REMARRIAGE RESTRICTION FOR WOMAN OF 300 DAYS IN TÜRKİYE: REVIEW OF THE ECtHR's *NURCAN BAYRAKTAR v. TÜRKİYE* JUDGMENT

Türkiye'deki 300 Günlük İddet Müddeti: AİHM'in Nurcan Bayraktar v. Türkiye Kararının Değerlendirilmesi

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Abstract

On 27 June 2023, the ECtHR held unanimously in Nurcan Bayraktar judgment that there has been a violation of Article 8 and Article 14 in conjunction with Article 12 of the ECHR. The violation arose from the application of Article 132 of the TCC which imposes a 300-day waiting period on divorced women to remarry, unless they lodge an application to a Family Court to lift the waiting period by proving with a medical report that they are not pregnant. The Court concludes that obligation to produce medical evidence to prove that the applicant was not pregnant -which can only be obtained by means of medical examination- constituted an interference with the applicant's exercise of her right to respect for her private life, considering that it was not necessary in a democratic society. This study aims to summarise and review this judgment, which was delivered in French, in English for a wider audience[1], by providing a background information on Article 132 of the TCC.

Keywords: European Court of Human Rights, European Convention on Human Rights, Right to Marry, Prohibition of Discrimination, Right to Respect for Private and Family Life.

Makalenin Geliş Tarihi: 19.05.2024, **Makalenin Kabul Tarihi**: 08.08.2024.

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1 Up to date, there is no offical translation available on the HUDOC's website.

Özet

27 Haziran 2023 tarihinde Avrupa İnsan Hakları Mahkemesi oybirliğiyle Nurcan Bayraktar davasında Avrupa İnsan Hakları Sözleşmesi'nin 8. maddesi ile 12. maddesiyle bağlantılı olarak 14. maddesinin ihlal edildiğine karar vermiştir. Boşanmış kadınlara hamile olmadıklarını doktor raporuyla kanıtlayarak bekleme süresinin kaldırılması için Aile Mahkemesi'ne başvurmadıkları sürece yeniden evlenmek için 300 günlük bekleme süresi getiren Türk Medeni Kanunu'nun 132. maddesinin uygulanması, ihale sebebiyet vermiştir. Mahkeme, demokratik bir toplumda, başvurucunun hamile olmadığını kanıtlamak için yalnızca tıbbi müdahale yoluyla elde edilebilecek bir kanıt sunma zorunluluğunun gerekli olmadığını göz önünde bulundurarak, bu müdahalenin başvurucunun özel hayatına saygı gösterilmesi hakkına aykırı olduğu sonucuna varmıştır. Bu çalışma, Türk Medeni Kanunu'nun 132. maddesi hakkında bilgi sunmayı ve Fransızca olarak verilen bu kararı daha geniş bir kitleye ulaştırmak için İngilizce olarak özetlemeyi ve incelemeyi amaçlamaktadır.

Anahtar Kelimeler: Avrupa İnsan Hakları Mahkemesi, Avrupa İnsan Hakları Sözleşmesi, Evlenme Hakkı, Ayrımcılık Yasağı, Özel Hayata ve Aile Hayatına Saygı Hakkı

INTRODUCTION

Gender inequality and gender-based discrimination is, still, one of the fundamental problems in the world. According to the United Nations, besides being a fundamental human right; gender equality is also a necessary foundation for a peaceful, prosperous and sustainable world[2]. Although the repealed 1926 Turkish Civil Code (Türk Medeni Kanunu) ("TCC") was considered to be an egalitarian law for its time, it was far from ensuring the equality of men and women. With the current TCC, adopted in 2002, the legislator tried to adopt a more modern structure by taking into account this inequality and evolving social life[3]. Nevertheless, there are still regulations in the field of family law that contradict gender equality, such as Article 187, which regulated that married women shall bear their husband's surname upon marriage, and Article 132, which regulates the 300-day waiting period for divorced woman to remarry. The European Court of Human Rights ("ECtHR") held that Article 187 of the TCC violates Article 14 of the European Convention on Human Rights ("ECHR") in conjunction with Article 8[4]. After this judgment that held in 2004, however, the government failed to take appropriate actions to amend the code. The Constitutional Court annulled Article 187 of the TCC in 2023 and this judgment is effective starting from 2024[5].

According to Article 132 of the TCC: *When a marriage is terminated, the woman shall not remarry until after three hundred days have passed as of the termination of the marriage. Giving birth terminates this period. In the cases where the woman is not pregnant from her former marriage or the spouses want to remarry each other, the court shall revoke this period*. Although in a modern society, this regulation seems to be an obvious violation

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2 "Goal 5: Achieve gender equality and empower all women and girls", United Nations https://www.un.org/sustainabledevelopment/gender-equality/ accessed July 1, 2023.

3 Özlem Yenerer-Çakmut, Özge Yücel-Dericiler, Sendi Yakuppur, Işık Özer, and Ferhat Yıldırım, "Türkiye'de Hukuk Eğitimi, Mevzuat ve Uygulamada Toplumsal Cinsiyete Duyarlılık", *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi* 27/2 (2021): 939.

4 "*The interests of married women who do not want their marriage to affect their name have not been taken into consideration.", "Consequently, the objective of reflecting family unity through a joint family name cannot provide a justification for the gender-based difference in treatment complained of in the instant case." See. Ünal Tekeli v. Turkey* App no 29865/96 (ECtHR, 16 November 2004) [61] and [68].

5 Anayasa Mahkemesi, E. 2022/155, K. 2023/38, T. 22/02/2023. Starting from 28 January 2024, Article 187 of the TCC cannot be enforced.

of human rights, the national courts did not consider it in this manner while applying it. Ultimately, the ECtHR established that there has been a violation of Article 8 and Article 14 in conjunction with Article 12 of the ECHR.

Since Article 132 of the TCC is now receiving close attention both nationally and internationally, thanks to the ECtHR judgment, this study aims to scrutinise the recent *Nurcan Bayraktar v. Türkiye* judgment and provide background knowledge in English on the marriage ban. To accurately discuss the case, the first section provides background information on the 300-day remarriage ban imposed on divorced Turkish women and the obligation to provide medical evidence to the competent Family Court to lift the waiting period. It then briefly discusses the role of the ECtHR and its judgments in Türkiye. Since the ECtHR delivered the *Nurcan Bayraktar v. Türkiye* judgment in French, the second section will provide a summary of the judgment in English in order to present it to a wider audience. The third section of the study will answer the following research question: *How could the national courts have intervened to avoid the violation judgment?* In the final part of the study, the conclusions will be presented.

