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The Legal Status of Transsexuals in Turkey

Yesim M. Atamer, PhD, LLM

ABSTRACT. The development of the legal regulations concerning transsexuals in Turkey can be analysed in three phases. The first phase was prior to 1988 when there were no legal parameters at all. The second phase started in 1988 when certain changes made in the Turkish Civil Code (TCC) for the first time gave people who had already undergone sex reassignment surgery (SRS) the possibility to enter this change into the birth register. The third phase commenced in 2002 when the new Turkish Civil Code came into force.¹ Art.40 of the Code now regulates the pre-conditions for a surgery and the procedure for getting a court authorisation in order to be operated as well as the procedure for entering the sex change into the birth register after the operation. Following remarks aim at briefly explaining these historical developments in Turkish law and presenting the current legal situation in Turkey with respect to transsexuals. The deficiencies in the existing regulation and possible ways of surmounting these will also be examined. *[Article copies available for a fee from The Haworth Document Delivery Service: 1-800-HAWORTH. E-mail address: <docdelivery@haworthpress.com> Website: <http://www.HaworthPress.com> © 2005 by The Haworth Press, Inc. All rights reserved.]*

KEYWORDS. Transsexuals in Turkey, Art.40 of the New Turkish Civil Code

FIRST PHASE

Prior to 1988 there were no legal regulations in Turkey concerning transsexuals. However, the Turkish Court of Cassation was required to deal with the pleas of a famous Turkish singer who had undergone a sex reassignment surgery abroad and wanted to effect the necessary changes in the birth register. The court rejected those applications on the ground that the existing laws did not give individuals the freedom to choose their sex.² It concluded that nobody could change his/her sex arbitrarily and then request a change in the birth register. Therefore, the court explicitly refused to accept the view that the Turkish law was silent on the subject, which would have meant that the judge would have the right to fill the legal gap according to Art.1 TCC through creating a new type of register change action.³ According to the decisions, only those who were considered to be intersex (hermaphrodites) from birth were allowed to be operated on in order to be assigned to one sex. The court concluded that since the litigant in question was not a hermaphrodite prior to the operation that he had undergone abroad, one could only pity him for the loss of his male sexuality without being able to transform into a “real” woman, but could not give him the right to change the register according to his alleged new sex.⁴

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SECOND PHASE

In the year 1988 the Turkish Parliament decided to make a change in the Turkish Civil Code in order to regulate the status of the transsexuals. According to the amended version of Art.29, a person able to produce a report of a health commission⁵ certifying that he/she has undergone a sex reassignment surgery could apply to the court to order a change in the birth register. Should this person be married, the spouse would be given due notice of the application, and upon the court order allowing the application for change in the birth register, the marriage would automatically come to an end. In the event that the couple in question had children, the court would also be required to decide which of the parents would be entitled to retain custody of the children.

Although this regulation was clearly a step forward with regard to the legal situation of transsexuals in Turkey, it was strongly criticized in the legal doctrine.⁶ As Turkish law only recognizes marriages between people of different sexes, one of the main issues that came up for debate was with respect to the possibility of married people to undergo such an operation. Another criticism was that Art.29 did not at all specify the pre-conditions for such an operation. Given the reality of widespread malpractice in the 1980s in Turkey, it was considered necessary to have stringent regulations for sex reassignment surgeries. It was hoped that medical practice would be controlled through strict laws.

THIRD PHASE

Under these circumstances one cannot be surprised that in the third phase harsh regulations were introduced. This phase started when the new Turkish Civil Code was put into force in 2002.⁷ Article 40, which is to be found among the regulations concerning the civil status registers, follows Art.39 on the need for a court decision to execute any change in the civil status registers and 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 completed 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.

If it is confirmed by an official health board report, that a sex reassignment operation was effected 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.”

THE PRESENT LEGAL SITUATION

According to Art.40 TCC there are now two stages to be completed before the sex change can be reflected in the civil status register. The first stage is prior to the operation, the second subsequent to the operation. The person of transsexual nature has to first apply to court to get permission for a sex reassignment surgery. The aim of this provision is obviously to bring sex reassignment surgeries under control. The court will give its permission only if the following conditions are fulfilled:

The Formal Conditions: The applicant must have completed the age of 18 and must be unmarried. The court itself can examine the existence of both conditions. Although not mentioned in the article, it is apparent that the applicant must be mentally capable. If he/she is under legal guardianship and over the age of 18 the court must also ask the guardian for his/her consent.⁸

