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RESEARCH ARTICLE

Evaluation of the Turkish Constitutional Court's Decisions Regarding Transsexuals' Individual Applications Following the Rejection of Their Name Change Requests*

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Abstract

A person's name distinguishes them from others and makes them unique. Due to its importance, the principle of the invariance of the name has been accepted as a rule in the Turkish Civil Code No. 4721 (TCC). However, a person can request the change of a name that they do not identify with from the court, only on the basis of valid reasons, pursuant to TCC art. 27. One of these valid reasons, which is frequently encountered in judicial decisions, is that the person is known by another name in their social life. Despite the fact that they are based on such a valid reason, which is generally accepted in the decisions included in this study, some name change requests of transsexuals were rejected by local courts as the issue was associated with gender reassignment, and the applicant then made individual applications to the Constitutional Court. Regarding these applications, the Constitutional Court decided that the right to respect for private life had been violated. The aim of this study is to examine the name change in light of these two recent decisions of the Constitutional Court.

Keywords

Valid Reason, Name Change, Transsexual, Decisions of the Turkish Constitutional Court

* This study is an expanded version of the paper presented at the International Mediterranean Law Congress on July 5, 2022.

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Introduction

The name of a person is a part of their personality and it can be protected by the general provisions of TCC art. 23-25[1]. However, the legislators did not consider this sufficient and also included the person's right to their name. In this context, "Protection of the Name" in art. 26 of TCC[2] and "Change of the Name" in art. 27 of TCC[3] were regulated.

Although the principle of invariance of the name has been accepted as a rule in Turkish law, according to art. 27 of TCC, a change of name can be requested from the judge in the presence of valid reasons. Therefore, the conditions for changing the name are a claim by litigation, finding valid reasons and a court decision. The judge will evaluate whether there is a valid reason or not in the concrete case.

In this study, the change of name is examined on the basis of the individual application decisions of two transgenders to the Constitutional Court. These individuals applied to the Constitutional Court because their requests for a name change based on the reason "the person is known by another name in their social life," which is generally accepted in the decisions of the Supreme Court, were rejected by the lower courts[4].

1 *"B. Protection of personality*
I. Against renunciation and excessive restriction
Article 23- No one can renounce her/his rights and capacity to act, even partially.
No one may renounce their freedom or limit them unlawfully or unethically.
It is possible to receive, vaccinate and transport biological materials of human origin upon written consent. However, the person who is under the obligation to give a biological substance cannot be asked to fulfill her/his obligation; material and moral compensation cannot be claimed.
II. Principle
1 Against Attack
Article 24- A person whose personal right is attacked unlawfully may request protection from the judge against those who attack it.
Any attack on personal rights is unlawful, unless it is justified by the consent of the person whose personal right is violated, for a superior private or public benefit, or for the use of the authority given by the law.
2. Lawsuits
Article 25- The plaintiff may request from the judge to prevent the danger of attack, to put an end to the ongoing attack, and to determine the illegality of the attack whose effects continue even though it has ended.
Along with these, the claimant may also request the notification or publication of the correction or decision to third parties.
The claimant's right to claim for pecuniary and non-pecuniary damages and that the earnings obtained due to unlawful attack be given to her/him in accordance with the provisions of acting without power of attorney is reserved.
The non-pecuniary damage request cannot be transferred unless accepted by the other party; it does not pass to the heirs unless it is claimed by the legator.
The plaintiff may file a lawsuit in the court of her/his own domicile or the domicile of the defendant for the protection of her/his personality rights."

2 *"III. The right to the name*
1. Protection of the name
Article 26- The person whose name is controversial can sue for the determination of her/his right. The person whose name is used unfairly must be terminated; if the wrongful user is at fault, she/he may also request the compensation of her/his material damage and the payment of moral compensation if the nature of the injustice she/he has suffered requires it."

3 *"2. Changing the name*
Article 27- Changing the name can only be requested from the judge based on valid reasons.
The name change is registered and announced in the registry.
Personal status does not change by changing the name.
The person who has been harmed by the change of name can sue for the annulment of the decision to change within one year, starting from the day she/he learned about it."

4 In the Constitutional Court decisions evaluated in this study, it was concluded that the right to respect for private life under the Constitution was violated. However, since this study deals with the issue in terms of civil law and name change, evaluations regarding public law, especially constitutional law, have been deliberately excluded from the scope of the study.

