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Legal Gender Recognition in Turkey

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LEGAL GENDER RECOGNITION IN TURKEY

1. The Silence Period: Case of Bülent Ersoy¹

The topic of gender affirmation was first brought to light with the case of Bülent Ersoy, a well-known musician. In May 1981, she underwent a gender affirmation operation in London. Following the surgery, she initiated a lawsuit seeking to have the sex section of her civil registers rectified. Though the civil court of first instance granted her request, the Court of Cassation reversed the decision. The matter was brought before the Court of Cassation on four occasions at various times, yet her request was not granted. About seven years after the first lawsuit, the legislator finally enacted a new provision addressing this very issue.²

1.1. The First Case

Bülent Erkoç initiated a lawsuit to have the sex record on her civil registry rectified on the grounds that she had undergone gender affirmation surgery. Her lawsuit was accompanied by signed medical reports from Dr. Philip of Charing Cross Hospital. In the reports, Dr. Philip declared that Bülent Ersoy had an operation that rendered her outward anatomy female-like. Furthermore, he claimed that she was a transwoman, and that the surgery was mandatory to secure her mental health and to enhance her life quality. He also stressed the fact that this surgery was not a capricious choice but totally in line with his own medical advice.

The court, on 5 June 1981, decided in the favor of Bülent Ersoy by authorizing the rectification of her civil registry. But this decision was appealed by a public prosecutor.³

The Court of Cassation reversed the court's decision on January 21, 1982. In its ruling, the Court stated that to be a woman and to appear female are not precisely one and the same thing. Whether or not the removal of the male genitalia was considered adequate to "become a woman" was left to

¹We have opted to follow the periodization used by Ulaş Sunata, Aslı Makaracı and Seda Öktem Çevik in their article "Legal Gender Recognition in Turkey", consisting of three phases: (i) the silence period, (ii) the progress period and (iii) the dilemma period.

The terminology of 'sex' or 'assigned sex' belongs to the fields of medical science. Sex can be determined by examining the genital characteristics of a person's body. Since natural sciences are commonly used to legitimize and to govern social dynamics, it should not be surprising that the gender assigned to individuals in their civil registry corresponds to their birth-assigned sex. Considering how gender refers to a self-identification that depends on people's internal perceptions of themselves and therefore on their statement embedded in socially constructed meanings, transgender activism refuses to use the words 'gender' or 'biological gender' when referring to sex. Historically, in Turkey, there has been a tendency to employ the word 'gender' while intending the meaning of 'sex'. * Once we began to translate the judgments of the courts and the legal opinions, we opted to preserve the sense that they were referring and not to translate mot à mot. Hence, we employed expressions like "sex change" and 'change of sex' while the proper wording was gender. In addition, we have preferred to adopt the following terms 'gender affirmation surgery' and 'gender affirmation' extensively throughout the text, albeit that in most cases inadequate wording was employed by the courts, the legislators, or the legal experts. Furthermore, despite it being recognized as a problematic term among the trans community, most of the legalists we referred to have preferred to employ the term 'transsexual'. Therefore, we decided to leave this term unchanged when referring to them and to employ the broader terminology such as "transgender" or "trans" in presenting our own views.

*(2020). *LGBTİ+ Hakları Alanında Çeviri Sözlüğü*. Kaos GL Derneği.

²Özkan, B., & Will, M. R. (1993). Hukukun Sebebiyet Verdiği Bir Acı-Transseksüellerin Hukuki Durumu. *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, 43.

³Kocayusufpaşaoğlu, N. (1986). *Türk Hukukunda Transseksüeller Nüfus Kütüğündeki Cinsiyet Kaydının Düzeltilmesi İçin Dava Açabilir mi?* (1st ed., pp. 41-43). Filiz Kitabevi.; Fatih 1. Asliye Mahkemesi 05.06.1981, E. 1981/232, K.1981/62.

the medical experts to decide. The Court therefore sought a medical opinion prior to delivering their judgment. From the Medical Board of Şişli Child Hospital, the requested medical report pointed out that the surgery undergone by Bülent Ersoy resulted in a "change of sex" as far as her physical appearance is concerned, however, due to the absence of uterus and ovaries, she was incapable of becoming 'a genuine woman' nor was she able to regain her former manhood. The applicant was referred to the Department of Psychiatry of Istanbul University for a psychiatric examination. Despite the existence of irrefutable evidence and doctor's reports demonstrating her transgender characteristics, the Head of the Department of Psychiatry opted to have her diagnosed as a homosexual. One can therefore argue that transphobia had a strong presence within the medical community.

The Court of Cassation remitted the case to the court of first instance. The court overruled the case on July 12, 1982, based on the fact that the applicant had not become a woman in real terms and this decision became final with the upholding of the Court of Cassation.⁴

Considering the medical opinion issued that Bülent Ersoy was in fact gay rather than a transwoman, the ruling of the Court against the applicant's request was understandable.

Nevertheless, one should not forget that law is not a messenger of medical science but has its own standards. It is entitled to establish its own parameters and definitions for the notions. Medical science may give definitions of women and men within its own scope, yet law has no obligation to adhere to such definitions, as it is not solely focused on the scientific facts, but a synthesis of both social and scientific norms. Thus, it is puzzling to understand the reason why the courts were so persistent in following the medical definitions of assigned sex to define one's gender identity.

While the decision of the Court of Cassation was taken unanimously, two dissenting opinions were issued, which differed in their rationale from that of the majority. One of the opinions presented was rather offensive and equally enlightening as a means of getting a better look at the way in which the judges approached the whole issue of transgenderism.

In his dissenting opinion, the judge declared that Bülent Ersoy had embraced the female persona with an image far more attractive than those of the porn stars. He further mentioned that despite the fact that Bülent Ersoy looked so beautiful, one could not identify her as a woman, as by essence, she was born as a man. He considered that, as her unlawful act (having an operation) had brought about this outcome, she had to endure the consequences. Otherwise, any male seeking to benefit from the advantages of womanhood might be able to become a woman through adopting a female persona. Doing so would ultimately subvert the natural order of things.⁵

The judge's phrasing is quite crude, yet in line with the overall mindset concerning transpeople. Historically, transgender people in Turkey have always been subjected to objectification. They could only be tolerated for the purposes of sexual fantasies. This also matches with the overwhelming presence of trans individuals within the sex work industry.

1.2. The Second Case

1.2.1. Before the Legal Opinion

⁴Yargıtay 2.H.D., 21.01.1982, E. 1981/8911, K.1982/259; Kocayusufpaşaoğlu, n 3 above, p.43-44.

⁵ Yargıtay, n 4 above.

Three years after the final judgment, Bülent Ersoy filed a new lawsuit, insisting that over the years passed, she had become 'a genuine woman'. The court once again demanded a medical opinion from the Forensic Medicine Institute to establish whether she could medically revert to a different sex and if she had become 'a true woman' both physically and spiritually. While it was pointed out in the first report that she was still rather appearing feminine instead of being a female, by the second one, the experts concluded that, as she had reached a mental state of a female and was living her life as a woman, it must be accepted that she had become a woman spiritually as much as physically.⁶

Regardless of the final report favoring the request of Bülent Ersoy, the Court declined the request of the applicant.

The court stated that given that the applicant had neither ovaries nor a uterus, there was no means of recognizing her as a woman. Moreover, the court claimed that by doing so they were preventing abuse of this right by the individuals pretending to be transsexual.⁷

Kocayusufpaşaoğlu, in his legal opinion, whilst referring to the jurisprudences of several European countries, held that Turkish courts were not up to date with the contemporary state of medicine. Emphasizing the inexistence of female reproductive system and the incapacity to bear a child, these courts had indisputably disregarded the crucial significance of the psychological factor regarding the identification of gender.

He maintained that the mere existence of individuals pretending to be transsexual alone ought not to inhibit genuine transsexuals from pursuing their right.⁸

Bülent Ersoy appealed against the decision of the first instance. Prior to delivering its judgment, the Court of Cassation reached out to Dr. Necip Kocayusufpaşaoğlu, a professor of civil law at Istanbul University back then, for his legal opinion.

In his legal opinion, Dr. Kocayusufpaşaoğlu drew a connection between the recent legislation on establishing the time of death and the issue of transgenderism. Considering that within the advances of the medical science, it became possible to establish new criteria for determining the time of death, hence it should be possible to change the sex record in the civil registry in light of the latest scientific discoveries. He argued that it was therefore the responsibility of legal experts to ensure compliance of the law in force with such new scientific findings.

Before discussing the legal basis of Bülent Ersoy's request, he opted to mention a number of similar instances from various countries.

One of those cases originated in Germany. In its ruling of 21 September 1971, the Federal Court stated that on the grounds of the first Article of the Basic Law (Constitution of Federal Republic of Germany) safeguarding human dignity and the second upholding the free development of the personality, transgender individuals who underwent gender affirmation surgery were entitled to initiate a lawsuit for the revision of the sex record on their civil registry.⁹

⁶Kocayusufpaşaoğlu, n 3 above, p. 44-46.

⁷Fatih 2. Asliye Mahkemesi, 31.12.1984, E. 984/1070, K. 984/1159.

⁸Kocayusufpaşaoğlu, n 3 above, p. 49-52.

⁹Ibid, p.22.

The significance of this decision lies in the similarity of the German and Turkish Constitutions. The Turkish Constitution too included a clause on the free development of the personality. This implies that the rationale of the Federal Court could have potentially been embraced by the Constitutional Court of Republic of Turkey, and indeed by the Turkish courts.

Dr. Kocayusufpaşaoğlu also chose to exemplify one of the decisions of the Cantonal Court of Neuchâtel, due to the fact that it was among the first decisions in favor of transgender applicant for the rectification of their sex record.¹⁰

In its ruling of 2 July 1945, the Court declared that in determining gender, the psychological factor was no less significant than the physical factor. Thus, not only did the human body but also the human psychology had a role in defining gender. By granting the applicant the permission to rectify their civil registry, the court would also ensure that they were not in constant conflict with society. As such Cantonal Court of Neuchâtel ruled that the request was not against public order or public morality.¹¹

The reason why Kocayusufpaşaoğlu had chosen this decision was that although there was no denial of the biological determinants of one's assigned sex at birth, the decision also emphasized on the relevance of one's psychology. In doing so, it demonstrated that more than one factor could affect gender, as well as the fact that gender was not an immutable, rigid norm.

The Turkish Constitution protects each person's right to protect and improve their corporeal and spiritual existence. Furthermore, according to the Constitution, no one can be subjected to punishment or treatment incompatible with human dignity.

For Kocayusufpaşaoğlu, these constitutionally protected rights were relevant to the matter of transgenderism. Initially, the clauses were rather similar to the article safeguarding the free development of the personality in the German Constitution. He argued that the right to improve and protect one's spiritual existence had unquestionably encompassed the right to experience life in conformity with one's desires and urges.