The Material Conditions: The applicant must be of transsexual nature; that means he/she must suffer from discordance between anatomical sex at birth and gender identity. But the law does not answer the question of how long this discordance must have lasted.⁹ This can differ from case to case and according to the assessment procedures used by the experts involved in each case. Besides this, the sex reassignment surgery must be compulsory for

the applicant's mental health, which means that he/she would suffer lifelong distress in the absence of effective treatment. Finally, he/she must be infertile.¹⁰ The court cannot examine the existence of these three conditions on its own but must decide according to an expert opinion,¹¹ which is explicitly required to be prepared by a health board of an education and research hospital.¹² The hospital, which may prepare this expert opinion, is defined very strictly so as to prevent the treatment of transsexuals and issuance of expert opinions by medical institutions having inadequate expertise or inadequate procedures for a prior medical examination. The requirement of a *board* report indicates that there has to be more than one specialist engaged in the procedure.

After the court gives its consent for the sexual reassignment surgery the transsexual can have the surgery performed at any hospital he/she desires. It can also be performed abroad. Following the surgery, the transsexual has to apply to court again, this time, to get a decision allowing him/her to enter the change into the birth register. The pre-condition for such a decision is a report issued by an official health board which should state that the sex reassignment surgery was effected in accordance with the aim of such operation and the relevant medical methods. Any official health institution can issue such an opinion; the stricter provision of paragraph one seeking for the report of an education and research hospital does not apply in this case. Once the court allows the application in this regard, the relevant authorities have to make the necessary changes in the birth register.

DEFICIENCIES IN THE PRESENT LEGAL SITUATION

One of the possible problems that may be encountered under the current regulation is the situation of people who have undergone an SRS without prior court permission. This situation may very well arise in a number of cases, for example, in respect of SRS conducted in a foreign country. As Art.40 (2) TCC only allows changes in the birth register for operations performed with prior permission, the

courts will have to reject all other applications such as those referred to above. Under these circumstances one of the questions that will arise in the future is whether this new regulation constitutes a violation of the right to respect to private life as prescribed under Art.8 of the European Convention on Human Rights. With the decision in the case of *Christine Goodwin v. The United Kingdom* the European Court of Human Rights has changed its jurisprudence regarding the legal situation of the transsexuals.¹³ The court found that by denying transsexuals the right to alter their register of birth the government of Great Britain was violating Art.8 of the Convention. If a plea rejected by the Turkish Court of Cassation on the ground of missing prior court consent to an SRS were to be brought to the European Court of Human Rights,¹⁴ it is not unlikely that the regulation of Art.40 TCC would be found incompatible with Art.8 of the Convention. As a matter of fact, in the Turkish doctrine, the view is already expressed that the operation without prior authorization would be illegal but that the law has to find a solution for the *de facto* outcome: The transsexual should be able to effect a change in the register although having no prior consent to the operation.¹⁵

Another area of concern is that the state of being permanently deprived of the capacity of reproduction is sought prior to the SRS.¹⁶ A transsexual with normal genital organs and hormonal functions is naturally also fertile. Therefore, this new regulation will force doctors to apply such treatment as is necessary to make a patient infertile, or even to take surgical steps to ensure this outcome. This constitutes an unnecessary burden for the transsexual.¹⁷ Also, one can only hope that the Turkish courts will not interpret the article in such a manner as to make it necessary for the transsexual to have been infertile from birth. Such an interpretation of the article would take away the chance of a transsexual who already has children to undergo an SRS and to cure his/her gender identity disorder.

The new regulation gives only unmarried persons the chance of getting court consent to undergo an SRS. However, in practice, a married person may have the operation without court consent. In this case the question that

arises is how the marriage should be treated. The 1988 provision in the TCC stipulated that the marriage would be automatically dissolved following the court decision regarding the change of the birth register, which was a very reasonable solution to this problem. But as the new code does not take into account the status of those transsexuals who do not have court consent prior to undergoing an SRS, the resulting situation will be exactly one that the framers of the new code wanted to avoid: that there will necessarily be couples of the same sex who will remain married unless such a marriage is terminated by divorce thereafter.

Another question is whether a court decision prior to the operation should remain indefinitely valid and subsisting, even if the SRS is not undertaken within a reasonable time thereafter. Art.40 TCC is silent in this respect. If the SRS is not carried out within a reasonable time after the courts decision the doctors would be well advised to ask for a new decision if there are doubts as to whether the conditions precedent for the SRS still exist.

