

JUDGMENT OF THE CONSTITUTIONAL COURT

Register Number : 2014/36
Judgment Number : 2015/51
Date of Judgment : 27.5.2015

APPLICANT: Pasinler Criminal Court of Peace

SUBJECT OF APPLICATION: Request for the annulment of paragraph (5) and (6) of Article 230 of Turkish Penal Code Nr. 5237 dated 26.9.2004 alleging that the said provisions are contradictory to Article 5, 10, 17, 20 and 24 of the Constitution.

I. THE CASE

In the public case filed against the defendants alleging that they performed or had others perform the religious ceremony of the marriage without civil marriage, the court of first instance concluded that the provision of law subject to application is unconstitutional and applied for the annulment of the said provision.

II. GROUNDS OF CONTENTION

The relevant part of the application describes the grounds of application as follows:

“With the indictment of the Pasinler District Chief Public Prosecutor Office (registry nr. 2014/47), it is understood that a public case is filed against the plaintiff/defendant ...alleging that he committed the crime of getting married with a religious ceremony without a civil marriage as per Article 230/5 of Turkish Penal Code (TCK) Nr. 5237; against the defendant...alleging that he committed the crime of getting married with a religious ceremony without a civil marriage and the crime of bodily injury; and against the defendant...alleging that he committed the crime of conducting a religious ceremony of wedding without a civil marriage as per Article 230/6 of TCK.

During the hearing on 24/01/2014, the said provisions, namely Article 230/5 and 230/6 of TCK Nr. 5237, were considered to be contradictory to our 1982 Constitution and the case file was referred to the Constitutional Court for the annulment of the relevant provisions.

It is understood from the examination of paragraph (5) of Article 230 of TCK Nr.5237 that the couples who marry by arranging religious ceremony without executing official marriage transactions are sentenced to imprisonment from two months to six months. However, both the public action and the punishment imposed thereof is abated with all its consequences when the civil marriage ceremony is accomplished. It is also understood from the examination of paragraph (6) that any person who conducts a religious marriage ceremony without seeing the certificate of marriage is punished with imprisonment from two months to six months.

Article 5 of the 1982 Constitution defines the fundamental aims and duties of the State in details. It is as follows: The fundamental aims and duties of the State are to safeguard the

independence and integrity of the Turkish Nation, the indivisibility of the country, the Republic and democracy, to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence.

Furthermore, Article 10 of 1982 Constitution states that 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 and that men and women have equal rights and the State has the obligation to ensure that this equality exists in practice. Besides, it is clearly defined that everyone possesses inherent fundamental rights and freedoms, which are inviolable and inalienable.

Article 17 of the 1982 Constitution explicitly states that everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence and that the corporeal integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law.

Article 20 of the 1982 Constitution guarantees that everyone has the right to demand respect for his/her private and family life and that the privacy of private or family life shall not be violated.

It is understood that Article 24 of our Constitution contains the provision which states that everyone has the freedom of conscience, religious belief and conviction, that the acts of worship, religious rites and ceremonies shall be conducted freely as long as they do not violate the provisions of Article 14 and that no one shall be blamed or accused because of his religious beliefs and convictions.

When the provisions in paragraphs 5 and 6 of Article 230 of TCK Nr. 5237 are considered together with the constitutional provisions cited above and the 1982 Constitution in its entirety, it is understood that imposing a penal sanction on those who marry by arranging religious ceremony without executing official marriage transactions or those who conduct a religious marriage ceremony without seeing the certificate of marriage contradicts the constitutional provisions explained above. It is also understood that there arises some problems in the implementation of these provisions of law by the relevant courts. That is to say, if the defendants testify "we convened and prayed for our relationship", then the court must rule for the acquittal of the accused for the lack of evidence. However, if the defendants admit by testifying that "yes we had our religious marriage ceremony", then a penal sanction is imposed and this causes an inequality among the persons accused of committing the same crime. It is also self-evident that such a crime is difficult to prove. Furthermore, considering the privacy of private or family life and the freedom of religion and conscience constitutionally guaranteed by the provisions of 1982 Constitution, the fact that a man and a woman living together without marriage does not constitute a crime but their living together after a religious marriage ceremony constitutes a crime is also a violation of the constitutional provision that no one shall be blamed or accused because of his religious beliefs and convictions. Yet again, as adultery has been decriminalized in the Republic of Turkey, the fact that the couples' making religious marriage ceremony without a civil marriage constitutes a crime is explicitly contradictory to the relevant provisions of 1982 Constitution.

