

# A CRITICAL OVERVIEW OF THE TURKISH CIVIL CODE IN THE CONTEXT OF GENDER EQUALITY\*

*Cinsiyet Eşitliği Bakımından Türk Medeni Kanunu'na Eleştirel Bir Bakış*

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*All talk of women's right is moonshine.*

*Women have every right.*

*They have only to exercise them.*

*Victoria Woodhull*

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## **ABSTRACT**

In terms of the Turkish Civil Code, equal rights are granted to men and women. However, it should not be assumed that there has been equality since the beginning of civil law. 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 married women to take the husbands' surname, the obligation of a waiting period only for the women 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 treating everyone 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, including 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, iddet müddeti, nafaka

## INTRODUCTION

Turkish Civil Code no. 743, which came into force in 1926, included the first provisions for realizing gender equality in the history of Turkish civil law, especially compared to Mecelle and Hukuk-ı Aile Kararnamesi<sup>1</sup>. Before Turkish Civil Code no. 743, there was a civil code of the Ottoman Empire (Mecelle)<sup>2</sup> and a family code of the Ottoman Empire (Hukuk-ı Aile Kararnamesi)<sup>3</sup> based

<sup>1</sup> For further information regarding Hukuk-ı Aile Kararnamesi; Orhan Çeker, *Osmanlı Hukuk-ı Aile Kararnamesi* (Mehir Vakfı Yayınları No:3, Konya 2016); Ebru Kayabaş, *Osmanlı Devleti'nde Tanzimat Dönemi İtibarıyla Aile Hukukunun Gelişimi -Hukuk-ı Aile Kararnamesi-*, (Filiz Kitabevi, İstanbul 2009); Belkis Konan, *Hukuk-ı Aile Kararnamesi'nde Kadının Hukuki Durumu ile İlgili Düzenlemeler*, II. Türk Hukuku Tarihi Kongresi Bildirileri Cilt I, ed. Fethi Gedikli, (Oniki Levha Yayıncılık, İstanbul 2016).

<sup>2</sup> For further information regarding Mecelle; Mücahit Ceylan, "Mecelle-i Ahkâm-ı Adliyye'nin Hazırlanışı, Uygulanması ve Kapsamı", *Adalet Dergisi*, 66 (2021) 709-720; Cihan Karahasanoğlu Osmanağaoğlu, "Mecelle-i Ahkâm-ı Adliyye'nin Yürürlüğe Girişi ve Türk Hukuk Tarihi Bakımından Önemi", *Osmanlı Tarihi Araştırma ve Uygulama Merkezi Dergisi*, 29 (2011) 93-124; Ekrem Buğra Ekinci, "Mecelle Hakkında Değerlendirmeler", *Adalet Dergisi*, 62-63 (2019) 335-356.

<sup>3</sup> Administrative and economic developments caused social transformations in Ottoman society. For instance, as more women joined employment instead of their husbands, who went off to war, the family structure began to evolve. The feminist movement gained strength with women's compulsory participation in economic and social life. Thus, a family code to regulate family relations was needed. Kayabaş, 16-17.

on Islamic regulations in force.<sup>4</sup> The family code remained in force for a very short period due to the need to adopt secular and modern laws.<sup>5</sup> Also afterward with the introduction of the Turkish Civil Code no. 743, the Mecelle which was inadequate to regulate family law<sup>6</sup>, was repealed.<sup>7</sup>

Like these Codes, the law dated 1926 has lost its validity over time. As a result of the developments in society on the equality of women and men, new regulations were needed.<sup>8</sup> Within this framework, the Law of 1926 was revoked and replaced by the Turkish Civil Code dated 2001<sup>9</sup>, which is currently in force. The Turkish Civil Code adopted the idea that men and women are equal.<sup>10</sup> 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.

It should be stated that the equality of men and women is separately and clearly regulated in Article 10 of 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 concerning women's rights in Turkish civil law are essential. In the following paragraphs, it will be seen that judicial decisions based on international conventions have achieved many developments regarding women's rights. Apart from the international documents, in terms of the Turkish Civil Code, it is stated that equal rights are granted to men and women. Lately, however, some provisions have been introduced to ensure equality between women and men, which have removed the positive

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<sup>4</sup> For further information regarding the history of the Civil Code; Selim Kaneti, "A General Review of the New Turkish Civil Code Project", İÜHFH 52/1-4 (1987) 336-344; Selahattin Sulhi Tekinay, *Türk Aile Hukuku*, (4<sup>th</sup> Edition, Fakülteler Matbaası, İstanbul 1982) 2-3.

<sup>5</sup> Çeker, 11.

<sup>6</sup> In the Ottoman legal system, family law disputes were in the scope of the Syaria Court. Therefore, family law was not included within the Civil Code, Mecelle. Additionally, the codification of family law was complicated by the sectarian divisions (Hanafi, Sunni, Shafi'i, etc.) that existed in society then. Mecelle is significant as a codification endeavor even if it includes no family law provisions and has made the conditions conducive to a family code. Kayabaş, 31.

