

A CRITICAL OVERVIEW OF THE TURKISH CIVIL CODE IN THE CONTEXT OF EQUALITY OF WOMEN AND MEN*

*Kadın ve Erkek Eşitliği Bakımından
Türk Medeni Kanunu'na Eleştirel Bir Bakış*

Tuğçem SEÇER**

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All talk of women's right is moonshine.

Women have every right.

They have only to exercise them.

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Abstract

In terms of the Turkish Civil Code, it is stated that equal rights are granted to men and women. However, it should not be assumed that there has been equality since the beginning. Turkish women were able to approach equality through long struggles, but they still could not totally reach it. So much so that the obligation of a married woman to take her husband's surname, the obligation of a waiting period only for the woman to remarry, and provisions regarding marital property can clearly indicate that equality between men and women is still not achieved. An egalitarian legal system can only be achieved by guaranteeing equality for men and women. However, it is not appropriate to consider a concept of equality one-dimensional. In legal terms, equality refers to how everyone is treated equally under the law. However, when comparing the social, economic, and cultural circumstances of men and women, absolute legal equality may not always guarantee equality. To ensure equality for men and women in this context, the regulations of the Turkish Civil Code should be updated. On the contrary, the provisions introduced to protect women's rights that include positive discrimination should be preserved.

Keywords: Equality, Gender-based Discrimination, Surname, Waiting Period, Alimony.

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Özet

Türk Medeni Kanunu'nda kadın ve erkeğe eşit haklar tanındığı belirtilir. Ancak anılan bu eşitliğin medeni hukukun başlangıcından beri süregeldiği düşünülmemelidir. Türk kadını uzun mücadeleler sonucunda eşitliğe yaklaşabilmiş, ancak yine de tam anlamıyla ulaşamamıştır. Öyle ki, evli bir kadının kocasının soyadını alma zorunluluğu, sadece kadının yeniden evlenebilmesi için bekleme süresini geçirme zorunluluğu, evlilik mallarına ve nafakaya ilişkin hükümler kadın-erkek eşitliğinin hala sağlanamadığının açık göstergesidir. Ancak kadın ve erkek eşitliğinin tam olarak sağlanabilmesiyle eşitlikçi bir hukuki düzenlemeye ulaşılabilmesi mümkün olur. Yalnız bu noktada, eşitlik kavramı tek yönlü olarak değerlendirilmemelidir. Hukuki anlamda eşitlik bireylerin kanun önünde ayırım yapılmaksızın değerlendirilmesidir. Ancak mutlak hukuki eşitlik, kadın ve erkeğin sosyal, ekonomik ve kültürel durumları değerlendirildiğinde her zaman adaleti sağlamayabilir. Bu çerçevede, Türk Medeni Kanunu'nun hükümlerinin kadın ve erkek eşitliğini sağlayacak şekilde yenilenmesi gerekmektedir. Buna karşın, yapılacak düzenlemelerde kadın haklarının korunması amacıyla getirilen ve pozitif ayrımcılık içeren hükümler korunmalıdır.

Anahtar Kelimeler: Eşitlik, Cinsiyet Temelli Ayrımcılık, Soyadı, İddet Müddeti, Nafaka

INTRODUCTION

Turkish Civil Code no. 743¹, which came into force in 1926, included the first provisions for realizing the equality of men and women in the history of Turkish civil law especially compared to Mecelle. Before Turkish Civil Code no. 743, there was a civil code of the Ottoman Empire (Mecelle)² which was based on Islamic regulations in force.³ Just like Mecelle, the law dated 1926 has lost its validity over time and as a result of the developments in the society on the equality of women and men, new regulations were needed. Within this framework, the Law of 1926 was revoked and replaced by the Turkish Civil Code dated 2001⁴, which is currently in force. The Turkish Civil Code expressly states that men and women are equal. Though the Turkish Civil Code's provisions have started to fall short of guaranteeing equality between men and women, the transformation has not yet occurred.

¹ Full-text see <<https://www.lexpera.com.tr/mevzuat/kanunlar/turk-kanunu-medenisi-743>> accessed 01 March 2024.

² For further information regarding the Mecelle; Mücahit Ceylan, "Mecelle-i Ahkâm-ı Adliyye'nin Hazırlanışı, Uygulanması ve Kapsamı", *Adalet Dergisi*, 66 (2021) 709-720.

³ For further information regarding the history of Civil Code; Selim Kaneti, "A General Review of the New Turkish Civil Code Project", *İÜHFİM* 52/1-4 (1987) 336-344.

⁴ Official Gazette Number: 24607, Date: 08.12.2001. For the full-text please follow the link <<https://www.mevzuat.gov.tr/mevzuatmetin/1.5.4721.pdf>> accessed 01 March 2024.

It should be stated that the equality of men and women is separately and clearly regulated in the Turkish Constitution; therefore, all other legal regulations must also ensure equality. Besides, the Republic of Türkiye has become a part of many international human rights documents such as the Universal Declaration of Human Rights, the European Convention on Human Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women. The international documents are highly important concerning women's rights in Turkish civil law. In the following paragraphs, it will be seen that many developments regarding women's rights have been achieved by judicial decisions based on international conventions. Apart from the international documents, in terms of the Turkish Civil Code, it is stated that equal rights are granted to men and women. However lately, some provisions introduced to ensure equality between women and men have removed the positive discrimination in favor of women. And some provisions have become inadequate over time. The subject of this study is the evaluation of some precedent provisions of the Civil Code, which aims to ensure equality between men and women.

