment treatment. The CJUE reasoned that, considering “its purpose and the nature of the rights which it seeks to safeguard,” the scope of the directive in question “cannot be confined to discrimination based on the fact that a person is of one or other sex.” Therefore, “such discrimination is based, essentially, if not exclusively, on the sex of the person concerned.” Those findings were reiterated, with some variation, in two other cases: *K.B.*,²⁶ concerning the access of the trans partner to a survivor’s

²⁰ *Corte interamericana de derechos humanos, Opinión consultativa OC-24/17 de 24 de noviembre de 2017 solicitada por la República de Costa Rica: Identidad de género, e igualdad y no discriminación a parejas del mismo sexo o obligaciones estatales en relación con el cambio de nombre, la identidad de género, y los derechos derivados de un vínculo entre parejas del mismo sexo (Interpretación y alcance de los artículos 1.1, 3, 7, 11.2, 13, 17, 18 y 24, en relación con el artículo 1 de la Convención americana sobre derechos humanos)*, §64-81.

²¹ CJEU, Case C-13/94 *P v S. and Cornwall County Council* [1996]; see further, Silvan Agius, Christa Tobler, *Trans and intersex people: Discrimination on the grounds of sex, gender identity and gender expression*, European Commission, 2011.

²² *Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.*

²³ *Report on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services*, 5 May 2015, available here: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015DC0190&from=EN>.

²⁴ *Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime. Preamble, §9; Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, [2011], Article 10(1)(d).

²⁵ *Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, Preamble, §9*

²⁶ CJEU, Case C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004].

occupational pension, and *Richards*,²⁷ concerning the access to a statutory retirement pension.

13. The CJEU's approach to the issue of determining a suitable comparator has shifted somewhat depending on the particular facts of each case. In *P. v. S.*, the CJUE compared the trans woman involved in the case with a cisgender²⁸ man. In *K.B.*, the CJEU compared a heterosexual cisgender couple and the treatment of couples including one trans partner. In *Richards*, the situation of the trans woman involved was compared to that of a cisgender woman. Advocate General Bobek has recently sought to reconcile these approaches in a pending case concerning the validity of making legal gender recognition (and, implicitly, eligibility for a gendered retirement pension) conditional on the person being unmarried.²⁹ AG Bobek stated that "gender reassignment is a process involving a considerable degree of dynamism challenging the more traditional and static comparison between men and women, effectively turning the comparator into a mobile target or even rendering the identification of any clearly defined comparable group impossible." Thus, "depending on the context of the case and bearing in mind the inherent dynamism in gender reassignment, the comparison might be carried out either with regard to the 'point of departure' or with regard to the 'point of arrival.'"³⁰

d) National jurisdictions

14. According to the data of Trans Rights Map 2017³¹ as of October 2017 and the Rainbow Europe Index³², legislation and/or court practice in 28 Council of Europe Member States³³ provided protection against discrimination on ground of gender identity in employment and in 23 countries in access to goods and services. Several countries have specifically defined the notions of "gender identity" and/or "gender expression" in their legislation. The Finnish Act on Equality 2014 bans discrimination on the basis of 'gender identity' (defined as "the person's own experience of (his or her) gender") and 'expressions of gender' (defined as "articulating one's gender by clothing, behaviour or in some other similar manner").³⁴ The Maltese Gender Identity Act defines the notions of 'gender expression' (as "each person's manifestation of their gender identity, and/or the one that is perceived by others") and 'gender identity' (as "each person's internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body - which may

²⁷ CJEU, Case C-423/04 *Sarah Margaret Richards v Secretary of State for Work and Pensions* [2006].

²⁸ Cisgender or Cis is a term used to describe non-trans people. It is used in the same way as heterosexual is used to mean non-homosexual. For additional terminological clarifications see the TGEU glossary, <https://tgeu.org/glossary/>.

²⁹ CJEU, Case C-451/16 *MB v Secretary of State for Work and Pensions* [pending], Opinion of Advocate General Bobek, 5 December 2017.

³⁰ The AG refers to an imaginary transition along the gender binary in this context.

³¹ Online at: <https://tgeu.org/trans-rights-map-2017/> (13.02.2018).

³² Online at: <https://rainbow-europe.org/> (13.02.2018).

³³ These countries are: Albania, Austria, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Czech Rep, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Malta, Montenegro, Norway, Portugal, Serbia, Slovak Rep, Slovenia, Spain in number of regions, Sweden, Switzerland, Ukraine and UK.