<sup>7</sup> Karahasanoğlu, 116; Ekinci, 344.

<sup>8</sup> Cengiz Koçhisarlıoğlu, "Aile Hukuku'nda Eşlerin Eşitliği", Ankara Üniversitesi Hukuk Fakültesi Dergisi, 40/1 (1988) 252-253.

<sup>9</sup> Official Gazette Number: 24607, Date: 08.12.2001.

<sup>10</sup> Since Article 8 of the Turkish Civil Code states that "every person is entitled to a vested right", this could be interpreted as gender equality must be ensured in the scope of the Turkish Civil Code. Aydın Zevkliler, *Medeni Hukuk*, (Dicle Üniversitesi Hukuk Fakültesi Yayınları No:5, Diyarbakır 1986) 489.

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

This study will examine opinions, thoughts, and solutions regarding four example articles—the surname of women, personal status of the divorced woman, waiting period, and alimony—that cause inequality in the Turkish Civil Code. It is necessary to state that many other articles, provisions, or regulations create unjust situations; nevertheless, examining these would greatly expand the study’s boundaries.

### A. Surname of Women

Some concepts should be considered by the spirit of its own time. Surname is a concept that develops with the recognition of women’s rights. However, a contradiction may occur between modernization movements and culture during these developments. 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 been unresolved in Turkish law for a long time and has not been concluded yet.<sup>11</sup> 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.<sup>12</sup>

Women’s surname after marriage was regulated in the Turkish Civil Code nr. 4721.<sup>13</sup> According to Article 187, “*A woman takes her husband’s surname 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 impossible for women to use only their maiden name after marriage. Stated differently, the legal framework recognizes the husband’s last name as the family name.<sup>14</sup> While men could use

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<sup>11</sup> Not all issues connected to gender inequality are legal. It is a social and psychological issue as well. Because of this, achieving legal equality between genders requires that spouses are treated equally on an economic, social, and psychological level. Koçhisarlıoğlu, 269-270.

<sup>12</sup> 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.

<sup>13</sup> 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.

<sup>14</sup> Serkan Ayan, “Anayasa Mahkemesi Kararları ve Çocuklar ile Kadının Soyadına İlişkin Değişiklik Tasarısı Taslağı Işığında Soyadının İlk Kez Edinilmesi Kendiliğinden Değişmesi ve Değiştirilmesi”, Gazi Üniversitesi Hukuk Fakültesi Dergisi, XVI (2012) 19-90; Hakan

their own surname after marriage, not giving this right to women was a clear gender-based discrimination.<sup>15</sup>

The women's status in the marriage union is no longer the same. They have gained independence and have equal rights and obligations in the family.<sup>16</sup> So, it has been accepted as *de lege ferenda* that women shall be licensed to choose their surname.<sup>17</sup> However, when there was still no effort to make new legal regulations, and the exercise of this right is subject to the obligation to file a lawsuit, it is contrary to gender equality.

Thus, in practice, women proved that the provision creates discrimination by filing a lawsuit and hence used their maiden surnames without their husbands' surnames. The courts agreed that there was an inequality in this provision, but filing a lawsuit was time-consuming and money-consuming. Unfortunately, case law could not provide sufficient legal protection on its own. Meanwhile, many individual applications have been made to the European Court of Human Rights and the Constitutional Court of Türkiye.

The Constitutional Court of Türkiye stated in its early decisions that it doesn't constitute discrimination or violation that women cannot continue to use only their maiden name after marriage.<sup>18</sup> In its rejection decision, the Constitutional Court did not mention the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, to which Türkiye is a party. However, it was clearly emphasized in the dissenting opinion that the provisions of the said convention and Turkish Constitution Article 10 include equality between men and women and that these regulations should be considered.<sup>19</sup>

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Atasoy, "Evli Kadının Soyadı Sorunu 'Anayasal' mı 'Bireysel' mi?", *Uyuşmazlık Mahkemesi Dergisi*, 5 (2015) 131-170.; Hayrunnisa Özdemir, "Türk ve İsviçre Medeni Hukukunda Ad Üzerindeki Hak ve Korunması", *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, 57 (2008) 561-598; Mustafa Dural, Tufan Ögüz and Mustafa Alper Gümüş, *Türk Özel Hukuku Cilt III Aile Hukuku*, (17th Edition, Filiz Kitabevi, İstanbul 2022).

<sup>15</sup> The opposite viewpoint claims that it would be against public order for women to use their last names. On the other hand, it also states that explaining the situation to others will be challenging if a child has a different last name than his/her parents. Turgut Akıntürk and Derya Ateş, *Aile Hukuku İkinci Cilt* (22nd Edition Beta Yayıncılık, İstanbul 2020) 118.

<sup>16</sup> Koçhisarlıoğlu, 266.

<sup>17</sup> 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) 23-30.

<sup>18</sup> 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.

<sup>19</sup> Ünal Özkorkut, 29; Seda Çakırca, "Evli Kadının Soyadına İlişkin Güncel Gelişmelerin Değerlendirilmesi", *İÜHFİM*, 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*, 5/1 (2017) 54.