I. ANALYSING THE RESTRICTION ON REMARRIAGE OF DIVORCED WOMEN FOR 300 DAYS

Before analysing the ECtHR judgment on this issue, it is first necessary to explain the relevant Turkish regulation and its application in practice to form an informative foundation.

A. The Restriction on Remarriage of Divorced Women for 300 days (Article 132 of the Turkish Civil Code)

Article 95 of the repealed Turkish Civil Code No. 743 regulated the period of remarriage restriction. Pursuant to this regulation, a woman who became a widow due to the death of her husband or divorce or whose marriage was judged to be null and void could not remarry until three hundred days had elapsed from the date of death, divorce or judgement of nullity; the period expired only after giving birth. If it was not possible for the woman to become pregnant or if the husband and wife separated by divorce wanted to marry each other again, the judge might shorten this period. The regulation is similarly included in the Turkish Civil Code that is currently in force. According to Article 132 of the TCC: *When a marriage is terminated, the woman shall not*

remarry until after three hundred days have passed as of the termination of the marriage. Giving birth terminates this period. In the cases where the woman is not pregnant from her former marriage or the spouses want to remarry each other, the court shall revoke this period. While the words "may shorten" were used in the repealed code, the use of the words "shall revoke" in Article 132 of the TCC is a conscious choice[6]; because in the event that it is understood that the woman is not pregnant or the ex-spouses remarry, the court has no discretionary power and must revoke the waiting period[7].

The rationale behind the regulation was to ensure the precise determination of parentage while protecting the rights and freedoms of others and upholding the public order[8]. The Marriage Regulations (Evlendirme Yönetmeliği) Article 2/1(i) provides that *the statutory waiting period (kanuni bekleme süresi) refers to the waiting period of three hundred days required for a woman whose marriage has been terminated to remarry in order to avoid confusion of kinship*.

The person who gave birth to a child is considered to be the mother of the child, according to Article 282/1 of the TCC. Thus, the parentage relationship between the child and the mother is automatically established by law, upon the birth of the child. The establishment of paternity between the child and the father, however, is not so straight forward. Article 282 of the TCC mentions four different possibilities : a) marriage with the mother, b) recognition, c) judgment of the competent court that is issued as an outcome of a paternity case, and d) adoption. Marriage with the mother of the child is the most convenient way to establish paternity. The presumption of paternity, which is regulated under Article 285, recognizes the husband as the father by stating that *the husband shall be the father of the child born during the marriage or within three hundred days following the termination of the marriage. The child born after the three hundred days shall be attributed to the ex-husband only if it is proved that the mother conceived during the marriage*. Article 287/2 states that *a child born at least one hundred and eighty days after the marriage and at most three hundred days after the termination of the marriage is deemed to have been conceived within the marriage*. Evidently, the legal paternity is not directly associates with the

6 Seda Gayretli Aydın, "Kadın ve Kanuni Bekleme Süresi" *TBB Dergisi* 136 (2018): 276.
7 Ali Yarayan, *Türk Medenî Hukuku Temel Bilgiler* (Ankara: Yetkin Yayınları, 2013), 269.
8 *Nurcan Bayraktar v. Türkiye* App no 27094/20 (ECtHR, 27 June 2023) [37-40].

biological paternity[9]. Given the loyalty obligations of the spouses during their marriage, this presumption serves the husband to be legally qualify as the father, without the necessity of legal action.

Here, there are two important questions to be asked: While having the *recognition* as an option to legally connect the child to the ex-husband with the paternity bond, in cases where the ex-wife is pregnant, why must the divorced woman wait three hundred days to be able to marry again? Furthermore, why is the divorced woman obligated to present medical evidence proving that she is not pregnant to a competent court in order to get this mandatory waiting period lifted?

Although current legal systems have made significant improvements in terms of human rights and women's rights, patriarchal practices that discriminate against women still exist, as this regulation[10]. Given today's technology, waiting three hundred days to bond the unborn baby to the ex-husband is pointless[11]. Parental DNA testing can easily be conducted after birth, even during pregnancy[12]. Hence, this regulation only creates a burden for divorced women, as it obliges them to receive a medical report on the pregnancy, file an application to the Family Court, and wait for the judicial approval of the medical report, just to lift that waiting period. This leads to unnecessary waste of effort, time, and money, including for the courts.

9 Özlem Sarı Fidan, "Karşılaştırmalı Hukuk Perspektifinden Babalık Karinesi", *Adalet Dergisi* 70 (2023): 121.

10 Nüket Paksoy-Erbaydar, and Aysun Balseven-Odabaşı, "Medeni Kanunun Bekleme Süresi (İddet Müddeti) ile İlgili 132. maddesinin Kadın Hakları ve Modern Tıptaki Gelişmeler Işığında Değerlendirilmesi" *Fe Dergi* 10 (2018): 114.

11 Same opinion, *See*. Gayretli-Aydın, "Kadın," 282.

12 The invention of DNA-based parentage testing made prenatal paternity testing possible; and it has been used both as an informational application for the pregnant woman and as a forensic application in the case of pregnancy after a rape. Charles M. Strom, Svetlana Rechitsky, Norman Ginsberg, Oleg Verlinsky, and Yury Verlinsky "Prenatal paternity testing with deoxyribonucleic acid techniques", *American Journal of Obstetrics and Gynecology* 174(6) (1996): 1853.

It shall be noted that such a regulation is not unique to Türkiye, but also exist or existed in other countries, such as Austria[13], Japan[14], Italy[15], and Switzerland. The origin of this Turkish provision on the woman's waiting period originates from Article 103 of the Swiss Civil Code (ZGB 1912). The regulation prohibited widows and women whose marriage has been annulled or declared invalid from contracting a new marriage before the expiration of three hundred days from the termination or annulment of the previous marriage. It was, also, claimed that the purpose of this waiting period was to prevent uncertanties about paternity[16]. However, that regulation was abolished before the current TCC entered into force[17]. Despite being criticised for years by scholars; however, the Grand National Assembly of Türkiye (Türkiye Büyük Millet Meclisi "TBMM") has never amended the regulation. In 2016, Mahmut Tanal, a lawyer and a member of parliament, officially submitted an amendment proposal to the TBMM to abolish Article 132 of the TCC in order to lift the waiting period for divorced women on the grounds that it is against equality, human rights, and democracy[18]. Since the proposal was not debated during the legislative period, it was declared *null*[19, 20].The representative re-

[13] Austria had such a regulation, as well. Before 1983, a waiting period of 10 months applied in Austria in accordance with §11 of the Marriage Act. *See.* "1. Zivilrecht", Gerichtsentscheide, accessed May 1, 2024, https://entscheidsuche.ch/docs/AR_Gerichte/AR_KG_005_OG-ARGVP-1992-3204_1992-01-28.pdf.