In consideration of the facts we have presented and explained above and other issues to be considered ex officio by the Court, we kindly request the Constitutional Court to annul paragraph 5 and 6 of Article 230 of the TCK Nr. 5237.”

III. THE LAW

A- The Contested Provisions of Law

Article 230 of the Law titled “*Multiple or fraudulent marriage, religious marriage ceremony*”, which includes the contested provisions, is as follows:

(1) A person who marries to another person although he/she is legally married at that time is punished with imprisonment from six months to two years.

(2) Any bachelor person who officially gets married to a person known as married to another person, is punished according to the provisions of above subsection.

(3) Any person who attempts to get married by concealing his/her identity is sentenced to imprisonment from three months to one year.

(4) The statute of limitation for the offenses defined in above subsections start to run as of the date of decision stipulating cancellation of marriage.

(5) The couples who marry by arranging religious ceremony without executing official marriage transactions are sentenced to imprisonment from two months to six months. Both the public action and the punishment imposed thereof, is abated with all its consequences when the civil marriage ceremony is accomplished.

(6) Any person who conducts a religious marriage ceremony without seeing the certificate of marriage is punished with imprisonment from two months to six months.

B- The Relevant Provisions of Constitution Serving the Basis of Contention

The application is based on Article 5, 10, 17, 20 and 24; and Article 13 of the Constitution is considered to be relevant.

IV- PRELIMINARY REVIEW

In accordance with the internal regulations of the Constitutional Court and in the result of the meeting held on 18.02.2014 for the preliminary review of the application with the participation of Haşim KILIÇ, Serruh KALELİ, Alparslan ALTAN, Serdar ÖZGÜLDÜR, Osman Alifeyyaz PAKSÜT, Zehra Ayla PERKTAŞ, Recep KÖMÜRCÜ, Burhan ÜSTÜN, Engin YILDIRIM, Nuri NECİPOĞLU, Hicabi DURSUN, Celal Mümtaz AKINCI, Erdal TERCAN, Muammer TOPAL, Zühtü ARSLAN and M. Emin KUZ, it was UNANIMOUSLY decided that the application be reviewed on merits as there is no deficiency in the application.

V. REVIEW ON MERITS

The application and its annexes, the report prepared by Rapporteur Judge Hamit YELKEN on the merits of the application, the contested provisions of law, the relevant provisions of Constitution that serve as basis of contention and other legislative documents were read and examined. *Per curiam*:

The application alleges that the contested provisions of law criminalize the act of marrying by arranging religious ceremony or conducting a religious marriage ceremony, and that these acts are issues related to private life and freedom of religion and conscience. It also alleges that such criminalization of marrying with religious ceremony or conducting a religious marriage ceremony in a legal order under which living together without any form of marital contract or agreement does not constitute a crime is contradictory to Article 5, 10, 17, 20 and 24 of the Constitution.

According to Article 43 of the Law on the Establishment and Trial Procedures of the Constitutional Court numbered 6216, the contested provisions of law were also reviewed under Article 13 of the Constitution as they were found relevant.

The contested provisions of law stipulate that the couples who marry by arranging religious ceremony without executing official marriage transactions and persons who conduct a religious marriage ceremony without seeing the certificate of marriage are sentenced to imprisonment from two months to six months. However, both the public action and the punishment imposed on such couples are abated with all consequences when the civil marriage ceremony is accomplished.

The first sentence in the first paragraph of Article 20 of the Constitution guarantees the right to demand privacy and protection of private life by stating “*Everyone has the right to demand respect for his/her private and family life.*”; and the first, second, and third paragraphs of Article 24 of the Constitution guarantees the freedom of religion and conscience by stating “*Everyone has the freedom of conscience, religious belief and conviction. Acts of worship, religious rites and ceremonies shall be conducted freely, as long as they do not violate the provisions of Article 14. No one shall be compelled to worship, or to participate in religious rites and ceremonies, or to reveal religious beliefs and convictions, or be blamed or accused because of his religious beliefs and convictions.*”

As it is stated in the legislative intent of Article 20 of the Constitution, “*the right to demand respect for private and family life*” aims to protect the privacy of private and family life and to prevent it from being exposed to public. In other words, it protects the individual’s right to demand all issues and events in his private life to be known to only himself or those whom he wishes to reveal and disclose. Furthermore, it aims to prevent public authorities from interfering in individual’s private life; i.e. it guarantees the individual’s right to regulate and live his personal and family life according to his own sense and understanding. Therefore, the regulation under Article 20 of the Constitution protects the private life and family life against the State, society and other people, subject to the exceptions stated in the Constitution.