The first Turkish application<sup>20</sup> to the European Court of Human Rights regarding this issue belongs to Ayten Ünal Tekeli.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

Finally, in 2023, the Constitutional Court of Türkiye decided to annul Article 187 because of all the developments mentioned above and the women's fight.<sup>24</sup> The Court stated that there is no reasonable and objective justification for the provision preventing women from using their maiden name alone after marriage since the fact that men and women bear a common surname is not a mandatory element that protects family ties. As of now, our Civil Code contains no laws governing women's surnames after marriage. Thus, it is anticipated that there will be a new, equal regulation on women's surnames. In conclusion, the name is a legal right for both men and women. This right cannot be restricted unequally. Therefore, more equitable regulation should be made instead of the repealed form of Article 187.<sup>25</sup>

## B. Personal Status of Divorced Women

The issue of the women's surname has not ended with Article 187. According to Turkish Civil Law, the surname of divorced women is another problem. 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.*

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<sup>20</sup> The first application to the European Court of Human Rights was *Burghartz v. Switzerland* <<https://hudoc.echr.coe.int>> accessed 01 March 2024.

<sup>21</sup> *Ünal Tekeli v. Turkey*, 29865/96 <<https://hudoc.echr.coe.int>> accessed 01 March 2024.

<sup>22</sup> *Tuncer Güneş v. Turkey*, 26268/08 <<https://hudoc.echr.coe.int>> accessed 01 March 2024.

<sup>23</sup> AYMT.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.

<sup>24</sup> AYMT.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.

<sup>25</sup> Tuğçem Seçer, "Eşlerin Soyadı ve Kanun Metni Önerisi" *İstanbul Medeniyet Üniversitesi Hukuk Fakültesi Dergisi*, 9/1 (2024) 284-285; Tuğçem Seçer, "Çocuğun Soyadı" *Yargıtay Dergisi*, 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*, 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*, 4/2 (2024) 493-526; Mustafa Şahin, "Anayasa Mahkemesi'nin İptal Kararı Ardından Türk Hukukunda Evli Kadının ve Çocuğun Soyadı" *TBB Dergisi* 170/36 (2024) 1-38.

*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.*" As it's seen, as a rule, divorced women keep the status that they gained by marriage. However, while concepts like citizenship and majority are ensured, even though the surname is also a personal status right, it's not protected.<sup>26</sup>

After the dissolution of marriage, women must retake their maiden name. The law provides no simple choice for the woman who takes her husband's surname after marriage.<sup>27</sup> The women may file a law case to keep their husband's surname after marriage when some legal conditions are provided.<sup>28</sup> These provisions make women beg for the husband's surname after marriage.<sup>29</sup> The judge will only accept the case if the women are interested in using 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 violates the personality rights of women who took their husband's surname not voluntarily but because of a legal regulation that forces them to leave the surname after the marriage union has ended.<sup>30</sup>

Also, according to Article 173, when the legal conditions that the women provide to keep their husband's surname after marriage change, the ex-husband may request an annulment of the court's permission. In other words, the ex-husband may claim from the court to prevent his ex-wife from using his surname.<sup>31</sup>

Meanwhile, an application has been made to the Constitutional Court of Türkiye. In the application, it was alleged that only the men are entitled to request the annulment of the decision allowing the women to use their divorced husband's surname, which is contrary to equality under Article 10 of the Turkish

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<sup>26</sup> Tekinay, 301; İpek Sağlam, Turkish Family Law, (Oniki Levha Yayınları, İstanbul 2019) 178.

<sup>27</sup> Sağlam, 178.

<sup>28</sup> Sağlam, 179-180; Ömer Uğur Gençcan, *Boşanma Hukuku*, (10th Edition Yetkin Yayınları, Ankara 2021) 1217-1218; Burcu Bahar Çataloğlu B. B and Seldağ Güneş Peschke, "30.09.2015 tarihli HGK Kararı ve Sonrası Evli Kadının Soyadına İlişkin Bir Değerlendirme", AÜHF Dergisi, 69/2 (2020) 407.

<sup>29</sup> Kumru Kılıçoğlu Yılmaz, "Kadının Bitmeyen Soyadı Sorunu" Ankara Barosu Dergisi, 4 (2014) 590.

<sup>30</sup> Burcu Bahar Çataloğlu, Seldağ Güneş Peschke, "30.09.2015 tarihli HGK Kararı ve Sonrası Evli Kadının Soyadına İlişkin Bir Değerlendirme", AÜHF Dergisi, 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, 22 (2016) 2019; İffet Didem Suna, "Kadının Soyadı" Konya Barosu Dergisi, 1/1 (2021) 34-38.

<sup>31</sup> Sağlam, 180.

Constitution. Because it is argued that women must wait for their divorced husbands to file a case if the circumstances alter. In this instance, restricting the women's ability to file a lawsuit contradicts the ideas of legal equality and the right to legal remedies. In this decision, the Constitutional Court of Türkiye stated that this article doesn't constitute any discrimination or violation.