[14] Japan Civil Code has also 100-day remarriage ban for women. Article 733 regulated six months ban, however in 2015 the Supreme Court of Japan found this period too long. After this judgement, the time limit has been amended and reduced to 100 days. *See.* "Japan: New Instructions Allow Women to Remarry 100 Days After Divorce", Library of Congress, accessed May 1, 2024, https://www.loc.gov/item/global-legal-monitor/2016-02-26/japan-new-instructions-allow-women-to-remarry-100-days-after-divorce/.

[15] Italy has 300-day waiting period, which is also known as "*lutto vedovile*" (widow's grief). Article 89 of the Italian Civil Code states that a woman may not marry until three hundred days after the termination or annulment of her previous marriage.

[16] Philipp Stehlin, *Das Personen- und Familienrecht des ZGB von 1912: Eine inhaltliche Untersuchung der Gesetzeskommentare des August Egger (1875–1954)* (Universität Bern, 2018), 116.

[17] Yenerer-Çakmut, et al., (n 2) 945; Gayretli-Aydın, (n 3) 290.

[18] "4721 Sayılı Türk Medeni Kanunu'nun 132. Maddesinin Kaldırılmasına Dair Kanun Teklifi", TBMM, accessed July 1, 2023, https://cdn.tbmm.gov.tr/KKBSPublicFile/D27/Y2/T2/WebOnergeMetni/13f532d7-5b30-4492-bd42-5295143a0d4f.pdf.

[19] Legislative proposals not concluded within the legislative period shall be deemed null and void at the end of that term. *See.* "Yeni Sisteme Göre Yasama El Kitabı", TBMM, accessed July 1, 2023, https://www5.tbmm.gov.tr/yayinlar/Yasama_El%20Kitabi.pdf.

[20] "Kanun Teklifi Bilgileri 26/1", TBMM, accessed July 1, 2023, https://www.tbmm.gov.tr/Yasama/KanunTeklifi/f72877c0-3880-037b-e050-007f01005610.

submitted the proposal in 2018, nevertheless, it was also declared null at the end of the legislative period in 2023[21]. It would have been both beneficial and appropriate if the TBMM could have amended its own regulation at its discretion.

B. Procedure for Lifting the 300-Day Remarriage Restriction

After the divorce judgment got finalised, the woman must wait 300 days from the date of divorce in order to remarry. This period corresponds to approximately 10 months. Starting date of this period, which is defined as the date of divorce, refers exactly to the date of legal finalisation of the divorce judgement. Article 26 of Law on Population Services (Nüfus Hizmetleri Kanunu), entitled *the beginning of a woman's waiting period,* regulates that *the woman's waiting period shall commence from the date of finalisation of the court decision.*

Pursuant to Article 154 of the TCC, the period of the statutory remarriage restriction does not constitute an *absolute ban* on marriage[22], hence if a woman marries without waiting for this period, her marriage cannot be deemed invalid[23]. However, the marriage officer is obliged to examine applications in accordance with Article 23 of the Marriage Regulation, and takes this statutory restriction period into account while assessing the applications. Hence, the non-completion of the period is -in practice- establishes an obstacle to marriage[24].

In cases where the divorced woman is willing to marry, without waiting 300 days, Article 132 of the TCC regulates three possibilities: *Giving birth terminates this period. In the cases where the woman is not pregnant from her former marriage or the spouses want to remarry each other, the court shall revoke this period.*

The first possibility, accordingly, is the birth. If the divorced woman gives birth, it is possible to remarry with another person without any other

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21 "Kanun Teklifi Bilgileri 28/1", TBMM, accessed July 1, 2023, https://www.tbmm.gov.tr/Yasama/KanunTeklifi/cf9d09d4-7188-418c-805c-0188dcc61480.

22 Article 154 of the TCC regulates that the marriage of a woman before the end of the waiting period does not require nullity of marriage.

23 Hatice Selin Pürselim, "MÖHUK Kapsamında İddet Müddetinin Soybağının Reddi ve Babalık Davalarına Etkileri" *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi* 27, (2021) :517.

24 *Same opinion, see.* Pürselim, "MÖHUK," 517; Gayretli Aydın, "Kadın," 276.

conditions. The second and third options require a lawsuit. When the divorced woman wants to get married within the waiting period, she must file a lawsuit for the abolition of the waiting period. By proving that she is not pregnant, the divorced woman can get this statutory waiting period lifted through the court judgment. If the divorced woman wants to remarry with the man she divorced, she will -also- have to file a lawsuit for the abolition of the waiting period. According to Article 132, however, the woman will not be required to prove that she is not pregnant with a hospital report, and the lawsuit accordingly will be finalised.

According to Article 382 of the Code of Civil Procedure (*Hukuk Muhakemeleri Kanunu*), the case for the lifting the restriction is a non-contentious judicial proceeding[25]. An agreement or documents regulating a certain legal situation are submitted to the court and the court makes a decision based on these documents. Any application for the lifting of the waiting period shall be brought before the Family Court pursuant to the Law on Establishment, Duties, and Trial Procedures of Family Courts (Aile Mahkemeleri Kuruluş Görev ve Yargılama Usullerine Dair Kanun). For the places where there is no family court, the civil court of first instance is accepted as the competent court. The lawsuit shall be filed to the court of residence of the divorced woman.

Regardless of the reason for the lifting of the waiting period, the decision of the court qualifies as a determination, and the court has *no discretion* whether or not to allow the marriage[26]. Even though it is a non-contentious judicial proceeding without discretion, the duration of these cases may be -still- very long, as it depends on whether the procedure has been dully followed and on the workload of the court -hence where the case is heard-. It is even possible that the judgment may not be issued before the 300-day period expires.

The procedure for obtaining a medical report to prove the absence of pregnancy should also be discussed. In practice, the process is not appropriate for this modern century[27]. The divorced woman has to go to the public hospital

25 Non-contentious jurisdiction (*çekişmesiz yargı*) refer to legal proceedings that are submitted to the court without a dispute between the parties. As it is a non-contentious judicial matter, there is no respondent party to the case for the abolition of the statutory period, as it is a non-contentious judicial matter.