I. ARTICLES THAT CREATE INEQUALITY IN WORDS AND SPIRIT

In this study some opinions, thoughts, and solutions regarding three example articles, which are surname of women, waiting period, and alimony, that cause inequality in the Turkish Civil Code will be examined. Also, it is a must to state that there are lots of other articles, provisions, or regulations that create unjust situations nevertheless examining these would greatly expand the boundaries of the study.

A. Surname of Women

Some concepts should be considered by the spirit of its own time. Surname is such a concept which develops with the recognition of women's rights. However, during these developments, a contradiction may occur between modernization movements and culture. While the legal system was rapidly modernizing, society may not have kept up with this speed.

Türkiye has been experiencing this contradiction regarding the surname regulations. So, this topic has taken a place in Turkish law as an unresolved issue for a long time, and it still has not been concluded yet. In fact, for now, there is no regulation regarding women's surnames because the Constitutional Court of the Republic of Türkiye has annulled the article of the Turkish Civil Code.⁵

The surname of women after marriage was regulated in the Turkish Civil Code nr. 4721.⁶ According to Article 187 "*A woman takes her husband's surname*

⁵ AYM T.22.02.2023, 2022/155E and 2023/38K. For the full-text <<https://normkararlarbilgibankasi.anayasa.gov.tr/Dosyalar/Kararlar/KararPDF/2023-38-nrm.pdf>> accessed 01 March 2024.

⁶ For the English translation of the code please follow the link <<https://rm.coe.int/turkish-civil-code-family-law-book/1680a3bcd4>> accessed 01 March 2024.

upon marriage; however, she can also use her previous surname before her husband's surname with a written application to the marriage officer or later to the civil registry office." As can be seen, in accordance with the letter of the provision, there was a mandatory regulation. That, it was not possible for women to use only their maiden name after marriage. While men could use their own surname after marriage, not giving this right to women was a clear gender-based discrimination.

In practice, women were proving that the provision creates discrimination by filing a lawsuit and thus were using their maiden surnames without their husbands' surnames.⁷ The courts had agreed that there was an inequality in this provision, but filing a lawsuit was time and money-consuming and unfortunately, case law could not provide sufficient legal protection on its own.⁸ In the meanwhile, many individual applications have been made to the European Court of Human Rights and to the Constitutional Court of Türkiye.

The Constitutional Court of Türkiye stated in its early decisions that it doesn't constitute a discrimination or violation that the woman cannot continue to use only her maiden name after marriage.⁹ The Constitutional Court did not mention the United Nations Convention on the Elimination of All Forms of Discrimination Against Women¹⁰, to which Turkey is a party, in its rejection decision. However, it was clearly emphasized in the dissenting opinion of the decision that the provisions of the said convention and Turkish Constitution Article 10 include equality between men and women and these regulations should be considered.¹¹

⁷ YHGK T.30.09.2015, E.2014/2-889 and K.2015/2011; Y.2HD T.16.11.2017 E.2016/22056 and K.2017/12849; Y.2HD T.30.06.2015 E.2015/8667 and K.2015/13891.

⁸ The issue of women's surname has been taken to court not only in our country but also in many state law countries and has caused long-lasting discussions. Even in the US, which is known for its libertarian attitude, the surname of women has become the subject of judicial decisions. For example, in the 1971 *Forbush v. Wallace* case, the request of a woman who wanted to use her maiden name after marriage was rejected by the court because the public interest was superior to the personal benefits and that the woman could change her surname by filing a lawsuit before the court. Heather MacClintock, "Sexism, Surnames, and Social Progress: The Conflict of Individual Autonomy and Government Preferences in Laws Regarding Name Changes at Marriage", *Temple International & Comparative Law Journal* V.24/1(2014) 299-300; Michael Rosensaft, "The Right of Men to Change Their Names Upon Marriage", *Journal of Constitutional Law*, V.5/1(2002) 198.

⁹ AYM T.29.9.1998, E.1997/61 and K.1998/59. <<https://normkararlarbilgibankasi.anayasa.gov.tr/Dosyalar/Kararlar/KararPDF/1998-59-nrm.pdf>> accessed 01 March 2024.

¹⁰ For the full-text <<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>> accessed 01 March 2024.

¹¹ Nevin Ünal Özkorkut, "Kadının Vazgeçilebilir Kişilik Hakkı: Soyadı- Kadının Soyadı Üzerindeki Hakkının Türkiye'deki Tarihsel Gelişimi" I. Türk Hukuk Tarihi Kongresi Bildirileri V.1(2014) 29; Seda Çakırca, "Evli Kadının Soyadına İlişkin Güncel Gelişmelerin Değerlendirilmesi",

The first Turkish application¹² to the European Court of Human Rights regarding this issue belongs to Ayten Ünal Tekeli.¹³ The Court found that the prohibition of using only a maiden name after marriage was contrary to Article 14 of the ECHR. The Court also stated that there cannot be an objective and logical justification, such as family unity, for this discriminatory provision.¹⁴ Despite the violation decisions of the European Court of Human Rights, the Constitutional Court of Türkiye has continued to reject the cases regarding the annulment of Article 187 of the Civil Code Nr. 4721 for a long time.¹⁵

Finally, in 2023, the Constitutional Court of Türkiye decided to annul Article 187 because of all the above-mentioned developments and the women's fight.¹⁶ The Court stated that there is no reasonable and objective justification for the provision preventing the woman from using her maiden name alone after marriage since the fact that a man and a woman bear a common surname is not a mandatory element that protects family ties. As of now, our Civil Code contains no laws governing a woman's surname after marriage. Thus, it is anticipated that there will be a new, equal regulation on women's surnames.

