CONTROVERSY OVER WOMEN’S SURNAME:
INDIVIDUAL RIGHTS VS. FAMILY UNITY

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Abstract: One reflection of patriarchal structure in many societies is that women are forced to change their surnames into the surname of the husband upon marriage. This practice is arguably a violation of human rights. Indeed, in a case regarding women’s surname after marriage (Ünal Tekeli v. Turkey, 16 November 2004, no. 29865/96) the European Court of Human Rights decided against Turkey. The court held that Turkey’s refusal to let the applicant (a female lawyer) use only her maiden name as her surname was in violation of Article 8 (right to respect private and family life) and Article 14 (prohibition of discrimination) of the European Convention of Human Rights. Following the cited decision, a family court in Ankara recently ruled in favor of an applicant seeking approval for using her maiden name despite being married; however the decision was overruled by the Turkish Supreme Court relying on arguments based on the current legislation, which prioritizes the concept of family unity over women’s right to keep their surnames. Focusing on this hotly debated issue in the Turkish context, this paper will:
- Explain regulations regarding surnames of married women in Turkey and contrast these with corresponding regulations in other legal systems;
- Assess the validity of Turkey’s arguments from a human rights perspective;

Keywords: Women’s surname, human rights, family unity, Turkey, ECtHR

Introduction

The name is a social sign that ensures the identification of a person and her/his distinction from other individuals and is formed of two main parts: The first (first name) serves to call the person in daily life, and to determine who he/she is, whereas the other (surname) integrates a person in a family, transcends from generation to generation and establishes a symbolic connection between family members.

As the name has served to distinguish the person from others as an individual, with the emerging of the modern state, it also provides requirement of the public interest: the State carries out census, registers the individuals on the state registers with their names and surnames, and thus meets the socially required need for order. That is why, once a name is given, the person does not have the right to change such name whenever he/she likes without just cause. Exceptionally, “Change of name may only be claimed from the judge with grounds of just cause” (Turkish Civil

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Pursuant to the Turkish Civil Code the surname which is gained by way of birth cannot be changed as well. However, marriage causes a compulsory change on the women’s surname. Married women shall bear their husband’s surname (TCC art. 187), whereas married men continue to preserve their surname acquired by way of birth, after marriage.

I. Name of the Married Woman as per the Turkish Civil Code

The Republic of Turkey, founded in 1923, endowed the country with a laic and liberal legal system with the 1926 Civil Code, which was adapted from Switzerland via reception. The Civil Code represents, besides other amendments made in the social sphere, a great step in providing equality between women and men. This Code, considered among the most modern of its period, reflected the traditional understanding of the family law of its era. However, many provisions involving women deserve criticism from a contemporary feminist point of view. One of them is the provision that the married woman shall bear her husband’s surname, which is regulated under paternalist influences.

Many articles unbalancing woman – man equality were revised, as well as new regulations were made to provide woman – man equality in the New Civil Code which entered into force in 2002. Discussions related to the married woman’s name came up in the enactment of these regulations. The legislative proposal towards the preservation of a woman’s original surname instead of taking her husband’s surname was not accepted on the grounds that it would contradict traditions (Nomer, 2002, p. 423), and following the debates, the woman’s surname was regulated under Article 187 of the Civil Code as follows: the married woman shall bear her husband’s surname by marriage; however, she may apply in writing to the registrar of marriages before marriage or to the civil registry office afterwards to use her former surname before her husband’s surname. In this case the married woman may preserve her surname before marriage at will but compulsorily takes her husband’s surname.

With the amendments made in 2002, with feminist issues taken into consideration, such provision was superseded by means of newly brought provisions, by which women and men who choose the family house together, who have equal voice on child raising, who equally represent the union of marriage, appear in a legal arrangement conforming to the principle of equality stated in the Constitution. Nevertheless, the rule of the woman taking compulsorily her husband’s surname was not amended on grounds of the belief that lineage comes from men, and that the continuity of

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2 This ruling actually relies on the amendment dated 1997 brought to the former Civil Code dated 1926.
lineage is ensured by boys. The fact that the question of women’s surname is prevalently considered as a problem “only for a specific portion of the society” and which is “unimportant” has come into play in this matter (Çakırca, 2010, p. 706).