³⁴ Kevät Nousiainen, *Country Report/Gender Equality/Finland: How are EU rules transposed into national law?*, 2017. p. 10.

involve, if freely chosen, a modification of bodily appearance and/or functions by medical, surgical or other means - and other expressions of gender, including one's name, dress, speech and mannerisms").³⁵

15. Several cases of gender identity-based discrimination in relation to access to services have been reported. In **Ireland**, the case *Deirdre O'Byrne v. AIB*³⁶ involved a trans woman asked her bank to update the details of her account after changing her name by deed poll. The bank asked her instead to close her old account and open a new one. The Equality Tribunal decided that O'Byrne's situation was comparable to that of a cisgender woman. As the bank's policies allowed cisgender women to keep their old accounts upon changing names after entering a marriage or civil partnership, the Tribunal concluded that there was discrimination on the grounds of gender. In a case involving a trans woman, a court of first instance in **Belgium** ruled against a health insurance company that would only provide health coverage that excluded any costs related to gender dysphoria, for acting in a discriminatory fashion.³⁷ In **Georgia**, the Public Defender decided that refusing to provide a taxi service to a trans woman constituted gender identity-based discrimination and asked the taxi company in question to develop and implement more inclusive internal policies.³⁸
16. There are no laws at the federal level protecting people against discrimination based on gender identity in the **United States of America**. Nonetheless, a series of recent court decisions and other developments³⁹ increasingly make it clear that federal legislation banning sex-based discrimination also covers gender identity. In addition, many states, counties and cities throughout the U.S.A. specifically prohibit discrimination based on gender identity.⁴⁰ The developments at the federal level are usually based on the sex-stereotyping theory articulated by the Supreme Court in the 1989 *Price Waterhouse v. Hopkins* judgment.⁴¹ In that case, the plaintiff, Ann Hopkins, was denied partnership at her accounting firm because she failed to conform to gender stereotypes of how women should look and act. Firm partners described her as "macho," noted that she "overcompensated for being a woman," recommended that she take "a course at charm school" and mentioned that she could improve her chances for

³⁵ Romina Bartolo, *Country Report/Gender Equality/Malta: How are EU rules transposed into national law?*, 2017, p. 9.

³⁶ Equality Tribunal, *Deirdre O'Byrne v. AIB*, DEC-S2013-015, 2 December 2013.

³⁷ Institut pour l'égalité des femmes et des hommes, *Une compagnie d'assurance condamnée pour avoir discriminé une personne transgenre*, 27 October 2016, http://igvm-iefh.belgium.be/sites/default/files/downloads/cp_trans_assurances.pdf.

³⁸ *Public Defender's Recommendation concerning Direct Discrimination on Grounds of Gender Identity*, 5 June 2017, available here: <http://www.ombudsman.ge/en/recommendations-Proposal/rekomendaciebi/public-defenders-recommendation-concerning-direct-discrimination-on-grounds-of-gender-identity.page>.

³⁹ See for example *Whitaker v. Kenosha Unified School District*, No. 16-3522 (7th Cir. 2017), concerning a school's decision to deny a trans male student access to the boys' washroom, or *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012), in which the federal Equal Employment Opportunity Commission held that the dismissal of a transgender ballistics technician by a federal agency constituted sex discrimination in the sense of Title VII of the Civil Rights Act 1964.

⁴⁰ Listed in American Civil Liberties Union, *Transgender People and the Law*, available here: https://www.aclu.org/sites/default/files/field_pdf_file/lgbttransbrochurelaw2015electronic.pdf.

⁴¹ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

partnership if she could “walk more femininely, talk more femininely, dress more femininely, have her hair styled, and wear jewelry.” The Supreme Court held that Title VII of the 1964 Civil Rights Act prohibited gender discrimination, which included sex stereotyping.