In its rejection decision, the Constitutional Court mentioned that although it is stated in the application that only the men can request the annulment of the court's permission decision, the purpose of the regulation is not to prevent the divorced women's right to sue, but to allow the men, who will be directly affected by the change of women's conditions. Furthermore, there is no mandatory regulation to express that the man can only submit the action. Women permitted to use their ex-husband's surname may also ask for this permission to be withdrawn if the situation changes or there is no longer a justified reason. Therefore, Article 173 does not contradict the principle of equality under Article 10 of the Turkish Constitution.<sup>32</sup>

Although the Constitutional Court of Türkiye has rejected the application, this decision does not change the fact that the article creates gender inequality. The issue here is not the recognition of the right to file a lawsuit for women or men but to give women the freedom to protect their personal status after divorce. As beforementioned, the widowed women shall return to their widow's surname upon remarriage and divorce. On the other hand, this regulation aims to allow women to bear the same surname as their children from the divorced husband.<sup>33</sup> But in today's world, women may, for example, want to be recognized with their ex-husbands' surname just because of their academic publications.<sup>34</sup> Nonetheless, prohibiting the women's right to use their maiden name to offer protection is incorrect.

Furthermore, the legal procedure is not over even when the women file a lawsuit to be granted permission to use their ex-husband's surname because women do not have this so-called privilege forever. If the circumstances change, for example, if the women get married, the men can ask the court to annul this decision. In other words, the women must live with the risk of losing their surname repeatedly.<sup>35</sup> Therefore, Turkish Civil Code Article 173 should be annulled without the need for an updated regulation. An update or replacement won't be necessary because, as beforementioned, Article 187 has been repealed and a more liberal provision has been expected to take place.

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<sup>32</sup> AYMT.01.03.2012, 2011/51E and 2012/32K. For the full-text <<https://normkararlarbilgibankasi.anayasa.gov.tr/Dosyalar/Kararlar/KararPDF/2012-32-nrm.pdf>> accessed 01 March 2024.

<sup>33</sup> Gençcan, 1217.

<sup>34</sup> Sağlam, 179; Y2HD T.19.03.2009, E.2007/19005 and K.2009/5094.

<sup>35</sup> Ahmet M. Kılıçoğlu, *Aile Hukuku*, (4th Edition Turhan Kitabevi, Ankara 2019) 126.



### C. Waiting period for Women after Dissolution of Marriage

Türkiye is a secular country, according to the mandate of the 1982 Constitution Article 2, 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.<sup>36</sup> 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 relationship between religion and society, and religious orders may structure the legal regulations somehow.<sup>37</sup>

The period that the women must wait after the dissolution of marriage before remarrying someone else is called “*iddet*”, “*iddah*” or “*waiting period*”.<sup>38</sup> Islam puts significant importance on the waiting period. According to Islam, *iddah* is a legal and religious duty.<sup>39</sup> *Iddah* strongly expects to provide multiple benefits. First, it's a protection for the maintenance of true bloodline. Second, it motivates women to respect and be loyal to their ex- or dead husbands.<sup>40</sup> Third, it creates time for couples to think about remarriage.<sup>41</sup> And the last, it prevents couples from having indiscreet affairs.<sup>42</sup>

<sup>36</sup> “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*, 10/1 (2018) 219.

<sup>37</sup> Annette Mahoney, Kenneth I. Pargament, Aaron Murray-Swank, Nichole Murray-Swank, “Religion, and the Sanctification of Family Relationships” *Review of Religious Research*, 44/3 (2003) 220; Ahmet Rıfat Geçioğlu, Ertuğrul Döner, “İslâm’da Evlilik ve Aile Bağlamında Günümüzde Tartışılan Konular Üzerine Psiko-Sosyal Bir Değerlendirme” *ÇÜİFD*, 19/2 (2019) 79.

<sup>38</sup> Tekinay, 300; Zevkliler, 627; Akıntürk/Ateş, 291; Halil Cin, *İslam ve Osmanlı Hukukunda Evlenme* (Second Edition, Selçuk Üniversitesi Basım Evi, Konya 1988); Fatih Karataş, “İslam Hukukunda İddet” *Şirnak Üniversitesi İlahiyat Fakültesi Dergisi*, 4/8 (2013) 162; İpek Yücer Aktürk, “Kadınlara Özgü Bekleme Süresi ve Sınırlı Evlenme Yasağı Sorunu”, *Başkent Üniversitesi Hukuk Fakültesi Dergisi*, 9/2 (2023) 195-208.

<sup>39</sup> Sunuwati Siti Irham, Yunus Rahmawati, “Gender Equality in Islamic Family Law: Should Men Take Iddah (Waiting Period After Divorce)?” *Russian Law Journal*, 11/3 (2023) 1132; Karataş (n.25), 162-164.

<sup>40</sup> 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*, 48/4 (1973) 203-215.

<sup>41</sup> The waiting period may lead couples to re-think about divorce, in other words, it may discourage them from 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*, 23/2 (2021) 255.

