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Judgment of the Turkish Constitutional Court (Case Number: 2022/155, Decision Number: 2023/38, Date of Judgment: 22/2/2023)

Melda Ezgi Toydemir

Research Assistant – Tokat Gaziosmanpaşa University Faculty of Law, Department of Philosophy and Sociology of Law,

Tokat/Türkiye,

meldaezgitoydemir@gmail.com,

https://orcid.org/0000-0003-1224-9674.

JUDGMENT OF THE CONSTITUTIONAL COURT[*]

Issued by the Presidency of the Constitutional Court:

Case Number: 2022/155

Decision Number: 2023/38

Date of Judgment: 22/2/2023

APPLICANT FOR PLEA OF UNCONSTITUTIONALITY: Istanbul 8th Family Court

SUBJECT OF THE PLEA OF UNCONSTITUTIONALITY: The request concerns the annulment of Article 187 of the Turkish Civil Code No. 4721, dated 22/11/2001, on the grounds of its alleged unconstitutionality about Articles 2, 10, 17, 20, 90, and 153 of the Constitution.

THE FACTS: In the lawsuit filed with the request for permission to use the surname before marriage, the Court concluded that the challenged provision was unconstitutional and applied for its annulment.

I. THE PROVISION SUBJECT TO ANNULMENT

The contested Article 187 of the Law is as follows:

"III. Woman's Surname

Article 187 – Upon marriage, the woman shall take her husband's surname; however, by submitting a written request either

[*] The relevant decision is of significant importance for Turkish law. Although the Turkish Civil Code No. 4721 has primarily mitigated the unequal position of women and men in family and society, some regulations prioritising men continue to exist. The provision stipulating that a woman will take her husband's surname upon marriage is one of these. The annulment of this provision constitutes an important step towards equality. In light of the significance of the decision, the original style of the decision text has been preserved as much as possible. The repetitions and headings within the decision have not been altered. Thus, the aim was to convey the Constitutional Court's stance on the issue and the dissenting opinions of the Court's Members in the most accurate manner.

to the registrar of marriage or later to the civil registry office, she may use her previous surname before her husband's surname. A woman who has previously used two surnames may exercise this right for only one surname."

II. PRELIMINARY EXAMINATION

1. By the provisions of the Rules of Procedure of the Constitutional Court, the issue of the applicable rule was initially discussed during the preliminary examination meeting held on 29/12/2022, with the participation of Zühtü ARSLAN, Hasan Tahsin GÖKCAN, Kadir ÖZKAYA, Engin YILDIRIM, Muammer TOPAL, M. Emin KUZ, Rıdvan GÜLEÇ, Recai AKYEL, Yusuf Şevki HAKYEMEZ, Selahaddin MENTEŞ, Basri BAĞCI, İrfan FİDAN, Kenan YAŞAR, and Muhterem İNCE.

2. According to Article 152 of the Constitution and Article 40 of Code No. 6216 on the Establishment and Rules of Procedure of the Constitutional Court, dated 30/3/2011, a court hearing a case is authorized to apply to the Constitutional Court for the annulment of the provisions of a law or a Presidential decree that it deems unconstitutional due to the case at hand, or if it concludes that the claim of unconstitutionality raised by one of the parties is serious. However, pursuant to the aforementioned articles, for a court to apply to the Constitutional Court, there must be a properly initiated case within its jurisdiction, and the provision subject to the annulment request must be applicable to that case. The applicable provision refers to the rules that have a positive or negative impact on resolving the issues arising at various stages of the ongoing case or on concluding the case.

3. In the first sentence of Article 187 of Law No. 4721, which is the subject of the objection, it is stipulated that a woman shall take her husband's surname upon marriage, but may also use her previous surname before her husband's surname by submitting a written request to the registrar of marriage or later to the civil registry office. In the second sentence of the same article, it is provided that a woman who previously used two surnames may exercise this right for only one surname. The subject matter of the

ongoing case does not concern the plaintiff's request to exercise the right to use two surnames once again but instead pertains to the request for permission to use her surname before marriage on its own. In this respect, the second sentence in question does not apply to the ongoing case.

4. For the reasons explained, regarding Article 187 of the Turkish Civil Code No. 4721, dated 22/11/2001:

A. To examine the merits of the first sentence;

B. The application concerning the second sentence was DISMISSED due to the lack of jurisdiction of the court, as this sentence does not apply to the case being heard by the referring court;

UNANIMOUSLY decided.

III. EXAMINATION OF THE MERITS

5. After the decision of referral and its annexes, the report on the merits of the case prepared by Rapporteur Onur MERCAN, the contested legal provision, the relevant provisions of the Constitution relied upon along with their justifications, and other legislative documents were read and examined, the necessary deliberations were held and the following was decided:

A. General Explanation

6. In Article 1 of the Surname Law No. 2525, dated 21/6/1934, it is stipulated that every Turkish citizen must have a surname in addition to their given name. Article 2 provides that in speech, writing, and signatures, the given name must be placed first and the surname last. Article 3 stipulates that surnames indicating rank, official duty, tribe, foreign race or nationality, as well as those contrary to public morality or that are obscene or ridiculous, cannot be used.

7. In the first paragraph of Article 5 of the aforementioned Law, it is stated that persons who have attained the age of majority and legal capacity are free to choose their surname. In the first sentence of Article 7, it is stipulated that those without a surname or those

wishing to change their surname must notify the name they will carry for registration in the state register of persons within two years from the date of publication of the Law. Article 8 grants the authority to resolve disputes arising in the process of surname selection, to assign a surname to those who do not choose one themselves, and to name children whose parents are unknown, as well as to decide whether a surname complies with the form prescribed by the Law, to the highest administrative official of the place where the main registry is located. Article 10 states that those wishing to change their surname after the period specified by the Law has expired shall be subject to the provisions of Law No. 4721 on this matter.

8. In subparagraph (c) of paragraph (1) of Article 7 of the Civil Registration Services Law No. 5490, dated 25/4/2006, it is specified that the surname and the previous surnames of married women must be included among the information recorded in the family registry.

9. In the first paragraph of Article 36 of Law No. 4721, it is stated that personal status shall be determined by the official registry kept for this purpose, while Article 39 provides that no correction can be made to any record in the personal status registry without a court decision. In paragraph (1) of Article 35 of Law No. 5490, it is stated that no record in the civil registry may be corrected without a finalized court ruling, and no annotations may be added that would alter the meaning or information contained in the records; however, the mistake in facts made during the registration of events in the family registry shall be corrected by the civil registry office by the supporting document.