17. In **Canada**, a bill adopted in 2017 added gender identity and gender expression as protected grounds to the Human Rights Act, making it illegal to deny services, employment, accommodation and similar benefits to individuals based on their gender identity or gender expression within a federal regulated industry. The same bill also added to the Criminal Code provisions dealing with hate propaganda, incitement to genocide, and aggravating factors in sentencing.⁴² Most Canadian jurisdictions enacted legislation prohibiting discrimination and harassment in private and public sector employment, housing, public services and publicity on the basis of gender identity as well as gender expression.⁴³
18. One relevant case is *Sheridan v. Sanctuary Investments Ltd.* involving a trans woman who was in the initial stage of undergoing hormonal treatment at a time when genital surgery was still a pre-requisite for obtaining legal gender recognition.⁴⁴ She alleged that the bar she went to during one evening in 1995 asked her to stop using the women’s washroom or leave the premises. The British Columbia Human Rights Tribunal, hearing the case, noted that the bar’s policy had an adverse impact on trans persons transitioning, that the bar had a duty to accommodate trans people in general, and held that discrimination against a trans person constituted discrimination based on sex and disability. Notably, the Tribunal found that the respondent had not presented any evidence to establish that the use of women’s washrooms by a trans person interfered with the maintenance of public decency, notwithstanding the fact that some patrons were clearly unhappy with the situation.
19. Legal changes introduced in 2013 made it unlawful to discriminate against a person on the basis of gender identity and intersex status under federal **Australian** law.⁴⁵ Gender identity is defined as “the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person’s designated sex at birth.” The bill in question aimed to provide maximum protection for gender diverse people by including the way a person expresses or presents their gender and recognising that a person may not identify as either male or female, and by acknowledging that the discord between a person’s gender presentation and their identity was often the cause of the discrimination. All Australian jurisdictions have legislation in place that protects transgender people against discrimination although the personal scope tends to vary.⁴⁶

⁴² *An Act to amend the Canadian Human Rights Act and the Criminal Code* (Bill C-16, 2016)

⁴³ Nunavut, Yukon, British Columbia, Newfoundland and Labrador, Alberta, Quebec, Prince Edward Island, New Brunswick, Nova Scotia, Ontario. Legislation in the Northwest Territories, Manitoba and Saskatchewan only mentions gender identity.

⁴⁴ *Sheridan v. Sanctuary Investments*, 1999 BCHRT 4*.

⁴⁵ *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill Act 2013*.

⁴⁶ Alastair Lawrie, *A Quick Guide to Australian LGBTI Anti-Discrimination Laws*, 29 July 2017, available here: <https://alastairlawrie.net/2017/07/29/a-quick-guide-to-australian-lgbti-anti-discrimination-laws/>.

III. Cross dressing bans jurisprudence

20. Historically, laws ranging from cross-dressing bans to dress codes have been used to enforce acceptable gender norms. “Sumptuary laws” criminalising or otherwise banning cross-dressing were common in medieval Europe and Colonial America and have been exported to many countries around the world. In recent times, surviving cross-dressing bans were often challenged and struck down for being in breach of human rights standards. Courts would usually find such statutes to be impermissibly vague, that one’s choice of dress engaged their right to freedom of expression or personal autonomy, in addition to being considered an element of gender identity or gender expression as discussed above.
21. In the case of *City of Chicago v. Wilson*, involving two transgender defendants, the Supreme Court of Illinois found unconstitutional a law mandating gendered dress codes, based on privacy considerations.⁴⁷ The Illinois Court held that individuals had a “constitutional liberty interest” in their choice of appearance, connected to the values of privacy, self-identity, autonomy, and personal integrity. Conversely, the Superior Court of Massachusetts held in *Doe v. Yunits* that a teenager’s style of dress was a form of expressing gender identity. That case concerned a transgender girl who brought suit against her junior high school for repeatedly expelling her from class for wearing girls’ clothes.⁴⁸ The school argued that the presence of a boy wearing girls’ clothes disrupted the learning environment. The Court noted that the clothes themselves were not distracting and a female student would not have been disciplined for wearing them. Preventing the student from wearing certain clothes was therefore a suppression of protected speech.

IV. Access to justice for victims of discrimination in Turkey

22. In Turkish law, discrimination in different fields is prohibited in different regulations and seen as a violation of rights. However, in practice these prohibitions are not put into practice. Furthermore, the notion of “moral counter indications” is used frequently in the same or other legal regulations, while ‘sexual orientation’ and ‘gender identity’ are not explicitly protected in anti-discrimination law, leaving LGBTI people outside the scope of relevant legislation.
23. According to the Kaos GL report “Situation of Gay, Lesbian, Bisexual, Trans and Intersex Public Sector Employees in Turkey”, participants stated that some legislation was openly discriminatory. The general approach of Law No. 657 (regulating public employment) under the title of “immorality” created an element of oppression over the employees, often being used as a means of intimidation. Furthermore, lack of spouse-related support, family aid, access to employment and other legal practices related to employment also continued their existence as

⁴⁷ *City of Chicago v. Wilson*, Supreme Court of Illinois, 26 May 1978.