<sup>42</sup> Sinta Pomahiya, Nur M. Kasim, Dolot Alhasni Bakung, “Legal Consequences of Marriage During Iddah Period Based on Compilation Islamic Law” *Estudiante Law Journal*, 4/3 (2022) 717; Karataş (n.25), 164-165.

Most Islamic States regulate the iddah period in their family laws.<sup>43</sup> This period is generally applied only to women.<sup>44</sup> On the other hand, the iddah period is sometimes adopted for men. For example, men should not marry ex-wives' sisters or aunts during the waiting period. If the men divorce one of the four wives, shall not marry in the waiting period for this wife. If the men divorce a freewoman, shall not marry a slave woman in the waiting period for his ex-wife.<sup>45</sup> But, it must be considered that the Islamic rules have come to the patriarchal structured society. Hence, these rules are generally in favor of men, and in this connection, they create a contradiction with today's women's rights.<sup>46</sup>

As mentioned above, before the Turkish Civil Code nr.743, there was a family code of the Ottoman Empire (Hukuk-ı Aile Kararnamesi) which was based on Islamic regulations in force. Since iddah is a legal and religious duty according to Islam, the family code of the Ottoman Empire has regulated this religious duty on a legal basis.<sup>47</sup>

The Turkish Civil Code nr.743 Article 95 has also adopted this regulation. According to the article, *"A woman who becomes a widow because of the death of her husband or divorce, or whose marriage has been declared null and void, may not remarry until three hundred days have passed. This period ends with childbirth. The judge may shorten this period if it is not possible for the woman to conceive or if the spouses wish to marry each other again."* However, the waiting period regarding religious basis differs from this regulation.<sup>48</sup> The most major evidence of that conclusion is that according to the Turkish Civil Code if the women marry again within the waiting period, the marriage will still be valid.<sup>49</sup> In addition, women are allowed to engage but not marry during the

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<sup>43</sup> 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.

<sup>44</sup> Since only women are capable of becoming pregnant, the idea of iddah is exclusively related to sex. Rahmawati et al. (n.26), 1133.

<sup>45</sup> Cin, 122; This waiting period for men is comparable to the penal waiting period defined by Turkish Civil Code nr.743 Article 122. However this regulation is annulled in 1988.

<sup>46</sup> Geçioğlu/Döner (n.24), 607.

<sup>47</sup> Yılmaz Yurtseven, "1917 Tarihli Hukuk-ı Aile Kararnamesi ve Osmanlı Aile Hukukuna Getirdiği Yenilikler", Selçuk Üniversitesi Hukuk Fakültesi Dergisi, 11 (2003) 248; Seda Gayretli Aydın, "Kadın ve Kanuni Bekleme Süresi", TBB Dergisi, 136 (2018) 267; Konan, 348-349; Kayabaş, 93-94; Yücer Aktürk, 196.

<sup>48</sup> For instance, in Islam, this period varied depending on whether the woman was a slave or free. Cin, 119-122.

<sup>49</sup> At the same time, the registrar who does not refuse the marriage application and perform the marriage ceremony has no legal or criminal liability. Yücer Aktürk, 200.

waiting period.<sup>50</sup>

This rule has also continued to be accepted by the Turkish Civil Code nr.4721. 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.*”<sup>51</sup> Unlike Islamic “*iddah*”, according to the Turkish Civil Code nr. 4721 “*the waiting period*” is not related to religious duties.<sup>52</sup> Turkish Civil Code regulates the waiting period to protect maintaining a true bloodline.<sup>53</sup>

In this connection, the Turkish Civil Code forbids women from remarrying 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.<sup>54</sup> This article doesn’t give any restrictions for men regarding the dissolution of marriage but does not allow women to marry within 300 days.<sup>55</sup> In other words, no obstacles or delay periods prevent the men from marrying again.<sup>56</sup> 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.

<sup>50</sup> Esat Arsebük, *Medeni Hukuk Cilt II*, (Recep Ulusöğlü Basımevi, Ankara 1940) 620.

<sup>51</sup> This article is regulated in parallel with the former Article 103 of the Swiss Civil Code. However, the Federal Law dated 26.06.1998 repealed Article 103 of the Swiss Civil Code.

<sup>52</sup> 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*, 36/3 (2015) 3161.

<sup>53</sup> Zevkliiler, 627; Gayretli Aydın, 271; Arsebük, 618-619; Şeyma Nalbant Ülger, “İslam Hukuku ve Türk Medenî Kanunu’nda İddet” *Kocatepe İslami İlimler Dergisi*, 5/2 (2022) 609; Sera Reyhani Yüksel, “Kadın ve Erkeğin Eşit Haklara Sahip Olması İlkesinin Aile Hukuku Alanında Uygulanması” *TBB Dergisi*, 145 (2019) 405.

<sup>54</sup> 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.

<sup>55</sup> 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.43), 262.

<sup>56</sup> Arsebük, 618; Sağlam, 177; Reyhani Yüksel (Aile Hukuku Alanında Uygulanması), 406.

