



ADF INTERNATIONAL

Working Session 14: Tolerance and non-discrimination II, including ensuring equal opportunity for women and men in all spheres in life, including through implementation of the OSCE Action Plan for the Promotion of Gender Equality

*Submissions and Recommendations of ADF International
ODIHR-OSCE: 2016 Human Dimension Implementation Meeting
Warsaw, Poland: 28 September 2016*

The Council of Europe's Convention on preventing and combating violence against women and domestic violence (better known as the Istanbul Convention) has the stated aim of combatting violence against women and domestic violence. It seeks to harmonize parts of national legislation in this area. However, the Convention goes far beyond what is necessary to achieve its stated aims in a number of areas.

Firstly, it codifies a controversial and non-consensual definition of 'gender' as a social construct that is independent of biological reality.

Prior to the Istanbul Convention, the only legally binding international definition of gender is contained in the Rome Statute of the International Criminal Court, which uses gender in its classical sense, i.e. as a synonym for biological sex:

For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the concept of society. The term gender does not indicate any other meaning different from the above.¹

The Istanbul Convention, however, states that 'gender' and 'sex' are not the same. This is evident from Article 4 (3) which lists the protected grounds, among which the first two are 'sex' and 'gender'.

¹ For the difference between the definition contained (and agreed) in treaties, and definitions contained in other international instruments, see Francesco Agnello, 'A New "Gender" Approach Definition in International Law: The Convention on Preventing and Combating Violence Against Women and Domestic Violence' [2014] (18) The Spanish Yearbook of International Law 87-114.

Furthermore, according to Article 3 (c):

“[G]ender” shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men.

The definition makes it clear that the ‘gender’ of a person is a social construct and a variable which is, in principle, independent of biological reality (being male or female). As a consequence, this definition carries an ideological burden by building on the belief that a human is born as a neutral being who can determine and/or change his or her gender in the course of life and under the influence of various factors, such as society, education, and self-determination.

Accepting this definition requires the identification with certain dogmas of gender anthropology that deny the existence of the natural differences between the two sexes.²

The inherently subjective nature of ‘gender’, according to this understanding, has powerful negative effects on the foreseeability and predictability of the Istanbul Convention, and blurs the exact content of the obligations on parties.

Secondly, the Istanbul Convention infringes on the right of parents to be the primary educators of their children, as enshrined in Article 2 Protocol 1 of the European Convention on Human Rights, Article 26(3) of the Universal Declaration of Human Rights, and Articles 5 and 18 of the UN Convention on the Rights of the Child.

Article 12 of the Istanbul Convention departs from the understanding that parents should be considered the primary educators of their children by highlighting that:

1. Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men.

2. Parties shall take the necessary legislative and other measures to prevent all forms of violence covered by the scope of this Convention by any natural or legal person.

² For more information, see *ibid.*

Furthermore, pursuant to Article 14 (1) of the Istanbul Convention:

Parties shall take, where appropriate, the necessary steps to include teaching material on issues such as equality between men and women, non-stereotyped gender roles, mutual respect, nonviolent conflict resolution in interpersonal relationships, gender-based violence against women and the right to personal integrity, adapted to the evolving capacity of learners, in formal curricula and at all levels of education.

These provisions of the Istanbul Convention could result in a severe infringement of the right of parents to ensure their children receive education and teaching in conformity with their own religious and philosophical convictions. For instance, parents would find it difficult to oppose controversial sex 'education' classes where children are taught to embrace and explore different sexual orientations and gender identities. They might be accused of violence towards their girl child if they refuse to treat her as a boy, if she expressed such a wish.

The same might happen if parents seek medical help for their child who suffers from gender dysphoria. It is unclear what 'stereotyped gender roles' constitute and who should identify and define those. In the light of these controversial definitions and of Article 33 of the Istanbul Convention, such parental conduct might be classified as 'psychological violence' and criminalised.³

Furthermore, provisions of the Istanbul Convention are in conflict with the teachings of large religious communities and may encroach upon the fundamental right to freedom of religion. The binary view of mankind and of marriage, held by all major religions, may be stigmatized as a tradition based on stereotyped gender roles⁴ and thus something that should be opposed in specific teaching materials. These provisions are so broad in scope and vague in terminology that they may become a vehicle for substantially redrafting educational materials on the matter, particularly those of ethos-based schools and institutions.

³ Istanbul Convention, Article 33: 'Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of seriously impairing a person's psychological integrity through coercion or threats is criminalised.'

⁴ See, to that effect, Istanbul Convention, Article 12 (1): 'Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices *which are based on the idea of the inferiority of women or on stereotyped roles for women and men.*' (emphasis added)

The Istanbul Convention may also directly violate the duty of professional secrecy for counsellors, therapists, pastors or ministers. Article 28 of the Istanbul Convention reads:

Parties shall take the necessary measures to ensure that the confidentiality rules imposed by internal law on certain professionals do not constitute an obstacle to the possibility, under appropriate conditions, of their reporting to the competent organisations or authorities if they have reasonable grounds to believe that a serious act of violence covered by the scope of this Convention, has been committed and further serious acts of violence are to be expected.

Orthodox and Catholic priests, for instance, are bound by an absolute obligation of secrecy about anything a person may confess. The provisions of the Istanbul Convention would force them to break the 'sacramental seal' and fundamentally violate their freedom of religion. No derogations from this rule are allowed.

There is also no opt-out clause for ethos-based or religious schools.⁵ These might be sanctioned for not allowing boys who identify with the female gender to use girls' bathrooms and vice versa. The refusal to admit a transgender child of the opposite sex to a single-sex school could be classified, under the Istanbul Convention, as violence against women.

Separately from the concerns raised above on the Istanbul Convention, Nottinghamshire Police recently announced that they had become the first police force in the United Kingdom to recognise misogyny as a 'hate crime', with the stated aim of making the region a safer place for women.⁶

While ADF International is fully in support of measures aimed at protecting women, it is concerned to see an extension of national 'hate crime' and 'hate speech' regimes that are far broader than the advancement of women's safety.

There are questions about what misogyny, and 'perceived misogyny', mean in this context. There are even bigger questions about what sort of comments would be perceived to be offensive or threatening enough that they would be considered to be 'hate crime'.

Violence against a person based on prejudice is rightly illegal. However, holding someone criminally responsible when someone perceives their

⁵ Even the possibility to make reservations is practically non-existent. See Istanbul Convention, Article 78.

⁶ See <https://www.theguardian.com/lifeandstyle/2016/jul/13/nottinghamshire-police-count-wolf-whistling-hate-crime>.

spoken opinion to be offensive is a deeply troubling prospect, especially in light of the fact that the European Court of Human Rights has clearly articulated that speech which is offensive, shocking or disturbing is protected under the European Convention of Human Rights.⁷ Criminalising speech in such a manner would not reflect the democratic values of plurality, tolerance and respect for all that should be firmly in mind when considering measures to combat ‘hate crime’.

Therefore:

ADF International strongly urges the OSCE to ensure the right of parents to be the primary educators of their children is respected and restated in measures aimed at promoting gender equality and combating violence against women.

ADF International further urges Participating States to repeal vaguely worded ‘hate speech’ laws to ensure a free exchange in the marketplace of ideas.

⁷ ECtHR, *The Sunday Times v. The United Kingdom*, Application no. 6538/74, judgment of 26 April 1979.