I. Decisions of the Constitutional Court

A. Decision Dated 27 January 2021, No. 2018/34343

The applicant, who was born in 1985, filed a lawsuit against the Bergama Registration Office on 11 December 2017 at the Bergama 1st Civil Court of First Instance to change their[5] name to S.Ö. In their petition, they justified their request by stating that they had been using the name S.Ö., which was suitable for their sexual orientation, for more than ten years, and that they were known by this name in their social environment. They also stated that they felt like a woman and lived accordingly but could not have sex reassignment surgery due to financial difficulties, and stated that their name being T. in the register caused confusion. The court requested an investigation on the subject, and as a result, it was determined that the applicant was known by the name S. in the social environment where they lived. However, the court decided to reject the case, stating that in order for the applicant, who is a male according to the register, to use a female name, they must first file a gender reassignment claim (TCC art. 40[6]) and wait for the outcome of this case.

The applicant appealed to the Court of Appeals by repeating their claims, but their appeal was also rejected on the merits. When rejecting the case on the merits, the Court of Appeals emphasized that civil rights cases are related to public order, that the acceptance of the applicant's request may cause confusion in the public order, and that it is not legally possible to change the name of a male to S., and stated that the decision was in accordance with the procedure and the law. The Court of Appeals also stated that the fact that the applicant, who was a male in the register, adopted a female identity and was known as S.Ö. in their social environment did not constitute a valid reason for changing the name. After the final decision was communicated to them, the applicant stated that they were known as S.Ö. in their social environment, that they had difficulties in their business and social life due to the difference between the name in the official records and the name by which they were known, that the requirement for gender reassignment surgery as a condition for a name change was unlawful, and that their request had been rejected on arbitrary grounds. They also stated that the regulation on which the courts are based is not about the name, but about the gender, and that they suffered moral damages due to the decisions given. They made an individual application to the Constitutional Court alleging that the

5 In order not to use gender-related pronouns, "they" are used in the article.

6 *"2. Gender reassignment*
Article 40- Anyone who wishes to change their gender may apply in person and request permission from the court to change their gender. However, in order for the permission to be granted, the applicant must be over the age of eighteen and not married; in addition, she/he is transgender and must document the necessity of gender reassignment in terms of mental health (...) with an official health board report to be obtained from a training and research hospital.
In case it is confirmed by the official health board report that a gender reassignment surgery has been performed in accordance with the purpose and medical methods, depending on the permission given, the court decides to make the necessary correction in the registry."

prohibition of discrimination[7], the right to respect for private life[8], and the right to a fair trial had been violated.

The Constitutional Court decided that the applicant's claim that their right to respect for private life had been violated was acceptable and examined the matter on the merits[9]. In this examination, the obligations of the state within the scope of the right to respect for private life, the importance of the name, the obligations of the state regarding the name change, the effect of the interpretation of the courts of instance on the right to change the name, and whether a fair balance had been established between the public interest and the private benefit were evaluated. As a result, it was unanimously decided that the right to respect for private life was violated and a copy of the decision was sent to the Bergama 1st Civil Court of First Instance for a retrial in order to eliminate the consequences of the damage[10].

B. Decision Dated 17 June 2021, No. 2019/42944[11]

H.K. filed a name change lawsuit[12] against the Ankara Registration Office on 11 September 2017, claiming that they were male according to the register, but they defined themself as a transexual, continued their social life in this way, and were known as D. in their social environment. During the proceedings at the 12th Civil Court of First Instance in Ankara, the applicant also stated that they had not yet had a sex reassignment surgery but were planning it, and repeated their reasons for requesting a name change. The representative of the Registration Office who was present in the case declared that the Court had discretion regarding the request. The court, in the reasoning of the decision, TCC art. 40, stated that the name D. was always used by women and that the applicant had declared that they had not undergone

7 The prohibition of discrimination and the principle of equality are intertwined concepts. The principle of equality requires that those with equal status be treated equally and those with different status be treated differently. Failure to comply with this principle without an objective reason would constitute discrimination. Accordingly, discrimination can be expressed as treating people in the same situation differently without an objective and reasonable reason. Both the Constitution and the European Convention on Human Rights prohibit discrimination. For the term prohibition of discrimination, see Bakım S, 'Avrupa İnsan Hakları Mahkemesi (Aihm) Kararları Çerçevesinde Cinsiyet Ayrımcılığı' (2016) 22/3, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, 3192-3193, Kudret HA, 'Avrupa İnsan Hakları Mahkemesi ve Türk Anayasa Mahkemesi Kararları Işığında Yasaklanan Ayrımcılık Temeli Olarak Cinsel Yönelim' (2020) 26/2, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, 1081 ff. Discrimination on the basis of gender and sexual orientation is also frequently encountered. For evaluations of the European Court of Human Rights' decisions on discrimination based on sexual orientation, see Kudret (7) 1094 ff.