Unfortunately, the issue of the women's surname has not ended with Article 187. The surname of the woman after the dissolution of marriage is also another problem according to Turkish Civil Law. According to article 173; *"In case of divorce, the woman protects her status gained by marriage; however, she takes her surname again before her marriage. If the woman was a widow before marriage, she can ask the judge to be allowed to bear her celibate name. If it is proven that the woman has an interest in using the surname of her husband and that it will not harm the husband, the judge allows her to bear her husband's surname upon her request."*

After the dissolution of marriage, women must take their maiden name again. The law does not provide any simple choice to the women who take her husband's surname after marriage. The women may file a law case to keep their husband's surname after marriage when some legal conditions are provided. These provisions make women the one who begs for the husband's surname

İÜHFİM, V.LXX/2 (2012) 149; Hamide Tacir, "Evli Kadının Kendi Soyadını Kullanması Konusunda Anayasa Mahkemesinin Yaklaşımının Temel Hak ve Özgürlükler Bakımından Değerlendirilmesi", Kadir Has Üniversitesi Hukuk Fakültesi Dergisi, V.5/1 (2017) 54.

¹² The first application to the European Court of Human Rights was *Burghartz v. Switzerland* <<https://hudoc.echr.coe.int>> accessed 01 March 2024.

¹³ Ünal Tekeli v. Turkey, 29865/96 <<https://hudoc.echr.coe.int>> accessed 01 March 2024.

¹⁴ Tuncer Güneş v. Turkey, 26268/08 <<https://hudoc.echr.coe.int>> accessed 01 March 2024.

¹⁵ AYM T.10.03.2011, E.2009/85 and K.2011/49. For the full-text <<https://normkararlarbilgibankasi.anayasa.gov.tr/Dosyalar/Kararlar/KararPDF/2011-49-nrm.pdf>> accessed 01 March 2024.

¹⁶ AYM T.22.02.2023, 2022/155E and 2023/38K. For the full-text <<https://normkararlarbilgibankasi.anayasa.gov.tr/Dosyalar/Kararlar/KararPDF/2023-38-nrm.pdf>> accessed 01 March 2024.

after marriage.¹⁷ Because the judge will only accept the case, if the woman has an interest in the use of the surname and if this use will not harm the husband's interest. Surname is an essential element of personality. Regardless of how it is gotten, it becomes part of the personality. For this reason, it is a violation of personality rights for the woman who took her husband's surname not voluntarily, but because of a legal regulation, to be forced to leave her surname after the marriage union has ended.¹⁸

In conclusion, the name is a legal right for both men and women. This right cannot be restricted unequally. Therefore, Turkish Civil Code Article 173 should be annulled immediately, and more equitable regulation should be made instead of the repealed form of Article 187.¹⁹

B. Waiting period for Woman after Dissolution of Marriage

Türkiye is a secular country by the mandate of the 1982 Constitution Article 2²⁰ and so the Constitution neither recognizes an official religion nor promotes any. However, religion plays a leading role in family relationships beyond a shadow of a doubt.²¹ Especially in Türkiye, most of the society believes in Islam, therefore it has a great influence on people's lives. So, there is a complex

¹⁷ Kumru Kılıçoğlu Yılmaz, "Kadının Bitmeyen Soyadı Sorunu" Ankara Barosu Dergisi, V.4 (2014) 590.

¹⁸ Burcu Bahar Çataloğlu, Seldağ Güneş Peschke, "30.09.2015 tarihli HGK Kararı ve Sonrası Evli Kadının Soyadına İlişkin Bir Değerlendirme", AÜHF Dergisi, V.69/2 (2020) 408; Saibe Oktay Özdemir, "Soyadı ile İlgili İsviçre Medeni Kanunu'nda 2013 Yılında Yürürlüğe Giren Değişiklikler ile Türk Hukukundaki Durumun Karşılaştırılması" Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi V.22 (2016) 2019; İffet Didem Suna, "Kadının Soyadı" Konya Barosu Dergisi V.1 (2021) 34-38.

¹⁹ Tuğçem Seçer, "Eşlerin Soyadı ve Kanun Metni Önerisi" İstanbul Medeniyet Üniversitesi Hukuk Fakültesi Dergisi, V.9/1 (2024), 284-285; Tuğçem Seçer, "Çocuğun Soyadı" Yargıtay Dergisi, V.49/3 (2023) 599-634; Damla Özden Çelt, "TMK M. 187'nin İptali Kararının Çocuğun Soyadına Olası Etkileri ve Olması Gereken Hukuk Bağlamında Bir Öneri", Akdeniz Üniversitesi Hukuk Fakültesi Dergisi, V.II (2024) 1065-1095; Seda Baş, Sezgin Baş, "Anayasa Mahkemesi'nin TMK M. 187 Hükmüne İlişkin İptal Kararından Sonra Evlenen Kadının Soyadı", Kırıkkale Hukuk Mecmuası, V.4/2 (2024) 493-526; Mustafa Şahin, "Anayasa Mahkemesi'nin İptal Kararı Ardından Türk Hukukunda Evli Kadının ve Çocuğun Soyadı" TBB Dergisi V.170/36 (2024) 1-38.