The freedom of religion and conscience regulated under Article 24 of the Constitution ensures everyone’s freedom of conscience, religious belief and conviction on one hand, and it involves “*the freedom to manifest religion or belief*” on the other hand. The scope of this freedom is explained in General Comment Nr. 22 of the UN Human Rights Committee as follows:

“The freedom to manifest religion or belief may be exercised “either individually or in community with others and in public or private”. The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest...”

The first paragraph in Article 8 of the European Convention on Human Rights guarantees the right to demand respect for private and family life by stating *“Everyone has the right to respect for his private and family life, his home and his correspondence.”*; and the first paragraph in Article 9 of the Convention guarantees the freedom of religion and conscience by stating *“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.”*

The European Court of Human Rights (ECHR) attaches utmost importance to *“the right to demand respect for private and family life”*. The Court states that the notion of *“private life”* is too broad to make an exhaustive definition and it encompasses a person’s name and identity, personal development and family life as well as his connections with the outside world, his relations with other people and his commercial and professional activities (see *Niemietz v. Germany*, App. Nr.: 13710/88, 16/12/1992, § 29-33). The ECHR makes a broad interpretation of the notion of *“family life”* within the scope of the right to demand respect family life and, accordingly, it notes that the protection area of this right covers not just the official marriages but the unofficial ones as well (see *Marckx v. Belgium*, App. Nr.: 6833/74, 13/6/1979, § 31; *Keegan v. Ireland*, App. Nr.: 16969/90, 26/5/1994, § 44; *Kroon and others v. the Nederland*, App. Nr.: 18535/91, 27/10/1994, § 30).

The ECHR emphasizes the importance of freedom of religion and conscience as follows:

*As enshrined in Article 9 (art. 9), freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to “manifest [one’s] religion”. (*Kokkinakis v. Greece*, App. Nr. :14307/88, 25/5/1993, § 31).*

Accordingly, just like the right to demand respect for private and family life, the freedom of religion and conscience constitutes a space that cannot be interfered by the State and others in principle as it is *“one of the foundations of a democratic society”* and a fundamental right *“that go to make up the identity of people and their conception of life”*.

However, the second paragraph of Article 20 in the Constitution recognizes that the right to protection of private life is not absolute by enumerating the reasons for limitation of this right. Likewise, although Article 24 of the Constitution includes no reasons for limiting the freedom of religion and conscience, it cannot be construed to mean that one’s freedom to manifest religion or belief is absolute. As a matter of fact, as it is noted in various judgments of the Constitutional Court, in addition to certain limits of the fundamental rights and

freedoms stemming from their very own nature, the rules in the other Articles of the Constitution also constitutes the limits of the fundamental rights and freedoms. In other words, the scope and objective field of application for the fundamental rights and freedoms must be determined by considering the Constitution as a whole.

By imposing a penal sanction on those who marry by arranging religious ceremony without executing official marriage transactions or those who conduct a religious marriage ceremony without seeing the certificate of marriage, the contested provisions of law introduce an explicit limitation on people's right to respect for private and family life and their freedom of religion and conscience. As a matter of fact, it is beyond any dispute that people's choices on how to establish their marital relationship and establishing such links according to the religious rituals and practices fall within the scope of the right to demand respect for his/her private and family life. With respect to the freedom of religion and conscience, "*the freedom to manifest religion or belief*" encompasses a broad range of acts such as worship, religious ritual and ceremonial acts, practices and teaching in accordance with internationally recognized norms. Therefore, there is no doubt that marrying by arranging religious ceremony or conducting a religious marriage ceremony falls within the scope of the said freedom.