Kocayusufpaşaoğlu asserted that a transwoman who had gender affirmation surgery (with both chest and genital surgery) was not a *de facto* man. Without the legal framework permitting her to identify herself as a woman, she would remain "*de jure non-woman*" as well as "*de facto non-man*" during her life time. In this way, such treatment would render her in permanent disharmony with society and would certainly constitute an illustration of the treatment incompatible with the human dignity set forth in the Constitution. Consequently, these two articles of Turkish Constitution obligated the compliance of sex record on the civil registry with the gender to which one person perceived oneself to belong.

As the Constitution is at the pinnacle of the legal hierarchy, other regulations are bound to adhere to it. Moreover, the interpretation of law in force ought to be in accordance with the Constitution. For that reason, Dr. Kocayusufpaşaoğlu stressed the responsibility of the Court of Cassation and other first and second instance courts to acknowledge a person's gender identity.

Accordingly, Kocayusufpaşaoğlu hold that legal recognition of sex change would not yield any adverse impact on public order and public morality. As a response to this legal dilemma, he proposed that Article 38 of the Civil Code could be interpreted in a manner that was in accordance

¹⁰Ibid, p. 35-38.

¹¹Ibid, p.24-26.

with the Constitution so that rectification would be authorized. Moreover, Article 46 of the Population Law stated that legal action could be taken to rectify the civil registry records of "age, name, surname and others". Accordingly, the lawsuit for a rectification following a post-birth sex change would fall within the margin of this provision and would qualify as a rectification of record within the terms of Article 38 of the Civil Code.¹²

1.2.2. After the Legal Opinion

The Court of Cassation declared that the laws in force did not authorize an 'arbitrary sex change'. The Court stated that that would constitute an infringement of Article 23 of the Civil Code, protecting the personality right. According to the Court, this article established that nobody was entitled to dispose of their bodily integrity except in the circumstances set down by the law. Therefore, no individual could freely change their sex. Additionally, the Court cautioned that authorizing sex change could potentially lead to numerous cases of *frauslegifacta*, such as in the examples of men seeking to avoid military service or to obtain an earlier retirement age. Hence, there would be a risk of providing unfair advantages to men pretending to be a transsexual.

For the Court, no matter what the applicant's own sexual urges and her state of mind were, she could not request a rectification of sex record on her civil registry subsequent to the 'capricious elimination' of her birth sex. Given that she violated her own personality right, it was not the duty of the legal system to provide for an unlawful solution to this wrongful conduct. Each had to face the outcome of their wrongdoing. The Court stated that they had no choice but to pity the applicant for losing her manhood yet not becoming 'a genuine woman'.

The Court upheld the first instance's decision, and the judgment thus became final.

In his dissenting opinion, Namık Yalçinkaya stated that there had been no reference in the Population Law to restrictions on the rectification of the civil registry. In using the formula "others", the legislators did not specify the types of records subject to rectification. The absence of a limitation in that clause implied that the right could be invoked with no further restraint.

In his medical reports, Dr. Philips had explained that the operation itself was medically necessary for preserving the patient's mental health. Therefore, Yalçinkaya had difficulty to understand how the Court could have regarded such operation as abuse of one's free will.

Moreover, Yalçinkaya was not satisfied with the Court's interpretation of Article 23 of the Civil Code. He emphasized the fact that this article was not intended to shield someone from themselves but from the others. He thus stated that the Court had no legal grounds to claim that this article precluded a person from arbitrarily changing their sex. Besides, as the Constitution was the paramount authority, the law in force must always be read in conformity with it. According to Article 17 of the Constitution, a person's corporeal and spiritual existence had to be preserved by the legal order. The inability to lead a life according to one's desires and to manifest one's authentic gender identity beyond any doubt would constitute the breach of this article. Yalçinkaya regarded gender affirmation surgery as a process assisting an individual to harmonize their unaligned spiritual and corporeal form.

¹²Ibid, p.35-38.

Regarding the alleged threat of *frauslegifacta*, Yalçinkaya argued that the examples put forward by the Court were all overstated and did not bear any resemblance to the present case¹³.

1.3. The Court of Cassation

What is abundantly evident from the Court of Cassation's rulings is that the Court failed to adequately comprehend the transgender agenda. The Court appeared to assume the whole procedure as an elective and capricious choice. Furthermore, it avoided any reference to the equality principle enshrined in the Constitution. Arguably, the Court's notion of equality may not include equality for all but is rather for those who fall in line with society's pre-determined standards.¹⁴

Despite the fact that Kocayusufpaşaoğlu had explained thoroughly in his legal opinion the legal grounds for allowing the rectification of the sex record, the Court still opted to disregard it as well as the medical opinions provided by medical experts. The ignorance of the Court in this matter demonstrates the potency of the transphobia embedded in society hindering the judges from ruling equitably.

1.4. Other Cases

Prior to the Bülent Ersoy Case, there have also been several cases where the applicant had requested for the rectification of their sex record. Five of these cases resulted in the rectification of the civil registry as requested by the applicants with little or no debate or appeal to the Court of Cassation. However, in the cases of 1986 and 1987 originated in İzmir, the Court of Cassation reversed the judgements which were in favor of the applicants.¹⁵

By the spring of 1988, a dramatic shift occurred in the Turkish legal system. With the enactment of the new Law no. 3444, the 6. Ankara Civil Court of First Instance granted the request of Bülent Ersoy and decided to rectify her record. As a result of this decision, finally the male identification in her sex record has been altered to female and Bülent Ersoy was given a new identification card. Further, the Court of Cassation reversed the decision of the Ayvalık Civil Court of First Instance which it had previously upheld on the ground of the new clause inserted into Article 29 of the Civil Code with the adoption of Law no. 3444.¹⁶

2. The Progress Period: The New Paragraph of the Article 29 of the Civil Code no. 743

The first legislation on sex change under Turkish law was implemented through the addition of a new paragraph to Article 29 of the Civil Code via Law No. 3444. Previous to that, no such direct regulation existed on this matter.¹⁷

¹³Yargıtay 2. H.D. 27.03.1986, E. 651, K.3256.

¹⁴Özkan, S. (2017). Cinsiyet Geçiş Sürecinin Hukuki ve Toplumsal Boyutu: Haklar ve İhlaller. *Yeditepe Üniversitesi Hukuk Fakültesi Dergisi*, 14(1), 55-84.

¹⁵Öztürel, A. (1981). Transseksüalizm ile Hermafrodizimde Yasal, Tıpsal ve Adli Tıp Problemleri (Kadınlaşan Erkekler, Erkekleşen Kadınlar, İki Cinsliler). *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, 38(1), 253-292.

¹⁶Özkan, n 2abov.

¹⁷Turan Başara, G. (2012). Türk Medenî Kanunu'nun 40'ıncı maddesi kapsamında cinsiyet değişikliği ve hukukî sonuçları. *Türkiye Barolar Birliği Dergisi*, (103). 245 – 266.

The following paragraph inserted to the article 29 regulating the rectifications required to be made on the civil registry following death and birth.¹⁸

"Upon documentation of the change of sex occurred post-birth by a medical board at least with a medical report, the required rectification shall be made in the civil registry. Any lawsuit to be filed in this regard shall also be addressed to the spouse, provided that the person changed his/her sex is married, and the same court shall also determine to whom the custody of the common children, if any, shall be awarded, and the marriage shall automatically be dissolved upon the date of finalization of the decision on sex change."

Considering that this article provided for rectification of the civil registry record upon post-birth sex change by submitting the report of the medical board before the court, it was implied that the sex change and the rectification of the civil registry record were authorized. As such, this regulation rendered sex change a legitimate practice.¹⁹

2.1. The Explanatory Memoranda of the Bill

Within the explanatory memoranda of the bill that the government presented to the assembly, it was stated that the legal grounds of this resolution could be traced to Article 38 of the Civil Code and Articles 11 and 46 of the Population Law, as previously stated by Kocayusufpaşaoğlu.

According to the explanatory memoranda, the reasoning behind gender affirmation surgery was the existence of the people identifying themselves with one sex, despite being members of the opposite sex in terms of reproductive organs and body features. This incompatibility between their self-perception and their sex led them to undergo this surgery. In such cases, the civil registry had to be rectified accordingly.

This matter had also become a major issue in the highly advanced Western societies, and they opted to regulate the authorization of the sex change and the rectification of the sex record. By contrast, the Turkish Court of Cassation had only authorized rectification for intersex people and decided against the requests of transgender individuals. By introducing this resolution, the intention of the government was to reverse the Court's jurisprudence. Following the implementation of the resolution, the Court of Cassation promptly reversed its position in this regard.²⁰

2.2. Deliberation on the Bill in the Plenary

During the deliberation of the bill in the plenary session, one deputy emphasized in his speech that there were in fact no constraints on the rectification of the sex records. Therefore, the purpose of the resolution was to alter the jurisprudence of the Court of Cassation, which had consistently dismissed the request for rectification, whereas the decisions of the courts of first instance were very often found in favor of the applicant. Under this resolution, the Court of Cassation would be left with no other choice than to authorize the rectification.

¹⁸Zevkliler, A. (1988). Medeni Kanun ve Cinsiyet Kargaşası. *Türkiye Barolar Birliği Dergisi*, 2, 258-285.

¹⁹Ibid.

²⁰TBMM Tutanak Müdürlüğü Dergisi, Birleşim: 64, 4.5.1988.

Moreover, another deputy from an opposition party, Abdullah Ulutürk also pointed out that such a resolution would not introduce any new elements into the legal system. As such, this provision was merely declarative in effect.²¹

The preliminary work carried out on the additional paragraph was limited and not particularly in-depth. No comparative law perspective was employed, nor were there any references to Council of Europe's consultations on the matter. This lack of preparatory work was highlighted by the deputies as well, with Abdullah Ulutürk explicitly declaring that the mere objective behind the resolution was to accommodate Bülent Ersoy's demand for rectification.²²

The opposition parties took a rather cynical approach towards the resolution. The bill also featured a new clause on the freedom of the press which they argued to be an attempt to restrict freedom of expression on the guise of protection of personality rights. Considering that at the time, the agenda of Turkish Grand National Assembly centered on the state of democracy due to the constant infringement of freedoms, the opposition parties struggled to comprehend how transgender became a matter of discussion at the plenary session²³

Turan Bayazıt, deputy of an opposition party, in his speech, sarcastically praised the Government for such a resolution. As the explanatory memoranda of the bill indicated that rectifying the civil registry following sex change was among the most prominent challenges of the highly advanced Western societies, Bayazıt criticized the resolution by stressing that Turkey was nowhere close to those societies mentioned, that it had quite a long way ahead of it to reach the same standard of them. While he stated that he didn't disregard the state of transgender people, his tone was revealing. Throughout the voting session, Bayazıt also inquired on the prevalence of possible cases to be decided upon this clause. He therefore wished to draw attention to the rarity of cases, which might suggest that such a regulation was not necessarily favorable to the public interest.