⁴⁸ *Doe v. Yunits et al.*, Superior Court of Massachusetts, 11 October 2000. Courts in Thailand and Malaysia among others employed similar arguments: *Teerarojjanapongs I and Champathong II v. The Governor of Chiang Mai Province*, Chiang Mai Administrative Court of Thailand, 5 February 2010 and *Khamis and Ors v State Government of Negeri Sembilan and Ors*, Court of Appeal/Malaysia, 7 November 2014.

direct legal discrimination. 40 per cent of those surveyed answered the question “Are there any open or covered rules or practices which cause discrimination based on sexual orientation or gender identity during appointment, promotion, removal from office and other similar processes?” with “Yes”.⁴⁹ When asked the question “Did you encounter any discrimination based on sexual orientation or gender identity against you personally at the workplace? How did it proceed?”, 26 (or 16 %) of 166 participants in a similar survey covering the private sector answered positively. Additionally, 82 participants stated that they did not disclose their identity for fear of being discriminated. In sum, 65% of participants were either discriminated or were closeted to prevent discrimination.⁵⁰

24. Article 122 of the Penal Code, which entered into force in 2004, introduced the first provision on discrimination in Turkish criminal law. That provision was amended on 2 March 2014, covering ‘discrimination and hatred’ as follows:

Hatred and Discrimination - 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, sex, 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.⁵¹

25. With this amendment, the notion of “hatred” was added in the title of the article; it was also added as a motivation in the content of the article; the range of prison sentences available was broadened; the option of replacing a prison sentence with an alternative punishment was removed; the option of replacing prison with fines was terminated. Notably, Article 122 provides for an exclusive list of protected grounds, which does not include ‘sexual orientation’ or ‘gender identity’. Nor is the ground of “sex” susceptible to being interpreted widely to cover “sexual orientation” or “gender identity,” as demonstrated by judicial practice and based on the law’s explanatory memorandum. In an isolated precedent, Istanbul 42nd Court of First Instance accepted that a transgender woman was discriminated when she had been denied access to a hammam.⁵² However, the court emphasized that the transgender woman had “changed her sexuality” 22 years ago, changed the sex as a woman in the state register and passed judgment based on the ground of sex in Article 122.

26. The European Commission against Racism and Intolerance (ECRI) has recently raised similar concerns, urging the Turkish Government to “include the grounds of [...] sexual orientation and gender identity among the prohibited grounds in Articles 122, 125 and 2016 and all other Criminal Code provisions aimed at combating racism and homo/transphobia” and “pro-

⁴⁹ http://www.kaosgildernegei.org/resim/yayin/dl/kamu_calisanlari_eng.pdf.

⁵⁰ http://www.kaosgildernegei.org/resim/yayin/dl/private_sector_2017.pdf.

⁵¹ Article 122, (Amended on 2 March 2014 – By Article 15 of the Law no. 6529) Penal Code of Turkey.

⁵² Decision 2015/19 of 29 January 2015.

vide explicitly that [...] homo/transphobic motivation constitutes an aggravating circumstance for any ordinary offence.”⁵³

27. According to the numeric data that Turkish Republic Ministry of Justice announced through General Directorate of Judicial Records and Statistics via its website, the number of cases opened on the grounds of the violation of Turkish Penal Code Article 122 and the population in same years⁵⁴ are as follows:

Year	Population	Number of Cases
2010	73722988	8
2011	74724269	13
2012	75627384	14
2013	76667864	14
2014	77695904	16
2015	78741053	13
2016	79814871	21

These numbers demonstrate that the State consciously prefers a ‘no policy’ choice apart from having any policy preventing the discrimination. On the other hand, it should be expressed in order not to mislead that numeric data given are the judgments within the motivations listed in the article. No judgments have been reported on the grounds of gender identity by institutions in Turkey, other than that forming the object of the case before this Court.

28. On the other hand, in the scope of the negotiations with European Union and as a result of civil society advocacy, the Human Rights and Equality Institution Act No. 6701 was published in the Official Gazette on 6 April 2016. The list of protected grounds provided for in Article 3 mirrors those in the Penal Code, once again excluding sexual orientation or gender identity. An equality body was supposed to be established under the Act, which however is still not fully functional, not having accepted any individual applications to date. Only one of the eleven members of the Equality Institution is a woman. Under recent constitutional changes, from 3 November 2019, the President of the Turkish Republic received exclusive powers to appoint the body’s members. Furthermore, it is not possible for the institution to have representatives from civil society, universities or bars.

⁵³ *ECRI report on Turkey* (fifth monitoring cycle), 29 June 2016 §11.

⁵⁴ See <http://www.adlisicil.adalet.gov.tr/adliarsiv.html> and http://www.tuik.gov.tr/PreIstatistikTablo.do?istab_id=1590.