8 This right is also protected under Article 8 of the European Convention on Human Rights. For European Court of Human Rights decisions on the subject, see. Stjerna v. Finland, No: 18131/91, 25/11/1994 § 39; Kemal Taşkın and Others v. Turkey, No: 30206/04..., 2/2/2010, § 48, Güzel Erdagöz v. Turkey, No: 37483/02, 21/10/2008, §§ 44-46.

9 Although the applicant claimed that the prohibition of discrimination was also violated, the Constitutional Court examined the issue mostly in terms of the right to respect for private life and did not make an examination in terms of the prohibition of discrimination.

10 It should be added that Engin Yıldırım, a member of the Constitutional Court, agreed with this conclusion with the additional justification that the right to equal treatment in Article 10 of the Constitution was also violated.

11 This decision was taken by the General Assembly of the Constitutional Court.

12 It should be noted that in the decision the case is described as a name correction case, but when the whole decision is examined, it is understood that the aim is to change the name.

gender reassignment surgery even though they had come to the hearing in women's clothes. Moreover, in the decision, it was stated that although the applicant wanted to take a female name, the applicant had not yet had a gender reassignment surgery, and the applicant did not have a fully determined opinion on this matter. The court stated that a change being made in line with the request could cause misperceptions in society, and such a situation would cause problems both for the applicant and for other people. After the rejection of the claim, the applicant appealed to the Court of Appeal, claiming that contrary to what was stated in the Court's decision, as per TCC art. 40, the correction of gender information in the register after sex reassignment surgery is regulated, that the relevant provision could not be applied in a request for a name change, and that the fact that the gender reassignment surgery had not yet been performed did not constitute an obstacle in terms of changing the name. In this application, they also claimed that the name D. was a name used by both women and men, that they were known by the name D. in their social surroundings, and that the decision of the Court was unlawful. However, the applicant's application was rejected on the grounds of the local court's decision being in line with procedural and substantive terms, and the applicant's claims regarding the reasoning of the name change were not, at this stage, considered valid reasons.

After the applicant was notified of the final decision, in their individual application to the Constitutional Court they claimed that they were known by the name D. in their social environment, that the difference in the name by which they were known in the official records caused difficulties in their education and professional life, that it was unlawful to seek gender reassignment surgery for a name change as a condition, and that their request for a name change had been rejected on arbitrary grounds. They also stated that the regulation on which the court decisions are based upon is not related to the concept of name, but rather gender, that they had suffered moral damages due to the decisions given, and that their right to a fair trial and respect for private life had been violated[13].

The Constitutional Court decided that the applicant's claim that their right to respect for private life had been violated was acceptable and examined the matter on the merits. In this examination, the obligations of the state within the scope of the right to respect for private life, the importance of the name, the obligations of the state regarding the name change, the effect of the interpretation of the courts of instance on the right to change the name, and whether a fair balance had been established between the public interest and the private benefit were evaluated. As a result, it was accepted by a majority of the votes that the right to respect for private life had been violated[14]. The decision also mandated that a copy of the decision be

13 The applicant also requested that their name be concealed in public documents, and this request was accepted by the Constitutional Court.

14 It should be added that Engin Yıldırım, a member of the Constitutional Court, agreed with this conclusion, with the

sent to the Ankara 12th Civil Court of First Instance for a retrial, in order to eliminate the consequences of the violation.

C. Common Grounds of the Decisions

Both decisions of the Constitutional Court regarding individual applications are related to the fact that there is a violation of rights due to the rejection of the name change requests of individuals with different genders and sexual orientations in the register, and who are known by the names they have adopted accordingly. It can be stated that the evaluations and the final decisions of the Constitutional Court are generally the same in terms of both decisions. On the other hand, although in both decisions violation of the right to respect for private life was accepted, the decision dated 27 January 2021 (application number 2018/34343) was given unanimously whilst the decision dated 17 June 2021 (application number 2019/42944) was given by a majority of votes due to two members' dissenting votes.

II. Name Change in Turkish Law

A. Name

The name is the word or words that each person has that distinguishes them from other people and introduces themself[15]. However, the name also denotes one's ties to a particular family, in other words, one's ties to one's family[16]. It is obligatory for each natural person to have a first and last name[17]. Therefore, in terms of natural persons,

additional justification that the right to equal treatment in Article 10 of the Constitution was also violated. Members Recai Akyel and Selahaddin Menteş stated that the evaluations made by the courts were not inaccurate, since the courts referred to Article 40 of the TCC on the grounds brought forth by the applicant both in their petition and at their statement in the hearing about their sexual orientation and gender reassignment surgery, and that the applicant's request was not an ordinary name change, but a gender difference. They did not agree with the majority decision that the right to respect for private life was violated, stating that it was appropriate for the courts to interpret TCC art. 27 and art. 40 together, since there was a request for a name change based on the allegation.