On the ground of this double standard, Nurcan Bayraktar filed a case before the European Court of Human Rights.<sup>57</sup> 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 Agreements and Conventions in which Türkiye is a party. Applicant Nurcan Bayraktar first brought an application 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 8<sup>58</sup>, 12<sup>59</sup>, and 14<sup>60</sup> of the European Convention on Human Rights.<sup>61</sup> 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.<sup>62</sup>

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<sup>57</sup> Nurcan Bayraktar v. Türkiye, 27094/20 <<https://hudoc.echr.coe.int/>> accessed 01 March 2024.

<sup>58</sup> 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.”

<sup>59</sup> 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.”

<sup>60</sup> 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.”

<sup>61</sup> For the full-text <<https://www.echr.coe.int/documents/d/echr/convention>> accessed 01 March 2024.

<sup>62</sup> 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

As we all know, marriages usually end long before the court decides to divorce. Again, when the court process is prolonged<sup>63</sup>, the parties may couple with 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 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.<sup>64</sup>

In 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.

#### D. Alimony

Alimony is financial support that a court orders to give their spouse during separation or after divorce.<sup>65</sup> The aim of alimony is the belief that the spouse's duty to support one another should continue after divorce.<sup>66</sup> 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 seen from the provision, alimony is gender-neutral according to the Turkish Civil Code, which may seem equal.<sup>67</sup> However, this provision should be considered, along with some important facts about Turkish society's social and cultural understanding.<sup>68</sup> Because the Civil Code may enact laws contradicting gender equality to protect

*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.*"

<sup>63</sup> 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](https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/29032023141410adalet_ist-2022cal%C4%B1sma100kapakl%C4%B1.pdf)> accessed 01 March 2024.

<sup>64</sup> See; Nurcan Bayraktar v. Türkiye, 27094/20 <<https://hudoc.echr.coe.int/>> accessed 01 March 2024.

<sup>65</sup> Mecit Demir, *Türk Medeni Hukuk Öğreti ve Uygulamasında Yoksulluk Nafakası* (Seçkin Yayıncılık, Ankara 2018) 18-19; Hüseyin Hatemi, *Aile Hukuku* (9th Edition On İki Levha Yayınları, İstanbul 2021) 137; Emin Başaklar, *Nafaka Davaları, (Halkevleri Kültür Vakfı Basımevi, Ankara 1974) 87.*

<sup>66</sup> Dural, Ögüz and Gümüş, 157; Demir, 40.

<sup>67</sup> Dural, Ögüz and Gümüş, 158; Demir, 61-62.

<sup>68</sup> Sinan Sami Akkurt, "TMK m. 175 Hükmünün Yoksulluk Nafakasının Süresine İlişkin Yaklaşımının Hukuki Yorum Yöntemleri Çerçevesinde Tahlili" *Anadolu Üniversitesi Hukuk Fakültesi Dergisi*, 10/1 (2024) 1-18.

the weaker party against social realities.<sup>69</sup>

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.<sup>70</sup> According to The Universal Declaration of Human Rights Article 23, “Everyone, without any discrimination, has the right to equal pay for equal work.”<sup>71</sup>

Although women’s rights advocates fight to improve women’s legal, educational, economic, and socio-political status, many economically inactive women remain in Türkiye.<sup>72</sup> These women are depending on their husbands’ income. So, after divorce, they generally have no job and no income other than alimony. Therefore, in the Turkish law system, alimony is a concept that men generally pay 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.<sup>73</sup> Even though there has been much invisible labor that women have done during the marriage.<sup>74</sup> 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.<sup>75</sup>

According to men’s advocates, women can be said to have two sources of income given the regime of acquired property participation (economic

<sup>69</sup> Zevkliler, 489.

<sup>70</sup> See the report <[https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_650553.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_650553.pdf)> accessed 01 March 2024.

<sup>71</sup> <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> accessed 10 March 2024.

<sup>72</sup> See the reports <<https://ceidizler.ceid.org.tr/dosya/turkiyedetoplumsal-cinsiyetesitliginiizl-emeraporu20212022pdf.pdf>>; <[https://vatandas.jandarma.gov.tr/KYSOP/uzaktan\\_egitim/Documents/1%20TCE.pdf](https://vatandas.jandarma.gov.tr/KYSOP/uzaktan_egitim/Documents/1%20TCE.pdf)>; <[https://read.oecd-ilibrary.org/social-issues-migration-health/the-pursuit-of-gender-equality\\_9789264281318-en#page2](https://read.oecd-ilibrary.org/social-issues-migration-health/the-pursuit-of-gender-equality_9789264281318-en#page2)> accessed 10 March 2024.

<sup>73</sup> Gillian Douglas, “Women in English Family Law: When Is Equality Equity?” Singapore Journal of Legal Studies, Special Issue (2011) 25-26.

<sup>74</sup> Domestic labor includes many elements, such as cleaning, cooking, laundry, dishwashing, ironing, childcare, and emotional support for children and husbands. In modern society, the concept of work is considered to be labor in exchange for wages. For this reason, these works of women, which cover almost half of the day, are not recognized as labor. Since unpaid domestic labor is considered the natural responsibility of women, it is not considered in divorce proceedings. Ayşe Aydın Şafak, *Feminist Bir Bakışla Türk Aile Hukukunda Kadın Bedeni* (On İki Levha Yayınları, İstanbul 2014) 52-54.

