



Transgender Prisoners' Rights in Turkey

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Mesopotamia Observatory of Justice (MOJUST)

in collaboration with

Özgürlük için Hukukçular Derneği (Association of Lawyers for Freedom – ÖHD)

Turkey's Destruction of Kurdish Graves With the Support of MOJUST & HEVI

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Yagmur Birdal & Muhammed Unsal

Mesopotamia Observatory of Justice

The Mesopotamia Observatory of Justice is a Switzerland-based non-profit charity established by a group of international lawyers and academics in 2018. MOJUST's programme of action is focused on assisting victims of international crimes and gross violations of human rights in the Middle East region. Its core activities include monitoring and research, advocacy and strategic litigation, and legal training. It is also working, in particular, to raise awareness of legal and humanitarian issues affecting Kurdish populations and to develop sustainable cooperation with organisations pursuing similar objectives. MOJUST has completed significant litigation and advocacy activities since it has been established, including the preparation and submission of dozens of individual complaints to INTERPOL, the European Court of Human Rights and to various United Nations 'Special Rapporteurs.'

Hêvî LGBTİ+

Hêvî LGBTİ+ is a non-profit organization founded in 2015 in Turkey, born from the collective effort of independent LGBTİ+ individuals who came together in 2013 to organize around shared ideals. Initially formed by Kurdish LGBTİ+ activists, Hêvî LGBTİ+ has since expanded to include activists from various ethnic backgrounds, such as Armenian, Arab, and Turkish, among others. The organization believes that LGBTİ+ rights should be viewed within a broad political framework that encompasses class, ethnicity, sexism, migrant and refugee rights, as well as the freedom of both people and nature. These issues are considered inseparable from LGBTİ+ advocacy. Hêvî LGBTİ+ focuses on a wide range of activities, including advocacy, legal support, and awareness-raising on issues affecting marginalized LGBTİ+ groups. Its office in Istanbul, serves as the base for its ongoing work, offering a safe space for collaboration and activism aimed at advancing the rights and freedoms of LGBTİ+ individuals in Turkey and beyond.

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ABBREVIATIONS

CAT	: Committee Against Torture
CC	: Constitutional Court
CCF	: Corradino Correctional Facility Professional Support Services
CISST	: Civil Society in the Penal System Association
CISST/TCPS	: Civil Society in the Penal System Association Turkey Prison Studies Center
CM/Rec	: Council of Europe Recommendation
CPT	: Committee for the Prevention of Torture
DSM	: The Diagnostic and Statistical Manual of Mental Disorders
ECHR	: European Convention on Human Rights
ECtHR	: European Court of Human Rights
ESSC	: European Social Charter
GDM	: General Directorate of Prisons and Detention Houses
GNAT	: Grand National Assembly of Turkey
HDP	: Peoples' Democratic Party
HIV	: Human Immunodeficiency Virus
HRA	: Human Rights Association
HRFT	: Human Rights Foundation of Turkey
HRJP	: Human Rights Joint Platform
ICCPR	: International Covenant on Civil and Political Rights
ICD	: International Classification of Diseases
ICESCR	: International Covenant on Economic, Social, and Cultural Rights
IRA	: Irish Republican Army
Kaos GL	: Kaos Gay and Lesbian Cultural Research and Solidarity Association

LGBTI+	: Umbrella term that includes Lesbian, Gay, Bisexual, Transgender, Intersex and other sexual orientations, gender identities and gender diversity
NGO	: Non-Governmental Organization
ODIHR	: Office for Democratic Institutions and Human Rights
SPOD	: Association for Social Policy, Gender Identity and Sexual Orientation Studies
TCC	: Turkish Civil Code
THREI	: Turkish Human Rights and Equality Institution
TMA	: Turkish Medical Association
TPC	: Turkish Penal Code
TSI	: Turkish Statistical Institute
UDHR	: Universal Declaration of Human Rights
UN	: United Nations
UNDP	: United Nations Development Programme
UNESCO	: United Nations Educational, Scientific and Cultural Organization
UNESCO IBC	: United Nations Educational, Scientific and Cultural Organization International Bioethics Committee
UNODC	: United Nations Office on Drugs and Crime
USA	: United States of America
WHO	: World Health Organization
WMA	: World Medical Association
WPATH	: World Professional Association for Transgender Health

METHODOLOGY

This report has been prepared with the aim of examining discrimination based on gender identity in penal institutions and drawing attention to the international norms and standards pertaining to it . Our research comprehensively addresses the difficulties encountered by transgender individuals in prisons around the world, particularly in Turkey, and the impact of these situations on individual health rights and isolation policies. Our study has been conducted in collaboration with national and international human rights advocates and non-governmental organizations, highlighting the struggle for the rights of LGBTI+ individuals.

In a review study that mapped 59 publications issued in various countries between 2000-2019, five main themes were identified concerning the issues faced by transgender prisoners in jails¹. These themes are:

1. Problems related to the definition and terminology of transgender in prisons and national legislation.
2. Placement and classification systems in prisons.
3. Prison staff's treatment incarcerated transgender individuals.
4. Gender affirmation processes, health experiences, and health risks of incarcerated transgender individuals.
5. Transgender people's access to health services in prison related to their sexual identity

In our study, we followed this systematic approach as much as the Turkish example allowed, utilizing a wide range of sources to identify local issues and to shed light on experiences in

¹ Van Hout, M. C./ Kewley, S./ Hillis, A., Contemporary transgender health experience and health situation in prisons: A scoping review of extant published literature (2000–2019), *International Journal of Transgender Health*, 21(3), 2020, pp. 258-306.

various penal institutions. These sources include reports from non-governmental organizations, press releases, research studies by professional associations, academic literature, decisions and reports of national and international human rights mechanisms, and internet and archive searches. Additionally, semi-structured interviews were conducted with four transgender prisoners who are direct subjects of this issue. These interviews, conducted between January and June 2022, provided an opportunity to deeply examine the relationship between the individuals' experiences and legal texts and court decisions.

Our research emphasizes that discrimination based on gender identity is not limited to penal institutions and should be addressed within a broader social and legal framework. In this context, how the normative structures of heteronormative patriarchy are shaped and how these structures affect the existence of transgender individuals has been examined. The report also addresses significant recent decisions by the European Court of Human Rights related to gender identity and the impact of these decisions on the member states of the Council of Europe.

The Turkish example has been studied as a case demonstrating how international mechanisms can be effective when national human rights mechanisms fall short on democracy and human rights issues. In this framework, the obligations arising from international treaties to which Turkey is a party, and the decisions made under these treaties have been thoroughly examined. Ultimately, this report aims to be a valuable resource for lawyers and human rights advocates in the fight against violations of rights based on gender identity.

SUMMARY

This report is jointly published by the Switzerland-based Mesopotamia Observatory of Justice (MOJUST) and the Turkey-based Association for Equality and Existence of Lesbian, Gay, Bisexual, Transgender, and Intersex Individuals (HEVI LGBTI+). It focuses on the human rights violations faced by transgender prisoners in Turkey due to their gender identities. The challenges and forms of discrimination encountered by transgender individuals worldwide share similar structural issues and specific factors when compared with the situation in Turkey. This study aims to expose these deep-rooted problems specific to Turkey and to address the identified gaps.

The research adopts a methodology that thoroughly examines the rights violations faced by transgender prisoners at both local and international levels and considers practical applications through semi-structured interviews. This analysis aligns with the efforts of the UN and other regional and local organizations. The study focuses on two fundamental rights violations: the isolation conditions of transgender prisoners and their access to health rights, calling for Turkey to fulfill its obligations under national legislation and international treaties.

This report aims to create awareness of the systematic problems faced by transgender individuals in Turkey and to encourage all actors to take responsibility against heteronormative patriarchy and transphobia. Transphobia encompasses discrimination, violence,

marginalization, and all forms of unfair treatment faced by transgender individuals due to their gender, sexual orientation, gender identity, and gender expressions. In Turkey, transgender individuals are targets of hate crimes, social exclusion, discrimination in education and employment, and face barriers to accessing health services, merely because of their gender identities. The approaches that deny the existence of transgender individuals and view them as "second-class citizens" or as a "third gender" persist despite efforts to increase the visibility of the transgender movement and break heterosexist norms. This report aims to provide a comprehensive legal and social framework to support the rights, equality, freedom, and justice of transgender individuals and to address the challenges and discriminations they face. The fact that the existence of transgender individuals was classified as a disease by the World Health Organization until 2018 indicates that there is still a long way to go. This report offers analysis and recommendations to support the justice pursuits of transgender prisoners against the policies of systematic denial and legal void in Turkey.

This study aims to be a comprehensive resource that addresses the legal framework concerning human rights violations against transgender prisoners in Turkish prisons and presents current best practices. The research targets NGOs, practitioners, and academics to draw attention to the issues faced by transgender prisoners and contribute to reporting on potential violations. In this context, the report seeks to fill a significant gap on the subject of transgender prisoners in Turkish prisons and has the potential to reach a broad audience.

The report is divided into three main sections: the first part provides a general assessment of transgender existence, the second examines the human rights violations experienced by transgender prisoners in isolation conditions, and the third discusses access to health rights. This approach aims to develop a comprehensive understanding of the subject and offer effective solutions.

INTRODUCTION

Prisons are among the most risk-prone areas for human rights violations. In countries like Turkey, where the binary gender system is the basis for prison construction, being a transgender prisoner deepens these violations. The social exclusion, unemployment, and lack of economic opportunities outside of sex work that transgender individuals face in society inevitably necessitate addressing transgender existence as a distinct category in prisons.

In Turkish prisons, there is a legal requirement that the gender identity declared by transgender prisoners must be medically aligned with the gender identity recognized by the state. For example, it is legally possible for a transgender woman to be placed in a women's prison provided she has undergone genital surgery as part of her gender transition process and legally changed her gender marker. However, transgender individuals who have not completed genital surgeries related to their gender affirmation process and have not changed their gender markers on official documents cannot be placed in a ward that corresponds to their legally recognized gender. In such cases, if there is no LGBTI+ ward in the prison which they are sent to, transgender individuals are often placed in special wards or under isolation conditions out of

concern to, or namely justified by the authorities that preventing sexual assault, harassment, or violence. Even if they are not subjected to disciplinary punishment or life imprisonment under aggravated circumstances, transgender prisoners are placed in solitary cells². This situation intensifies violations related to isolation and access to health rights for transgender individuals.

Transgender individuals might opt not to undergo these surgeries due to the high cost or the various and challenging potential post-operative risks. Furthermore, some may choose never to undergo any surgical intervention on their bodies throughout their lives. These issues lead to more severe consequences in prisons, where individuals are more vulnerable to human rights violations. The binary gender categorization in incarceration procedures in many countries, including Turkey, results in human rights violations for transgender individuals. Although some countries like Malta, Brazil, and Ireland have implemented incarceration procedures based on the declared gender identity due to transgender activism drawing attention to these violations, these best practices have not yet become widespread³.

Systematic isolation also restricts transgender prisoners' access to work, workshops, activities, and education for the so-called security concerns , hindering their rights to self-improvement, earning money, and socializing. Essentially, this leaves them in a dependent situation, unable to meet their needs if there is no person or organization to assist them. Additionally, their inability to participate in prison activities and events adversely affects their psychological and mental health⁴.

Access to the right to health for transgender prisoners is a reflection of their basic human rights. This includes not only the provision of medical treatments and interventions but also comprehensive access to psychological and social support services appropriate to their gender identities. Fair and equal access to health services plays a critical role in alleviating the challenges faced by transgender prisoners. Support for gender reaffirmation processes, access to hormone treatments, and access to surgical interventions when necessary are fundamental components of their right to health. The provision of these services should be considered a matter of respecting human dignity and social justice.

Due to the extremely weak public oversight of prisons and the government's failure to share data, it is impossible to know the exact number of transgender prisoners. However, it is possible to map out the situation based on cases reported to NGOs and covered in the media. The primary problems faced include violations related to the right to health, access to legal resources, financial difficulties, isolation, discrimination, harassment, and violence.

Judgments of the European Court of Human Rights (ECtHR)⁵ can sometimes fall short in effecting changes in practice. Trapped in a cycle where the law is inadequate and at an impasse,

² Akpınar, H., “Trans Mahpuslar: Cezaevi Koşulları, Hak İhlalleri, Mücadele Yöntemleri”, Salgın Sonrası Dönemde İnsan Hakları Gündemi Sempozyum Bildirileri, 23-30 May 2021, HRFT 2021, p. 81.

³ UNDP, UNODC, Mapping of Good Practices for the management of Transgender Prisoners, Bangkok 2020.

⁴ Akpınar, p. 82.

⁵ ECtHR, X v. Turkey, 24626/09. [ECHR, X v. Turkey, 24626/09]

transgender prisoners have even resorted to hunger strikes to assert their rights⁶. Hunger strikes may be initiated over seemingly minor unmet demands, such as the provision of tweezers to a transgender woman, or they may be a response to more grave issues like the gender reaffirmation process or inhumane conditions such as isolation. However, when they engage in hunger strikes, they are then subjected to disciplinary punishments for the act of striking itself⁷. Naturally, their situation does not immediately improve even when they undertake such actions. For transgender prisoners to adequately exercise their health rights, especially if they are taking hormones, ensuring easy access to them and fulfilling state obligations in this regard is critically important.

On the other hand, letters written about these rights violations are censored by the prison commission. Many letters from Trans Prisoner Esra Arıkan, whom we interviewed, were either censored or deemed inappropriate for sending. The arbitrary nature of the prison administration's attitude has been overturned in some Enforcement Court decisions, while in others, the administration's stance has been overlooked⁸. This blocking and censoring of letters represent a significant violation of transgender prisoners' freedom of expression and communication rights, further inhibiting their ability to publicize their experiences⁹.

For individuals who have undergone genital surgeries as part of their gender reaffirmation process, incarceration poses fewer problems.

I. TRANS EXISTENCE

A. Overview

Trans existence is a general term that denotes an individual's non-identification with the gender assigned at birth. This means that individuals might identify with a gender identity that does not conform to the biological sex assigned to them by society. This concept defines individuals assigned "male" at birth but who identify as female as trans women, and those assigned "female" at birth but who identify as male as trans men. Trans identity concerns how individuals define themselves and does not necessarily require any surgical intervention. This identity declaration is determined by the individual's own definition and is not directly related to sexual orientation. The sexual orientations of trans individuals can vary; they may identify as heterosexual, lesbian, gay, bisexual, or they may develop a sexual identity independent of these classifications¹⁰.

The struggle for existence transcends the discrimination, violence, and marginalization trans individuals face due solely to their gender identities and sexual orientations. It emphasizes that all individuals, regardless of their sexual orientation and gender identity, should have equal

⁶ Look at Kaos GL's web site for more information: <https://kaosgl.org/haber/vegan-trans-mahpus-ida-kocak-aclik-grevinde> (11.05.2024)

⁷ 04.07.2022 dated Silivri Women's Closed Penal Execution Institution Directorate Disciplinary Board Decision No. 2022/201

⁸ 01.09.2022 dated Silivri 1st Execution Judgeship 2022/2301 Execution Judgeship File 2022/2584 Decision No.

⁹ Akpınar, p. 83.

¹⁰ Kaos GL, Sıkça Sorulan Sorular Kılavuzu, 9. Ed., 2020, p.10-11.

rights, advocating for amendments in constitutional and legal regulations, and aims not only for societal acceptance and understanding for trans individuals but also for the safeguarding of their fundamental human rights.

Transsexuality, though an older term often preferred by medical professionals, refers to individuals who opt for or intend to undergo medical interventions like hormone therapy or sex reassignment surgeries¹¹. The concept of transsexuality first appeared under the title of psychosexual disorders in the Diagnostic and Statistical Manual of Mental Disorders (DSM III). In DSM IV, transsexuality was designated as "gender identity disorder," treated separately as "childhood, adolescent, and adult gender identity disorder." Transsexuals were categorized under gender identity disorders until 2013. In the DSM V published in 2013, the term used for transsexuals was "gender dysphoria," described as "distress with sexual identity," analyzed under "distress with sexual identity in children" and "distress with sexual identity in adolescents and adults."¹²

In 2017, the World Health Organization's International Classification of Diseases (ICD) 11 ceased to define transsexuality as a "mental disorder." In ICD 11, the topic is addressed under Chapter 17 "Conditions Related to Sexual Health" with the subsection "Gender Incongruence."¹³ On May 25, 2019, the World Health Organization approved ICD 11, which was published online by WHO in June 2018. In ICD 11, all diagnostic codes related to trans individuals were removed from the "Mental and Behavioral Disorders" section and the "Gender Incongruence" code. A new category called "Gender Incongruence in Adolescence and Adulthood" has been developed in a new section titled "Conditions Related to Sexual Health."¹⁴ The purpose of this new categorization has been stated as facilitating access to sex reassignment surgeries.

B. Gender Reassignment Process

The gender reassignment process refers to a process that is reflected in a wide range of psychosocial, economic, legal and medical aspects regarding the gender of transgender people, and is born out of the interrelationship of these areas, and whose beginning, stages and end are not very clear.¹⁵ Some trans individuals begin to experience difficulties when their legal gender assigned at birth does not align with their gender identity. Although this discordance does not always cause distress, those who do experience difficulties may enter a gender transition process, seeking a series of medical surgeries to achieve a physical appearance that matches their gender identity¹⁶.

¹¹ Kaos GL, Sıkça Sorulan Sorular Kılavuzu, 9. Ed., 2020, p.11.

¹² Acar, K./ Aygin, D., "Transseksüel bireylerde cinsiyet değiştirme cerrahisi ve hemşirelik yaklaşımları", Androloji Bülteni, 17(62), 2015, 241-245.

¹³ ICD 11 for Mortality and Morbidity Statistics (Version: 02/2022) <https://icd.who.int/browse11/l-m/en#/http://id.who.int/icd/entity/90875286>.

¹⁴ WHO, World Health Organization, ICD-11, International Statistical Classification of Diseases and Related Health Problems, 11th Revision. Geneva 2018.

¹⁵ Kaos GL, 2020, p. 39

¹⁶ For more information: Çelik, H.,

[Transların Geçiş Sürecine Dair Kullanılan](https://transkimliklervardir.wordpress.com/2018/08/11/translarin-gecis-surecine-dair-kullanilan-dil/) <https://transkimliklervardir.wordpress.com/2018/08/11/translarin-gecis-surecine-dair-kullanilan-dil/> (15.03.2022).

This series related to the gender transition process includes surgeries like breast augmentation or mammoplasty, genital reconstruction, rhinoplasty, lip and cheek fillers, reduction of the chin and Adam's apple, vocal cord surgery, mastectomy (breast removal and reshaping to a more masculine form), gynecomastia (a method used for fat accumulation in the male breast), hysterectomy (removal of the uterus), metoidioplasty (shifting the clitoris to form a penis), salpingo-oophorectomy (operation to remove the ovaries and fallopian tubes), phalloplasty (penis construction surgery), and implant (prosthetic inserted inside the penis). For trans individuals, the most challenging and costly of these surgical processes is genital reconstruction, which involves surgeries directed at the sexual organs. In Turkey and many other countries, the performance of these surgeries requires court permission. The state's control over surgeries involving sexual organs aims to prevent their indiscriminate performance and to ensure oversight¹⁷.

Gender reaffirmation surgeries are divided into those for female-to-male transitions and male-to-female transitions. This process is arduous, involving extensive medical and legal dimensions. Trans individuals wishing to start this process are required to demonstrate firm resolve concerning surgeries that are difficult or impossible to reverse, with confirmation needed from both medical and legal perspectives. Before undergoing sex change surgeries, the following medical stages are typically undergone:

1. **Psychological Diagnosis:** Diagnosing an individual's condition through psychological observation¹⁸.
2. **Psychological Observation:** Assessing an individual's psychological suitability for undergoing sex change surgeries¹⁹.
3. **Hormone Therapy:** When psychological observations are deemed sufficient, the individual is referred to an endocrinologist for hormone therapy. Hormone therapy involves the use of sex hormones and other hormonal medications intended to align an individual's secondary sexual characteristics more closely with their gender identity²⁰.
4. **Reproductive Health:** Following surgeries on genital organs, the individual's reproductive organs are restructured to align with their gender identity²¹.

Both female-to-male and male-to-female transition operations can be divided into three main categories: breast surgery, genital surgery, and various aesthetic operations such as voice surgery, liposuction, and facial aesthetics²². Throughout this process, continuous supervision by specialist physicians is crucial.

¹⁷ Turan Başara, G., "Türk Medeni Kanunu'nun 40'ıncı Maddesi Kapsamında Cinsiyet Değişikliği ve Hukuki Sonuçları", Turkey Barolar Birliği Dergisi, 2012, <http://tbbdergisi.barobirlik.org.tr/m2013-103-1234>, 245-266.

¹⁸ Koç Kızılyel, p. 11.

¹⁹ Koç Kızılyel, p. 11.

²⁰ Koç Kızılyel, p. 11.

²¹ Koç Kızılyel, p. 13.

²² World Professional Association for Transgender Health- WPATH - (DPTSB), Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, 2012,

Female-to-male transition operations are generally more challenging than male-to-female operations. In female-to-male transitions, the procedure typically begins with the removal of a significant portion of breast tissue and internal genital organs. Subsequently, the ovaries, fallopian tubes, and uterus are removed, and almost all of the vagina is excised²³. After this surgery, a period of 6-8 months is expected before the individual is ready for the second surgery. In the second operation, penis reconstruction and scrotum formation are performed. Different techniques are employed for penis reconstruction surgery. One technique uses the "radial forearm flap," which involves skin from the front and side surfaces of the arm, or the "fibular bone skin flap," which includes skin covering the leg along with the fibula. Another method involves the use of breakable penis prostheses. It is important to note that the fibular bone may dissolve inside the penis over time. Additionally, osteomyelitis, a persistent inflammatory condition of the bone, may develop in some individuals later on, potentially necessitating the removal of the bone. Another method involves penis reconstructions using skin tissue from the underarm area. The tissue needed for penis reconstruction can be taken from the back or underarm, and in cases where a large amount of tissue is used, a skin patch may be applied to compensate for the tissue loss at the donor site²⁴.

Even though hormone therapy during the gender reaffirmation process may result in breast growth, the size may not be satisfactory for the individual. Therefore, saline-filled implants under the breast tissue and other methods are used to perform mammoplasty. In genital operations, the skin tissue that envelops the penis and scrotum is typically inverted for use²⁵.