²⁰ "Article 2- The Republic of Turkey is a democratic, secular, and social state governed by the rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets outlined in the preamble." For the full-text <https://www.anayasa.gov.tr/media/7258/anayasa_eng.pdf> accessed 01 February 2024.

²¹ "Throughout history and across faiths and cultures, religion has led to both good and evil, to familial joy and familial sorrow." David C. Dollahite, Loren D. Marks, Hilary Dalton, "Why religion helps and harms families: A conceptual model of a system of dualities at the nexus of faith and family life" Journal of Family Theory & Review V.10/1 (2018) 219.

relationship between religion and society, and religious orders may structure the legal regulations somehow.²²

The period that the women must wait after the dissolution of marriage before remarrying someone else is called “*iddet*”, “*iddah*” or “*waiting period*”.²³ According to Islam, *iddah* is a legal and religious duty.²⁴ Multiple benefits are strongly expected to be provided by *iddah*. First, it’s a protection for the maintenance of true bloodline. Second, it motivates women to show respect and loyalty to their ex or dead husband.²⁵ Third, it creates time for couples to think remarriage over.²⁶ And the last, it prevents couples from having indiscreet affairs.²⁷ Most Islamic States regulate the *iddah* period in their family laws.²⁸ This period generally is applied only to women.²⁹ It must be considered that the Islamic rules have come to the patriarchal structured society. Hence these rules are generally in favor of the man and in this connection, they create contradiction with today’s women’s rights.³⁰

²² Annette Mahoney, Kenneth I. Pargament, Aaron Murray-Swank, Nichole Murray-Swank, “Religion, and the Sanctification of Family Relationships” Review of Religious Research V.44/3 (2003) 220; Ahmet Rifat Geçioğlu, Ertuğrul Döner, “İslâm’da Evlilik ve Aile Bağlamında Günümüzde Tartışılan Konular Üzerine Psiko-Sosyal Bir Değerlendirme” ÇÜİFD, V.19/2 (2019) 679.

²³ Fatih Karataş, “İslam Hukukunda İddet” Şırnak Üniversitesi İlahiyat Fakültesi Dergisi V.4/8 (2013) 162.

²⁴ Sunuwati Siti Irham, Yunus Rahmawati, “Gender Equality in Islamic Family Law: Should Men Take Iddah (Waiting Period After Divorce)?” Russian Law Journal V.11/3 (2023) 1132; Karataş (n.25), 162-164.

²⁵ Not only Islam, but many people from different beliefs also think that ties to one’s family have a direct spiritual connection. So, family relationships are so frequently seen as holy. Mahoney et al. (n.24), 222-223; For detailed information regarding religions and family relationships see Carle Zimmerman, “Family and Religion” Social Science, V.48/4 (1973) 203-215.

²⁶ The waiting period may lead couples to re-think about divorce, in other words, it may discourage them to dissolution of marriage. Crystal Wong Ho-Po, “Can’t Wait Any Longer? The Effects of Shorter Waiting Periods on Divorce and Remarriage” American Law and Economics Review V.23/2 (2021) 255.

²⁷ Sinta Pomahiya, Nur M. Kasim, Dolot Alhasni Bakung, “Legal Consequences of Marriage During Iddah Period Based on Compilation Islamic Law” Estudiante Law Journal V.4/3 (2022) 717; Karataş (n.25), 164-165.

²⁸ For example, according to Indonesian Marriage Law “*If the marriage is broken up due to divorce, then the waiting period for women who are still menstruating is set at three sacred times with a minimum of 90 days and women who are not menstruating is set at 90 days.*” Pomahiya et al. (n.29), 716.

²⁹ Since only women are capable of becoming pregnant, the idea of *iddah* is exclusively related to sex. Rahmawati et al. (n.26), 1133.

³⁰ Geçioğlu/Döner (n.24), 607.

According to Turkish Civil Code Article 132, “*If the marriage has ended, the woman cannot marry until three hundred days have passed from the end of the marriage. The time is over with breeding. In cases where it is understood that the woman is not pregnant from her previous marriage or if the spouses whose marriage has ended want to marry each other again, the court removes this period.*”³¹ Unlike Islamic “*iddah*”, according to the Turkish Civil Code nr. 4721 “*the waiting period*” is not related to religious duties.³² Turkish Civil Code regulates the waiting period as a protection for the maintenance of a true bloodline.³³

In this connection, the Turkish Civil Code forbids women to remarry during the waiting period, however, if the marriage is established in some way, this marriage cannot be declared null and void any longer. Besides, when the woman proves before the court that she is not pregnant, may remarry anytime.³⁴ This article doesn’t give any restrictions for men regarding the dissolution of marriage but does not allow women to marry within 300 days.³⁵ As it is seen, if a woman wants to marry someone other than her divorced husband during this duration called a waiting period, she needs to prove that she is not medically pregnant by applying to the court.