When we consider the legal benefits aimed to be protected by the definition of crimes in the contested provisions, the purpose of the said limitation is to protect the family order established through marriage. Indeed, it is evident that the said provisions of law aim to ensure that the spouses are not deprived of the rights granted by the conjugal community by prohibiting the acts of marrying with religious ceremony or conducting a religious marriage ceremony as such marriage has no formal status and therefore does not provide any legal protection.

The protection of family order and people's legal rights secured through marriage institution serves to protect and develop the material and spiritual integrity of family members and, thereby, to realize public interest. For the aims and purposes described above, certain limitations may be imposed on the right to protection of private life and the freedom of religion and conscience. Furthermore, as it is emphasized in many of the Constitutional Court's previous rulings, the legislative organ has discretion to decide on which acts are to be defined as crimes in accordance with its criminal policy. The legislative organ may impose such limitations on these rights and freedoms by defining a crime and punishment. However, such limitations must be in accordance with the guarantees secured under Article 13 of the Constitution.

According to Article 13 of the Constitution, the right to demand respect for private and family life and the freedom of religion and conscience may be restricted only by law and to the extent that it is necessary in a democratic society. Besides, these restrictions shall not be contrary to the letter and spirit of the Constitution, the requirements of the democratic order of the society, the secular republic, and the principle of proportionality.

The principle of proportionality requires that there be a fair balance between a particular objective to be achieved and the means used to achieve that objective. The principle of proportionality also requires that legal measure is favorable to achieve the objectives of limitation, that there is a fair proportion between the objective and the means, and that the restrictive measure is a requirement of the democratic order of the society.

According to the principle of proportionality, there must be a requirement of the democratic order of the society in order to interfere in the right to demand respect for private and family life and the freedom of religion and conscience, in other words, the legal protection provided by the family institution must not be available in the absence of the limitations articulated in the contested provisions. However, the legal order already includes legal arrangements for the protection of people's rights arising from the establishment of conjugal community. In accordance with the relevant provisions of Turkish Civil Code, it is mandatory for spouses to have their official marriage certificate issued by the relevant officials stated in the law in order to claim their rights arising from the matrimony. Otherwise, they cannot claim a number of rights arising from the conjugal community. In other words, there are legal sanctions that people may be subject to if they do not execute civil marriage transactions, and these sanctions are adequate to ensure that people execute these transactions. Therefore, there is no need to impose penal sanctions on the acts of marrying by arranging religious ceremony or conducting a religious marriage ceremony in accordance with the religious belief of people.

The only fact that marrying by arranging religious ceremony or conducting a religious marriage ceremony be not defined as a criminal act does not grant legal status to such marriage. Besides, conducting a religious marriage ceremony does not establish a conjugal community in legal sense, and it does not provide for exercising the rights arising from conjugal community.

There is no requirements of the democratic order of the society, in other words, the contested provisions of law are not necessary for the protection of family order which is the purpose of the limitation introduced with those provisions. Under these circumstances, as marrying by arranging religious ceremony or conducting a religious marriage ceremony falls into the scope of the right to demand respect for private and family life and the freedom of religion and conscience, defining such acts as crime and introducing penal sanction on these acts constitute a disproportionate interference to the said rights and, thereby contradict the principle of proportionality.

According to the principle of proportionality, it is not possible to prefer a stringent means of limitation if there is a moderate one available to achieve the objective of limitation. Within the context of the contested provision of law, it contradicts the principle of proportionality by adopting a stringent means of limitation on the right to protection of private life and freedom of religion and conscience to achieve the objective of "*protecting the family order*" even though a moderate means of limitation is available to do so. The legal order, by assigning no legal consequences to any form of marriage other than the "civil marriage" i.e. by using "*a legal sanctioning*", takes measures to ensure the protection of family life which is the objective of the contested provisions of law. Therefore, resorting to the means of "*crime and punishment*" which brings a more stringent sanction than "*legal sanctioning*" already available in the legal order demonstrates that the limitation introduced with the contested provisions of law is not proportionate.

Indeed, while living together without a civil or religious marriage and having children is not defined as a criminal act and no penal sanction is imposed by the legal order within the context of respect to private life, marrying by arranging religious ceremony due to personal preferences and requirements of religious beliefs is criminalized. This discrepancy explicitly shows the above-explained disproportionateness.

On the other hand, as those who conduct a religious marriage ceremony without seeing the certificate of civil marriage do so for the purpose of helping people who marry by arranging religious ceremony due to personal preferences and requirements of their religious beliefs, the provision of law which imposes penal sanction on these people contradict the principle of proportionality for the same reasons.