In addition to the operations performed during the gender reaffirmation process, an individual may undergo various cosmetic surgeries. Interventions involving face and neck surgery aimed at altering masculine facial features or voice transformation surgeries may be needed. Voice transformation surgeries, however, are not easily performed and are not always recommended²⁶.

C. The Right to Recognition of Gender Identity, and National and International Regulations

1. International Regulations

The provision of all rights related to health, education, housing, social security, and employment to individuals depends on their recognition. The right to equal recognition before the law is a central principle concerning other rights and freedoms. Proper identification of an

https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf (01.06.2022).

²³ Koç Kızılyel, p. 14.

²⁴ Koç Kızılyel, p. 17.

²⁵ Acar, K./ Aygin, D., 242-243.

²⁶ For detailed information see: Koçak, İ./ Atmış, E. Ö., "Erkekten Kadına Cinsiyet Dönüşüm Ameliyatları- Sekonder Seks Karakterlerine Yönelik Yaklaşımlar: Ses Restorasyonu, Turkey Klinikleri Plastik Cerrahi", 2016, Volume 5, Issue 3, p. 107.

individual in all forms of deprivation of liberty is the first guarantee of the state's accountability. However, trans identities are not recognized by many states worldwide.

Some states recognize trans identities but impose obligations for changing gender and names in official records that can amount to human rights violations. These obligations can include forced or otherwise involuntary sterilization; surgeries and hormonal therapies related to the gender transition process; medical diagnoses, psychological evaluations, and other medical procedures or treatments; third-party consent for adults, mandatory divorce, and age restrictions for children²⁷. Such practices contradict the fundamental principles of international human rights law. Particularly, the Yogyakarta Principles, adopted in 2007 and updated in 2017, aim to prevent human rights violations related to gender identity and sexual orientation and to set international standards in this area. These principles strengthen individuals' rights to freely express their gender identities and to be recognized, encouraging states to adopt a human rights-based approach in their practices. Therefore, the Yogyakarta Principles provide a roadmap for states to overcome challenges in recognizing gender identity and highlight the necessity of abolishing these obligations.

“Gender identity is a deeply felt internal and personal experience of a person's gender, which may not necessarily correspond with the sex assigned at birth. It refers to the individual's personal sense of their own body (which may include, if freely chosen, modifications to bodily appearance and functions through medical, surgical, and other means) and other expressions of gender, including dress, speech, behavior, movement, and demeanor.”²⁸

The Yogyakarta Principles' 2017 update offers more detailed and inclusive provisions for the recognition and protection of gender identity. This update aims to better address the challenges faced by trans individuals and those showing gender diversity. For instance, the updated principles have expanded to simplify the procedures required for legal recognition of gender identity, to eliminate mandatory medical interventions, and to include the official recognition of non-binary genders²⁹.

These extended provisions of the Yogyakarta Principles are consistent with Article 6 of the Universal Declaration of Human Rights and Article 16 of the International Covenant on Civil and Political Rights, which uphold the right of every individual to be recognized as equal before the law³⁰. In this context, the recognition of gender identity can be seen as a fundamental human

²⁷ United Nations Independent Expert Report on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity: <https://kaosgldernegi.org/images/library/cinsiyet-kimlig-i-bm.pdf> (10.04.2022), p. 8-9.

²⁸ Conference of International Legal Scholars, Yogyakarta, Indonesia, 6-9 November 2006, Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (March 2007), Introduction to the Yogyakarta Principles.

²⁹ The Yogyakarta Principles, 2017 Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Page 18 of 18 Identity, Gender Expression and Sex Characteristics, to Complement the Yogyakarta Principles. <http://www.yogyakartaprinciples.org/principles-en/yp10/>

³⁰ For example, see CCPR/C/IRL/CO/3, para. 8; and CCPR/C/SRB/CO/3, pp. 12 and 13.

right necessary for ensuring individuals' equality before the law and their full participation in society.

Thus, the updated version of the Yogyakarta Principles offers a contemporary framework for how the recognition and protection of gender identity should be approached in international human rights law. This approach aligns with the general principles of human rights found in universal human rights documents and regional human rights regulations³¹. In this way, the Yogyakarta Principles provide a comprehensive guide on how legislation in this field should be developed when considered alongside existing international and regional provisions and confirm binding international legal standards. They play a critical role in combating discrimination and violence in judicial, legislative, policy, and practice developments related to sexual orientation and gender identity. The principles have directly influenced various international and national legal frameworks and policies. For instance, Argentina's 2012 Gender Identity Law, consistent with the Yogyakarta Principles, facilitated critical service access for trans individuals without medical intervention, sending a strong message confirming the rights and dignity of trans individuals. Additionally, the UN Refugee Agency has referenced the Yogyakarta Principles in its guidelines for the protection of refugees based on sexual orientation and gender identity, enhancing protection for LGBTI+ individuals from threats, assault, and violence. The inclusion of the term “gender identity” in the principles, thanks to advocacy by LGBTI+ advocates from the global south, has enabled the inclusion of the concept of gender identity in national-level judicial decisions and policy documents. While not binding, the Yogyakarta Principles have been influential in shaping legal systems and practices worldwide.

According to the UN Independent Expert's Report on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity, even conditions that initially appear neutral can become unacceptable barriers or be used to obstruct respect for gender identity. The completion of procedures can take years, and the success of treatments can be jeopardized. Naturally, the official documents and data linked to these procedures are highly relevant to the exercise of rights. The report indicates that procedures implemented in many countries lead to delays and violations of rights. In this context, the UN High Commissioner for Human Rights and treaty bodies recommend that states regulate legal identity documents reflecting an individual's gender based on the right to self-determination³².

In February 2017, the UN High Commissioner for Human Rights made specific recommendations for identity recognition processes. According to these recommendations, identity recognition processes should :

³¹ Convention on the Elimination of All Forms of Discrimination Against Women, Art. 15; Convention on the Rights of the Child, Art. 8; Convention on the Rights of Persons with Disabilities, Art. 12; American Convention on Human Rights, Art. 3; and African Charter on Human and Peoples' Rights, Art. 5, United Nations Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity Report <https://kaosgldernegi.org/images/library/cinsiyet-kimlig-i-bm.pdf> (10.04.2022), p. 7.

³² United Nations Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity Report <https://kaosgldernegi.org/images/library/cinsiyet-kimlig-i-bm.pdf> (01.03.2024), pp. 8-9.

- Be based on the applicant's self-determination,
- Be a straightforward administrative process,
- refrain from asking the individuals to go through such abusive requirements as providing certificates, going through surgery, sterilization operations or divorce. ,
- Accept and officially recognize non-binary and other gender identities,
- Ensure access to recognition of gender identities for minors.

The High Commissioner highlighted that judicial procedures could create significant additional barriers to accessing gender identity recognition. These procedures can also unnecessarily prolong the process and create financial burdens. Leaving the validation of an individual's gender identity to a judge's assessment has been pointed out as a disproportionate and unnecessary interference with the exercise of individual rights³³.

Considering these recommendations, the World Health Organization's (WHO) 2018 decision to stop classifying gender diversity as a mental illness in the latest version of the International Classification of Diseases (ICD-11) was recognized as an important step against the pathologization of trans individuals. This change has positively influenced the perception of gender diversity and trans individuals in society, contributing to their greater acceptance and the recognition of their rights.

The 2020 Trans Legal Mapping Report published by ILGA World was also a significant study detailing the effects of laws on the legal recognition of gender and the criminalization of trans identities. This report, examining the current situation in 143 UN member states, provided valuable information on how trans and gender-diverse individuals can change their gender and names on official identity documents.

Since the acceptance of the Yogyakarta Principles, some countries have adopted or strengthened laws facilitating the legal recognition of gender identity. For example, countries like Finland, Belgium, France, Luxembourg, Portugal, Brazil, Chile, and Costa Rica have taken significant steps to allow trans individuals to determine their gender. These national-level developments are in line with international standards set out in the Yogyakarta Principles and have led to major progress in recognizing individuals' gender identity. ³⁴. This progress is reflected in several landmark decisions by the European Court of Human Rights (ECtHR).

Gender identity is directly related to the right to privacy protected by the ECtHR, as an individual's sexual identity and life are crucial parts of the personal sphere protected under Article 8 of the European Convention on Human Rights (ECHR). The Court has addressed issues such as bans on certain types of sexual relations, differential treatment based on sexual orientation, barriers to changing gender, and the limited or non-recognition of new gender rights

³³ United Nations Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity Report <https://kaosglider.org/images/library/cinsiyet-kimlig-i-bm.pdf> (01.03.2024), pp. 9-10.

³⁴ Duffy, S., "Contested Subjects of Human Rights: Trans-and Gender-Variant Subjects of International Human Rights Law", *The Modern Law Review*, 84(5), 1041-1065.

in national laws as matters of sexual identity. The Court has ruled that laws requiring individuals to be permanently infertile to undergo gender reassignment surgery are not necessary in a democratic society, and that denying an applicant the opportunity to undergo gender reassignment surgery for years constitutes a violation of Article 8³⁵. Additionally, the Court has found violations of the right to privacy in numerous cases where the legal recognition of a trans applicant's gender change was lacking following surgery³⁶.

With the introduction of gender change issues to the ECtHR, the Court has emphasized that the European Convention on Human Rights also guarantees transsexuals' rights to personal development and to physical and psychological integrity³⁷, although it has not unconditionally secured the right to undergo gender change surgery³⁸. However, recent decisions by the Court, such as in the cases of *A.P., Garçon, Nicot v. France*, 79885/12, 52471/13, and 52596/13, *X, Y v. Romania*, 2145/16, 20607/16, and *A.D. et al. v. Georgia*, 57864/17, 79087/17, and 55353/19, have shown that provisions imposed by states regarding surgery have disrupted the fair balance between the public interest and the individual interests involved.

In *A.P., Garçon, and Nicot v. France*, 79885/12, 52471/13, and 52596/13, the ECtHR held that subjecting individuals to these procedures for official changes of gender and name violates the principles of bodily autonomy and the right to self-determination³⁹. Furthermore, the Court ruled that mandatory sterilization as a precondition for recognition of sexual identity is contrary to the European Convention on Human Rights⁴⁰.

In the case of *X, Y v. Romania*, 2145/16, 20607/16, the Court viewed the requirement for applicants to undergo surgery as evidence of a rigid approach, placing the applicants in a distressing position likely to cause vulnerability, humiliation, and anxiety for an unreasonable and prolonged period. Like in the *A.P., Garçon, and Nicot* case, the national courts left the applicants facing an impossible dilemma: either undergo surgery against their will - thus forgoing their right to respect for private life and their right to physical integrity under Article 3 of the Convention - or renounce the recognition of their gender identity, which also falls under the right to respect for private life. According to the Court, this situation has disrupted the fair balance that Contracting States must establish between the general interests and the individual interests involved⁴¹.

2. National Regulations

According to the Constitutional Court's definition, "gender is a concept that expresses the physiological, biological, and genetic characteristics of an individual, and biological gender is

³⁵ ECtHR, *Y.Y. v. Turkey*, 14793/08, pp. 66-122.

³⁶ ECtHR, *Hämäläinen v. Finland*, 37359/09, p. 59.

³⁷ ECtHR, *Christine Goodwin v. United Kingdom*, 28957/95, p. 90, *Van Kück v. Germany*, 35968/97, p. 69.

³⁸ ECtHR, *Christine Goodwin v. United Kingdom*, 28957/95, p. 81, *Y.Y. v. Turkey*, 14793/08, p. 65, *Arslan Öncü*, p. 63.

³⁹ ECtHR, *A.P., Garçon and Nicot v. France*, 79885/12, 52471/13 and 52596/13, p. 41 vd.

⁴⁰ *Ibid.* p. 41 vd.

⁴¹ ECtHR, *X and Y. V. Romania*, 2145/16, 20607/16.

defined as 'female' or 'male' based on the reproductive organs and systems the individual possesses from birth." ⁴²

The Constitutional Court has defined the concept of biological gender in two ways: as either female or male. Despite this definition, trans existence is legally recognized and established in Turkey, although the regulations regarding this process are heteronormative and do not fully consider the sociological and psychological conditions of trans existence. Article 40 of the Turkish Civil Code No. 4721 sets out the legal conditions for performing genital surgery in the gender reaffirmation process.

Article 40 of the Turkish Civil Code is as follows:

“Anyone who wishes to change their gender can apply in person and request the court to grant permission for the gender change. However, for the permission to be granted, the applicant must be over the age of eighteen and unmarried; additionally, they must provide proof from an official health board report obtained from an education and research hospital that they are of transsexual nature and that gender change is necessary for their mental health.

(2) Based on the granted permission, if it is verified by an official health board report that a gender reassignment surgery suitable to the purposes and medical methods has been performed, the court will decide on making the necessary corrections in the civil registry.”

As can be understood from the relevant article, the law addresses the gender transition process in two stages. The first stage is the conditions for obtaining court permission for gender transition surgeries. These conditions can be listed as follows:

- a. Application
- b. Being over the age of 18
- c. Being unmarried
- d. Providing proof from an official health board report obtained from an education and research hospital that they are of transsexual nature and that gender change is necessary for their mental health

The second stage determines the conditions for the lawsuit to change the gender marker in the registry after the gender transition surgeries⁴³.

Until March 2018, in addition to proving transsexual nature and the necessity of gender change for mental health with a health board report obtained from an education and research hospital, Article 40, paragraph 1 of the Turkish Civil Code also required proving "permanent infertility."

⁴² Constitutional Court Official Gazette date 20.03.2018, 30366 R.G. number, K.T. 29.11.2017, 2015/79 E. 2017/164 K. decision, para.15, (20.10.2023).

⁴³ SPOD, Legal Aspects of the Gender Transition Process – Frequently Asked Questions Guide, 2021, p.12.

The Constitutional Court annulled the requirement of "permanent infertility" with its decision No. 2017/130 and 2017/165 dated 29/11/2017, published in the Official Gazette on 20/03/2018, stating: "...Therefore, the condition of permanent infertility, which is a consequence of the gender reassignment surgery, is envisaged as a separate condition for obtaining court permission for gender change. Forcing the person who will undergo gender reassignment surgery to be subjected to a separate medical intervention to ensure infertility before the surgery is an intervention that is not necessary physically or mentally for the individual and is a disproportionate restriction that cannot be reasonably balanced with the intended purpose." Before this requirement was annulled, individuals who had started the legal process and were using hormones but had not yet undergone surgery had to prove permanent infertility when requesting permission from the court for surgery. However, since hormone use alone does not render a person permanently infertile, the health board reports required for surgery permission could not confirm permanent infertility, and the requests of the trans applicants were rejected.

Paragraph 2 of Article 40 of the Turkish Civil Code stipulates the requirement of undergoing surgery to change the gender marker in the civil registry. A lawsuit was filed for the annulment of this provision, and the Constitutional Court, in its meeting on 29.11.2017, rejected the annulment request regarding paragraph two of Article 40 of the Turkish Civil Code No. 4721 in case E. 2015/79. The appeal argued that the rule in question regulated that after the court's permission for gender change, the necessary correction in the civil registry could be made if it is verified by an official health board report that a gender reassignment surgery appropriate to the purposes and medical methods was performed. It was asserted that protecting the individual's physical and mental health should also be considered within the scope of protecting bodily integrity, and forcing trans men to carry a female identity solely because they did not undergo surgery related to male genitalia violates Article 17 of the Constitution, which ensures the protection of an individual's material and moral existence⁴⁴.

The Court's assessment is very clear in terms of the gender control approach in the Turkish legal system. The court's evaluation is as follows:

*"The irreversible nature of gender reassignment surgeries and the health risks they entail necessitate that the conditions for these surgeries be determined by the legislator and that this process be subjected to state control. For these reasons, **the aim is to prevent the trivialization of such surgeries by performing them without any oversight** and to ensure that courts are not merely approval authorities for changes in the gender marker in the civil registry. Accordingly, the legislator has regulated the conditions for gender reassignment in a specific statute subject to oversight, and the rule in question has been regulated in this context.*

...

⁴⁴ Press Release of Decisions on the Rules on Gender Reassignment No: GK 10/18 <https://www.anayasa.gov.tr/icsayfalar/basin/kararlarailliskinbasinduyurulari/genelkurul/detay/35.html> (01.03.2024).

The rule in question does not interfere with the right of trans individuals to choose whether or not to undergo gender reassignment surgery or with their preferences regarding their sexual life within the right to respect for private life. It imposes an obligation to verify by an official health board report that a gender reassignment surgery has been performed if the individual wishes to change the gender marker in the civil registry. The restriction imposed by the rule stems from compelling social needs such as ensuring the permanence and clarity of civil registry records and protecting public order in a democratic society. This restriction does not eliminate or render the right to change the gender marker in the civil registry unusable. Indeed, a trans individual who has undergone gender reassignment surgery based on court permission always has the right to change their gender marker in the civil registry upon verification by an official health board report.

On the other hand, accepting that a trans individual can change the gender marker in the civil registry without undergoing gender reassignment surgery would result in a discrepancy between the individual's biological gender and the gender appearing in the civil registry. In other words, it would legally recognize a situation that does not align with the individual's biological gender. Moreover, individuals might change their gender marker in the civil registry to benefit from certain rights or avoid obligations that they cannot enjoy or escape due to their biological gender. Ultimately, this situation could negatively impact social life and disrupt public order, as well as hinder individuals' proper use of their rights and freedoms.

Therefore, considering the potential problems the legal acceptance of changing the gender marker in the civil registry without gender reassignment surgery and thus having a different gender from the biological one would create for the legal system and its negative reflections on social order, the rule in question does not constitute a disproportionate limitation on the right to develop one's material and moral existence and the right to respect for private life. There is no contradiction with the requirements of a democratic society in the rule, which aims to protect public order.

*Consequently, the request for annulment of the rule in question was rejected as it was not found contrary to Articles 13, 17, and 20 of the Constitution."*⁴⁵

The surgeries mentioned in the above decision can include vaginoplasty, hysterectomy (removal of the uterus), and sometimes phalloplasty (penis surgery). This situation has led to a particularly ambiguous area for trans men. Due to the lack of specialist doctors performing phalloplasty in Turkey, some judges consider hysterectomy, that is, the removal of the uterus, sufficient, while others do not⁴⁶.

⁴⁵ Press Release No: GK 10/18 on Rules Regarding Gender Change Decisions <https://www.anayasa.gov.tr/icsayfalar/basin/kararlarailiskinbasinduyurulari/genelkurul/detay/35.html> (12.04.2022).

⁴⁶ SPOD, Gender Transition Guide, <https://spod.org.tr/wp-content/uploads/2022/03/Cinsiyet-Gecis-Kilavuzu.pdf> (Accessed: 10.03.2022), p.26.

In Eskişehir, a local court rejected the case of a trans male applicant on the grounds that he had not completed the surgeries in accordance with medical purposes and methods because he had not gone through the external genital surgery. The decision of the higher court regarding the applicant who appealed the local court's decision is as follows: *"It is lawful to reject the case of a trans male applicant who has removed his uterus and ovaries but whose external genitals do not appear male."*⁴⁷

It is evident that courts requiring phalloplasty (penis surgery) for those seeking a change in the gender marker lack information about the difficulties of phalloplasty, the scarcity of specialists in Turkey, or the health risks involved in such surgeries. Moreover, the high costs of these surgeries and the challenges trans individuals face in participating in social life and earning an income are blatantly overlooked. As highlighted in the quoted decision, the legislator's focus on gender control and potential harm to public order pushes trans individuals into a significant dilemma. Therefore, it is important to include criticisms of Article 40 of the Turkish Civil Code in our study.

D. The Predicaments of Trans Existence considering National Regulations

Individuals who do not conform to the sexual and social roles expected of their assigned gender from childhood or later in life face violence, discrimination, bullying, and overall transphobia from society and their immediate surroundings. Trans individuals are subjected to discriminatory behaviors such as not being hired, being denied services or charged higher fees because of their gender identity, being unable to access basic human rights such as healthcare, facing negative looks and gestures during religious practices, insults and threats, derogatory experiences during military service, and discriminatory behavior such as looks and gestures while walking down the street⁴⁸.

Due to these harsh living conditions, trans individuals are driven to suicide, fall victim to transphobic murders, and face the risk of leaving home early and being forced into sex work. According to Transgender Europe, between 2008 and 2015 alone, 1913 trans individuals were killed, with the actual number reported to be much higher. Besides trans murders, it has been reported by the families and close ones of the victims that there is a mafia-like structure in Turkey targeting trans women, forcing them into sex work and various crimes, and killing them if they resist. This indicates that trans women are trapped in multiple ways⁴⁹.

As understood from the wording of Article 40 of the Turkish Civil Code, only individuals who have undergone genital surgery can make legal changes and change their gender markers in Turkey. Although the law emphasizes protecting public order or preventing random surgeries, it ignores the difficulties of trans existence in Turkey.

⁴⁷ Ankara Regional Court of Justice, 16th Civil Chamber, Decision No. E.2018/34 K.2019/1092 dated 3.10.2019.

⁴⁸ Göregenli, M./ O'Neil, M. L./ Ergün, R./ Değirmenci, S./ Erkengel, D., "Türkiye'de Özel Sektör Çalışanı Lezbiyen, Gey, Biseksüel, Trans ve İntersekslerin Durumu", 2019, p.14.

⁴⁹ Kaos GL, <https://kaosgl.org/gokkusagi-forumu-kose-yazisi/devlet-mafya-iliskisi-ulker-sokak-eryaman-esat> (05.04.2022).

It is very clear that the legislative body has not considered the aforementioned situation. In a system where life is constantly threatened, and anyone can be a perpetrator⁵⁰, an individual's legal status and access to rights are tied to highly challenging, costly operations and a lengthy process. Individuals who are in this difficult life struggle face additional challenges even if they start the process as required by the legislator. One such challenge is the shortage of doctors in state hospitals who can perform these types of operations, with existing doctors often working in private institutions⁵¹. Therefore, trans individuals have limited access to services under public support within the scope of health insurance in state hospitals. Operations in private health institutions, on the other hand, are extremely costly. Moreover, irreversible damages may result from these operations. For instance, a trans individual had to undergo multiple correction surgeries due to complications from a vaginoplasty performed in 2014, ultimately resulting in no live cells remaining in their vagina⁵².

