

# THE MYTH OF GENDER EQUALITY IN TURKEY: HER NAME OR SIR-NAME?

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## ABSTRACT

*Gender equality is one of the most contentious matters in the contemporary Turkish society. Unlike in many other parts of the developed world, Turkish women still struggle to use their maiden name, as well as to pass it on to their children upon marriage. A woman's surname is of crucial importance to her identity. Despite the fact that Turkey is a part of the European Civil Law tradition and the Turkish Civil Code has a specific provision regarding women's surnames, Turkey has failed to grant its female population a choice in relation to their surname after marriage. The European Court of Human Rights has, in the past, censured Turkey on this very issue. The censure prompted Turkish lawmakers to accept an individual application mechanism before the Turkish Constitutional Court. This mechanism, however, does not guarantee gender equality or a choice for women to maintain their maiden name after marriage in Turkey. This article examines gender equality in Turkey through the problem of lack of right for wives to choose their marital surname upon marriage and exposes a gap between Turkey's domestic law practice and its international commitments by analyzing the case law of the Turkish judiciary and the European Court of Human Rights.*

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“One cannot put women and men on an equal footing. It is against nature. They were created differently. Their nature is different. Their constitution is different.”<sup>1</sup>

Recep Tayyip Erdoğan, President of Turkey

“Forcing a woman to take her husband’s name can be seen as a form of ‘depersonalization’ of a woman.”<sup>2</sup>

Svetlana Smirnova, Rapporteur for the Parliamentary Assembly of the Council of Europe

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## INTRODUCTION

Turkey is one of the very few Islamic states that has declared itself secular in the text of its Constitution.<sup>3</sup> The modern Turkish Republic was founded on the principles of secularism, the rule of law, and a pluralistic democratic system.<sup>4</sup> The

<sup>1</sup> Alexandra Sifferlin, *Turkish President Says Men and Women Are Not Equal*, TIME (Nov. 24, 2014), <http://time.com/3602883/turkey-erdogan-men-women/> (quoting Recep Tayyip Erdoğan, President of Turkey, *Address at the Women and Justice Summit* (Nov. 21, 2014)).

<sup>2</sup> Svetlana Smirnova (Rapporteur: Russian Federation, European Democrat Group), *Respect for the Principle of Gender Equality in Civil Law*, EUR. PARL. ASS., ¶ 4, DOC. 11177 (Feb. 6, 2007), reproduced in PARLIAMENTARY ASSEMBLY, WORKING PAPERS: 2007 ORDINARY SECESSION (SECOND PART) 16-20 APRIL 2007, at 51 (Council of Eur. Pub. 2007).

<sup>3</sup> Ergun Özbudun, *Secularism in Islamic Countries: Turkey as a Model*, in CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 135, 135 (Rainer Grote & Tilmann J. Roder eds., Oxford U.P. USA 2012).

<sup>4</sup> Ergun Özbudun, *Constitutions and Political System*, in THE ROUTLEDGE HANDBOOK OF MODERN TURKEY 194, 195-96 (Metin Heper & Sabri Sayari eds., 2012). For general information about

Turkish Constitution of 1982 also declares that Turkey is a democratic and secular republic, deriving its sovereignty from the People.<sup>5</sup> This sovereignty rests with the Turkish nation, which delegates the exercise of its sovereignty to an elected single-chamber parliament, the Turkish Grand National Assembly.<sup>6</sup>

Since the establishment of the Turkish Republic in 1923, the role of Turkish women in society has undergone a dramatic change.<sup>7</sup> The Turkish legal system underwent a complete overhaul as well.<sup>8</sup> For example, women's participation in the general economy of the state has steadily increased, their roles within the family have become more complex and diversified, and their social roles took on a new meaning.<sup>9</sup> In addition, the Turkish Civil Code of 1926, which was a revolutionary departure from the laws of the Ottoman era, placed Turkish women on the same footing as men.<sup>10</sup> This process of transition seemed to be completed by enshrining the right of women to vote and to be elected to the national assembly for the first time in 1934.<sup>11</sup> Despite these progressive changes, the legal development of women's rights in Turkey does not seem to have kept pace with other states in the Council of Europe where women play a more prominent role.<sup>12</sup> This is rather curious since Turkey is a signatory to the European Convention on Human Rights,<sup>13</sup> as well as other international legal instruments relating to gender

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Modern Turkey, see BERNARD LEWIS, *THE EMERGENCE OF MODERN TURKEY* 160 (2002); ERIK JAN ZURCHER, *TURKEY: A MODERN HISTORY* 173 (3d ed. 2004).

<sup>5</sup> At the outset, the characteristics of the Republic are defined in Article 2 of the Turkish Constitution of 1982 as follows: "The Republic of Turkey is a democratic, secular and social state governed by 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 set forth in the preamble." TÜRKİYE CUMHURİYETİ ANAYASASI [TCA] [CONSTITUTION] Oct. 18, 1982, art. 2 (Turk.).

<sup>6</sup> Article 4 of the Turkish Constitution of 1982 declares the irrevocability and immutability of the founding principles of the Republic that are set out in the first three articles of the Constitution, namely, (1) the Republican form of government; (2) secularism, social equality, and equality before law; and (3) the indivisibility of the Republic and of the Turkish nation. *Id.* art. 4.

<sup>7</sup> Asli Çarkoğlu & Nilüfer Kafescioğlu, *For Whose Sake Is It Anyway? Evaluation of Explicit Family Policies in Turkey*, in *HANDBOOK OF FAMILY POLICY ACROSS THE GLOBE* 239 (Mihaela Robila ed., 2014); Bilge Ataca & Diane Sunar, *Continuity and Change in Turkish Urban Family Life*, 11 *PSYCHOL. & DEVELOPING SOCIETIES* 77, 79 (1999).

<sup>8</sup> Adnan Güriz, *Sources of Turkish Law*, in *INTRODUCTION TO TURKISH LAW* 9 (Tuğrul Ansay & Don Wallace eds., 2013).

<sup>9</sup> See generally FERHUNDE OZBAY, *WOMEN, FAMILY, AND SOCIAL CHANGE IN TURKEY* 3 (Ferhunde Ozbay ed., 1990); Nur Vergin, *Social Change and the Family in Turkey*, 26 *CURRENT ANTHROPOLOGY* 571, 571 (1985).

<sup>10</sup> Zuhâl Yeşilyurt Gündüz, *The Women's Movement in Turkey: From Tanzimat Towards European Union Membership*, in *PERCEPTIONS* 116 (2004).

<sup>11</sup> *Id.*

<sup>12</sup> The World Economic Forum Global Gender Gap Report of 2015 ranks Turkey as 130th out of 145 countries considered. *Rankings, The Global Gender Gap Report 2015*, WORLD ECON. FORUM (2015), <http://reports.weforum.org/global-gender-gap-report-2015/>. The percentage of women among legislators, senior officials, and managers is a mere 13%. *Economies, The Global Gender Gap Report 2015*, WORLD ECON. FORUM (2015), <http://reports.weforum.org/global-gender-gap-report-2015/economies/#economy=TUR>.

<sup>13</sup> In addition to being a member of the European Convention on Human Rights, Turkey is also a party to the European Convention for the Prevention on Torture and Inhuman or Degrading Treatment or Punishment. *Chart of Signatures and Ratifications of Treaty 126: European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, COUNCIL OF EUR.,

equality.<sup>14</sup> Moreover, the European Court of Human Rights, through its jurisprudence and other major organs of the Council of Europe, such as the Parliamentary Assembly of the Council of Europe, has been unequivocal in declaring that gender equality is one of the cornerstones of a democratic society within the framework of the European Convention on Human Rights.<sup>15</sup>

The European Convention on Human Rights (“ECHR”) has strongly influenced the legal system and political discourse in Turkey since the country acceded to recognize the right of individual application to the European Court of Human Rights (“ECtHR”) in the early 1990s.<sup>16</sup> Surnames have a defining role in relation to women’s societal roles in Turkey because naming practices are fundamental to the conceptions of individuality, equality, family, and community.<sup>17</sup> In cases dealing with women’s surnames before the ECtHR, applicants can argue that their rights to private and family life under article 8 of the ECHR, taken together with the prohibition of discrimination laid down in article 14 of the ECHR, have been violated.<sup>18</sup> While the Turkish government has given lip service to the issue of gender equality,<sup>19</sup> true equality is far from being achieved. For example,

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[http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/126/signatures?p\\_auth=CukCYHQx](http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/126/signatures?p_auth=CukCYHQx) (last visited Mar. 5, 2016). Turkey also adopted the revised European Social Charter of 1996, which embodies, in one instrument, all of the rights guaranteed by the Charter of 1961, and the additional protocol of 1988. *Chart of Signatures and Ratifications of Treaty 163: European Social Charter (Revised)*, COUNCIL OF EUR., [http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163/signatures?p\\_auth=CukCYHQx](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163/signatures?p_auth=CukCYHQx) (last visited Mar. 5, 2016). The revised European Social Charter of 1996 adds new rights and amendments adopted by all the members of the Council of Europe. *Id.*

<sup>14</sup> The major U.N. human rights treaties ratified by Turkey are: the International Covenant on Civil and Political Rights; the International Covenant on Economics, Social and Cultural Rights; the Convention on the Right of the Child, the Convention on the Elimination of All Forms of Discrimination against Women; and the Convention on the Elimination of All Forms of Racial Discrimination. Dilek Kurban, *Protecting Marginalized and Minorities in the ECtHR: Litigation and Jurisprudence in Turkey, in THE EUROPEAN COURT OF HUMAN RIGHTS AND THE RIGHT OF MARGINALIZED INDIVIDUALS AND MINORITIES IN NATIONAL CONTEXT* 159 (Dia Anagnostou & Evangelia Psychogiopoulou eds., 2009).

<sup>15</sup> Şahin v. Turkey, App. No. 44774/98, para. 111, 44 Eur. H.R. Rep. 99 (2005) (Grand Chamber Judgment); *see also* Comm. of Ministers of the Council of Eur., Res. (78)37 on Equality of Spouses in Civil Law (1978); Comm. of Ministers of the Council of Eur., Recommendation R (85)2 on Legal Protection Against Sex Discrimination (1985); Comm. of Ministers of the Council of Eur., Declaration on Equality of Women and Men, 83d Sess. (1988); Eur. Parl. Ass., Recommendation 1229 (1994) on Equality of Rights Between Men and Women (1994).

<sup>16</sup> European Convention on Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 22 [hereinafter ECHR]; Loizidou v. Turkey, App. No 15318/89, para. 24, 310 Eur. Ct. H.R. (ser. A) (1995) (Court Chamber Judgment).

<sup>17</sup> Kif Augustine-Adams, *The Beginning of Wisdom Is to Call Things by Their Right Names*, 7 S. CAL. REV. L. & WOMEN’S STUD. 1, 1 (1997).

<sup>18</sup> Leventoğlu Abdulkadiroğlu v. Turkey, App. No. 7971/07, para. 17, Eur. Ct. H.R. (2013) (Judgment).

<sup>19</sup> In 2004, Article 10 of the Turkish Constitution of 1982 was amended as follows: “(Paragraph added on May 7, 2004; Act No. 5170) Men and women have equal rights. The State has the obligation to ensure that this equality exists in practice. (Sentence added on September 12, 2010; Act No. 5982) Measures taken for this purpose shall not be interpreted as contrary to the principle of equality.” TÜRKİYE CUMHURİYETİ ANAYASASI [TCA] [CONSTITUTION] Oct. 18, 1982, art. 10 (Turk.). In addition, Article 41 of the Constitution was amended as follows: “(Paragraph added on October 3, 2001; Act No. 4709) Family is the foundation of the Turkish society and based on the equality between the spouses.” *Id.* art. 41.

Turkey, as in the case of many other countries around the world, is overrepresented by men in top management positions in its political, judicial, and commercial sectors.<sup>20</sup> The new Turkish Civil Code of 2002, however, reflects the recognition of important fundamental social changes, especially in relation to gender equality.<sup>21</sup>

This article explores the attitude of the Turkish legal system and its apparent ambivalence towards women's surnames. More specifically, this article provides a critical analysis of the jurisprudence of the Turkish Constitutional Court and the ECtHR relating to women's surnames. In Part I, the article commences a thematic background about the challenges that women face, generally, regarding maintaining their maiden name after marriage. The article then presents a brief historical background of the Turkish legal system. Building upon this background, in Part II, the article discusses the importance of a woman's surname in the Turkish legal system. It argues that in a true democracy, that Turkey is, a woman should have a choice to keep her maiden name after marriage. Part III of the article is devoted to providing a critical analysis of the Turkish judiciary's approach to women's surnames. This Part explores the importance of Turkey being a member of the Council of Europe and a signatory to the European Convention on Human Rights. Part IV elaborates on the corresponding international law governing the use of the surnames, with a special focus on the Convention on the Elimination of All Forms of Discrimination against Women and the extent of Turkey's compliance with the Convention. Finally, Part IV discusses the case law of the ECtHR, which has in the past censured Turkey for its intransigence to women's right to maintain their maiden name after marriage.<sup>22</sup>

## I. BACKGROUND

### A. *What Is in a Surname?*

"[P]ersonal names are a core marker of the individual, with legal force and with social purchase on an everyday basis."<sup>23</sup>

The right to a name is one of the most important aspects of any human

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<sup>20</sup> As for the gender gap, according to the 2014 Global Gender Gap Report of the World Economic Forum, Turkey ranks 125th out of 142 states considered. WORLD ECON. FORUM, THE GLOBAL GENDER GAP REPORT 2014, at 9 (2014), [http://www3.weforum.org/docs/GGGR14/GGGR\\_CompleteReport\\_2014.pdf](http://www3.weforum.org/docs/GGGR14/GGGR_CompleteReport_2014.pdf). The Report also ranks Turkey 132nd in economic participation and opportunity, 105th in education attainment and 113 in political empowerment. *Id.*

<sup>21</sup> Başak Başoğlu & Candan Yasan, *National Report: Turkey*, 19 AM. U. J. GENDER SOC. POL'Y & L. 319, 327 (2011).