In consideration of the reasons explained above, the contested provisions of law are contradictory to Article 13, 20 and 24 of the Constitution. They shall be annulled.

Serdar ÖZGÜLDÜR, Serruh KALELİ, Osman Alifeyyaz PAKSÜT and Recep KÖMÜRCÜ dissented to this judgment.

The contested provisions of law are not found to be relevant to Article 10 of the Constitution.

As the provisions of law are annulled under Article 13, 20 and 24 of the Constitution, they are not reviewed under Article 5 and 17 of the Constitution.

VI. JUDGMENT

It was decided on 27/5/2014 with the dissenting votes of the members Serdar ÖZGÜLDÜR, Serruh KALELİ, Osman Alifeyyaz PAKSÜT and Recep KÖMÜRCÜ and BY MAJORITY OF VOTES that paragraph (5) and (6) of Article 230 of Turkish Penal Code Nr. 5237 dated 26.9.2004 are unconstitutional and they shall be ANNULLED.

President	Deputy President	Deputy President
Zühtü ARSLAN	Alparslan ALTAN	Burhan ÜSTÜN
Member	Member	Member
Serdar ÖZGÜLDÜR	Serruh KALELİ	Osman Alifeyyaz PAKSÜT
Member	Member	Member
Recep KÖMÜRCÜ	Engin YILDIRIM	Nuri NECİPOĞLU
Member	Member	Member
Hicabi DURSUN	Celal Mümtaz AKINCI	Erdal TERCAN

Member
Muammer TOPAL

Member
M. Emin KUZ

Member
Kadir ÖZKAYA

Member
Rıdvan GÜLEÇ

DISSENTING OPINION

Paragraph (5) and (6) of Article 230 of Turkish Penal Code Nr. 5237 dated 26.9.2004 titled “Multiple or fraudulent marriage, religious marriage ceremony” are as follows:

“(5) The couples who marry by arranging religious ceremony without executing official marriage transactions are sentenced to imprisonment from two months to six months. Both the public action and the punishment imposed thereof, is abated with all its consequences when the civil marriage ceremony is accomplished.

(6) Any person who conducts a religious marriage ceremony without seeing the certificate of marriage is punished with imprisonment from two months to six months.”

It must be noted in the first place that a similar provision was regulated under Article 237 of Turkish Penal Code Nr. 765(added with Law Nr. 3038 dated 11.6.1936) and the text of that law was as follows:

“...(paragraph 3) Any man or woman who conducts a religious marriage ceremony without seeing the certificate of marriage is punished as described in the previous paragraph(imprisonment from two months to six months)

(paragraph 4) Any man or woman who marries by arranging religious ceremony without executing official marriage transactions is sentenced to imprisonment from two months to six months...”

Paragraph 4 in Article 237 of abrogated law nr.765, which shows parallelism with the contested provisions of law under this application, was also contested before the Constitutional Court and that application was rejected UNANIMOUSLY on the following grounds:

“... The legislative organ, while making regulations in the field of criminal law to protect public order, has the discretionary power to decide on which acts are to be defined as crimes in society and how and to what extent these crimes are to be punished. However, the legislative organ must comply the fundamental principles of the Constitution and basic rules of the criminal law while making such regulations.

Turkish Civil Code constitutes one of the cornerstones of the transition of the Republic of Turkey into a modern, contemporary and secular legal order. **In view of the importance of exercising the provisions in Civil Code especially on the “civil marriage” for Turkish social and family life and in consideration of the problems that may be caused particularly for the women and children by the conjugations established through religious marriage without observing the said provisions, the institution of “civil marriage” is specially protected under Article 174 of the Constitution.**

And, Article 41 of the Constitution states that family is the foundation of the Turkish society and that the State shall take the necessary measures and establish the necessary organization to protect peace and welfare of the family, especially mother and children, thereby assigns the State the duty to protect family, especially mother and children. Considering this duty of the State, conducting a religious marriage ceremony before completing official marriage proceedings can be defined as criminal act and penal sanctions can be imposed on such acts in order to eliminate the negative results of *de facto* marriages through religious ceremony on family, society and public order. Making such a regulation is not contradictory to the principle of rule of law and general principles of criminal law.