15 Franz Jürgen Säcker, 'BGB § 12 I–XII' (Ed. Claudia Schubert) Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 1, Allgemeiner Teil §§1-240 (C. H. Beck, 2021) BGB § 12, para 1; Bilge Öztan, *Kişiler Hukuku, Gerçek Kişiler* (Yetkin 2021) 400; Arif Barış Özbilen, 'Mahkeme Kararına Dayanmayan Ad ve Soyadı Değişiklikleri (Nüfus Hizmetleri Kanunu Geçici Madde 8 Hükmüne Bir Bakış)' (2019) 40 TBB Dergisi 194; İhsan Erdoğan and Dilşad Keskin, *Türk Medeni Hukuku (Başlangıç Hükümleri-Kişiler Hukuku)* (Gazi 2019) 307; Jale G. Akipek, Turgut Akıntürk and Derya Ateş Karaman, *Türk Medeni Hukuku Başlangıç Hükümleri, Kişiler Hukuku* (Beta 2013) 418; Helvacı on the other hand, stated that while defining the name, it was an "identification sign." See. Serap Helvacı, *Gerçek Kişiler* (Legal 2021) 175. Similarly, see Hayrünnisa Özdemir, 'Türk ve İsviçre Medenî Hukukunda Ad Üzerindeki Hak ve Korunması' (2008) 57/3 AÜHFD 563 and Ahmet Cemal Ruhi and Canan Ruhi, *Nüfus Davaları* (Seçkin 2017) 447; It should be noted that the name is not only valid for natural persons but also for legal persons. However, since natural persons are important in terms of our subject, legal persons were not mentioned when giving the explanations.

16 Öztan (n 15) 400; Mehmet Ayan and Nurşen Ayan, *Kişiler hukuku* (Seçkin 2016) 141.

17 Helvacı (n 15) 176; Öztan (n 15) 400; Andrea Büchler, 'Art. 30' (Ed. Jolanta Kren Kostkiewicz, Stephan Wolf, Marc Amstutz, Roland Fankhauser) ZGB Kommentar Schweizerisches Zivilgesetzbuch, OFK - Orell Füssli Kommentar (Swisslex 2021) N. 1; Rona Serozan, *Medeni Hukuk, Genel Bölüm/ Kişiler Hukuku* (Vedat 2013) 481; Akipek, Akıntürk And Ateş Karaman (n 15) 419; İhsan Erdoğan, 'Şahsiyeti İncitici Soyadı Meselesi' (1998) 6/1 Selçuk Üniversitesi Hukuk Fakültesi Dergisi, 705; Özbilen (n 15) 194; Özdemir (n 15) 566; Zafer Zeytin and Ömer Ergün, *Türk Medeni Hukuku* (Seçkin 2020) 97.

the name consists of the first name and surname[18]. Broadly speaking, the scope of the name includes a pseudonym, or nickname, but their use is not obligatory[19]. However, it should be noted that although their use is not mandatory, they also benefit from the protection regulated under TCC art. 26[20].

B. Change of Name

The principle of invariance of the name has been accepted as a rule in TCC[21]. However, this does not mean that the name cannot be changed under any circumstances, and as such, name change is regulated under paragraph 1 of Article 27 of the TCC on changing the name. As per this provision, *"The change of name can only be requested from the judge based on valid reasons."*[22] Thus, changing the name arbitrarily is not allowed, due to the quality of distinguishing the person from other people and making them special, and as a rule, the person keeps their name from birth to death[23].

Despite the acceptance of the principle of invariance of the name, in some cases, it is the duty of the state to provide this opportunity and it is within the scope of the protection of personality. Regarding the change of a person's name, Supreme Court considers name and surname to be integral element of personality. It also states that a person is known and recognized by their name, that a name and surname have meaning when they are adopted by the carrier, and that a person who does not adopt their name and whose name is not identified with their personality has the most natural right to change their name. [24]

It is possible to say that three conditions are sought in TCC art. 27 in order to change the name, which is so important for the person and is a part of their personality. The first of these is request. Namely, a person who wants to change their name must claim and sue according to article 27 of the TCC[25]. In other words, changing the name can

18 Öztan (n 15) 400; Ruhi and Ruhi (n 15) 447.

