

THE NEW CONSTITUTION OF TURKEY: A BLESSING OR A CURSE FOR LGBT CITIZENS?

Turkey has long been governed by constitutions prepared under the purview of military juntas. Promises of a new “civilian” constitution have given hope to different minority groups long suffering from either no recognition or misrecognition. The lesbian, gay, bisexual, and transgender (LGBT) community has been among the most afflicted minority groups in Turkey due to the lack of legal protection of their rights and liberties. In light of theoretical debates on LGBT equality and constitutions, this article offers insight into how support for LGBT equality emerged as a dividing line between the right and left sides of the political spectrum. The political dynamics that pose obstacles to the inclusion of a LGBT equality clause in the new constitution are also analyzed.

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Democracy can be minimally defined as a political system that allows the popular will to select the rulers through competitive elections and without using violence.¹ Democracies, in their minimalist form, do not necessarily provide guarantees for lives and liberties of minorities, especially for those against which majorities have strong prejudices. Bringing power into the analysis of democracy, it becomes clear that “democracy is about inclusion and exclusion, about access to power, about the privileges that go with inclusion and the penalties that accompany exclusion.”²

An overwhelming majority of democracies have constitutions that regulate the power dynamics between majorities and minorities, or the powerful and the weak, in one way or another. Though products of power dynamics themselves, constitutions, as basic laws of societies, do not necessarily reflect and legitimize pre-existing power imbalances in societies. They might also set goals for a better future. In line with the developments of international human rights laws and struggles of disadvantaged groups worldwide, many constitutions today include clauses aiming to provide legal protection for disadvantaged groups against various risks emerging from the economic system and/or social prejudices.

One of the major political demands of the lesbian, gay, bisexual, and transgender (LGBT) rights movement worldwide has been amending constitutions to decriminalize homosexuality, to protect LGBT individuals from all forms of discrimination, and to end the exclusion of LGBT individuals from public benefits.

Not all scholars agree with the idea that constitutions can (and should) include clauses that are not products of social consensus or are not mirror images of values of the majorities. Given the controversies over LGBT equality even in societies with liberal values, J. Harvie Wilkinson, a former U.S. judge, argues that demands for LGBT equality cannot be regarded as a constitutional issue, the fate of which should be left to normal democratic processes.³

Nevertheless, Wilkinson overlooks already existing power imbalances between the LGBT community, and homophobic, as well as transphobic majorities and institutions. Introduction of constitutional guarantees for lives and liberties of LGBT individuals will not (and has not in countries where it is introduced) give an end to political contestations over demands of LGBTs. What the introduction of constitutional

1 Adam Przeworski, “Minimalist Conception of Democracy: A Defense,” in Dahl et al. (eds.), *The Democracy Sourcebook* (Cambridge and London: The MIT Press, 2003), p. 12.

2 Donald L. Horowitz, “Democracy in Divided Societies,” *Journal of Democracy*, Vol. 4, No. 4 (October 1993), p. 18.

3 J. Harvie Wilkinson, “Gay Rights and American Constitutionalism: What’s a Constitution for?,” *Duke Law Journal*, Vol. 56, p. 580.

guarantees actually does, is to acknowledge members of the LGBT community as equal citizens that can take part in “normal democratic processes.” Without these constitutional guarantees, the LGBT community is left with only one option: to defend their lives and existence. In this worst scenario, the scene resembles the state of nature, rather than democratic politics between equal parties.

State of LGBT Issues in Turkey

Unlike many European countries, homosexuality and transgenderism has never been considered a crime in Turkish legislation. However, this should not imply that the society and social institutions in Turkey were tolerant towards LGBTs in late Ottoman and Republican periods.

LGBT’s were not mentioned in Turkish law until 1980. In a sense, they were “invisible”. The first examples of clauses concerning LGBTs in Turkish law appeared after the *coup d’état* of 12 September in 1980. In 1981, the military junta issued a memorandum prohibiting “the employment of men wearing female clothing in pubs and night clubs,”⁴ which led to the banning of the famous trans woman singer Bülent Ersoy from taking stage in nightclubs and TV shows.

In late 1988, after the transfer of political power to civilians, Turkish law recognized sex reassignment and transgenderism, though as a psychological problem.⁵ Despite its openly discriminatory conceptualization, this amendment enabled trans individuals to undergo sex reassignment operations (if they chose), change their official records and get married to someone of the opposite sex. On the other hand, this amendment also left no room for transgendered people to be recognized by the law without undergoing sex reassignment operations.