On the ground of this double standard, Nurcan Bayraktar filed a case before the European Court of Human Rights.³⁶ Nurcan Bayraktar stated that Article 132 of the Turkish Civil Code constitutes discrimination based on gender and is therefore contrary to the Turkish Constitution, International Human Rights Agreements, the European Convention on Human Rights, and other International

³¹ This article regulated in parallel with the former Article 103 of the Swiss Civil Code. However, the Article 103 of the Swiss Civil Code was repealed by the Federal Law dated 26.06.1998.

³² The waiting period exists not just for countries whose religion is Islam, but also it exists in secular or non-Islamic countries. Hatam Soltani, Naser Ebrahimi Boukani, Alireza Lotfi, Kamel Kiani, Fatemeh Mozafari, “The Effect of Scientific Progress on Waiting Period Legal Law” Cumhuriyet Üniversitesi Fen Edebiyat Fakültesi Fen Bilimleri Dergisi, V.36/3 (2015) 3161.

³³ Şeyma Nalbant Ülger, “İslam Hukuku ve Türk Medeni Kanunu’nda İddet” Kocatepe İslami İlimler Dergisi V.5/2 (2022) 609.

³⁴ Iddah must be more than just sex. Considering that this idea offers a married couple the opportunity to heal their relationship and marriage, some Islamic beliefs state that men ought to observe the iddah period as well. To be able to marry again, they must wait for his wife’s iddah time to end. Rahmawati et al. (n.26), 1136-1137.

³⁵ In some states the waiting period may be applied to both men and women. For example, the waiting period for divorce is another type of waiting period that can be seen in the United States of America. However, this type of waiting period still creates a double standard for women. Because women usually have an age concern when they remarry, on the other hand, men generally remarry younger women. Ho-Po (n.26), 262.

³⁶ Nurcan Bayraktar v. Türkiye, 27094/20 <<https://hudoc.echr.coe.int/>> accessed 01 March 2024.

Agreements and Conventions in which Türkiye is a party. Applicant Nurcan Bayraktar first, applied to the Court of First Instance then the Court of Cassation, and finally to the Constitutional Court. The Court of First Instance, the family court, stated in its decision that women and men are not equal biologically. The court noted that it should not be missed out that the ability to give birth is a unique characteristic of women. Hence this article doesn't constitute gender-based discrimination and violation of human rights. The Court of Cassation also approved this decision, and the Constitutional Court rejected the plaintiff's application due to *ratione materiae*. For her, the last resort was the European Court of Human Rights, so she took the case there.

European Court of Human Rights decided in favor of plaintiff Nurcan Bayraktar and accepted the violation of rights due to articles 8³⁷, 12³⁸, and 14³⁹ of the European Convention on Human Rights.⁴⁰ The Court concludes that imposing a three-hundred-day waiting period on divorced women due to the possible pregnancy, unless the women prove through medical examination that they are not pregnant, is considered direct gender-based discrimination and cannot be justified through the aim of paternity.⁴¹

As we all know, usually marriages end long before the court decides to divorce. Again, in cases when the court process is prolonged⁴², the parties may couple with

³⁷ Article 8 regulates the right to respect for private and family life. According to this *article* “1. Everyone has the right to respect his private and family life, his home, and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is following the law and is necessary for a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others.”

³⁸ Article 12 regulates the right to marry. According to this *article*, “Men and women of marriageable age have the right to marry and to find a family, according to the national laws governing the exercise of this right.”

³⁹ Article 14 regulates the prohibition of discrimination. According to this *article*, “The enjoyment of the rights and freedoms outlined in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

⁴⁰ For the full-text <<https://www.echr.coe.int/documents/d/echr/convention>> accessed 01 March 2024.

⁴¹ There is an important annotation in this decision which states that the “*European Court of Human Rights must speak truth and fairly on the issues regarding equality between men and women. Court must speak truthfully; because these issues are important and must speak fairly; because the Court also undertakes a very important pedagogical function.*”

⁴² A divorce case lasted approximately three years in Türkiye. See <https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/29032023141410adalet_ist-2022cal%C4%B1sma100kapakl%C4%B1.pdf> accessed 01 March 2024.

someone else. In addition, although couples pledge loyalty to each other, they may have other partnerships or sexual intercourse with another person during marriage. Hence, when a woman becomes pregnant during or after a short time from marriage, the assumption that the child is from the divorced husband cannot be taken account for any legal or administrative decision. For example, nowadays a significant number of families are based on different types of unions other than civil marriage, such as a civil union or common-law union, and many children are even born outside of marriage or because of anonymous sperm donation.⁴³

As a conclusion, marriage, divorce, and remarriage are legal rights for both men and women. These rights cannot be restricted in an unequal manner. And the waiting period is a form of gender injustice. Therefore, the Turkish Civil Code Article 132 should be annulled immediately.