Although the Constitutional Court has ruled that the requirement for trans individuals to undergo gender reassignment surgery for legal recognition of gender change is not unconstitutional, prior to this decision, the Parliamentary Assembly of the Council of Europe, in its Resolution 1728 (2010) on Discrimination on the Basis of Sexual Orientation and Gender Identity, recommended in paragraph 16.11.2: *“Ensure the right of individuals to obtain documents reflecting their preferred gender identity without being obliged to undergo prior sterilization or other medical procedures such as gender reassignment surgery or hormone therapy.”*⁵³ Furthermore, the ECtHR in its decision A.P., Garçon and Nicot v. France, Applications Nos. 79885/12, 52471/13, and 52596/13, found that requiring individuals to undergo these procedures and inevitably losing their reproductive ability as a result of surgery constitutes a violation. Considering this, applications to the ECtHR are likely to yield favorable results.

Some academics in Turkey argue that the conditions of permanent infertility, gender reassignment surgery, and hormone therapy are legally problematic under the modern approach accepted by other countries, and thus Article 40/2 of the Turkish Civil Code should also be annulled considering these recommendations⁵⁴. Additionally, some academics consider the requirement for trans individuals to undergo surgery to change their gender markers a serious intervention in bodily integrity, emphasizing that the Constitutional Court's decision creates

⁵⁰ Gazete Duvar, <https://www.gazeteduvar.com.tr/gundem/2019/01/09/izmirde-polis-trans-kadini-oldurdu> (01.06.2022).

⁵¹ SPOD, Cinsiyet Geçiş Kılavuzu, <https://spod.org.tr/wp-content/uploads/2022/03/Cinsiyet-Gecis-Kilavuzu.pdf> (10.03.2022), p. 26.

⁵² Her Life Was Turned Upside Down With Erroneous Surgeries: Solidarity Call for Trans Woman Zehra Hayel, 19.09.2019, <https://sendika63.org/2019/09/hatali-ameliyatlara-hayati-altust-odu-transkadin-zehra-hayel-icin-dayanisma-cagrisi-561921/> (07.04.2022).

⁵³ Parliamentary Assembly of the Council of Europe, Recommendation 1728 (2010) on Discrimination on the Basis of Sexual Orientation and Gender Identity, dated 29.04.2010, http://www.ceidizleme.org/ekutuphaneresim/dosya/697_1.pdf (07.04.2022).

⁵⁴ Alçık, M., “Türk Anayasa Mahkemesinin Trans Bireylere İlişkin Cinsiyet Değişikliği Kararları Üzerine Bir Değerlendirme”, Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, 21(2), p. 1875-1906, p. 1899.

discrimination in its current form⁵⁵. Instead of this requirement, it is suggested that conditions not involving surgical levels of intervention could be imposed, referencing the principle of practical compatibility⁵⁶.

The Constitutional Court has deemed genital surgeries necessary to change the gender marker to be a legitimate intervention to maintain public order in a democratic society, thereby ignoring the Council of Europe's Committee of Ministers and the ECtHR's decisions in *A.P., Garçon and Nicot v. France*. Thus, it is clear that the Court's decision falls short of international standards.

In addition to lagging behind international standards, it is also worth noting the predicaments trans individuals face in seeking their rights within domestic law: According to Article 152/4 of the Constitution, if the Constitutional Court rejects an annulment request on the merits, another request for annulment of the same provision cannot be made for ten years from the date of publication of the rejection in the Official Gazette. Therefore, since the rejection decision regarding the legal recognition of gender change through surgery was published in the Official Gazette on 20.03.2018, no application can be made to the Constitutional Court regarding the constitutionality of the same provision until 20.03.2028. In its decision, the Constitutional Court did not refer to international and comparative law (for example, in some Council of Europe member states like Croatia, the United Kingdom, Austria, and Portugal, surgical operations, hormone therapy, and sterilization are not required for changing the gender marker)⁵⁷, indicating that it will only consider biological gender in civil registry records with the statement "enabling the legal recognition of a situation not in accordance with biological gender."⁵⁸

With the rejection decision numbered 2015/79 E. 2017/164 K. by the Constitutional Court (, trans individuals who wish to change their gender without undergoing surgery will be forced to undergo surgery for the next ten years according to AY 152/4, unless a legal change is made (either a change in the law or a change in the constitutional provisions alleged to be contrary to the norm). The surgery requirement poses a threat to the health of transsexual individuals.

One of the predicaments faced by trans individuals in the Turkish legal system is the lack of specific legal regulations addressing discrimination against trans people. Trans existence has been confined only to Article 40 of the Turkish Civil Code. The absence of such legislation in Turkey manifests as the systemic neglect and disregard of trans lives and their gender transition processes. The deep and multifaceted aspect of this issue, compressed into two paragraphs, has

⁵⁵ For more information: Şirin, T., "Homofobinin Anayasal Üretimi: Anayasa Mahkemesi ve Eş Cinsellik", https://www.academia.edu/37982035/Homofobinin_Anayasal_Üretimi (24.05.2022).

Kudret, H. A. "Avrupa İnsan Hakları Mahkemesi ve Türk Anayasa Mahkemesi Kararları Işığında Yasaklanan Ayrımcılık Temeli Olarak Cinsel Yönelim." *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi* 26.2 (2020): 1079-1110 (24.05.2022).

⁵⁶ Alçık, M., "Türk Anayasa Mahkemesinin Trans Bireylere İlişkin Cinsiyet Değişikliği Kararları Üzerine Bir Değerlendirme", *Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi*, 21(2), p. 1875-1906, p. 1899.

⁵⁷ Özkan, S. "Cinsiyet Geçiş Sürecinin Hukuki ve Toplumsal Boyutu: Haklar ve İhlaller", *Yeditepe Üniversitesi Hukuk Fakültesi Dergisi*, 2017, Issue 1, p. 73.

⁵⁸ Alçık, p. 1901.

been ignored. The deeply ingrained transphobia that complicates the lives of trans people and puts them in economic and psychological straits has been deliberately overlooked. The justification in the applications made to the Turkish Human Rights and Equality Institution (THREI), citing the lack of specific mention of sexual orientation and gender identity, is an example revealing the embedded LGBTI+ phobia in public institutions⁵⁹.

II. ISOLATION OF TRANS PRISONERS

A. Overview

Trans individuals are imprisoned in special wards created for them or under solitary confinement conditions until they complete genital surgeries related to gender transition and change their gender markers on official documents. One reason for the isolation is that the trans identity is not recognized by official authorities, and the legal system is built on a binary gender system. Another reason is the potential for sexual assault and harassment by other inmates. Indeed, when trans prisoners, especially trans women, are placed with men according to their assigned gender, it paves the way for sexual harassment and assault⁶⁰.

The application of all institutions and procedures of the penal system based on the legally assigned gender of the trans prisoner can result in violations of fundamental rights for the trans prisoner. As explained above, according to the laws of the Republic of Turkey, the gender marker of an individual cannot be changed in state records until the gender transition process is completed.

When the problem is addressed in the context of social policy, trans individuals face violence and discrimination in social life. Additionally, due to high unemployment rates, lack of family support, and interrupted education because of transphobia and similar reasons, these individuals may never initiate the medical and legal procedures related to the gender transition process, which can be arduous, lengthy, difficult, and, moreover, expensive. Considering these life experiences of trans individuals, it is highly likely that a trans person who is faced with the penal system has not legally completed their gender transition process.

Solitary confinement conditions are legitimized by placing the prisoner in a cell under the pretext that they have been or are at risk of being assaulted or harassed during their imprisonment. In response to CISST's application under the Right to Information Act on 24.07.2013 regarding LGBTI+ prisoners, the Directorate General of Prisons and Detention Houses stated that planning is made to ensure that LGBTI+ prisoners do not come into contact with other convicts and detainees in common areas and during social activities.

⁵⁹ For more information : <https://www.tihek.gov.tr/public/images/kararlar/l6rikg.pdf> (08.06.2024)

⁶⁰ UNODC (United Nations Office on Drugs and Crime), Handbook on Prisoners with Special Needs, New York 2009, Turkish translation by CISST in 2013, p. 108. ICJ (International Commission of Jurists), International Human Rights References to Human Rights Violations on the Grounds of Sexual Orientation and Gender Identity, October 2006, p. 9. United Nations General Assembly, Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity, Report of the United Nations High Commissioner for Human Rights, A/HRC/19/41, 2011, p. 12.

However, isolation is a severe punishment on its own. In addition to causing enormous psychological damage, it creates a more vulnerable environment to potential dangers from prison staff. Moreover, the prisoner is deprived of activities such as group therapy and educational programs that contribute to the development of vocational skills and allow the individual to earn an income after release from prison. Isolation is already a very severe condition, and the inability to predict the duration of this period turns the suffering into a frightening, endless solitary confinement.

Although international awareness of the human rights crisis caused by isolation is increasing daily, there is a deep chasm between knowledge and practice. Even in the most democratic countries according to the global democracy index⁶¹, such as Canada and Scandinavian countries, isolation policies are implemented⁶². Regarding isolation practices, the USA represents a horrific example on a global scale, though it should be noted that in recent years, thanks to the efforts of human rights activists, the rate of isolation has significantly decreased in some states⁶³. In Europe, while the situation cannot be compared to that in the USA, isolation is still implemented as a widespread practice within the penal system⁶⁴.

B. Effects of Isolation on Prisoners

Research on humans has found that social isolation creates deprivation-related psychic and organic damage accompanied by sensory and perceptual impairment over time. The restriction of sensory and perceptual stimuli can lead to sensory and perceptual disorders, which, depending on the duration of isolation and the individual's psychological background, can result in psychiatric disorders. These include concentration disorders, dissociative disorders, depression, anxiety disorders, auditory and visual hallucinations, sleep disorders, and decreased intellectual capacity⁶⁵. Additionally, behavior changes of an aggressive or passive nature, disturbances in the perception of social identity, feelings of insecurity, distrust, decreased quality of social relationships, and difficulty in forming relationships with the opposite sex have been observed⁶⁶.

A 1975 study on isolation in Canadian prisons concluded that long-term isolation poses "serious danger" to inmates⁶⁷. Stuart Grassian, a psychiatrist at Harvard University who has been studying the effects of solitary confinement for over twenty years, similarly suggested that the symptoms experienced by isolated prisoners form a distinct syndrome resembling 'delirium.' Subsequent studies examining high-security prisons in America have found similar results⁶⁸.

⁶¹ Economist Intelligence, Democracy Index 2023, p. 9.

⁶² Parkes, s. XII.

⁶³ Shalev, The View from Europe, p. 143.

⁶⁴ Shalev, The View from Europe, p. 143.

⁶⁵ Parkes, p. VII. TMA Report on F-Type Prisons, (accessed on 05.03.2022). Shalev, p. 17. Mottram, P. G., HMP Liverpool, Styal and Hindley Study Report, University of Liverpool, 2007, Liverpool.

⁶⁶ Summaries of 59 scientific articles available in the medical literature regarding the medical outcomes of solitary confinement environments in prisons, as accessed by TMA, are presented in Appendix 2 of the relevant report.

⁶⁷ Shalev, p. 12.

⁶⁸ Grassian, p. 337, Shalev, p. 12.

More recent studies have generally reaffirmed that solitary confinement negatively affects those subjected to it, defining “confinement psychosis” as a medical condition characterized by frequent hallucinations and delusions, produced by long-term physical isolation and inactivity in completely segregated areas⁶⁹. A 2014 study conducted on 135,000 inmates over 1,000 days found a direct relationship between exposure to isolation and self-harm. Many prisoners consider self-harm as a way to escape the hardships of solitary confinement⁷⁰.

One of the most commonly reported issues by prisoners in isolation is difficulty distinguishing between reality and their thoughts or finding reality so painful that they create their own fantasy world. Researchers attribute such incidents to the absence of external stimuli, causing the brain to start creating its own stimulation, manifesting in fantasies and hallucinations. In a study of inmates isolated for periods ranging from 11 days to 10 months, both auditory and visual hallucinations were reported⁷¹. One interviewee described, “The cell walls start to shake... everything in the cell begins to move; you feel like you are losing your vision,” while others explained auditory hallucinations as “I hear guards talking. Did they say that? Yes? No? It gets confusing. Am I losing my mind?”⁷² As noted in interviews with prisoners conducted by the Turkish Medical Association (TMA) in 2015, almost all inmates subjected to isolation experienced various physical and mental health issues due to prolonged limited human contact and interaction⁷³.

Another finding from research is that the rates of suicide and self-harm are significantly higher among inmates subjected to isolation. In California, in 2005, 69% of prison suicides were committed by inmates in isolation, while in England and Wales, one-fifth of isolated inmates were reported to have committed suicide⁷⁴. A study comparing the subsequent hospitalization rates of isolated prisoners and other inmates in Denmark found that the hospitalization rates of those in solitary confinement were approximately 20 times higher than those of inmates not held in isolation for the same period⁷⁵. A 1983 study reported that legal regulations in Massachusetts' Walpole prison required isolated inmates to be removed from solitary confinement for at least 24 hours every 15 days, during which symptoms quickly diminished⁷⁶. However, many other studies show that numerous symptoms persist even after the end of isolation⁷⁷. Some symptoms, especially in mentally ill and young inmates, have irreversible

⁶⁹ Shalev, p. 11.

⁷⁰ Kaba, F./ Lewis, A./ Glowa-Kollisch, S./ Hadler, J./ Lee D./ Alper, H./ Selling, D./ MacDonald, R./ Solimo, A./ Parsons, A./ Venters, H., Solitary Confinement and Risk of Self-Harm Among Jail Inmates, A Publication of the American Public Health Association, Mart 2014, <https://ajph.aphapublications.org/doi/10.2105/AJPH.2013.301742>, (08.03.2022).

⁷¹ Grassian, S., “Psychopathological effects of solitary confinement” Am J Psychiatry, 1983, Nov, 140 (11), 1450-4. doi: 10.1176/ajp.140.11.1450. PMID: 6624990.

⁷² For this and many other studies, see Shalev, p. 13 ff.

⁷³ Tuğlu, C./ Şahin, Ç., “F Tipi Yaşamlar-Ceza İçinde Ceza: İnsan-Tecrit-İzolasyon”, HFSA, İstanbul 2016, s. 361.

⁷⁴ National Offender Management Service Annual Report and Accounts 2016-2017, Shalev, p. 17.

⁷⁵ Andersen, H.S., et. al. “A longitudinal study of prisoners on remand. Repeated measures of psychopathology in the initial phase of solitary versus nonsolitary confinement”, International Journal of Law and Psychiatry, 2003, 26:165-177.

⁷⁶ Shalev, p. 22.

⁷⁷ Enggist, S./ Moller, L./ Galea, G./ Udesen, C., WHO, Prisons and Health, 2014 Copenhagen, p. 31.

negative effects on health⁷⁸. Therefore, doctors have concluded that solitary confinement is extremely dangerous for inmates already diagnosed with mental illness, as these inmates are more likely to exacerbate their symptoms⁷⁹.

The final point regarding the effects of isolation on prisoners is that it undermines one of the fundamental principles of contemporary criminal law: the rehabilitation and reintegration of the prisoner into society. Practices referred to as 'treatment' are essential measures to maintain and restore the physical and mental health of the inmate and encourage their reintegration into society and their ability to live responsibly and free from crime. These principles are expressed in both international legislation and recommendations, and in the fundamental principles of Law No. 5275 on Execution⁸⁰. However, the practice of isolation, going against the goal of "rehabilitation," imposes a double punishment on the inmate by isolating them from society and exacerbating the sentence imposed on them. In this sense, isolation can be seen as a deliberately planned policy to cause the physical and psychological deterioration of detainees and convicts, rather than as a method of punishment and rehabilitation⁸¹.

C. International Regulations on Solitary Confinement

1. UN Regulations

Solitary confinement is considered a form of torture and ill-treatment. It can potentially violate several provisions, including Article 7 of the International Covenant on Civil and Political Rights (ICCPR), which prohibits torture and cruel, inhuman or degrading treatment or punishment, and Article 10, which mandates respect for the inherent dignity of persons deprived of their liberty. Additionally, it can violate various articles of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), particularly Article 2. Since Turkey is a party to both treaties, it must fulfill its obligations under these conventions. Failure to do so allows for the possibility of recourse to the monitoring mechanisms of these treaties.

The fundamental document setting standards for the treatment of prisoners was first adopted at the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955. It was subsequently approved by the UN Economic and Social Council by resolutions 663 C (XXIV) on 31 July 1957 and 2076 (LXII) on 13 May 1977, as the "Standard Minimum Rules for the Treatment of Prisoners." Articles 30 and 31 of this text include two fundamental regulations on the issue.

⁷⁸ Shalev, s. 22, National Center for Transgender Equality, LGBTQ People Behind Bars, A Guide To Understanding The Issues Facing Transgender Prisoners and Their Legal Rights, 2018, p. 14.

⁷⁹ Metzner, J. L./ Fellner, J., "Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics", The Journal of the American Academy of Psychiatry and the Law 38:104-108, 2010, 104 vd.

⁸⁰ Tuğlu/Şahin, p. 353.

⁸¹ Tuğlu/Şahin, p. 359.

“30. (1) No prisoner shall be punished except in accordance with the law or regulation...

31. Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments are completely prohibited as disciplinary measures.”⁸²

Since their adoption in 1955, the Standard Minimum Rules have been regarded as the primary standard and framework for both states and monitoring and evaluation mechanisms that assess the treatment of prisoners. Article 30 of the 1955 Rules left a broad scope for any involuntary separation from the general prison population, whether as a disciplinary measure or for maintaining order and security, such as imprisonment, isolation, special care units, or restricted housing; it required that all involuntary separation be reviewed, approved, and regulated by law⁸³.

However, due to more than 60 years passing, the Standard Minimum Rules were revised to reflect the changes and developments in human rights and prison administration. They were re-adopted by the United Nations General Assembly on 17 December 2015 as the United Nations Standard Minimum Rules for the Treatment of Prisoners, also known as the Nelson Mandela Rules⁸⁴.

Nelson Mandela Rules, Rule 43:

“1. In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices are specifically prohibited:

- (a) Indefinite solitary confinement;*
- (b) Prolonged solitary confinement;*
- (c) Placement of a prisoner in a dark or constantly lit cell;*
- (d) Corporal punishment or the reduction of a prisoner’s diet or drinking water;*
- (e) Collective punishment*

2. Instruments of restraint shall never be applied as a sanction for disciplinary offences.

3. Disciplinary sanctions or restrictive measures shall not include the prohibition of family contact. Contact with family members shall only be restricted for a limited time and to the extent strictly necessary for the maintenance of security and order.”⁸⁵

Rule 44 of the Nelson Mandela Rules defines solitary confinement and prolonged solitary confinement. Accordingly, solitary confinement refers to the confinement of prisoners for 22 hours or more a day without meaningful human contact, and prolonged solitary confinement refers to solitary confinement for more than 15 consecutive days⁸⁶.

⁸² United Nations Standard Minimum Rules for the Treatment of Prisoners , 1955.

⁸³ HRFT, Nelson Mandela Rules - United Nations Standard Minimum Rules for the Treatment of Prisoners.

⁸⁴ HRFT, Nelson Mandela Rules - United Nations Standard Minimum Rules for the Treatment of Prisoners.

⁸⁵ HRFT, Nelson Mandela Rules - United Nations Standard Minimum Rules for the Treatment of Prisoners.

⁸⁶ HRFT, Nelson Mandela Rules - United Nations Standard Minimum Rules for the Treatment of Prisoners.

Nelson Mandela Rules, Rule 45:

“1. Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible, and subject to independent review and only with the authorization of a competent authority. It shall not be imposed by virtue of a prisoner’s sentence.

2. The imposition of solitary confinement shall be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures. The prohibition of the use of solitary confinement and similar measures against women and children shall continue to apply as set out in other United Nations standards and norms in crime prevention and criminal justice.”⁸⁷

Article 7 of the United Nations General Assembly Resolution 45/111 on Basic Principles for the Treatment of Prisoners, dated 14 December 1990, states that efforts should be made and encouraged to abolish or restrict the use of solitary confinement as a punishment⁸⁸.

Although the Nelson Mandela Rules are not directly binding on states, they are important because they set out the standards and interpretive principles that the Human Rights Committee, the monitoring body of the ICCPR, and the Committee Against Torture, the monitoring body of UNCAT, will consider when evaluating cases. Therefore, it can be said that these types of regulations are indirectly binding as they are referenced in the decisions of judicial and quasi-judicial mechanisms.

2. Council of Europe Regulations

a. General Overview

Article 3 of the ECHR, the fundamental treaty of the Council of Europe governing human rights, prohibits torture. In this context, solitary confinement is primarily an issue that can be evaluated under Article 3 of the Convention. Additionally, the Council of Europe has its own Prison Rules concerning the treatment of prisoners. The comments we made regarding flexible legal rules apply here as well.

Since Turkey is a party to the ECHR, the evaluations made by ECtHR under Article 3 will be binding. On the other hand, the European Prison Rules will not be binding on their own; however, they will be indirectly binding as they indicate the criteria that the ECtHR will consider when evaluating cases.

At the European level, to detail the issue and supervisory mechanisms and universal standards, the 1987 European Prison Rules were initially adopted, revised with several recommendations by the Committee of Ministers of the Council of Europe in 2006, and subsequently revised on 1 July 2020, taking into account the Nelson Mandela Rules and the 2010 United Nations Rules

⁸⁷ HRFT, Nelson Mandela Rules - United Nations Standard Minimum Rules for the Treatment of Prisoners.

⁸⁸ Aras, B., “Hükümlü ve Tutukluların İnsan Onuruna Uygun Koşullarda Barınma Hakkı”, Dergipark Y. 2022, V. 4, I. 2-5- 59, p. 28.

for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules).

Under the heading of “Separation” in Article 53A, which falls under “Security” in Article 51 and “Safety” in Article 52, it is stipulated that separation from other prisoners is possible when necessary for security and safety beyond the situations specified in Articles 51 and 52:

“If a prisoner is separated from others as a special high-security or safety measure, the following provisions shall apply:

- a. Separated prisoners shall be allowed a minimum of two hours of meaningful human contact a day;*
- b. The decision to separate should take into account the health status of the prisoner and the possibility of worsening health or disability due to negative effects of isolation;*
- c. Separation should be used for the shortest possible period and regularly reviewed to achieve its purpose;*
- d. Separated prisoners should not be subjected to any restrictions beyond those necessary to achieve the purpose of the separation;*
- e. Rooms used for separation should meet the minimum standards set for other living quarters for prisoners under these Rules;*
- f. The longer a prisoner is separated from others, the more opportunities and activities should be provided to reduce the negative effects of separation;*
- g. Separated prisoners should be provided with reading materials and allowed a minimum of one hour of exercise per day, as stated in Rules 27.1 and 27.2;*
- h. Separated prisoners should be visited daily by prison staff, including the prison director or someone acting on behalf of the director;*
- i. If separation negatively affects a prisoner’s physical or mental health, steps should be taken to suspend the measure or replace it with a less restrictive one;*
- j. Any separated prisoner should have the right to lodge a complaint under the conditions set out in Rule 70.”*

Under the heading of “Discipline and Punishment,” the following provisions are included:

“60.3 Collective punishment, corporal punishment, punishment by placing in a dark cell, and all other forms of inhuman or degrading punishment shall be prohibited.