Apart from those comments, little or no debate followed in the preliminary session on this regulation. The draft proposed by the government was adopted almost verbatim, with just two minor modifications.²⁴

While the lack of an exhaustive preliminary study and examination on this issue was worth being criticized by the opposition parties, in doing so, they could nevertheless employ a tone that did not trivialize the transgender issue. Rather, they have preferred to disregard any problems of the transgender individuals and portray them as marginalized minorities outcast from the society. As members of parliamentary representatives of the whole nation, their duty would have been to acknowledge the hardships that transgender people were forced to overcome throughout every aspect of their lives and to emphasize the importance of having their gender identity legally recognized.

2.3. Commentaries and Criticisms on the Additional Paragraph

²¹Ibid.

²²Öztan, n 2above.

²³TBMM, n 20above; Zevkliler, n 18above.

²⁴TBMM, n 20above.

While this new paragraph inserted into the Civil Code enabled transsexuals to rectify their civil registry, it received strong criticism due to its ambiguity on the requirements as well as its absence of any restrictions in this regard.²⁵ Moreover, no discussion was held on the substantial and procedural implications that the new version of the article would entail.

The fact that this issue had been reduced to two sentences could be interpreted as a clear indication that the political dimension of the issue was quite different from other European Countries. As far as Turkey is concerned, it appeared that no public interest had yet been established that would require an exclusive action to be taken on this issue.

This version of the Civil Code, in sum, suffered from a very apparent deficiency of precision. With respect to the article in question, various questions had been raised.

Would the report of the medical board alone qualify for the rectification of the civil registry, or could the judge also consider additional evidence before making a decision? Was hormone treatment or gender affirmation surgery required, or was it sufficient to simply alter one's appearance to conform to their gender identity? The wording of the article failed to provide answers to these questions. Further, the criteria to be followed by the medical board in writing the report was not set out in any legal statute. The matters such as the minimum age, length of the probationary period, marital status, ability to procreate ought to be determined by the law in force. Since no guidance on the requirements for such rectification was provided in the relevant article of the Civil Code, it was left to medical experts and legal experts to determine.

Given that in the explanatory memorandum of the bill it was stated that such regulation has also been adopted by the most advanced countries, it was only logical to assume that those countries' legislation had been reviewed in advance. Nevertheless, this had not been the case. The Turkish legislator did not take the regulations of these countries as an example, but instead added an article open to interpretation, aiming to be interpreted by the judges in the light of the particularities of each case. Here, as Turkey is a member of the Council of Europe, such interpretations ought to be made in accordance with the Council's consultations on the matter.²⁶

2.3.1. Medical Board Report

Aydın Zevkliler argued that a medical board report was a necessity although not sufficient to make a decision. According to him, it was for the judge to thoroughly examine each case together with the available evidence, including, but not limited to, the medical committee report. He emphasized that, as the transgender condition derived mainly from psychosexual factors, the medical board ought to be composed of a group of psychiatrists and other medical personnel with expertise in transgenderism to consider the matter in a comprehensive manner.²⁷

2.3.2. Marital Status

At that time, in European countries such as Sweden, Germany, the Netherlands and Austria, the condition of not being married was required in order to invoke this right. Therefore, when a married person sought to rectify their civil registry, they had to dissolve their existing marriage. As for Turkish

²⁵Turan, n 17above.

²⁶Öztan, n 2above.

²⁷Zevkliler, n 18above.

law, the legislator did not include such a requirement when enacting the bill. According to the article 29, in such a case, the marriage would be dissolved *ex nunc*, not *ex tunc* as done in other countries.

Under this resolution, rectification of the sex record in the civil registry became one of the grounds for termination of the marriage, such as death, divorce, etc. The termination of the marriage union would occur immediately upon the finalization of the decision on the change of sex. Rectification of the registers of marital statuses in the civil registry did not have to be performed for the dissolution of the marriage, as these registers only served a declarative purpose.²⁸

In his commentary, Zevkliler claimed that being married and of having children were immutable indicators of the sex to which one belonged. Therefore, no reversal from this would be possible. He declared that any sex change that might occur in such cases would most certainly demonstrate that person in question was a homosexual driven by perverted impulses. In this respect, Zevkliler considered that homosexuals might undergo gender affirmation surgery for the sole purpose of facilitating their same-sex relations. He denied the very existence of transgender homosexuals, disregarding the fact that sexual orientation and gender were two distinct concepts.

According to Zevkliler, declaring the marriage null and void following a change of sex would violate the principle of matrimonial favor enshrined in the Constitution and other legal provisions. As the marriage was initially valid, he reasoned that it would only become null and void upon decision of a judge. While the purpose of the clause was to prevent same-sex marriages following the rectification of one of the spouse's civil registry, he argued that it was inconsistent within the legal system. Therefore, the legislators ought to grant such right exclusively to unmarried individuals to ensure the legal consistency.

In his view, upon the entry into force of the paragraph inserted in Article 29 of the Civil Code, the emergence of a gender conflict in Turkish law was highly anticipated. It was therefore an obligation to amend this article to prohibit married persons from changing their sex.²⁹

2.3.3. The Ability to Procreate

As for the ability to procreate, the European countries that regulated this issue at that time all made sterilization a compulsory condition for the rectification of civil registry. For this reason, Bilge Öztan argued that sterilization surgery ought to be rendered mandatory, otherwise complications could arise, such as the possibility of a person defined as male in the civil registry giving birth to a child.³⁰

2.3.4. The Parental Custody

According to the Article, the judge was the one who in charge of establishing the custody of the child, therefore it could be possible for the transgender parent to assume the role of the custodial parent.³¹

With respect to this matter, Öztan argued that the judge ought not award custody to one parent for the sole reason that other one being transgender. The judge's decision should favor the best

²⁸Öztan, n 2 above.

²⁹Zevkliler, n 18 above.

³⁰Öztan, n 2 above.

³¹Zevkliler, n 18 above.

interests of the child. The evaluation ought to be carried out with the utmost care and impartiality (sine ira et studio).³²

Zevkliler, in contrast, argued that granting custody to the transgender parent would be likely to lead to a great number of breakdowns and conflicts in the life of the child concerned.³³

2.3.5.The Minimum Age Limits

Based on the age limit for organ and tissue transplantation, Öztan suggested setting a minimum age limit of 18 for gender affirmation procedures.

2.3.6.The Length of the Probationary Period

According to Öztan, it was appropriate not to set a probationary period for gender affirmation under Turkish law. This would give judges the discretion to consider the particular circumstances of each case.

3. The Dilemma Period: Entry Into Force of the Turkish Civil Code No. 4721

The former Civil Code's regulation on sex change was significantly amended and was restructured in the Article 40 of the Turkish Civil Code No. 4721, which was enacted in 2002. As revealed in the new regulation, the legislator, taking the criticisms against the previous regulation into account, has stipulated detailed and comprehensive conditions for the gender affirmation surgery and for the rectification of the civil registry following the surgery. As such, the new regulation set forth in Article 40 of the Civil Code addressed this matter in a much more comprehensive manner.³⁴

The Article 40 of the Turkish Civil Code reads as follows:

'A person who wants to change his/her sex has to apply to the court personally and ask for permission for a sex reassignment. For this permission to be given, the applicant must have reached the age of 18 and must be unmarried. Besides he/she must prove with an official health board report issued by an education and research hospital that he/she is of transsexual nature, that the sex reassignment is compulsory for his/her mental health and that he/she is permanently deprived of the capacity of reproduction.'³⁵

If it is confirmed by an official health board report, that a sex reassignment operation was affected based on the permission given and in accordance with the purpose and medical methods, the court will decide for the necessary changes to be made in the civil status register.'

Although the deficiencies in the former Turkish Civil Code revealed the obvious need for a separate regulation on gender affirmation surgery, legislator once again preferred to address this issue under the Article 40 of the Turkish Civil Code.³⁶

³²Öztan, n 2above.

³³Zevkliler, n 18above.

³⁴Turan, n 17above.

³⁵The first version of the article contained the following clause: "and being permanently deprived of the ability to reproduce". However, this statement was annulled by the Constitutional Court's decision dated 29.11.2017.

³⁶Karadağ, N. (2007). *Avrupa İnsan Hakları Sözleşmesi ve Türk Hukuku Kapsamında Cinsel Azınlık Hakları* [Master'sthesis, İstanbul Üniversitesi Sosyal Bilimler Enstitüsü Kamu Hukuku Anabilim Dalı].

Transsexuellengesetz (German “Transsexual Law”) dated 1980 served as a source of inspiration for the legislator. However, it is worth to emphasize that under the Transsexuellengesetz, there was only one required stage to complete for rectification. As there is no regulation on the requirements to obtain court permission for gender affirmation surgery, the German legislator had preferred to grant individuals liberty with respect to the post-surgery stage.

Under Turkish Civil Code, the applicant must follow the 2 steps as set out in Article 40 to rectify the civil registry according to their gender identity.³⁷

During the first stage, the applicant is required to obtain permission from the court to undergo the surgery, while the second stage involves receiving a decision from the court to rectify the civil registry upon the submission of the required of the official health board report.³⁸

In her article, Yeşim Atamer defines Article 40 as a set of harsh regulations.³⁹ Having the civil registry rectified according to one's true gender identity is by no means a straightforward task; to the contrary, it is a complicated series of steps. And this process is fraught with many obstacles and excessive delays.⁴⁰

It could reasonably be argued that the intention of the legislator was to render this process all but accessible, instead of actually facilitating and regulating it.

The fact that the legislator while adopting this regulation has manifestly disregarded hardships that transgender individuals encounter in their lifetimes suggests that they still favor to maintain a strict conservative stance on this issue. Therefore, numerous existing problems relevant to the transgender issue remain unresolved under this legislation, and in fact they have become even more challenging.⁴¹

3.1. Two Stages for the Rectification of the Civil Registry

3.1.1. The Pre-operation Stage

3.1.1.1. Legal Age and Mental Capacity

An applicant who wants to undergo gender affirmation surgery is required to be over 18 years of age. For some scholars, since adolescence marks a period in which a person's sexual identity becomes fully established, it seems suitable for legislator to adopt such an age limit. According to them, an underage person is more likely to be influenced by their peers and to engage in irrevocable life choices.⁴²

³⁷Turan, n 17above.