C. Alimony

Even today, it cannot be claimed that women reach absolute freedom and equality. Such an obvious norm is that they still cannot get equal pay for equal work.⁴⁴ According to The Universal Declaration of Human Rights Article 23 “*Everyone, without any discrimination, has the right to equal pay for equal work.*”⁴⁵

As it’s known, alimony is financial support that a court orders to be given to their spouse during separation or after divorce. According to Article 175 of the Turkish Civil Code, “*The party who will fall into poverty due to divorce may request alimony indefinitely, in proportion to his/her financial strength, for his/her livelihood, provided that the fault is not more severe.*” As it is seen from the provision, alimony is gender-neutral according to the Turkish Civil Code which may seem equal. However, this provision should be considered with some important facts about Turkish society’s social and cultural understanding.⁴⁶

Although women’s rights advocates are fighting battles on multiple fronts to improve women’s legal, educational, economic, and socio-political status, there are still many economically inactive women in Türkiye. These women are depending on their husband’s income. So, after divorce generally, they have no job and no income other than alimony. Therefore, in the Turkish law system,

⁴³ See; Nurcan Bayraktar v. Türkiye, 27094/20 <<https://hudoc.echr.coe.int/>> accessed 01 March 2024.

⁴⁴ See the report <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_650553.pdf> accessed 01 March 2024.

⁴⁵ <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> accessed 10 March 2024.

⁴⁶ Sinan Sami Akkurt, “TMK m. 175 Hükümünün Yoksulluk Nafakasının Süresine İlişkin Yaklaşımının Hukuki Yorum Yöntemleri Çerçevesinde Tahlili” Anadolu Üniversitesi Hukuk Fakültesi Dergisi V.10/1 (2024) 1-18.

alimony is a concept that is generally paid by men after divorce. Besides, many women work at a job and do the housework without any help. However, when the court calculates the financial income of each spouse for alimony or marital property, the housework doesn't count as financial income or support.⁴⁷ Even though there has been a lot of invisible labor that women have done during the marriage. Additionally, in Turkish culture women and men do not receive equal pay for equal work and in some regions, married women are not allowed to work traditionally.⁴⁸

According to the men's advocates, a woman can be said to have two sources of income given the regime of acquired property participation (economic partnership) and the indefinite alimony arrangement. Therefore, when one of the parties receives an equal share of the marital estate and this may be considered as a source of income for the purposes of imposing support responsibilities.⁴⁹ So, lately, there has been a big debate regarding Article 175 of the Turkish Civil Code about whether the government should regulate "*alimony with a deadline*" rather than "*indefinite alimony*".⁵⁰ Because Turkish men think that indefinite alimony is a violation of rights.⁵¹

In this scope, for the first time an alimony that is restricted to two years was awarded by the First Instance Court, a family court, because the marriage took a short time, the spouses have no kids, and they will never see each other again. However, the Court of Cassation has reversed this decision and stated that indefinite alimony may be awarded when one of the spouses cannot maintain the standard of living⁵² for the parties after the divorce. Moreover, the law does not restrict the alimony with time limitation. Since the law clearly stipulates that

⁴⁷ Gillian Douglas, "Women in English Family Law: When Is Equality Equity?" Singapore Journal of Legal Studies, Special Issue (2011) 25-26.

⁴⁸ Akkurt, 3; Semra Yılmaz, "Türkiye'de Kadınların Çalışma Hayatındaki Yeri ve Sosyal Güvenlik Hukuku Düzenlemeleri" Sosyal Çalışma Dergisi V.2/2 (2018) 63-80; Saniye Dedeoğlu, "Eşitlik mi, Ayrımcılık mı? Türkiye de Sosyal Devlet, Cinsiyet Eşitliği Politikaları ve Kadın İstihdamı" Çalışma ve Toplum Dergisi V.21/2 (2009) 41-54.

⁴⁹ Laura W. Morgan "Double Dipping: A Good Theory Gone Bad [notes]" Journal of the American Academy of Matrimonial Lawyers V.25/1 (2012) 139-140.

⁵⁰ See <<https://www.ntv.com.tr/turkiye/adalet-bakani-tunctan-suresiz-nafaka-aciklamasi,VDMPOIGyikux1IpnJr3xww>>; <<https://medyascope.tv/2023/10/11/yeniden-refah-partisi-nafaka-teklifini-tbmm-baskanligina-sundu/>> accessed 01 March 2024.

⁵¹ Dilek Keleş, "Toplumsal Cinsiyet Karşıtı Hareketlerin Bir Örneği Olarak "Süresiz Nafaka Mağdurları Platformu" Akdeniz Kadın Çalışmaları ve Toplumsal Cinsiyet Dergisi V.VI/2 (2023) 517-544.

⁵² According to the Court of Cassation standard of living "*should be assessed by evaluating the economic conditions of the day, the social and economic situation of the parties and their lifestyles.*" YHGK, T. 25.11.2009, E. 2009/2-500 and K. 2009/557. For the full-text <<https://karararama.yargitay.gov.tr/>> accessed 01 March 2024.

the alimony should be “indefinite”, limiting the alimony to a certain period by relying on the power of discretion would constitute a clear violation of the law.⁵³