19 Öztan (n 15) 400; For name variants, see Helvacı (n 15) 176-178, Öztan (n 15) 400-406.

20 Helvacı (n 15) 178; Öztan (n 15) 400; Serozan (n 17) 483; Özdemir (n 15) 567; Ayan and Ayan (n 16) 141; Erdoğan and Keskin (n 15) 307.

21 Büchler (n 17) N. 2; Ergun Özsunay, *Gerçek Kişilerin Hukuki Durumu* (Sulhi Garan Matbaası 1977) 205; Öztan (n 15) 429; Helvacı (n 15) 186; Mustafa Dural and Tufan Öğüz, *Türk Özel Hukuku, Cilt II, Kişiler Hukuku* (Filiz 2006) 168; Erdoğan (n 17) 708; Ruhi and Ruhi (n 15) 448.

22 In Swiss law, it is stated that the name change is possible if it is found in "*actenswerte Gründe.*" See Büchler (n 17) N. 2; In German law, it stated that the name change is possible if it is found in "*wichtiger Grund.*" See Säcker (n 15) para. 211, 225.

23 Öztan (n 155) 429; Akipek, Akıntürk And Ateş Karaman (n 15) 429; Erdoğan and Keskin (n 15) 315.

24 Supreme Court 8. CD, 2017/6499, 2017/11305, 21.09.2017; Supreme Court 8. CD, 2017/6911, 2018/1819, 08.02.2018; On the importance of identifying with one's name for transgender individuals and the problems created by name difference, see also Sarah Steadman, ''That Name is Dead To Me': Reforming Name Change Laws To Protect Transgender And Nonbinary Youth' (2021) 55/1 University of Michigan Journal of Law Reform 3 ff.

25 It should be emphasized here that changing the name and correcting it are different, because in the lawsuit regarding the correction of the name, the request is to correct a typo in the registry, in other words, a mistake in the registry. In changing the name, there is no mistake in the name written in the registry, rather a change in the name is requested and at the same time it must be based on a valid reason. See. Öztan (n 15) 430, Helvacı (n 15) 186, Büchler (n 17) N. 1 and Akipek, Akıntürk And Ateş Karaman (n 15) 431. On the contrary, see Säcker (n 15) para. 204.

only be requested through a lawsuit[26]. As changing the name is a relative personality right, a person with the mental capacity but limited capacity to act may also sue for a change of name[27]. It should be noted that the names that can be requested to be changed are the first name and surname,[28] because these are the names registered in the civil registry. For example, since nicknames are not registered in the registry, it is not possible to appeal to a judge to change them[29]. The second condition for changing the name is the existence of a valid reason. The valid reasons are not specifically regulated under the TCC. The judge evaluates whether there is a valid reason for changing the name, taking into consideration the specifies of the case[30]. The third condition is the court's decision. In other words, the name change must be based on a court decision[31]. Therefore, it is necessary for the person who wants to change their name to make a request to the court, the request must be based on a valid reason, and a court decision should be acquired to change the name.

C. Valid Reasons for Change of Name

Although an appeal to the court and the decision of the court are necessary for changing the name, the condition that the person making the request must put forward and that will affect the process is the existence of a valid reason. However, as stated before, article 27 of the TCC does not regulate the valid reasons for changing the name. The judge has discretion in this matter (TCC art. 4)[32], so much so that there is no objective valid reason for changing the name, and the judge will determine whether the request to change the name is based on a valid reason, depending on the concrete case. In the decisions of the Supreme Court, this situation is stated as *"Which cases constitute a valid reason will be determined by the court according to the specific circumstances of each case. While making this determination, it is necessary to take into account the special reasons to be presented to the court by the*

26 Helvacı (n 15) 187; Dural and Öğüz (n 21) 169; Erdoğan (n 17) 708; Özbilen (n 15) 195; Süleyman Yılmaz and Abdulkerim Yıldırım, *Medeni Hukuk-I (Başlangıç Hükümleri- Kişiler Hukuku- Aile Hukuku)* (Seçkin 2021) 143; Zeytin and Ergün (n 17) 98.

27 Öztan (n 15) 429; Büchler (n 17) N. 6; Helvacı (n 15) 189-190; Serozan (n 17) 483; Erdoğan (n 17) 709; Erdoğan and Keskin (n 15) 315-316; against Dural and Öğüz (n 21) 170.

28 Özsunay (n 21) 206; Öztan (n 15) 430; Dural and Öğüz (n 21) 168; Erdoğan and Keskin (n 15) 317; Ruhi and Ruhi (n 15) 450.