³⁸Tekin, N. (2009). Cinsiyet Değişirme Kavramı ve Cinsiyet Değişikliği Ameliyatının Hukuki Açıdan Değerlendirilmesi. *Terazi Hukuk Dergisi*, 4(39), 97-114.

³⁹Atamer, Y. (2005) The Legal Status of Transsexuals in Turkey, *International Journal of Transgenderism*, 8:1, 65-71, DOI: 10.1300/J485v08n01_06.

⁴⁰Hun, S. (2015). Türk Medeni Kanunu'nun 40. Maddesi Somut Norm Denetimine Tabiyken: Trans Geçiş Sürecinde 'Bekletmeler'in Trans Öznelliklere Etkisi. *Ankara Barosu Dergisi*, (4); Atamer, Y. M., & Taşkın, D. Z. (2016). Transseksüellere İlişkin Hukuksal Düzenlemeler: Uygulama, Anayasa e Avrupa İnsan Hakları Sözleşmesi'ne Aykırı Yönler ve Revizyon Teklifleri. *Yargıtay Dergisi*, 42(4), 719-782.

⁴¹Güven, K. (2015). Cinsel Kimlik Üzerinde Hak Kavramı ve Korunması: Transseksüellik ve İnterseksüellik. *BÜEHFD*, 1(1), 133-176.

⁴²Sağlam, İ. (2004). Türk Medenî Kanunu Madde 40 Üzerine Bir Değerlendirme. *AÜEHFD*, 8(3-4), 455-489; Tekin, n 38 above.

Even though it is not exclusively stated under the article 40, one must possess mental capacity to undergo this surgery. Since the request is a declaration of will, there is no doubt that the mental capacity, which is required for every declaration of will, must also be present here. Moreover, considering that the decision of the court on gender affirmation surgery will lead to serious implications on one's life, it is necessary that the applicant has the mental capacity.⁴³

3.1.1.2. Requirement of not Being Married

To obtain permission from the court for gender affirmation surgery, the applicant has to be unmarried. However, such requirement can be read in two different ways. The Article 40 itself fails to clarify whether this means that the applicant must have never been married in their lifetime or if it is considered sufficient that they are not currently married.⁴⁴ Majority opinion favors the second interpretation. Namely, the applicant must not be married at the time of the application.⁴⁵

As the legislator has not recognized sex change as a special ground for divorce, the applicant, if married, is required to seek a divorce on the grounds of irretrievable breakdown of the marriage. In those cases, being divorced or having children at the time of the application would not imply that the request for gender affirmation is an arbitrary request nor an act of curiosity.⁴⁶

In the Explanatory Memoranda of the Article 40, the requirement of not being married has been justified as follows:

"In order to prevent the family institution, which is the foundation of society, from shattering as a result of individuals whose gender remains ambiguous, it has been stated that the person should not be married. Such requirement has been imposed to prevent the psychological and moral implications emerged from when a person, while continuing their marriage, carries out such a change, and doing so while still sharing their life with their spouse or their children."

As per the Explanatory Memoranda, the legislator has sought to preserve the marital union and family peace as well as to mitigate the adverse outcomes that might arise if one of the parents undergoes a gender affirmation surgery despite remaining married.⁴⁷

Among the scholars, there are those who argue that the court should not grant permission for divorced individuals provided that they have children from their previous marriage. They assert the Turkish Constitution's recognition of the family as the foundation of Turkish society as a legal basis for their arguments.⁴⁸

3.1.1.3. Official Medical Board Report

Another requirement for gender affirmation surgery is an official medical board report. In this report, three statements must be included. The first one is that the applicant is transsexual. The

⁴³Turan, n 17above.

⁴⁴Atamer, Y. (2015). Turkey. In J. Scherpe (Ed.), *The Legal Status of Transsexual and Transgender Persons* (pp. 313-332). Intersentia.

⁴⁵Ibid; Sağlam, n 42above; Turan, n 17above.

⁴⁶Sağlam, n 42above.

⁴⁷Turan, n 17above.

⁴⁸Sert, S. (2015). Türk Medeni Hukukunda Cinsiyet Değiştirme. *TBB Dergisi*, (118), 255-270.

second is that the surgery serves as a necessity to preserve the applicant's mental health. And finally, that the applicant is unable to procreate.

Since the court is incompetent to render a decision on these matters, an expert opinion is required. In the Article, it is expressly stated that the report has to be issued by a health board of a training and research hospital. Accordingly, multiple medical experts should be present for the preparation of this report. As a matter of practice, many of the training and research hospitals providing gender affirmation surgery have established "gender identity councils" with experts from different medical branches.

The health board report should confirm that the applicant is transsexual. Yet there is no specification under Article 40 on how this matter is to be examined. Neither is there an established minimum length of time during which a person must self-identify as the opposite legal sex. Hence, the criteria have been entrusted to the judgement of medical experts.

To confirm whether a person is transsexual, the observation of the person by a psychiatrist needs to be carried out for a period of time. Following the observation period, the psychiatrist will submit their opinion on the matter and ultimate decision will be taken by the health board. Whilst recognizing that the applicant is transsexual, the board also acknowledges the necessity of gender affirmation surgery for the applicant's mental health.⁴⁹ Their report has to persuade the judge that the surgery has a complete remedial nature, that it was not the fruit of a passing enthusiasm, and that the applicant does not have any other option.⁵⁰

As to the requirement of being unable to procreate, which was included in the first version of the Article but annulled following the decision of the Constitutional Court, in the case of a transgender person in possession of genitals and well-functioning hormones, it is very likely for them to be able to procreate. This requirement will therefore most probably lead the applicant. This requirement would therefore most likely lead to the applicant having undergone a sterilization operation designed to deprive them of reproductive capacity.⁵¹

3.1.2. The Post-operation Stage

3.1.2.1. The Court's Judgement

For the judge to rule on the rectification of the civil registry, a report from the health board should be submitted by the applicant. Such report shall verify that the applicant has performed the gender affirmation surgery pursuant to the permission issued in the first stage, in accordance with the purpose and medical methods.⁵²

Before granting permission for rectification, the judge is required to thoroughly examine the health report and the satisfaction of other conditions. Besides, the court shall not be bound by the health board report and may also request a further expert opinion in case of dissatisfaction with the findings of report. Where the Court of First Instance declined the request of a transgender individual, the appeal is feasible.

⁴⁹Atamer (2015), n 44 above.

⁵⁰Sağlam, n 42 above.

⁵¹Tekin, n 38 above.

⁵²Atamer (2015), n 44 above.

3.2. The Deficiencies of the Article 40

3.2.1.The Requirement of Legal Age

In the Explanatory Memoranda of the Article 40, it is stated that:

“(...) To prevent individuals who have not yet been required to have a change of their sex, or those who are uncertain whether they are required to have such a change, to resort to this method, the requirement of at a minimum of eighteen years of age applies (...)”

According to this justification, it is evident that the intention of the legislator is to discourage and deter the applicant from engaging in the gender affirmation process by pointing out the challenging route to be followed and by providing time until their coming of age for them to come to their senses.⁵³ As such, the legislator have perceived the transgender identity as a fleeting and temporary curiosity, a whim.

While even the scholars, for whom the legal age limit is a suitable measure, have argued that in cases of undue delay, it should be possible for the judge to grant permission earlier than the age of eighteen on condition of relying on an expert's report.⁵⁴ Atamer notes that in the case of a minor feeling that they do not belong to their assigned sex, if they will be forced into adopting their legal sex within every area of their domestic and social life throughout their childhood, it is very likely for them to be subject to a significant amount of pain and suffering.⁵⁵

3.2.2.The Requirement of not Being Married

Due to the characteristics of Turkish society, it is highly anticipated for a transgender individual to marry against their will out of social pressure and coercion. A group of scholars therefore claim that it is unfair to subject these people to such requirement when they decide, sometime in their lives, that they wish to change their sex to reflect their gender identity.⁵⁶

To be entitled to obtain permission from the court for the surgery, the person has to dissolve their marriage in the first place. As such, it has been deemed unnecessary as well as distressing by some academics. They propose granting permission for the surgery to those who are married, with the decision on dissolution of marriage to be made upon the rectification of the civil registry⁵⁷. Besides, among the scholars, there are those who favor the formulation of the former Civil Code, which enabled the automatic dissolution of the marriage following a court decision on the rectification of the civil registry, as a more reasonable solution than the formulation of law in force.⁵⁸

3.2.3.The Validity of the Court Decision

The duration of the validity of the court decision on a permission for gender affirmation surgery in the first stage is also under debate among academics. Atamer holds that if the applicant does not

⁵³Hun, n 40 above.

⁵⁴Tekin, n 38above;Turan, n 17above.

⁵⁵Atamer (2016), n 40 above.

⁵⁶Bafra, J. (2004). Türkiye’de Cinsiyet Değişikliği Ameliyatlarında Tıbbi ve Hukuki Sorunlar. *Türkiye Klinikleri Adli Tıp ve Adli Bilimler Dergisi*, 1, 47-54.

⁵⁷Bafra, n 56above; Turan, n 17above.

⁵⁸Güven, n 41above;Atamer (2005), n 39above.

undergo surgery within a reasonable period, the doctor carrying out the surgery may request a new ruling confirming that the suitability still remains.⁵⁹

In contrast, Merve Alçık argues that seeking another court decision would further complicate the life of the applicant, who has been struggling to fulfil the requirements set out in the law so that their civil registry would reflect their gender identity. It is perfectly understandable for an individual to wish to postpone the operation due to financial and psychological factors or to not feel ready for the operation given its medical complications.⁶⁰

3.2.4. The Legal Status of the Individuals Who Have Undergone the Gender Affirmation Surgery Without Prior Authorization from a Turkish Court

The status of individuals who have undergone gender affirmation surgery with no prior court decision remains unregulated under Turkish law. Considering that the court only has the power to rule on the rectification of civil registry once gender affirmation surgery has been carried out pursuant to a court decision, it will be required for the judge to dismiss all requests relying on unauthorized surgery. However, regardless the illegal nature of the surgery, the legal system cannot turn a blind eye to the state of these individuals. Therefore, the Turkish doctrine considers the overwhelming necessity for a legislation enabling transgender people to rectify their civil registry despite of having undergone an unauthorized surgery.⁶¹

As Turkey is a State Party to the European Convention of Human Rights and the Article 90 of Turkish Constitution stipulates that ***"In the event of a conflict between international treaties relating to fundamental rights and freedoms duly put into force and the laws which contain different provisions on the same subject, the provisions of the international treaty shall prevail."***, Turkish courts are bound to respect the rulings of the European Court of Human Rights (ECtHR) and they must rely on the case-law of the ECtHR in addressing the controversial issues.

Accordingly, the case of Christine Goodwin v. The United Kingdom was invoked by several academics in relation to this matter.