II. Principle of Equality as per the Constitution of the Republic of Turkey

As per Article 10 of the Constitution of the Republic of Turkey:

“Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.

Men and women have equal rights. The State has the obligation to ensure that this equality exists in practice. [...] No privilege shall be granted to any individual, family, group or class. State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings.”

Article 10 of the Constitution generally regulates equality. Another article draws attention: in paragraph 1 of Article 41 related to the Protection of Family and again following the statement that the family is the foundation of Turkish society, it is indicated that the family is based on the “equality between spouses”.

According to the Constitution, the principle of equality shall be valid in all areas of society. This principle of equality is emphasized again in order to ensure equality in the family. When the subject of the surname is taken into consideration, while it is possible for men to carry the same surname with their children, women are deprived from such possibility. Furthermore if a married man is adopted, his surname will change along with his spouse’s surname. Should the married man want to change his surname by applying to the court, in case the court acknowledges his right, again his spouse’s surname will change even without her consent. As seen, the married woman is not able to preserve her native surname, to transfer it to her children, and cannot be considered as a decision maker in the continuation of her surname (Özen, 2015, p. 94).

The married woman is subjected to her surname’s change upon marriage, retrieving her former surname upon divorce. However, if the woman proves that she has a legitimate interest in using her divorced husband’s surname and that such use shall not harm the husband, the court may authorize the preservation of the divorced husband’s surname. The husband may request for the discharge of such authorization in the event of a change of conditions, placing the divorced woman in a difficult situation. Divorce in practical life causes the need to reorganize information related to all credit cards, passports, driving licenses and identity cards, and although the husband being
married or single or widowed has no effect on his surname, a woman who gets married and
divorced and then gets married again can have many different surnames during her entire lifetime.

When considering that the requirement that all legislative regulations shall conform to the Constitution, one should come to the conclusion that the provision related to the woman’s surname is contrary to the principle of equality and thus to the Constitution.

III. Women’s Surname in the Ratified International Treaties

Pursuant to Article 90 of the Constitution of the Republic of Turkey,

“International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail”.

In this case, it should be examined whether or not an international treaty related to the woman’s surname has been signed, and the existence of a contradiction with such treaties be investigated.

Turkey has signed the United Nations Universal Declaration of Human Rights and rendered such treaty a domestic rule of law. In the Preamble of this Declaration it is stated that “the peoples of the United Nations have in the Charter reaffirmed their faith in […] the equal rights of men and women”, and general equality understanding is regulated in Articles 1 and 7, as well as the equality understanding in the union of marriage regulated in Article 16. Even though it is accepted that the Declaration is not legally binding, it has been an important resource to the decisions of the Constitutional Court of Turkey by being respected by all states over time, and the consistent acceptance of the opinion that it binds all states. Therefore, it is seen that the principle of equality appearing in the Declaration is prejudiced one more time in respect of women’s surname.

The Republic of Turkey has also lately ratified the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) which was adopted by the United Nations General Assembly at the date of 18/12/1979 and entered into force in 1981. It seems possible to say that the current provision on the obligation for a married woman to take her husband’s surname in the Turkish Civil Code is also contrary to this treaty (Oktay Özdemir, 2016, p.2028).

Turkey, although not a Member State of the European Union, has established many legal relations with Europe. Turkey, being a part of the Council of Europe, shall also take Council of Europe’s decisions into consideration. The Council of Europe generally criticizes, in its decisions
and recommendations, all provisions bringing forth a superior protection to a spouse compared to the other and states that such provisions would violate the European Convention on Human Rights.

It is stated in the Resolution of the Committee of Ministers on Equality of Spouses in Civil Law dated 27/09/1978 that discrimination between sexes is ongoing, and some recommendations were made on the family name and the common child’s surname. According to such, it is proposed that a legislative regulation to be enacted in order to remove the compulsion of a spouse to take the other spouse’s surname by changing its own.