Homosexuality is only visible in the Health Competence Regulation of Turkish Armed Forces that considers homosexuality (in addition to transgenderism) as a

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4 “Bülent Ersoy’un 12 Eylül’deki Hukuk Savaşı,” [Legal War of Bülent Ersoy on September 12th], *NTVMSNBC*, 27 February 2008, <http://arsiv.ntvmsnbc.com/news/437238.asp>

5 Republic of Turkey, “Article 2,” in *743 Sayılı Türk Medeni Kanunu’nun Bazı Maddelerinin ve 818 Sayılı Borçlar Kanunu’nun 49. Maddesinin Değiştirilmesine İlişkin Kanun*, [Law on the Amendment of Turkish Civil Code No. 743 and 49th Article of Turkish Code of Obligations no. 818], Law no. 3444, 4 May 1988.

psychosocial disorder.⁶ However, the medicalization of state's discourse towards homosexuality did not result in the enforcement of "treatment" practices for lesbians, gays and bisexuals so far.

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Some legal phrases are interpreted so as to exclude LGBTs from public service, despite the fact that they do not openly pronounce homosexuality and transgenderism. For instance, the Law on the Promotion and Punishment of Primary and Secondary School Teachers suggests that "unchastities" of a teacher in and out of work is sufficient for his/her dismissal from work.⁷ While homosexuality and transgenderism are not openly addressed in this legislation, there are cases on which judges interpreted

alleged homosexuality of a teacher as "unchastity" and decided to dismiss this teacher.⁸ Therefore, despite the lack of overall criminalization of homosexuality and transgenderism in Turkish law and state-led "witch hunts" of LGBTs as a group in some European countries in the past, interpreters of Turkish law sometimes moved one step forward and treated homosexuality and transgenderism as one's choice that deserves a punishment (i.e. in the form of dismissal from public services).

Likewise, Turkish society's overall attitudes towards LGBT individuals can hardly be considered tolerant. A recent research demonstrates that the overwhelming majority of Turkish society seems to support the criminalization of homosexuality with the exception of roughly 11 percent that are against it.⁹ According to another survey, around 81 percent of Turkish society expressed negative views regarding the possibility of their children being gay.¹⁰ Despite the presence of strong prejudices against LGBTs, neither constitutional nor legal protections for lives and liberties are available for LGBT individuals.

6 Turkish Military Forces, "Article 17," in *Türk Silahlı Kuvvetleri Sağlık Yeteneği Yönetmeliği Hastalıklar ve Arızalar Listesi*, [Turkish Military Forces Bylaw on Health Competency, List of Illnesses and Disorders], Decision of the Council of Ministers, 8 October 1986.

7 Republic of Turkey, "Article 27," in *İlk ve Orta Tedrisat Muallimlerinin Terfi ve Tecziyeleri Hakkında Kanun*, [Law on the Promotion and Punishment of Primary and Secondary School Teachers], 10 June 1930.

8 Ezgi Başaran, "Eşcinsel İlahiyatçı Sınıfını Geri İstiyor," [Gay Religion Teacher Wants His Class Back], *Radikal*, 5 December 2010.

9 Volkan Yılmaz, "LGBT Meselesinde Siyasi Tehditler ve Olanaklar," [Political Threats and Opportunities regarding the LGBT Issue], *Bianet*, 21 July 2012.

10 Volkan Yılmaz, "Cinsel ve Siyasal Eğilim," [Sexual and Political Disposition], *Radikal* 2, 13 May 2012.

The LGBT struggle for equality in Turkey became visible in the 1990s and gained momentum in the 2000s. The movement established itself as a collection of LGBT rights associations after legislative changes were made in the Law on Associations as a part of the European Union accession process in the first half of the 2000s. There are now six legal LGBT associations in Turkey: Lambda İstanbul, Kaos GL, İstanbul LGBTT, Pembe Hayat, Siyah Pembe Üçgen, and SPoD. Pride marches have taken place in İstanbul annually since 2005. Since its birth, the LGBT rights movement has worked for, and succeeded to make its cause a part of a broader human rights agenda, which is shared by the overwhelming majority of rights-based NGOs and social movements. However, LGBTs still lack legal recognition, and discrimination in different policy domains including employment, housing, education, social services, and social security against LGBT individuals is rampant.¹¹