10. In the first paragraph of Article 27 of Law No. 4721, it is stipulated that a request for a name change may be submitted to the court in the presence of justified reasons. In subparagraph (b) of paragraph (1) of Article 36 of Law No. 5490, it is stated that a request for correction in the civil registry may be submitted to the court in the presence of justified reasons. Furthermore, it is stipulated that in the case of a name change, the civil registry office shall also

correct the father's or mother's name of the person whose name has been changed, and in the case of a surname change, the surname of the spouse and minor children of the person whose surname has been changed.

11. In Additional Article 3 of the aforementioned Law, it is stipulated that if a woman who has been allowed to use her former husband's surname after divorce wishes to carry her maiden surname, or if a woman who uses both her former surname and her husband's surname wishes to use only her husband's surname, the necessary action shall be taken by the civil registry office upon a written request.

12. In the first sentence of Article 321 of Law No. 4721, it is stipulated that if the child's parents are married, the child shall bear the family's surname. In the third paragraph of Article 314, it is provided that if the adoptee is a minor, they shall take the adoptive parent's surname, and the adoptive parent may assign a new name to the child if desired; if the adoptee is an adult, they may choose to take the adoptive parent's surname at the time of adoption.

B. Meaning and Scope

13. In the contested first sentence of Article 187 of Law No. 4721, it is stipulated that upon marriage, the woman shall take her husband's surname; however, by submitting a written request to the marriage registrar or later to the civil registry office, she may also use her previous surname before her husband's surname.

14. According to the provision, upon the conclusion of marriage, the woman shall take her husband's surname; however, she may submit a written request to the marriage registrar or later to the civil registry office to use her maiden surname before her husband's surname.

15. In this respect, according to the provision, it is not possible for a woman to use her maiden surname alone after marriage.

C. Reasoning for the Plea of Unconstitutionality

16. In summary, the decision of plea asserts that a surname constitutes a part of a woman's identity and personality, that the restriction imposed by the contested provision on the right of a woman to use her maiden surname after marriage lacks a legitimate aim, and that denying a woman the same right to retain her surname for life, while a man is allowed to do so from birth, is incompatible with the principle of equality. It is also stated that the European Court of Human Rights (ECtHR) has issued violation rulings due to this discriminatory treatment and that the Constitutional Court has similarly issued violation rulings in individual applications, yet the contested provision continues to be applied by administrative authorities without any amendment, thereby violating the principle of binding effect of Constitutional Court decisions. Based on these grounds, it is claimed that the provision is contrary to Articles 2, 10, 17, 20, 90, and 153 of the Constitution.

Ç. Issue of Unconstitutionality

17. Article 10 of the Constitution states that "*Everyone is equal before the law without discrimination based on language, race, colour, sex, political opinion, philosophical belief, religion, sect, or similar reasons. Women and men have equal rights. The state is obliged to ensure the implementation of this equality. Measures to be taken for this purpose cannot be interpreted as contrary to the principle of equality. Measures to be taken for children, the elderly, persons with disabilities, widows and orphans of those who died in war or the line of duty, and for veterans shall not be considered contrary to the principle of equality. No privilege shall be granted to any person, family, group, or class. State bodies and administrative authorities must act in compliance with the principle of equality before the law in all their proceedings.*"

18. The principle of equality before the law, as stated in the aforementioned article of the Constitution, applies to those who are in the same legal circumstances. This principle prescribes legal equality rather than de facto equality. The purpose of the principle of equality is to ensure that individuals in the same situation are subject to the same treatment before the law and to prevent

discrimination and the granting of privileges. This principle prohibits the violation of equality before the law by applying different rules to certain individuals or groups in the same situation. Equality before the law does not mean that everyone will be subject to the same rules in every respect. The specific characteristics of certain individuals or groups may require different rules and practices. If identical legal situations are subject to the same rules and distinct legal situations are subject to different rules, the principle of equality stipulated in the Constitution is not violated (Constitutional Court, E.2017/47, K.2017/84, 29/3/2017, § 18; E.2020/95, K.2022/3, 26/01/2022, § 25).

19. In the constitutional review regarding the principle of equality, it must first be determined whether there is differential treatment among individuals in the same or similar situations within the framework of Article 10 of the Constitution and whether any distinction has been made between individuals in the same or similar circumstances. Subsequently, it should be examined whether the differential treatment is based on an objective and reasonable justification, and ultimately, if it is based on such a justification, whether the differential treatment is proportionate. The principle of proportionality implies the necessity of a fair balance between the objective and the means. In other words, this principle requires that the differential treatment be proportionate to the intended objective (Constitutional Court, E.2016/205, K.2019/63, 24/7/2019, § 65; E.2021/1, K.2021/32, 29/4/2021, § 32).

20. The provision stipulates that a married woman shall take her husband's surname, but may also use her previous surname before her husband's surname by submitting a written request to the marriage registrar or later to the civil registry office. The provision does not allow a woman to use her maiden surname alone after marriage.

21. It is quite difficult to assert that the positions of spouses within the marital union were regulated equally in every respect during the period before the enforcement of Law No. 4721. Indeed, in Article 152 of the repealed Turkish Civil Code No. 743, dated

17/2/1926, it was stated that "*The husband is the head of the union. The selection of the home and the proper maintenance of the wife and children are his responsibility*." In the second paragraph of Article 153, it was stated that "*The wife is the assistant and advisor to her husband as much as she is able, in ensuring mutual happiness. The wife takes care of the home*." In the first sentence of Article 154, it was stated that "*The husband represents the union.*" Additionally, in Article 21 of the repealed Code, it was stipulated that the domicile of the husband would be considered the domicile of the wife. Article 98 provided that the marriage application should be submitted to the authority in the place where the husband resides. In the second sentence of Article 263, it was stated that in the event of a disagreement between the parents regarding matters of custody during the continuation of the marital union, the father's decision would prevail.