<sup>75</sup> Akkurt, 3; Semra Yılmaz, “Türkiye’de Kadınların Çalışma Hayatındaki Yeri ve Sosyal Güvenlik Hukuku Düzenlemeleri” Sosyal Çalışma Dergisi, 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, 21/2 (2009) 41-54.

partnership) and the indefinite alimony arrangement. Therefore, when one of the parties receives an equal share of the marital estate, this may be considered a source of income for imposing support responsibilities.<sup>76</sup> 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”<sup>77</sup> because men think that indefinite alimony violates rights.<sup>78</sup>

Article 144 of the repealed Civil Code nr.743 regulated that alimony can be granted for one year after marriage.<sup>79</sup> This limitation was criticized at that time as women could fall into an economically difficult situation if the alimony was granted for a year. Thus, the regulation regarding alimony should have been indefinite.<sup>80</sup> On the other hand, it’s important to acknowledge that social and economic structure developments have lessened the differences between men and women.<sup>81</sup>

This discussion has also been subjected to the Constitutional Court of Türkiye. The applicant claimed that the phrase “indefinitely” in Article 175 of the Turkish Civil Code, obligates one spouse with a lifelong financial duty in favor of the other. Therefore, this article contradicts the principle of equality under Article 10 of the Turkish Constitution. In this decision, the Constitutional Court of Türkiye stated that this article doesn’t constitute any discrimination or violation. In its rejection decision, the Constitutional Court mentioned that if the conditions are completed, the spouse must provide alimony indefinitely to the other spouse who falls into poverty because of the divorce. This requirement comes from the principle of the social state and from the spouse’s duty to support one another, which should continue after divorce.<sup>82</sup>

In this scope, for the first time, an alimony restricted to two years was awarded by the First Instance Court, a family court, because the marriage took a short time, the spouses had no kids, and they would never see each other again. However, the Court of Cassation has reversed this decision and stated that

<sup>76</sup> Laura W. Morgan “Double Dipping: A Good Theory Gone Bad [notes]” *Journal of the American Academy of Matrimonial Lawyers*, 25/1 (2012) 139-140.

<sup>77</sup> Dural, Öğüz and Gümüş; 159; See <<https://www.ntv.com.tr/turkiye/adalet-bakani-tuncantanasuresiz-nafaka-aciklamasi,VDMPO1Gyikux1IpnJr3xww>>; <<https://medyascope.tv/2023/10/11/yeniden-refah-partisi-nafaka-teklifini-tbmm-baskanligina-sundu/>> accessed 01 March 2024.

<sup>78</sup> Dilek Keleş, “Toplumsal Cinsiyet Karşıtı Hareketlerin Bir Örneği Olarak “Süresiz Nafaka Mağdurları Platformu” Akdeniz Kadın Çalışmaları ve Toplumsal Cinsiyet Dergisi, VI/2 (2023) 517-544; Demir, 65-67.

<sup>79</sup> Arsebük, 794-795; Hatemi, 137; Başaklar, 87.

<sup>80</sup> Zevkliler, 630; Dural, Öğüz and Gümüş; 160.

<sup>81</sup> Tekinay, 309; Hatemi, 140.

<sup>82</sup> AYM T.17.05.2012, 2011/136E and 2012/72K. For the full-text <<https://normkararlarbilgibankasi.anayasa.gov.tr/Dosyalar/Kararlar/KararPDF/2012-72-nrm.pdf>> accessed 01 March 2024.

indefinite alimony may be awarded when one of the spouses cannot maintain the standard of living<sup>83</sup> for the parties after the divorce. Moreover, the law does not restrict alimony with time limitations. Since the law stipulates that 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.<sup>84</sup>

The indefinite alimony has also been subjected to the Constitutional Court of Türkiye.<sup>85</sup> The application claims 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 to support the spouse who will fall into poverty due to divorce to sustain minimum living needs.<sup>86</sup>

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.<sup>87</sup> However, this provision was issued because it contradicts the principle

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<sup>83</sup> 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.

<sup>84</sup> 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.

<sup>85</sup> 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.

<sup>86</sup> Some authors criticize this approach. 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, 4/1 (2022) 350-351.