29 Özsunay (n 21) 206; Öztan (n 15) 430; Dural and Öğüz (n 21) 168; Erdoğan and Keskin (n 15) 317; Ruhi and Ruhi (n 15) 450.

30 Öztan (n 15) 431; Büchler (n 17) N. 4; Helvacı (n 15) 188; Özbilen (n 15) 195; Ruhi and Ruhi (n 15) 450; Yılmaz and Yıldırım (n 26) 143; Gamze Turan Başara, 'Türk Medeni Kanunu'nun 40'ıncı Maddesi Kapsamında Cinsiyet Değişikliği ve Hukukî Sonuçları' (2012) 103 TBB Dergisi 258.

31 Özsunay (n 21) 206; Öztan (n 15) 434; Özbilen (n 15) 195; Ayan and Ayan (n 16) 149; Changing the name is a non-contentious jurisdiction according to Code of Civil Procedure (CCP) art. 382/2-2, and in a non-contentious judicial case pursuant to CCP art. 383, unless there is a contrary regulation, the magistrate's court is in charge. Furthermore, see Supreme Court 17. CD, 2013/18692, 2013/17538, 11.12.2013; Supreme Court 17. CD, 2013/18691, 2013/17540, 11.12.2013; On the other hand, according to Article 36 of the Civil Registry Services Act, the competent court is the civil court of first instance, see. Supreme Court ACC, 2013/18-464, 2013/1698, 25.12.2013; Supreme Court 20. HD, 2019/192, 2019/1386, 04.03.2019.

32 Öztan (n 15) 431; Helvacı (n 15) 188; Büchler (n 17) N. 4.

person requesting the change, rather than the objective conditions"[33]. Therefore, in the face of a request to change a name, the judge should evaluate whether there is a benefit that requires leaving the principle of invariance of the name in the concrete case and decide to change the name when they have come to the conclusion that such a benefit exists[34].

In determining the existence of a valid reason, the judge should take into account the applicant's family relations, commercial or professional activities, social status, or personality[35]. Although valid reasons are not specifically regulated under the TCC, some states are given as examples of valid reason in the doctrine. These examples are based on the evaluations and judicial decisions.

The first examples given for valid reasons are that it can be shown that the name has a ridiculous or bad meaning that can humiliate the person or cause ridicule by others[36]. As another example of a valid reason, it can be shown that the person is thought to be related to people who are notorious in society due to their surname, or that a member of their family does not want to bear the same surname because they have committed a serious crime[37]. In addition to these, the fact that the person has changed their religion[38] or changed their citizenship[39] can also be considered a valid reason for the request to change their name[40].

The fact that the person is known by another name in their social life is also sufficient for the acceptance of the valid reason for the name change request. [41]. Because the name is not only important for the person themself, but also for society, it is important both for themself and for society that the name of the person in the civil

33 Supreme Court 8. CD, 2017/6499, 2017/11305, 21.09.2017; Supreme Court 8. CD, 2017/6911, 2018/1819, 08.02.2018; For the same view, see Büchler (n 17) N. 3.

34 Büchler (n 17) N. 4; Helvacı (n 15) 188.

35 Öztan (n 15) 431; Akipek, Akıntürk And Ateş Karaman (n 15) 430; Ruhi and Ruhi (n 15) 450; Supreme Court 8. CD, 2017/6499, 2017/11305, 21.09.2017; Supreme Court 8. CD, 2017/6911, 2018/1819, 08.02.2018.

36 Özsunay (n 21) 207; Öztan (n 15) 431; Säcker (n 15) para. 215; Dural and Öğüz (n 21) 168; Serozan (n 17) 483; Özbilen (n 15) 196; Ayan and Ayan (n 16) 146; For instances in name change requests, where courts examine the existing name for being obscene, ridiculous, or ridiculed, see. Supreme Court 8. CD, 2017/7950, 2018/11588, 25.04.2018; Supreme Court 8. CD, 2017/7435, 2018/11219, 12.04.2018; Erzurum Regional Courts of Appeal, 5. CD, 2018/1223, 2019/46, 11.01.2019; Samsun Regional Courts of Appeal, 1. CD, 2016/46, 2016/42, 21.12.2016.

37 Özsunay (n 21) 207; Öztan (n 15) 431.

38 *"...the plaintiff changed his religion by preferring the Christian religion at his request and this matter was recorded in the register with the administrative registration correction on 29.1.2007. The name he carries as K1 is the name of one of the holy months of Islam. In addition to changing his religion, the plaintiff's wish to use the name that he believes reflects his own religion and cultural structure should be considered a justifiable reason."* Supreme Court 18. CD, 2007/7881, 2007/8649, 22.10.2007.