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The rise of the LGBT rights movement ironically coincided with the strengthening of conservative politics in Turkish political scene. Formerly excluded from the mainstream politics in Turkey, representatives of political Islam under the newly established Justice and Development Party (AKP) in the first half of 2000s seemed to be willing to cooperate with European institutions and human rights movements in Turkey to further democratization and extend rights and liberties. For this reason, despite the apparent ideological disharmony between the LGBT rights movement, which is positioned on the left of the political spectrum in Turkey, and the conservative ideology of the governing party, the LGBT rights movement stayed away from discourses that might make the political representatives of the conservatives, as the scapegoats of rampant homophobia and transphobia. Since, for many LGBT rights activists in early 2000s, the AKP was not the major obstacle against LGBT equality.

The AKP’s second term wrecked the hopes of many. Selma Aliye Kavaf, then Turkish Minister of State responsible for Women and Family Affairs, publicly stated that homosexuality is a disease and needs to be cured.¹² This statement not only led to a change in the LGBT rights movement’s attitude towards the AKP from being neutral to openly dissenting, but also symbolized a rupture between conservative

11 Volkan Yılmaz and Sinan Birdal, “LGBT Rights in Turkey: The Long Road to Tolerance,” *e-International Relations*, 14 December 2012, <http://www.e-ir.info/2012/12/14/lgbt-rights-in-turkey-the-long-road-to-tolerance/>

12 Selma Aliye Kavaf, “Eşcinsellik Hastalık, Tedavi Edilmeli,” [Homosexuality is a Disease and it should be Cured] *Hürriyet*, 7 March 2010, <http://www.hurriyet.com.tr/pazar/14031207.asp>

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and secular human rights activists in Turkey, when, especially after the controversial statement by the Minister, the former took sides with the government and the latter took sides with the LGBT rights movement. The AKP’s negative attitude towards LGBT equality were evidenced as the government refused to make any references to sexual orientation and gender identity in newly adopted legislations in 2012, concerning domestic violence and the establishment of the Human Rights Institution.¹³ In the legislation on domestic violence, the government restricted the scope of legal protection from domestic violence

to married heterosexual couples only. The second legislation resulted in the establishment of Human Rights Institution that is financially and administratively dependent upon the government. In addition, the founding law of the Institution does not openly define discrimination on the basis of sexual orientation and gender identity within the Institution’s area of responsibility.

New Constitution is on the Agenda

Turkey has long been suffering from militaristic constitutions restricting rights and freedoms of citizens. Promise of a new –and first– “civilian” constitution has given hope to different minority groups as well as the disadvantaged people that have long suffered from legal, and day-to-day exclusion.

A majority of political parties called for a new civilian constitution during their campaigns for the general elections that took place on 12 June 2011. The AKP secured almost half of the votes in this election, symbolizing a historic victory by maintaining power in three consecutive terms with increasing its votes each time. From another angle, given Turkey’s majoritarian political system with a strong executive and without powerful checks and balances mechanisms, the AKP’s rise to power for the third period might be regarded as alarming news for ethnic and lifestyle minorities. Independent candidates of the Peace and Democracy Party (BDP) gained the majority of votes in seven provinces of mostly Kurdish populated region

13 SPoD, Kaos GL and IGLHRC, “Human Rights Violations of Lesbian, Gay, Bisexual and Transgender (LGBT) People in Turkey: A Shadow Report,” Submitted to the 106th Session of the Human Rights Committee of the United Nations, 15 October 2012, pp. 4-5.

of Turkey. In addition, Republican People's Party (CHP) received the majority of votes of secularists.¹⁴

Prime Minister Erdoğan's victory speech in June 2011 was not polarizing. Erdoğan interpreted the results as the indication of a popular support for the new constitution. He declared that the constitution would be a product of a participatory political process and that the AKP would collaborate with all political parties in the Parliament and work with non-governmental organizations throughout the constitution drafting process. In Erdoğan's words, Turkey's new constitution would "meet the demands of each and every citizen for liberty, democracy, justice, and peace."¹⁵

Following the general elections, political parties in the Parliament reached an agreement on establishing a Parliamentary Commission on the new constitution within which, equal numbers of MPs from all political parties would be represented. The Commission started to collect views of the citizenry as well as the organized political interest groups on drafting the new constitution. In order to avoid polarization of citizens and MPs throughout the process, the Commission decided to close its meetings to media representatives and non-authorized participants. In addition, members of the Commission agreed to use the

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principle of unanimity in making decisions. The deadline set for the finalization of the Commission's work on the new constitution was the end of 2012.