26 Yarayan, "Türk," 269.

27 Pürselim, "MÖHUK," 518.

designated by the court. Before visiting the hospital, a stamp is placed on her wrist at the court, and she must apply to the hospital for an examination before the stamp is removed from her wrist[28]. At the end of the examination, the hospital gives the result to the woman in a sealed envelope, which she must hand to the court unopened, then the court opens the envelop and reads the result before the woman, herself[29].

This procedure is not only old-fashioned and redundant, but also violates human rights. Technology and science have advanced greatly, thus there is no reason to stamp somebody's wrist for identification purposes, not anymore. Since everyone has the Turkish identity number and Turkish identity card that includes the picture of the person, identification should not be an issue at the hospital. Furthermore, not informing the person about a medical test result carried out on her body and not informing her, but informing the court first is also contrary to the respect of private life, regulated under Article 8 of the ECHR.

II. ANALYSING THE *NURCAN BAYRAKTAR V. TÜRKİYE* JUDGMENT[30]

A. The Role of the ECHR and the ECtHR judgments in Türkiye

Türkiye ratified the ECHR in 1954[31] and recognised the compulsory jurisdiction of the ECtHR in 1990. Hence, the ECHR and the ECtHR judgments are recognised among the sources of the Turkish legal system[32].

According to the Article 90/5 of the Constitution of the Republic of Türkiye ("the Constitution"), *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*. Articles of the ECHR, thus, takes precedence over any code that has been regulated and enacted in

28 Pürselim, "MÖHUK," 518.
29 Pürselim, "MÖHUK," 518.
30 The judgement is translated by the author.
31 "Türkiye", European Court of Human Rights, accessed July 1, 2023, https://www.echr.coe.int/documents/d/echr/cp_turkey_eng.
32 Rebublic of Türkiye, Ministry of Foreign Affair's website: <https://www.mfa.gov.tr/İnsan-hakları.en.mfa> accessed July 1, 2023.

Türkiye. Meaning that the national courts are obliged to give precedence to the ECHR when there is a conflict with a domestic regulation.

When the first instance court or the appeal court fails to or prefers not to review the constitutionality examination, the Constitutional Court of the Republic of Türkiye (Türkiye Cumhuriyeti Anayasa Mahkemesi) shall assess it. For the constitutionality examination, there are three possible manners: an action for annulment, a contention of unconstitutionality, or an individual application[33]. The President of the Republic, the groups of two political parties which have the highest number of members in the TBMM and a minimum of one-fifth of the total number of members of the TBMM have the power to apply for an annulment action. On the other hand, the contention of unconstitutionality can be initiated by the civil, criminal, or administrative courts of general jurisdiction only for legal provisions applicable on an actual case pending before them. The individual application, which was first implemented in the Turkish legal system in 2010 and began functioning in 2012, is the third and the last option for the constitutionality examination. According to Article 148 of the Constitution, after exhausting legal national remedies, anyone can apply to the Constitutional Court for a violation by public authorities of one of the fundamental rights and freedoms that fall under the joint protection of the Constitution and the ECHR. Following the constitutionality examination, the Constitutional Court may dismiss the case or annul the challenged provision on the grounds that it violates to the Constitution[34].

After more than a decade of having the highest number of applications to the ECtHR and the highest number of violation judgements within the member states of the Council of Europe, the main objective behind the introduction of the individual application to the Constitutional Court as a remedy was to increase the level of protection of human rights and reduce the number of applications to Strasbourg[35]. Since it is not possible to apply to the ECtHR without exhausting domestic remedies, the Constitutional Court currently

33 *See.* "Constitutional Court of Turkey", Türkiye Cumhuriyeti Anayasa Mahkemesi, accessed July 1, 2023, https://anayasa.gov.tr/media/7365/introductory-booklet.pdf.

34 "Constitutionality Review", Türkiye Cumhuriyeti Anayasa Mahkemesi, accessed July 1, 2023, https://www.anayasa.gov.tr/en/proceedings/constitutionality-review/.

35 Christos Giakoumopoulos, "The Execution of Judgments of the European Court of Human Rights and the role of Constitutional Courts", *Anayasa Yargısı,* (2016): 40-41.

constitutes an intermediary step in securing human rights and also to preventing a large amount of applications to the ECtHR.

Besides being obliged to guarantee the rights and freedoms regulated in the ECHR, according to Article 46 of the ECHR, all States that are Parties to the Convention are also under the obligation to abide by the judgments of the European Court of Human Rights. Thus, the judgments of the ECtHR are binding on Member States. However, the ECtHR judgments cannot overturn the judgments of the national courts, as the Court does not act as a court of appeal. Moreover, the Court has no duty or competence to correct alleged errors of law of national courts or to substitute them[36]. Thus, the ECtHR judgments do not lead to immediate or automatic results in the domestic legal order[37].

The ECtHR shall only determine whether there has been a violation of the Convention. In the event of a finding of a violation, Member States are required to take the necessary measures to implement the Court's judgments. In other words, Article 46 of the Convention does not regulate how the judgments are to be executed, and therefore each Member State will determine itself how to implement it[38]. It must be emphasised that the main duty for the protection of the rights and freedoms provided for in the Convention lies with the national authorities and judicial organs; however when a satisfactory solution cannot be found in the national proceedings, then the ECtHR steps in[39]. The implementation and execution of an ECtHR judgment is not restricted to the payment of the just satisfaction. The Member State concerned shall take other measures to secure full implementation of the ECtHR judgments. When a Member State fails to execute a judgment, the Committee of Ministers, the executive body of the Council of Europe, will put political and diplomatic pressure on the member State in question. Indeed, failure in execution creates a liability towards all other High Contracting Parties to the Convention[40].

According to the 16th Annual Report of the Committee of Ministers, 77 cases concerning Türkiye were taken over by the Committee of Ministers in

36 Ebru Karaman, "Avrupa İnsan Hakları Mahkemesinin Kararlarının Yerine Getirilmemesinden Doğan Sorumluluk" *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası* 72/1, (2014):413.

37 Giakoumopoulos, "The Execution," 39.

38 Karaman, "Avrupa," 414.

39 Şeref Ünal, *Avrupa İnsan Hakları Sözleşmesi – İnsan Haklarının Uluslararası İlkeleri* (Ankara: TBMM Yayınları, 2001) 407.