<sup>22</sup> The Turkish Government tried to justify the intransigence by maintaining that the traditional unity of the family in Turkey could only be ensured by one surname, which by custom in Turkey has been that of the husband. ANETTE FAYE JACOBSON, HUMAN RIGHTS MONITORING: A FIELD MISSION MANUAL 568 (2008).

<sup>23</sup> Janet Finch, *Naming Names: Kinship, Individuality and Personal Names*, 42 SOC. 709, 709 (2008).

being's identity. According to Burke, identity comprises the "sets of meanings people hold for themselves that define 'what it means' to be who they are as persons, as role occupants, and as group members."<sup>24</sup> Other scholars argue, "the prevailing patrilineal surname customs made it hard for women to remain socially visible and present as stable and independent individuals."<sup>25</sup> However, in a patriarchal social system, such as Turkey's, women are never recognized as individuals, and in every stage of their lives, "receive a different surname in every transition from one patriarch to another."<sup>26</sup> There is no question that women's social visibility is further isolated after marriage and after the adoption of their husband's surname.

In the Swiss-Turkish civil law tradition, "name" is defined as a word or a group of words, which serve to identify a person and distinguish that person from other legal subjects.<sup>27</sup> Besides this juridical definition, a name also has a sociological function. Every individual receives the name of their father upon birth as a symbol of a patronymic system in occidental culture<sup>28</sup> due to the fact that the father was the head of the family in the nineteenth and twentieth centuries.<sup>29</sup> Therefore, the family unit, which consists of a woman and a man, is a result of the patriarchal model of the nineteenth century's codifications.<sup>30</sup> Thus, in the context of a family name, it is problematic to overcome the historical gender equality barrier and the balancing of the unity of family and the equality of genders is yet to be achieved.<sup>31</sup>

The right to a name is considered an integral part of one's personality. Therefore, the protection of a name is regulated as a part of the protection of the personality right of each individual.<sup>32</sup> It is also worth noting that in both the Swiss

<sup>24</sup> Peter J. Burke, *Identities and Social Structure: The 2003 Cooley-Mead Award Address*, 67 SOC. PSYCHOL. Q. 5, 5 (2004).

<sup>25</sup> Yofi Tirosh, *A Noble Case: A Case Study of Discrimination, Symbols and Reciprocity*, in DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR 121, 130 (Eva Brems ed., 2013).

<sup>26</sup> *Id.*

<sup>27</sup> HENRI DESCHENAUX & PAUL-HENRI STEINAUER, *PERSONNE PHYSIQUES ET TUTELLE* 124 n.403 (2001) (Fr.); MUSTAFA DURAL & TUFAN ÖGÜZ, *TÜRK ÖZEL HUKUKU CILT II: KIŞİLER HUKUKU* 165 (2012) (Turk.); HÜSEYİN HATEMİ & BURCU KALKAN OĞUZTÜRK, *KIŞİLER HUKUKU* 50 (2012) (Turk.); M. KEMAL OĞUZMAN ET AL., *KIŞİLER HUKUKU* 105 (2012) (Turk.); Suzette Sandoz, *Commentaire Romand*, in *CODE CIVIL I*, at 1142 (Pascal Pichonnaz & Benedict Foëx eds., 2010). *See also* TURGUT AKINTÜRK ET AL., *TÜRK MEDENİ HUKUKU, BAŞLANGIÇ HÜKÜMLERİ KIŞİLER HUKUKU* 418 (2009) (Turk.).

<sup>28</sup> Marie Bernadette Schönenberger, *Le Cœur A Des Raisons Que La Raison Ne Connait Point Ou Les Difficultés De La Révision Dun Om De Famille Des Époux En Suisse*, in *UNE EMPREINTE SUR LE CODE CIVIL MELANGES EN L'HONNEUR DE PAUL-HENRI STEINAUER* 260 (Alexandra Rumo-Jungo et al. eds., 2013) (Fr.).

<sup>29</sup> Jennifer Lamesta & Margereta Baddeley, *Au Nom Du Père Et De La Mère—Étude Comparative Sur Le Droit Du Nom Dans La Perspective Du Droit Du Nom 2013*, in *LE DROIT CIVIL DANS LE CONTEXTE INTERNATIONAL: JOURNÉE DE DROIT CIVIL 2011*, at 77 (Margereta Baddeley et al. eds., 2012) (Fr.).

<sup>30</sup> Schönenberger, *supra* note 28, at 260.

<sup>31</sup> Augustine-Adams, *supra* note 17, at 2.

<sup>32</sup> OĞUZMAN ET AL., *supra* note 27, at 105.

and Turkish Civil Codes, the norms related to protection of personal rights preceded the establishment of the norms related to one's name.<sup>33</sup> While, a surname indicates affinity to a family, bearing a surname was not an obligation until the Surname Law of 1934 was passed, which required every citizen to bear a surname.<sup>34</sup>

### *B. A Brief Historical Background of the Turkish Legal System*

The Turkish legal system is eclectic and synthetic; it is inspired in a significant way by the continental European models.<sup>35</sup> The present legal system in Turkey has been synthetically built through imitations, adjustments, and imposed and voluntary adoptions of European law in order to prepare for the variety of challenges the Turkish legal system would face in the future.<sup>36</sup>

Historically, Turkey, and its legal system, have gone through a number of developmental phases. Turkey was a legal pluralistic Islamic state between 1299 and 1923.<sup>37</sup> Thereafter, the state had a pluralistic, mixed legal system with considerable French influence.<sup>38</sup> At the end of the eighteenth century, the idea of a vigorous programme of westernization and modernization was seen as the best solution for rescuing the Ottoman Empire from collapse.<sup>39</sup> The period of reform,

<sup>33</sup> See generally Nicole A.N.M. Van Os, *Polygamy Before and After the Introduction of the Swiss Civil Code in Turkey, in THE STATE AND THE SUBALTERN: MODERNIZATION, SOCIETY AND THE STATE IN TURKEY AND IRAN 179-98* (Touraj Atabaki ed., 2007).

<sup>34</sup> Surname Law of 1934 (Law No. 2525) art. 7 (Turk.). For an article discussing the adoption of a Westernized surname system in the early days of the Turkish Republic, which resulted in the Surname Law of 1934, see Robert F. Spencer, *The Social Context of Modern Turkish Names*, 17 SW. J. ANTHROPOLOGY 205, 206 (1961).

<sup>35</sup> Esin Öricü, *Turkey's Synthetic Civilian Tradition in a "Covert" Mix with Islam as Tradition: A Novel Hybrid?*, in MIXED LEGAL SYSTEMS, EAST AND WEST 185-86 (Vernon Valentine Palmer et al. eds., 2015).

<sup>36</sup> After the collapse of the Ottoman Empire and the establishment of the Turkish Republic in 1923, the European law was incorporated into the Turkish legal system from the "four circles of diffusion": France, Switzerland, Germany, and Italy. Esin Öricü, *Infusion of the Diffused: Four Circles of Diffusion Infusing the Legal System of Turkey*, in THE DIFFUSION OF LAW: THE MOVEMENT OF LAWS AND NORMS AROUND THE WORLD 7, 14-15 (Sue Farren, James Gallen & Christa Tautenbauch eds., 2015).

<sup>37</sup> As early as in the twelfth century during the Ottoman Seljuk reign, the Turkish Ottoman Empire (the predecessor to the Turkish Republic) established a legal system that was based on the Hanifian Islamic Law. Arzu Oğuz, *The Role of Comparative Law in the Development of Turkish Civil Law*, 17 PACE INT'L L. REV. 373, 375 (2005). The Islamic law of the Ottoman Empire dominated the Empire for nearly seven centuries. *Id.* Moreover, Sultans had the power to create only public law and under the condition that the new law would comply with Islamic law. GÜLNIHAL BOZKURT, BATI HUKUKUNUN TÜRKİYE'DE BENİMSENMESİ: OSMANLI DEVLETİ'NDEN TÜRKİYE CUMHURİYETİ'NE RESEPSİYON SÜRECİ (1839-1939), at 40 (2d ed. 2010) (Turk.). However, the limited scope of *Sharia*, the basic Islamic legal system, meant that its principles had to be supplemented by rules, which constituted customary law (*örfi hukuk*). GARETH JENKINS, POLITICAL ISLAM IN TURKEY: RUNNING WEST, HEADING EAST 40 (2008).

<sup>38</sup> Öricü, *supra* note 35.

<sup>39</sup> One of the earlier examples of this trend of thought was a treaty between the governmental authorities and the representative of local rulers *Ayans* named *Sened-i İttifak* ("Charter of Alliance"), which was signed during the reign of Mahmud II in 1808. AYKUT KANSU, THE REVOLUTION OF 1908 IN TURKEY 29 (1997). See also KEMAL H. KARPAT, STUDIES ON OTTOMAN SOCIAL AND POLITICAL HISTORY: SELECTED ARTICLES AND ESSAYS 40 (2002).

called *Tanzimat* (“Reorganization”), took place between 1839 and 1876.<sup>40</sup> *Tanzimat* is considered the corner-stone of constitutional development in the Ottoman Empire,<sup>41</sup> according to which, everyone, whether Muslim or non-Muslim, was equal in the eyes of law.<sup>42</sup> These developments created a need for codification of the law of obligations and commercial law in order to fill the gap in an atmosphere of then very dynamic commercial relations with European countries.<sup>43</sup> This gap was filled by a series of codifications entitled “Mecelle,”<sup>44</sup> which were enacted between 1869 and 1876.<sup>45</sup>

Islamic rule remained in place in the Ottoman Empire until Turkey became a republic in 1923.<sup>46</sup> The Turkish Republic, the successor to the Ottoman Empire, is

<sup>40</sup> The period of *Tanzimat* is of particular importance because it allowed the basic normative principles and the governmental apparatus of reform to emerge in the Ottoman Empire during the nineteenth century; however, a written constitution could not be established throughout this period. Bozkurt, *supra* note 37, at 52. Nonetheless, after 1860, the idea of having a constitution was promoted by the intellectuals, and as a result, a struggle for freedom began in the Empire. LEWIS, *supra* note 4, at 60. The reform of *Tanzimat* debate on December 23, 1876 culminated in the establishment of the first Constitution and a parliament consisting of two chambers. Roderic H. Davidson, *Turkish Attitudes Concerning Christian-Muslim Equality in the Nineteenth Century*, in *ESSAYS IN OTTOMAN AND TURKISH HISTORY, 1774-1923: THE IMPACT OF THE WEST* 115 (1990). Furthermore, the judicial functions were taken away from the Sultan and given to independent courts; the Sultan had to give legal force to the Constitution. GÁBOR ÁGOSTON & BRUCE MASTERS, *ENCYCLOPEDIA OF THE OTTOMAN EMPIRE* 144 (2009). See also M. Şükrü Hanioglu, *The Second Constitutional Period, 1908-1918*, in 4 *THE CAMBRIDGE HISTORY OF TURKEY: TURKEY IN THE MODERN WORLD* 63 (Reşat Kasaba ed., 2008).

<sup>41</sup> The word, *Tanzimat*, is derived from the Arabic root of “ordering” and means ordering or reform in the edict of *Tanzimat*, by virtue of which the Ottoman Sultan accepted a number of fundamental principles, such as security of life, honour, and property, for the first time in the Ottoman Empire. Carter Vaughn Findley, *The Tanzimat*, in 4 *THE CAMBRIDGE HISTORY OF TURKEY: TURKEY IN THE MODERN WORLD* 13 (Reşat Kasaba ed., 2008). See also BERNARD LEWIS, *THE EMERGENCE OF MODERN TURKEY* 107 (2002); STANFORD J. SHAW & EZEL KURAL SHAW, *HISTORY OF THE OTTOMAN EMPIRE AND MODERN TURKEY: II REFORM, REVOLUTION, AND REPUBLIC: THE RISE OF MODERN TURKEY, 1808-1975*, at 100 (1977).

<sup>42</sup> The Penal Code of 1858 was a result of the need to create equality before law for all the citizens of the Ottoman Empire. AYŞE ÖZİL, *ORTHODOX CHRISTIANS IN THE LATE OTTOMAN EMPIRE: A STUDY OF COMMUNAL RELATIONS IN ANATOLIA* 8 (2012). One of the manifestations of this was the edict of *Ishahat*, dated 1856. Roderic H. Davidson, *Atatürk's Reforms: Back to the Roots*, in *ESSAYS IN OTTOMAN AND TURKISH HISTORY, 1774-1923 THE IMPACT OF THE WEST* 247 (1990).

<sup>43</sup> The Commercial Code of 1850 is one of the examples. See generally LEWIS, *supra* note 42, at 110; JUNE STARR, *LAW AS METAPHOR: FROM ISLAMIC COURTS TO THE PALACE OF JUSTICE* 33 (1991); HIFZI VELDET VELIDEDEOGLU, *LES FACTEURS DE CODIFICATION DANS L'EMPIRE OTTOMAN ET LES CAUSES DE LA RECEPTION DU CODE CIVIL SUISSE PAR LA TURQUIE REPUBLICAINE, RAPPORTS ET CONTRIBUTIONS* 24 (1961) (Fr.).

<sup>44</sup> The full name of the codification is *Mecelle-i Ahkâm-ı Adliye* (“Codex of Legal Rules and Justices”). Sıddık Sami Onar, *La Codification D'une Partie Du Droit Musulman Dans L'empire Ottoman (Le Médjellé)*, in *ANNALES DE LA FACULTE DE DROIT D'ISTANBUL* 171 (1954) (Fr.). The code consisted of a series of sixteen books on commercial law, procedural law, law of property, and law of contracts. SELÇUK AKSIN SOMEL, *THE A TO Z OF THE OTTOMAN EMPIRE* 176 (2010).