60.5 Solitary confinement should be used only in exceptional cases and for a specified and as short a time as possible.

60.6 Restrictive measures should not be used as a punishment.

60.6.a Solitary confinement, meaning holding a prisoner alone for more than 22 hours a day without meaningful human contact, should never be applied to children, pregnant women, breastfeeding mothers, or parents with babies in prison.

60.6.b Decisions on solitary confinement should consider the prisoner’s current health status. Solitary confinement should not be applied to prisoners with mental or physical disabilities if their condition would worsen as a result. If the mental or physical condition of the prisoner worsens during solitary confinement, the measure should be ended or suspended.

60.6.c Solitary confinement should not be used as a disciplinary punishment except in exceptional cases, should be as short as possible, and should never constitute torture, inhuman, or degrading treatment or punishment.

60.6.d The maximum duration for solitary confinement should be determined by national legislation.

60.6.e When a prisoner who has completed the maximum period of solitary confinement is given another solitary confinement punishment for a new disciplinary offense, this punishment should not be applied until the prisoner has recovered from the negative effects of the previous solitary confinement.

60.6.f Prisoners in solitary confinement should be visited daily by prison staff, including the prison director or someone acting on behalf of the director.”

As seen in this text, solitary confinement is regulated within the context of cell confinement and being held alone for more than 22 hours a day is not considered a human rights violation per se but is subject to many conditions and limitations.

Moreover, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment is a regional human rights treaty regulating states' obligations against torture. The monitoring mechanism of this treaty, the Committee for the Prevention of Torture (CPT), functions through observation and reporting rather than individual applications like the ECtHR.

b. CPT Criteria

The CPT (Committee for the Prevention of Torture) was established as a preventive and monitoring mechanism under the 1987 European Convention for the Prevention of Torture. The CPT examines the legal basis of solitary confinement using traditional tests (PLANN), which include Proportionality (P), Legality (L), Accountability (A), Necessity (N), and Non-discrimination (N)⁸⁹.

(a) Proportionality: The further restriction of a prisoner's rights should be related to the potential harm caused by or to them⁹⁰. Considering the inherent risks of solitary confinement, the level of potential harm must be at least as significant as the risks posed by this punishment, and preventing such harm must be achievable only through this means. This principle is reflected in most countries' use of solitary confinement only as a sanction for the most severe disciplinary offenses; however, this principle should apply in every use of the measure. The duration of the measure should be proportionate to the reason for its application, and efforts should be made to achieve the measure's goal within that time frame⁹¹.

⁸⁹ Shalev, The View from Europe, s. 147-148, Council of Europe, CPT/Inf(2011)28 part-2, p. 2.

⁹⁰ Ramires Sanches v. France, 59450/00.

⁹¹ Council of Europe, CPT/Inf(2011)28 part-2, p. 2.

(b) Legality: Each type of solitary confinement must be regulated within a country's domestic law, specifying the exact conditions under which it can be applied, who can apply it, the procedures to be followed, the prisoner's right to complain within the procedure, the reasons for the decision, the review process and its frequency, and the avenues for appeal. Each solitary confinement regime should be defined by law, and the differences between each regime should be explained⁹².

(c) Accountability: All records related to the decision to impose solitary confinement and its review should be maintained. These records should include all factors considered and information relied upon in making the decision. Additionally, the prisoner's contribution to or refusal to participate in the decision process should be documented⁹³.

(d) Necessity: The rule that restrictions can only be imposed on prisoners as necessary for maintaining security and order, and justice also applies to those in solitary confinement. Therefore, there should be no automatic removal of visits from relatives, telephone calls, correspondence, or access to resources (e.g., reading materials) that prisoners normally have during solitary confinement. The regime should be flexible enough to reduce any unnecessary restrictions in each case⁹⁴.

(e) Non-discrimination: Authorities must oversee all applications of solitary confinement to prevent its disproportionate use against a particular prisoner or group of prisoners without purpose and reasonable justification⁹⁵.

(2) Types of Solitary Confinement

There are four main situations where solitary confinement is used, each with its justification and approach⁹⁶:

(a) Court-ordered solitary confinement: The CPT believes that solitary confinement should never be part of a punishment or under the discretion of the relevant court. The principle that individuals sent to prison to serve their sentences are not there to be punished further should be remembered. Imprisonment is a punishment in itself, and it is unacceptable to further aggravate a prison sentence as part of a punishment. While it may be necessary to subject a convicted prisoner to a solitary confinement regime for a certain period, such a regime should not be part of a series of punitive sanctions⁹⁷. The F-type regime is entirely contrary to universal principles in this context. In the case of *Babar Ahmad and Others v. the UK*, the applicants argued that if extradited to the USA and convicted, they would live under solitary confinement

⁹² Council of Europe, CPT/Inf(2011)28 part-2, p. 2.

⁹³ Council of Europe, CPT/Inf(2011)28 part-2, p. 2.

⁹⁴ Council of Europe, CPT/Inf(2011)28 part-2, p. 2.

⁹⁵ Council of Europe, CPT/Inf(2011)28 part-2, p. 3.

⁹⁶ Council of Europe, CPT/Inf(2011)28 part-2, p. 3.

⁹⁷ Council of Europe, CPT/Inf(2011)28 part-2, p. 3.

conditions in a high-security prison in Colorado, potentially violating Article 3⁹⁸. The court requested information on the conditions of the mentioned prisons but ultimately concluded that the presence of mechanisms allowing for changes in these conditions and the possibility for prisoners to spend time with other prisoners and their families prevented it from being considered a violation of Article 3, except for the applicant with paranoid schizophrenia⁹⁹.

(b) Solitary confinement as a disciplinary sanction: This is the most common form of solitary confinement and is considered legitimate by the Court when applied for a limited, predetermined period, with specified appeal processes and effective domestic remedies¹⁰⁰. Solitary confinement is applied as the most severe disciplinary sanction within normal disciplinary procedures¹⁰¹. Given the potentially highly damaging effects of solitary confinement, the CPT believes it should be used as a disciplinary sanction only in exceptional cases, as a last resort, and for the shortest possible duration¹⁰².

The trend in most Council of Europe member states is to reduce the maximum duration of solitary confinement¹⁰³. For instance, Norway banned its use as a disciplinary sanction in 2001, while Belgium allows it for a maximum of 8 days, Finland 14, Poland, England, and Wales 28, France and Estonia 45, and Ireland 60 days¹⁰⁴. However, many countries keep prisoners in solitary confinement for the maximum period allowed by law and then reapply it¹⁰⁵. The CPT foresees that the maximum duration for solitary confinement for any offense should not exceed 14 days and preferably be shorter. Additionally, continuous solitary confinement should not be imposed successively beyond the maximum duration¹⁰⁶.

(c) Administrative solitary confinement for preventive purposes: Many countries worldwide allow administrative decisions to place prisoners who have caused or are considered capable of causing serious harm to others or pose a serious risk to prison security and safety in solitary confinement¹⁰⁷. This can last from a few hours in individual cases to years for particularly dangerous prisoners. This type of solitary confinement has the least procedural safeguards¹⁰⁸.

(d) Protective solitary confinement: Every prison system may have prisoners who need protection from other inmates¹⁰⁹. The risk for some prisoners may be so great that the prison can only fulfill its duty to protect and care for them by keeping them separate from others. This

⁹⁸ Shalev, *The View from Europe*, s. 164, ECtHR, *Babar Ahmad and others v. the UK*, 24027/07, 119/08, 36742/08, 66911/09, 67354/09, p. 189.

⁹⁹ Shalev, *The View from Europe*, p. 164.

¹⁰⁰ Shalev, *The View from Europe*, p. 155.

¹⁰¹ Shalev, s. 25.

¹⁰² Council of Europe, CPT/Inf(2011)28 part-2, p. 4.

¹⁰³ Shalev, *The View from Europe*, p. 155.

¹⁰⁴ Shalev, *The View from Europe*, p. 155.

¹⁰⁵ Shalev, *The View from Europe*, p. 155.

¹⁰⁶ Council of Europe, CPT/Inf(2011)28 part-2, p. 4.

¹⁰⁷ Shalev, p. 26.

¹⁰⁸ Council of Europe, CPT/Inf(2011)28 part-2, s. 4.

¹⁰⁹ Shalev, s. 25 vd.

can be done at the prisoner's request or when deemed necessary by the administration. Regardless of the process, it is extremely difficult for the prisoner to exit this protection during the remainder of their sentence¹¹⁰. This situation applies to LGBT prisoners in both Turkey and many other places worldwide.

States are obligated to provide a safe environment for those held in prison and should strive to fulfill this obligation by allowing as much social interaction as possible while maintaining order. Solitary confinement should only be used for protection if the prisoner's safety cannot be ensured otherwise¹¹¹. Protective solitary confinement at the prisoner's request, although creating fewer concerns than when decided by prison staff, should still be considered carefully. The CPT believes that various alternatives should be tried first, such as transferring the prisoner to another prison, providing mediation, and offering assertiveness training. The consequences of protective solitary confinement should be explained to the prisoner. The prisoner's request to return to the general population should also be considered and allowed if it can be done safely¹¹². The ECtHR has noted in recent rulings that solitary confinement lasting more than a few days, even for protection, must be scrutinized, stating that an 8-month solitary confinement was not justified even for protection purposes¹¹³.

3. National Regulations

Article 90 of the Constitution of the Republic of Turkey regulates the place and importance of international agreements within the legal system. According to this article, international agreements duly ratified by the Turkish legislative body and put into effect have the force of law and are directly applicable within the Turkish legal system, provided they do not conflict with existing laws. If an international agreement on human rights conflicts with existing laws and has been duly ratified, the provisions of the international agreement will prevail.

This article reinforces Turkey's commitment to fulfilling its obligations under international law by ensuring the implementation of these obligations within domestic law. Article 90 is a crucial provision that regulates Turkey's compliance with international law and its legal relationships with the international community. It emphasizes that Turkey must act in accordance with international agreements on human rights, which hold a prioritized place within the Turkish legal system. Turkey is a party to international agreements and protocols such as the Universal Declaration of Human Rights, the UN Convention Against Torture (CAT), the European Convention on Human Rights (ECHR), the Optional Protocol to the UN Convention Against Torture (OPCAT), and the European Committee for the Prevention of Torture (CPT). These commitments require countries to respect human rights, prevent torture and inhuman treatment, and act in accordance with the rule of law. In this context, solitary confinement practices must be applied in line with international standards and human rights, only when necessary and for

¹¹⁰ Council of Europe, CPT/Inf(2011)28 part-2, s. 4.

¹¹¹ Council of Europe, CPT/Inf(2011)28 part-2, s. 4.

¹¹² Council of Europe, CPT/Inf(2011)28 part-2, s. 6.

¹¹³ Shalev, *The View from Europe*, s. 154-155, ECtHR, *X v. Turkey*, 24626/09.

the shortest possible duration. In evaluating Turkish legislation on solitary confinement, it is evident that many provisions and practices conflict with the aforementioned agreements.

Solitary confinement is stipulated in the law both as part of a penal execution regime for inmates under a high-security regime and as a disciplinary measure in the form of cell confinement. The execution law in the Turkish legal system is primarily regulated by Law No. 5275 on the Execution of Penalties and Security Measures. Article 2 of the law, which outlines the fundamental principles, does not explicitly include discrimination based on gender identity and sexual orientation but establishes the principle of equality, stating that torture and penalties that violate human dignity cannot be imposed.

Article 9 of the law, which aligns with our definition of solitary confinement, is regulated under the heading of high-security closed penal institutions. According to this:

“(1) High-security closed penal institutions are facilities where inmates are accommodated in one- or three-person rooms under a strict security regime with limited contact with other inmates and the outside world, except in cases specified by the legislation...”

(3) Those who are found to be dangerous due to their actions and behaviors and who need to be kept under special surveillance and control, as well as those who disrupt order and discipline in the institutions where they are held or who persistently oppose rehabilitation measures, tools, and methods, are sent to these institutions.”

Article 25 of the law, under the heading "Execution of Aggravated Life Imprisonment," states:

“(1) The principles of the execution regime for aggravated life imprisonment are as follows:

a) The convict is accommodated in a single-person room.

b) The convict is granted the right to go out into the open air and exercise for one hour each day.

c) Depending on the requirements of risk and security, as well as the convict's efforts and good behavior in rehabilitation and educational activities, the time for going out into the open air and exercising may be extended, and limited contact with other convicts in the same unit may be allowed.

d) The convict may engage in an art or vocational activity approved by the administrative board, depending on the available facilities.

e) The convict may make phone calls to the individuals specified in subparagraph (f), not exceeding ten minutes each time, with the approval of the administrative board and once every fifteen days.

f) The convict may be visited by their spouse, descendants, ascendants, siblings, and guardian under the conditions specified and within designated hours, for a maximum of one hour every fifteen days.

g) The convict cannot be employed outside the penal institution under any circumstances and is not granted leave.

h) The convict cannot participate in any sports or rehabilitation activities other than those specified in the internal regulations of the institution.

i) The execution of the convict's sentence cannot be interrupted under any circumstances. All health measures to be applied to the convict, except for medical examinations and necessities, are carried out within penal institutions. If this is not possible, they are applied in single-person, high-security convict wards of fully equipped state or university hospitals."

Article 44, under the heading "Cell Confinement," regulates disciplinary procedures related to cell confinement. According to this:

"(1) The penalty of cell confinement is the solitary confinement of a convict in a cell, day and night, for a period of one to twenty days, depending on the nature and severity of their actions, with the right to go out into the open air preserved, and deprived of all contact.

(2) The actions requiring a cell confinement penalty of one to ten days are:

a) Damaging the institution's facilities, vehicles, and equipment.

...

(3) The actions requiring a cell confinement penalty of eleven to twenty days are:

a) Instigating a riot.

...

(4) The cell is arranged in a way that meets the vital needs of the convict.

(5) Convicts placed in a cell are not prevented from meeting with official and authorized bodies and their lawyer."

Additionally, although not directly related to solitary confinement, Article 49/2 states: "In case the order of the institution and the safety of individuals are seriously endangered, measures not explicitly provided for in the Law may also be taken to maintain order and security. The application of these measures does not prevent the imposition of disciplinary penalties." This provision is often invoked by practitioners to justify the isolation of LGBTI+ individuals. LGBTI+ prisoners can remain in solitary confinement for years, even though they have not committed any actions related to the aforementioned legal provisions.

When evaluating Turkish legislation on solitary confinement, it is clear that cell confinement is stipulated as an execution regime for many cataloged offenses, contrary to the UN regulations. Solitary confinement is defined as holding a prisoner alone for more than 22 hours a day without meaningful human contact. Articles 9 and 25 of the law explicitly state that it is a life isolated from other people for 23 hours a day¹¹⁴. The second issue is the solitary confinement mentioned in Article 44, referred to as a disciplinary sanction in the law. Paragraph 3 of the article stipulates solitary confinement for 11 to 20 days. According to the Nelson Mandela Rules, solitary confinement lasting more than 15 days is considered prolonged, and the law does not align with these rules.

The sentence duration for aggravated life imprisonment is regulated to be served for 30 years under conditional release provisions. However, considering that conditional release provisions

¹¹⁴ Law No. 5275 on the Execution of Penal and Security Measures

do not apply to crimes committed within the scope of organizational activity as stipulated in Articles 302 and 325 of the Turkish Penal Code (TPC), aggravated life imprisonment effectively remains as a form of the death penalty in all but name¹¹⁵. In other words, this represents a situation of isolation until death. Prisoners sentenced to aggravated life imprisonment serve their sentences in violation of international regulations. This brings to mind the concept of the law of the enemy¹¹⁶. Moreover, in the fourth periodic report on Turkey, discussed during the 57th session of the UN Committee Against Torture on April 26-27, 2016, the Committee expressed concerns regarding the conditions of detention for those serving aggravated life sentences and recommended the abolition of Article 47 of the TPC and Article 25/1 of the Execution Law¹¹⁷.

The practice of solitary confinement raises potential issues related to the prohibition of torture and inhuman or degrading treatment or punishment, given the harm it causes. This practice also creates opportunities for deliberate mistreatment of prisoners out of sight of other inmates and prison staff. Systematic torture allegations and the subsequent emergence of deaths in Turkish prisons are significant aspects of this issue that cannot be ignored¹¹⁸.

D. Data on the Solitary Confinement of Trans Prisoners in Turkey

In Turkey, data on penal institutions are published annually by TSI (Turkish Statistical Institute) and compiled using a binary gender categorization¹¹⁹. Therefore, it is not possible to obtain numerical data on detained or convicted LGBTI+ individuals, particularly on trans prisoners, from these datasets. The government has an obligation to provide information under the right to information law regarding this issue. In the recent case of *Magyar Helsinki Bizottsag v. Hungary*, the ECtHR affirmed the right of civil society organizations to access information in their role as "public watchdogs."¹²⁰ This ruling is significant for future research to present more clear numerical data and emphasizes the importance of the government fulfilling its obligations under the right to information law, which should be enforced by civil society organizations.

It is worth noting the difficulties we face in reaching out to LGBTI+ and especially trans prisoners in Turkey. Even for CISST, an organization working in the field of prisons, there are significant problems with data collection except for direct communication through letters from

¹¹⁵ Tuğlu, Şahin, p. 363.

¹¹⁶ Rosenau, H., "Jakobs'un Düşman Ceza Hukuku Kavramı Hukukun Düşmanı", Çev. Temel, E., AÜHFD, 2008, C. 57, S. 4, s. 391-403, s. 394 vd. The article was presented as a paper at the 1st Turkish-German Law Symposium on Current Problems of Law at Dokuz Eylül Law Faculty on 12 January 2008.

¹¹⁷ HRFT, Evaluation of the 4th Periodic Review Report of Turkey to the UN Committee Against Torture, <https://tihv.org.tr/duyurular/bm-iskenceye-karsi-komite-turkiye-4-periyodik-inceleme-raporuna-iliskin-degerlendirme-notu/> (10.03.2022).

¹¹⁸ Evrensel Newspaper, <https://www.evrensel.net/haber/459440/silivri-cezaevinde-iskence-sonucu-intihara-zorlanan-10-tutuklu-10-ayri-cezaevine-sevk-edildi> (20.04.2022).

¹¹⁹ TURKSTAT, Penal Institution Statistics : <https://data.tuik.gov.tr/Search/Search?text=ceza%20infaz%20kurumu> (01.06.2022)

¹²⁰ ECtHR, *Magyar Helsinki Bizottsag v. Hungary*, 18030/11.

prisoners. Systematic applications by CISST, the only civil society organization working on the thematic area of the penal system in Turkey, are persistently left unanswered¹²¹.

Esin Zengin Taş, in her study "Experiences of Social Exclusion, Prison Processes, and Social Service Needs of LGBTI+ Individuals," noted that numerical data were requested from the Ministry of Justice under the right to information, but no response was received¹²².

Currently, the penal system in Turkey operates as an even more isolated and closed-circuit system. Another reason preventing data collection is that prisoners may choose not to disclose their identities to avoid discrimination. An inmate serving an aggravated life sentence under solitary confinement conditions mentioned that due to being homosexual, they were unable to benefit from the rights granted to other inmates serving aggravated life sentences¹²³.

Hilal Başak Demirbaş, in her study "Being an LGBTI+ Prisoner in Turkey," reported that, as of May 2014, there were 95 LGBTI+ prisoners in Turkish prisons, according to a response to her information request. On January 20, 2016, representatives from CISST and LGBTI+ associations visited the General Directorate of Prisons and Detention Houses and learned that the number of LGBTI+ prisoners was 137. The biggest challenge in obtaining numerical data on LGBTI+ inmates in penal institutions is visibility. Many LGBTI+ individuals may choose not to disclose their identities due to potential violence, discrimination, and other adverse treatment. The numerical data available tend to focus more on trans women and gay men due to their visibility¹²⁴.

More than 10 LGBTI+ prisoners held in Alanya L-Type Closed Prison have reported that they were not provided with a ward and have been held in solitary cells for more than three years because allegedly the prison was at full capacity. Their transfer requests have been resisted by the administration¹²⁵. Applications to the lower courts regarding this issue have been accepted, citing the case of X v. Turkey¹²⁶.

In Alanya L-Type Closed Penal Institution, a trans prisoner named Miray started a hunger strike to be moved from a single cell to a ward¹²⁷. In 2020, many letters sent to Kaos GL from trans prisoners indicated that the most common feeling among prisoners was loneliness, and many were being held in solitary confinement¹²⁸.

¹²¹ 1428th meeting (March 2022) (DH) - Rules 9.2 and 9.6 - Communication from NGOs (31/01/2022) in the case of X. v. Turkey (Application No. 24626/09) and reply from the authorities (10/02/2022), p. 4.

¹²² Zengin Taş, E., LGBTlerin Sosyal Dışlanma Yaşantıları, Cezaevi Süreçleri ve Sosyal Hizmet İhtiyaçları, Ankara Yıldırım Beyazıt Üniversitesi, Sağlık Bilimleri Enstitüsü, Doktora Tezi, Ankara 2019, p. 26.

¹²³ Koyuncu, R., Voltaçark: Hapiste LGBTİ Olmak, CISST, İstanbul 2015, s. 116-117, Demirbaş, s. 58.

¹²⁴ Demirbaş, H.B. Türkiye’de LGBTİ mahpus olmak, İstanbul: Ceza İnfaz Sisteminde Sivil Toplum Derneği Yayını, 2016, s. 28

¹²⁵ Demirbaş, s. 59-62.

¹²⁶ <https://kaosgl.org/haber/lgbti-mahpus-artik-tekli-hucrede-tutulmayacak> (02.05.2022).

¹²⁷ Karahan, D., 2019 Yılında Translara Yönelik Gerçekleşen Hak İhlalleri Raporu, Pembe Hayat LGBTİ+ Dayanışma Derneği, s. 15, <https://www.pembehayat.org/haberler/detay/2226/ldquotekli-hucrede-tutuluyorzrdquo>, (03.05.2022).