40 Giakoumopoulos "The Execution," 39.

2022, to supervise their execution[41]. According to the report, as of 31 December 2022, there were 480 cases pending execution, including 36 leading cases classified under enhanced procedure and 89 were leading cases classified under standard procedure[42]. Ongoing cases include particularly related to *the rights to freedom of expression and freedom of assembly, judicial independence, detention without sufficient reasoning, ineffective investigations and impunity*, and *domestic violence*[43]. The ECtHR held that the whole structure of the Convention is based on the general assumption that public authorities in Member States act in *good faith*, and it also includes the enforcement of judgements with the "conclusions and spirit" of the judgment[44]. Thus, failure to comply with the ECtHR judgments constitutes a violation of Article 46.

B. Relevant ECHR Articles

Before discussing the recent ECtHR judgment, the relevant well-known rights and freedoms of the ECHR, Article 8, Article 12 and Article 14, will be briefly summarised.

Article 8 of the ECHR regulates the right to respect for private and family life, home, and correspondence. Every terminology used in this Article has autonomous meaning. Notion of "private life" is, to the ECtHR, a broad concept and cannot be exhaustively defined[45]. It is not limited to an "inner circle" of the individual's personal life[46], but it also includes establishing and developing relationships with the outside world[47]. The Court also considers that the right to personal autonomy and personal development includes the right to respect for the decision both to have and not to have a child[48].

The Court examines whether the interference was justified under the second paragraph of Article 8. As regards the necessity of the interference, the Court reiterates that an interference is considered *necessary in a democratic*

41 "Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights", Council of Europe Committee of Ministers, accessed July 26, 2023, https://rm.coe.int/annual-report-2022/1680aad12f 82.
42 "Supervision of the Execution."
43 "Supervision of the Execution."
44 *Kavala v. Türkiye* App no 28749/18 (ECtHR, 11 July 2022) [169].
45 *Niemietz v. Germany* App no 13710/88 (ECtHR, 16 December 1992) [29].
46 *Denisov v. Ukraine* App no 76639/11 (ECtHR, 25 September 2018) [96].
47 *Bărbulescu v. Romania* App no 61496/08 (ECtHR, 5 September 2017) [71].
48 *A, B and C v. Ireland* App no 25579/05 (ECtHR, 16 December 2010) [212].

society to achieve a legitimate aim if it meets a *pressing social need*, and particularly, if it is proportionate to the legitimate aim pursued and if the reasons given by the national authorities to justify the interference are *relevant and sufficient*[49]. While it is for the national authorities to assess the reason for the interference first, the ECtHR decides whether it was necessary within the meaning of Article 8, ultimately[50].

Article 12 of the ECHR regulates the right to marry and according to Article 14 of the ECHR, the enjoyment of the rights and freedoms set forth in the ECHR shall be secured without discrimination on any grounds including sex or other status such as being divorced. In these cases, Article 14 shall be determined in conjunction with Article 12. According to the Court, Article 12 guarantees *the fundamental right of man and woman to marry and found a family*. Despite being subjected to national laws[51], the Contracting States shall not limit the right in such a way or such a degree to affect its very substance[52]. Article 12, in contrast to Article 8 of the Convention, does not include any permissible grounds for interference, such as "in accordance with the law" or being "necessary in a democratic society". Hence, the Court would not apply the test of "necessity" or "pressing social need", in examining a case under Article 12[53]. Although Article 12 does not regulate right to divorce, it does guarantee divorced persons the *right to remarry* without unreasonable restrictions[54]. The enjoyment of the rights and freedoms recognized by the Convention is subject to Article 14, which prohibits different treatment of persons in comparable situations, unless there is objective and reasonable justification[55]. Moreover, not every difference in treatment automatically entails a violation of Article 14. In cases where a different treatment to persons in similar situation is based on an objective and reasonable justification, it can be justified[56]. Yet, the extent of the margin provided to the Contacted States

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49 *L.B. v. Hungary* App no 36345/16 (ECtHR, 9 March 2023) [115].

50 *S. and Marper v. the United Kingdom* App no 30562/04, 30566/04 (ECtHR, 4 December 2008) [101-102].

51 The margin of appreciation available to the domestic authorities cannot be so disproportionate. *See*. *Delecolle v. France* App no 37646/13 (ECtHR, 25 October 2018) [55].

52 *O'Donoghue and Others v. the United Kingdom* App no 34848/07 (ECtHR, 14 December 2010) [82].

53 *O'Donoghue and Others v. the United Kingdom*, [84].

54 *F. v. Switzerland* App no 11329/85 (ECtHR, 18 December 1987) [38]; *Nurcan Bayraktar v. Türkiye* (n 3) [71].

55 *Burden v. the United Kingdom* App no 13378/05 (ECtHR, 29 April 2008) [60].

56 *Andrejeva v. Latvia* App no 55707/00 (ECtHR, 18 February 2009) [81-82].

is very narrow where the difference in treatment is based on intrinsic and immutable personal characteristics, such as sex[57]. Whatever the margin of appreciation vested in the State, it is ultimately for the Court to rule on compliance with the requirements of the Convention[58].

C. Facts of the Case

The application concerns the refusal by the national authorities to grant the applicant's request that she be exempted, without undergoing a medical examination to determine whether she was pregnant, from the 300-day waiting period for divorced women regulated in Article 132 of the TCC[59]. The applicant, who was subjected to the waiting period, was refused permission to remarry without waiting for the expiry of that period, on the grounds that she had refused to undergo a medical examination to determine whether she was pregnant[60]. Even though the applicant had not produced any concrete evidence of any plans to remarry after her divorce and had refused to obtain the medical certificate she had been asked to produce in the context of the proceedings she had brought before the national authorities to obtain the lifting of the waiting period, the obligation imposed on her to respect the 300-day waiting period after her divorce fell within the scope of her right to marry[61].

In outline[62], in 2014 the applicant requested İstanbul Anadolu Family Court to waive the 300-day waiting period and during the proceedings at the domestic court, she submitted an official letter stating that she would not obtain the medical certificate in question by alleging that the court's request in this regard based on Article 132 of the TCC was contrary to Articles 8, 12 and 14 of the ECHR. The Family Court ordered the medical certificate from a hospital, warned the applicant that the application would be rejected on procedural grounds if she did not comply, and dismissed her claim that Article 132 of the TCC was unconstitutional. The Family Court did not accept the argument that this situation deprives women of their legal capacity or restricts

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57 *D.H. and Others v. the Czech Republic* App no 57325/00 (ECtHR 13 November 2007) [196]; *Beeler v. Switzerland* App no 78630/12 (ECtHR, 11 October 2022) [96]; *Nurcan Bayraktar v. Türkiye*, [73-75].