Members of the Commission engaged in a laborious process of preparing a constitutional draft without sacrificing the principle of unanimity. Collaborative work of these MPs has been slowly progressing, yet symbolized a real opportunity in finding a common ground for the deeply divided Turkish society to live together in peace and solidarity.

14 "KONDA Barometresi 4. Ara Rapor," [4th Interim Report of KONDA's Barometer], *KONDA*, July 2011, http://www.konda.com.tr/tr/raporlar/2011_06_KONDA_Barometre_4_Aylik_Rapor_Secim_Analizi.pdf

15 "Başbakan'dan Üçüncü Balkon Konuşması," [Third 'Balcony Speech' by the Prime Minister], *Hürriyet*, 13 June 2011, <http://www.hurriyet.com.tr/gundem/18015912.asp>

The LGBT Rights Movement as an Actor

Recognizing the new civilian constitution making process as an opportunity to create a more democratic, egalitarian, and libertarian Turkey, the LGBT rights movement showed its willingness to take part in the process as a constructive party. The LGBT rights movement was among the most visible political actors, with three leading LGBT organizations –Kaos GL, Pembe Hayat, and SPoD– actively participating in the process. They issued their carefully worded demands for the new constitution.¹⁶ All three organizations demanded that the new constitution recognize LGBT individuals as equal citizens of Turkey, be based upon international human rights principles, individual rights and freedoms, aim at full realization of gender equality, guarantee the right to privacy, and not include articles referring to vague expressions such as “public morality” that were formerly used to restrict the rights and freedoms of LGBT citizens.

Kaos GL organized a postcard sending campaign aimed at drawing the attention of MPs to the demands of LGBT citizens from the new constitution. SPoD collected views of LGBT individuals on the new constitution by organizing forums in different metropolitan cities and conducting a survey. As a result, SPoD issued a report on LGBT individuals’ demands from the new constitution generally supporting the already announced views of LGBT organizations.¹⁷ Meanwhile, representatives of LGBT organizations visited the Parliament and met with MPs from different political parties in order to inform them about the importance of the recognition of LGBT individuals as equal citizens in the new constitution.¹⁸ Finally, Lambda Istanbul and SPoD activists organized the annual Pride Marches in Istanbul which succeeded in gathering thousands of LGBT individuals carrying banners calling for LGBT equality in the new constitution.

Nevertheless, neither strong presence of LGBT rights movement throughout the process nor recommendations of EU officials to integrate LGBT demands into the new constitution convinced the governing party. Representatives of both the AKP

16 Pembe Hayat Derneği, “Eşcinsel, Biseksüel ve Trans Bireylerin Hakları Anayasal Güvence Altına Alınmalıdır,” [Rights of the Homosexual, Bisexual and Transgender Individuals Should be Constitutionally Protected], *Kaos GL*, 2 January 2012, <http://kaosgl.org/sayfa.php?id=10256>; “10. Maddeye Ek: LGBT Realitesi Tanınsın,” [Additions into Article 10: LGBT Reality Should be Recognized], *Kaos GL*, 28 December 2011, <http://kaosgl.org/sayfa.php?id=10216>; SPoD, “Yeni Anayasa Yapım Süreci ve İçeriğine Dair Görüşler,” [New Constitution Making Process and Views Regarding its Content], *SPoD*, 16 December 2011, <http://www.spod.org.tr/turkce/yeni-anayasa-yapim-sureci-ve-iceri-gine-dair-gorusler/>

17 *LGBT Yurttaşların Yeni Anayasaya Yönelik Talepleri*, [LGBT Citizen’s Demands from the New Constitution] (Istanbul: SPoD Anayasa Çalışma Grubu, 2012).