39 For examples of the Supreme Court decision in which it was accepted that the requests of individuals to change their names from those they had before they acquired citizenship, as a result of the difficulties they experienced due to the name taken during the transition to citizenship of the Republic of Turkey, were accepted as justified, and that these names were composed of Turkish letters, see. Supreme Court 18. CD, 2014/18217, 2015/7150, 30.04.2015; Supreme Court 18. CD, 2011/4285, 2011/6939, 09.06.2011; Supreme Court 18. CD, 2011/7449, 2011/9051, 20.09.2011.

40 Öztan (n 15) 431, 434; Dural and Öğüz (n 21) 169; Özbilen (n 15) 196.

41 Büchler (n 17) N. 5; Helvacı (n 15) 188; Özbilen (n 15) 196; Ayan and Ayan (n 16) 146; Ruhi and Ruhi (n 15) 451; For a different assessment, see Säcker (n 15) para. 217

registry and the name they are known by are the same. When the jurisprudence on changing the name is examined, many examples are encountered where the person is known in society and requests taking the name by which they are known, and this is accepted as a valid reason and it is decided that the name can be changed[42].

Another example that can be given as a valid reason for changing the name is gender change[43], because the name that a person acquires at birth is usually determined according to their assigned gender[44]. The person who has changed their gender can request that their name be changed to a name that is more common for people of that gender in society, if they wish[45]. It should be emphasized that the request to change the name is up to the person whose gender has been changed, and there is no automatic change of the name in case of a gender change[46].

III. Evaluation and Conclusion

When the decisions of the Constitutional Court are examined, it is seen that TCC art. 40 on gender reassignment and TCC art. 27 on the change of name are evaluated together in the cases subject to the decision. While the conditions for gender reassignment are regulated in TCC art. 40/1, it is regulated in TCC art. 40/2 that the court will decide to make the necessary correction in the registry. However, it is clear that the correction in the registry here is about the change of gender, not the change of the name. A change of gender does not necessarily make it necessary to change the name. In other words, a person who has changed their gender can request a name change if they wish, and in such a case, gender change is considered a valid reason for changing the name in accordance with TCC art. 27. However, there is no other relationship between TCC art. 27 and TCC art. 40. That is, one of these provisions is not a prerequisite for the other. Therefore, we would like to state that we do not agree with the interpretation by the courts of instance that one of these provisions is almost a prerequisite for the other, and that for the request for a change of name pursuant to TCC art. 27, a gender change request must first be made pursuant to TCC art. 40 and the name can be changed after the gender change.

Another issue that should be emphasized is that the situation of "being known by another name in the social life of the person," which is frequently encountered in the decisions of the Supreme Court and accepted as a valid reason, has not been accepted

42 Supreme Court 8. CD, 2017/6911, 2018/1819, 08.02.2018; Supreme Court 18. CD, 2009/14650, 2010/4217, 22.03.2010; Supreme Court 18. CD, 2006/3544, 2006/4251, 23.05.2006; Supreme Court 18. CD, 2010/8125, 2010/12554, 05.10.2010; Supreme Court 18. CD, 2008/5627, 2008/7945, 03.07.2008.

43 Öztan (n 15) 434; Kudret Güven, 'Cinsel Kimlik Üzerinde Hak Kavramı ve Korunması: Transseksüellik ve İnterseksüellik' (2015) 1/1 Başkent Üniversitesi Hukuk Fakültesi Dergisi 171-172; Michael R. Will and Bilge Öztan 'Hukukun Sebebiyet Verdiği Bir Acı- Transseksüellerin Hukuku Durumu' (1993) 43/1 AÜHFD 451; Turan Başara (n 30) 258.

44 Steadman (n 24) 3.

45 Öztan (n 15) 434.

46 Güven (n 43) 172; After a gender change, if the name is not used by those of that gender, the change should be mandatory, see. Will and Öztan (n 43) 450-451.

as a valid reason in concrete cases, because, it is clear that it is in the interest of both the person and society that the name of the person known in their social life is the same as the name in the official records. However, due to the sexual orientation of individuals, the courts of instance made an almost opposite assessment and stated that taking the names by which they are known in society may create inconveniences for both society and the individual.