¹²⁸ Kaos GL, <https://kaosgl.org/haber/trans-mahpuslarin-mektuplarında-en-cok-karsilastigimiz-duygu-yalnizlik> (05.05.2022).

In a complaint filed by CISST on October 26, 2021, it was noted that an LGBTI+ individual with HIV+ status was subjected to solitary confinement, with given reason that this person is alone as LGBTI+ in this prison. However, this was found to be untrue, and the individual was isolated due to their illness¹²⁹.

The solitary confinement of LGBTI+ prisoners can also lead to a risk of death. In 2017, in response to CISST's inquiry, the Provincial Prison Monitoring Board reported the suicide of a trans woman in Isparta Closed Penal Institution, stating: *"Upon her admission to the institution and the identification of her different sexual orientation, it was determined that she would not be accommodated in the same environment with other convicts and detainees. She was placed in a single-person high-security room, frequently checked due to the lack of a ventilation yard, taken to the yard for smoking, provided with clothing from the institution due to the unsuitability of her own, and only a bed and blanket were provided. Supervision and control were documented in accordance with the regulations. The Ministry was requested to transfer the person. On the day of the incident, 27/10/2017, she was checked during the morning count, taken to the yard for smoking at 09:00, checked in her room at 10:38, and found to be in no negative condition. At around 11:45, during lunch distribution, she was found to have hanged herself with her t-shirt, and the institution's doctor was immediately notified..."*¹³⁰

At Elazığ T-Type Closed Penal Institution, a trans prisoner was subjected to solitary confinement despite a unanimous medical report stating that it was not suitable for her to stay in a single cell on the grounds that there were no other LGBTI+ prisoners¹³¹.

In a parliamentary question submitted by HDP MP Ömer Faruk Gergerlioğlu on April 3, 2020, it was stated that LGBTI+ individuals in Tokat T-Type Penal Institution were subjected to solitary confinement, allowed only half an hour of fresh air per day, and denied makeup and depilation materials on the grounds that they were prohibited¹³².

Another aspect of solitary confinement is that LGBTI+ prisoners, who may not be open about their identities to their families and close ones or may face rejection if they are, often have weaker relationships with other prisoners. This further isolates LGBTI+ prisoners who are already subjected to solitary confinement¹³³.

As a positive example, a trans prisoner in a prison was employed in a hairdressing salon to avoid isolation, which provided her with both financial means and also protection from solitary confinement¹³⁴.

¹²⁹ 1428th meeting (March 2022) (DH) - Rules 9.2 and 9.6 - Communication from NGOs (31/01/2022) in the case of X. v. Turkey (Application No. 24626/09) and reply from the authorities (10/02/2022), p. 7.

¹³⁰ Demirbaş, s. 64.

¹³¹ Demirbaş, s. 65.

¹³² 1428th meeting (March 2022) (DH) - Rules 9.2 and 9.6 - Communication from NGOs (31/01/2022) in the case of X. v. Turkey (Application No. 24626/09) and reply from the authorities (10/02/2022), p. 7.

¹³³ Berghan, S., Türkiye’de Trans Kadın Mahpuslar, İstanbul 2017, p. 18.

¹³⁴ Demirbaş, p. 68.

All trans prisoners interviewed for this research had been or were being held under solitary confinement conditions. According to CISST's 2021 prison report, of the 70 LGBTI+ prisoners they corresponded with, 16 were in solitary confinement, 20 reported torture and ill-treatment, and 21 indicated that their special needs were not being met¹³⁵.

Let's set aside the solitary confinement of trans prisoners for a moment. There is not even a comprehensive mapping of the current number of LGBTI+ individuals in prisons or the types of rights violations they face. The most recent figures available are from an action plan submitted by the Turkish Government to the Committee of Ministers of the Council of Europe on October 14, 2021, following a request by CISST and SPOD on January 31, 2022. According to the action plan, as of 2020, there were a total of 164 LGBTI+ prisoners in the Turkish prison system. Although these figures were provided by penal institutions, NGOs responding to the government's action plan noted that there were no convincing and concrete elements regarding how and by what method these numbers were obtained¹³⁶. The action plan dated April 26, 2022, indicated that this number had increased to 255¹³⁷. However, as mentioned, there are no specific figures available regarding the number of trans prisoners.

E. Transnational Control Mechanisms' Approaches to Solidarity Confinement

1. United Nations Human Rights Mechanisms

The United Nations General Assembly has noted that LGBTI+ individuals are frequently subjected to solitary confinement. While it is acknowledged that this may be deemed necessary for protective purposes, it has been stated that LGBTI+ status does not justify solitary confinement¹³⁸. Despite the presence of multiple UN mechanisms, this section will examine the decisions of treaty-based monitoring bodies with protective mechanisms, specifically the Human Rights Committee (which oversees the International Covenant on Civil and Political Rights) and the Committee Against Torture (which oversees the UN Convention Against Torture), focusing on individual applications related to solitary confinement¹³⁹.

¹³⁵ CISST 2021 Hapishaneler Raporu, p. 62.

¹³⁶ Council of Europe Committee of Minister, Meeting: 1428th meeting (March 2022) (DH) Communication from NGOs (31/01/2022) in the case of X. v. Turkey (Application No. 24626/09) and reply from the authorities (10/02/2022).

¹³⁷ For more info: [https://hudoc.exec.coe.int/#{%22execidentifier%22:\[%22DH-DD\(2022\)459E%22\]}](https://hudoc.exec.coe.int/#{%22execidentifier%22:[%22DH-DD(2022)459E%22]}) (08.06.2024)

¹³⁸ International Human Rights Instruments, HRI/Gen/1/Rev.1., International Human Rights Law on Solitary Confinement, Human Rights First-Summer 2015, p. 21.

¹³⁹ For detailed information see, United Nations General Assembly, A/66/268, A/68/295, United Nations Economic and Social Council, E/CN.4/2003/68, United Nations Economic and Social Council, E/CN.4/2004/56, United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/OP/PRY/1, United Nations, International Human Rights Instruments, HRI/Gen/1/Rev.1., International Human Rights Law on Solitary Confinement, Human Rights First-Summer 2015.

In the case of Victor Polay Campos, leader of the Tupac Amaru Revolutionary Movement, the Human Rights Committee found that his confinement in a 2x2 meter cell for 23 hours a day, with less than 10 minutes of sunlight exposure, violated Articles 2(1), 7, 10(1), 14(1)(2)(3)(b)(d) of the International Covenant on Civil and Political Rights. The Committee determined that such treatment amounted to a violation of the Covenant¹⁴⁰. In another decision, the Human Rights Committee stated that the applicant's detention in solitary confinement for several months was contrary human dignity and accordingly violated Article 10 of the International Covenant on Civil and Political Rights¹⁴¹.

Regarding the protective mechanism under the UN Convention Against Torture, the Committee Against Torture has noted in a case that solitary confinement can violate Article 16 of the Convention, depending on the concrete circumstances of the case, the type and severity of the solitary confinement, its duration, and its purpose and effects on the individual¹⁴². The Committee also recalls its recommendation that solitary confinement and separation should be used as a last resort, for the shortest possible period, with strict supervision and the possibility of judicial review.¹⁴³

In a submission to the Committee Against Torture, the Committee referred to the Nelson Mandela Rules, defining solitary confinement as the confinement of prisoners for 22 hours or more a day without meaningful human contact and prolonged solitary confinement as lasting more than 15 consecutive days¹⁴⁴. In another case, the Committee found that preventing an applicant from meeting with their lawyer and family while subjecting them to solitary confinement constituted a violation of Article 16 of the UN Convention Against Torture¹⁴⁵.

2. European Court of Human Rights' Approach to Solitary Confinement

While the human rights mechanisms of the Council of Europe encompass a broader framework, this section will evaluate the issue based on the decisions of the ECtHR, the monitoring body of the ECHR, which offers the possibility of individual application. The criteria of another monitoring mechanism, the CPT, have been examined above.

The ECtHR evaluates solitary confinement within the framework of Article 3 of the ECHR. According to Article 3, which prohibits torture and inhumane or degrading treatment, this prohibition is absolute. States cannot derogate from this prohibition, even in times of war or other public emergencies. In the case of *Ireland v. United Kingdom*, concerning human rights violations against IRA members, the Court established a minimum threshold that ill-treatment

¹⁴⁰ Office Of The United Nations High Commissioner For Human Rights, *International Covenant On Civil And Political Rights Selected Decisions Of The Human Rights Committee under The Optional Protocol*, V. 6., Fifty-sixth to sixty-fifth sessions (March 1996 – March 1999), UN New York and Geneva, 2005, s. 117-121.

¹⁴¹ *International Covenant On Civil And Political Rights, Selected Decisions of the Human Rights Committee under The optional Protocol*, V. 2., p. 148.

¹⁴² *A.A. v. Morocco*, CAT/C/68/D/817/2017, p. 8.5, *A.A. v. Denmark* (CAT/C/49/D/412/2010), p. 7.4.

¹⁴³ *V. v. New Zealand* (CAT/C/62/D/672/2015), p. 7.3, *A.A. v. Morocco*, CAT/C/68/D/817/2017, p. 8.5.

¹⁴⁴ *A/66/268*, p. 26, *A.A. v. Morocco*, CAT/C/68/D/817/2017, p. 8.5.

¹⁴⁵ CAT/C/68/D/782/2016.

must reach to be considered under Article 3 of the ECHR¹⁴⁶. According to this standard, “The duration of the treatment, its physical or mental effects, and in some cases the sex, age, and state of health of the victim are factors to be taken into account.”¹⁴⁷

In a case involving human rights violations by the Greek junta, which led to Greece's withdrawal from the Council of Europe, inhuman treatment was defined as “at least, such treatment that deliberately causes severe mental or physical suffering that cannot be justified in a particular situation.”¹⁴⁸ Solitary confinement, in this context, can in some cases amount to cruel, inhuman, and degrading treatment or even torture¹⁴⁹.

Although over 40 years ago, the European Commission of Human Rights expressed that total sensory isolation would undoubtedly destroy personality and that it was a human rights violation that could not be justified under the guise of security, the ECtHR, while recognizing it as an undesirable condition, does not consider solitary confinement alone as a violation of Article 3¹⁵⁰. Whether such a measure falls within the scope of Article 3 of the Convention depends on the specific circumstances, the severity of the measure, its duration, the objective pursued and its effects on the person concerned¹⁵¹.

The ECtHR acknowledges that solitary confinement for a reasonable period may be acceptable for reasons of security, discipline, the protection of the prisoner, or to prevent a detainee under judicial process from establishing criminal contacts with the outside world¹⁵².

In its older decisions on solitary confinement, the ECtHR considered the following as acceptable justifications: the prisoner's extremely dangerous behavior and ability to “manipulate situations and incite other prisoners to undisciplined actions,” and the security of the prisoner¹⁵³.

In the case of *Krocher v. Switzerland*, the Court mentioned that “the general situation related to the climate of terrorism at the time” justified serious security measures, including solitary confinement¹⁵⁴. Ten years later, in 1992, the Court slightly narrowed this view, stating, “The

¹⁴⁶ Shalev, S., “Solitary Confinement: The View from Europe”, *Canadian journal of Human Rights*, 4:1 Can J Hum Rts., 2015, s. 143-165, s. 146, Graffin, N., *From the Greek Case to the Present: 50 Years of Article 3 of the European Convention on Human Rights*, p. 58.

¹⁴⁷ *Ireland v. Great Britain*, 5310/71, p. 162, <https://www.refworld.org/cases,ECHR,3ae6b7004.html>, (03.03.2022), Shalev, *The View from Europe*, p. 146.

¹⁴⁸ Shalev, S., *Time for a Paradigm Shift, A Follow Up Review of Seclusion and Restraint Practices in New Zealand*, NZ Human Right Commission, Auckland 2020, p. 62.

¹⁴⁹ Shalev, S., *Time for a Paradigm Shift, A Follow Up Review of Seclusion and Restraint Practices in New Zealand*, NZ Human Right Commission, Auckland 2020, p. 62.

¹⁵⁰ Shalev, *The View from Europe*, s. 146, *Guide on the Case-Law of The European Convention on Human Rights*, p. 50.

¹⁵¹ *Guide on the Case-Law of the European Convention of Human Rights, Prisoner's Rights*, Updated on 31 August 2022, p. 221.

¹⁵² Harris, D./ O'Boyle, M./ Bates, E./ Buckley, C., *Avrupa İnsan Hakları Sözleşmesi Hukuku*, Harris O'Boyle & Warbrick, İstanbul 2021, (Çev. Bingöllü Kılıcı M., Karan, U.), s. 250.

¹⁵³ Shalev, p. 34. See also ECtHR, *X v. United Kingdom*, 8324/78, *X v. United Kingdom*, 8241/78, *M v. United Kingdom*, 9907/82.

¹⁵⁴ ECtHR, *Krocher v. Switzerland*, 8463/78.

undeniable difficulties inherent in the fight against crime, especially terrorism, cannot place restrictions on the protection to be afforded concerning the physical harm inflicted on the integrity of the prisoner's personality.”¹⁵⁵

In *Ilașcu and Others v. Moldova and Russia*, the Court stated that “complete sensory isolation, combined with total social isolation, can destroy the self and constitute inhuman treatment that cannot be justified by security or similar reasons.”¹⁵⁶ In this case, the applicant was entirely isolated from the outside world, denied contact with lawyers and family members, and kept in a cell without heating, sunlight, or fresh air during the harshest winter conditions. The Court found a violation of Article 3 in favor of the applicant¹⁵⁷.

In the more recent case of *Ramires Sanches v. France*, also known as *Carlos the Jackal*, the Court assessed the applicant's conditions of detention. The Court noted that the cell was of a size suitable for a prisoner, furnished with a bed, table, and chair, equipped with sanitary facilities, and had a window that provided natural light. The applicant had access to books, newspapers, a reading lamp, and a television set. He could use the exercise yard for two hours a day and the cardio training room for one hour. Additionally, he was visited by doctors twice a week, a priest once a month, and very frequently by one or several of his 58 lawyers. His wife visited him more than 640 times over four years and ten months, while his other lawyers visited him over 860 times in seven years and eight months. Medical reports indicated no adverse effects on his physical and mental health due to the "relative isolation," as described by the Court¹⁵⁸. Despite sharing the CPT's concerns about long-term solitary confinement, the Court did not find a violation of Article 3. The same judgment also emphasized that complete sensory isolation is strictly prohibited¹⁵⁹.

In the case of *Razvyazkin v. Russia*, the Court noted that prolonged solitary confinement without physical or mental stimuli is harmful to mental and social abilities¹⁶⁰. Furthermore, the Court, referring to the 2011 General Report, emphasized that the harmful effects of solitary confinement become evident immediately and increase in intensity and duration the longer it continues, making its impact unpredictable. The Court stated that solitary confinement should be applied only in very exceptional circumstances and for the shortest time possible¹⁶¹.

In *Onoufriou v. Cyprus*, the Court expanded the procedural safeguards required to ensure the welfare of prisoners and the proportionality of their detention periods. The Court particularly noted that there was no adequate justification for the applicant's solitary confinement, the duration was uncertain, and there was no reliable system to record the solitary confinement measures or ensure the applicant was not confined beyond necessary¹⁶². Similarly, in the case

¹⁵⁵ Shalev, s. 34, ECtHR, *Tomasi v. France*, 12850/87, p. 115.

¹⁵⁶ ECtHR, *Ilașcu and others v. Moldova and Russia*, 48787/99, p. 432.

¹⁵⁷ *Harris/ O'Boyle/ Bates/ Buckley*, s. 250.

¹⁵⁸ ECtHR, *Ramires Sanches v. France*, 59450/00, p. 126-150.

¹⁵⁹ *Ibid.* p. 120.

¹⁶⁰ Shalev, *The View from Europe*, p. 146, ECtHR, *Razvyazkin v. Russia*, 13579/09, p. 104.

¹⁶¹ ECtHR, *Razvyazkin v. Russia*, 13579/09, p. 104.

¹⁶² *Guide on the Case-Law of The European Convention on Human Rights*, p. 50-51.

of *Csüllög v. Hungary*, the Court found that the authorities did not provide any substantial reason when solitary confinement was imposed or extended. Therefore, in the absence of justification, the restriction was deemed arbitrary. Arbitrary restrictive measures imposed on vulnerable individuals such as prisoners inevitably contribute to feelings of submission, total dependency, helplessness, and thus, humiliation¹⁶³.

Similarly, in *Ivan Karpenko v. Ukraine*, the Court found that prohibiting a life-sentenced prisoner from communicating with other inmates during outdoor activities, combined with additional factors such as confinement with one or two prisoners, only brief outdoor walks, and lack of purposeful activity, worsened the situation. The automatic application of this ban without any possibility of review or safeguard against arbitrariness due to the life sentence; the prolonged duration of the measure (at least ten years); and the evidence that the applicant's health had deteriorated as a result, with insufficient responses to his complaints and requests for assistance, amounted to inhuman and degrading treatment in violation of Article 3 of the Convention¹⁶⁴. However, it must be noted that in all these decisions, the Court still considers "security" as a valid reason for solitary confinement during the period it is applied¹⁶⁵.

In the case of *X v. Turkey*, regarding the solitary confinement of an LGBTI + prisoner, the Court found a violation of Article 3 of the Convention due to the applicant's placement in protective solitary confinement without any justification for not allowing outdoor exercise or contact with other prisoners, and the lack of proper judicial review of the measure¹⁶⁶.

The ECtHR tends to accept solitary confinement as legitimate when it is imposed by a court decision, as a disciplinary measure within the prison, or for preventive or protective purposes¹⁶⁷. However, this framework can serve as a pretext for states to apply solitary confinement practices that effectively amount to inhuman treatment, thereby violating prisoners' rights.

When evaluating solitary confinement cases, CPT reports play an important role in the ECtHR's assessments. The CPT's 2011 annual report clearly states, "solitary confinement can have extremely damaging effects on physical, somatic, and social health. This harm can become immediate, and the longer it lasts, the more permanent and blurred its effects and duration become,"¹⁶⁸ emphasizing the need to meet certain criteria (PLANN¹⁶⁹)¹⁷⁰. The revised European Prison Rules¹⁷¹, adopted by the Council of Europe's Committee of Ministers on July 1, 2020, aim to further define the areas outlined by the ECtHR.

¹⁶³ ECtHR, *Csüllög v. Hungary*, 30042/08, p. 37-38.

¹⁶⁴ ECtHR, *Ivan Karpenko v. Ukraine*, 45397/13, p. 58-65.

¹⁶⁵ ECtHR, *Ivan Karpenko v. Ukraine*, 45397/13, p. 57.

¹⁶⁶ Guide on the Case-Law of The European Convention on Human Rights, p. 51.

¹⁶⁷ Harris/ O'Boyle/ Bates/ Buckley, p. 249.

¹⁶⁸ Shalev, *The View from Europe*, è. 147.

¹⁶⁹ Proportionate (Orantılı), Lawful (Hukuki), Accountable (Hesap Verilebilir), Necessary (Gerekli), Non-Discriminatory (Ayrımcılık Yasağı)

¹⁷⁰ Council of Europe, CPT/Inf(2011)28 part-2, p. 1 vd.

¹⁷¹ https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016809ee581

It should not be overlooked that solitary confinement, which creates a prison within a prison, further restricts the already limited rights of a prisoner deprived of liberty. Therefore, considering its effects on the prisoner, it should only be applied in exceptional circumstances and for the shortest time possible¹⁷². The UN Human Rights Committee similarly confirmed the dangers of solitary confinement and stated that it could constitute a violation of Articles 10 and 7 of the International Covenant on Civil and Political Rights (ICCPR)¹⁷³. While Article 7 of the ICCPR mirrors Article 3 of the ECHR in its text, Article 10 of the ICCPR, which regulates the rights of persons deprived of their liberty, should be taken into account by the ECtHR when defining the scope of Article 3¹⁷⁴. Article 10 of the ICCPR states that all prisoners must be treated with humanity and respect for the inherent dignity of the person, and the primary purpose of the penal system should be the reformation and social rehabilitation of prisoners¹⁷⁵.

F. The Case of X v. Turkey in the Context of Solitary Confinement of Trans Prisoners

The case of X v. Turkey, decision 24626/09, is significant in our context as it found that the solitary confinement of LGBTI + individuals by the Turkish state violated the prohibition of torture and the prohibition of discrimination.

The applicant, a homosexual named X, faced economic difficulties in 2009 and used the identity information of a family member to create a fake ID card with his photo. He attempted to use this ID to obtain a bank loan¹⁷⁶. After he went to the police station and confessed to committing the crimes that remained in the attempted stage, a public lawsuit was filed against him and his arrest was ordered in accordance with the decision of the criminal judge of peace on duty.¹⁷⁷ This situation serves as an example highlighting the nature of the justice mechanism.

The applicant requested to be transferred to another ward where other homosexual prisoners were held, claiming that he was being harassed and disturbed by other prisoners in his current ward. However, the prison administration placed him in a solitary 7 m² cell. Regarding the cell's conditions, the applicant reported that the toilet was in the same space, there were no necessary hygiene materials for handwashing, the cell was dirty and infested with rats, making it uninhabitable. He was not allowed to go outside or participate in any social activities within the prison, although he was allowed to meet with his lawyer. He claimed that he was subjected to

¹⁷² Shalev, s. 33.

¹⁷³ Human Rights Committee, Concluding Remarks on Denmark. 31/10/2000. CCPR/CO/70/DNK, General Comment 21/44, of 6 April, 1992, Shalev, p. 33.

¹⁷⁴ Guide on the Case-Law of The European Convention on Human Rights, Prisoners' Rights, Updated on 31 December 2021, s. 50, Harris/ O'Boyle/ Bates/ Buckley, p. 249.

¹⁷⁵ United Nations International Covenant on Civil and Political Rights, <https://insanhaklarimerkezi.bilgi.edu.tr/media/uploads/2015/08/03/MedeniVeSiyasiHaklaraIliskinSozlesme.pdf>, (01.06.2022).

¹⁷⁶ Cengiz, S., X v. Turkey Kararının Uygulanması İzleme Raporu, p. 5.

¹⁷⁷ Doğmuş, S., "Karar İncelemesi: Avrupa İnsan Hakları Mahkemesi'nin X- Turkey Kararı (Başvuru No: 24626/09 Hakkında Bir Değerlendirme", Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, V. 20, I. 1, 2018, p. 355.

solitary confinement because he was LGBTI + and that this had led to a deterioration in his mental health¹⁷⁸.