<sup>45</sup> This codification, however, is not considered a Civil Code under the meaning of Western codifications during the nineteenth century. This is because the Mecelle did not contain the law of persons, family law, or inheritance law. Gülnihal Bozkurt, *Review of the Ottoman Legal System*, in 3 *OTAM* 27 (1992). In fact, there was no need to regulate these areas of law because they were governed by Islamic law for Muslims, and all others' own religious law for non-Muslims. SUAD JOSEPH, *ENCYCLOPAEDIA OF WOMEN AND ISLAMIC CULTURES: II FAMILY, LAW AND POLITICS* 338 (Suad Joseph ed., 2004).

<sup>46</sup> As a result, the Sultanate of Ottomans and the Caliphate were abolished. Davidson, *supra* note

a centralized, modern, Western, and secular democracy.<sup>47</sup> Although Turkey has had a troubled history as a constitutional democracy because the state experienced three military *coups d'état* in the past, the Turkish Republic “combines a reasonably stable democratic regime with a thoroughly secular legal system.”<sup>48</sup> The innovation of the private law that has a constitutional basis thus became inevitable and a new civil code had to be enacted promptly by the emerging Turkish Republic.<sup>49</sup> The Turkish Civil Code was adopted in 1926 and is based on the Swiss Civil Code, which abolished polygamy, child marriages, and recognized women as equal to men.<sup>50</sup> Ever since, Kemalist feminists have celebrated the enactment of the Civil Code of 1926 as a major step forward in advancing the emancipation of Turkish women and, of course, in the modernization of Turkey.<sup>51</sup> Despite this progress, the Civil Code of 1926 neglected to truly account for gender equality within the nucleus of a family.<sup>52</sup> However, the enactment of the new Turkish Civil Code of 2002<sup>53</sup> has been perceived as a significant development for women’s rights in Turkey.<sup>54</sup>

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42, at 259. Upon the establishment of the Turkish Republic in 1923, the Islamic legal system of the Ottoman Empire was replaced by a secular legal system in 1924. See generally NİYAZI BERKES, *THE DEVELOPMENT OF SECULARISM IN TURKEY* 480 (2000).

<sup>47</sup> Clement H. Dodd, *The Turkish Republic*, in *THE ROUTLEDGE HANDBOOK OF MODERN TURKEY* 54 (Metin Heper & Sabri Sayan eds., 2012).

<sup>48</sup> ERGUN ÖZBUDUN, *THE CONSTITUTIONAL SYSTEM OF TURKEY: 1876 TO THE PRESENT* 1 (2011).

<sup>49</sup> İzveren notes that, “as the time required for the preparation of a new national code was limited, there remained for the Turkish jurists, desirous of receiving one of the great codes of the century, only one possibility: the Swiss Civil Code, which, with its popularity, clarity and especially with its simple style was suitable for the purpose.” Adil İzveren, *The Reception of the Swiss Civil Code in Turkey, and the Fundamental Problems Arising in the Practice of Turkish Courts*, in *ANNALES DE LA FACULTÉ DE DROIT D’ISTANBUL* 171 (1956) (Turk.).

<sup>50</sup> The Civil Code of 1926 also outlawed the practice according to which husbands could end their marriages by repudiation. Zehra F. Kabasakal-Arat, *Women*, in *THE ROUTLEDGE HANDBOOK OF MODERN TURKEY* 260 (Metin Heper & Sabri Sayan eds., 2012). The Code granted women the right to choose their spouses, initiate divorce, and maintain certain maternal rights after divorce. *Id.*

<sup>51</sup> Van Os, *supra* note 33, at 179.

<sup>52</sup> According to the Turkish Civil Code of 1926, the husband was designated as the head of the household and the representative of the family; therefore, the husband was solely liable for the administration of the matrimonial property. Cengiz Koçhisarlıoğlu, *Aile Hukukunda Eşlerin Eşitliği*, in 40 ANKARA ÜNİVERSİTESİ HUKUK FAKÜLTESİ DERGİSİ 253, 254 (1998) (Turk.).

<sup>53</sup> Although many parliamentary commissions were established in order to change the civil code, none of these efforts succeeded until 2001. The first initiative to draft a new civil code took place in 1951, and a preliminary draft was presented to the National Assembly several times but none of the drafts of the code was passed in either 1974, 1976, 1981, or 1994. M. KEMAL OĞUZMAN & NAMI BARLAS, *MEDENİ HUKUK* 28-29 (2008) (Turk.). Then, the Ministry of Justice established a new commission on January 14, 1999, which prepared the current Turkish Civil Code of 2002. *Id.* at 30. The National Assembly passed this draft of the Code on November 22, 2001, and the Code was published in the Official Gazette on December 8, 2001. *Id.* This version of the Civil Code has been in force since January 1, 2002. *Id.*; see also Akıntürk et al., *supra* note 27, at 49-51.

<sup>54</sup> It is important to emphasize that the new Turkish Civil Code of 2002 established a new gender regime based on equality of men and women in relation to marriage and divorce. GÜL ALDIKAÇTI MARSHALL, *SHAPING GENDER POLICY IN TURKEY: GRASSROOTS WOMEN ACTIVISTS, THE EUROPEAN UNION, AND THE TURKISH STATE* 93 (2013).

## II. THE IMPORTANCE OF MARRIED WOMEN'S SURNAMES IN THE TURKISH LEGAL SYSTEM

Under Turkish law, a person's first name, or forename, and last name, or surname, can be found in the civil registry.<sup>55</sup> Initially, parents give a first name to a child when the child is born, and subsequently register the child's full name in the civil registry.<sup>56</sup> A surname, however, has a different nature depending on whether the child is born in a family or out of wedlock.<sup>57</sup> In fact, according to article 321 of the Turkish Civil Code of 2002, if a child is born in a legitimate marriage, the child takes the father's surname.<sup>58</sup> On the other hand, if the child is born out of wedlock, the child will take the mother's surname until a court of law has established the child's affiliation to a father.<sup>59</sup>

Unless a woman's surname was changed because of adoption or a court decision to change the name, she will use the surname she was given at birth.<sup>60</sup> However, according to article 187 of the Turkish Civil Code of 2002, women must change their surname to their husband's surname when they get married.<sup>61</sup> Nevertheless, if they apply to the Registrar of Births, Marriages, and Deaths, women can use their maiden name before their husband's surname.<sup>62</sup> As a consequence of the compulsory character of this provision, married women assume their husbands' surnames automatically (*ipso jure*)—after the marriage ceremony. As a result, it is impossible for married women to use only their maiden names without obtaining a court decision to that effect.<sup>63</sup> Still, married women are allowed to use their maiden name in front of their husband's surname.<sup>64</sup> According to the old Turkish Civil Code of 1926, married women were not allowed to use their maiden names, since the code provided no such alternative.<sup>65</sup> Later, article

<sup>55</sup> Besides the first name and the surname, nicknames and pseudonyms also benefit from the legal protection of "names." Hayrünnisa Özdemir, *Türk Ve İsviçre Medeni Hukukunda Ad Üzerindeki Hak Ve Korunması*, in 57 ANKARA ÜNİVERSİTESİ HUKUK FAKÜLTESİ DERGİSİ 567 (2008) (Turk.).

<sup>56</sup> It is the natural way to obtain a surname. Serkan Ayan, *Anayasa Mahkemesi Kararları Ve Çocuklar İle Kadının Soyadına İlişkin Değişiklik Tasarısı Taslağı Işığında Soyadının İlk Kez Edinilmesi, Kendiliğinden Değişmesi Ve Değiştirilmesi*, in XVI GAZI ÜNİVERSİTESİ HUKUK FAKÜLTESİ DERGİSİ 22 (2012) (Turk.).

<sup>57</sup> *Id.* at 23. See also TURGUT AKINTÜRK & DERYA ATEŞ KARAMAN, *TÜRK MEDENİ HUKUKU, AİLE HUKUKU* 394 (2012) (Turk.).

<sup>58</sup> See CODE CIVIL [C. CIV.] [CIVIL CODE 2002] art. 321 (Turk.) ("if the couple were not married then the child shall bear her/his mother's surname"). This provision was annulled by the decision of the Turkish Constitutional Court on July 2, 2009. *Anayasa Mahkemesi [AM] [Constitutional Court]*, E. 2005/114, K. 2009/105, July 2, 2009 (Turk.).

<sup>59</sup> *Id.*

<sup>60</sup> Deniz Ergene, *İnsan Hakları Hukukundaki Gelişmeler Işığında Türk Hukukunda Kadının Ve Çocuğun Soyadı Meselesi Ve Medeni Kanun'da Değişiklik Önerisi*, 31.2 MHB 129 (2011) (Turk.).

<sup>61</sup> Ünal Tekeli v. Turkey, App. No. 29865/96, Eur. Ct. H.R. (2004).

<sup>62</sup> CODE CIVIL [C. CIV.] [CIVIL CODE 2002] art. 187 (Turk.).

<sup>63</sup> Sera Reyhani Yüksel, *Türk Medeni Kanunu Bakımından Kadın-Erkek Eşitliği*, in XVIII GAZI ÜNİVERSİTESİ HUKUK FAKÜLTESİ DERGİSİ 184 (2014) (Turk.).

<sup>64</sup> CODE CIVIL [C. CIV.] [CIVIL CODE 2002] art. 187 (Turk.).

<sup>65</sup> CODE CIVIL [C. CIV.] [CIVIL CODE 1926] art. 153 (Turk.). See Ahmet Kılıçoğlu, *Medeni Kanun Açısından Kadın-Erkek Eşitliği*, in ANKARA BAROSU DERGİSİ 12 (1991) (Turk.); Saibe Oktay, *Medeni*

153 of the old Turkish Civil Code of 1926, which is entitled “women’s surname,” was amended in 1997 and adopted by the new Turkish Civil Code of 2002.<sup>66</sup> Since then, a married woman can use her maiden name in front of her husband’s surname.<sup>67</sup>

If, however, the marriage were to end, women would face different challenges in Turkey. If a marriage ends because of the death of her husband, the wife can choose between using her husband’s surname or her maiden name.<sup>68</sup> Yet, if the marriage ends because of an annulment of the marriage or as a result of divorce,<sup>69</sup> the woman may elect to revert back to the surname she used before her marriage.<sup>70</sup> This surname can either be her maiden name or the surname of her former husband. If she wishes to keep the husband’s surname after the divorce, she has to prove that she has a legitimate interest in continuing to use her husband’s surname and that doing so would not be detrimental to him.<sup>71</sup>

Another important matter to consider is the surname of the children if a divorced couple has children. According to article 4(2) of the Surname Law of 1934,<sup>72</sup> even if the marriage ends because of an annulment of the marriage, or by divorce, and the mother has custody of the children, they must use the surname of the father.<sup>73</sup> It is important to emphasize that a civil court of the first instance<sup>74</sup> in Turkey has ruled that this provision is unconstitutional and the Turkish Constitutional Court annulled article 4(2) of the Surname Law for the following reason:

The spouses have the same legal status regarding the rights and obligations in the course of their marriage and upon divorce. While, allowing the man to choose his child’s surname based on the fact that he has the custody of the child, but a woman is not legally allowed to do so, creates discrimination between the man and woman. Therefore, the provision in question is against Article 10<sup>75</sup> and 41<sup>76</sup> of the Turkish Constitution and

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*Kanunda Kadın*, in KADINLARIN GÜNDEMİ 56-57 (1997) (Turk.).

<sup>66</sup> Lale Sirmen, *Medeni Hukuktaki Son Gelişmelerin Işığında Evlenme Ve Boşanma Alanında Yeniden Düzenlenmesi Gereken Konular*, in HUKUKTA KADIN SEMPOZYUMU 85 (2000) (Turk.).

<sup>67</sup> CODE CIVIL [C. CIV.] [CIVIL CODE 2002] art. 187 (Turk.).

<sup>68</sup> YILDIZ ABIK, KADININ SOYADI VE BUNA BAĞLI OLARAK ÇOCUGUN SOYADI 207 (2005) (Turk.).

<sup>69</sup> CODE CIVIL [C. CIV.] [CIVIL CODE 2002] arts. 173, 158 (Turk.).

<sup>70</sup> *Id.* art. 173.

<sup>71</sup> *Id.*

<sup>72</sup> After adoption of the Surname Law of 1934, every citizen is obliged to choose a surname. Surname Law of 1934 (Law No. 2525) art. 7 (Turk.).

<sup>73</sup> Anayasa Mahkemesi [AM] [Constitutional Court], E. 2010/119, K.2011/165, Aug. 12, 2011 (Turk.).

<sup>74</sup> The civil court of first instance is a basic trial court with general and residual jurisdiction presiding over all matters not specifically assigned to other tribunals. TUĞRUL ANSAY & DON WALLACE, INTRODUCTION TO TURKISH LAW 214 (2011).

<sup>75</sup> Article 10 of the Turkish Constitution of 1982 provides: “(1) 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. (2) (Paragraph added on May 7, 2004; Act No. 5170) Men and women have equal rights. The State has the obligation to ensure that this equality exists in practice. (Sentence added

ought to be annulled.<sup>77</sup>

It seems obvious that adopting and maintaining the surname of a man by a woman after marriage serves as a means of identifying the family name, as well as both the surname of the wife and the children. Indeed, it is an indication of a patriarchal attitude towards marriage that is found in both the Turkish and Swiss Civil Codes.<sup>78</sup> In fact, according to the lawmakers that drafted the Swiss Civil Code of 1907, family unity was based on marriage, which was controlled by the husband to the detriment of the equality of the spouses.<sup>79</sup> For example, according to the Swiss Civil Code of 1907, the husband was legally the head of the family and only he could decide the domicile of the family.<sup>80</sup> As for her family name, a woman would lose her maiden name upon marriage in order to take her husband's surname so that the husband's surname could pass on to their children as the family name.<sup>81</sup> In 1984, Swiss lawmakers revised the provisions of the Swiss Civil Code of 1907 concerning marriage in order to find a compromise between gender equality and unity of family.<sup>82</sup> According to this revision, the surname of the husband is the family name of both spouses and their children; however, if the wife wished to maintain her maiden name, she could make a declaration to the civil registrar regarding the use of her maiden name in addition to, and after, the family

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on September 12, 2010; Act No. 5982) Measures taken for this purpose shall not be interpreted as contrary to the principle of equality. (3) (Paragraph added on September 12, 2010; Act No. 5982) Measures to be taken for children, the elderly, disabled people, widows and orphans of martyrs as well as for the invalid and veterans shall not be considered as violation of the principle of equality. (4) No privilege shall be granted to any individual, family, group or class. (5) State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings." TÜRKİYE CUMHURİYETİ ANAYASASI [TCA] [CONSTITUTION] Oct. 18, 1982, art. 10 (Turk.).

