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## National Report: Turkey

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# NATIONAL REPORT: TURKEY

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**1. Legal framework: Please briefly explain the legal system used in your country. Include information about the type of Constitution (written; unwritten; modifiable by a Constitutional Tribunal, by Supreme Court decisions, by Congress only; etc.) Please do not use more than one page to provide your legal framework.**

The Republic of Turkey is a country which follows the civil law tradition. Accordingly, the primary feature of the Turkish legal system is that laws are written as comprehensive codes.

Turkey has a written Constitution which regulates the basic rights and freedoms of the citizens as well as the administrative order. The current Constitution of Turkey was ratified in 1982, however it has been amended many times over the past twenty-eight years. Currently, a draft Constitution is on the agenda of the Turkish Parliament and the debate resulted with a referendum which will be held on 12 September 2010. The Constitutional Court was established under the 1961 Constitution and its basic function is to examine the constitutionality, in both form and substance, and to determine the compliance of each rule with the Constitutional values. Turkish citizens do not have direct access to the Constitutional Court. However, the judges of both the first instance courts and the Court of Cassation may convey the issue of unconstitutionality of the dispute either by their own discretion or upon the claims of the parties.

Like the Constitution, codified rules are applied in Turkey whereas the Turkish Civil Code regulates the matters related to personality, family law, property law and inheritance law; the Code of Obligations, which is organically linked to the Turkish Civil Code, regulates mainly contract law, the law of torts, unjust enrichment and special contract types; the Turkish Civil Procedure Code regulates the procedural law to be followed by the civil courts.

The Court of Cassation is the last instance for reviewing rulings and judgments rendered by first instance courts of civil and criminal law and

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the examination courts. The Court of Cassation reviews the judgments upon appeal. The judgments of the Court of Cassation are taken as precedents for legal rulings in the first instance courts. Despite the fact that judicial precedents are not considered as the primary source of law, the first instance courts have the tendency to follow the case law of the Court of Cassation.

**2. Constitutional regulations applicable to same-sex partnerships. Please be specific about the constitutional guarantees in your country that conflict/support same-sex marriage and those that can conflict/support same-sex unions in a format different than marriage. Explain each case.**

In the Turkish Constitution, there is no provision which could be applicable to same-sex partnerships. Moreover, there are not any provisions in the Turkish Constitution regarding discrimination against sexual orientation or sexual identity. Turkey has signed Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms on 18, April, 2001. However, the Protocol has not been ratified yet.

Article 41 of the Turkish Constitution stipulates the “Protection of the Family” under the social and economic rights and duties. In this article, it is emphasized that the family is the foundation of Turkish society and the state shall take the necessary measures and establish the necessary organization to ensure the peace and welfare of the family, especially where the protection of the mother and children is involved. Accordingly, it is apparent that the family, as the basic foundation of Turkish society, and marriage, as the legitimization of the family, are of special importance under the constitutional law of Turkey.

Also, it should be emphasized that, contrary to many other legal systems with a similar social background, Turkey has never regulated “homosexuality” as a crime.

Under Turkish law, only the legal status of the transgender population has been regulated and this is a relatively new regulation since prior to 1988, there was not any legal parameter regarding the transgender population. However, in 1988, the Turkish Civil Code was amended in order to give the people who had already undergone sex reassignment surgery the possibility to enter the sex change in the official register. Currently, the legal status of the transgender people is regulated under Article 40 of the Turkish Civil Code of 2002 and, accordingly, the pre-conditions for surgery, the procedure for getting a court authorization for surgery, and the procedure for entering the sex change into the official register after the operation, are regulated. Consequently, the marital status

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of the person who request surgery authorization should be single; married people do not have the right to undergo sex reassignment surgery. However, there is a legal loophole regarding the consequences of such surgery in case the person is married. It is accepted by doctrine that the marriage of same-sex couples is contrary to morality and public order.

**3. Legal statutes: Does your country have a specific law allowing same-sex marriage? If yes, please give exact information about such law, its place among the authoritative sources of law and relevant information about its history.**

No. Under Turkish law, marriage is a union which can only be established between a man and a woman. The Turkish Civil Code does not clearly indicate that a marriage can only be established between a man and a woman. However, it is deduced from the wording of the Turkish Civil Code that a marriage could only be established between a man and a woman (Article 124, 134, and 136 of the Turkish Civil Code). Likewise, article 2 of the Marriage Regulation describes marriage as “a legal contract concluded between a man and a woman with the intention to establish a family before [an] authorized marriage officer in the required procedure.” This definition is as well supported in Turkish legal doctrine.