The Preamble of the Constitution states that “sacred religious feelings shall absolutely not be involved in state affairs and politics as required by the principle of secularism”, Article 14 states that “none of the rights and freedoms embodied in the Constitution shall be exercised in the form of activities aiming to create a distinction as to language, race, religion and sect,” Article 24 states that “no one shall be compelled to reveal religious beliefs and convictions, or be blamed or accused because of his religious beliefs and convictions”. The final paragraph of Article 24 of the Constitution states “No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political interest or influence, or for even partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets” and, **thereby, explains the principle of secularism in a way and emphasizes the classical definition of this principle which is the separation of religious and State affairs.**

Such definition of secularism as explained in the relevant provisions of the Constitution arises from the respect to freedom of belief, and **it can not be perceived as hate against religion, profanity or blasphemy.** The principle of secularism requires that the State maintains the same degree of proximity or distance to all persons of different beliefs and religions and that no discrimination is made between people. As the prohibition of marriage by arranging religious ceremony without executing official marriage transactions does not in any way prohibit conducting such a religious ceremony after the official marriage, this regulation is not contradictory to the principle of secularism.

In consideration of the reasons explained above, the contested provision of law is not contradictory to Article 2, 10, 12i 13 and 24 of the Constitution. Therefore the application for the annulment of this provision must be rejected...” (Judgment of the Constitutional Court dated 24.11.199, Registry Nr. 1997/7. Judgment Nr. 1999/42; published in Official Gazette Nr. 24743 on 2.5.2002)

The reasoning for the contested provisions of law is as follows:

“... Paragraph five of the article states that conducting the religious ceremony of wedding without a civil marriage shall be punished. **Thereby, paragraph (4) of Article 174**

of the Constitution is emphasized. However, by stating that both the public action and the punishment imposed thereof, is abated with all its consequences when the civil marriage ceremony is accomplished, a provision is introduced to promote civil marriage. Considering the fact that people actually live together without any marriage for long periods of time and this constitutes no crime, then it must be admitted that such a provision is appropriate. **The final paragraph** prescribes that any person who conducts a religious marriage ceremony without seeing the certificate of civil marriage shall be punished.

As it is seen, the legislative organ explicitly states in the justifications of the contested provision of law that this regulation is made as a requirement of paragraph (4) of Article 174 of the Constitution.

In Article 174 of the Constitution titled “Preservation of Reform Laws” cites the reform laws in eight paragraphs and states that no provision of the Constitution shall be construed or interpreted as rendering unconstitutional the Reform Laws. Of these Reform Laws, the one cited in paragraph (4) states that “**the principle of civil marriage according to which the marriage act shall be concluded in the presence of the competent official,** adopted with the Turkish Civil Code No. 743 of 17 February 1926, and Article 110 of the Code”.

In one of its rulings related to Article 174 of the Constitution, the Constitutional Court clarifies the values protected with this Article of the Constitution as follows:

“...Article 174 of the Constitution titled “Preservation of Reform Laws” is a repetition of Article 153 of the 1961 Constitution with a few minor changes in wording. The Article prescribes that no provision of the Constitution shall be construed or interpreted as rendering unconstitutional these eight laws cited and that these reform laws aim to raise Turkish society above the level of contemporary civilization and to safeguard the secular character of the Republic...The Reform Laws cited in Article 174 are closely interrelated. Each and every one of those laws regulates a separate field of secularism and they establish the modern structure of the country... **Interpretation of Article 174 independently and in conjunction with the Preamble, Article 2 and 24 of the Constitution clearly presents the Republic of Turkey’s conception of secularism...**” (Judgment of the Constitutional Court dated 7.3.1989, Registry Nr. 1989/1. Judgment Nr. 1989/12; published in Official Gazette Nr. 20216 on 5.7.1989)

The Preamble of the Constitution states “... **this Constitution, in line with the concept of nationalism introduced by the founder of the Republic of Turkey, Atatürk, the immortal leader and the unrivalled hero, and his reforms and principles;**”... That **no protection shall be accorded to an activity contrary to the nationalism, principles, reforms and civilizationism of Atatürk and that sacred religious feelings shall absolutely not be involved in state affairs and politics as required by the principle of secularism;**.. With these IDEAS, BELIEFS, and RESOLUTIONS **to be interpreted and implemented accordingly, thus commanding respect for, and absolute loyalty to, its letter and spirit;** Has been entrusted by the TURKISH NATION to the democracy-loving Turkish sons’ and daughters’ love for the motherland and nation.”