The case of Christine Goodwin v. The United Kingdom concerned a citizen of the United Kingdom who, despite having undergone gender affirmation surgery, had been registered as a male on the civil records. This discrepancy had a number of large-scale implications for the applicant's life, most notably for her retirement age and her employment⁶². In its assessment, the Court noted that the refusal to change gender following gender affirmation surgery, as well as the incompatibility between social reality and the law, was likely to render the applicant vulnerable and humiliated by placing her in an atypical status.⁶³ The Court underlined that the right to determine the details of one's identity was enshrined in Article 8 of the European Convention of Human Rights.⁶⁴ It further found that there was no overriding element of public interest to justify the infringement of the

⁵⁹Atamer (2015), n 44 above.

⁶⁰Alçık, M. (2019). Türk Anayasa Mahkemesinin Trans Bireylere İlişkin Cinsiyet Değişikliği Kararları Üzerine Bir Değerlendirme. *DEÜHFD*, 21(Special Issue, Prof. Dr. Durmuş TEZCAN' a Armağan), 1875-1906.

⁶¹Atamer (2015), n 44 above.

⁶²Goodwin v. United Kingdom., App. No. 28957/95 (ECtHR, 11 July 2002), para 76.

⁶³Ibid, para 77.

⁶⁴Ibid, para 90.

applicant's right to private life. Accordingly, the refusal to legally acknowledge the applicant's gender affirmation amounted to a violation of Article 8 of the Convention.⁶⁵

In the light of this decision, in the event of a person applying to the ECtHR following the refusal of their request for rectification by the Court of Cassation on the grounds of the unauthorized gender affirmation surgery, it is very likely that this infringement will be found the violation of Article 8 of the Convention. For this reason, the courts should adopt a de facto approach allowing rectification following gender affirmation surgery in the absence of prior permission.⁶⁶

Judging from the Court of Cassation's jurisprudence, it could be concluded that it has also been ruling in line with the ECtHR's judgement by favoring the request of transgender individuals facing such situations.

In 2009, a former Turkish citizen applied to a Turkish court for therecognition of the German court's ruling on gender affirmation. The Court of Cassation reversed the ruling of the court of first instance which had rejected this request. It held that the mere fact that the sex change was performed without complying with the procedure set out in Article 40 and that the health report upon which the German court had based its decision was not issued in accordance with the requirements of the Turkish Civil Code would not, by itself, amount to a violation of Turkish public order. Therefore, the court of first instance should have had to recognize the sex change.⁶⁷

In another case in 2010, the applicant sought the rectification of his civil registry. Having satisfied all the requirements listed in paragraph 1 of Article 40, he had failed to request permission from a Turkish court in advance of having undergone gender affirmation surgery in Germany. Thus, the court of first instance rejected the rectification request on the ground that the surgery had been performed without obtaining authorization. The Court of Cassation adopted an alternative interpretation favoring the applicant's request and ruled that this request for the rectification had in fact also contained a request for gender affirmation surgery in accordance with the first paragraph. It therefore reversed the judgement.⁶⁸

3.3. Annulation of the Requirement to be Permanently Unable to Procreate

This requirement, even before the case of *Y.Y. v. Turkey* and the Constitutionality Review was heavily criticized by Turkish legal experts.⁶⁹ The majority of the Turkish Doctrine considered this requirement as a psychological and physical burden.⁷⁰ Since becoming deprived of the ability to procreate was the de facto result of the gender affirmation surgery, they claimed that this requirement was valid only for second stage, namely for the legal recognition of the one's gender identity.⁷¹

⁶⁵Ibid, para 93.

⁶⁶Atamer (2015), n 44 above. See also Karadağ, n 36 above.

⁶⁷Yargıtay 2. H.D. 21.12.2009, 2009/9678 E. 2009/22090 K.

⁶⁸Yargıtay 2. H.D. 13.12.2010 2009/19039 E. 2010/20942 K.

⁶⁹Sunata, U., Makaracı Başak, A., & Öktem Çevik, S. (2022). Legal gender recognition in Turkey. *International Journal of Discrimination and the Law*, 22(1), 56–73. <https://doi.org/10.1177/13582291211070223>.

⁷⁰Atamer (2005), n 39 above; Bafra, n 56 above; Erman, B. (2003). *Ceza Hukukunda Tıbbi Müdahalelerin Hukuka Uygunluğu* (p. 215). Seçkin Yayıncılık; Tekin, n 38 above,

⁷¹Güven, n 41 above; Sağlam, n 42 above; Bafra, n 56 above.

İpek Sağlam, in her view, argued that enacting such requirement, the legislator deliberately had dismissed the foreseeable future tragic implications concerning transsexuals.

Since the inspiration for this regulation lies within the *Transsexuellengesetz*, Sağlam examined the German version in order to better comprehend the intention of the legislator. As we already stated above, the *Transsexuellengesetz* only regulated the legal recognition of the sex change, thus there was no conditions to fulfill in order to undergo gender affirmation surgery. Moreover, the condition of being permanently unable to procreate was stated as a requirement for the legal recognition. Accordingly, Sağlam holds that the legislators misinterpreted the German regulation and miss out the fact that being permanently unable to procreate was the result of the gender affirmation surgery, not the requirement of it.⁷²

Since feeling belonged to the sex other than the sex assigned at birth, does not have an impact on one's ability to procreate⁷³, this requirement was indeed in contrast with the notion of transgenderism. Transgender individuals possess healthy functioning internal and external genital members⁷⁴, thus if they do not have any medical complication, they are fertile just like cisgender people. Kudret Güven held that the legislator confused the notions of intersexuality and transsexuality. According to him, this requirement could only be seen as an appropriate and sensible regulation for the intersexual individuals.⁷⁵

Under the original version of the Article 40, the only feasible path to follow for the people desiring to undergo gender affirmation surgery was to perform an operation with sterilization effect.⁷⁶ Atamer suggested that the intention of the legislator as to prevent transgender men from 'mothering' children and transgender women from 'fathering' children.⁷⁷ Since there is no medical explanation for this intervention⁷⁸, making transsexuals subject to this requirement, could only be interpreted as an attempt to preclude transsexuals from undergoing the gender affirmation surgery.⁷⁹

As regards fertile individuals carrying out sterilization surgery on the sole purpose of obtaining permission for gender affirmation surgery, it was, beyond doubt, inadmissible under medical law and ethics to perform such medical intervention in the absence of any medical necessity.⁸⁰

In practice, transgender individuals used to give up their ability to procreate "deliberately" without any prior questioning or objection. Sinem Hun, hold that they internalized the assumption that the reproduction of a transgender person went against the very nature of the things.⁸¹

⁷²Sağlam, n 42above.

⁷³Karadağ, n 36above.

⁷⁴Güven, n 41above .

⁷⁵Ibid.

⁷⁶Karadağ, n 36above.

⁷⁷Atamer (2015), n 44above.

⁷⁸Sert, G. (2013). *Üreme Haklarının Yasal Temelleri ve Etik Değerlendirme* (1st ed.). İnsan Kaynağını Geliştirme Vakfı.

⁷⁹Güven, n 41above.

⁸⁰Sert G., n 78above.

⁸¹Hun, n 40 above.

To solve this problem, Sağlam suggested a new interpretation for the article, as it was not legally feasible to grant permission for surgery to transgender individuals with reproductive capacity by pursuing literal interpretation of the article. She stated that the literal interpretation was not in conformance with the social realities. Therefore, the judge had to interpret it not exclusively from a biological aspect, but also by taking into account the psychological angle.

According to Sağlam, a transsexual would only have sexual and emotional attraction to the people from their assigned sex. Thus, she alleged the presence of a psychological barrier precluding transsexuals from having sexual intercourse with other sex. What she suggested was to include transsexuals who were unable to procreate due to this psychological barrier while applying the article.⁸²

The trouble with this statement is that, as mentioned earlier, sexual orientation and gender identity represent two completely different notions. Accordingly, it is perfectly possible for a transgender person to identify themselves as heterosexual, homosexual, asexual or so on.⁸³

3.3.1. The Case of Y.Y. v. Turkey

On 30 September 2005, the applicant applied to the Mersin District Court ("the District Court") requesting permission to undergo gender affirmation surgery.⁸⁴ At the end of the hearing, the District Court requested the submission of medical reports confirming if the applicant fulfilled the requirements laid down in the law⁸⁵. On 27 June 2006, based on the reports presented to it, the District Court declined the request for surgery since the applicant had not fulfilled the condition of being permanently incapable of procreation⁸⁶. On 17 May 2007 the Court of Cassation upheld the District Court's decision⁸⁷, and it dismissed the application for rectification of the judgment⁸⁸. On 5 March 2013, the applicant submitted a new application to the District Court⁸⁹. Notwithstanding the fact that the report revealed that the applicant was still capable of reproduction⁹⁰, the court held that the operation was essential for the applicant's mental health and was intended to prevent him from suffering further. Therefore, on 21 May 2013, it granted the applicant's request and authorized gender affirmation surgery.⁹¹

The applicant applied to the ECtHR alleging the violation of Article 8 of the Convention, namely his right to respect for his private life.⁹²

The Government objected to this allegation.⁹³ In the Government's view, the reason why this operation was subject to certain requirements under the law was to prevent such operations from becoming commonplace and to avoid any unnecessary operations. Therefore, it was intended to

⁸² Sağlam, n 42 above.

⁸³ Güven, n 41 above.

⁸⁴ YY v Turkey, App. No. 14793/08 (ECtHR, 10 March 2015), para 7.

⁸⁵ Ibid, para 9.

⁸⁶ Ibid, para 17.

⁸⁷ Ibid, para 19.

⁸⁸ Ibid, para 20.

⁸⁹ Ibid, para 22.

⁹⁰ Ibid, para 24.

⁹¹ Ibid, para 25.

⁹² Ibid, para 3.

⁹³ Ibid, para 64.

preserve the public interest. Furthermore, it was claimed that since the surgery itself was non-reversible and posed a threat to the physical and mental well-being of the person, the Government also sought to preserve the interests of individuals wishing to undergo this surgery⁹⁴. According to the government, the possibility of improper exploitation of the surgery by some sections of society (e.g., the sex industry) further justified the restrictions⁹⁵. It was also argued that the imposed restrictions on gender affirmation surgery were within the scope of the wide margin of appreciation given to States.⁹⁶ Simultaneously, the government asserted that the impugned provision did not necessarily require the individuals concerned to have undergone prior medical sterilization or hormone treatment to be eligible for gender affirmation surgery.⁹⁷

Although the Court, while examining this case, has relied on its case-law on the gender affirmation process, the case in question differs from the previous cases. In the former cases, the applicants were individuals who had already undergone gender affirmation surgery.⁹⁸ Whereas here, the requirements applicable prior to the surgery and their compliance with Article 8 of the Convention are being examined.⁹⁹

The Court establishes that the concept of "private life" includes elements such as gender identity, sexual orientation and therefore these are protected by the Convention¹⁰⁰. In that respect, even though Article 8 of the Convention itself does not grant them an unconditional right to gender affirmation surgery,¹⁰¹ the rights of transgender people to personal development and to physical and moral security are also protected¹⁰².