Furthermore, the fact that marriage could only be established between a man and a woman is considered to be the constituent element of marriage in Turkey. The consequence of absence of this constituent element is nullity. In other words, even if a same-sex couple gets married before the authorized officer in the required procedure, their marriage is considered to be non-existent since they are of the same sex. Therefore, such marriage will not bear any consequences.

**4. If your country regulates same sex marriage, is there any formal difference in the treatment between different sex and same-sex marriages? In other words, does the law that regulates same-sex marriage provide grounds for any differential treatment? What are those formal differences?**

Not applicable.

**5. If your country does not have a same-sex marriage regulation. Please specify if your country has some sort of civil union regulation. If so, please specify the statute, its place among the authoritative sources of law, and the conditions for entering into a civil union.**

Under Turkish law, there is no regulation for civil unions and/or registered partnerships. The only union types which are legally accepted by the Turkish Civil Code are “engagement” and “marriage.” These are

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counted as *numerus clausus*. Accordingly, the parties do not have any discretion to freely create new types of legal unions which have not been set forth in the Civil Code. It must also be stated that engagement is not a registered relationship, whereas marriage is a registered relationship.

The Turkish legislature has a clear preference of not regulating civil unions but only regulating marriage as the sole type of registered civil union. Thus, it is not possible to apply the consequences of marriage to civil unions by analogy. Neither heterosexual couples nor same-sex couples may establish any other unions than marriage and engagement under Turkish law.

**6. If your country has a civil union regulation, please specify if this is open to heterosexual couples or only to same-sex couples.**

As stated above, there is no applicable law regarding same-sex marriages or same-sex civil unions in Turkey. Consequently, the only possible way for same-sex couples is to establish a de facto union, namely cohabitation outside marriage, which does not provide any legal consequences under Turkish family law.

**7. If the civil union statute is open to heterosexual and same-sex couples, please specify if there is any formal differential treatment between both types of couples within such legal framework.**

Not applicable.

**8. If your country does not have a specific regulation on same-sex partnerships, please indicate if there are other legal statutes that specifically recognize same sex partners for specific purposes, i.e.: domestic violence act, inheritance rights act, adoption laws, etc.**

There are no codifications in Turkey which specifically recognize same-sex partnerships for any specific purposes. Despite this fact, some regulations may be applicable in order to protect same-sex couples. In that sense, we assume that it can be possible for Turkish courts to apply the Domestic Violence Act dated 14, January, 1998 and numbered 4320 for same-sex cohabitants.

The Domestic Violence Act sets forth in Article 1 that its aim is to protect spouses, children and other family members living together. Obviously, the concept of family under Turkish law is related to marriage between a man and a woman. Even though same-sex cohabitation does not constitute a family under Turkish law, the courts may still interpret Article 1 in a broad way. Such interpretation shall be in compliance with the *ratio legis* of the Act, which is to protect people who live together and share their lives. Parallel to this view, there are examples of first instance judgments

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(such as Kadıköy Family Court dated 1, March, 2005) in favor of the application of the Domestic Violence Act for heterosexual couples who live together by concluding a religious wedding (“Muslim marriage”) which is, in fact, not equal to the marriage solemnized officially, thus it does not provide any rights and obligations under Turkish family law. Regarding this judgment, it could be possible for the courts to apply the protection measures provided in the Domestic Violence Act to same-sex couples living together.

**9. Is your country discussing future regulation on same-sex marriage? If so, please explain the type of regulation being proposed, at what level (constitutional, legislative, administrative, etc.), in what stage the discussion is at present, what are the chances of being passed and when.**

Currently, there are not any discussions in Turkey for a future regulation considering same-sex couples. However, in 2007, intense campaigns were organized by Platforms for the Rights of the Lesbian, Gay, Bisexual, Travesty and Transsexuals. Their basic claim was the amendment of the Constitution and including provisions regarding discrimination against sexual orientation and sexual identity. Despite all of these campaigns, such amendment is disregarded in the Draft Constitution, which will be voted on in the referendum of 12 September 2010.

According to a public opinion research held in Turkey in 2003, only 16% of the Turkish population is of the view that same-sex marriages should be regulated while the 79% of the Turkish population disagrees with such regulations. (For further information, please see: “Public Opinion and same-sex unions,” <http://www.ilga-europe-org/europe/issues/marriage> and partnership). Besides the idea of same-sex marriages, even same-sex couples or declarations of sexual orientation or sexual identity are not welcomed by the Turkish society.