As it is noted in a ruling of the Constitutional Court: “... Article 176 of the Constitution states that the Preamble of the Constitution, which explains the fundamental ideas and principles as the basis of the Constitution, is an integral part of the Constitution’s text; and the reasoning of the said Article emphasizes that the Preamble is equivalent to other

provisions of the Constitution. Article 2 defines the characteristic of the Constitution as “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**” and, thereby, **identifies the fundamental tenets set forth in the preamble with the characteristics of the Republic...**”(Judgment of the Constitutional Court dated 13.5.1985, Registry Nr. 1984/14. Judgment Nr. 1985/7; published in Official Gazette Nr. 18852 on 24.8.1985)

A similar interpretation of the Constitutional Court on the Preamble and Article 2 of the Constitution was as follows:

“... Actually, the characteristics of the Republic of Turkey are explicitly defined in the Preamble and Article 2 of the 1961 Constitution. Our Republic is a political entity that aims, with a national consciousness and solidarity, the development of the country on the basis of peace and human rights and freedoms and in line with principles of social justice and the **Reforms of Atatürk.**” Here the phrase “**Reforms of Atatürk**” deserves a special emphasis. As it can be understood from the explicit meaning of the word, the concept of reform is the antonym of stagnation, habituation and inactivity. There is no pause in revolutionism. The living conditions of modern society change constantly with the development of science and technique. The social groups that can not adapt themselves to such changes, that is to say those who can not achieve reforms, are doomed to fall behind the modern age and become the colonies of advanced societies. The basic purpose of Atatürk’s reforms is to reach the level of contemporary civilization. It is impossible to think that Atatürk’s Reforms have reached their aims after a certain period of time and there is no further need for new advancements. Because, Atatürk’s Reforms are on the move constantly in line with the level of contemporary civilization and they follow one another in succession without any interruption. (Judgment of the Constitutional Court dated 25.2.1975, Registry Nr. 1973/37. Judgment Nr. 1975/22; published in Official Gazette Nr. 15431 on 3.12.1975)

Article 14 of the Constitution titled “Prohibition of abuse of fundamental rights and freedoms” prescribes:

“None of the rights and freedoms embodied in the Constitution shall be exercised in the form of activities aiming to violate the indivisible integrity of the State with its territory and nation, and to endanger the existence of the democratic and secular order of the Republic based on human rights.

No provision of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms recognized by the Constitution or to stage an activity with the aim of restricting them more extensively than stated in the Constitution.

The sanctions to be applied against those who perpetrate activities contrary to these provisions shall be determined by law.”

In the justifications for the Article 174 of the Constitution, it is stated as follows: “**The importance of Atatürk’s reforms in reaching the level of Western civilization, shown as a target by Atatürk, is apparent beyond any dispute.** Turkish nation has comprehended these reforms and merged their reflection on these reforms into the core of ideas that they

gather around. **However, as it is seen that there may be some people who do not comprehend the meaning of Atatürk's reforms, the provision of 1961 Constitution that brings constitutional protection to the reforms is decided to be preserved in the new Constitution.**"

Article 41 of the Constitution states that family is the foundation of the Turkish society and that the State shall take necessary measures to protect peace and welfare of the family, especially mother and children.

The final paragraph of Article 24 of the Constitution titled "Freedom of religion and conscience" prescribes that:

No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political interest or influence, or for even partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets.