<sup>87</sup> 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.*”



of equality between women and men. Nevertheless, after the legal modification of the Civil Code, men and women become subjected to equal conditions regarding the obligation to pay alimony. This regulation, which seems prima facie fair, cannot ensure equality when evaluated with social facts.<sup>88</sup>

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 discrimination<sup>89</sup> is in the institution of the family. It may be discussed that women and men should be equal before the laws to ensure justice. However, justice does not always rise from commutative justice (*Justitia Commutative*). Even if equality is one of the foundations of the concept of justice, this concept should also include providing more to needy individuals.<sup>90</sup>

The idea that absolute equality in a regulation does not have the same effect on women and men implies that the focus should be on the rule of law's consequences and effects. This is called substantive equality. Substantive equality focuses, in particular, on compensating for past discrimination in the present. So, it is insufficient to adopt regulations while ignoring social consequences such as women's poverty and financial dependence on men created in time.<sup>91</sup>

So, treating everyone equally does not always ensure justice. It is necessary to treat those who are equal equally and those who differ differently. In this circumstance, it's just that the women can be given more rights and protection than the men.<sup>92</sup> 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.*"

According to the traditional marriage understanding, the wife makes numerous initial sacrifices that are valuable solely to her husband, such as childcare, household duties, or emotional support. These investments would be only made in exchange for a long-term commitment. In other words, a logical negotiator

<sup>88</sup> Sera Reyhani Yüksel, "Türk Medeni Kanunu Bakımından Kadın-Erkek Eşitliği" Gazi Üniversitesi Hukuk Fakültesi Dergisi, XVIII (2014) 195.

<sup>89</sup> 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, 15/Özel Sayı (2014) 372-378.

<sup>90</sup> "*Treating everyone equally may itself disrupt equality.*" A. Can Tuncay, "Adalet Nedir?" Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi, 171-172/13 (2018) 229-231.

<sup>91</sup> Aydın Şafak, 37-42.

<sup>92</sup> Bihterin Dinçkol, "Kadın-Erkek Eşitliği İçin Pozitif Ayrımcılık" İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi, 8/4 (2005) 103-104.

could only make these expenditures in exchange for a long-term commitment.<sup>93</sup> In this scope, seeing marriage as an investment, especially in today's conditions, would be unfortunate.

While spouses typically originate from identical socioeconomic backgrounds, their earning capacities differ. Because men often make more money than women do. True equality in terms of income to the marriage cannot be achieved even 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.<sup>94</sup> No woman should invest all her being in an emotional relationship that may not work out.<sup>95</sup> Even if the court orders the man to pay alimony to the woman, her economic well-being will be reduced after the marriage since her income is less.<sup>96</sup>

Leaving men under the obligation to pay alimony to their divorced wives throughout their lives 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. So, the law should find a solution to ensure equality for both genders.

In this scope, the Turkish Civil Code may rule out the possibility of indefinite alimony. In this case, the court may decide without eliminating the positive discrimination granted to women, but at the same time, by adopting an egalitarian attitude towards men. So, the court can decide by focusing on the specific status of the marriage, such as 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

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<sup>93</sup> 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*, 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.

<sup>94</sup> Ellman (n.52), 46.

<sup>95</sup> The amount of alimony awarded by the courts is enough that it prevents the alimony creditor 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.barobirltik.org.tr/Haberler/tubakkom-suresiz-nafaka-iddialari-hukuki-gercegi-yansitmamaktadir-84000>> accessed 01 March 2024.

<sup>96</sup> 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*, 43/5 (1990) 1496.

prospects of the spouses and the likely cost of reintegration into working life and ensure the most equal decision for both parties.<sup>97</sup>

## CONCLUSION

Equal rights are promised to men and women in the Turkish Civil Code. This study focuses on analyzing several precedent-setting clauses of the Turkish Civil Code that are supposed to ensure gender equality. From this point, this study examines the provisions of the law that have recently been subjected to judicial decisions of the High Courts of Türkiye and the European Court of Human Rights.

Firstly, the surname of women is such a concept that has developed 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 parliament has still not made the necessary regulation. Also, 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.

Second, another point to be mentioned is that it is insufficient to revise only the annulled provision, Article 187. Because there are more provisions regarding the surname in the Turkish Civil Code, for example, along with the amendment of the provision on the woman's surname, Article 173 should also be annulled without needing an updated regulation. Because, as mentioned, this provision still creates discrimination against women. Hence, it would be more appropriate to reexamine the provisions of the Civil Code down to the ground before making regulations on the surname.

Third, 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, 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. The waiting period is a form of gender injustice. Therefore, Turkish Civil Code Article 132 should be annulled immediately without other replacement legislation.

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<sup>97</sup> Dural, Ögüz and Gümüş, 160; For example, Hatemi suggests that the overall wealth of the other spouse will be calculated proportionately and that the marital settlement for divorce may be determined based on this calculation. Hatemi, 140.

It may be discussed that women and men should be equal before the laws to ensure justice. However, justice does not always rise from commutative justice. Although the concept of justice is based on equality, it ought to involve providing more to those in need. In other words, it is necessary to treat those who are equal equally and those who differ differently. 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 genders.

Article 125 of the Swiss Civil Code may enlighten Turkish legislators on this. According to this regulation, when a spouse cannot reasonably be expected to provide for his or her maintenance, the other spouse must make 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 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 the marriage and spouses and ensuring an equal decision for both parties.

In sum, the surname of women, personal status of the divorced woman, waiting period, and alimony were only four 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, Turkish women actively pursue the equality outlined in the Civil Code. For equality to be maintained and for Turkish women to receive the respect they are promised, equality must be guaranteed in both the letter and the spirit of the Turkish Civil Code.

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