18 Mehmet Tarhan, “SPoD ve LİSTAG Heyeti TBMM’de,” [SPoD and LISTAG Committee in the TBMM], *SPoD*, 27 June 2012, <http://www.spod.org.tr/turkce/spod-ve-listag-heyeti-tbmmde/>

and the Nationalist Movement Party (MHP) expressed that they are against any constitutional changes that might imply the recognition of LGBT citizens in the new constitution.¹⁹ Furthermore other political parties of political Islam such as the Felicity Party (SP) and non-governmental organizations such as the Organization of Human Rights and Solidarity for Oppressed People took a common stance against the recognition of LGBT equality in the new constitution and supported the governing party. The youth section of the SP took one step further and organized a march calling for the criminalization of homosexuality and consensual sex outside of marriage, in the new constitution.²⁰

But still, the glass is half full. The LGBT rights movement succeeded in extending its political alliance with the left side of the political spectrum. As a result of the deepening collaboration between the BDP of the Kurdish movement and the LGBT rights movement, BDP representatives openly voiced the demands of LGBT rights movement, and called for the recognition of LGBT individuals as equal citizens. LGBT rights movement managed to broaden

its political alliance that now includes the center-left CHP, which is currently the largest opposition party in the Parliament. Hence CHP's supportive stance toward LGBT equality prevented the marginalization of the demands of LGBT rights movement during the new constitution making process.

CHP's increasing interest in LGBT equality can be attributed to the success of the LGBT rights movement in making its case, as well as the changes in the leading cadre of the party promising to transform it into a European-style social democratic party, and pursuing a quest to broaden the anti-AKP (anti-conservative) political alliance.

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19 “AKP ve MHP Anayasadaki ‘Eşitlik’ Maddesine ‘Cinsel Yönelim’ Eklenmesine Karşı Çıktı,” [AKP and MHP Have Objected to the Attachment of “Sexual Orientation” into the “Equality” Article in the Constitution], *Kaos GL*, 21 May 2012, <http://www.kaosgl.com/sayfa.php?id=11400> ; “Anayasa ‘Eşcinsel Haklarına’ Takıldı,” [The Constitution is Stuck on “Homosexual Rights”], *NTVMSNBC*, 21 May 2012, <http://www.ntvmsnbc.com/id/25351064/>

20 “Saadet Partililer, Yeni Anayasada Eşcinselliğin Suç Sayılmasını İstediler,” [Felicity Party Members Called for the Criminalization of Homosexuality in the New Constitution], *Haberler.com*, 19 May 2012, <http://www.haberler.com/saadet-partililer-yeni-anayasada-escinselligin-suc-3637308-haberi/>

Development of a New Constitution in the Shadow of Majoritarianism

The Parliamentary Commission continues to draft the new constitution that appears to be paving the way for significant changes in Turkey's political system. This process will determine whether the regime will be parliamentary or presidential, what the scope of decentralization will be, and through which institutional channels civil rights will be protected.

Unfortunately hopes of human rights activists for the new constitution to be libertarian and egalitarian are nearly lost. The views submitted to the Commission, 64.000 citizens and 440 NGOs were ignored, and activists have increasingly felt excluded from the process.²¹

The governing party is pressuring the opposition parties to consent to the introduction of a presidential system as a part of the new constitution. If they do not, the AKP threatens them with the option of holding a referendum on its own constitutional draft. The AKPs' method of approving the new constitution by referendum as a trump card *vis-à-vis* the opposition seems to be evidencing political scientist Arend Lijphart's concern that constitutional referendum might be used as "a blunt majoritarian instrument that may well be used against minorities."²² Representatives of the opposition parties should not leave the table, as this would provide an opportunity for the AKP to pursue the referendum track.

These developments imply that while the new constitution continues to develop, it is doing so in the shade of the government's demand for an even stronger majoritarian political system. In her work on how LGBT equality became part of the post-apartheid South-African constitution, sociologist Jacklyn Cock writes: "Fortunately, the dominant notion of democracy was rooted in a conception of rights rather than a simple majoritarianism."²³ Unfortunately, the opposite is true for the Turkish case. In this context, it is highly unlikely for the new constitution to include a clause on LGBT equality. In near future, it is clear that the success of LGBT rights movement in promoting LGBT equality in Turkey, definitely shares the same fate with the electoral success of the political parties on the left side of the spectrum.

21 Kentel et al., "Yeni Anayasa Sürecini İzleme Raporu II Şubat 2012-Haziran 2012, [Monitoring Report on the New Constitution Process II February 2012-June 2012], *Türkiye Ekonomik ve Sosyal Etüdler Vakfı Demokratikleşme Programı*, [The Turkish Economic and Social Studies Foundation Democratization Program], 2012, p. 6.

22 Arend Lijphart, "Constitutional Design for Divided Societies," *Journal of Democracy*, Vol.15, No.2 (April 2004), p. 106.

23 Jacklyn Cock, "Engendering Gay and Lesbian Rights: The Equality Clause in the South African Constitution," *Women's Studies International Forum*, Vol.26, No.1, p. 38.