<sup>76</sup> *Id.* Article 41 of the Turkish Constitution of 1982 provides: "(1) (Paragraph added on October 3, 2001; Act No. 4709) Family is the foundation of the Turkish society and based on the equality between the spouses. (2) The State shall take the necessary measures and establish the necessary organization to protect peace and welfare of the family, especially mother and children, and to ensure the instruction of family planning and its practice. (3) (Paragraph added on September 12, 2010; Act No. 5982) Every child has the right to protection and care and the right to have and maintain a personal and direct relation with his/her mother and father unless it is contrary to his/her high interests. (4) (Paragraph added on September 12, 2010; Act No. 5982) The State shall take measures for the protection of the children against all kinds of abuse and violence." TÜRKİYE CUMHURİYETİ ANAYASASI [TCA] [CONSTITUTION] Oct. 18, 1982, art. 10 (Turk.).

<sup>77</sup> *Anayasa Mahkemesi [AM] [Constitutional Court]*, E. 2010/119, K.2011/165, Aug. 12, 2011 (Turk.).

<sup>78</sup> GÖRAN THERBORN, *BETWEEN SEX AND POWER: FAMILY IN THE WORLD, 1900-2000*, at 88 (2004). *See also* YESİM ARAT, *THE PATRIARCHAL PARADOX: WOMEN POLITICIANS IN TURKEY* 29 (1990).

<sup>79</sup> Suzette Sandoz, *The Names of Spouses and Children in Swiss Law*, in *ACTES DU COLLOQUE CIEC/PROCEEDINGS ICCS COLLOQUY* 41 (1999).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*; *see also* Schönenberger, *supra* note 28, at 262.

<sup>82</sup> Sandoz, *supra* note 79. The fundamental objective of this revision was to achieve gender equality between spouses and to comply with Switzerland's international legal obligations such as the European Convention on Human Rights and United Nations Convention on Political and Civil Rights. *See* Schönenberger, *supra* note 28, at 261.

name, which she would write first.<sup>83</sup>

The 1994 decision of the ECtHR in *Burghartz v. Switzerland* regarding article 160 of the Swiss Civil Code of 1907, which governs the use of a family name in Switzerland, has a great significance.<sup>84</sup> In this case, even though the wife was allowed to use her maiden name, the decision was about the husband who bore his wife's surname as a "family name" according to Germany's law (where they were married), but who wished to keep his surname and use it in front of the family name of his wife.<sup>85</sup> The husband brought the case before the ECtHR because Swiss law did not allow him to keep his surname, which he used before he got married.<sup>86</sup> The Court found that, pursuant to article 14 of the ECHR, the husband was discriminated against based on gender and ruled against Switzerland awarding compensation to the husband.<sup>87</sup> In reaction to *Burghartz*, the Swiss government revised the ordinance of civil status, which is hierarchically inferior to the Civil Code, to state that if the husband were to choose the surname of his wife as a family name, the husband could keep his surname as well.<sup>88</sup> Finally, the Swiss lawmakers, after seventeen years of legislative work, revised article 160 of the Swiss Civil Code of 1907 on September 30, 2011, and the new law became effective on January 1, 2013.<sup>89</sup> As a result, the lawmakers transformed this legal framework from a patronymic system to a system of liberty and choice based on gender equality.<sup>90</sup> The amended article 160 of the Swiss Civil Code of 1907 provides:

B. Surname 1 Each spouse retains his or her surname. 2 However, the bride and groom may declare to the civil registrar that they wish [to] bear the surname of the bride or the groom as the family surname. 3 If the bride and groom retain their surnames, they decide which of the surnames their children will bear. In justified cases, the civil registrar may relieve the bride and groom of this obligation.<sup>91</sup>

Moreover, in 2005, a member of the main opposition party, the Republican People's Party of Turkey ("CHP"),<sup>92</sup> submitted a private member's bill to the Turkish Parliament to amend article 187 of the Turkish Civil Code of 2002, which provided in its original version that,

<sup>83</sup> Sandoz, *supra* note 79.

<sup>84</sup> *Burghartz v. Switzerland*, App. No. 16213/90, 18 Eur. Ct. H.R. 101 (ser. A) (1994).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Sandoz, *supra* note 79.

<sup>89</sup> CODE CIVIL [C. CIV.] [CIVIL CODE 1907] art. 160 (Switz.), *amended by* No 1 of the Federal Act of Sept. 30, 2011 (Name and Citizenship), in force since Jan. 1, 2013 (AS 2012 2569; BBl 2009 7573 7581).

<sup>90</sup> Schönenberger, *supra* note 28, at 265.

<sup>91</sup> CODE CIVIL [C. CIV.] [CIVIL CODE 1907] art. 160 (Switz.).

<sup>92</sup> The party's Turkish name is Cumhuriyet Halk Partisi.

Partners can choose one of their surnames which they obtained when they were born, by applying to the registrar. Wife/husband, whose surname was not chosen as family name, can use her/his surname before the family name.<sup>93</sup>

However, this bill is still under review at the Parliamentary Commission stage and has not as yet been enacted into law. In 2011, another member of CHP submitted another private member's bill to the Turkish Parliament and the bill, likewise, is still under consideration by the Parliamentary Commission.<sup>94</sup> The purpose of this bill was to reverse article 187 of the Turkish Civil Code of 2002 concerning women's surnames. According to this second bill:

A woman shall keep her maiden name after marriage. However, if she applies to the Registrar of Births, Marriages, and Deaths, she can use her husband's surname after her maiden name. If she used two surnames before, she can use this right only for one surname.<sup>95</sup>

In addition, the Ministry of Justice prepared a draft bill to amend article 187 of the Turkish Civil Code of 2002.<sup>96</sup> The draft proposed that a married woman had to bear her husband's surname.<sup>97</sup> However, she could make a written declaration to the registrar of marriage or at the Registry of Births, Marriages and Deaths after the marriage if she wanted to keep her maiden name and use it in front of her husband's surname, or to use only her maiden name.<sup>98</sup> If a woman has already been using both her maiden name and her previous husband's surname, she would have to make a choice and use either her maiden name or her previous husband's surname.<sup>99</sup>

### III. THE ATTITUDE OF THE TURKISH JUDICIARY REGARDING THE MARITAL SURNAME CHOICE FOR WOMEN

For the first time, in 1998, a civil court of the first instance declared article 153 of the old Turkish Civil Code of 1926, which stated that "married women shall bear their husband's name," unconstitutional on the grounds of being against the principle of equality.<sup>100</sup> Furthermore, the civil court of the first instance stated that article 153 of the Code was against Article 12<sup>101</sup> and Article 17<sup>102</sup> of the Turkish

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<sup>93</sup> Draft Bill No. 288 (Sept. 3, 2005), which was submitted by the Turkish member of parliament, Ms. Birgen Keles, and other parliamentarians of the Republican People's Party ("CHP").

<sup>94</sup> Draft Bill No. 150 (Dec. 14, 2011), which was submitted by the Turkish member of parliament, Mr. Mahmut Tanal, a parliamentarian of CHP.

<sup>95</sup> *Id.*

<sup>96</sup> Ayan, *supra* note 56, at 70, 71.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Anayasa Mahkemesi [AM] [Constitutional Court], E. 1997/61, K. 1998/59, Sept. 29, 1998 (Turk.).

<sup>101</sup> TÜRKİYE CUMHURİYETİ ANAYASASI [TCA] [CONSTITUTION] Oct. 18, 1982, art. 12 (Turk.) ("Everyone possesses inherent fundamental rights and freedoms, which are inviolable and inalienable.

Constitution of 1982,<sup>103</sup> and filed an application before the Turkish Constitutional Court for review of constitutionality of article 153.<sup>104</sup> However, the Court did not annul article 153 of Turkish Civil Code of 1926.<sup>105</sup> Relying on tradition, the Turkish Constitutional Court described the common challenges women in Turkey faced in 1998, namely that “the rule according to which married women bear their husband’s name derives from certain social realities and is the result of the codification of certain customs that have formed over centuries in Turkish society.”<sup>106</sup> The Turkish Constitutional Court proclaimed that the rationale behind this approach was to protect the sanctity of family unity in Turkey, since, in its opinion, women “are of a more delicate nature than men, strengthen family bonds, nurture the prosperity of the marriage, and preclude bicephalous authority within the same family.”<sup>107</sup> Further, in a somewhat controversial manner the Court held that:

[T]he contention that this provision infringes Article 10 of the Constitution, which prohibits any discrimination on the ground of sex, is not founded either. The principle of equality within the meaning of Article 10 of the Constitution does not mean that everyone is subject to the same rules of

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The fundamental rights and freedoms also comprise the duties and responsibilities of the individual to the society, his/her family, and other individuals.”)

<sup>102</sup> *Id.* art. 17, providing that: “(1) Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence. The corporeal integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law; and shall not be subjected to scientific or medical experiments without his/her consent. (2) No one shall be subjected to torture or mal-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity. (3) (As amended on May 7, 2004; Act No. 5170) The act of killing in case of self-defence and, when permitted by law as a compelling measure to use a weapon, during the execution of warrants of capture and arrest, the prevention of the escape of lawfully arrested or convicted persons, the quelling of riot or insurrection, or carrying out the orders of authorized bodies during martial law or state of emergency, do not fall within the scope of the provision of the first paragraph.”

<sup>103</sup> The control mechanism of laws before the Turkish Constitutional Court has three different alternative recourses according to the application procedures, namely: Action for Annulment (Abstract Review of Norms); Contention of Unconstitutionality (Concrete Norm Control); and, Individual Applications. *See also id.* art. 152, which provides that: “(1) If a court hearing a case finds that the law or the decree having the force of law to be applied is unconstitutional, or if convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it shall postpone the consideration of the case until the Constitutional Court decides on the issue. (2) If the trial court is not convinced of the seriousness of the claim of unconstitutionality, such a claim, together with the court judgment, shall be decided upon by the competent authority of appeal. (3) The Constitutional Court shall decide on the matter and declare its judgment within five months of receiving the contention. If no decision is reached within this period, the trial court shall conclude the case under legal provisions in force. However, if the trial court receives the decision of the Constitutional Court until the judgment on the merits of the case is final, the trial court is obliged to comply with it. (4) No claim of unconstitutionality shall be made with regard to the same legal provision until ten years elapse after publication in the Official Gazette of the decision of the Constitutional Court dismissing the application on its merits.”

<sup>104</sup> *Anayasa Mahkemesi [AM] [Constitutional Court]*, E. 1997/61, K. 1998/59, Sept. 29, 1998 (Turk.).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

law. The special characteristics of each person or each group of persons may reasonably justify the application of different rules of law . . . .<sup>108</sup>

This decision by the Turkish Constitutional Court was clearly a reflection of the old Turkish Civil Code of 1926,<sup>109</sup> which was not based on the principle of gender equality.<sup>110</sup>

The old Turkish Civil Code of 1926 also contained many provisions that were deemed to be discriminatory against women, such as identifying the husband as the head of the family and the representative of the union of marriage, granting him the right and responsibility of choosing the family residence, assigning to him the responsibility of providing for his wife and children, and granting him the right to decide whether to give his wife permission to go to work.<sup>111</sup> Crucially, the old Turkish Civil Code of 1926 compelled wives to adopt their husband's surname upon marriage.<sup>112</sup> In contrast, the new Turkish Civil Code of 2002 does not have these provisions. Instead, for example, a married couple can manage their marriage collectively and each of them can represent their conjugal union during the life of the marriage.<sup>113</sup> It is also worth noting that this new approach by the lawmakers was borne out of the need to achieve gender equality in the new Turkish Civil Code.<sup>114</sup> It, however, seems somewhat strange that the provisions regarding the representation and management of a conjugal union were changed in the new Turkish Civil Code of 2002, and yet the provision regarding women's surname remained the same as in the old Turkish Civil Code of 1926.

After the 1998 decision of the Turkish Constitutional Court, the issue of a woman's surname was brought before the ECtHR in 2004, in the case of *Ünal Tekeli v. Turkey*.<sup>115</sup> Contrary to the Turkish Constitutional Court, the ECtHR decided that article 153 of the Turkish Civil Code of 1926 regarding a woman's surname was against both the principle of gender equality enshrined in the Turkish Constitution of 1982 and the prohibition of discrimination under article 16, paragraph 1(g) of the ECHR; article 153 was also deemed to be against the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW").<sup>116</sup>

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<sup>108</sup> *Id.*

<sup>109</sup> *Ünal Tekeli v. Turkey*, App. No. 29865/96, Eur. Ct. H.R. (2004).

<sup>110</sup> Hilal Elver, *Gender Equality From a Constitutional Perspective: The Case of Turkey*, in *THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* 278, 285 (Beverly Baines & Ruth Rubio-Marin eds., 2005).

<sup>111</sup> See generally Zehra F. Kabasakal-Arat, *Kemalism and Turkish Women*, 14 *WOMEN & POL.* 57 (1994).

<sup>112</sup> FATİH ÖZTÜRK, *OTTOMAN AND TURKISH LAW* 137 (2014). According to Öztürk, "it is a clear evidence of violation of gender equality; providing superiority to husband over the wife using the last name of the husband." *Id.*

<sup>113</sup> CODE CIVIL [C. CIV.] [CIVIL CODE 2002] arts. 186, 188 (Turk.).

<sup>114</sup> Elver, *supra* note 110, at 303. See also Başoğlu & Yasan, *supra* note 21, at 327.

<sup>115</sup> *Ünal Tekeli v. Turkey*, App. No. 29865/96, Eur. Ct. H.R. (2004).