22. On the other hand, before the amendment made by Article 1 of Law No. 4248, dated 14/5/1997, it was stipulated in the first paragraph of Article 153 of the repealed Code that the wife would bear her husband's family name. In the amendment made to the said paragraph, it was specified that upon marriage, the woman would take her husband's surname, but could also use her previous surname before her husband's surname by submitting a written request to the marriage registrar or later to the civil registry office. It was also stated that a woman who had previously used two surnames could benefit from this right for only one of her surnames. In the justification for the said amendment, it was stated that the need arose to allow a woman to use her maiden surname alongside her husband's surname in cases where she had been recognized in her professional life before marriage or did not wish to lose her former surname for certain reasons.

23. Reasons such as social, economic, demographic, and technological developments may give rise to the need for certain legal changes over time. Furthermore, *the principle of a state respectful to human rights*, as stipulated in Article 2 of the Constitution, may require certain legal regulations to be amended or repealed, taking into account the developments and transformations in the field of human rights. In other words, provisions that had positive effects

on social life and ensured order in a specific area at the time of their enactment may, over time, become insufficient to meet societal needs and may fail to adequately ensure the implementation of universally accepted values in the context of human rights. Indeed, in the general preamble of Law No. 4721, it was emphasized that, like living beings, laws also age over time and struggle to adequately respond to the needs of the day, and with Article 1028, Law No. 743 was repealed.

24. Under Law No. 4721, the positions of spouses within the marital union were restructured, taking into account the principle of equality. In the general preamble of the said Law, it was stated that the amendments made to marriage law were based on the idea of maintaining the principle of equality of women and men, which is accepted as a fundamental principle in modern legal systems, and that provisions contradicting this equality were either removed from the Law or revised to ensure equality. Furthermore, it was emphasized that the majority of the amendments made in the Third Section titled "*GENERAL PROVISIONS OF MARRIAGE*" aimed to achieve equality of women and men.

25. Within this scope, Article 186 of the Law stipulates those spouses shall jointly decide on the residence they will live in, jointly manage the marital union, and contribute with their labour and assets in proportion to their means. In the justification for the said article, it was stated that the provision granting the husband the authority to choose the residence was amended, the provision designating the husband as the head of the marital union was repealed to ensure equality of women and men, equal decision-making rights were granted to both spouses in the management of the marital union, and the contribution of spouses to the expenses of the union was regulated with due regard to the principle of equality.

26. On the other hand, following the annulment of Article 159 of the repealed Turkish Civil Code No. 743, which stipulated that the wife could engage in a profession or trade only with the explicit or implicit consent of the husband, by the Constitutional Court's

decision dated 29/11/1990 and numbered E.1990/30, K.1990/31, Article 192 of Law No. 4721, which regulates the same subject and refers to the aforementioned decision in its preamble, provides that neither spouse is required to obtain the other's consent in choosing a profession or occupation, but that the peace and welfare of the marital union must be taken into account in the choice and performance of professions and occupations.

27. Moreover, in the first paragraph of Article 134 of Law No. 4721, it is stipulated that a man and a woman who intend to marry shall jointly apply to the marriage registrar in the place of residence of either party, thereby abandoning the approach in Article 98 of the repealed Turkish Civil Code No. 743, which prioritized the husband's domicile in determining the place of marriage application.

28. On the other hand, in the first paragraph of Article 336 of Law No. 4721, it is stipulated that during the continuation of the marriage, custody shall be exercised jointly by both parents and the provision in Article 263 of the repealed Turkish Civil Code No. 743, which prioritized the father's decision, was not included in the said article. Furthermore, the first sentence of the second paragraph of Article 4 of Law No. 2525, which stipulated that the child would bear the name chosen or to be chosen by the father even in cases where custody was granted to the mother following annulment or divorce, was found to be contrary to the principle of equality and was annulled by the Constitutional Court's decision dated 8/12/2011 and numbered E.2010/119, K.2011/165.

29. Accordingly, it is understood that for history, legal developments have taken place to implement equality of women and men, that certain provisions deemed contrary to the principle of equality have been annulled, that the provisions of the repealed Turkish Civil Code No. 743 considered to be contrary to the principle of equality were not included in Law No. 4721, and that marriage law has been largely restructured in line with the principle of equality. In contrast, the issue of a woman's surname was not restructured in Law No. 4721, and the provision in the first

paragraph of Article 153 of the repealed Turkish Civil Code No. 743 was included unchanged in Article 187 of Law No. 4721, which contains the contested provision.

30. In Article 1 of Law No. 2525, bearing a surname is stipulated as an *obligation*. Moreover, in the first paragraph of Article 20 of the Constitution, it is stated that everyone has the right to demand respect for their private life. It is clear that the right to a name, which is closely associated with an individual's life, has become an integral part of their personality, is one of the most important elements in determining individual identity, and constitutes an inalienable, non-transferable, and strictly personal right, is also an element of private life. Therefore, identity information such as gender and birth records, information regarding family ties, as well as the right to request changes and corrections in these, along with the right to a name and surname, is also covered under Article 20 of the Constitution (for similar assessments, see *Hacı Ahmet Eskikanbur*, App. No: 2015/2944, 9/1/2019, § 27; *Turgay Karaca*, App. No: 2018/34343, 27/1/2021, § 29).

31. Accordingly bearing a surname, which is a part of one's personality, is not only an *obligation* but also a *right* within the scope of Article 20 of the Constitution. Indeed, the ECtHR has also recognized that the aforementioned right falls within the scope of Article 8 of the European Convention on Human Rights (the Convention) (*Ünal Tekeli v. Turkey*, App. No: 29865/96, 16/11/2004, § 42).

32. In the first paragraph of Article 41 of the Constitution, which contains the provision stipulating that the family is the foundation of Turkish society, the phrase "*and is based on equality between the spouses*" was added by Article 17 of Law No. 4709, dated 3/10/2001. In the general preamble of the said Law, it was stated that the need to revise the Constitution arose due to the requirements that emerged during its period of application, public expectations, and new political initiatives. Additionally, it was emphasized that certain amendments to the Constitution were inevitable in the process of full membership to the European Union, as meeting the

economic and political criteria and making the necessary legal arrangements in this field were prerequisites. The proposal aimed to introduce a constitutional amendment that could meet the needs of society, adhere to contemporary democratic standards and universal norms and emphasize human rights and the rule of law. In the preamble of the said article, it was stated that the provision aimed to ensure the equality of women and men.