Turkey has also signed the European Convention on Human Rights and integrated it to its domestic law. The European Convention on Human Rights does not include a provision on the women’s surname. Nevertheless, the court has conducted the discussions in the matter within the frame of the following Articles: Article 8 of European Convention on Human Rights regulates the right to respect for private life, family life, home and communication, Article 12 stipulates the right to marry and to form a family, and Article 14 brings forth the prohibition of discrimination among the beneficiaries of the protected rights and freedoms.

**IV. Decision of the European Court of Human Rights: Ünal Tekeli v. Turkey**

It should be mentioned to a decision of the European Court of Human Rights related to the subject matter: Ayten Ünal Tekeli being a lawyer, she was recognized with the surname Ünal at the beginning of her career. She then took the surname Tekeli with marriage, and had to leave the surname Ünal as regulated by the then-on-force former Civil Code. She applied to the first instance court in order to use the surname she had before marriage and her request was rejected. Ayten Tekeli then appealed before the Turkish Supreme Court which also rejected her appeal, and confirmed the rejection of the request made by the first instance court. Meanwhile, an amendment was brought to Article 153 of the Turkish Civil Code with a new paragraph preventing the loss of the surname before marriage and permitting its use in front of the spouse’s surname³. A. Tekeli requesting the use of her surname before marriage only, she deemed that such amendment did not answer her request and thus she did not benefit from it. All domestic remedies being exhausted, the case was brought upon the European Court of Human Rights.

The European Court of Human Rights concluded that the prohibition of use of the surname Ünal had a negative impact on professional activities as well as on other social fields. In the court decision, the subject matter was examined in the frame of Article 8, and the applicant was found

³ Please refer above to footnote 2.
injured. In examining whether Article 14 was violated, the purpose of reflecting family unity with a common family name was not found as an adequate ground for the discrimination based on sex subject to complaint in said case. The Court has given Turkey freedom to choose the remedy method to abate the determined violations. However Turkey being convicted in this case has yet to create a proper solution in accordance with the Resolution and Recommendation of the Council of Europe Committee of Ministers and the Parliamentary Assembly (Göztepe, 2006, p.45).

V. Women’s Surname in Constitutional Court Decisions

Discussions on the fact that the change of women’s surname depending upon marriage and divorce caused distress in women’s life persisted and the subject matter was also brought before the Constitutional Court of Turkey. The action for annulment of the Article 187 of the Turkish Civil Code which stipulates that women shall take their husband’s surname upon marriage was examined by the Constitutional Court and rejected.

The grounds used by the Constitutional Court for the annulment decision are striking:

“The purpose of the principle of equality set forth in Article 10 of the Constitution is to ensure that all persons with the same legal conditions be subject to the same procedures under the law. Different rules may apply for persons in different status and positions. When differences between economic and social statuses of married women and men are taken into consideration, the grant of a privilege to the husband’s surname in respect to family name would not contradict the principle of equality stated in Article 10 of the Constitution. Fundamental rights and liberties comprise the duties and responsibilities of a person to the society, to its family and to others. This point is explicitly stated in Article 12 of the Constitution. As in Article 41, it is described that the State shall take appropriate measures for the serenity and welfare of the family. Albeit the surname is a protected value in respect to personal rights, interventions may be done to such value for the unity and wealth of the family. The woman’s sacrifice in respect to abandoning her previous surname is a requirement arising from her duties and responsibilities vis-a-vis her family. Intervention to the married woman’s surname, aside from the protection of family unity and consolidation of family bonds, also serves to purposes including keeping registers of persons in order, preventing confusion in official documents and determination of the lineage. Therefore, such intervention relies on public interest and public order. Finally, it can be said that the choice of the husband’s surname as the family name is conform to the family apprehension and traditional structure of the Turkish society”.