<sup>116</sup> *Id.*; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

After the amendment of the Turkish Civil Code in 2002, three civil courts of the first instance held that article 187 of the Code was unconstitutional, relying on the decision of the ECtHR in *Ünal Tekeli v. Turkey*.<sup>117</sup> The courts based their decisions on the grounds that article 187, which relates to family name, was in contravention of Articles 2,<sup>118</sup> 10, 12, 17, 41, and 90 of the Turkish Constitution of 1982.<sup>119</sup>

In another decision, in 2009, however, the Turkish Constitutional Court interpreted Article 10 of the Turkish Constitution of 1982 erroneously and held that “giving priority to husband’s surname is not [a] contradiction to the principle of equality.”<sup>120</sup> The Court reasoned that “the burden of bearing a surname was regulated by law in order to identify the descendants, protect family, and keep in order the registration of persons systematically in Turkey.”<sup>121</sup> The Court held further that “the provision in question is accepted to protect the unity of family and strengthen the family bonds. Since the family reflects the characteristic of every society, the perception and effectiveness of family are varied depending on different societies.”<sup>122</sup> Still, it is regrettable that even though the Turkish Constitutional Court does have the power to annul article 187 of the Turkish Civil Code of 2002, it did not do so.

Since there has been no annulment decision of the Turkish Constitutional Court, article 187 of the Turkish Civil Code of 2002 that relates to women’s surnames is still being enforced. This is in light of the fact that despite Turkey’s international legal commitments, Turkish lawmakers have not taken any action to revise article 187 in terms of gender equality. Furthermore, according to Article 90 of the Turkish Constitution of 1982, in the event of a conflict between an international agreement that regards fundamental rights and freedoms and a

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<sup>117</sup> Hukuk Hakimliği [Civil Court] E. 2010/94 (Turk.); Hukuk Hakimliği [Civil Court] E. 2010/35 (Turk.); Hukuk Hakimliği [Civil Court] E. 2009/85 (Turk.).

<sup>118</sup> TÜRKİYE CUMHURİYETİ ANAYASASI [TCA] [CONSTITUTION] Oct. 18, 1982, art. 2 (Turk.) (“The Republic of Turkey is a democratic, secular and social state governed by 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 set forth in the preamble.”).

<sup>119</sup> Hukuk Hakimliği [Civil Court] E. 2010/94 (Turk.); Hukuk Hakimliği [Civil Court] E. 2010/35 (Turk.); Hukuk Hakimliği [Civil Court] E. 2009/8 (Turk.).

<sup>120</sup> Anayasa Mahkemesi [AM] [Constitutional Court], E. 2009/85, K. 2011/49, Oct. 3, 2011 (Turk.). The Turkish Constitutional Court noted, “[e]ven though the surname is one of the personal rights, it can be interfered with. In the present case, it is obvious that the lawmaker has a discretionary power in order to interfere the use of surname in compliance with the constitution on the basis of the public interest and public order. Accordingly, using a discretionary power in order to give a priority to one of the spouses in favor of the unity and the integrity of Turkish family life because of the certain necessities of public order and public interest is not in contradiction to the principles of the state of law. The assertion that different treatment of the sexes by the Civil Code was based on gender apartheid was not well grounded. Therefore, the particularities of one’s conditions and status of certain persons and communities require different rules. On the ground of the reasons stated above, in the context of the discretionary power of the law maker, giving priority to husband’s surname is not contradiction to the principle of equality.”

*Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

domestic law, the judge must apply the international agreement.<sup>123</sup> In a recent case related to article 187 of the Turkish Civil Code of 2002, the judge was faced with a conflict between the Civil Code and international agreements related to fundamental rights and freedoms.<sup>124</sup> The judge correctly based his reasoning and judgment on Article 90 of the Turkish Constitution of 1982 and directly applied the relevant provisions of the ECHR and CEDAW.<sup>125</sup> In relying on *Ünal Tekeli v. Turkey* and on the Council of Europe Parliamentary Assembly's Recommendation 1271,<sup>126</sup> the judge ruled in favor of the plaintiff and allowed the married woman to use only her maiden name.<sup>127</sup> However, on appeal, the Turkish Supreme Court reversed the judgment reasoning that:

According to article 187 of the Civil Code, unless the marriage ends in a divorce or if the annulment is decided by a Civil Court, there is no possibility for a married woman to only use her maiden name. Despite the amendments of article 10 and 41 of the Constitution in 2004 and 2010 the Constitutional Court did not consider article 187 of Civil Code unconstitutional. Therefore, it did not annul it. Since all the executive and judicial bodies are bound to apply this, the Constitutional Court's decision and article 187 is still in force. Therefore, there is no possibility to decide otherwise.<sup>128</sup>

Moreover, the Turkish Supreme Court stated that in the event of a conflict between the national law and international agreements regarding fundamental rights and freedoms, Article 90(5)<sup>129</sup> of the Turkish Constitution of 1982 can be applied when a national law and international agreement have different provisions on the same matter.<sup>130</sup> The Court also noted that, although there is no explicit provision in relation to "keeping the maiden name after marriage" in either the ECHR or other international agreements concerning fundamental rights and freedoms:

[t]he ECtHR decided that Article 187 was a violation of the ECHR interpreting that Article 187 forces a woman to bear her husband's surname and does not allow her to choose and keep her maiden name. In this

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<sup>123</sup> According to Article 90 of the Turkish Constitution of 1982, "[i]nternational agreements duly put into effect have the force of law. No appeal to the Turkish Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. (Sentence added on May 7, 2004; Act No. 5170) 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." TÜRKİYE CUMHURİYETİ ANAYASASI [TCA] [CONSTITUTION] Oct. 18, 1982, art. 90 (Turk.).

<sup>124</sup> Hukuk Hakimliği [Civil Court] E. 2011/59, K. 2011/656, Dec. 12, 2011 (Turk.).

<sup>125</sup> *Id.*

<sup>126</sup> Eur. Parl. Ass., Recommendation 1271 (1995) on Discrimination Between Men and Women in the Choice of a Surname and in the Passing on of Parents' Surnames to Children [hereinafter Recommendation 1271 (1995)].

<sup>127</sup> *Ünal Tekeli v. Turkey*, App. No. 29865/96, para. 66, Eur. Ct. H.R. (2004).

<sup>128</sup> Yüksek Mahkemesi [Turkish Supreme Court] E. 2012/2319, K. 2013/4523, Feb. 2, 2013 (Turk.).

<sup>129</sup> TÜRKİYE CUMHURİYETİ ANAYASASI [TCA] [CONSTITUTION] Oct. 18, 1982, art. 90(5) (Turk.).

<sup>130</sup> *Id.*

decision, whether the Court's applications or interpretations of the provision violated the ECHR was not discussed. However, unless the provision does not change by the lawmakers, courts are obliged to decide each case on the basis of the present law, since it is the responsibility of the Court to uphold public order and the general principle of family union and integrity.<sup>131</sup>

A recent decision in 2015 by the Turkish Supreme Court held that according to Article 90(5) of the Turkish Constitution of 1982, there is a conflict among (1) article 187 of the Turkish Civil Code of 2002; (2) article 8 (private and family life) and article 14 (prohibition of discrimination) of the ECHR; and (2) article 16(1)(g) (marriage and family life) of the CEDAW.<sup>132</sup> Consequently, the Supreme Court upheld the decision of the civil court of the first instance that a woman can use only her maiden name upon marriage.<sup>133</sup>

After the amendment of the Turkish Constitution of 1982 in 2010, Turkey adopted an individual application mechanism,<sup>134</sup> which allows every citizen of the Turkish Republic to apply to the Turkish Constitutional Court on the grounds of violation of fundamental rights and freedoms according to the ECHR, and, as a result, the Turkish Constitution of 1982.<sup>135</sup> So far, three individual applications were brought before the Turkish Constitutional Court on grounds that article 187 of the Turkish Civil Code of 2002 concerning women's surnames is against Articles 10, 12, 17, and 90 of the Turkish Constitution of 1982.<sup>136</sup> In all three cases, the Court examined article 187 of Turkish Civil Code of 2002 taking into account (1) Article 17 of the Turkish Constitution of 1982 regarding personal inviolability, corporeal and spiritual existence of the individual; (2) Article 90 of the Turkish Constitution related to ratification of international treaties; and (3) article 8 of the ECHR, which guarantees the right to respect one's private and family life.<sup>137</sup> The

<sup>131</sup> *Id.*

<sup>132</sup> Yüksek Mahkemesi [Turkish Supreme Court] E. 2014/20471, K. 2015/8704, June 10, 2014 (Turk.).

<sup>133</sup> *Id.*

<sup>134</sup> The "[i]ndividual application is not (an additional) remedy of appeal." HÜSEYİN EKİNCİ & MUSA SAĞLAM, INDIVIDUAL APPLICATION TO THE TURKISH CONSTITUTIONAL COURT 1, 2 (2015); <http://constitutionalcourt.gov.tr/inlinepages/IndividualApplication.pdf>. "Claimed violation of any of the rights described in the Constitution rather than redressing any unlawfulness that may emerge during the proceedings in a legal remedy can be a subject of an individual application." *Id.*

<sup>135</sup> TÜRKİYE CUMHURİYETİ ANAYASASI [TCA] [CONSTITUTION] Oct. 18, 1982, art. 148 (Turk.) ("(3) (Paragraph added on September 12, 2010; Act No. 5982) Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted. (4) (Paragraph added on September 12, 2010; Act No. 5982) In the individual application, judicial review shall not be made on matters required to be taken into account during the process of legal remedies. (5) (Paragraph added on September 12, 2010; Act No. 5982) Procedures and principles concerning the individual application shall be regulated by law.")

<sup>136</sup> Anayasa Mahkemesi [AM] [Constitutional Court], App. No. 2014/5836, Apr. 16, 2015 (Turk.); Anayasa Mahkemesi [AM] [Constitutional Court], App. No. 2013/2187, Dec. 19, 2013 (Turk.); Anayasa Mahkemesi [AM] [Constitutional Court], App. No. 2013/4439, Mar. 3, 2014 (Turk.).

<sup>137</sup> *Id.* (citing, CEDAW, *supra* note 116, art. 23; International Covenant on Civil and Political

Turkish Constitutional Court subsequently accepted all of the applications regarding women's surnames and sent back the cases to the civil court of the first instance for retrials.<sup>138</sup> However, these three decisions affect only the individual applicants and are not binding on other courts.<sup>139</sup> This is due to the nature of the individual application mechanism in the Turkish legal system, where these individual decisions of the Constitutional Court do not have any general consequences for the general population.<sup>140</sup>

#### IV. THE INTERNATIONAL LAW GOVERNING THE USE OF SURNAMES

##### *A. The Role of the Council of Europe in Fostering Gender Equality at the Member-State Level*

Turkey was a founding member of the Council of Europe and, in 1954, ratified the ECHR along with Protocol No. 1 concerning the peaceful enjoyment of property.<sup>141</sup> In 1987, Turkey acknowledged the right of individuals to petition directly to the ECtHR; and, in 1990, Turkey recognized the compulsory jurisdiction of the ECtHR.<sup>142</sup> Apart from the Council of Europe's Human Rights Conventions,<sup>143</sup> Turkey is also a party to the Principal United Nations Conventions

Rights art. 23, Dec. 19, 1966, 999 U.N.T.S. 172 [hereinafter ICCPR]; Ünal Tekeli v. Turkey, App. No. 29865/96, Eur. Ct. H.R. (2004); Leventoğlu Abdülkadiroğlu v. Turkey, App. No. 7971/07, May 28, 2013 (Turk.); Güneş v. Turkey, App. No. 26268/08, Oct. 3, 2013 (Turk.); Tüten v. Turkey, App. No. 38249/09, Dec. 10, 2013 (Turk.).

<sup>138</sup> Anayasa Mahkemesi [AM] [Constitutional Court], App. No. 2014/5836, Apr. 16, 2015 (Turk.); Anayasa Mahkemesi [AM] [Constitutional Court], App. No. 2013/4439, Mar. 6, 2014 (Turk.); Anayasa Mahkemesi [AM] [Constitutional Court], App. No. 2013/2187, Dec. 19, 2013 (Turk.).

<sup>139</sup> If a violation of a fundamental right or freedom arises from a court's decision, the Turkish Constitutional Court accepts an individual's application related to such violation, and sends the case back for retrial. The Law on the Establishment of the Turkish Constitutional Court and Rules of Procedure of the Constitutional Court of Turkey (Law No. 6216) art. 50 (Turk.). This decision is binding on the court whose action caused the violation. *Id.*

<sup>140</sup> EKINCI & SAGLAM, *supra* note 134, at 1-2.

<sup>141</sup> Turkey ratified the ECHR with Law No. 6366, published in the Official Gazette No. 1567 on March 10, 1954.

<sup>142</sup> Council of Europe, *Annuaire De La Convention Europeenne Des Droits De L'homme*, 1990 Y.B. Eur. Conv. on H.R. 11 (Eur. Comm'n of H.R.).

<sup>143</sup> Turkey is now a party to all the seven principal human rights conventions of the United Nations, and 96 of the 200 Council of Europe conventions. Asbjørn Eide, *Making Human Rights Universal: Achievements and Prospects*, in HUMAN RIGHTS IN DEVELOPMENT: YEARBOOK 1999/2000 THE MILLENNIUM EDITION 1, 22 (Hugo Stokke & Arne Tostensen eds., 2001). Turkey ratified Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty, Apr. 28, 1983, E.T.S. No. 114, in November 2003; Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in All Circumstances, May 3, 2001, E.T.S. No. 187, in February 2006; and, the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, Dec. 15, 1989, 1642 U.N.T.S. 414, in March 2006. As a testimony to its commitment to strengthening the national and international human rights machinery, Turkey also signed the Optional Protocol to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 18, 2002, 2375 U.N.T.S. 237, in 2005. See *generally Human Rights: Policy Objectives and Developments*, REPUBLIC OF TURKEY MINISTRY OF FOREIGN AFFAIRS, [http://www.mfa.gov.tr/human-rights\\_policy-objectives-and-developments.en.mfa](http://www.mfa.gov.tr/human-rights_policy-objectives-and-developments.en.mfa) (last visited Dec. 20, 2015).

on human rights.<sup>144</sup> In these international treaties, discrimination has been defined as including a “distinction, exclusion, or preference . . . which nullif[ies] or impair[s] equality of opportunity or treatment.”<sup>145</sup> In addition, the Parliamentary Assembly of the Council of Europe described equal rights between men and women as “a fundamental principle of democracy, being a factor in the recognition of the legitimacy of women’s status in public life.”<sup>146</sup> Thus, in cases where women must adopt their husband’s surname upon marriage, in breach of Turkey’s international legal commitments, women are in fact denied gender equality.