In the past few years, the social visibility of the homosexual and transsexual population increased in Turkey. Despite this fact, the majority of the Turkish population still considers these people as “sick.” Moreover, the homosexual and transsexual populations in Turkey are facing discrimination and severe invasions of their privacy, freedom of speech, right to association and organization due to their sexual orientation and sexual identity.

In this regard, the decision given by Seventh Civil Chamber of the Court of Cassation, dated 25, December, 2008 and numbered 4109/5196, regarding the Lambda Istanbul LGBT Association which rejected the decision given by the first instance court is very important. The court of first instance (Beyoğlu Third Civil Court decision dated 29, May, 2008,

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and numbered 190/236) has rendered that the LAMBDA Istanbul is an association which has a structure which is not approved by society and contrary to the morality, and the activities of the association are a threat against Article 41 of the Turkish Constitution which protects the family and children and article 58 of the Turkish Constitution which stipulates the rights and freedoms of the youth.

In Turkey, where the basic rights and freedoms of the homosexual and transsexual populations are violated, it seems rather impossible to believe that the legal status of same-sex partnerships will be legally accepted. As a matter of fact, social and moral structure in Turkey is inconvenient for legitimization of same-sex partnerships. In an opposing view for the decision given in 1999 by the General Assembly of the Court of Cassation, it is emphasized that the relationship of a same-sex couple, which shares a mutual life like a family, should be considered as a “mistress life” and it should not be protected by the Turkish legal system since it is a relationship which is contrary to the moral values of Turkish society and morality. (The decision of the General Assembly of the Court of Cassation is dated 26, May, 1999 and numbered 9-307/467).

**10. Is your country discussing future regulation on same-sex unions in a format different than marriage? If so, please explain the type of regulation being proposed, at what level (constitutional, legislative, administrative, etc.), in what stage the discussion is at, what are the chances of being passed, and when.**

Currently, there is no discussion in Turkey for a future regulation considering same-sex couples.

**11. Non-legislative regulations: does your country provide specific benefits/rights to same-sex couples via administrative acts? i.e.: death pension for the surviving partner; hospital visitations or the right to make decisions when one of the partners is incapacitated to make them. Please provide details.**

Since there is no legislative regulation in Turkey which is applicable to same-sex couples, it has been argued that civil unions of same-sex couples could be considered an engagement, and thus, the consequences of the engagement shall be applied to civil unions of same-sex couples. However, engagement is also regulated as a legal relationship between a man and a woman who have the mutual intention to get married. As it is not possible for same-sex couples to get married in Turkey, it is not possible for them to be engaged since the constituent element is missing in such relations.

As explained above, Turkish family law does not grant any legal protection for same-sex couples. However, the consequences that could be

applied to same-sex partnerships are not limited to family law. The partners can arrange their legal relations by means of contracts since the freedom of contract is one of the main principles of the Turkish Code of Obligations. Thus, the same-sex cohabitants are free to conclude contracts, for instance, to arrange for the distribution of their property in cases of death or separation. Consequently, an alternative way to protect same-sex cohabitants may be established under Turkish contract and property law.

On the other hand, in such a case, the issue whether these contracts constitute illegality or not, is to be discussed. According to Articles 19 and 20 of the Turkish Law of Obligations, the subject matter of a legal transaction shall not be contrary to the mandatory rules, public order, morality and rights of personality, and shall not be impossible to execute. Such transactions are considered to be void and null. Moreover, in a case where the subject matter is given to the other party for a purpose which is contrary to the mandatory rules, public order or morality, it could not be compensated in accordance with restitution rules.

The notion of morality is very broad. Thus, the Turkish courts should broaden the lines of the concept of morality in order to assemble a common understanding. The Court of Cassation has rendered, in its numerous decisions regarding heterosexual couples, that established, *de facto* unions should be considered contrary to morality and any contracts made accordingly should be considered void and null (for instance, the judgment of the Thirteenth Civil Chamber of the Court of Cassation dated 24, April, 2006, and numbered 355/6349). Accordingly, it is obvious that Turkish courts would certainly consider null and void any contracts concluded between same-sex partners regarding their *de facto* unions. However, we are of the view that the notion of morality should be narrowly interpreted. Thus, only contracts concluded with the purpose of imposing on the personal rights and free will of the other party and thus forcing the party to make a commitment should be considered contrary to morality; for instance, if the purpose of the contract is to force the other party into a sexual affair.

Lastly, dissolution provisions of the ordinary partnership pursuant to Article 538 *et seq.* of the Turkish Code of Obligations could be applied by analogy to *de facto* unions of the same sex in order to establish a solution. However, such provisions may only be applied if the parties get separated, but not in case of death.