The Court assesses a three-stage examination to determine whether the interference in question amounts to a violation of Article 8. These are the examination of the presence of a legitimate aim, conformity with the law and necessity in a democratic society.¹⁰³ The Court considers that the legality condition is fulfilled.¹⁰⁴ However, the arguments raised as a legitimate aim, such as the risk of the surgery becoming commonplace or being misused by certain sections of society, fail to convince the court.¹⁰⁵

As regards the margin of appreciation invoked by the Government, the court finds that the extent of that margin depends on a number of factors, such as 'the nature of the right in question, its importance for the individual, the nature of the interference and the aim pursued by the interference'. Where the right in question is essential to the 'individual's effective enjoyment of "intimate" or key rights', the margin will be considerably narrower. This includes situations where a particularly important aspect of the individual's existence or identity is threatened. In the absence of consensus among the member States of the Council of Europe regarding the right, however, the scope of the margin will widen.¹⁰⁶

⁹⁴Ibid, para 74.

⁹⁵Ibid, para 75.

⁹⁶Ibid, para 93.

⁹⁷Ibid, para 91.

⁹⁸Ibid, para 61.

⁹⁹Ibid, para 62.

¹⁰⁰Ibid, para 56.

¹⁰¹Ibid, para 65.

¹⁰²Ibid, para 58.

¹⁰³Ibid, para 67.

¹⁰⁴Ibid, para 71.

¹⁰⁵Ibid, para 78.

¹⁰⁶Ibid, para 101.

The Court has established that, in the present case, the issue at stake concerns an essential element of the right to self-determination, namely the freedom to self-identify one's gender identity.¹⁰⁷ Although there is lack of evidence of a common European understanding of this matter, this fact is no more significant than the presence of clear and undisputed evidence of an ongoing international trend not only towards increased social acceptance of transgender individuals, but also towards the legal recognition of the gender identity of post-operative transgender individuals¹⁰⁸.

It is unclear to the Court why, under this provision, those wishing to undergo gender affirmation surgery are obliged to prove that they are deprived of the ability to procreate.¹⁰⁹

The court also considers the government's claim that there was no need for the individuals to undergo sterilization surgery as not credible. In the absence of sterilization surgery, it was not understandable as to how it was feasible to fulfill the requirement of being permanently unable to procreate and therefore to obtain the permission for the gender affirmation surgery.¹¹⁰

On these grounds, the court rules that such interference of the right to respect for private life is not "necessary" in a democratic society. The fact that Mersin District Court did not seek the sterility requirement in the latest application reinforces this conclusion.¹¹¹

Accordingly, the Court unanimously holds that the State violated the applicant's right to respect for private life by refusing his request to undergo gender affirmation surgery for many years.¹¹²

For a long time, there was a general assumption that the sacrifice of the transsexual's reproductive capacity was a natural part of the gender affirmation process.¹¹³ Only in recent years, this assumption has been challenged with increasing awareness of the fact that the right to 'physical and moral security' not only applies to cisgender people, but also to transgender people.

The judgement of the Second Chamber in the case of *Y.Y. v. Turkey* has been greatly appreciated by human rights observers. Peter Dunne, in his commentary, asserted that the judgment represented a turning point for gender identity rights in Europe, giving recognition and practical effect to the right to 'physical and moral security'.

If the Court were to reject the applicant's claim and rule no violation of the rights, the right to self-determination and freedom to determine one's gender under Article 8 would be drastically deprived of their significance. By holding that individuals seeking to undergo gender affirmation surgery could not be subjected to unnecessary or disproportionate prerequisites, the case of *Y.Y.* marked the first judgement where the Court applied the concept of bodily integrity to national legislation with regard to the requirements for gender affirmation surgery. Henceforth, Contracting Parties are bound to respect the 'physical and moral security' of transgender individuals in regulating their national health policies.

This judgement further illustrated the progressive evolution of the ECtHR's understanding of gender identity. Following the Yogyakarta Principles' call in 2007 for 'legislative, administrative and other

¹⁰⁷Ibid, para 102.

¹⁰⁸Ibid, para 108.

¹⁰⁹Ibid, para 116.

¹¹⁰Ibid, para 118.

¹¹¹Ibid, para 121.

¹¹²Ibid, para 122.

¹¹³Nixon, L. The Right to (Trans) Parent: A Reproductive Justice Approach to Reproductive Rights, Fertility, and Family-Building Issues Facing Transgender People, 20 Wm. & Mary J. Women & L. 73 (2013).

measures necessary to ensure full protection against harmful medical practices based on gender identity', numerous hard and soft law actors at both national and international level have introduced provisions confirming transgender people's right to personal development without any form of invasive intervention. By recognizing the ever-increasing body of international jurisprudence on gender identity and embodying these principles in its judgment, the ECtHR has joined these actors.

Accordingly, this judgment signifies a promising chapter for the ECtHR and therefore, it is highly anticipated that the Court will maintain this rights-centered perspective in future cases on gender identity.¹¹⁴

3.3.2. The Court of Cassation

Contrary to the ECtHR's judgment, the Court of Cassation maintained its case-law by examining the fulfillment of the sterilization requirement until the Constitutionality Review.¹¹⁵

About two months after the ECtHR judgment, the Court of Cassation upheld the decision of the court of first instance refusing the applicant's request for authorization to undergo gender affirmation surgery on the grounds that the applicant was still able to procreate. In his dissenting opinion, the judge drew attention to the ECtHR's judgement. He reasoned that the Turkish courts had an obligation under Article 90 to follow the international treaties in the event of a contradiction between a national legislation and an international human rights treaty, and therefore they had to comply with the ECtHR's jurisprudence. According to him, the Court of Cassation should have reversed the judgement and clarified that the requirement of being permanently incapable to procreate would not be enforceable following the Y.Y. judgement.¹¹⁶

This discussion led to the introduction of a bill in the Grand National Assembly of Turkey on 23 November 2015.¹¹⁷ The author of the bill, Mahmut Tanal, suggested removing the sterilization requirement from Article 40 on the grounds of violation of the reproductive rights guaranteed by the European Convention on Human Rights, CEDAW and the Turkish Constitution.¹¹⁸

3.3.3. The Constitutionality Review of the Turkish Constitutional Court

The applicant requested for the rectification of the sex record on his civil registry from 'female' to 'male'. While examining the request, the Civil Court agreed with the applicant's claims and opted to apply to the Constitutional Court for the annulment of the requirement on the basis of the violation of the Constitution.

The applicant argued that the requirement of being permanently unable to procreate was unconstitutional by stating that transsexuals who were not permanently deprived of the ability to procreate could not change their sex due to this requirement and that this situation caused inequality between transsexuals depending on whether they were permanently deprived of the

¹¹⁴Dunne P. (2015). YY v TURKEY: YY v TURKEY: Infertility as a Pre-condition for Gender Confirmation Surgery. *Medical law review*, 23(4), 646–658. <https://doi.org/10.1093/medlaw/fwv019>.

¹¹⁵Sunata, n 69 above.

¹¹⁶Yargıtay 18. H.D. 30.04.2015, 2014/18452 E. 2015/7159 K.

¹¹⁷Atamer (2016), n 40 above.

¹¹⁸Sunata, n 69 above.

ability to procreate or not. He also added that transsexuals could not be forced to live in this way, deprived of their right to undergo gender affirmation surgery.¹¹⁹

The Court has acknowledged that the provision subject to objection restricted the right to develop one's spiritual and corporeal existence.¹²⁰

According to the Court, when introducing this legislation, the intention of the legislator was to prevent the ordinaryisation of gender affirmation surgeries since such operations are irreversible and pose health risks, and to prevent them from being carried out without any supervision, as well as to protect public order.¹²¹

It has been recognized by the Court that transsexuals, just like all other human beings, can have and not have the ability to procreate.¹²² Under this requirement, transsexuals who are capable of reproduction are obliged to undergo a medical intervention in order to obtain authorization for the gender affirmation surgery.¹²³

While, in accordance with the second paragraph of the same article, in case where the person has undergone gender affirmation surgery in accordance with the purpose and the medical techniques, it is beyond doubt that they will be permanently deprived of the ability to procreate resulting from this surgery.¹²⁴

Subjecting a person seeking gender affirmation surgery to a separate medical intervention to ensure that they are deprived of the ability to procreate prior to this surgery is an unnecessary intervention to be endured physically and mentally in terms of the person concerned, and it constitutes an disproportionate restriction on the corporeal and spiritual existence of the person and their private life.¹²⁵

Furthermore, in the event that a person permanently deprived of the ability to procreate due to a medical intervention for any reason is unable to undergo gender affirmation surgery, then they are likely to suffer the consequence of having lost the ability to procreate despite not being able to change their sex.¹²⁶

For these reasons, the Court ruled that this requirement amounts to violation of the article 13, 17 and 20 of the Turkish Constitution and thus it must be annulled.¹²⁷

With the annulment of this requirement by the Constitutional Court, Turkey has finally fulfilled its obligation to implement the overall measures that arise from the Y.Y. judgment. In addition, this judgement brought Turkey's legislation on gender identity into greater conformity with ECtHR case law. Along with the Y.Y. judgement, the Constitutional Court appeared to have taken into consideration the criticisms of legal experts asserting the unlawfulness of this provision. As a result, there is no legal obligation for transsexuals to be subjected to sterilization operation to receive authorization for gender affirmation surgery. Since this decision has facilitated the process of gender

¹¹⁹AYM 29.11.2017, 2017/130 E. 2017/165 K., para 6.

¹²⁰Ibid, para 19.

¹²¹Ibid, para 20.

¹²²Ibid, para 22.

¹²³Ibid, para 23.

¹²⁴Ibid, para 24.

¹²⁵Ibid, para 25.

¹²⁶Ibid, para 26.