33. On the other hand, while the first paragraph of Article 10 of the Constitution states that everyone is equal before the law without discrimination based on gender, the second paragraph, added by Article 1 of Law No. 5170, dated 7/5/2004, provides that women and men have equal rights and that the state is responsible for ensuring the implementation of this equality. In the general preamble of the said Law, it was stated that the need to harmonize with new democratic initiatives emerging worldwide and to elevate fundamental rights and freedoms to the level of universally accepted standards and norms, as well as to meet the criteria of the European Union, necessitated amendments to the Constitution alongside legislative regulations. In the preamble of the said article, reference was made to international conventions prohibiting gender-based discrimination, and it was stated that the amendment aims to ensure that measures providing certain advantages in favor of underrepresented gender would not be considered contrary to the principle of equality.

34. With the aforementioned constitutional amendments, it was strongly emphasized that full equality of women and men must be achieved for the principle of equality before the law to be effectively implemented, and it was clearly demonstrated that the constitutional legislator attaches great importance to the application of the principle of equality in the context of relations between spouses.

35. On the other hand, Article 5 of Protocol No. (7) to the Convention explicitly regulates the principle of equality between spouses by stating that "*Spouses shall enjoy equality of civil rights and responsibilities in their relations with each other and in their relations with*

their children, both during marriage and in the event of its dissolution. This article shall not prevent States from taking the necessary measures in the interests of the children." The said Additional Protocol was ratified by the Council of Ministers' decision dated 28/3/2016 and numbered 2016/8717, which was published in the Official Gazette dated 8/4/2016 and numbered 29678, following its approval by Law No. 6684 dated 10/3/2016.

36. Accordingly, it has been concluded that women and men are in a comparable and similar situation about the use of their surnames after marriage. While a man can continue to use his surname alone after marriage, it is stipulated by the provision that a woman may only use her maiden surname before her husband's surname after marriage. Therefore, it is evident that differential treatment based on gender is applied to spouses who are in a comparable and similar situation.

37. Numerous individual applications have been submitted to the ECtHR and the Constitutional Court, claiming that the failure to allow a woman to continue using her surname after marriage constitutes a violation of rights. In this context, the ECtHR ruled that the failure to allow a woman to use her maiden surname alone after marriage constitutes a violation of Article 14 in conjunction with Article 8 of the Convention (*Ünal Tekeli v. Turkey*).

38. The Constitutional Court, on the other hand, stated that pursuant to the fifth paragraph of Article 90 of the Constitution, the provisions of international conventions, which stipulate equal rights for men and women regarding their surnames after marriage, should prevail over domestic legal regulations that require a married woman to adopt her husband's surname, as they contain conflicting provisions on the same subject. Accordingly, the application of Article 187 of Law No. 4721 to the applicants was deemed incompatible with the principle of legality and resulted in a violation (for similar decisions, see *Sevim Akat Eşki*, App. No: 2013/2187, 19/12/2013; *Gülsüm Genç*, App. No: 2013/4439, 6/3/2014; *Neşe Aslanbay Akbıyık*, App. No: 2014/5836, 16/4/2015).

39. On the other hand, the Court of Cassation, which has established a significant precedent regarding disputes over a woman's surname, has also held, similar to the Constitutional Court, that in disputes arising from the failure to allow a woman to use her maiden surname, the provisions of international conventions must be applied pursuant to the fifth paragraph of Article 90 of the Constitution. In this context, the Court of Cassation concluded that the failure to allow a woman to use her maiden surname alone after marriage is contrary to Article 14 in conjunction with Article 8 of the Convention. The court also emphasized that there is no need for a justified reason for a woman to continue using her maiden surname alone after marriage (Court of Cassation General Assembly of Civil Chambers, E.2014/889, K.2015/2011, 30/9/2015).

40. However, it cannot be said that the aforementioned judicial precedents are sufficient on their own to implement the principle of equality before the law. For the said principle to prevail in the legal order, the legislative and executive bodies, as well as administrative authorities, also have certain obligations. In other words, as a requirement of the principle of a state respectful of human rights, all state organs and administrative authorities must to establish a system in which there are no disputes or controversies regarding the principle of equality concerning women's rights. It should be noted that the provision in the second sentence of the second paragraph of Article 10 of the Constitution, which stipulates that the state is responsible for ensuring the implementation of equality of women and men, and in the fifth paragraph, which provides that state organs and administrative authorities are obliged to act by the principle of equality before the law in all their actions, refer to the aforementioned duty.

41. On the other hand, the Preamble of the Constitution states that the separation of powers is a civilized division of labour and cooperation among state organs. Accordingly, the cooperation of state organs and administrative authorities is a constitutional obligation in terms of ensuring the implementation of the principle of equality between spouses. In this context of cooperation, it is clear

that legal regulations and administrative practices hold great importance. This is because the essence of implementing the principle of equality between spouses is enabling women to enjoy equal rights with men without resorting to legal proceedings. In other words, it is evident that ensuring women's enjoyment of equal rights with men must primarily be guaranteed by law, which is the primary source of legal authority, and that administrative practices capable of implementing this guarantee must be developed. In this regard, it is clear that judicial precedents alone cannot be considered sufficient to provide adequate assurance.

42. The aforementioned decisions of the ECtHR, the Constitutional Court, and the Court of Cassation have provided women with a limited opportunity to continue using their maiden surname alone after marriage. Despite the constitutional amendments concerning equality between women and men and all developments in judicial precedents, it has not been possible for a woman to use her maiden surname alone without bearing any burden, due to the persistence of the rule that continues to be enforced by administrative authorities.

43. In assessing whether there is an objective and reasonable justification for different treatment of those in similar situations or to what extent differential treatment may be permissible, public authorities have a certain margin of appreciation. However, the scope of this discretion may vary depending on the nature of the right subject to differential treatment (*Nuriye Arpa*, App. No: 2018/18505, 16/6/2021, § 59). On the other hand, when differential treatment based on gender is in question, the margin of appreciation afforded to public authorities becomes narrower (*Ayşe Tezel and Others* [Plenary], App. No: 2018/14186, 20/10/2022, § 91). Furthermore, considering the importance attached by the constitutional framers to the application of the principle of equality between spouses, it is evident that the framers have a very limited margin of discretion in cases involving gender-based differential treatment between spouses.

44. There is a public interest in preventing confusion in civil registries and ensuring the accurate determination of lineage. However, considering that individuals have Turkish Republic identification numbers and that civil registry services are provided through the use of information technologies, it cannot be said that the only way to ensure the aforementioned public interest is by requiring a woman to use her surname only before her husband's surname after marriage. Therefore, the objective of ensuring the order of civil registries cannot be regarded as a reasonable justification for the differential treatment prescribed by the provision.