According to the Council of Europe, equality between men and women must be safeguarded in all areas, including employment, work, and pay.<sup>147</sup> The ECtHR has also reiterated that the “equality of the sexes is today a major goal in the member states of the Council of Europe,”<sup>148</sup> and proclaimed gender equality<sup>149</sup> as one of the key underlying principles of the ECHR.<sup>150</sup>

Similarly, in its Recommendation 1271,<sup>151</sup> the Parliamentary Assembly of the Council of Europe asked the Committee of Ministers to identify those member states that still had discriminatory legislations towards women, and to “ensure strict equality in the event of marriage with regard to the choice of a common surname

<sup>144</sup> Turkey has ratified the following United Nation’s human rights treaties: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of the Child; the CEDAW; and the Convention on the Elimination of All Forms of Racial Discrimination. See generally Dilek Kurban, *Protecting Marginalized Individuals and Minorities in the ECtHR: Litigation and Jurisprudence in Turkey*, in THE EUROPEAN COURT OF HUMAN RIGHTS AND THE RIGHTS OF MARGINALIZED INDIVIDUALS AND MINORITIES IN NATIONAL CONTEXT 159 (Dia Anagnostou & Evangelina Psychogiopoulou eds., 2009).

<sup>145</sup> See, e.g., Convention Concerning Discrimination in Respect of Employment and Occupation, ILO Convention No. 111, June 25, 1958, 362 U.N.T.S. 31 (stripped of labour-specific language).

<sup>146</sup> Eur. Parl. Ass., Recommendation 1229 (1994) on Equality of Rights Between Men and Women.

<sup>147</sup> See SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES 57 (Oxford U.P. 2008).

<sup>148</sup> *Abdulaziz v. U.K.*, App. No. 9214/80; 9473/81; 9474/81, para. 78, Eur. Ct. H.R. (1985).

<sup>149</sup> According to the Council of Europe, “[a]chieving gender equality is central to the protection of human rights, the functioning of democracy, respect for the rule of law and economic growth and competitiveness.” EUR. PARL. ASS., COUNCIL OF EUROPE GENDER EQUALITY STRATEGY 2014-2017, at 7 (2014); see also *Şahin v. Turkey*, App. No. 44774/98, para. 115, 44 Eur. H.R. Rep. 99 (2005) (Grand Chamber Judgment).

<sup>150</sup> Several working papers by the Council of Europe are indicative of the fact that some member states had laws that were deemed to be in contravention of the equality of the sexes. Two texts released by the Committee of Ministers of the Council of Europe specifically deal with the issue of names and the equality of men and women. They include Comm. of Ministers of the Council of Eur., Res. (78)37 on Equality of Spouses in Civil Law (1978), and Comm. of Ministers of the Council of Eur., Recommendation R (85)2 on Legal Protection Against Sex Discrimination (1985). The Committee of Ministers called upon all the member states of the Council of Europe to eradicate all kinds of discrimination in the choice of family name and the transmission of parents’ surnames to their children, since it observed that a certain degree of discrimination between the sexes in legislation and practice in some of the member states still existed. *Id.*; Eur. Parl. Ass., Motion for a Recommendation on Equality Between Women and Men in the Choice of a Child’s Surname, Doc. 6839 (1993). It seems that the Committee of Ministers was aware of the existence of some discriminatory measures in certain member states. *Id.* The Committee recommended to the member states that they take or reinforce measures through legislative changes and create effective legal remedies in order to eliminate such discriminatory measures. *Id.*

<sup>151</sup> Recommendation 1271 (1995), *supra* note 126.

for both marriage partners.”<sup>152</sup> In its reply of April 3, 1996, although the Committee of Ministers acknowledged that every member state had its own legal systems based on “local customs and traditions,”<sup>153</sup> the Committee stressed that these legal systems should not include any discriminatory provisions.<sup>154</sup> Further, the Committee of Family Law Experts was entrusted with the task of deliberating on this issue.<sup>155</sup> Overall, a majority of the Council of Europe have settled the issue of gender equality, especially with respect to a woman’s choice to retain her surname upon marriage.<sup>156</sup>

In order to achieve complete harmony amongst the High Contracting Parties of the Council of Europe, the European Committee on Legal Cooperation (“CDCJ”) noted that certain member states were yet to meet the conditions contained in the related resolutions regarding the joint name of married couples.<sup>157</sup>

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<sup>152</sup> *Id.*

<sup>153</sup> In its final activity report, the European Committee on Legal Cooperation (“CDCJ”) held that the lack of uniformity in the national laws among the member states of the Council of Europe made any attempt in harmonization of this matter very difficult. See Comm. of Ministers of the Council of Eur., Reply to Recommendation 1271 (1995) on Discrimination Between Men and Women in the Choice of a Surname and in the Passing on of Parents’ Surnames to Children, Doc. 7521 (1996).

<sup>154</sup> In fact, in 1982-1983, the CDCJ had considered the issue of surnames in relation to married couples as a reaction to Recommendation No. 2 of the 13th Conference of European Ministers of Justice. See Comm. of Ministers of the Council of Eur. (Rapporteur Group on Social and Health Questions (GR-SOC)), Activities of the Council of Europe in the Field of Family Law (1998). The Parliamentary Assembly held that it was not sufficient for the Committee of Ministers merely to tell the member states that their respective legal systems should not include discriminatory provisions towards women but that it should also ask each member state to advise the Assembly as to the period it will require to comply with the principle of non-discrimination. Eur. Parl. Ass., Recommendation 1362 (1998) on Discrimination Between Women and Men in the Choice of a Surname and the Passing on of Parents’ Surname to Children, Doc. 8247 (1998). Furthermore, the issue at hand was considered by the CDCJ and the Steering Committee for Equality between Women and Men in 1995, and subsequently in 1999, in reply to the transmission of two recommendations by the Parliamentary Assembly. See *id.*; Eur. Parl. Ass., Report of the Committee on Legal Affairs and Human Rights, Doc. No. 7885 (1997).

<sup>155</sup> All the member states of the Council of Europe were asked to submit observations concerning their legal position and the practice in their respective countries. Eur. Comm. on Legal Co-operation (CDCJ), Opinion of the Eur. Comm. on Legal Co-operation (CDCJ) on Recommendation 1271 (1995) of the Parliamentary Assembly on Discrimination between Men and Women in the Choice of a Surname and in the Passing on of Parents’ Surname to Children, App. III (1996). The submitted observations revealed that many states had already reformed their legal systems to promote greater clarity and equality between men and women before the law in relation to their surname. Eur. Comm. on Legal Co-operation (CDCJ), Opinion of the Eur. Comm. on Legal Co-operation, (CDCJ) on Parliamentary Assembly Recommendations 1271 (1995) and 1362 (1998) on Discrimination Between Men and Women in the Choice of a Surname and in the Passing on of Parents’ Surname to Children, App. IV (1999). It is important to note that after the Committee examined these submissions, it held that some states had not completely implemented the abovementioned resolutions. See EUR. PARL. ASS., DOCS. 11628-11672, in PARLIAMENTARY ASSEMBLY, WORKING PAPERS: 2008 ORDINARY SECESSION (THIRD PART) 23-27 JUNE 2008 (Council of Eur. Pub. 2008).

<sup>156</sup> Eur. Parl. Ass., Recommendation 1798 on Respect for the Principle of Gender Equality in Civil Law para. 1 (2007) [hereinafter Recommendation 1798] (stating that the Parliamentary Assembly welcomed the “developments in many member states of the Council of Europe securing more respect for the principle of gender equality in civil law”). However, the Council of Europe noted that, “in some areas of law and in some jurisdictions—even in Europe—women continue to suffer discrimination.” *Id.*

<sup>157</sup> Recommendation 1271, *supra* note 126. In Recommendation 1271, the Parliamentary Assembly of the Council of Europe stated that “[m]any countries have introduced legislative reforms in recent decades with the aim of gradually achieving equality between the sexes in respect of the legal system governing surnames. Other countries have, however, retained the traditional legal systems based on

In turn, the Parliamentary Assembly of the Council of Europe urged the CDCJ to re-examine the related state laws on that subject and encouraged the CDCJ to implement fully the principles enshrined in paragraph 1(g) of article 16 of the CEDAW.<sup>158</sup>

### B. The CEDAW and Turkey

There have been many efforts by the international community to address the discrimination suffered by women,<sup>159</sup> the culmination of which was the CEDAW.<sup>160</sup> Although international treaties such as the CEDAW have undoubtedly contributed greatly to transforming the rights of women,<sup>161</sup> the conceptual and practical problems with implementing these rights persist in many parts of the world.<sup>162</sup> This is mainly due to the fact that the CEDAW has no established mechanism for addressing non-compliance and the Convention simply promotes substantive gender equality by requiring state parties to deal with the underlying causes of women's inequality.<sup>163</sup>

Women worldwide have struggled to have the right to maintain their own

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criteria which are often discriminatory between mother and father and discriminatory in terms of whether the child is born in or out of wedlock. Accordingly, a determined effort needs to be made to ensure that the legislation of all Council of Europe member states is quickly brought into line with the major principles of equality." *Id.*

<sup>158</sup> See Recommendation 1798, *supra* note 155, para. 1 (text adopted by the Standing Committee, acting on behalf of the Assembly, on May 24, 2007). In 2007, in Recommendation 1798, the Parliamentary Assembly welcomed developments in many states of the Council of Europe ensuring more efforts for the principle of gender equality in civil law. *Id.* However, the Assembly reiterated the point that in spite of said achievements, "even in Europe—women continue to suffer discrimination." *Id.*

<sup>159</sup> See, e.g., U.N. Charter art. 4, ¶ 1; G.A. Res. (III) A, Universal Declaration of Human Rights art. 2(2), U.N. Doc. A/RES/217(III) (Dec. 10, 1948); ICCPR, *supra* note 136, art. 2(2); ICESCR, *supra* note 98, arts. 2(1), 3.

<sup>160</sup> Article 1 of the CEDAW is unequivocal in providing a comprehensive definition of discrimination against women. CEDAW, *supra* note 116, art. 1 ("[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.").

<sup>161</sup> Otto noted that "violations experienced exclusively or primarily by women are expressly recognized in the founding human rights instruments, they are treated as a sub-category of the universal and formulated as 'protective' measures rather than human rights." Dianne Otto, *Women's Rights, in INTERNATIONAL HUMAN RIGHTS LAW* 345 (Daniel Moeckli et al. eds., 2010).

<sup>162</sup> The CEDAW has been described as a powerful international human rights law that reflects a global determination on the part of the international community to achieve gender equality through advancing women's rights. MEENA SHIVDAS & SARAH COLEMAN, WITHOUT PREJUDICE: CEDAW AND THE DETERMINATION OF WOMEN'S RIGHTS IN A LEGAL AND CULTURAL CONTEXT 3 (Meena Shivdas & Sarah Coleman eds., 2012). For an overall assessment of the CEDAW, see generally ANNE HELLUM & HENRIETTE SINDING AASEN, WOMEN'S HUMAN RIGHTS: CEDAW IN INTERNATIONAL, REGIONAL AND NATIONAL LAW 2 (Anne Hellum & Henriette Sinding Aasen eds., Cambridge U.P. 2013); Comm. on the Elimination of Discrimination Against Women, *General Recommendation on Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (Economic Consequences of Marriage, Family Relations and Their Dissolution)*, UN Doc. CEDAW/C/GC/29 (Oct. 30, 2013) [hereinafter *Comm. on CEDAW General Recommendation*].

<sup>163</sup> *Comm. on CEDAW General Recommendation, supra* note 162.

surname upon marriage.<sup>164</sup> Adoption of the husband's name by the wife and the children reflects a belief that the husband is the head of the family and the wife and children are subject to his control.<sup>165</sup> In such cases, in effect, the wife becomes subsumed behind his identity. As Jonathan Herring argued, this notion is largely *passé* in many developed countries.<sup>166</sup> However, this approach continues to persist even in some of the member states of the Council of Europe.<sup>167</sup> As for Turkey, bringing the Turkish law in line with the requirements of the CEDAW would considerably improve the lives of Turkish women.<sup>168</sup> For example, article 15(2) of the CEDAW stipulates that:

States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.<sup>169</sup>

Turkey was one of the sixty-nine states that ratified the CEDAW.<sup>170</sup> Crucially, Turkey placed a reservation on article 16, which grants women equal rights "during marriage and its dissolution," and in relation to children, and "[the same right] to choose a family name, a profession and an occupation."<sup>171</sup> The ratification document, however, states that Turkey clearly illustrated its intention to

<sup>164</sup> See, e.g., Deborah J. Anthony, *A Spouse by Any Other Name*, 17 WM. & MARY J. WOMEN & L. 187, 193 (2010); Heather MacClintock, *Sexism, Surnames, and Social Progress: The Conflict of Individual Autonomy and Government Preferences in Laws Regarding Name Changes at Marriage*, 24 TEMP. INT'L & COMP. L.J. 277, 281 (2010); Ki-young Shin, "The Personal Is the Political": *Women's Surname Change in Japan*, 8 J. KOR. L. 161, 161 (2008).

<sup>165</sup> Jonathan Herring, *The Power of Naming: Surnames, Children and Spouses*, in LAW AND LANGUAGE: 15 CURRENT LEGAL ISSUES 310, 316 (Michael Freeman & Fiona Smith eds., Oxford U.P. 2013).