¹²⁷Ibid, para 27.

affirmation for transsexuals,¹²⁸ therefore it might be appreciated as a significant step in the legal recognition of gender identity within Turkish law.¹²⁹

Article 153 of the Constitution stipulates that the decisions of the Constitutional Court shall be published immediately in the Official Gazette and shall be binding on the legislative, executive, and judicial organs, administrative authorities, real and legal persons. Nevertheless, the relevant decision of the Constitutional Court was published over three and a half months from the date of the decision. Consequently, the provision that the Constitutional Court declared to be against rights enshrined in the Constitution has remained in force even after the annulment for a period of time. While it is certain that this situation would entail further infringements of rights, one cannot comprehend the reasons why such a delay was adopted.¹³⁰

3.3.4. The Individual Application

Individual Application right has been introduced by the Constitutional Amendment of 2010.¹³¹ In order for an application to fulfill the eligibility requirement, there has to be a violation of any fundamental right and freedom enshrined in the Turkish Constitution, also covered by the European Convention on Human Rights (ECHR), by the public power.¹³² Regarding the infringement of the rights and freedoms not explicitly mentioned in the Convention, an Individual Application can be accepted. If the ECtHR recognizes that these rights and freedoms fall within the scope of the Convention.¹³³

The M.K. decision holds great significance as it is the first individual application with regard to Article 40. It was decided two and a half months after the publication of the annulment of the sterilization requirement in the Official Gazette.

In the case, the applicant first submitted his request for gender reassignment to the court on 20.03.2014 and this request was denied on 20.06.2014. After the decision became final, the applicant made an Individual Application. On 12.12.2016, the applicant applied again to the 1st Şanlıurfa Civil Court of First Instance for permission; in the meantime, on 29.11.2017, the Constitutional Court abrogated the requirement of being permanently unable to procreate which had been the grounds for the refusal of the applicant's first application. Upon this ruling, the applicant's request was accepted, and the applicant was granted permission. The said decision became final On February 7, 2018. The applicant announced that he would undergo gender reassignment surgery on 20.06.2018 following permission of the court.¹³⁴

In the Individual Application, the applicant alleged that this requirement was in breach of Article 8 of the European Convention on Human Rights and, according to Article 90 of the Constitution, the national legislation was in conflict with the Convention and, therefore, the provision of the Convention had to be given precedence and should be complied with.¹³⁵

¹²⁸ Alçık, n 60 above.

¹²⁹ Sunata, n 69 above.

¹³⁰ Alçık, n 60 above.

¹³¹ <https://www.anayasa.gov.tr/en/individual-application/>

¹³² <https://www.anayasa.gov.tr/en/individual-application/who-may-apply/>

¹³³ Inceoğlu, S. (2013). *İnsan Hakları Avrupa Sözleşmesi ve Anayasa* (3rd ed., p. 11). Beta Basım.

¹³⁴ AYM. 12.06.2018, 2015/13077 E. 2015/13077 K., para 47.

¹³⁵ Ibid, para 14.

The applicant claimed that since the annulment decision of the Constitutional Court was issued after his application, he had suffered non-pecuniary damage and that Court should release a decision stating this violation.¹³⁶ Taking into account that it took almost 4 years before the applicant could undergo gender affirmation surgery, the Court states that it is a matter of certainty that the applicant's private life was adversely affected throughout this period. Since the second application of the applicant concluded with an approval constitutes an irrelevant fact on whether the fundamental rights and freedoms of the applicant have been violated due to the first decision, the Court acknowledges the continuation of the applicant's victim status.¹³⁷

The Court, citing its ruling on this matter during the Constitutionality Review, holds that the applicant's right to the protection and improvement of his corporeal and spiritual existence guaranteed under Article 17 of the Constitution has been violated.¹³⁸

Noting that a new judgment was issued by the court of first instance, the Court considers that the verdict stating that the applicant's fundamental rights and freedoms had been violated provided a satisfactory remedy for the applicant and dismisses his claim for non-pecuniary damages.¹³⁹

With this decision, the Constitutional Court aligned its Individual Application jurisprudence with its Constitutionality Review jurisprudence by referring to the decision on the annulment of the relevant requirement given during the Constitutionality Review.¹⁴⁰

3.4. The Requirement of H Undergone Gender Affirmation Surgery

Under Article 40 paragraph 2, the applicant is required to undergo gender affirmation surgery in accordance with the purpose and medical methods, in order to obtain authorization for the rectification of the civil registry according to their gender identity. This requirement must be confirmed by a medical board report which must be submitted to the court.¹⁴¹

For the legal recognition of self-identification, the applicant then has to endure gender affirmation surgery. Self-identification is not recognized unless there has been medical intervention.¹⁴² Hence, the choice to undergo this surgery can hardly be considered to be a truly deliberate and voluntary decision. While the applicant may not wish to undergo this surgery, they are nevertheless compelled to satisfy this condition as long as they seek to rectify their civil registry.¹⁴³

This forced operation amounts to a violation of the right to respect for private life.¹⁴⁴ A body can never be required to be subjected to any medical intervention for the sole purpose of complying with the binary gender perception.¹⁴⁵

¹³⁶Ibid, para 47.

¹³⁷Ibid, para 48

¹³⁸Ibid, para 71.

¹³⁹Ibid, para 76.

¹⁴⁰Alçık, n 60above.

¹⁴¹Sunata, n 69above.

¹⁴²Atamer (2015), n 44 above.

¹⁴³Cumalıoğlu, E., Transseksüellerin Sicil Cinsiyetini Değiştirmelerinde Kısırlık ve Ameliyat Zorunluluğu Türk Medeni Kanunu'nun 40. Maddesi Anayasa'ya Aykırı mıdır?, *İstanbul Kültür Üniversitesi Hukuk Fakültesi Dergisi*, 15(2), 439-464.

¹⁴⁴Hun, n 40 above;Cumalıoğlu, n 143above.

¹⁴⁵Hun, n 40 above.

3.4.1.The Court of Cassation

The extent of requirement for gender affirmation surgery in accordance with the purpose and medical methods has been set forth by the Court of Cassation in its judgment of 13 February 2006.

On 23 November 2004, a court of first instance granted the applicant permission for gender affirmation operation pursuant to Article 40/1 of the Turkish Civil Code and, upon the authorization decision, the applicant had undergone a medical operation. Following the operation, he applied to the court for the rectification of his civil registry, but his request was refused. This refusal justified by the fact that although his labium minus was removed and his vagina was covered due to the operation, urologically he was not endowed with male external genital organs. The applicant made an appeal to the Court of Cassation. The Court, emphasizing the findings of the court of first instance, held that this type of surgery was not sufficient for the rectification of the civil registry under Article 40.

Accordingly, the Court of Cassation considers that the gender affirmation surgery must have been carried out with both chest and genital surgery the civil registry to be rectified. It is not the applicant's self-identification which is of importance for the Court, but rather the visual factors such as the presence of external reproductive members.¹⁴⁶

3.4.2.The Constitutionality Review of The Turkish Constitutional Court

The applicant requested for the rectification of his civil registry at the 4th Ankara Civil Court of First Instance. While examining the request, the Civil Court agreed with the applicant's claims and opted to apply to the Constitutional Court for the annulment of the requirement on the basis of the violation of the Constitution.

The applicant alleged that the protection of a person's physical and mental health should also be considered within the scope of the protection of bodily integrity and that, therefore, forcing transsexuals to undergo surgery to rectify their civil registry amounted to a violation of Article 17 of the Constitution, protecting an individual's spiritual and corporeal existence.¹⁴⁷

The Court acknowledges that transsexuals' request to rectify their civil registry records is within the scope of the right to the protection and development of one's spiritual and corporeal existence as well as the right to respect for private life¹⁴⁸, thus the requirements set out in the second paragraph regarding the rectification constitutes a restriction of these rights.¹⁴⁹

In order to establish the constitutionality of this restriction, the Court examines three criteria: this restriction should not harm the essence of the right, it should be in accordance with the requirements of democratic society, and it should be proportionate.¹⁵⁰

The Court states that following the birth of an individual, the sex record in the civil registry is issued in accordance with the birth sex of the individual and, pursuant to this record, the individual exercises their rights and fulfilled their obligations, which are regulated differently for men and

¹⁴⁶ Atamer (2016), n 40 above.

¹⁴⁷ AYM 29.11.2017, 2015/79 E. 2017/164 K., para 6.

¹⁴⁸ Ibid, para 13.

¹⁴⁹ Ibid, para 17.

¹⁵⁰ Ibid, para 23.

women. In the Turkish legal system, under very exceptional circumstances, it is permitted to change the birth sex of a person, as long as the condition of surgery is fulfilled.¹⁵¹

The Court asserts that due to the importance of civil registry records in terms of the legal order and the preservation of public order in this respect, the restriction imposed by the provision in question is intended to hinder the arbitrary rectification of civil registry records without undergoing gender affirmation surgery.¹⁵²

According to the Court, such restriction arises from compelling social needs with regard to the democratic social order and it neither abrogates the right to rectification of civil registration nor renders its enjoyment infeasible.¹⁵³

Accepting that a transsexual can rectify their civil registry without having undergone a gender affirmation surgery would lead to a discrepancy between their sex and the sex that appears in their civil registry.¹⁵⁴ The Court considers that this would conflict with the public order in the Turkish legal system, which recognizes positive discrimination for women, granting them rights and obligations in certain professions and other matters. Regulations such as the early retirement age for women and the prohibition of women employment in mines represent examples of this legal practice.¹⁵⁵ Furthermore, it is also considered by Court to be possible for a person to rectify their civil registry just to enjoy certain rights or to get rid of some obligations, which they were unable to benefit from due to their sex. Ultimately, in the opinion of the Court, the annulment of the surgery requirement may adversely impact the social life and may cause a disruptive effect on public order, as well as prevent individuals from exercising their rights and freedoms as required.¹⁵⁶

The Court finds that the provision in the second paragraph does not constitute an unreasonable restriction on the right to develop one's spiritual and corporeal existence and the right to respect for one's private life. Moreover, since it aims to protect public order, the Court held that is not contrary to the requirements of the democratic social order.¹⁵⁷ For these reasons, it rejects the applicant's objection of unconstitutionality.¹⁵⁸

In this Review, the Constitutional Court has taken the position in favor of biological facts on the issue of rectification, stating that rectification of civil registry without having undergone gender affirmation surgery beforehand would constitute a legal recognition of a situation inconsistent with one's genuine sex. The Court holds that the sex listed on the identification card should be in accordance with one's physical appearance, thus it renders being male or female down to the mere possession of either a vagina or a penis.¹⁵⁹

Whilst the Court finds that the restrictions arising from the second paragraph of Article 40 do not preclude a person from exercising their right to rectify the civil registry, those seeking to rectify their sex record would be obliged to undergo gender affirmation surgery thereby sacrificing their right to respect for their physical integrity. If they wish to retain this right, then they will not be in a position

¹⁵¹Ibid, para 24.

¹⁵²Ibid, para 27.

¹⁵³Ibid, para 32.

¹⁵⁴Ibid, para 33.

¹⁵⁵Ibid, para 34.

¹⁵⁶Ibid, para 35.

¹⁵⁷Ibid, para 36.

¹⁵⁸Ibid, para 37.