45. In the first paragraph of Article 41 of the Constitution, it is stated that the family is the foundation of Turkish society, and it has important functions such as transmitting social values to future generations. It can be said that a family is identified by a single surname, in other words, family members sharing the same surname, help preserve family bonds and thereby contribute to the fulfilment of the family's social function. Nevertheless, a woman taking her husband's surname after marriage is not the only option for a family to have a common surname. In this context, it is also possible to grant spouses the opportunity to choose one of their surnames or another name as a common family surname or to stipulate that the common surname shall be formed by combining the spouses' surnames before marriage.

46. Moreover, it is difficult to assert that having a common surname is an indispensable element for preserving family bonds and that family bonds cannot be maintained in any way if spouses do not share a common surname.

47. Thus, the objective of preserving and strengthening family bonds cannot be regarded as a reasonable justification for the differential treatment prescribed by the provision. No other justification has been identified for the provision stipulating that a woman may use her maiden surname after marriage only before her husband's surname.

48. Therefore, it has been concluded that the differential treatment prescribed by the provision between men and women regarding the use of a surname after marriage violates the principle of equality, as it lacks an objective and reasonable justification.

49. For the reasons explained, the provision is in violation of Article 10 of the Constitution and should be annulled.

Kadir ÖZKAYA, Muammer TOPAL, Yıldız SEFERİNOĞLU, Selahaddin MENTEŞ, İrfan FİDAN, and Muhterem İNCE did not agree with this opinion.

Since the provision was found to violate 10 of the Constitution and annulled, it has not been examined for Articles 2, 17, 20, 90, and 153 of the Constitution.

IV. THE IMPACT OF THE ANNULMENT ON OTHER PROVISIONS

50. Article 43, paragraph (4) of Law No. 6216 stipulates that if the annulment of certain provisions of the law, the Presidential decree, or the Rules of Procedure of the Grand National Assembly of Turkey results in the non-application of other provisions or the entire text, the Constitutional Court may also annul these provisions.

51. As the first sentence of Article 187 of Law No. 4721 has been annulled, rendering its application impossible, the second sentence of the same article should be annulled by paragraph (4) of Article 43 of Law No. 6216.

V. THE ISSUE OF THE DATE OF ENTRY INTO FORCE OF THE ANNULMENT DECISION

52. In the third paragraph of Article 153 of the Constitution, it is stated that "*The law, Presidential decree, or the Rules of Procedure of the Grand National Assembly of Turkey, or their provisions, cease to be in effect on the date the annulment decision is published in the Official Gazette. In necessary cases, the Constitutional Court may decide on the date the annulment decision will take effect, which cannot exceed one year from the date of publication in the Official Gazette*." This rule is

reiterated in paragraph (3) of Article 66 of Law No. 6216, where it is also stated that, if deemed necessary, the Constitutional Court may determine the effective date of the annulment decision, starting from the date of its publication in the Official Gazette, which shall not exceed one year.

53. Due to the annulment of the first and second sentences of Article 187 of Law No. 4721, the legal vacuum created is considered to violate the public interest. Therefore, by the third paragraph of Article 153 of the Constitution and paragraph (3) of Article 66 of Law No. 6216, it has been deemed appropriate for the annulment provisions concerning these sentences to take effect nine months after the decision is published in the Official Gazette.

VI. JUDGMENT

The judgment of the Constitutional Court regarding Article 187 of the Turkish Civil Code No. 4721, dated 22/11/2001, is as follows:

A. The first sentence of Article 187 is found to violate the Constitution and is ANNULLED, with dissenting opinions from Kadir ÖZKAYA, Muammer TOPAL, Yıldız SEFERİNOĞLU, Selahaddin MENTEŞ, İrfan FİDAN, and Muhterem İNCE, and by MAJORITY VOTE. The annulment decision will take effect nine months after the publication of the decision in the Official Gazette, in accordance with the third paragraph of Article 153 of the Constitution and paragraph (3) of Article 66 of Law No. 6216, dated 30/3/2011.

B. The second sentence of Article 187 is annulled in accordance with paragraph (4) of Article 43 of Law No. 6216. The annulment decision will take effect nine months after the publication of the decision in the Official Gazette, in accordance with the third paragraph of Article 153 of the Constitution and paragraph (3) of Article 66 of Law No. 6216.

The decision was made on 22/2/2023.

President	Deputy-President	Deputy-President
Zühtü ARSLAN	Hasan Tahsin GÖKCAN	Kadir ÖZKAYA
Member	Member	Member
Engin YILDIRIM	Muammer TOPAL	M. Emin KUZ
Member	Member	Member
Rıdvan GÜLEÇ	Recai AKYEL	Yusuf Şevki HAKYEMEZ
Member	Member	Member
Yıldız SEFERİNOĞLU	Selahaddin MENTEŞ	Basri BAĞCI
Member	Member	Member
İrfan FİDAN	Kenan YAŞAR	Muhterem İNCE

DISSENTING OPINION

1. In the case filed by H.O.G.S. requesting permission to use her maiden surname before marriage, the Istanbul 8th Family Court, upon considering that Article 187 of the Turkish Civil Code No. 4721 is in violation of the Constitution, requested the annulment of the article. The majority of our Court has decided to annul the first sentence of the aforementioned article. For the reasons explained below, we did not participate in the decision.

2. In the first sentence of Article 187 of the Turkish Civil Code No. 4721, which is the subject of the plea, it is stated that upon marriage, the woman shall take her husband's surname, but she may also use her maiden surname before her husband's surname by submitting a written request to the marriage registrar or subsequently to the civil registry office. In the second sentence, which was not subjected to constitutional review as it is not

applicable to the specific case under review, it is stipulated that a woman who has previously used two surnames may benefit from this right for only one of those surnames. Thus, upon marriage, the woman will, in principle, take her husband's surname; however, if she wishes, she may submit a written request to the marriage registrar or subsequently to the civil registry office to use her maiden surname before her husband's surname, thereby being able to use her maiden surname as a prefix to her husband's surname. According to the provision, a woman cannot use her maiden surname alone after marriage without her husband's surname.