The indefinite alimony has also been subjected to the Constitutional Court of Türkiye.⁵⁴ In the application, it's claimed that one of the spouses is under a lifelong financial obligation in favor of the other after the divorce due to indefinite alimony. It's also submitted that the indefinite alimony withholds the spouse's remarriage opportunity. However, the Court decided that the indefinite alimony cannot be considered as a tool for unjust enrichment. According to the Turkish Civil Code, women may only ask for alimony if they cannot maintain their daily life on their own income. The Court also stated that alimony ends automatically in case of re-marriage of the alimony creditor or death of one of the parties. Besides, alimony also ends automatically when the alimony creditor lives with somebody else or starts to produce higher income than the other party and when he/she lives a dishonorable life, or the alimony obligator completely loses his/her ability to pay. In conclusion, the Court decided that indefinite alimony does not create any violation of rights, because the main aspect of this concept is just to support the spouse who will fall into poverty due to divorce, in order to sustain minimum living needs.⁵⁵

On the other hand, in the repealed provision of Turkish Civil Code no.743, a woman's economic situation must have been well-off for a man to ask for alimony.⁵⁶ However, this provision was issued because it contradicts the principle of equality between women and men. Nevertheless, after the legal modification of the Civil Code, men and women become subjected to equal conditions in terms of the obligation to pay alimony. This regulation which seems prima facie fair, cannot ensure equality when it is evaluated together with social facts.⁵⁷

⁵³ Y2HD, T. 12.12.2017, E.2016/8859 and K.2017/14407. For the full-text <<https://karararama.yargitay.gov.tr/>> accessed 01 March 2024.

⁵⁴ AYM, T.17.05.2012, E.2011/136 and K.2012/72. For the full-text <<https://normkararlarbilgibankasi.anayasa.gov.tr/Dosyalar/Kararlar/KararPDF/2012-72-nrm.pdf>> accessed 01 March 2024.

⁵⁵ This approach is criticized by some authors. According to this criticism, courts must follow some criteria (age, marriage duration, child, etc.) regarding indefinite alimony. Because they generally decide in favor of women without any further examination. Courts must act neutral regarding indefinite alimony decisions. Seda Baş, Nisa Özcan, “Yoksulluk Nafakasında Süre Sorununun Anayasal ve Medeni Hukuk Boyutuyla Tartışılması ve Bir Öneri Olarak Boşanma Tazminatı” Ankara Sosyal Bilimler Üniversitesi Hukuk Fakültesi Dergisi V.4/1 (2022) 350-351.

⁵⁶ According to Article 144/2 “*The spouse who will fall into poverty due to divorce may request alimony from the other spouse indefinitely in proportion to his/her financial capacity, if his/her fault is not more severe. However, for the husband to request alimony from the wife, the wife must be in a state of affluence.*”

⁵⁷ Sera Reyhani Yüksel, “Türk Medeni Kanunu Bakımından Kadın-Erkek Eşitliği” Gazi Üniversitesi Hukuk Fakültesi Dergisi V.XVIII (2014) 195.

From this point of view, it becomes significant to discuss how the idea of equality presents itself as positive discrimination. Since women are often treated unfairly in society, they need more protection in some fields. One of the areas where women most need positive discrimination⁵⁸ is in the institution of the family. It may be discussed that women and men should be equal in front of the laws to ensure justice, however, justice does not always rise from arithmetic equality. As is known, treating everyone equally does not always ensure justice. It is necessary to treat equally those who are equal and differently, those who differ. In this circumstance, it's just that the women can be given more rights and protection than the men.⁵⁹ Besides, according to the Constitution of the Republic of Türkiye Article 10, "*Men and women have equal rights. The State has the obligation to ensure that this equality exists in practice. Measures taken for this purpose shall not be interpreted as contrary to the principle of equality.*"

So, according to the traditional marriage understanding, the wife makes numerous initial sacrifices that are valuable solely to her husband-investments that a self-serving negotiator would only make in exchange for a long-term commitment. The wife invests in a marriage, whether it be for childcare, household duties, or providing emotional support to her spouse alone. A logical self-interested negotiator could only make these expenditures in exchange for a long-term commitment.⁶⁰

To see marriage as an investment, especially in today's conditions, would be unfortunate in every aspect. Whilst spouses typically originate from identical socioeconomic backgrounds, their earning capacities tend to be different. Because men often make more money than women do. True equality in terms of income to the marriage cannot be achieved even in cases when men and women have identical salaries since the woman still must fulfill her marital responsibilities. Besides, women must generally abandon many career opportunities to meet their marital obligations.⁶¹ No woman should invest all of her being in an emotional relationship that may not work out.⁶² Even if the court orders the man to pay

⁵⁸ Positive discrimination at work is another field that is regulated in the Turkish laws, Devrim Ulucan, "Eşitlik İlkesi ve Pozitif Ayrımcılık" Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi V.15/Özel Sayı (2014) 372-378.

⁵⁹ Bihterin Dinçkol, "Kadın-Erkek Eşitliği İçin Pozitif Ayrımcılık" İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi V.8/4 (2005) 103-104.

⁶⁰ Ellman's theory starts with the idea that, to the extent that they make less money than their spouses, women should focus on household tasks. Ira Mark Ellman, "The Theory of Alimony" California Law Review V.77 (1989) 42; Given the conditions at the time, the theory might hold water since women's involvement in business was extremely restricted at that period. But in today's economic world, women should be just as powerful as men. As a result, it is unrealistic to expect women to focus mostly on housework when men are employed.

⁶¹ Ellman (n.52), 46.