It should also be added that although it was emphasized in the decisions of the courts of instance that the applicants could not take a female name due to their male gender in the civil registry, especially in the case subject to the decision dated 17 June 2021 and application number 2019/42944, the person's name is used by both women and men. The reason why their request was rejected, despite their willingness to take name and showing the rightful reason why they are known by this name in society, cannot be understood. Considering the statement seen in the dissenting vote of one of the Constitutional Court's decisions, that these name change requests are not ordinary name change requests, unfortunately, the thought comes to mind that the applicants are being discriminated against by the courts, because it is clear that people in the same situation are treated differently without any objective and reasonable reason.

For all these reasons, we would like to state that we agree with the decisions of the Constitutional Court that a person's right to respect for private life has been violated, and that the additional reasoning of one of the members of the Constitutional Court that the right to equal treatment under Article 10 of the Constitution has also been violated is appropriate.

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Bibliography

Akipek JG, Akıntürk T and Ateş Karaman D, *Türk Medeni Hukuku Başlangıç Hükümleri, Kişiler Hukuku* (Beta 2013).

Ayan M and Ayan N, *Kişiler hukuku* (Seçkin 2016).

Bakım S, 'Avrupa İnsan Hakları Mahkemesi (Aihm) Kararları Çerçevesinde Cinsiyet Ayrımcılığı' (2016) 22/3, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, 3191-3218.

Büchler A, 'Art. 30' (Ed. Jolanta Kren Kostkiewicz, Stephan Wolf, Marc Amstutz, Roland Fankhauser) ZGB Kommentar Schweizerisches Zivilgesetzbuch, OFK - Orell Füssli Kommentar (Swisslex 2021).

Dural M and Öğüz T, *Türk Özel Hukuku, Cilt II, Kişiler Hukuku* (Filiz 2006).

Erdoğan İ, 'Şahsiyeti İncitici Soyadı Meselesi' (1998) 6/1 Selçuk Üniversitesi Hukuk Fakültesi Dergisi, 705-712.

Erdoğan İ and Keskin D, *Türk Medeni Hukuku (Başlangıç Hükümleri-Kişiler Hukuku)* (Gazi 2019).

Güven K, 'Cinsel Kimlik Üzerinde Hak Kavramı ve Korunması: Transseksüellik ve İnterseksüellik' (2015) 1/1 Başkent Üniversitesi Hukuk Fakültesi Dergisi, 133-176.

Helvacı S*, Gerçek Kişiler* (Legal 2021).

Kudret HA, 'Avrupa İnsan Hakları Mahkemesi ve Türk Anayasa Mahkemesi Kararları Işığında Yasaklanan Ayrımcılık Temeli Olarak Cinsel Yönelim' (2020) 26/2, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmlarası Dergisi, 1079-1110.

Özbilen AB, 'Mahkeme Kararına Dayanmayan Ad ve Soyadı Değişiklikleri (Nüfus Hizmetleri Kanunu Geçici Madde 8 Hükmüne Bir Bakış)' (2019) 40 TBB Dergisi, 193-220.

Özdemir H, 'Türk ve İsviçre Medenî Hukukunda Ad Üzerindeki Hak ve Korunması' (2008) 57/3 AÜHFD, 561- 598.

Özsunay E, *Gerçek Kişilerin Hukuki Durumu* (Sulhi Garan Matbaası 1977).

Öztan B, *Kişiler Hukuku, Gerçek Kişiler* (Yetkin 2021).

Ruhi AC and Ruhi C, *Nüfus Davaları* (Seçkin 2017).

Säcker FJ, 'BGB § 12 I–XII' (Ed. Claudia Schubert) Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 1, Allgemeiner Teil §§1-240 (C. H. Beck, 2021).

Serozan R, *Medeni Hukuk, Genel Bölüm/ Kişiler Hukuku* (Vedat 2013).

Steadman S, ' 'That Name is Dead To Me': Reforming Name Change Laws To Protect Transgender And Nonbinary Youth' (2021) 55/1 University of Michigan Journal of Law Reform 1-44.

Turan Başara G, 'Türk Medeni Kanunu'nun 40'ıncı Maddesi Kapsamında Cinsiyet Değişikliği ve Hukukî Sonuçları' (2012) 103 TBB Dergisi 245-266.

Will MR and Öztan B, 'Hukukun Sebebiyet Verdiği Bir Acı- Transseksüellerin Hukuku Durumu' (1993) 43/1 AÜHFD 227-268.

Yılmaz S and Yıldırım A, *Medeni Hukuk-I (Başlangıç Hükümleri- Kişiler Hukuku- Aile Hukuku)* (Seçkin 2021).

Zeytin Z and Ergün Ö, *Türk Medeni Hukuku* (Seçkin 2020).

www.lexpera.com.tr

www.karararama.yargitay.gov.tr

www.resmigazete.gov.tr