3. By the majority of our Court, it was stated that after addressing the legal developments aimed at achieving equality of men and women throughout history and establishing that marriage law has been largely reorganized in the context of the principle of equality, it was observed that the issue of a woman's surname was not reorganized in Law No. 4721, and the provision in the first paragraph of Article 153 of the repealed Law No. 743 was retained verbatim in Article 187 of Law No. 4721, which contains the provision under review.

4. Following the findings and evaluations, it was concluded that women and men are in comparable and similar circumstances about to the use of the surname after marriage. Based on this conclusion, it was stated that the provision introduces gender-based differential treatment between spouses who are in comparable and similar situations.

5. It was subsequently acknowledged that there is a public interest in preventing confusion in civil registries and ensuring the accurate determination of lineage. However, it was stated that requiring a woman to use her maiden surname only before her husband's surname after marriage is not the sole means of achieving this public interest, and that other measures could also be adopted to serve the same purpose.

6. In this context, it was acknowledged that the family has important functions, such as transmitting social values to future generations, and that family members sharing the same surname

contribute to the fulfilment of the family's social function by preserving family bonds. However, it was once again emphasized that requiring a woman to take her husband's surname after marriage is not the only option for the family to have a common surname. Furthermore, it was noted that it is difficult to assert that a common surname is an indispensable element for preserving family bonds. Consequently, it was concluded that the differential treatment prescribed by the provision violates the principle of equality.

7. Article 2 of the Constitution states that the Republic of Turkey is a state governed by the rule of law. The rule of law, as specified in the article, refers to a state whose actions and practices comply with the law, that respects human rights, protects and strengthens these rights and freedoms, establishes a fair legal order in all areas, maintains and develops it, ensures legal certainty, refrains from unconstitutional acts and behaviours, considers itself bound by legal rules, and is subject to judicial oversight.

8. Article 10 of the Constitution states, "*Everyone is equal before the law without distinction based on language, race, colour, gender, political opinion, philosophical belief, religion, sect, or similar grounds. Women and men have equal rights. The State is obligated to ensure that this equality is implemented in practice. Measures to be taken for this purpose cannot be interpreted as contrary to the principle of equality. Measures taken for children, the elderly, persons with disabilities, widows and orphans of martyrs, and disabled veterans shall not be considered violations of the principle of equality. No individual, family, group, or class shall be granted any privilege. State bodies and administrative authorities are required to act in compliance with the principle of equality before the law in all their proceedings.*" thereby enshrining the principle of equality before the law.

9. The purpose of the principle of equality stated in Article 10 of the Constitution is to ensure that individuals in the same legal situations are subject to the same treatment under the law and to prevent discrimination and the granting of privileges before the law. This principle prohibits the violation of equality before the law

by applying different rules to certain individuals or groups in the same circumstances. This principle envisions legal equality, not factual equality. Equality before the law does not mean that everyone is subject to the same rules in every respect. The characteristics of their situations and positions may necessitate different rules for certain individuals or groups. If identical legal situations are subject to the same rules and different legal situations are subject to different rules, the principle of equality prescribed by the Constitution is not violated. (Constitutional Court, E.2020/95, K.2022/3, 26/1/2022, § 25).

10. Article 12 of the Constitution states, "*Everyone possesses inherent, inalienable, indispensable fundamental rights and freedoms. Fundamental rights and freedoms also include the duties and responsibilities of the individual toward society, their family, and other individuals.*" As is clearly understood from the way the article is structured, while the Constitution grants individuals fundamental rights and freedoms, it emphasizes that these rights and freedoms cannot be considered separately from the duties and responsibilities of the individual toward society, their family, and other individuals. Article 17 states, "*Everyone has the right to life and the right to protect and develop their material and spiritual existence*"; and Article 41 declares, "*The family is the foundation of Turkish society and is based on equality between spouses. The State shall take the necessary measures and establish the necessary organizations to ensure the peace and welfare of the family, particularly to protect mothers and children, and to teach and implement family planning*."

11. A surname is a name that distinguishes members of a particular family from those of another family and is passed down from generation to generation. A surname, which is the most important element in determining a person's identity, is an indispensable, inalienable, and strictly personal right. In addition, according to Article 1 of the Surname Law No. 2525, which states, "*Every Turk is required to have a surname in addition to their given name*" the use of a surname is an obligation imposed on individuals. In Turkish law, a surname, which is used synonymously with a family name, not only serves to identify an individual's identity but also

functions to determine their family and lineage and to distinguish the individual from members of other families. Due to these functions, the legislator regulates the use of surnames through legal provisions for reasons such as maintaining the order of civil registries, preventing confusion in official documents, determining lineage, and protecting the family. (Constitutional Court, E.2009/85, K.2011/49, 21/10/2011).

12. It is understood that the contested provision, "*A woman takes her husband's surname upon marriage*," was adopted primarily for the protection of family unity and the strengthening of family bonds, as well as for reasons of public interest and public order, such as maintaining the order of civil registries, preventing confusion in official documents, and determining lineage.

13. The family, as the institution responsible for transmitting the distinctive characteristics, values, beliefs, and thought patterns of nations and maintaining the intergenerational bond, reflects the characteristics of nearly every society through the roles and functions it has undertaken from past to present. In this respect, the role and perception of the family within society also vary from one society to another. The family, as the fundamental unit of society, is a sacred institution where love, respect, tolerance, and similar human and moral values, as well as traditions, customs, language, religion, and other characteristics, are experienced and transmitted to future generations. (Constitutional Court, E.2009/85, K.2011/49, 21/10/2011).

14. Article 41 of the Constitution, which defines the family as the foundation of Turkish society, emphasizes the importance of the family in individual and social life and imposes duties on the State to make the necessary regulations and establish the required institutions for the protection of the family.

15. On the other hand, in fundamental documents of international law, such as Article 16 of the Universal Declaration of Human Rights and Article 10 of the International Covenant on Economic, Social and Cultural Rights, it is stated that the family is the natural and fundamental unit of society and must be protected

by the State. Additionally, Article 8 of the European Convention on Human Rights recognizes the right of everyone to respect for their family life.

16. With the contested provision, the surname used as the family name is passed down from generation to generation, thereby ensuring the continuity of the unity and integrity of the family, which is the foundation of Turkish society.

17. The fact that a surname is considered a personal right should not be interpreted as meaning that it cannot be subject to any intervention. It is clear that the legislator has the discretion to regulate the use of surnames by the Constitution, provided that it is based on public interest and public order requirements.