58 *Konstantin Markin v. Russia* App no 30078/06 (ECtHR, 22 March 2012) [126]; *Nurcan Bayraktar v. Türkiye*, [76].

59 *Nurcan Bayraktar v. Türkiye*, [1].

60 *Nurcan Bayraktar v. Türkiye*, [82].

61 *Nurcan Bayraktar v. Türkiye*, [78].

62 *Nurcan Bayraktar v. Türkiye*, [2-12].

it[63]. In 2015, the Court of Appeal, to which the applicant had appealed, upheld the Family Court's judgment, holding that it complied with procedural rules and the law. In 2016, the applicant lodged an individual appeal to the Turkish Constitutional Court, yet in 2020, her appeal was declared inadmissible finding that her claims regarding respect for private life and the principle of equality were manifestly ill-founded, ruling that there had been no interference with the rights and freedoms in question or that, if there had been an interference, it had not entailed a violation of those rights and freedoms. Eventually the applicant lodged an application to the ECtHR in 2020, and the ECtHR discussed Article 6/1, 8, and Article 14 in conjunction with Article 12 in this case.

First and foremost, the Government raised two objections to the inadmissibility of the applicant's complaints by stating that she does not carry the victim status and did not suffer significant damage[64]. It is true according to case law that in order to claim to be the victim of a violation, an individual must have directly suffered the effects of the disputed measure. The Convention does not permit the possibility of initiating an *actio popularis* for the purposes of interpreting the rights recognized in the Convention; nor does it authorize individuals to complain about a provision of domestic law simply because it appears to them, without their having directly suffered its effects, that it breaches the Convention[65]. The ECtHR states that in the present case it is not for the Court to speculate on whether the applicant had serious prospects to remarry when she lodged her application; and the fact that the applicant did not remarry after the end of the waiting period is also irrelevant[66]. Hence, the fact that the applicant was subjected to a waiting period and obliged to initiate a specific proceeding to lift that period by submitting a medical certificate stating that she was not pregnant, on the sole ground that she belonged to the category of divorced women; it is sufficient to conger on her status of victim[67]. It also considers that the effect of imposing this waiting period on the applicant was to restrict her freedom of choice as to the date of a possible remarriage - even though this was undoubtedly of significant importance for her personal

63 *Nurcan Bayraktar v. Türkiye*, [8].
64 *Nurcan Bayraktar v. Türkiye*, [21-23].
65 *Burden v. the United Kingdom*, [33].
66 *Nurcan Bayraktar v. Türkiye*, [27].
67 *Nurcan Bayraktar v. Türkiye*, [28].

life - and that this effect cannot be underestimated; thus the Court also rejects the plea of lack of significant damage[68].

D. Judgment on Article 8

Regarding Article 8, the Court focuses on the part that the applicant was asked to produce a medical certificate proving that she was not pregnant following her divorce, in order to initiate the proceedings to lift the 300-day waiting period. Rightfully, the ECtHR considers that undergoing a medical examination to verify that she was not pregnant clearly has an impact on the applicant's private life, and it amounts to interference with the exercise of her right to respect for her private life[69].

As it was given above, the Court later examines whether the interference was justified under the second paragraph of Article 8; particularly the necessity of the interference in a democratic society. Although it is for the national authorities to assess the reason for the interference first, the ECtHR is going to decide whether it was necessary within the meaning of Article 8, ultimately. The reason provided in the Marriage Regulations to impose such a waiting period is to avoid "confusion of kinship". If the main purpose of the waiting period and of making the lifting of that period conditional on the woman concerned not being pregnant is the accurate determination of the biological parentage of any unborn child, the Court states that, then a distinction must be drawn in that regard between the biological paternity and the legal presumption of paternity. Although in most legal systems when a child is born in marriage is deemed to have the husband as the legal father; acknowledging the child or claiming the paternity is possible at any time by presenting scientific evidence[70]. As provided in the first section of the study, the presumption of paternity is already regulated under Article 285 of the TCC to recognize the husband as the father of the child born within three hundred days following the termination of the marriage. Hence, the objective of preventing "confusion in kinship" is unrealistic in a modern society[71]. The Court also underlines that divorce proceedings in Türkiye sometimes take years; yet the 300-day waiting period initiates only after the divorce judgment

68 *Nurcan Bayraktar v. Türkiye*, [31].
69 *Nurcan Bayraktar v. Türkiye*, [43-44].
70 *Nurcan Bayraktar v. Türkiye*, [54-55].
71 *Nurcan Bayraktar v. Türkiye*, [55].

becomes final. This means that the spouses, in most cases, are practically no longer living together from the beginning of the divorce proceedings[72].

Lastly, the Court expresses its concern at the implication of the Family Court's conclusion that divorced women, by virtue of their biological characteristics as women, particularly their role as mothers and their ability to give birth, would have a duty to the society to disclose any pregnancy before remarrying and that they would have to bear the disadvantage of the waiting period in order to protect the interests of any unborn child[73]. This assumption reflects a traditional view of female sexuality as being primarily associated with woman's reproductive functions, and thus, ignores the woman's physical and psychological development as a person[74].

In the light of the abovementioned explanations, the Court concludes that imposition of a waiting period and the obligation to produce medical evidence proving that the applicant was not pregnant, which could only be obtained by means of medical examination, in order to obtain the lifting of that waiting period cannot be regarding as meeting a pressing social need. Consequently, the interference in question with the applicant's exercise of her right to respect for her private life was not necessary in a democratic society. There has been, therefore, a breach of Article 8 of the Convention[75].

E. Judgment on Article 14 in conjunction with Article 12

Regarding Article 12 and 14, the applicant claims[76] that the waiting period of 300 days unquestionably constitutes discrimination on the grounds of sex; it also discriminates against divorced woman in comparison to women who have never been married. Furthermore, the applicant rightfully considers that forcing divorced women to obtain a court decision based on a medical certificate proving that they are not pregnant in order to remarry before the end of the waiting period, which is likely to reveal their sex life, amounts to profound and systematic discrimination against women and infringement of human rights.