<sup>166</sup> Jonathan Herring, *The Shaming of Naming: Parental Responsibilities in the Naming of Children*, in RESPONSIBLE PARENTS AND PARENTAL RESPONSIBILITY 105, 120 (Rebecca Robert et al. eds., 2009).

<sup>167</sup> Ivana Radacic, *Gender Equality Jurisprudence of the European Court of Human Rights*, 19 EUR. J. INT'L L. 841, 842 (2008).

<sup>168</sup> Yasemin Çelik-Levin, *The Effect of CEDAW on Women's Rights*, in HUMAN RIGHTS IN TURKEY 202, 205 (Zehra F. Kabasakal Arat ed., Pennsylvania U.P. 2007).

<sup>169</sup> CEDAW, *supra* note 116, art. 15.

<sup>170</sup> Turkey acceded to the CEDAW in 1985, and entered reservations to article 15(2), which provides for equal legal capacity and equal rights to manage property, and to article 15(4), which relates to choice of residence and domicile. MARSH A. FREEMAN, RESERVATION TO CEDAW: AN ANALYSIS FOR UNICEF, POLICY AND PRACTICE 21 (2009). Article 16(1)(c) (same rights during marriage and at dissolution), article 16(1)(d) (same rights and responsibilities as parents), article 16(1)(f) (same rights as guardians, trustees, adoptive parents), and article 16(1)(g) (rights to family name and to choice of profession) also were reserved. *Id.* In addition, the state reserved article 29. *Id.*

<sup>171</sup> *Id.* Indeed, Turkey expressed the opinion that certain aspects of the CEDAW contradicted the relevant clauses of the old Turkish Civil Code of 1926 that regulated marriage and family life. *Id.* Çelik-Levin, *supra* note 168, at 205. The Turkish Civil Code of 1926, which was in effect at the time, proclaimed that "1. The husband has the legal standing to represent the conjugal union (Article 154). 2. The husband chooses the domicile and duly provides for the maintenance of wife and children (Article 152/2). 3. The wife acquires the husband's surname (Article 153/1). 4. The wife, to the extent of her ability, must assist the husband by word and deed in his effort to maintain the home. The wife is responsible for household management (Article 153/2). 5. Both parents share authority over children but in the case of dispute, the husband's view prevails (Article 263) (Introductory Statement 1997)." *Id.*

implement the Convention fully in relation to substantive issues and at no stage showed any intention of invoking its reservations as an excuse for avoiding implementation of any article of the Convention.<sup>172</sup> After discovering that many of the articles of the Turkish Civil Code of 1926, such as article 153, violated the principles of the CEDAW, Turkey removed all reservations on September 20, 1999, and has subsequently taken a number of significant steps to fully implement the CEDAW.<sup>173</sup> By adopting this approach, the focal point of Turkey's law shifted from the Ottoman past to the contemporary international standards.<sup>174</sup> As a result, Turkey's new Civil Code of 2002 radically departed from its previous version, especially in relation to gender relations and family.<sup>175</sup> Moreover, in 2001 and 2004, the Turkish lawmakers added new language to Article 10<sup>176</sup> and Article 41<sup>177</sup> of the Turkish Constitution of 1982, in relation to gender equality.<sup>178</sup>

### C. The ECHR and the Lack of Marital Surname Choice for Women

The ECHR is silent on the issue of a married woman's surname, unlike some other international instruments that have either explicit provisions that govern the choice of surname by women at marriage or have explicit references to surnames.<sup>179</sup> Both the European Commission for Human Rights and the ECtHR have decided that regulation of names, and surnames in particular, falls within the ambit of private life.<sup>180</sup> But, in two cases relating to names and surnames brought before the ECtHR, *Burghartz v. Switzerland* and *Unal Tekeli v. Turkey*, the applicants focused their arguments on two articles of the ECHR: article 8,<sup>181</sup> which

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<sup>172</sup> FERIDE ACRE & AYSE GUNES-AYATA, GENDER AND IDENTITY CONSTRUCTION: WOMEN OF CENTRAL ASIA, THE CAUCASUS AND TURKEY 4 (Feride Acre & Ayse Gunes-Ayata eds., 2000).

<sup>173</sup> This was a reaction to the 1995 World Conference on Women in Beijing during which Turkey committed to withdrawing its reservations to the CEDAW. Çelik-Levin, *supra* note 168, at 206.

<sup>174</sup> Ekrem Eddy Güzeldere, *Civilianizing Turkish Policy: Civil Society in Decision-Making and Civil-Military Relations*, in GOVERNANCE IN THE MIDDLE EAST AND NORTH AFRICA: A HANDBOOK 218, 223 (Abbas Kadhim ed., 2012).

<sup>175</sup> See generally Ergun Ozsunay, *Some Remarks on the Amendments Proposed by the Preliminary Draft of the Turkish Civil Code*, in LIBER MEMORIALIS FRANCOIS LAURENT, 1810-1887, at 605 (Johan Erauw ed., 1989) (assessing the Revised Code).

<sup>176</sup> See *supra* note 75.

<sup>177</sup> See *supra* note 76.

<sup>178</sup> Elver, *supra* note 110, at 283; KAN AKKANAT, COMPARISON OF THE EQUALITY AND PARTICIPATION RIGHTS IN THE CONSTITUTIONS OF TURKEY, CHINA AND GERMANY 4 (2014).

<sup>179</sup> International instruments, such as article 24(2) of the International Covenant on Civil and Political Rights, article 7 and article 8 of the Convention on the Rights of the Child of November 20, 1989, or article 18 of the American Convention on Human Rights specifically refer to the issue of names. See sources cited *supra* note 14. Article 8 of the Convention on the Rights of the Child does not have any specific provisions on names. *Id.*

<sup>180</sup> See *Burghartz v. Switzerland*, App. No. 16213/90, 18 Eur. Ct. H.R. 101 (ser. A) (1994); *Unal Tekeli v. Turkey*, App. No. 29865/96, Eur. Ct. H.R. (2004); *Güneş v. Turkey*, App. No. 26268/08, Oct. 3, 2013 (Turk.); *Tüten v. Turkey*, App. No. 38249/09, Dec. 10, 2013 (Turk.); *Leventoğlu Abdülkadiroğlu v. Turkey*, App. No.7971/07, May 28, 2013 (Turk.).

<sup>181</sup> *Burghartz*, App. No. 16213/90; *Unal Tekeli v. Turkey*, App. No. 29865/96, Eur. Ct. H.R. (2004). According to article 8 of the ECHR, "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the

provides protection for private and family life, and article 14, which decrees not to discriminate in relation to the rights and freedoms prescribed in the ECHR.<sup>182</sup>

The ECtHR has frequently referred to positive obligations of states in relation to private life under article 8 of the ECHR.<sup>183</sup> Nonetheless, where positive obligations are concerned, contracting states are granted a considerable margin of deference.<sup>184</sup> In its landmark decision of *Marckx v. Belgium*, the ECtHR held:

[T]he object of [article 8 of the ECHR] is “essentially” that of protecting the individual against arbitrary interference by the public authorities . . . . Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective “respect” for family life.<sup>185</sup>

This kind of positive obligation compels the member states of the Council of Europe to protect actively their citizens and realize their obligations under the ECHR.<sup>186</sup> Therefore, the existence of these positive obligations necessitates the “effective” protection of a Convention right according to article 1 of the ECHR, which requires High Contracting Parties to take positive action for the enjoyment of the rights protected by the Convention for everyone within their jurisdiction.<sup>187</sup> Moreover, article 14 of the ECHR requires High Contracting Parties to secure the enjoyment of rights and freedoms set forth in the ECHR without discrimination.<sup>188</sup>

Although article 14 of the ECHR can be invoked only in conjunction with another substantive right or freedom protected by the ECHR and Additional Protocols to the ECHR, from the beginning of its existence the ECtHR held that discrimination prohibited by article 14 of the ECHR could take place even where a

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exercise of this right except such as is in accordance with the law and is necessary in 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 for the protection of the rights and freedoms of others.” ECHR, *supra* note 16, art 8. See generally, Ivana Roagna, *Protecting the Right to Respect for Private and Family Life Under the European Convention on Human Rights*, in COUNCIL OF EUROPE HUMAN RIGHTS HANDBOOKS 16 (2012).

<sup>182</sup> ECHR, *supra* note 16, art 14 (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”).

<sup>183</sup> *Marckx v. Belgium*, App. No. 6833/74, Eur. Ct. H.R. (1979).

<sup>184</sup> MICHAEL HAAS, INTERNATIONAL HUMAN RIGHTS: A COMPREHENSIVE INTRODUCTION 140 (2013).

<sup>185</sup> Laurens Lavrysen, *The Scope of Rights and the Scope of Obligations*, in SHAPING RIGHTS IN THE ECHR: THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN DETERMINING THE SCOPE OF HUMAN RIGHTS 162 (Eva Brems & Janneke Gerards eds., 2013).

<sup>186</sup> See generally ALASTAIR MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS 5 (2004).

<sup>187</sup> Lavrysen, *supra* note 185, at 162.

<sup>188</sup> Essentially, formal equality requires that all individuals who are in the same situation should be accorded the same treatment and that people should not be treated differently because of religion, gender, and race. See generally Christopher McCrudden, *Theorising European Equality Law*, in EQUALITY IN DIVERSITY: THE NEW EQUALITY DIRECTIVES 1, 20 (Cathryn Costello & Eilís Barry eds., 2003).

substantive article of the ECHR has not been violated.<sup>189</sup>

The ECtHR's approach as to whether the right to a surname triggers the positive obligation in regards to article 8 of the ECHR, on the part of the state has been rather inconsistent.<sup>190</sup> Both the European Commission for Human Rights and the ECtHR have presided over cases in which women have challenged the legal requirements imposed by the states that they should adopt their husband's surname after marriage.<sup>191</sup> In essence, through their jurisprudence, the European Commission for Human Rights and the ECtHR have established that regulation of names falls within the ambit of article 8 of the ECHR.<sup>192</sup> However, until *Hagmann-Hüsler v. Switzerland*,<sup>193</sup> the first case concerning the issue of surnames, reached the Strasburg organs in 1977, their attitude towards the issue was very ambivalent.

In *Hagmann-Hüsler v. Switzerland*, the applicant had intended to register as a parliamentary candidate for her local canton in Switzerland under her maiden name Lucie Hüsler.<sup>194</sup> Even after her marriage, Hüsler continued to use her maiden name and was widely recognized by it in her local community.<sup>195</sup> However, the canton electoral authorities refused to register her under her maiden name and asked Ms. Hüsler to register as a parliamentary candidate under her husband's name, Hagmann.<sup>196</sup> Subsequently, the plaintiff, Lucie Hüsler, suggested that she could stand for election under Hüsler-Hagmann but the canton electoral authorities denied her request and would only accept her registration if she reversed the order of the names to Hagmann-Hüsler.<sup>197</sup> After exhausting all domestic remedies in Switzerland, Hüsler applied to the European Commission for Human Rights, arguing that the Swiss Law of Surname was in direct contravention of the ECHR.<sup>198</sup> However, the Commission found no violation of the privacy and family life rights, or equality rights under the ECHR.<sup>199</sup> In other words, the legal approach adopted by the Swiss judiciary was in no way a breach of the ECHR and the Commission rejected Hüsler's application.<sup>200</sup> Essentially, the Commission

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<sup>189</sup> ALASTAIR MOWBRAY, *CASES, MATERIALS, AND COMMENTARY ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 815 (2012). See also "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium, App. No. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, 8 Eur. H.R. Rep. 252 (1968).

<sup>190</sup> DAVID J. HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 539 (2014).

<sup>191</sup> Aeyal M. Gross, Note, *Rights and Normalization: A Critical Study of European Human Rights Case Law on the Choice and Change of Names*, 9 HARV. HUM. RTS. J. 269, 271 (1996).

<sup>192</sup> *Stjerna v. Finland*, App. No. 18131/91, para. 37, Eur. Ct. H.R. (1994).

<sup>193</sup> *Hagmann-Hüsler v. Switzerland*, App. No. 8042/77, 12 Eur. Comm'n H.R. Dec. & Rep. 202 (1977).

<sup>194</sup> *Id.* at 205-06.

<sup>195</sup> *Id.* at 202.

<sup>196</sup> *Id.* at 205.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 206.

<sup>200</sup> *Id.*

found that in treating women's marital names differently than men's, the purpose of the Swiss law served the interest of the state, which was to enable correct identification of families.<sup>201</sup>

In the case of *X. v. the Netherlands*,<sup>202</sup> under very similar circumstances, the Commission rejected an application of a woman who wished to be included on the electoral list under her maiden name, and not under her husband's surname.<sup>203</sup> In *X.*, the Commission did not apply article 8 of the ECHR but decided the case by relying on the right to free elections under article 3 of the first Protocol to the ECHR, and the equality clause under article 14 of the ECHR.<sup>204</sup> The Commission concluded that the distinction between the treatment of married women and married men in the Dutch legislation was primarily an administrative function and a furtherance of a legitimate state goal.<sup>205</sup> Consequently, the Commission decided that the disparate treatment of married women did not constitute discriminatory interference with the right to elect freely the legislature within the contracting states, which article 3 of the first Protocol of the ECHR guarantees.<sup>206</sup>

However, a decade after *X. v. the Netherlands*, the case of *Burghartz v. Switzerland* marked a change of approach in relation to the issue of surnames by the ECtHR.<sup>207</sup> In *Burghartz*, Susanna Burghartz and Albert Schnyder, a Swiss couple, wanted to use the wife's maiden name as part of the husband's family name—as Burghartz-Schnyder.<sup>208</sup> The couple married in Germany but they returned to Switzerland as permanent residents.<sup>209</sup> Upon their return, the couple realized that unlike the law in Germany where the husband had availed himself of the possibility of inserting his surname in front of the family name Schnyder-Burghartz, he could not do so in Switzerland.<sup>210</sup> At the time, the Swiss Civil Code of 1907 required that a couple adopt the husband's surname as their family name and only the wife could use her maiden name before the family name.<sup>211</sup>

<sup>201</sup> *Id.*

<sup>202</sup> *X. v. Netherlands*, App. No. 9250/81, 32 Eur. Comm'n H.R. Dec. & Rep. 175 (1983).