18. The European Court of Human Rights has also examined applications concerning the use of surnames within the scope of the principle of 'respect for private and family life' enshrined in Article 8 of the European Convention on Human Rights. In its judgments, the Court has stated that legal restrictions on the ability to change a surname may be imposed in the interest of public needs, such as ensuring the complete and accurate registration of the population, maintaining the stability of family names, establishing personal identity, or linking individuals carrying a specific name to a particular family. It also noted that national legislators have discretion in determining these restrictions in line with their country's historical and political structure. (Constitutional Court, E.2009/85, K.2011/49, 21/10/2011).

19. Therefore, the legislator's exercise of discretion regarding the family surname, by prioritizing one of the spouses due to certain necessities required by public interest and public order—primarily the preservation of family unity and integrity and the strengthening of family bonds—is not contrary to the rule of law or the principle of equality. Moreover, the contested provision ensures the establishment of a fair balance between personal rights and the public interest by allowing a woman, upon application, to add her previous surname before her husband's surname. (Constitutional Court, E.2009/85, K.2011/49, 21/10/2011).

20. It should also be noted that the argument that a woman taking her husband's surname upon marriage creates a distinction based on gender discrimination is unfounded. The legislator has deemed the use of a surname necessary and, in this context, exercised its discretion in favour of the husband in the manner specified in the contested provision. Moreover, as acknowledged by the majority, the characteristics of situations and positions may necessitate different rules for certain individuals or groups. In this case, it cannot be said that the legislator's preference for prioritizing the husband's surname as the family surname within its discretionary power constitutes a violation of the principle of equality.

21. For the reasons explained, the contested provision is not unconstitutional. The request for annulment should be dismissed.

Deputy-President	Member	Member
Kadir ÖZKAYA	Yıldız SEFERİNOĞLU	Selahaddin MENTEŞ

Member	Member
İrfan FİDAN	Muhterem İNCE

DISSENTING OPINION

I dissent from the majority's decision to annul the first sentence of Article 187 of the Civil Code No. 4721 because it violates Article 10 of the Constitution, for the following reasons.

The purpose of the principle of equality enshrined in Article 10 of the Constitution is to ensure that individuals in the same legal circumstances are subject to the same treatment under the law and to prevent discrimination and the granting of privileges before the law. This principle prohibits the violation of equality before the law by applying different rules to certain individuals or groups in the same circumstances. This principle prescribes legal equality, not factual equality. Equality before the law does not mean that everyone is subject to the same rules in every aspect. The characteristics of their circumstances and positions may necessitate

different rules for certain individuals or groups. If identical legal situations are subject to the same rules and distinct legal situations are subject to different rules, the principle of equality prescribed by the Constitution is not violated.

Following the first paragraph of Article 10 of the Constitution of the Republic of Turkey, dated November 7, 1982, and numbered 2709, a paragraph was added by Law No. 5170, dated May 7, 2004, stating: "*Women and men shall have equal rights. The State is obligated to ensure the realization of this equality.*"

Every human being possesses inherent dignity and value simply by-being human. This is his or her natural right. By this right, no discrimination among individuals can be made based on any attribute or criterion. No distinction can be made among individuals in terms of the application of laws. Thus, the principle of equality before the law serves as one of the foundations of equality among individuals. State organs and administrative authorities are obligated to carry out state activities without discrimination among individuals in all their actions.

Article 12 of the Constitution states: "*Everyone possesses fundamental rights and freedoms which are inherent, inviolable, inalienable, and indispensable. Fundamental rights and freedoms also encompass the duties and responsibilities of the individual towards society, their family, and other individuals.*"From the wording of this provision, it is evident that while the Constitution endows individuals with fundamental rights and freedoms, it also emphasizes that these rights and freedoms cannot be considered separately from the duties and responsibilities of individuals towards society, their family, and others. Article 17 states, "*Everyone has the right to protect and develop their material and spiritual existence,*" and Article 41 provides, "*The family is the foundation of Turkish society and is based on equality between spouses.*"

Article 12 of the Constitution defines the nature of fundamental rights and freedoms, emphasizing in its first paragraph that these are not a "favor" granted by the state but constitute an inherent, inviolable, inalienable, and indispensable element of one's

personality. The state is obligated, as a principle, to refrain from interfering with this area reserved for the individual and to avoid intruding into the boundaries of this private sphere.

Article 17 of the Constitution safeguards the right to life, the integrity of an individual's material and spiritual existence, and the right to develop it, within the scope of the rights and freedoms possessed by individuals. It is evident that these two rights constitute a whole and complement each other.

Article 41 of the Constitution provides that the family is the foundation of Turkish society and is based on equality between spouses. As an extension of this, policies in this direction have been developed in our country, and significant steps have been taken with discourses of positive discrimination toward women.

A surname is a name that distinguishes the members of a particular family from those of other families and is passed down from generation to generation. A surname, as the most significant element in determining an individual's identity, is an indispensable, inalienable, and strictly personal right. Additionally, pursuant to Article 1 of the Surname Law No. 2525, which states, 'Every Turk is obliged to carry a surname in addition to their given name,' the use of a surname is an obligation imposed on individuals. In Turkish law, the surname, which is used synonymously with the family name, not only serves to identify an individual's identity but also functions to determine their family and lineage and to distinguish them from members of other families. Due to these functions, the legislator regulates the use of surnames through legal provisions to ensure the proper maintenance of civil records, prevent confusion in official documents, determine lineage, and protect the family.

It is understood that the contested provision, which states "*A woman takes her husband's surname upon marriage*" was adopted primarily for reasons of public interest and public order, such as preserving family unity, strengthening family ties, ensuring the proper maintenance of civil records, preventing confusion in official documents, and determining lineage.

The family, which ensures the transmission of distinctive characteristics, values, beliefs, and thought patterns of nations, as well as the preservation of intergenerational bonds, reflects the traits and functions of nearly every society from past to present through its roles and functions. In this respect, the influence and perception of the family within society vary from one society to another. The family, as the fundamental unit of society, is a sacred institution where love, respect, tolerance, and similar human and moral values, along with traditions, customs, language, religion, and other characteristics, are experienced and passed on to future generations.