On May 7, 2009, the applicant, through his lawyer, appealed to the İzmir Execution Judge, responsible for overseeing detention conditions, to end his solitary confinement and return to normal detention conditions. He argued that there was no legal basis for the imposition and continuation of solitary confinement and that this decision had caused him irreparable psychological harm¹⁷⁹.

The execution judge, after reviewing the case file, concluded that there was no need to make a decision on the merits. He stated that the applicant was a "detainee," not a convict, and that the prison administration's practice was lawful both in form and substance. The judge noted that the administration had discretion in this matter, as the Law on the Execution of Sentences and Security Measures No. 5275 did not provide specific rules on how detainees should be placed, as it did for convicts. The judge used the following expressions:

" (...) it is clear that the detainee is held in solitary confinement because the state cannot risk the lynching of a transvestite in a prison under any circumstances. (...)." ¹⁸⁰ In this case, it was observed that the judicial authorities had difficulty in understanding the concept of homosexuality and, in particular, male homosexuality, equating it with transvestite and transsexual identities. As a reflection of this confusion, the judicial authorities felt the need to refer the detainee to a hospital to determine if he was homosexual, and in administrative correspondence, the detainee's situation was referred to as being afflicted with a "homosexual disease." ¹⁸¹

The applicant appealed this decision of the Execution Judge to the İzmir High Criminal Court, stating that he was held in solitary confinement for 24 hours a day, deprived of all interaction with other detainees and access to open air. He requested equal treatment with other detainees, including the ability to participate in outdoor activities and social interactions with other detainees, which could be achieved through other measures to protect his physical integrity¹⁸².

The applicant was held under observation at Manisa Psychiatric Hospital from July 8 to August 12. A report prepared by three psychiatrists indicated that the individual exhibited homosexual identity disorder, had developed depression due to his confinement, and that any future psychiatric issues could be managed within the prison¹⁸³.

The ECtHR first determined the duration the applicant was held in solitary confinement to evaluate the complaint under Article 3 of the Convention. Based on the evidence in the case

¹⁷⁸ ECtHR, X v. Turkey, 24626/09, p. 10, 12.

¹⁷⁹ ECtHR, X v. Turkey, 24626/09, p. 13.

¹⁸⁰ ECtHR, X v. Turkey, 24626/09, p. 14.

¹⁸¹ Canseven/ Özeren, s. 81.

¹⁸² ECtHR, X v. Turkey, 24626/09, p. 15.

¹⁸³ ECtHR, X v. Turkey, 24626/09, p. 19.

file, it was understood that the applicant had been held in a 7 m² cell (with living space approximately half that size) from February 5, 2009, until his transfer to Eskişehir prison. The applicant was continuously deprived of outdoor exercise. Similarly, apart from the periods from July 8 to August 12 (when hospitalized) and from August 12 to November 11, 2009 (when another detainee was placed in his cell), he was deprived of all contact with other detainees. This situation continued until his transfer to Eskişehir prison on February 26, 2010. Thus, the applicant was held in solitary confinement for eight months and eighteen days. The ECtHR focused its examination on the entire duration of these periods¹⁸⁴.

The ECtHR recalls that Article 3 of the Convention regarding the right of prisoners to be held in conditions that respect human dignity imposes an obligation on the State to ensure that every person is detained under conditions compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and that, given the practical demands of imprisonment, their health and well-being are adequately secured (*Kudla v. Poland*, no. 30210/96, paras. 92-94, ECtHR 2000-XI)¹⁸⁵.

The ECtHR observes that the solitary confinement imposed on the applicant was not sensory or total social isolation but relative isolation. However, it is a fact that some aspects of these conditions were even stricter than the regime provided for prisoners sentenced to aggravated life imprisonment in Turkey. The complete prohibition on the applicant's access to open air and contact with other detainees (which continued for the entire period he was held in a single cell) indicates that his detention conditions were extraordinary¹⁸⁶. While concerns about assaults on the applicant's physical integrity, given the intimidation and harassment he faced and complained about when held with other detainees, are not unfounded, these concerns do not justify his complete exclusion from the prison community¹⁸⁷.

Moreover, the ECtHR finds that the applicant's attempts to have the measure reviewed by the execution judge and the high criminal court yielded no significant results, as his applications were dismissed without substantive examination. The execution judge merely stated that the prison administration had discretion in this matter, without examining the appropriateness of the specific solitary confinement measure complained of or deciding on requests to mitigate the conditions of isolation¹⁸⁸.

The Court concluded that the differential treatment the applicant experienced due to his homosexuality violated the principle of non-discrimination, and the solitary confinement he

¹⁸⁴ ECtHR, *X v. Turkey*, 24626/09, p. 37-38.

¹⁸⁵ ECtHR, *X v. Turkey*, 24626/09, p. 39.

¹⁸⁶ ECtHR, *X v. Turkey*, 24626/09, p. 43-44.

¹⁸⁷ ECtHR, *X v. Turkey*, 24626/09, p. 48.

¹⁸⁸ ECtHR, *X v. Turkey*, 24626/09, p. 49.

was subjected to constituted a breach of the prohibition of torture¹⁸⁹. This case exemplifies the pervasive heteronormative structure reflected in the Turkish judicial system¹⁹⁰.

Despite ten years having passed since the ruling, the solitary confinement of trans individuals and LGBTI+ persons remains a pressing human rights violation that needs to be addressed. In the context of the *X v. Turkey* case, an action plan was submitted to the Committee of Ministers of the Council of Europe. During the 1436th meeting on April 26, 2022, the Turkish government claimed to have taken all necessary steps and invited the closure of the supervision of the case¹⁹¹. However, during the 1451st meeting on September 26, 2022, CISST and SPOD presented their statements against the action plan, asserting that general measures had not been taken¹⁹². Despite these concerns, the Committee concluded in the 1447th meeting that the government had fulfilled its obligations and decided to close the case. Unfortunately, this indicates the loss of a crucial mechanism in the struggle for justice, as the government places significant importance on the procedure conducted before the Committee of Ministers and responds with utmost seriousness.

III. TRANS PRISONERS' RIGHT TO HEALTH

A. Overview

The right to health is not just the right to be healthy. It is also not the right to receive unlimited medical care for every illness or disability. The right to health encompasses access to and the use of all social and physical conditions, facilities, and services necessary for the best possible health. This concept includes access to healthcare services and general living conditions that affect health. This includes factors such as gender, distribution of resources, age, poor hygiene conditions, violence, war, and armed conflicts, which can directly or indirectly harm health¹⁹³.

In the Health and Human Rights Evaluation Report prepared by the WHO, 4-7 December 1997, it was emphasized that people are biologically and genetically different and thus have different health conditions. Therefore, the right to health includes the claim that each individual should have the highest potential for physical and mental health, considering their personal conditions. In summary, because the right to health is a holistic concept, it is unacceptable to settle for standards worse than the best possible conditions¹⁹⁴.

¹⁸⁹ For more Info: [https://hudoc.exec.coe.int/eng#{%22execidentifier%22:\[%22DH-DD\(2022\)459E%22\]}](https://hudoc.exec.coe.int/eng#{%22execidentifier%22:[%22DH-DD(2022)459E%22]})

¹⁹⁰ Canveren, Ö./ Özeren, E., "Avrupa İnsan Hakları Mahkemesi'nin X/Turkey Kararı Temelinde Türkiye'de LGBT Mahkumlara Yönelik Bir İnceleme", https://www.researchgate.net/publication/313880711_An_Examination_of_LGBT_Inmates_in_Turkey_Based_on_XTurkey_Case_by_the_European_Court_of_Human_Rights (03.05.2022), p. 77.

¹⁹¹ [https://hudoc.exec.coe.int/eng#{%22execidentifier%22:\[%22DH-DD\(2022\)459E%22\]}](https://hudoc.exec.coe.int/eng#{%22execidentifier%22:[%22DH-DD(2022)459E%22]})

¹⁹² [https://hudoc.exec.coe.int/eng#{%22execidentifier%22:\[%22DH-DD\(2022\)1003E%22\]}](https://hudoc.exec.coe.int/eng#{%22execidentifier%22:[%22DH-DD(2022)1003E%22]})

¹⁹³ Sereli Kaan, M., Tutuklu ve Hükümlülerin Sağlık Hakkına ve Hizmetlerine Erişimi, Ankara Üniversitesi Sosyal Bilimler Enstitüsü İnsan Hakları Anabilim Dalı, Yüksek Lisans Tezi, Ankara 2020, p 27.

¹⁹⁴ Sereli Kaan, p 27.

Imprisonment, even as a concept, poses a serious risk to health. The closed and confined nature of prisons, the fact that detainees are often poor and socially disadvantaged individuals, overcrowding, lack of ventilation, inadequate nutrition and medical care, and the prevalence of violence facilitate the occurrence and spread of diseases, particularly mental and infectious diseases. Therefore, prisons and detention centers must provide continuous, quality, equal, and independent healthcare services accessible to prisoners under equal conditions¹⁹⁵. However, the reluctance of authorities to address health issues in prisons and the high financial burden of such measures result in various levels of health problems within these institutions¹⁹⁶.

All prisoners are potentially vulnerable individuals with individual health and care needs that require appropriate assessment and management. Overcrowding in prisons affects the physical and mental health of all inmates but has a particularly negative impact on those with special needs. This situation imposes additional challenges on prison authorities and staff. Many prisoners have specific needs that require special attention. These individuals, who may have disabilities, be elderly, or belong to certain ethnic groups, minority statuses, nationalities, sexual orientations, or gender identities, are among those whose health care needs must be met with the utmost care in a prison setting¹⁹⁷.

When the special needs of risk groups are not considered, they are deprived of the right to health. In this case, while a prison is already a place of punishment, it can lead to double punishment. Therefore, identifying risk groups is essential in the regulation of national health systems. It is imperative to plan preventive health services for these risk groups and address curative health services according to these risks.

B. Special Needs of Trans Prisoners in the Context of Health Rights

Access to health rights for trans prisoners is multifaceted due to both their status as prisoners and their trans identities. Trans prisoners challenge the binary gender categorization that is a significant assumption of incarceration. This categorization fails to address the existence of trans individuals within the penal system, resulting in their double punishment¹⁹⁸. The variety of special needs of trans prisoners leads to human rights violations on different levels. Trans prisoners have unique healthcare requirements. Additionally, they face difficulties in accessing healthcare services, including psychiatric evaluations, sterilization, and the manipulation of hormone treatments (either denial or imposition). Therefore, identifying adequate healthcare for trans prisoners is complex, involving their special needs, increased risk, systematic risk factors, and the need for specialized care. Any penal system that fails to meet these special needs and requirements is inadequate in protecting this vulnerable demographic¹⁹⁹.

¹⁹⁵ TMA, Özgürlüğünden Yoksun Bırakılanların Sağlık Hakkına İlişkin Etik Kurul Görüşü, https://www.TMA.org.tr/makale_goster.php?Guid=cca66a7e-bff9-11e8-bd56-00aa55ab5dcd: (30.03.2022).

¹⁹⁶ İşlegen, Y., Cezaevlerinde İnsan Hakları ve Sağlık, Toplum ve Hekim Dergisi 1996, I. 75-76, p. 72.

¹⁹⁷ Gatherer, A./ Atabay, T./ Hariga, F., Prisoners with special needs. Prisons and health, 2014, s. 151.

¹⁹⁸ Van Hout, M. C./ Crowley, D., The “double punishment” of transgender prisoners: A human rights-based commentary on placement and conditions of detention, International journal of prisoner health, 2021, p. 441.

¹⁹⁹ Van Hout/ Crowley, p.440.

The United Nations Office on Drugs and Crime (UNODC), together with the United Nations Development Programme (UNDP), mapped good practices for the management of prisons housing trans individuals. Their report highlights that hormone therapy, although considered the main medical intervention to address gender dysphoria, is often denied or limited in access. There are three main models present in prisons:

- 1) “Freeze-frame” approach (maintaining hormone access at the level prior to imprisonment);
- 2) Continuation approach (continuing treatment initiated before imprisonment, allowing dose adjustments);
- 3) Initiation approach (allowing the commencement or continuation of hormone therapy)²⁰⁰.

The report states that the first model "can never be considered good practice or even adequate care," and the second model can be problematic for trans individuals as it is possible for trans prisoners to obtain hormones illegally. The report emphasizes that abrupt discontinuation of hormones or non-initiation of hormone therapy can lead to highly adverse outcomes²⁰¹.

In a compilation study that mapped 59 publications on transgender prisoners published between 2000 and 2019 highlighted prison conditions concerning access to health rights for trans prisoners²⁰². Reports from the USA, the UK, Canada, Australia, South Africa, Thailand, Italy, Brazil, Hong Kong, and Ireland, although not offering a comprehensive scale and measurability of health needs and access, collectively detail the nature of health conditions among trans prisoners. Three predominant health issues for trans prisoners are diagnosis, care, and gender-affirming surgeries.

According to the Standards of Care by the World Professional Association for Transgender Health (WPATH), health services related to gender affirmation broadly include "primary care, gynecological and urological care, reproductive options, voice and communication therapy, mental health services (e.g., assessment, counseling, psychotherapy), and hormonal and surgical treatments."²⁰³ These interventions are considered life-saving by medical academics, who argue that they are critical for protecting the health and safety of prisoners. Without such treatment, trans prisoners are at a higher risk of deeper depression and life-threatening self-castration²⁰⁴.

Reports from the USA, the UK, Canada, and Australia indicate that trans prisoners are generally much more likely to be sexually and physically victimized than the general prison population.

²⁰⁰ UNDP, UNODC, Mapping of Good Practices for the management of Transgender Prisoners, Bangkok 2020, p.34.

²⁰¹ UNDP, UNODC, Mapping of Good Practices for the management of Transgender Prisoners, Bangkok 2020, p.36-37.

²⁰² Van Hout/ Kewley/ Hillis, p. 258-306.

²⁰³ Coleman, E., ve others "Standards of care for the health of transsexual, transgender, and gender-nonconforming people", International journal of transgenderism, 13.4, 2012,p.165-232.

²⁰⁴ ECtHR, W.W. v. Polonia, 31842/20. Zarząd Fundacji - Helsińska Fundacja Praw Człowieka <https://www.hfhr.pl/wp-content/uploads/2021/11/20211108-WW-amicus-skan.pdf> s.9.

These reports also note that discrimination and violence in prison significantly impact trans prisoners' mental health and increase the likelihood of self-harm²⁰⁵. When the discontinuation of hormone therapy is added to the discrimination and violence experienced by trans prisoners, their situation worsens considerably²⁰⁶.

1. Diagnosis

The conceptual and medical terminology for identifying and classifying the gender identity of incarcerated trans individuals, as detailed in the section on the Concept of Trans Identity, is based on international criteria and the ICD-11 classification²⁰⁷. However, these accepted definitions are not implemented uniformly across all countries, leading to varying recognition procedures. In countries with different procedures, incarcerated trans individuals may face stigmatization when classified medically as transsexuals, as this categorization implies being labeled as ill or abnormal. Consequently, some trans individuals may not wish to be diagnosed during their incarceration. On the other hand, some trans individuals may request this diagnosis to access appropriate medications and hormones. However, access to a gender identity diagnosis during incarceration is problematic due to the general lack of medical knowledge among prison healthcare staff. This can result in trans prisoners being deprived of initial assessments or diagnoses, receiving incorrect diagnoses, and subsequently not obtaining the correct medical treatment. Therefore, the diagnosis of gender identity among trans individuals in prisons is uncommon due to the lack of knowledge among prison staff and the stigmatizing attitudes of other prisoners. Requesting such a diagnosis can increase the likelihood of experiencing greater violence and discrimination²⁰⁸. The general issue with diagnoses in prisons is that they are often ignored or denied. Some correctional officers believe these requests are frivolous and that inmates are merely seeking cosmetic body modification procedures²⁰⁹.

2. Hormone Therapy and Care

Hormones are a serious medical necessity for many trans individuals. Data collected from the general population of trans individuals indicate that access to hormone therapy improves quality of life, reduces substance use, and decreases symptoms of suicide, depression, and anxiety²¹⁰. Trans women who were on hormone therapy before incarceration should not have their hormone treatment abruptly stopped, regardless of whether the hormones were prescribed or not. Sudden cessation can result in hot flashes, dizziness, anxiety, suicidal tendencies, a

²⁰⁵ Van Hout/ Kewley, Hillis, p. 294.

²⁰⁶ Van Hout/ Kewley, Hillis, p. 295.

²⁰⁷ Routh, D./ Abess, G./ Makin, D./ Stohr, M. K./ Hemmens, C./ Yoo, J., "Transgender inmates in prisons: A review of applicable statutes and policies", *International Journal of Offender Therapy and Comparative Criminology*, 61(6), 2017, p. 647-649.

²⁰⁸ Van Hout/ Kewley/ Hillis, p.295-296.

²⁰⁹ Van Hout/ Kewley/ Hillis, p.296.

²¹⁰ World Professional Association for Transgender Health -WPATH (DPTSB) , *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, 2012, https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf (01.06.2022).

desire for self-castration, and other severe mental health issues with physical consequences²¹¹. Adverse outcomes such as self-harm, including self-castration or self-penectomy, can occur when surgeries related to the genitalia are delayed or denied²¹².

According to the Standards of Care by the World Professional Association for Transgender Health (WPATH), providing medical hormone therapy to incarcerated trans individuals in prisons and other detention facilities is a requirement.

While some prisons globally support the use of hormone therapy, they often require proof of an official diagnosis and evidence of legal hormone use before incarceration²¹³. However, many trans individuals obtain hormone treatments through black market channels due to the high cost of prescriptions, which means they cannot show a treatment history or diagnosis upon entry into prison²¹⁴.

In the United States, 28 states do not allow trans inmates to receive treatment after incarceration. Only 13 states allow the initiation of hormone therapy, and 21 states permit the continuation of hormone therapy. However, 20 states do not allow the continuation of hormone therapy²¹⁵. Even when appropriate treatment is provided in prison, continuity of care is not always ensured. Trans women are more likely to live with HIV+, and this discrepancy is even more pronounced among those with a history of incarceration²¹⁶. Trans individuals in the U.S. prisons have reported interruptions in treatments for HIV+ infection, such as anti-retroviral therapy, due to delays in prescriptions, medications being out of stock, transfers to different wings, and intermittent dosing. Additionally, the prevalence rate of HIV+ in prisons is not documented. A 2011 study found that 60-80% of trans individuals incarcerated in a California prison were HIV+²¹⁷.

Trans prisoners who have experienced sexual abuse require psychological support and medical care. Even in the absence of sexual abuse, trans prisoners face discriminatory attitudes and humiliations in prisons, resulting in mental stress that necessitates special psychological support and programs. However, many prisons lack sufficient qualified personnel for psychological support²¹⁸.

3. Gender-Affirming Surgeries

²¹¹ Bashford, J/ Hasan, S/ Marriott, C/ Patel, K, Inside Gender Identity: A report on meeting the health and social care needs of transgender people in the criminal justice system, Bradford: Community Innovations Enterprise, 2017.

²¹² Brown George R., "Autocastration and autopenectomy as surgical self-treatment in incarcerated persons with gender identity disorder." *International Journal of Transgenderism*, 12.1, 2010, s.31-39.

²¹³ Clark Kirsty A./ Jaclyn M./ Hughto, W./ Pachankis, J. E., "'What's the right thing to do?'" Correctional healthcare providers' knowledge, attitudes and experiences caring for transgender inmates." *Social Science & Medicine* 193, 2017, p.80-89. doi: 10.1016/j.socscimed.2017.09.052, (01.06.2022).

²¹⁴ Van Hout/ Kewley/ Hillis, p.296.

²¹⁵ Routh/ Abess/ Makin/ Stohr/ Hemmens/ Yoo, p. 645–666.

²¹⁶ Van Hout/ Kewley/ Hillis, p.296.

²¹⁷ Van Hout/ Kewley/ Hillis, p.296.

²¹⁸ CISST, Özel İhtiyacı Olan Mahpuslar El Kitabı, 2013.

Gender-affirming surgeries are rarely offered as a treatment option in prisons. Trans prisoners may hesitate to express their thoughts on genital surgeries due to concerns about receiving adequate care or timely interventions for other symptoms if such a surgery were performed under prison conditions. Because trans prisoners often try to minimize or hide their symptoms due to the severity of stigmatization and discrimination they face in prisons, finding supportive policies and resources to cope with these issues is challenging²¹⁹.

Access to these services for trans prisoners is crucial for improving health outcomes, increasing self-care behaviors, and reducing potential criminal behavior. In the US, courts have long ruled that banning gender-affirming surgeries as a matter of prison policy is unconstitutional²²⁰. As a result, prison authorities have been compelled to consider whether certain gender-affirming surgeries are medically necessary for some trans prisoners, which prisoners qualify for them, and the potential outcomes of the surgeries, including classification, security, and placement. However, there is little data on the needs of trans women during or after incarceration and what facilitates improved health outcomes for this population. Therefore, more research is needed on the healthcare needs and outcomes related to transition among incarcerated trans women²²¹.

C. The Right to Health in International Regulations

The right of trans prisoners to the highest attainable standard of health is enshrined in international human rights treaties (ICESCR, Article 12; ICCPR, Article 6, the right to life, and Article 10, the right to humane treatment; European Social Charter (ESC), Article 11). The right to health is a universal human right. This right also includes the environmental determinants of health in prisons, standards of healthcare, and the rights to privacy and medical confidentiality. The ICCPR and ICESCR specify that prisoners retain their rights even when deprived of their liberty. The ICCPR particularly emphasizes that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." This encompasses access to adequate healthcare and information, alongside the fundamental determinants of health. These principles are also delineated in soft law documents from international organizations and in the jurisprudence of international human rights bodies.

The right to health is also articulated in soft law instruments. Several regulations safeguard the health rights of prisoners, such as the Universal Declaration of Human Rights (UDHR), the "Standard Minimum Rules for the Treatment of Prisoners," the "Istanbul Protocol" of November 4, 1999, the "Tokyo Declaration" adopted by the World Medical Association in 1975 and revised in 2006, the European Prison Rules, CPT Criteria, and the principles recognized in WHO's health guidelines for prisons²²².

²¹⁹ Van Hout/ Kewley/ Hillis, p.297.

²²⁰ Marissa, L., "Transgender Inmates' Right to Gender Confirmation Surgery." *Fordham L. Rev.* 89, 2020.