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4Constitutional Court, 10.03.2011, Official Gazette: 21.11.2011.
The decision given by the Constitutional Court, taking into consideration the international treaties signed by Turkey, is a highly controversial, paternalistic decision, which also has ideological characteristics. As the grounds related to the identity and registry records do not make sense, the idea of protecting family unity by way of constituting discrimination between spouses is not also well suited.

The individual application right to the Constitutional Court of Turkey was brought with the referendum on the Constitution of the Republic of Turkey dated 2010. In its individual application decisions, the Constitutional Court has not assessed the women’s compulsory taking of their husband’s surname upon marriage in terms of equality principle. However it has decided that such provision violated Article 17 of the Constitution regulating physical integrity, corporeal and spiritual existence of the individual. Besides it has stated that such provision was also contrary to the international treaties to which Turkey is a party, and thus violated Article 90 of the Constitution.

VI. Evolution on Turkish Supreme Court Decisions

Parallel to these evolutions, Turkish Supreme Court started to accept women’s applications willing to use only their surnames. In the Turkish Supreme Court decisions, it is indicated that when domesticated international law rules are in question, such rules shall prevail over internal law. In this case, the Supreme Court refers to the principles of the European Convention on Human Rights including prohibition of discrimination, principle of equality, and indicates that the use of women’s maiden names would be appropriate.

Conclusion

The internal law regulation towards women’s compulsory procurement of their husband’s surname is revealing paternalistic characteristics, and violates the principle of equality. Besides, it is also contrary to the international treaties to which we are party to. The effort to base said provision to the protection of the family unity cannot be accepted. While the legal amendment needed to be done on the matter is way overdue, it is pleasing to see the evolution of practice of the Turkish Supreme Court. There is one last step to take from now on: amending Article 187 of the Turkish Civil Code regulating that women shall take their husband’s surname upon marriage, in the light of the decisions of the European Court of Human Rights and of the Turkish Supreme Court, and

5For the criticism of the decision, please refer to Serozan, 2013, p.151; Oder, 2013, p.12 ff.
6Supreme Court Civil Law General Assembly, 30.09.2015, 2-889/2011.
primarily granting both spouses the right to keep their own surname. Spouses may, at will, prefer to use one surname among the two as the family name. In this case, as it is in the current legislative regulation, it should be possible for the spouse whose surname is not the family name, to be able to use his/her surname in front of the family name.

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Controversy over Women’s Surname: Individual rights vs. Family unity

Abstract: Una reflexión de la estructura patriarcal en ambas sociedades es que mujeres están forzadas a cambiar sus apellidos con lo de sus maridos después del matrimonio. Esta práctica significa posiblemente una violación de los derechos humanos. En efecto, en un caso respecto al apellido de la mujer después del matrimonio (Unal Tekeli c. Turquía, 16 de Noviembre 2004, no. 29865/96) el Tribunal Europeo de Derechos Humanos decidió en contra de Turquía. El Tribunal sostuvo que la denegación de Turquía de dejar el demandante (una abogada) solo utilizar su nombre de soltera como su apellido constituía una violación del Artículo 8 (derecho de respectar la vida privada y familiar) y del Artículo 14 (prohibición de la discriminación) del Convenio Europeo de los Derechos Humanos. Siguiendo la decisión citada, un tribunal de familia en Ankara sostuvo recientemente a favor de un demandante buscando aprobación para utilizar su nombre de soltera a pesar de estar casada, no obstante la decisión fue rechazada por el Corte Suprema de Turquía dependiendo de argumentos fundados en la legislación corriente, cual prioriza el concepto de la unidad familiar por encima de los derechos de las mujeres de mantener sus apellidos. Centrándose en este tema muy debatido en el contexto turco, este trabajo intentará: Explicar las regulaciones respecto a los apellidos de mujeres casadas en Turquía y contrastar estos con regulaciones correspondientes en otros sistemas legales; Evaluar la validez de los argumentos de Turquía desde una perspectiva de derechos humanos.

Keywords: Constitución de la República de Turquía. Convención sobre la Eliminación de Todas las Formas de Discriminación Contra la Mujer. Unidad familiar. Derechos individuales. Nombre de soltera. Apellido de las mujeres