Article 41 of the Constitution, which defines the family as the foundation of Turkish society, highlights the importance of the family in individual and social life and imposes duties on the State to enact necessary regulations and establish institutions to protect the family. It is stated in Article 16 of the Universal Declaration of Human Rights and Article 10 of the International Covenant on Economic, Social and Cultural Rights, which are foundational documents of international law, that the family is the natural and fundamental unit of society and must be protected by the State. Additionally, Article 8 of the European Convention on Human Rights recognizes the right of everyone to respect their family life.

With the contested provision, which establishes the transmission of the surname as the family name across generations, the continuity of family unity and integrity, which forms the foundation of Turkish society, is maintained.

The fact that a surname is a personal right does not mean that it cannot be subject to any interference. It is evident that the legislator has the discretion to intervene in the use of surnames, provided that such intervention serves the requirements of public interest and public order and complies with the Constitution.

The European Court of Human Rights has also examined applications concerning the use of surnames within the scope of the principle of "*protection of private and family life*" enshrined in Article 8 of the European Convention on Human Rights. In its judgments,

the Court has stated that legal restrictions on the possibility of changing a surname may be imposed in accordance with the requirements of public interest, such as ensuring the complete and accurate registration of the population, maintaining the stability of family names, determining personal identity, or establishing the connection between individuals and their families. The Court has further acknowledged that national legislators have a margin of appreciation in choosing these restrictions in line with the historical and political structure of their respective states.

In this context, the legislator exercises its discretion regarding the family surname by giving precedence to one spouse, primarily for reasons such as preserving family unity and integrity, strengthening family ties, and addressing certain necessities required by public interest and public order, does not contravene the principles of the rule of law. Moreover, the contested provision allows a woman, upon her request, to use her previous surname by adding it before her husband's surname, thereby establishing a fair balance between the right to personal rights and the public interest.

For the State to fulfil the principle of equality enshrined in Article 10 of the Constitution within the framework of the annulled law, it must fully define the societal significance of the "*surname*" and take into account the balance between the individual's right to protect and develop their material and spiritual existence and the unity of the family, which is considered the foundation of Turkish society. In this context, it is necessary to focus on the societal implications of the phrase "*…is based on equality between spouses*" as stated in Article 41.

Although men and women are equal as human beings, it is not possible to claim that they are identical in terms of the differences arising from gender. The primary principle emphasized by the modern world on this matter is equality. In Turkish culture, this corresponds to equivalence and complementarity. Men and women are equivalent both biologically and in terms of their sociocultural positions/roles.

It has been argued that in the modern world, an unequal structure based on male dominance exists in society and within the family, where masculinity is used as a tool of exploitation and violence against women. It is claimed that men oppress and devalue women, confine them to the home, and that a historical process has developed a type of woman who serves men. Additionally, it is stated that the classical culture of obedience, which has turned into slavery, has reinforced this, emphasizing gender-based and biological discrimination, and exploiting women's labour. The rebellion fueled and motivated by these arguments has made its impact felt worldwide, and the idea of "*equality between women and men*" has been proposed as a solution to these issues. Legal regulations introduced in this direction have further strengthened this idea. As an extension of the aforementioned provision in Article 41 of the Constitution, policies in this direction have been developed in our country, and significant steps have been taken with the discourse of positive discrimination towards women.

In the modern world, the thesis that a good relationship within the family is only possible through an egalitarian relationship where each party has equal rights and responsibilities has been embraced. This belief is grounded in the idea that equality fosters mutual respect between the parties and reinforces the belief that they will act in each other's best interests.

In line with the aforementioned arguments, it can be argued that the root of inequality of men and women lies in the traditional division of roles, where men are responsible for providing for the household and women are tasked with domestic work. This division is unequal, and it stems from a shared belief that men and women should be responsible for different spheres.

Ultimately, the anatomical, physiological, psychological, and social differences between men and women inherently possess characteristics that render social equality impossible. In short, there is a structural inequality between men and women as a reality of creation. This situation is generally regarded as an obstacle to the equality of men and women in terms of their positions in society.

Therefore, even though it is presented as a dogmatic value that must be accepted without question, equality between women and men in the family is one of the modern myths and does not possess the qualities necessary to ensure peace, justice, or happiness, either within the family or in society.

In that case, it can be said that the value determining the position of men and women is equivalence and complementarity. What enables this is the fact that men and women possess certain superiorities over one another.

Equivalence refers to the value and significance of one entity about the other, taking into account their existing differences and characteristics. Positioning men and women in this way is both more aligned with the reality of human nature and more meaningful and consistent than the concept of equality imposed by the modern world. Because in equality two entities are two halves of a whole and share the same characteristics. And one can replace the other. In this respect, equivalence differs from equality. No matter how valuable and important a person is to themselves, their true worth and significance is determined by their differences, their interaction and relationships with their surroundings, the need others have for them, and the interest shown to them by others.

Ultimately, questions like "*Is a woman more important than a man, or is a man superior to a woman?*" are entirely meaningless, artificial, and contrived. Women and men are generally equal before the law; however, their equivalence in terms of societal roles comes to the forefront.

The matter of which surname, that of the man or the woman, will be used as the family surname can also be determined by the parties themselves based on their roles in society. As stated in the majority decision, a woman taking her husband's surname after marriage is not the only option that allows the family to have a common surname. In this context, it is also possible to grant the parties the option to designate either one of their surnames or another name as the family surname or to stipulate that the family surname be formed by combining the surnames of the spouses before marriage.

However, this should be decided by the legislative body by the demands that may arise from society (including the violation decisions regarding "*surname*" that may be issued by the judiciary in individual applications). It is not correct for societal demands to be directed by judicial decisions. It is not correct for societal demands to be directed by judicial decisions. Societal demands should arise within their natural context in line with the development and changes of society.

Another point to be addressed is the violation decisions regarding "*surname*" in individual applications. It is considered that the violation decisions in this regard, in terms of emphasizing the protection and development of the person's material and spiritual existence in relation to society, are in accordance with the Constitution.

The claim that a woman taking her husband's surname upon marriage creates a differentiation based on gender is also not valid in light of the explanations provided above. The characteristics of their situation and position may require different rules for certain individuals or groups. For the reasons stated, the legislature's discretion to prioritize the husband's surname as the family surname does not constitute a violation of the principle of equality.

For the reasons explained, I do not agree with the majority's opinion to annul the provision, as I believe it does not violate Article 10 of the Constitution.

Member

Muammer TOPAL