One other provision that obviously could be applied to same-sex partners is the right to damages for the loss of support. It is regulated under the Turkish Code of Obligations in Article 45; that in the case of death, persons such as family members, whom the deceased maintained or would have maintained if death had not occurred, are treated as having suffered

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recoverable damaged to the extent of the loss of that support. Under Turkish law, the claim for indemnity for the loss of support is not limited to the family members of the deceased. This indemnity could be claimed by any person whom the deceased maintained or would have maintained if death had not occurred. Therefore, even though same-sex partners are not considered to be family members under Turkish law, they still have the right to indemnity for the loss of support in accordance with tort law.

The adoption of children for same-sex couples is not possible since, under Turkish Civil Code, children may only be adopted together by a married man and woman. However, same-sex couples may apply for the option of adopting children as a single parent. However, in such case when one of the partners adopts a child, the other partner may not have any rights and obligations, including parental rights, over the child and the child may not be a legal inheritor of the other partner. The sexual orientation or identity of a person may not be a reason for rejecting the application for adoption of a single parent since the adoption application is only examined for the benefits of the children. Turkey, as a country that has signed the 1989 United Nations Convention on the Rights of the Child, has undertaken not sexually discriminate in issues related to children. Sexual orientation or sexual identity shall be considered within the scope of this Convention.

However, regarding the general approach of Turkish courts on the relation between the child and homosexual parents, the adoption of children by a single homosexual parent shall be a tough process. A court decision given in 1982 exposes the approach of the Turkish courts to the parental rights of homosexuals. (Decision of the Second Civil Chamber of the Court of Cassation dated 21, June, 1982, and numbered 5077/5531). The court of first instance rendered the divorce of a married couple since the mother was lesbian; however, the parental right of the couple's child was given to the mother. The Court of Cassation examined the case with regard to the parental right of the mother and rendered that the parental right given to the lesbian mother may affect the future of the child; thus, the parental right shall be taken from the mother and given to the father. In its reasoning, the Court of Cassation stated, "homosexuality is a habit which is equal to a sickness and could not be accepted by the society." However, the court, in its decision, disregarded the child's benefit of living with the mother.

Lastly, it should also be stated that in-vitro fertilization is a right only given to married couples in Turkey. Also, sperm-egg donations and surrogacy are forbidden. Therefore, same-sex couples do not have the opportunity to benefit from such reproduction methods in Turkey.

## **12. Judicial construction of the law: Are there any relevant decisions in**

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**your country that had or may have future impact in the legal construction of same-sex marriage or in the legal recognition of same-sex unions/partnerships? Please provide the date and name of the case, and briefly explain the case and its relevancy for this topic.**

In a judgment regarding the violation of personal rights via mass media, the Fourth Civil Chamber of the Court of Cassation has rendered a rather unique approach; while it emphasized in the decision that, in the member countries of the European Council, there are legal regulations which provide equal civil and social rights to same-sex and heterosexual couples and that discrimination against sexual orientation is on the agenda of the European Parliament —these countries have provided legal protection to the LGBT. (Decision dated 22, February, 2000 and numbered 10478/1598).

**13. Additional comments: Please feel free to include additional comments on the topic that you consider relevant to the specific situation of your country.**

The current Turkish Civil Code of 2002 constitutes an important recognition of fundamental social change. Major amendments include provisions establishing equality of spouses in the family, removing the designation of the husband as head of the household, recognizing equal inheritance rights to children born out of wedlock, recognizing adopted children as equal family members, and replacing the previous separation of property regime for marital assets with the default regime, which accords the spouses equal shares in property acquired during the marriage. Even with this fundamental social change, Turkey has disregarded same-sex couples. Moreover, Turkey, as a country currently discussing a new draft Constitution, continues to disregard sexual orientation and sexual identity and the possible consequences.

On the other hand, Turkey cannot disregard these issues forever since there are an increasing number of countries which recognize and regulate same-sex partnerships as marriages or registered partnerships. Such global changes shall make the Turkish legal system and Turkish courts face these issues as a problem of international private law and the issue of same-sex marriage will be brought before the Turkish courts as a matter of recognition. Even in such case, Turkish courts may raise the issue of public order for the application of foreign competent law or for the recognition and execution of foreign judgments. Furthermore, Turkey, as a European Union candidate country, could not be isolated from the current developments in modern legal systems on same-sex marriage and registered partnerships.

In this framework, the issues regarding the basic rights and freedoms of the LGBT society should be resolved in Turkey, and then, the marital status

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of same sex partnerships shall be legitimized. Hopefully, the changes in the social structure and the developments in the area of human rights will lead the Turkish lawmaker to regulate the relations of same-sex partners.