<sup>203</sup> *Id.* at 176 (citing Elections Act, Nov. 6, 1976, art. D 4(2), also cited in Tirosh, *supra* note 25, at 265)). The Dutch Elections Act postulated that a married woman should be registered in the electoral register either under her husband's name followed by "born . . . (maiden name)," or alternatively under her maiden name/premarital name followed by "wife of . . . (husband's name)." *Id.*

<sup>204</sup> *Id.* According to article 3 of the first Protocol to the European Convention on Human Rights, "[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Mar. 20, 1952, E.T.S. No. 155.

<sup>205</sup> *Id.*; *X.*, App. No. 9250/81.

<sup>206</sup> *Id.*

<sup>207</sup> *Burghartz v. Switzerland*, App. No. 16213/90, 18 Eur. Ct. H.R. 101 (ser. A) (1994). The Court awarded the applicant CHF 20,000 for costs and incurred expenses. *Id.*

<sup>208</sup> *Burghartz*, App. No. 16213/90.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* According to article 1355 of the German Civil Code, the couple had chosen the wife's surname, Burghartz, as the family name, while the husband registered his birth surname in front of the family name, to be known as Schnyder-Burghartz. *Id.*

<sup>211</sup> *Id.*

Nevertheless, the Swiss registry office recorded both names under the husband's premarital name.<sup>212</sup> In fact, the Swiss courts later decided that the couple could use the wife's name as part of their family name, but did not allow an application by the husband to include both surnames in their family name.<sup>213</sup> Schnyder complained to the ECtHR alleging that the Swiss courts had violated his rights under article 8 and article 14 of the ECHR.<sup>214</sup> The ECtHR held that unlike some other international instruments, article 8 of the ECHR does not have any explicit provisions that govern the use of names.<sup>215</sup> Nonetheless, the Court stated that:

As a means of personal identification and of linking to a family, a person's name nonetheless concerns his or her private and family life. The fact that society and the State have an interest in regulating the use of names does not exclude this, since these public-law aspects are compatible with private life conceived of as including, to a certain degree, the right to establish and develop relationships with other human beings, in professional or business contexts as in others . . . .<sup>216</sup>

Whilst the majority of the ECtHR accepted that the issue of surnames exists at the meeting point of the private and public spheres, the opinions previously expressed in the European Commission of Human Rights' report reflected a lack of unanimity on the subject.<sup>217</sup> In a similar case, *K.B. v. Netherlands*,<sup>218</sup> the majority of the European Commission of Human Rights were of the opinion that names are protected under article 8 of the ECHR, and the ECtHR held that "the right to develop and fulfill one's personality necessarily comprises the right to identity and, therefore, to a name."<sup>219</sup> Still, in a dissenting opinion, some of the Commissioners emphasized the private nature of names, but concluded that the interference with article 8(1) of the ECHR may be justified under article 8(2) of the ECHR,<sup>220</sup> which allows certain limitations on the rights protected by article 8(1) of the ECHR.<sup>221</sup>

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* International Treaties, such as article 24(2) of the International Covenant on Civil and Political Rights, articles 7 and 8 of the Convention on the Rights of the Child of November 20, 1989, or article 18 of the American Convention on Human Rights specifically refer to the issue of names. Article 8 of the Convention does not have any specific provisions on names. See sources cited *supra* note 14.

<sup>216</sup> ECHR, *supra* note 16, art. 8; see also *Burghartz v. Switzerland*, App. No. 16213/90, 18 Eur. Ct. H.R. 101 (ser. A) (1994).

<sup>217</sup> Gross, *supra* note 191, at 272-73.

<sup>218</sup> *K.B. v. Netherlands*, App. No. 18806/91, Eur. Ct. H.R. (1993).

<sup>219</sup> *Id.*; see also Thomas Frank, *Constructing the Self: the Right to One's Name*, in LIBER AMICORUM JUDGE MOHAMMED BEDJAOUI 699 (Emile Yakpo & Tahar Boumedra eds., 1999).

<sup>220</sup> *K.B.*, App. No. 18806/91. Article 8(2) of the ECHR sets out three main and cumulative criteria under which interference with the rights under article 8(1) can be justified, namely: the interference must be (1) "in accordance with the law;" (2) "necessary in a democratic society;" and (3) in advancement of at least one of the aims listed in paragraph 2—"national security, public safety, economic well-being of the country, prevention of disorder or crime, protection of health or morals or protection of the rights and freedoms of others." ECHR, *supra* note 16, art. 8(2).

<sup>221</sup> *K.B.*, App. No. 18806/91; *Burghartz*, App. No. 16213/90. In their dissenting opinion, Judges Pettiti and Valticos stated that, "[a]s in the determination of nationality, the legislation on assigning

However, the ECtHR and the Commission in the past have adopted a consistent approach when faced with marital naming issues, identifying the principle of gender equality as “a major goal in the member States of the Council of Europe as manifested by the choice availed in the marital naming option communicated.”<sup>222</sup> Hence, the ECtHR found that despite the fact that the ECHR did not contain any specific provisions on names, as a means of personal identification and linking to a family, a person’s surname, nevertheless, concerns her or his private and family life.<sup>223</sup> Therefore, under the ECHR, a person’s name comprises yet another facet of her or his private and family life.<sup>224</sup> Following the decision in *Burghartz*, the ECtHR recognized that the “requirements that women register under their husband’s name may perpetuate patriarchal notions of society and constitute significant violations of equality.”<sup>225</sup>

It is quite clear that the ECtHR has now accepted that the matters concerning forenames and surnames fall within the ambit of article 8 of the ECHR.<sup>226</sup> In *Stjerna v. Finland*, the ECtHR did not find any violation of article 8 of the ECHR by the Finish authorities, which had denied a man’s application to change his surname.<sup>227</sup> The ECtHR, in a unanimous opinion, granted Finland a wide “margin of appreciation”<sup>228</sup> in regulating the changing of names, due to the fact that at the time there was little common ground in the member states’ domestic practices regarding surnames.<sup>229</sup> In *Guillot v. France*, the ECtHR was of the opinion that based on the fact that forenames constituted a means of identifying persons within their family and community, they also concerned private and family life.<sup>230</sup>

However, in *Ünal Tekeli v. Turkey*, the ECtHR held unanimously that the tradition of obliging women to adopt their husbands’ surnames in Turkey was incompatible with the ECHR.<sup>231</sup> Upon marriage, the wife-applicant adopted her husband’s surname as required by the Turkish Civil Code of 1926.<sup>232</sup> In 1995, she

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names must remain within the State’s domain and does not come within the ambit of the Convention. It is well known that views on the assignment and choice of surnames and first names vary within each national system, both as regards births and as regards marriages and divorces. In different countries it would be possible to find hundreds of variants.” *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> MOWBRAY, *supra* note 189, at 503.

<sup>225</sup> Gross, *supra* note 191, at 274.

<sup>226</sup> HARRIS ET AL., *supra* note 190, at 539.

<sup>227</sup> *Stjerna v. Finland*, App. No. 18131/91, Eur. Ct. H.R. (1994). The man complained that he needed to change his name because other people often misspelled it. *Id.*

<sup>228</sup> The ECtHR has developed the approach that states have a “margin of appreciation” in deciding whether a particular restriction on a right is required in the given circumstance. *See generally* YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR 2-3 (2002); HOWARD C. YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE 112 (1996).

<sup>229</sup> *Stjerna*, App. No. 18131/91.

<sup>230</sup> *Guillot v. France*, App. No. 22500/93, Eur. Ct. H.R. (1996).

<sup>231</sup> *Ünal Tekeli v. Turkey*, App. No. 29865/96, Eur. Ct. H.R. (2004).

<sup>232</sup> *Id.*

failed in her attempt to use her maiden name, Ünal, after marriage and she applied to the domestic courts for an order allowing her to use only her maiden name.<sup>233</sup> In 1997, Turkey amended the Civil Code of 1926 to add a provision enabling women to use their maiden name in front of their husband's name, and the provision was re-enacted in 2001.<sup>234</sup> However, this possibility was not ideal to Ünal who wished to use only her maiden name.<sup>235</sup> After exhausting all domestic remedies, she complained to the ECtHR alleging a violation of article 8 and article 14 of the ECHR.<sup>236</sup> In reviewing the case, the ECtHR noted "the emergence of a consensus among the Contracting States of the Council of Europe in favour of choosing the spouses' family name on an equal footing."<sup>237</sup> The ECtHR also singled out Turkey as

[t]he only country which legally imposes—even where the couple prefers an alternative arrangement—the husband's name as the couple's surname and thus the automatic loss of the woman's own surname on her marriage. Married women in Turkey cannot use their maiden name alone even if both spouses agree to such an arrangement.<sup>238</sup>

Even in the opinion of the ECtHR, the fact that the legislation enacted on November 22, 2001 enabled Turkish women to use their maiden name in front of their husband's surname after marriage did not make any difference since, in reality, it did not address the interests of married women who would want to maintain their maiden name after marriage.<sup>239</sup> The Court also acknowledged the fact that prior to the legislative amendments of the Turkish Civil Code of 2002, on November 22, 2001, the position of men in Turkish society was from a legal view of undoubtable dominance.<sup>240</sup> As for the tradition of reflecting family unity through the adoption of the husband's name by the wife, the ECtHR stated that because of the advancement of the equality of sexes, it is no longer acceptable to consider women as anything but equal in states within the Council of Europe, including Turkey.<sup>241</sup> Furthermore, the ECtHR emphasized the importance of the principle of non-discrimination.<sup>242</sup> The decisions of the ECtHR reveal that the ECtHR no longer grants states discretion in matters relating to choice of family name where a national law is in conflict with article 14 of the ECHR's prohibition on discrimination—if the national law tolerates gender discrimination, as is the case of Turkey.

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<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* para. 61.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

Following its case-law, the ECtHR applies article 8 (right to respect for family life) together with article 14 (prohibition of discrimination) of the ECHR to decide cases concerning surnames.<sup>243</sup> For example, in 2013, three Turkish citizens brought their cases before the ECtHR, which found violation of article 14 in conjunction with article 8, because the applicants, all married women, could not maintain their maiden name after marriage.<sup>244</sup>

### CONCLUSION

Turkey has evolved from an absolute patriarchal society during the Ottoman Empire into a modern democracy. From a developmental point of view, the state still struggles with certain aspects of gender equality. The lack of choice of women's marital surnames is one of them. In a truly democratic society, gender equality is considered an integral part of the human rights, which should be guarded by the state. The Turkish Civil Code of 2002, however, compels women to adopt their husband's surname upon marriage.<sup>245</sup> Married women in Turkey also have little or no input in the selection of a surname for their children.<sup>246</sup> Even upon divorce, the wife must relinquish her husband's surname unless she can prove that retaining his surname would be of no legal detriment to him.<sup>247</sup>

Since the Turkish Constitutional Court did not annul article 187 of the Turkish Civil Code of 2002, which governs the use of women's surnames, the article is still in force. As a result, a woman who wishes to use only her maiden name after marriage must bring a case before a civil court of the first instance. If the judge accepts her case and decides that she can use only her maiden name, the Turkish Supreme Court may uphold this decision. However, if the Supreme Court dismisses the decision of the civil court of the first instance then the married woman has to file an individual application referring to the previous decisions of the Turkish Constitutional Court regarding women's surnames. If the Turkish Constitutional Court, in turn, accepts her application, she may use only her maiden name. Nevertheless, if the married woman has a child during the marriage, the child will bear the father's surname *ipso jure*. In that scenario, the father and the child will have the same surname and the woman will have a different surname.

In its recent cases, the Turkish Constitutional Court adopted a more liberal

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<sup>243</sup> In 2010, in *Rose v. Switzerland*, a non-Swiss husband was unable to retain his surname upon marriage to a Swiss national. *Rose v. Switzerland*, App. No. 664/06, Eur. Ct. H.R. (2010). The ECtHR was unanimous in finding a breach of article 14 in combination with article 8 of the ECHR. *Id.*

<sup>244</sup> The ECtHR held that "the Government [has] not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court considers that there has been a violation of Article 14 of the [ECHR] in conjunction with Article 8." *Güneş v. Turkey*, App. No. 26268/08, Oct. 3, 2013 (Turk.). See also *Tüten v. Turkey*, App. No. 38249/09, Dec. 10, 2013 (Turk.); *Leventoğlu Abdülkadiroğlu v. Turkey*, App. No. 7971/07, May 28, 2013 (Turk.).

<sup>245</sup> CODE CIVIL [C. CIV.] [CIVIL CODE 2002] art. 187 (Turk.).

<sup>246</sup> *Id.* art. 321.

<sup>247</sup> *Id.* art. 173.

approach to gender equality and the Court currently accepts all individual applications of women to retain their maiden name. Nonetheless, the Turkish Constitutional Court's decisions affect only the individual woman applicant, not the public at large. This more liberal and progressive approach adopted by the Turkish judiciary is rather encouraging and follows the evolution of the ECtHR's jurisprudence, which is now firmly based on gender equality.

Furthermore, in deciding cases concerning women's surnames, the Turkish Constitutional Court and the Turkish Supreme Court have been directly applying the ECHR and CEDAW in accordance with Article 90(5) of the Turkish Constitution, rather than relying on article 187 of the Turkish Civil Code of 2002. The Turkish Constitution of 1982 allows for the application of the ECHR and CEDAW in these cases because it provides that the duly ratified international treaties have force of law in Turkey. Undoubtedly, this is an improvement for Turkish women; however, in practice, married women still would be unable to pass their chosen surname onto their children. Therefore, in order to fulfill its international legal obligations and ensure true gender equality, Turkey's lawmakers need to address this problem by changing the law.