THE EFFECTS OF REGISTRATION OF THE SEX CHANGE IN THE BIRTH REGISTER

Name Change: After the amendment of the transsexuals' civil status record he/she will have the right to change his/her name. According to Art.27 TCC a person has the right to file a suit in order to change his/her name if there is a just ground. It is up to the judge to decide if the ground is just or not. Certainly an SRS and a consequent change in the register must be considered a just ground, as his/her previous name will not conform to his/her new physical status.

Marriage: On the change of sex being registered, the transsexual has the right to marry someone from his/her previous sex. Under Turkish law only a man and a woman can enter into a marriage. As long as the person who underwent transsexual surgery has not obtained a change in the birth register he/she cannot marry someone belonging to the sex he/she once belonged to. But after this change is made there will be no legal obstacle to such a marriage. Should the partner find out about the

SRS after the marriage he/she will be entitled to annul the marriage as per the provisions of Art.149 or 150 of the TCC. Art.149 gives the spouse the right to dissolve the marriage if the other spouse does not possess some major qualities without which it would be unbearable for him/her to live with this partner. Parallel to this, Art.150 regulates the right of the spouse to annul the marriage if he/she fraudulently was deceived about some major qualities of the other spouse. Both of these cases are subject to a time bar of 6 months from the date of awareness of such missing quality or the fraud, and in any case to an absolute time bar of 5 years from the date of marriage. After this period the only way to end the marriage would be by divorce.

Adoption of Children: According to Turkish law a person who is single and 30 years or older can adopt a child on his/her own. If a married couple want to adopt a child then both of them have to be at the age of 30 or must be married to each other for the past 5 years at least. Only married couples can jointly adopt a child. Cohabitation without marriage does not give such right of adoption.

According to Art.305 TCC the adopting person has to take care of the child for a period of at least one year and it is only after fulfilling this necessary precondition that an application to the court for an order to allow the adoption can be filed. Before allowing the adoption the judge must make thorough investigations especially with respect to the health of the adopting person and the adopted child, their mutual relationship, their economic situation, the educational qualifications of the adopting person, and his/her motives for the adoption, as also the family situation and the developments during the one year care period (Art.316/2 TCC). The judge is entitled to ask for professional assistance while taking this decision (Art.316/1 TCC). For any transsexual who has undergone an SRS it is legally possible to make an application under these preconditions.

Social Benefits

Relating to all kind of social benefits it has to be accepted that with the change in the birth register the transsexual is going to be judged according to his/her new sex. This means that

principally the retirement age will be determined in line with his/her new sex and all kinds of social payments will be assessed the same way. In a decision given by the Turkish Council of State in 1993 for example, it was accepted that the appellant, who was a male to female transsexual, was put again on orphan's pension, which according to Turkish law is continued to be paid only to female and not male descendants after the age of 25. The court stated that the appellant who had effected a change in the birth register has absolutely the same rights as any other woman in Turkey.¹⁸

NOTES

1. The Turkish Civil Code put into force in 1926 was a literal translation of the Swiss Civil Code of 1912 and was applied for 76 years. In 2002 a new Civil Code was put into force in Turkey. However, the new code has exactly the same structure and mostly the same provisions as the previous one. One of the major changes made was the language purification and the formulation of the code in modern Turkish language. The most important changes regarding the content are to be found in the Family Law section, which are partly again translations of changes in the Swiss Civil Code made from time to time until 2002. The newly introduced Art.40 TCC concerning the legal status of transsexuals however is original and not existent in the Swiss Civil Code.

2. 2nd chamber of the Turkish Court of Cassation (Y2HD), 21.01.1982, Yargıtay Kararları Dergisi 323-326 (1982) and Y2HD, 27.03.1986, Yargıtay Kararları Dergisi 1112-1126 (1986). For explanations regarding the first phase see Oztürel, 1980-1981; Kocayusufpaşaoğlu, 1986; for a review of the publication of Kocayusufpaşaoğlu see Burcuoğlu, 1986.