⁶² The amount of alimony awarded by the courts is enough that it prevents the alimony creditor

alimony to the woman, her economic well-being will be reduced after the marriage since her income is less.⁶³

In sum, leaving the man under the obligation to pay alimony to his divorced wife throughout his life can be seen as very unequal. However, as mentioned above, the article regarding alimony is gender-neutral in the Turkish Civil Code. For this reason, the women are also under the same obligation. However, in the real world, as women cannot achieve the same economic and social conditions as men, they generally may have the role of alimony creditor.

CONCLUSION

In terms of the Turkish Civil Code, equal rights are promised to men and women. This study's focus is on analyzing several precedent-setting clauses of the Turkish Civil Code that are supposed to ensure gender equality. From this point, this study examined the provisions of the law that have been subjected to judicial decisions of the High Courts of Türkiye and the European Court of Human Rights recently. Based on these provisions, other provisions that may cause discrimination in the future can hopefully be eliminated.

The surname of women is such a concept which develops with the recognition of women's rights. Despite this, it is an issue that has not been resolved for years. Notwithstanding the annulment decision of the Constitutional Court of Türkiye, the necessary regulation has still not been made by the parliament. Also, it's seen that from the judicial reform package, the draft law on the new regulation to be made instead of the annulled provision is almost the same as the abrogated regulation. Despite adverse events, the new regulation must eliminate discrimination and ensure equality by giving freedom to use their surname to women. Because women should be given equal choices with men regarding civil rights.

Another point to be mentioned is that it is not sufficient to revise only the annulled provision, Article 187. Because there are more provisions regarding the surname in the Turkish Civil Code. And many of these provisions still create discrimination against women. For example, along with the amendment of the provision on the surname of the woman, the surname of the child should also be revised. Hence, it would be more appropriate to reexamine the provisions of the Civil Code down to the ground, before making regulations on the surname.

from maintaining a life worthy of human dignity, and it is frequently uncollected because of the alimony obligor's illegal actions. For the full-text <<https://www.barobirlik.org.tr/Haberler/tubakkom-suresiz-nafaka-iddialari-hukuki-gercegi-yansitamaktadir-84000>> accessed 01 March 2024.

⁶³ The author proposed the restitution mechanism as a solution. June Carbone, "Economics, feminism, and the reinvention of alimony: A reply to Ira Ellman" *Vanderbilt Law Review* V.43/5 (1990), 1496.

The waiting period is a concept that is impossible to be accepted in the frame of gender equality. This article is regulated in parallel with the former Article 103 of the Swiss Civil Code which was repealed in 1998. In Turkish Law, still, imposing a three-hundred-day waiting period on divorced women due to the possible pregnancy, unless the women prove through medical examination that they are not pregnant, creates direct gender-based discrimination and cannot be justified through the aim of paternity or bloodline. Obviously, the waiting period is a form of gender injustice. Therefore, Turkish Civil Code Article 132 should be annulled immediately without any other replacement legislation.

It may be discussed that women and men should be equal in front of the laws to ensure justice, however, justice does not always rise from arithmetic equality. It is necessary to treat equally those who are equal and differently, those who differ. So, injustice is arising from this point. On the other hand, it is not appropriate to claim that there is no inequality in terms of indefinite alimony from men's aspect. So, the law should find a solution to ensure equality for both men and women.

In this scope, Article 125 of the Swiss Civil Code may enlighten the Turkish legislator. According to this regulation when a spouse cannot reasonably be expected to provide for his or her maintenance, the other spouse must pay a suitable contribution. In deciding whether such a contribution is to be made and, if so, in what amount and for how long, some factors are stated in the provision. These are; the division of duties during the marriage, the duration of the marriage, the standard of living during the marriage, the age and health of the spouses, the income and assets of the spouses, the extent and duration of child care still required of the spouses, the vocational training and career prospects of the spouses and the likely cost of reintegration into working life and expectancy of federal old age and survivor's insurance benefits and of occupational or other private or state pensions, including the expected proceeds of any division of withdrawal benefits.

Similar provisions in the Turkish Civil Code may rule out the possibility of the issue of indefinite alimony. In this case, the court may decide without eliminating the positive discrimination granted to the woman, but at the same time by adopting an egalitarian attitude towards the man. So, the court can decide by focusing on the specific status of marriage and spouses and ensure the most equal decision for both parties.

In sum, the surname of women, the waiting period, and alimony were only three examples of inequalities in the Civil Code as in practice. For example, even if divorces are due to domestic violence, the provisions of the Civil Code allow the courts to tend to equate the faults of the husband and wife in order not to rule compensation in favor of women. Again, the Civil Code's provision which states that the peace and benefit of marriage should be considered in the

choice of profession, is interpreted by the court only against women's choice of profession in practice. It's also well known that men typically disclose low incomes during court proceedings, and tragically, our system makes it simple to submit paperwork that misrepresents the truth. As it's known, men are obligated under religious rules to uphold the family's financial standing. Men emphasize religious values while discussing women's surnames or waiting periods. But again, as it comes to alimony, they're addressing equality. This double standard needs to end. Furthermore, women must truly be treated equally, not just legally.

In conclusion, it can be said that Turkish women actively pursue the equality outlined in the Civil Code. Equality must be guaranteed in both the letter and the spirit of the Turkish Civil Code for equality to be maintained and for Turkish women to receive the respect they are promised.

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