¹⁵⁹Özkan, n 14 above.

to exercise their right to obtain legal recognition of their gender identity. Consequently, a decision between these two rights has to be made.¹⁶⁰

The consequences of a mandatory gender affirmation surgery are not limited only to the judicial sphere, but also have both psychological and sociological impacts on individuals. In case of refusal of rectification, this would further exacerbate the hardships encountered by transgender people daily during their lifetime. It is likely to lead to stigmatization and discrimination; as such, transgender people would struggle to integrate into social life, even in some cases they would not be able to exercise their rights such as access to employment, social security, and education.¹⁶¹

Everyone has the right to self-determination and to live without discrimination on the basis of their sexual orientation and gender identity, as recognized by numerous international instruments as well as by several human rights courts.¹⁶² Over most of Europe, the legal recognition of one's gender identity has become detached from anatomical facts.¹⁶³ Accordingly, it is now widely recognized that the right to legal recognition of gender identity constitutes an extension of the fundamental right to develop one's corporeal and spiritual existence. This right further touches upon human dignity and respect for private life.¹⁶⁴

It can be argued that the Turkish Constitutional Court is still rather out of line with international human rights¹⁶⁵ and that Turkish legal system has remained committed to an outdated and long-abandoned perspective¹⁶⁶. Therefore, it is of great importance for the Constitutional Court to harmonize its jurisprudence with universal human rights standards with respect to legal provisions on gender affirmation.¹⁶⁷

3.4.3. The Case of X and Y v. Romania

Applicants X and Y are two transgenders seeking to amend their administrative records to reflect their gender identity. They were rejected on the grounds of having not previously undergone gender affirmation surgery. The Court considers that the refusal of the domestic authorities to legally recognize the applicants' gender identities, even though neither of them had undergone surgery, amounts to an unjustified interference with their right to respect for their private life. In the course of this case, the Court has introduced a novel notion which is called 'the impossible dilemma'. In its view, it constitutes an impossible dilemma for an individual to have to waive either their right to legal recognition of their gender identity or their right to respect for bodily integrity, just to have their civil registry rectified.¹⁶⁸

¹⁶⁰Sunata, n 69above.

¹⁶¹Akbaş, Ö. O. (2021). Türkiye'de Cinsiyet Geçişi ile İlgili Hükümlerinin Özerklik Hakkı Açısından İncelenmesi. *Türkiye Biyoetik Dergisi*, 8(4), 170-177

¹⁶²Ibid;Özkan,n 14 above.

¹⁶³Atamer (2016), n 40above.

¹⁶⁴Sunata, n 69above.

¹⁶⁵Özkan, n 14above.

¹⁶⁶Atamer (2016), n 40 above.

¹⁶⁷Akbaş, n 162above.

¹⁶⁸(2021). *Information Note on the Court's case-law* (247th ed.). Council of Europe/European Court of Human Rights.

This case differs from the Court's previous case-law as the applicants expressly announced that they did not wish to undergo gender affirmation surgery in order to rectify their civil registry records. It bears similarities to *A.P., Garçon and Nicot v. France*, a case which focused mainly on the sterilizing impact of gender affirmation surgery. The novelty of the case is that the grounds of refusal to undergo gender affirmation surgery lies in the invasive nature of the operation, rather than in its impact on reproductive capacity.

Additionally, the Court's approach towards the case is different from previous cases. For instance, in *X v. FYROM*, it only pointed to the lack of unambiguous and established national legislation on the gender affirmation process and considered it unnecessary to further examine the requirement of surgery. On the contrary, while the legal framework in Romania may be also interpreted as ambiguous owing to its fragmented nature and incoherence, Court has opted not to dwell on this point and to examine the surgery requirement.

Having the Court unanimously rule that requiring a person to undergo gender affirmation surgery in order to legal recognition of their gender identity amounts to a violation of Article 8 of the Convention will undoubtedly have significant impact on the transgender community.

Within the trans community, there are numerous individuals who are unable to undergo this surgery for a variety of reasons, including financial costs, lack of medical interventions, religious concerns, family constraints and many others. Furthermore, there are some individuals who, even if they are able to do so, are unwilling to undergo this surgery. By this judgement, the Court renders legal recognition much more achievable and accessible for all those who are unwilling or unable to undergo such surgery. It therefore has the capacity to de-escalate everyday occurrences that cause anxiety and depression as well as make one feel humiliated and vulnerable, especially when one's identity documents do not match one's gender presentation.

However, this ruling should not be considered as a final judicial victory for the transgender community, since there are still numerous issues that remain to be addressed. Among them is the existence of many other abusive requirements for legal recognition. If the Court opts to follow it, the 'impossible dilemma' approach might be potentially valuable in terms of annulling further requirements bearing impact on a person's physical integrity, such as compulsory hormone replacement therapies.

It is worth emphasizing that by abrogating the requirement of surgery, any other requirements laid down in national legal frameworks might gain significant relevance. For example, ECtHR has acknowledged and legitimized other requirements, such as having a diagnosis of 'gender identity disorder' and spending several years living as the members of the opposite sex, as essential indicators of being a 'genuine transgender person'.

Given that cisgender people are not required to satisfy any requirements for the recognition of their gender identity, one might question the legitimacy of any requirements being imposed on transgender people seeking to enjoy the same right. In 2017, the Inter-American Court of Human Rights resorted to this reasoning to condemn abusive requirements for legal recognition. Yet, the European Court of Human Rights is nowhere remotely near to embracing this perspective and acknowledging the possibility of trans experiences which may not conform to a binary view of gender. Therefore, within this binary and essentialist perspective, people whose stories fail to follow the 'classic' narrative of the trans experience are not welcome.

Overall, the significance of this judgment cannot be brushed aside nor can its expected positive impact upon the trans community be underestimated. At the same time, it does not necessarily

imply that this promising evolvement in the Court's jurisprudence has to stop here. Rather, the Court is required to reach a point where it acknowledges the self-determination as the sole requirement for gender recognition, similar to the case of the Inter-American Court of Human Rights, which established this in 2017.¹⁶⁹

As regards the implications of this judgement upon the Turkish legal system, under Article 90 of the Constitution of the Republic of Turkey, upon this judgement, the Turkish courts are now under an obligation to authorize the rectification of civil registry records without requiring gender affirmation surgery. This raises the question of how Turkish national legislation will align with this judgement.

Article 152, § 4 of the Turkish Constitution reads as follows:

“No claim of unconstitutionality shall be made with regard to the same legal provision until ten years elapse after publication in the Official Gazette of the decision of the Constitutional Court dismissing the application on its merits”

As the date of publication of the Constitutionality Review in the Official Gazette is 20th March 2018, the unconstitutionality of Article 40 § 2 cannot be raised through this procedure until 20th March 2028. For this reason, the Constitutionality Review cannot be regarded as an effective solution.

Two other ways remain to resolve this discrepancy between the case-law of the ECtHR and the Turkish legislation.

The first one is to apply to the Individual Application procedure. Considering that the Court cannot annul a legislation through this procedure, therefore, each individual has to submit an Individual Application in relation to their own particular case. Furthermore, it cannot be asserted for certain that the Court will rule contrary to its previous findings and thus in favor of the applicant. Besides, given that submitting an Individual Application is a rather arduous procedure, it remains unlikely that relying on this method for approximately five and a half years would be a convenient approach.

The last and final alternative is for the legislator to take this inconsistency into consideration and amend Article 40 in accordance with the ECtHR judgement. To this end, the Individual Application shall also be significant in terms of bringing this problem onto the legislator's agenda.

3.5. Further Thoughts

When the northern European countries started to recognize preferred gender in the mid-and late 20th century, they favored a medical approach to this issue. As this approach continues to exist since then, in many legal systems the recognition of gender identity bound up with the requirements imposed by the medical profession.¹⁷⁰

As legal experts assumed that all they needed was to be 'fixed' via multiple medical interventions, for a long-time transgender people were perceived as mere 'object[s] of medicine'. Therefore, their

¹⁶⁹Schoentjes, S., & Cannoot, P., Dr. (2021, February 25). *X and Y v. Romania: the 'impossible dilemma' reasoning applied to gender affirming surgery as a requirement for gender recognition*. Strasbourg Observers. <https://strasbourgobservers.com/2021/02/25/x-and-y-v-romania-the-impossible-dilemma-reasoning-applied-to-gender-affirming-surgery-as-a-requirement-for-gender-recognition/>

¹⁷⁰Scherpe, J., & Dunne, P. (2015). Comparative Analysis and Recommendations. In J. Scherpe (Ed.), *The Legal Status of Transsexual and Transgender Persons* (pp. 615-663). Intersentia. doi:10.1017/9781780685588.026.

rights to bodily integrity and informed consent were disregarded and they were compelled to simply play along with the narrative set out for them by others.

Accordingly, as the case law of the ECtHR shows, legislators and the courts collectively constructed a stereotype of the transgender person to fit their self-assigned characterization. As such, each transgender individual has to feel uncertain about their gender during their childhood which will be evolve into distress when they become adults. In order to get rid of this feeling of gender dysphoria, they have to resort to the only solution: surgical interventions and the removal of certain physical characteristics.¹⁷¹

Since each human being is so unique, there is no unified trans narrative applicable to every individual in the trans community.¹⁷² Where some of them wish to undergo gender affirmation surgery, they are others who do not desire any, or only some, medical intervention.¹⁷³

At the heart of this problem lies the binary perception shared by policy makers and the judiciary. Relying on the assumption that each individual is born with either unambiguously male or unambiguously female sex characteristics, they consider gender from an "either/or" perspective. As no other alternative possibility is recognizable for them, therefore, they require transgender individuals seeking legal recognition of their gender identity to have their bodies altered to conform to the binary model, where necessary by surgical intervention. According to their reasoning, recognizing the existence of 'unnatural bodily diversity' would tend to provoke public confusion or disturbance.¹⁷⁴

Even from a strictly biological standpoint, the existence of two definite and absolute binary genders cannot be acknowledged as an irrefutable fact. The very existence of intersex people proves beyond doubt the falsehood of the assumption that all human beings have unambiguously male or female sex characteristics and suggests that alternative possibilities also exist among humans. That being so, then why should transgender people be compelled to modify their bodies just to maintain a binary standard, whose very existence is questionable? Even if the existence of such a binary is recognized, why does the inference be drawn from this fact that each individual ought to conform to this binary?¹⁷⁵ And why do legal systems, and indeed the society itself, fail to come to terms with the fact that not everyone's gender identity has to follow predefined standards? It is within the answers to these questions where the truth of the transgender matter lies.

¹⁷¹Dune, n 114 above.

¹⁷²Ibid.

¹⁷³Scherpe, n 170 above.

¹⁷⁴Ibid.

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