3. Art.1 Swiss and Turkish Civil Code has the following wording: "(1) The law regulates all matters to which the text or spirit of one of its dispositions relate. (2) If the law is silent, the judge shall decide according to customary law and if this also lacks, he shall decide according to the rule he would have set had he been the lawmaker. (3) While deciding, he shall make use of doctrine and jurisprudence." It is interesting to know that most of the Swiss courts, which were also confronted with the pleas to change the birth register after a sex reassignment surgery, accepted these, although, at that time they worked with the same Civil Code articles as in Turkey. In contrast to the Turkish courts, the Swiss courts concluded that the law was silent on this subject and that a register change action of a *sui generis* type had to be created according to the right given to the judge in Art.1 of the Civil Code. See e.g., Bezirksgericht Laupen

17.02.1971, Zeitschrift für Zivilstandswesen (ZZW) 129-130 (1971); Bezirksgericht Vevey 09.05.1974, ZZW 181-185 (1975); Zivilgericht Kanton Basel-Stadt 08.05.1979, ZZW 281-285 (1979); For an analysis of these decisions see Aubert/Reich, 1987. See also St. Gallen Bezirksgericht 26.11.1996, Schweizerische Juristenzeitung 442-443 (1997). For a comparison of the Swiss and Turkish court decisions on the subject see Will, 1991, 832; Will/Oztan, 1993, 244.

4. Oztürel an Will report of several decisions of lower courts, which did accept the pleas for change in the birth register after SRS. However until the change in the law in 1988, the Court of Cassation always rejected those lower court decisions, which were appealed (see for these unpublished decisions: Oztürel, 1980-1981, at 253, 268-273 and Will, 1991, at 825, 832-834). See also YHGK 23.10.1987, in: Nihat Inal, Uygulamada Medeni Hakların Kullanılması-Kısıtlanmasi Davalari (Civil Rights Usage and Guardianship Cases in Praxis), Ankara 1994, 372-373.

5. For a Court of Cassation decision (Y2HD, 2.12.1993), accepting the report given by the Forensic Medicine Institute, stating that a SRS was carried out, see: Omer Ugur Genccan, Nufus Davalari (Personal Status Actions), Ankara 2000, 267.

6. Kocayusufpaşaoğlu, 1991; Will, 1991; Will/Oztan, 1993; Guven, 1997.

7. According to Article 2 of the Law on the Enforcement and Application of the Turkish Civil Code, all regulations of the new TCC concerning public order are to be applied immediately with the coming into force of this code on 01.01.2002. Meanwhile the Court of Cassation has decided that Art.40 TCC is also in relation with the Turkish public order and therefore has to be applied even to pending cases regarding sex changes (Y2HD 29.03.2002, Yargıtay Kararları Dergisi 2002, 1160).

8. Article 24 of the Turkish Patients Rights Regulation of 1998 states that for medical interventions on people under legal guardianship principally the guardian has to give consent. If this consent is not given although the intervention is in favour of the person under guardianship, one can request the court to give this consent. See also Dural/Oguz, 2002, 116.

9. For different approaches concerning the real-life test in European legislation see: Will, 1995, at 75, 86-87.

10. All three material conditions are of medical nature and will not be examined in detail in this paper, which is concerned only with the juridical side of the problem. Information on the criteria applied for the issuing of an expert opinion confirming the need for a sex reassignment surgery in Turkey can be obtained from Karali et al., 1998. Also see: Yuksel et al., 2000.

11. According to Turkish procedural law this report is an expert opinion which is not binding on the judge. He can freely evaluate this evidence and ask for a new expert opinion if he does not find the existing one convincing.

12. The Turkish Ministry of Health designates the education and research hospitals.

13. Application Nr.28957/95, 11.07.2002 (<http://www.echr.coe.int/Hudoc.htm>). According to the court “the respondent Government can *no longer* claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention. Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention.” About the previous decisions of the Court see Stephen Whittle, “Transgender Rights: The European Court of Human Rights and New Identity Politics for a New Age,” in Hegarty/Leonard (Ed.), *A Human Rights: An Agenda for the 21st Century*, Cavendish 1999, 201-216; and Will, 1995, at 75, 77-80.

14. According to Art.35 of the European Convention on Human Rights: “The court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.” As there is no higher instance for final decisions of the Court of Cassation in Turkey, the domestic remedies will be exhausted thereafter and an application to the European Court of Human Rights can be submitted.

15. Dural/Oguz, 2002, 117

16. In contrast, European laws that mention infertility require it as a condition for registering the sex change, not as a condition for the SRS itself. See German Transsexuals’ Law 8; Dutch Civil Code Art.29a; Swedish Law on Gender Assignment Art.1. Some regulations such as the Italian and the Austrian ones do not even specifically mention the inability of procreating as a condition.

17. Erman, 2003, 215. According to Will it is doubtful that the European Court of Human Rights would find the precondition of infertility, as it is regulated in Art.40 TCC today, compatible with the European Convention on Human Rights (Will, 2003, at 741, 752).

18. 10th chamber of the Council of State, 27.12.1993, Esas: 1992/4706, Karar: 1993/5536, www.ajanstuba.com.tr

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