²²¹ Van Hout/ Kewley/ Hillis, p.300.

²²² Human Rights Institution of Turkey, Investigation Report on Access to Health Services by Prisoners and Convicts in Penal Execution Institutions, No.2014/1, 29.05.2014, s. 11.

The Universal Declaration on Bioethics and Human Rights adopted by UNESCO in 2005 is significant for the emphasis placed on respecting the vulnerability and personal integrity of individuals, particularly prisoners, recognized as vulnerable groups in medical ethics and human rights²²³. In 2013, UNESCO's International Bioethics Committee (IBC) produced a special report reiterating the obligations of states and communities to protect vulnerable individuals' the right to health and ensure they are not deprived of the necessary means to access health rights²²⁴.

Beyond its curative purpose, the protective and preventive nature of healthcare is crucial. The WHO's standards and declarations on prison health and the World Medical Association's views mandate preventive measures to avoid the spread of diseases. States must also ensure that prisoners with special needs—such as those with mental health requirements, disabilities, foreign nationals, LGBTI+ individuals, and particularly those who are elderly and/or have serious health issues—receive appropriate and adequate healthcare.

The Nelson Mandela Rules emphasize that even in countries facing significant difficulties in providing high-standard healthcare to the entire population, prisoners are entitled to the best possible healthcare arrangements free of charge²²⁵. This includes a reference to the CPT, which states that nothing should absolve the state from its responsibility to meet the essential needs of those deprived of their liberty, even in times of severe economic hardship²²⁶.

The CPT has stated that “inadequate healthcare in a prison setting can rapidly lead to situations falling within the scope of the term inhuman and degrading treatment.”²²⁷ Therefore, "failure to provide adequate medical treatment or, in some cases, medical release for a person on health grounds, unauthorized medical experiments, or in some cases, non-consensual medical treatment, intentional deprivation of food, or in some cases, forced feeding" can lead to violations of the prohibition of torture and ill-treatment as per the European Prison Rules²²⁸.

On November 11, 2015, the CPT addressed gender identity discrimination in a report for the first time. It recommended that Austria allow detainees access to trans-specific healthcare and

²²³ UNESCO, Biyoetik ve İnsan Hakları Evrensel Bildirgesi, 2005. https://www.unesco.org.tr/Content_Files/Content/Sektor/Sosyal_ve_Beseri_B/evrensel_bildirgesi.pdf, (01.06.2022).

²²⁴ Van Hout/ Kewley/ Hillis, s. 297, Sereli Kaan, s.38.

²²⁵ HRFT, Nelson Mandela Rules - United Nations Standard Minimum Rules for the Treatment of Prisoners, <https://tihv.org.tr/ozel-raporlar-ve-degerlendirmeler/nelson-mandela-kurallari-mahpuslara-muameleye-dair-birlesmis-milletler-asgari-standart-kurallari/> (03.03.2022).

²²⁶ Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. 11th general report on the CPT's activities covering the period 1 January to 31 December 2000. Strasbourg, 2001 (CPT/Inf (2001) 16) <https://rm.coe.int/1680696a75>, (25.05.2022).

²²⁷ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Health Care Services In Prisons, CPT/Inf(93) 12 part, s. 1, <https://rm.coe.int/16806ce943>, (20.04.2022).

²²⁸ See: Nigel Rodley, N./ Polard, M., The Treatment of Prisoners under International Law, United States, Oxford University Press, 2009 (Third edition), s. 407.

legal gender recognition. It also underscored the need to develop and promote "policies to combat discrimination and exclusion faced by transgender persons in closed institutions." ²²⁹

In addition to general health services, the CPT Subcommittee highlighted in its 2016 annual report the necessity for states to take measures to identify and adequately address the specific health needs of transgender individuals, including hormone and other treatments related to gender transition²³⁰.

For trans prisoners with a valid medical diagnosis requiring gender affirmation surgery, allowing such surgeries and having the state cover the costs is considered best practice. The Council of Europe Committee of Ministers' Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity outlines steps member states should take to ensure the safety and dignity of trans prisoners, prevent physical assaults and sexual abuse by inmates or staff, and respect and protect their gender identities. The Committee of Ministers emphasized the need for appropriate measures to ensure effective access to gender reassignment without unreasonable requirements²³¹. Additionally, the updated 2017 Yogyakarta Principles, focusing on sexual orientation and gender identity, apply to prisons. These principles assert the right to humane treatment during detention (Principle 9)²³², the right to bodily and mental integrity (Principle 32), and mandate that gender identity should be integral to one's dignity and humanity, prohibiting it from being a basis for discrimination. They also state that prisoners should be involved in decisions regarding their place of detention in accordance with their sexual orientation and gender identity whenever possible.

In a 2016 report on Malta, the CPT noted issues such as inadequate accommodation for trans prisoners, violence against trans prisoners, addressing trans women by male names, and preventing them from expressing themselves as women. The CPT recommended implementing policies to combat the discrimination and exclusion faced by transgender individuals²³³. Shortly after the report's publication, the Malta Prison Services implemented the Trans, Gender Variant and Intersex Inmates Policy ("Policy"), aimed at preventing and protecting against discrimination and harassment based on gender identity, gender expression, and sex characteristics. This Policy addresses various aspects of incarceration, from entry and

²²⁹ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Report on visit to Austria CPT/Inf (2015)34, SS 115, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680653ec7> (01.06.2022).

²³⁰ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment CAT/C/57/4, 2016.

²³¹ Council of Europe, Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted by Committee of Ministers on 31.03.2010, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf40a, (04.04.2022).

²³² International Commission of Jurists, Yogyakarta principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, 2007, www.yogyakartaprinciples.org/principles_en.pdf, (01.06.2022).

²³³ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Report on visit to Malta, CPT/Inf (2016)25, S 50-54., <https://rm.coe.int/16806b26e8> (01.06.2022).

registration procedures to the training of prison officers²³⁴. Crucially, it also deals with the recognition of gender identity and access to healthcare, highlighting the connection between recognizing gender identity and the right to health.

First, the Policy mandates that prisoners should not be denied access to procedures for recognizing their gender identity and that prison staff must express willingness to assist and provide professional help in implementing such procedures.

Secondly, addressing healthcare needs, the following points are highlighted:

- 1) Any hormone medications prescribed to a prisoner upon entry should be recorded and continued;
- 2) Access to hormone therapy, electrolysis, voice therapy, or surgery as part of the transition process while incarcerated should be obtained in consultation with a medical professional in accordance with general principles;
- 3) Recognizing that a trans prisoner has special needs, the penal system must make every effort to provide necessary/requested medical treatment to help align the physical characteristics of the prisoners with their gender identity, regardless of their assigned legal gender;
- 4) Such assistance should be provided "immediately";
- 5) Due to the increased risk of depression, anxiety, self-harm, and high suicide risk among trans prisoners, Correctional Institutions are responsible for individually assessing the prisoner's risk level and current needs. The Malta Policy, adopted by UNODC and UNDP and referenced as an example of a gender and gender-based violence prevention policy, highlights these requirements²³⁵.

The right to health for trans individuals also stems from the principle of equal treatment. As stated in the documents above, the principle of equal treatment mandates taking all positive steps to eliminate the discrimination and risks faced by trans individuals. The right to health, among the guiding principles affecting prisoners, includes the right to equal access to services and medications and to enjoy the highest attainable standard of health and humane treatment, like all people. Examples include all provisions in the UDHR ("the right to adequate conditions for health and well-being"), ICESCR ("the right to the highest attainable standard of physical and mental health"), and other specific provisions of the ICCPR (Articles 5, 9, 10, 26), CEDAW (Article 3); the Basic Principles for the Treatment of Prisoners (Principle 5), the Nelson

²³⁴ Correctional Services(Malta),Trans Gender Variant& Intersex Inmates Policy, 2016,[https://homeaffairs.gov.mt/en/media/Policies-Documents/Documents/Trans%20Gender%20Variant%20and%20Intersex%20Inmates%20Policy%20-%20August%202016%20\(Final-%20Final\).pdf](https://homeaffairs.gov.mt/en/media/Policies-Documents/Documents/Trans%20Gender%20Variant%20and%20Intersex%20Inmates%20Policy%20-%20August%202016%20(Final-%20Final).pdf), (22.04.2022).

²³⁵ ECtHR, W.W. v. Polonia, 31842/20, Zarząd Fundacji - Helsińska Fundacja Praw Człowieka <https://www.hfhr.pl/wp-content/uploads/2021/11/20211108-WW-amicus-skan.pdf>.

Mandela Rules (Rules 2, 5, 7, 19, 37, 38, 43-45), and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, EPR (Rules 2, 5).

In the European Convention on Human Rights, the right to health is not explicitly defined. While there is no explicit right to health in the ECHR, it should be considered along with the right to life, the prohibition of torture, the right to respect for private life, and the prohibition of discrimination. The European Court of Human Rights, through its case law, has contributed to the development of rules relating to prisons, although it acknowledges that states' obligations regarding medical care will vary according to the existing level of treatment²³⁶. States are expected to provide all medical care services to detainees and convicts as far as their resources allow. However, it should be noted that insufficient resources should not reach a level that would lead to inhumane treatment. The Court does not allow financial insufficiency that would violate human dignity²³⁷. Nevertheless, since the Court acknowledges that states' financial capabilities impact access to the right to health, it also accepts that access to health for detainees and convicts may be restricted or limited²³⁸. According to the Court, the medical care provided to detainees and convicts is related to prison conditions, and prison health facilities have limited resources²³⁹. Thus, it is not guaranteed to be equal to the services provided in the best clinics outside prisons²⁴⁰. States are obliged to ensure that the conditions of detention are healthy for those they incarcerate and to provide care when they fall ill due to these conditions. While the European Convention on Human Rights does not impose a "general obligation" to release a detained person on health grounds, it states that if the physical or mental suffering arising from health issues is exacerbated or at risk of being exacerbated by the conditions of detention for which the authorities can be held responsible, this may fall within the scope of Article 3 of the Convention²⁴¹.

The ECtHR emphasizes that the state is obliged to ensure that detainees are not subjected to hardship or distress beyond the inevitable level inherent in detention conditions and to maintain their health and well-being by providing necessary medical support²⁴². The Court has ruled that "failure to provide immediate medical care in emergencies, failure to provide medical care without justification for delays, and inadequacy of treatment" violate the prohibition of torture and ill-treatment under Article 3, causing pain and humiliation that can double the illness due to reduced physical and moral resistance. Furthermore, the Court has ruled that failure to provide necessary medical care and subsequent death constitutes a violation of the right to life²⁴³. The European Court of Human Rights has also established that states are obligated to

²³⁶ ECtHR, *N. v. the U.K.*, 26565/05, p. 44.

²³⁷ Doğan, E., *Avrupa İnsan Hakları Mahkemesi İçtihatlarında Tutuklu ve Hükümlülerin Sağlık Hakkı*, İstanbul Üniversitesi Sosyal Bilimler Enstitüsü, Kamu Hukuku Anabilim Dalı, Yüksek Lisans Tezi, İstanbul 2017, s. 36-37.

²³⁸ Doğan, p. 37.

²³⁹ *Grishin v. Russia*, 30983/02, p. 76; *Kozhokar v. Russia*, 33099/08, p. 106; *Sergey Antonov v. Ukraine*, 40512/13, p. 74.

²⁴⁰ *Pitalev v. Russia*, 34393/03, p. 54; *Gladkiy v. Russia*, 3242/03, p. 84; The Court does not always comply with the CPT's equality standard for convicted prisoners. However, this is not the case for detainees.

²⁴¹ ECtHR, *Mouisel v. France*, 67263/01.

²⁴² Biçer Ü., *Avrupa İnsan Hakları Mahkemesi Kararları ve İstanbul Protokolü*. TIHV 2017.

²⁴³ TMA, *Ethical Board Opinion on the Right to Health of Deprived Persons*.

provide preventive healthcare services to detainees and to take practical preventive measures to prevent the spread of infectious diseases among detainees, considering this obligation under Article 3²⁴⁴. It has been stated that independent committees and mechanisms should be established to monitor and oversee to protect individuals held in detention and custody from human rights violations, especially torture and other ill-treatment²⁴⁵.

Regarding access to health rights, in the case of *D.Ç. v. Turkey* (10684/13), the European Court of Human Rights (ECtHR) ruled on the problems faced by a trans prisoner in accessing gender reassignment procedures and hormone therapy²⁴⁶. The Court rejected the application on the grounds that domestic remedies had not been exhausted. The Court dismissed the arguments of the Turkish government that the applicant did not qualify as a victim and recognized the issues the applicant faced. However, as mentioned, it ruled the case inadmissible due to the non-exhaustion of domestic remedies. Despite the inadmissibility ruling, this decision indicates that the Court considers the special healthcare needs of trans prisoners.

In recent years, some countries have made legal and policy changes to better address the special needs of trans prisoners. These include providing accommodation consistent with their gender identity, access to gender-affirming healthcare services like hormone therapy and ensuring the safety and dignity of trans prisoners. Within the framework of international regulations and recommendations, some countries have taken pioneering steps regarding access to health rights and prison conditions for trans prisoners. Canada stands out with its progressive policies that respect gender identity and expression, supporting the housing of trans prisoners in facilities consistent with their gender identity and their access to gender-affirming healthcare services. The recommendations of the European Committee for the Prevention of Torture (CPT) and the gender-diverse-sensitive approaches in the prison systems of Scandinavian countries are notable steps towards addressing the special healthcare needs of trans prisoners. In the United Kingdom, there are guidelines for housing trans prisoners in conditions that align with their gender identity and support for access to gender-affirming healthcare services. These examples highlight the steps taken at the international level to improve access to health rights for trans prisoners while emphasizing that the prevalence and effectiveness of these practices can vary from country to country. They underscore the importance of further efforts and the development of consistent policies to protect the rights of trans prisoners²⁴⁷.

D. National Regulations

Turkey has significant obligations to protect the rights of prisoners and ensure their access to healthcare within the framework of international human rights norms and national legislation.

²⁴⁴ ECtHR, *Cătălin Eugen Micu v. Romania*, 55104/13, p. 56.

²⁴⁵ Can, İ. Ö./ Davaş, H. A./ Biçer, Ü., “COVID-19 Pandemisi ve Alıkonulanlar”, *Adli Tıp Bülteni*, 25(COVID-19 Sp. I.), 2020, p.63.

²⁴⁶ ECtHR, *D. Ç. v. Turkey*, 10684/13.

²⁴⁷ Butcher, T., “Human Rights, Trans Rights, Prisoners' Rights: An International Comparison”, *Nw. JL & Soc. Pol'y*, V. 18, p. 43-73.

These obligations are established by both international agreements and Turkey's own laws, forming a foundation for the protection and promotion of prisoners' human rights.

Turkey has committed to protecting the human rights of prisoners by being a party to international documents such as the United Nations Universal Declaration of Human Rights, ICCPR, International Covenant on Economic, Social and Cultural Rights (ICESCR), and the European Convention on Human Rights (ECHR). These documents encompass the prisoners' right not to be subjected to torture and ill-treatment, the right to a fair trial, the right to access healthcare, and the right to be treated with dignity. Particularly, access to healthcare is defined under ICESCR as everybody's right to the highest attainable standard of health, which applies to prisoners as well. Although the Yogyakarta Principles do not have binding legal force in Turkey, they can be interpreted and applied in harmony with other international human rights treaties to which Turkey is a party.

For prisoners in Turkey, the Yogyakarta Principles serve as an important guide, especially for the protection of the rights of LGBTI+ individuals. By considering these principles, Turkey can align its actions with international standards in combating discrimination based on sexual orientation and gender identity and in protecting the human rights of prisoners. These principles emphasize that LGBTI+ prisoners should not face discrimination, should receive equal and fair treatment, should have access to specialized healthcare, and should be protected from any violence and harassment based on their sexual orientation or gender identity. The applicability of the Yogyakarta Principles in Turkey depends on how well these principles are integrated into national laws and practices. It would be a significant step for the protection and improvement of the rights of LGBTI+ prisoners if Turkey considers these principles and aligns its practices with these international standards.

The Constitution of the Republic of Turkey stipulates that everyone has the right to life, and the right to develop their material and moral existence, as well as the rights to personal liberty and security. The Constitution also emphasizes the state's obligation to protect and promote individuals' rights to health and a healthy environment. The Turkish Penal Code, Law No. 5275 on the Execution of Penalties and Security Measures, the Regulation on the Execution of Penalties and Security Measures published in the Official Gazette on the same day as the primary law, the tripartite protocol signed by the Ministries of Health, Justice, and Interior on August 19, 2011, and the bilateral protocol between the Ministries of Health and Justice on April 30, 2009²⁴⁸, contain specific regulations regarding the treatment of prisoners and their access to healthcare.

These laws aim to ensure that prisoners are treated in a manner consistent with human dignity, have access to basic healthcare services, and receive adequate medical care when necessary. The state has various obligations to protect the health rights of prisoners. These obligations include providing equal access to healthcare, ensuring adequate health facilities and staff,

²⁴⁸ Protocol Between the Ministry of Health and the Ministry of Justice on the Regulation of Health Services in Penal Institutions, <https://cte.adalet.gov.tr/Resimler/Dokuman/292019142507p34.pdf> (26.05.2022).

providing emergency medical interventions, preventing and controlling diseases, conducting regular health check-ups, offering psychological and psychiatric services, addressing special health needs, providing information and education, maintaining confidentiality and privacy, and establishing complaint mechanisms. Additionally, Turkey's obligations to protect against sexual orientation-based discrimination and ensure fair and dignified treatment of prisoners aim to prevent discrimination, violence, harassment, and ill-treatment. These measures are intended to protect the physical and mental health of prisoners and improve their quality of life within prison conditions.

Article 56 of the Turkish Constitution is dedicated to the right to health. According to this provision: “Everyone has the right to live in a healthy and harmonious environment. It is the duty of the state and citizens to improve the environment, protect environmental health, and prevent pollution.” The absolute acceptance of the right to live in a healthy and harmonious environment should be noted²⁴⁹. According to the Constitutional Court: “The right to health is the right to benefit from all means provided by the state to protect people's health, to recover when they fall ill, to receive medical care, and to be treated.”²⁵⁰

Article 90 of the Constitution states that international treaties accepted by Turkey become binding in domestic law after being approved by the Grand National Assembly of Turkey and published in the Official Gazette. Documents related to the health rights of detainees and prisoners, such as the Convention on Human Rights and Biomedicine, fall within this scope. Consequently, the health rights and access to healthcare services for detainees and prisoners have binding authority over national laws²⁵¹.

Article 2/2 of the Law on the Execution of Penalties and Security Measures, which regulates the "Basic Principles of Execution," states: “No cruel, inhuman, degrading, or humiliating treatment can be inflicted during the execution of penalties and security measures.”²⁵²

Article 6(f) of the law emphasizes the necessity of taking all kinds of protective measures to safeguard the lives and physical and mental integrity of prisoners in penal institutions. The Handbook on Prison Management published by the General Directorate of Prisons and Detention Houses states: “The punishment of imprisonment includes only the deprivation of liberty; the conditions of imprisonment should never be used as additional punishment. All individuals deprived of their liberty must be always treated with respect for their inherent dignity as human beings.”

The fact that all human rights are indivisible, interconnected, and interrelated means that these rights manifest both within their own categories and across different categories, as seen with the right to life and the prohibition of torture. The right to health, regulated as a human right in national and international documents, is closely related to three civil and political rights due to

²⁴⁹ Şahbaz, İ., “Bir Sosyal Hak Olarak Sağlık Hakkı”, Türkiye Barolar Birliği Dergisi, 2009, Issue 86, p.405-411.

²⁵⁰ Kanadoğlu, K., “Türk Anayasa Hukukunda Sağlık Alanında Temel Haklar”, TBB Dergisi, 2015-119, p. 12.

²⁵¹ Sereli Kaan, p. 55-56.

²⁵² Law No. 5275 on the Execution of Penalties and Security Measures.

the principle of the indivisibility of human rights²⁵³. These rights are: the right to life, the prohibition of torture and ill-treatment, and the right to respect for private life.

There are also Constitutional Court rulings regarding the relationship between the right to life and the right to health. In one judgment, the Constitutional Court stated, "...the right to life and the right to protect and develop one's material and spiritual existence are fundamental, inalienable, and indispensable rights that are closely connected. It is the duty of the state to remove all obstacles against these rights. The state, which will protect the weak against the strong, will ensure true equality, maintain social balance, and thus achieve its social nature..."²⁵⁴

In another ruling, the Constitutional Court emphasized, "The rights and freedoms possessed by the individual are included in the Constitution considering their importance. In this context, the profession of medicine is directly related to the right to life, which is the most important right of the individual as per Article 17 of the Constitution, and the right to protect and develop one's material and spiritual existence. The main condition for individuals to develop their material and spiritual existence and to be happy and peaceful is to be able to access and benefit from health services when needed. Any regulations that make it difficult or weaken this right, which is both a duty for the state and a right for individuals, are against the Constitution."²⁵⁵

The relationship between the prohibition of torture and ill-treatment and the right to health is concretized through the standards set by this prohibition to protect individuals' health. There is no doubt that actions and practices that constitute torture and ill-treatment have serious effects on both physical and mental health. Establishing the connection between the right to health and the prohibition of torture and ill-treatment in this regard may cause the issues to become confused regarding both rights.

The right to respect for private life primarily protects an individual's right to conduct their life without interference from public authorities. The rights covered under Article 8 of the ECHR regarding respect for private and family life are guaranteed in various articles of the Constitution²⁵⁶. Article 17 of the Constitution, titled "the inviolability of the person, and the material and spiritual existence of the individual," Article 20, titled "privacy of private life," Article 21, titled "inviolability of the domicile," and Article 22, titled "freedom of communication," correspond to the rights under Article 8 of the ECHR. One of the legal interests protected under the right to respect for private life is the right to physical and mental integrity²⁵⁷. One type of intervention targeting the legal interest in physical and mental integrity

²⁵³ See : Resolution 421 (V) adopted by the 3rd Committee of the UN General Assembly, the Limburg Principles for the Implementation of the International Covenant on Economic, Social and Cultural Rights adopted at the UN in Maastricht in 1986.

²⁵⁴ AMKD, C. 27/1, 1991, (Sf. 130-142) AYM 1990/27 Esas, 1991/2 Karar sayılı 17.01.1991 Tarihli kararı, Sf.137.

²⁵⁵ Metin, B., "Sağlık Hakkı", Sağlık Akademisyenleri Dergisi, 2017, V.4.I.1,p. 49.