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72 *Nurcan Bayraktar v. Türkiye,* [55].
73 *Nurcan Bayraktar v. Türkiye,* [57].
74 *Carvalho Pinto de Sousa Morais v. Portugal* App no 17484/15 (ECtHR 25 July 2017) [52]; *Nurcan Bayraktar v. Türkiye,* [57].
75 *Nurcan Bayraktar v. Türkiye,* [58-59].
76 *Nurcan Bayraktar v. Türkiye,* [62].

As given above, Article 12 guarantees *the fundamental right of man and woman to marry and found a family*. In contrast to Article 8, Article 12 does not include any permissible grounds for interference and thus, the Court does not apply the test of "necessity" or "pressing social need" on cases regarding Article 12[77]. Article 14 prohibits different treatment of persons in comparable situations while enjoying their rights and freedoms recognized by the Convention, unless there is objective and reasonable justification[78]. As noted above, not every difference in treatment automatically results in a violation of Article 14; it can be legitimised by objective and reasonable justification[79]. The margin of appreciation vested in the State is an issue to be discussed by the ECtHR[80], since the extent of the margin provided to the Contacted States shall be very narrow where it comes to the difference in treatment is based on intrinsic and immutable personal characteristics, such as sex[81].

In the present case, the applicant was refused permission to remarry without waiting for the expiry of that period, on the grounds that she had refused to undergo a medical examination to determine whether she was pregnant. The Court noted that such a decision could only be taken in respect of a woman, since only women can become pregnant, and that in any event the relevant legislation required only women to observe the waiting period. The ECtHR, hence, finds that the decision handed down in respect of the applicant amounts to a difference in treatment based on sex[82]. The Court further notes that only women are subject to the waiting period provided for in Article 132 of the TCC, to the exclusion of men who are not required to respect such a period in order to remarry[83].

The Court underlines the fact that even though the Government's argument on the disputed waiting period was to determine the biological parentage of any unborn child and to prevent uncertainty in this respect is based on a traditional conception of the family founded on the official institution of marriage; that does not necessarily reflect developments in modern European societies: in these societies, a significant number of families

77 *Nurcan Bayraktar v. Türkiye,* [84].
78 *Burden v. the United Kingdom,* [60].
79 *Andrejeva v. Latvia,* [81-82].
80 *Konstantin Markin v. Russia*, [126]; *Nurcan Bayraktar v. Türkiye,* [76].
81 *D.H. and Others v. the Czech Republic*, [196]; *Beeler v. Switzerland,* [96]; *Nurcan Bayraktar v. Türkiye,* [73-75].
82 *Nurcan Bayraktar v. Türkiye,* [82].
83 *Nurcan Bayraktar v. Türkiye,* [80].

are based on a form of union other than civil marriage, for example civil partnership or cohabitation, and many children are even conceived out of marriage or from anonymous sperm donation[84].

The Court takes this issue one step further and states that the sexist stereotypes, such as the idea that women would have a duty to society by virtue of their potential role as mothers and their ability to give birth, constitute a serious obstacle to the achievement of genuine substantive equality between the sexes, which is one of the major objectives of the member States of the Council of Europe[85].

Consequently, the Court concludes that the obligation imposed on divorced women, due to the possibility of pregnancy, to wait 300 days unless they prove by medical examination that they are not pregnant amounts to direct discrimination on grounds of sex, which cannot be justified by the aim of preventing uncertainty as to the parentage of any unborn child[86]. Hence, there has been a violation of Article 14 in conjunction with Article 12 of the ECHR.

III. HOW COULD THE NATIONAL COURTS HAVE INTERVENED TO AVOID THE VIOLATION JUDGMENT?

The national courts had two possibilities to avert the ECtHR's violation judgment. The first possibility for the national court was to choose to apply the rights and freedoms provided in both the Constitution of the Republic of Türkiye ("the Constitution") and the ECHR instead of the Article 132 of the TCC. Article 10 of the Constitution emphasizes that *everyone is equal before the law without distinction of language, race, colour, sex, political opinion, philosophical belief, religion, sect and other similar grounds*. The 2004 amendment clarifies that *woman and men have equal rights and the State is obliged to ensure that this equality is realised*; and Article 20 of the Constitution states that *everyone has the right to demand respect for his private and family life. The privacy of private and family life shall be strictly protected.* As stated above, Article 90/5 of the Constitution which regulates that *in the case of a conflict between international agreements, duly put into*

84 *Nurcan Bayraktar v. Türkiye*, [86].
85 *Nurcan Bayraktar v. Türkiye*, [89].
86 *Nurcan Bayraktar v. Türkiye*, [90-91].

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. Articles of the ECHR, thus, takes precedence over any code that has been regulated and enacted in Türkiye. Hence, the Family Court must have considered the provisions of the international human rights conventions, before applying the Turkish Civil Code. It is evident from the case that the plaintiff already submitted her claim that Article 132 of the TCC was contrary to Articles 8, 12 and 14 of the ECHR. Instead of approaching the claim with the utmost scrutiny, the competent Family Court chose to apply the provisions of the TCC using the legal positivist approach. The Court also warned the applicant that the application would be dismissed on procedural grounds if failed to provide a medical report, and rejected her claim that Article 132 of the TCC was unconstitutional.

Besides the ECHR, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was also ratified by the Republic of Türkiye. In the sixth periodic report of Türkiye, the Committee on the Elimination of Discrimination against Woman also found the waiting period for remarriage discriminatory. It is also recommended to take appropriate steps by reviewing and amending the regulation without delay, to be entirely in conformity with Articles 2 and 16 of the CEDAW[87]. Apart from the ECHR, by looking at the CEDAW and the periodic reports of Türkiye, the violation outcome must have been expected. Yet, the applicant had to take her claim before the ECtHR to prove the violation. The case before the Family Court was held in 2014 and the ECtHR decision has arrived recently, on 27 June 2023. Nine years to reach the obvious outcome is tremendously lengthy.

The second possibility for the national court was to initiate the contention of unconstitutionality. As briefly provided above, the contention of unconstitutionality can be initiated by the civil, criminal, or administrative courts of general jurisdiction only for legal provisions applicable on an actual case pending before them. The Constitutional Court will, then, conduct a constitutionality examination and may decide to annul the challenged provision on the grounds that it violates to the Constitution. While applying

[87] "Concluding observations of the Committee on the Elimination of Discrimination against Women : Turkey", United Nations Committee on the Elimination of Discrimination against Women, accessed June 30, 2023, https://www2.ohchr.org/english/bodies/cedaw/docs/co/cedaw-c-tur-co-6.pdf, 11.

the Article 132 of the TCC, Family Court was supposed to realise the possible controversy and initiate the contention of unconstitutionality procedure.

However, it could be argued that this would not prevent the ECtHR's violation judgment. It is indeed clear from the facts of the case that the applicant, after exhausting domestic legal remedies, had already filled an individual application before the Constitutional Court on the grounds that her fundamental rights and freedoms, which are under the joint protection of the Constitution and the ECHR, had been violated. Unfortunately, the Constitutional Court failed to find any violation. Hence, instead of leaving the debate to the judiciary, it would be more appropriate for the TBMM to use its legislative power to discuss the amendment and annulment options for Article 132.

IV. CONCLUSION

The 300-day remarriage restriction is regulated under Article 132 of the TCC. It regulates that: *When a marriage is terminated, the woman shall not remarry until after three hundred days have passed as of the termination of the marriage. Giving birth terminates this period. In the cases where the woman is not pregnant from her former marriage or the spouses want to remarry each other, the court shall revoke this period.* As stated in the introduction; in a modern society, Article 132 of the TCC would appear to be a clear violation of human rights, yet neither the legislator nor the national courts have considered it this way, for many years. Eventually, on 27 June 2023, the European Court of Human Rights unanimously declared that the complaint of Nurcan Bayraktar was admissible and held that there has been a violation of Article 8 and Article 14 in conjunction with Article 12 of the European Convention on Human Rights.

As given above, the rationale behind Article 132 of the TCC was to establish the legal fatherhood of the child. The ECtHR has accurately rendered that it is unrealistic in a modern society to try to justify the interference with the right to privacy by claiming that it precludes "confusion in kinship". The ECtHR also rightfully stated that a distinction must be drawn between the biological paternity and the legal presumption of paternity. The presumption of paternity is already regulated in Article 285 of the TCC regarding the recognition of the ex-husband as the father of the child born within three hundred days following the termination of the marriage.

Regarding Article 12 and 14 of the ECHR, the applicant successfully argued that the waiting period of 300 days unquestionably constitutes discrimination on the grounds of sex, not only between men and women; but also, against divorced woman in comparison to women who have never been married. The Court correctly underlined that a traditional conception of the family based on a on formal marriage does not necessarily reflect the developments in modern European societies, since currently, a significant number of families are based on a form of union other than civil marriage. Hence, it is indeed a fact as the ECtHR established that sexist stereotypes constitute serious obstacles to achieving genuine substantive equality between the sexes, such as the idea that women would have a duty to society by virtue of their potential role as mothers and their ability to bear a child. Thus, it would be unexpected only if the Court did not reach a judgment on the violation of Article 14 in conjunction with Article 12.

In order to prevent this foreseeable violation, the TBMM could have amended the regulation precedently. As mentioned earlier, the Swiss Civil Code, which is the reference source of the Turkish Civil Code, abolished the regulation on the woman's waiting period, before the current TCC was entered into force. Likewise, Mahmut Tanal's amendment proposal to abolish Article 132 of the TCC, which was submitted to the TBMM in 2016 and again in the following years, could have been taken into consideration to initiate the discussions on the amendment. The more appropriate course would have been for the TBMM to amend its own regulation at its discretion.

In response to the research question of this study it can be stated that this expected violation judgment, given by the ECtHR, could have been averted by the national courts in two possible ways. The first possibility for the national court was to choose to apply the rights and freedoms provided in both the Constitution of the Republic of Türkiye and the European Convention on Human Rights, instead of the Article 132 of the TCC. The second possibility for the national court was to initiate the contention of unconstitutionality. Then the Constitutional Court could have conducted a constitutionality examination and may decide to annul the challenged provision on the grounds that it violates to the Constitution. However, this would not avert the violation judgment, in this specific case. Indeed, the applicant had already filled an individual application before the Constitutional Court for violation of the fundamental rights and freedoms that fall under the joint protection of the Constitution and the ECHR, yet regrettably, the Constitutional Court failed to

declare any violation. Consequently, the national authority had failed to take necessary actions to amend Article 132 of Turkish Civil Code, which regulates the 300-day remarriage restriction regulated for divorced women only.

As stated in the introduction part, some positive steps were taken to promote gender equality, over the years[88]. Nevertheless, the ECtHR judgment from 2004[89], where violation of Article 14 of the Convention in conjunction with Article 8 was found, had no impact on the law or its application until 2022, when the Constitutional Court, finally, annulled Article 187 of the TCC[90].

I regret to note that, at the time of submission of this study, Article 132 has yet to be amended. As mentioned earlier, Member States are required to take the necessary measures to implement the Court's judgments; and the main responsibility for protecting the rights and freedoms provided for in the Convention falls on national authorities and judicial bodies. Thus, Article 132 of Turkish Civil Code must be abolished with the utmost urgency. It shall be reiterated that failure to comply with the ECtHR judgments constitutes a violation of Article 46. At this stage, the declaration of violation by the ECtHR on the *Nurcan Bayraktar v. Türkiye* judgment can be considered as a trigger to initiate modernisation changes in the TCC. Moreover, the *Nurcan Bayraktar v. Türkiye* judgment should serve as an example to Italy to annul Article 89 of the Italian Civil Code, known as "*lutto vedovile*" (widow's grief), that regulates the same 300-day remarriage restriction. As a Member State, Italy shall also take necessary steps following the ECtHR judgment[91].

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88 The ECtHR observes that Türkiye *does not position itself outside the general trend towards placing men and women on an equal footing in the family. See. Ünal Tekeli v. Turkey*, [62].

89 *See. Ünal Tekeli v. Turkey*.

90 The Constitutional Court annulled Article 187 of the TCC, which regulated that married women shall bear their husband's surname upon marriage, on 22 February 2023 (Anayasa Mahkemesi, E.2022/155, K.2023/38, T.22/02/2023). As of 28 January 2024, Article 187 of the TCC cannot be enforced.

91 Article 232 of the Italian Civil Code regulates the presumption of the kinship. According to the regulation, a child shall be presumed to have been conceived during the marriage if three hundred days have not yet elapsed since the annulment, cancellation, or termination of the marriage. As the kinship would be granted regardless of the waiting period; avoiding the *commixtio sànguinis* (mixture of blood) is possible anyway. The 300-day remarriage ban, therefore, violates the rights and freedoms regulated under Article 8, Article 12, and Article 14 of the ECHR.

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