²⁵⁶ Arslan Öncü, G., "Özel Yaşama ve Aile Yaşamına Saygı Hakkı, İnsan Hakları Avrupa Sözleşmesi ve Anayasa, Anayasa Mahkemesine Bireysel Başvuru Kapsamında Bir İnceleme", Mesleki Hayat Bağlamında Özel Hayata Saygı Hakkı , vol.38, Ankara, Turkey, pp.263-272, 2021.

²⁵⁷ Örnek karar için bkz: ECtHR, X and Y v. Netherland, 8978/80, 26.03.1985, p. 22.

under the subcategory of the right to respect for private life is medical intervention. Medical intervention includes preventive care, diagnosis, treatment, rehabilitation, and all types of medical tests and research.

One of the aspects within the scope of the right to respect for private life is an individual's gender identity. In Turkey, a binary categorization system based on the assigned gender in identity documents is applied to individuals to be incarcerated. When a transgender person arrives at a prison and there is a discrepancy between the gender marker on their ID and their gender performance, it causes confusion among the prison staff. This lack of knowledge and training, combined with deep-rooted transphobia, leads to rights violations, such as forcibly stripping transgender inmates for inspection by multiple guards²⁵⁸ and placing them in solitary confinement during the decision-making process. The fact that some transgender inmates may not have applied for any psychiatric processes or surgeries before incarceration leaves them at the discretion of prison staff.

Due to their gender identities and the social, psychological, and medical needs arising from these identities, transgender individuals have specific rights and needs. In correctional institutions, issues such as the safety, access to healthcare, privacy, and psychological support of transgender inmates are part of their special needs. These unique circumstances require that transgender inmates be considered a distinct category within the general prison population. This necessitates the development and implementation of specific policies, regulations, and practices tailored to them.

In Turkey, the right to health is protected by the Constitution and international treaties to which Turkey is a party. However, despite these guarantees, the state's failure to recognize transgender identities and the gaps in this area lead to significant rights violations for transgender inmates. This situation stems from Turkey's failure to fulfill the responsibilities imposed by international regulations and the Constitution, often using various pretexts. The state's disregard for transgender identities can be explained through in-depth sociological analyses, but this essentially means that a country that adopts the principle of a social state is neglecting its duty to make improvements in favor of disadvantaged groups.

E. Data on Access to Health Rights for Transgender Prisoners

1. Overview

There are no studies in Turkey addressing transgender prisoners' rights to health and specific needs, despite numerous reports of discrimination, humiliation, sexual harassment, and assaults they face in prisons. The limited visibility of transgender prisoners and the restriction of visits to only a few individuals outside of their families impede the visibility of rights violations and exacerbate them. However, the rights violations and experiences reported to

²⁵⁸ Pembe Hayat Derneği and Kaos GL, *Türkiye'de Trans Kadın Mahpuslar*, 2017, p. 15.

NGOs and organizations indicate that transgender identity is further punished with unhealthy living conditions and restricted access to health rights beyond imprisonment.

Transgender prisoners experience such severe rights violations from the moment of detention that even if they are held alone or with other transgender individuals, they cannot access any health services. Requests for access to hormones or care for newly implanted silicone are often dismissed by staff as non-essential or aesthetic needs. The treatment of transgender individuals is so degrading that they often do not even consider making such requests²⁵⁹. Police violence against transgender women has become so normalized that assaults are filmed in public²⁶⁰. In many platforms documenting transgender experiences, including the oral history documentary series "Years Don't Forgive" by the Pink Life LGBTI+ Solidarity Association, transgender women share their experiences of police violence in events like Ülker Sokak and Eryaman, symbols of deep-seated transphobia in Turkey. Transgender women report sexual assaults by police while in custody, having their wigs and other belongings forcibly removed, and being detained themselves when reporting as victims²⁶¹. These accounts reveal how the state, through the police, persecutes these vulnerable groups instead of protecting them. Given the extent of police violence against transgender individuals in Turkey, it is not difficult to imagine the significant rights violations they endure from detention to imprisonment. International documents recommend access to hormones and health services during detention, but such practices seem far from being implemented in Turkey.

The challenges faced by transgender prisoners stem not only from being incarcerated but also from the fact that they have an identity that is not accepted by society . This dual exposure further hinders their access to health rights. The current legal framework in Turkey does not adequately address the specific needs of transgender prisoners, preventing the full realization of their health rights.

As a result, the rights violations experienced by transgender prisoners in Turkey constitute a violation of health rights recognized both nationally and internationally. This situation calls for urgent action to protect and improve the rights of disadvantaged groups at both the national and international levels. Achieving this requires not only legal reforms but also the development of social awareness and understanding.

Depriving a person of their freedom does not mean denying them the right to access health services, medical care, and necessary conditions for health. It is clear that transgender prisoners cannot be deprived of these rights. However, in Turkey, transgender prisoners often face barriers to obtaining basic and necessary medical treatment. This situation is exacerbated by the lack of knowledge or training among prison health staff on how to meet these needs. Under

²⁵⁹ For more information: <https://m.bianet.org/bianet/lgbti/218562-yildiz-idil-gozaltindayken-trans-kimligimden-dolayi-iskence-gordum>. (08.06.2024)

²⁶⁰ <https://www.evrensel.net/haber/396369/beyogluda-polisin-trans-kadina-siddeti-kameraya-yansidi>. (08.06.2024)

²⁶¹ Pembe Hayat, Yillar Affetmez, 2021, <https://www.youtube.com/watch?v=fKO5jCglEPU&list=PLbo30tyTPWfKjCCasLIInNHif9XqIghC7>. (08.06.2024)

these conditions, directly or indirectly, access to the health services needed for the gender affirmation process is suspended or delayed. Transgender prisoners face difficulties in accessing diagnosis, hormones, care and gender affirmation surgeries.

2. Diagnosis

Transgender prisoners are either held in solitary confinement by the institution for alleged protection or request solitary confinement themselves due to harassment, discrimination, and transphobia in the wards. According to one application received by Hevi LGBTI+ Association, a transgender male prisoner was sexually assaulted on the night he was placed in the men's ward and had to be taken into solitary confinement.

The deepening of solitary confinement exacerbates the harsh material conditions faced by transgender prisoners and prevents them from obtaining information about procedures such as initiating the gender transition process or applying for surgery permits. The lack of knowledge among prison staff also deprives them of this guidance. Having their trans identity not recognized officially also hinders access to hormones, laser treatments, different clothing, etc²⁶².

Another issue is the application for diagnosis or surgery permits by transgender individuals whose assigned gender does not match their social gender. Some transgender individuals may wish to hide their identity during imprisonment due to fear of discrimination and violence. Thus, the issue of diagnosis is less prevalent in studies in Turkey compared to international studies. The invisibility and concealment of these individuals make it difficult to report accurate data on the transgender prison population.

3. Access to Hormones and Care

Ensuring the initiation or continuity of hormone therapy is crucial for transgender prisoners. Restrictions, delays, or denial of access to hormones can lead to adverse outcomes, ranging from suicide to self-castration. Although the approach to this issue varies from prison to prison in Turkey, no mapping study has been conducted due to difficulties in accessing data. In some prisons, transgender prisoners are given excess hormone medication, while in others, there is no access to hormones at all. Even where hormone access is possible, effective control and care of medications that should be administered under medical supervision are not provided.

A person who has been using hormones without psychiatric supervision before imprisonment can only obtain hormone treatment after being evaluated by psychiatric and endocrine specialists and having the medications prescribed. Those who were under psychiatric follow-up and endocrinology supervision before imprisonment and used hormones with prescriptions

²⁶² Colopy, T. W., "Setting gender identity free: Expanding treatment for transsexual inmates." *Health Matrix* 22,2012,p.227-272, also online version: [https://heinonline.org/HOL/LandingPage?handle=hein.journals/hmax22&div=11&id=&page=\(01.06.2022\)](https://heinonline.org/HOL/LandingPage?handle=hein.journals/hmax22&div=11&id=&page=(01.06.2022)).

can obtain hormone treatment after a psychiatric evaluation. If the hormone medications prescribed by the prison psychiatrist, covered by the General Health Insurance, cause side effects, alternatives can be provided at the inmate's expense²⁶³. In Turkey, prisoners do not have the right to choose their doctor, determine their treatment or surgery date, or select their medication. This restriction leads to the use of hormone medications that may cause different symptoms due to side effects²⁶⁴. Many transgender prisoners cannot afford the cost. Since the state views the gender affirmation process as a "pathology" and hormone use as a "treatment," there is no legal obstacle to continuing the process in prison. Although the Enforcement Law and related regulations foresee that medical treatments dependent on prisoners' health conditions should not be interrupted, the discrimination, unemployment, and economically disadvantaged position faced by transgender individuals in society make it impossible to apply the recognized rights²⁶⁵.

Alongside the limited access to health rights for transgender prisoners, communication with uninformed prison and healthcare staff poses another issue. Even with the recognized rights and access to hormone medication, there are cases where the medication is not administered. According to CISST, a transgender male prisoner at Izmir Women's Closed Prison was denied hormone injections by the prison administration due to the short duration of his sentence²⁶⁶.

The lack of psychological support for a transgender prisoner undergoing the gender transition process is another critical issue due to the low number of staff working in the psychosocial unit in Turkish prisons²⁶⁷. In a 2018 report on Elazığ Type T Prison, the Subcommittee on Prisoners and Detainees of the Parliamentary Human Rights Inquiry Committee reported that a transgender prisoner could not receive psychological support and was not referred to the hospital either²⁶⁸. In a report on İskenderun Type T Prison published by the Human Rights Association (HRA) in April 2022, it was stated that requests for meetings with a psychologist by transgender prisoners were rejected by the prison administration²⁶⁹.

4. Gender Affirmation Surgeries

Before 2014, transgender prisoners in Turkey did not have access to gender affirmation surgeries. A transgender woman sentenced to 20 years in prison was denied requests for laser surgery and gender affirmation surgery due to the lack of convict wards in urology departments. However, with the support of various associations and lawyers, a convict ward was established at Marmara University and Bülent Ecevit University in 2014, enabling the gender affirmation surgery of a transgender prisoner. A report from an official health committee at an educational and research hospital stating that gender transition was necessary

²⁶³ SPOD, Cinsiyet Uyum Sürecinin Hukuki Boyutu – Sıkça Sorulan Sorular Kılavuzu, 2021, p.31.

²⁶⁴ CISST, Türkiye’de Lgbt+ Mahpus Olmak, p. 72.

²⁶⁵ SPOD, Cinsiyet Uyum Sürecinin Hukuki Boyutu – Sıkça Sorulan Sorular Kılavuzu, 2021, p.31.

²⁶⁶ <https://t24.com.tr/haber/trans-erkek-hapishane-yonetimi-hormon-ignesi-vurmama-izin-vermedi,344814,%20>

²⁶⁷ CISST, Türkiye’de Lgbt+ Mahpus Olmak, p. 103.

²⁶⁸ TBMM İnsan Hakları Komisyonu, https://www.tbmm.gov.tr/Files/Komisyonlar/insanHaklari/docs/2018/elazig_rapor_08022018.pdf.

²⁶⁹ <https://kaosgl.org/haber/iskenderun-cezaevi-nde-lgbti-ve-hasta-mahpuslara-Kaos> , (01.06.2022).

for the prisoner's mental health was deemed sufficient for the surgery. The costs were covered by the Ministry of Health²⁷⁰. This practice aligns with the conditions and applications for gender affirmation surgeries for non-incarcerated transgender individuals. However, as mentioned in CISST's 2018 report "Being an LGBTI+ Prisoner," information requests to the Ministry of Justice regarding the number of convicted and detained prisoners applying for gender affirmation surgeries were left unanswered due to the lack of statistical data²⁷¹. The same report and letters to CISST/TCPS indicate that despite court rulings, the Ministry of Justice and the Ministry of Health require reports from the Forensic Medicine Institute on the urgency of the situation and state that surgeries can be performed after release if there is no "life-threatening urgency."²⁷² This situation implies that transgender prisoners can only undergo surgeries if they cover the costs themselves. This practice is not applied to short-term sentences, as seen in the case of another transgender prisoner who has been in prison for 24 years and has 15 years remaining on her sentence²⁷³. Despite the court ruling suggesting surgery after release due to the lack of "life-threatening urgency," the human rights violation continues as the transgender woman's gender transition process has been completed, but she is still held in a men's prison. However, due to the parliamentary question posed by HDP MP Filiz Kerestecioğlu to the Turkish Grand National Assembly²⁷⁴ and the pressure from NGOs, the transgender woman's gender transition process was completed. Nevertheless, the rights violation continues as she is still being held in a men's prison²⁷⁵.

The rights violations experienced by transgender prisoners regarding access to health services have led to desperate measures such as hunger strikes. According to CISST, by the end of 2018 and throughout 2019, four transgender prisoners went on hunger strikes/indefinite hunger strikes due to difficulties related to their gender transition process, and those on hunger strikes harmed themselves. A transgender prisoner who could not start the gender transition process and whose process was delayed due to procedural issues went on a death fast on January 26, 2018. The hunger strike ended after the prison administration met some of the prisoner's demands. In another incident reported in 2018, a transgender woman prisoner in Gebze Women's Prison in Kocaeli had her mammoplasty (breast augmentation) surgery covered by the Ministry of Health, a good practice example. However, this practice has not been repeated until 2022, remaining an individual application and not becoming a general practice²⁷⁶.

If a transgender prisoner wishes to undergo this surgery, the question of how to cover the costs arises:

²⁷⁰ Kaos GL, <https://kaosgl.org/haber/trans-mahkum-cinsiyet-gecis-ameliyati-olabilecek>, (01.06.2022).

²⁷¹ Demirbaş, p. 31.

²⁷² Demirbaş, p. 92.

²⁷³ Kaos GL, <https://kaosgl.org/haber/hdpden-trans-kadin-mahpus-buse-icin-soru-onergesi>, (01.06.2022).

²⁷⁴ Kaos GL, <https://kaosgl.org/haber/hdpden-trans-kadin-mahpus-buse-icin-soru-onergesi> (21.10.2023).

²⁷⁵ Bianet, <https://bianet.org/haber/bakanlik-trans-mahpus-buse-nin-kadin-hapishanesi-talebine-kayitsiz-275283> (21.10.2023).

²⁷⁶ Kaos GL, <https://kaosgl.org/haber/trans-kadin-mahpusun-meme-ameliyatini-bakanlik-karsilayacak>, (01.06.2022).

- Article 3 of the Ministry of Health's Circular No. 2013/2 states that almost all treatments during inpatient and outpatient treatment will be covered by the healthcare provider. However, aesthetic treatments must be covered by the patient ²⁷⁷.

- Article 120(3) of the Regulation on the Management of Penal Institutions and the Execution of Sentences and Security Measures, dated March 20, 2006, No. 2006/10218, states that the costs of treatments for complaints that do not impede the inmate's life in the institution, or aesthetic treatments, must be covered by the patient ²⁷⁸.

At this point, it is essential to highlight Turkey's perception of transgender existence. Whether gender transition surgeries fall under aesthetic treatments and whether the prisoner must undergo the surgery during their imprisonment need to be discussed, and the perspective on whether it has become a psychological necessity for the applicant needs to be clarified. The institutions and judiciary's reliance on the "lack of life-threatening urgency" justification for not addressing or delaying requests in Turkish prisons leads to violations of health rights and other rights guaranteed by international regulations and the Constitution.

EVALUATION AND RECOMMENDATIONS

Turkey is a party to various international human rights treaties and is thus obligated to protect the rights of transgender prisoners. These obligations are detailed in documents such as the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Turkey is required by these international treaties to respect the right of everyone to be free from torture and ill-treatment, the right to a fair trial, the right to privacy, and the principle of non-discrimination.

Combating deep-rooted transphobia in the social sphere is exceedingly challenging given economic, political and cultural difficulties. This situation results in the marginalization of transgender individuals and the violation of their human rights, including access to health services. The inclusion of a transgender person in the criminal justice system, which has become a widespread violation mechanism in Turkey, leads to incessant human rights violations.

Transgender prisoners in Turkey have not yet been the subject of specific regulations. The absence of a separate regulation has largely left transgender individuals at the discretion of prison management and staff. As a result, significant issues have been reported by transgender prisoners, including being forced into solitary confinement, accessing health services, and preventing discrimination. There is an increasing consensus among human rights organizations

²⁷⁷ 2013/2 sayılı : Adli olaya taraf kişiler Hakkında Genelge Güncelleme Tarihi: 10.01.2018 <https://shgmsgudb.saglik.gov.tr/TR,31195/20132-sayili-adli-olaya-taraf-kisiler-hakkinda-genelge.html> (26.05.2022).

²⁷⁸ Regulation No. 2006/10218 on the Management of Penal Institutions and the Execution of Penalties and Security Measures: <https://www.mevzuat.com/2006-10218-ceza-infaz-kurumlarinin-yonetimi-ile-ceza-ve-guvenlik-tedbirlerinin-infazi-hakkinda-tuzuk/> (26.05.2022), Koç Kızılyel, pp. 82-83.

and literature that transgender individuals constitute an especially vulnerable group of prisoners, and that the conditions of solitary confinement should be abandoned, and their health needs (including gender affirmation treatments) should be recognized and adequately protected. Failing to meet these needs results in additional punishment beyond imprisonment and has serious mental and physical consequences.

The ECHR's decision in *X v. Turkey* serves as an important precedent against discrimination based on gender identity. This ruling emphasizes that Turkey must implement the necessary legal and administrative regulations to protect the rights of transgender individuals and respect gender identity. It necessitates concrete steps to protect the rights of transgender prisoners and recognize their gender identity as a reflection of Turkey's international obligations. The implementation of the YARDM program, as mentioned in action reports to the Committee of Ministers of the Council of Europe, and providing necessary training to prison staff on their conduct towards LGBTI+ individuals, must be ensured.

In terms of the solitary confinement of transgender prisoners under the pretext of security concerns, the state must act in accordance with the *X v. Turkey* decision. However, solutions like building separate prisons for LGBTI+ individuals, about which civil society organizations related to LGBTI+ and the penal system have legitimate reservations due to stigma, further isolation from society and other related reasons, should not be pursued. Within the current legal framework, solitary confinement should be applied only as a last resort and for the shortest possible duration. Creative solutions, such as employing transgender prisoners in jobs like hairdressing, can be considered, along with gathering them in "LGBTI+ wards" rather than in a separate prison.

At this point, it is worth highlighting that Malta's policy should serve as a good practice example for Turkish prisons. The Malta Prison Services' Trans, Gender Diverse, and Intersex Prisoners Policy²⁷⁹ aims to prevent and protect against discrimination and harassment based on gender identity, gender expression, and sex characteristics. It includes providing access to gender recognition procedures for prisoners and ensuring that prison staff are willing to assist and provide professional help to inmates.

Regarding healthcare services:

1. When a prisoner is admitted to prison, the hormone medication prescribed must be recorded and maintained ;
2. Access to hormone therapy, hair removal, voice therapy or surgery as part of the transition process should be obtained in consultation with a medical professional in accordance with general principles during a prisoner's time in prison. ;

²⁷⁹ Correctional Services (Malta), Trans Gender Variant & Intersex Inmates Policy, 2016, [https://homeaffairs.gov.mt/en/media/Policies-Documents/Documents/Trans%20Gender%20Variant%20and%20Intersex%20Inmates%20Policy%20-%20August%202016%20\(Final-%20Final\).pdf](https://homeaffairs.gov.mt/en/media/Policies-Documents/Documents/Trans%20Gender%20Variant%20and%20Intersex%20Inmates%20Policy%20-%20August%202016%20(Final-%20Final).pdf) (22.04.2022).

3. Recognizing that transgender prisoners have special needs, regardless of their assigned gender, every effort should be made by the prison system to help prisoners align their physical characteristics with their gender identity and provide access to the necessary/requested medical treatment;

4. Such assistance should be provided "immediately";

5. Due to increased depression, anxiety, self-harm, and high suicide risk among transgender prisoners, Correctional Institutions must individually assess the prisoner's risk level and current needs, with particular attention to mental health requirements.

Prisoners whose declared gender is male and assigned gender is female should be placed in wards according to their declaration. However, if a transgender prisoner requests transfer to a female ward due to a high risk of sexual assault in a male ward, necessary measures should be taken without subjecting them to solitary confinement. Prisoners whose declared gender is female and assigned gender is male should be placed in female wards according to their declaration. They should not be automatically assumed to pose a high risk of sexual assault to others, and their interactions with other prisoners should not be automatically restricted.

Prisoners have the right to sufficient positive social contact to support their mental health and well-being, and they should be encouraged to maintain desired relationships with friends or relatives as best as possible. Transgender prisoners have the right to be visited by friends or relatives without discrimination or harassment by staff or other inmates.

The experiences of transgender prisoners in prisons cannot be considered independently of the external phobia. The ECHR's decisions on recognizing gender identity hold the potential to bring about changes in Turkey on this issue. Recognizing gender identity is foundational in addressing the discrimination faced by transgender prisoners in prisons.

Prison administrations are structures that are completely closed to the control and cooperation of NGOs . Over the past decade, the relationship between prisoners and society has increasingly been debilitated , especially with the construction of high-security prisons on the outskirts of cities. Along with this, civil society's interest in prisons has also been diminishing.

The closure of the X v. Turkey case by the Committee of Ministers of the Council of Europe, citing that the state has fulfilled its obligations, is a significant factor weakening civil society's efforts. Indeed, the only information the NGOs had was from the action plans submitted by the government to the Committee of Ministers. For this reason, institutions should hold themselves accountable to the decision taken by the Committee of Ministers and find new legal ways to monitor the state .

A comprehensive study should be conducted to determine the number of LGBTI+ individuals in prisons across Turkey. Qualitative and quantitative data collection methods should be used to understand the extent of the challenges faced by transgender prisoners. A multidisciplinary team should be established to address the health, psychological, and social needs of transgender prisoners. Integration of psychological support, social services, and legal assistance should be ensured. The participation of transgender prisoners, their families, and the LGBTI+ community should be encouraged, and their views should be considered. Cooperation and dialogue mechanisms between civil society organizations, the government, and prison administration should be developed. Training programs on LGBTI+ rights and gender diversity should be organized for prison staff. Campaigns should be conducted to raise awareness about the rights of transgender prisoners. International examples and best practices should be examined and adapted to Turkey's conditions. Policies to protect the rights of transgender prisoners should be developed, drawing from successful examples such as the Malta Policy.

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