In the application for the annulment of Article 163 of abrogated Turkish Penal Code nr.765, which regulated the crime to make propaganda or indoctrination for adapting the social, economic, political or legal orders of the state to religious principles beliefs even partially in defiance of the secularism, the Constitutional Court relied on the following grounds while rejecting the application for annulment: "...By adopting the principle of secularism, the Republic ensured the secularism of the law and, thereby, the State gained its modern and contemporary structure as an independent and impartial legal institution. Therefore, as the secularism prevails as a basic principle in the political and legal life through Article, 2 of the Constitution, **Article 163 of Turkish Penal Code which protects the secularism becomes a natural and mandatory result of Article 2 of the Constitution...** Paragraph 4 of Article 163 of Turkish Penal Code, which protects the principle of secularism, does not contradict with Article 12 of the Constitution which provide dignity to the said principle... The material and spiritual components of the crime defined under paragraph 4 of Article 163 of Turkish Penal Code are parallel to those in paragraph 5 of Article 19 of the Constitution and the phrases "exploit, abuse, breach of prohibition and provoke" in Article 19 of the Constitution contains the "propaganda and indoctrination" as used in paragraph 4 of Article 163 of Turkish Penal Code. It is also explicitly stated that sanctions shall be imposed by law against the acts prohibited under the said provision of the Constitution. Therefore, the contested provision of law does not contradict with Article 19 and, also, 12, 20, 333 of the Constitution ..." (Judgment of the Constitutional Court dated 3.7.1980, Registry Nr. 1980/19. Judgment Nr. 1980/48; Journal of Constitutional Court Judgments, Issue: 18)

As the contested provision of law aims to protect one of the eight reform laws (the one on civil marriage) cited in Article 174 of the Constitution in the field of criminal law; it would be relevant to refer to another justification in one of the previous rulings of the Constitutional Court on "Atatürk's reforms-secularism-Constitutional Protection":

"... The principle of secularism lies in the origin of Atatürk's reforms and this principle constitutes the basis of reforms. In other words, any concession on the principle of secularism may lead to distortion of Atatürk's reforms and, eventually, their extinction. That is why our Constitution included in its "Preamble" an imperative provision by stating "no protection shall be accorded to an activity contrary to the nationalism,

principles, reforms and civilizationism of Atatürk and that sacred religious feelings shall absolutely not be involved in state affairs and politics as required by the principle of secularism"... Turkish revolution is the name of the movement for national independence and modernization under the leadership of Atatürk and this system of thought constitutes the fundamental basis and philosophy of 1982 Constitution... **Therefore, attributing different meanings to paragraph 4 of Article 24 of the Constitution is contrary to Atatürkist ideology and Turkish revolution** and it also contradicts with the explicit meaning of the provision which leaves no room of interpretation... ” (Judgment of the Constitutional Court dated 25.10.1983, Registry Nr. 1983/2(SPK). Judgment Nr. 1983/2; Journal of Constitutional Court Judgments, Issue: 20)

It would be appropriate to take a look at the justifications for another previous ruling of the Constitutional Court where similar assessments are made:

“...Article 174 of the Constitution titled “preservation of reform laws” is a repetition of Article 153 of the 1961 Constitution with a few minor changes in wording. Article 174 prescribes that no provision of the Constitution shall be construed or interpreted as rendering unconstitutional these eight laws cited and it also states that these reform laws aim to raise Turkish society above the level of contemporary civilization and to safeguard the secular character of the Republic... The titles of the laws cited in Article 174 of the Constitution shows their importance for the Republic of Turkey. As it is acknowledged in the Constitution that these laws aim to reach above the level of contemporary civilization and to safeguard the secular character of the Republic of Turkey and **they are called “reform laws”, it shows that they aim to realize Turkish Revolution and principles of Atatürk...** When Article 174 is considered in isolation or in conjunction with the Preamble and Article 2 and 24 of the Constitution, it manifestly reveals the Republic of Turkey’s understanding of secularism. The Reform Laws cited in Article 174 are closely interrelated. Each and every one of those laws regulates a separate field of secularism and they establish the modern structure of the country... **Every one of these Laws has a crucial importance on their own as a monument of the revolution and they are the values to serve for the eternal existence of the Republic of Turkey ...**” (Judgment of the Constitutional Court dated 7.3.1989, Registry Nr. 1989/1. Judgment Nr. 1989/12; Journal of Constitutional Court Judgments, Issue: 25)”

Considering the provisions of the Constitution explained in details above and the previous rulings of the Constitutional Court relating to this issue; we have come to conclude **that** one of the reform laws protected under paragraph 4 of Article 174 of the Constitution prescribes “the principle of civil marriage according to which the marriage act shall be concluded in the presence of the competent official adopted with the Turkish Civil Code No. 743 of 17 February 1926, and the provisions of Article 110 of the Code”(Although Turkish Civil Code Nr. 743 was abrogated with Turkish Civil Code Nr. 4721 on 22.11.2001, the said provisions in Article 174/4 of the Constitution were preserved in Article 141, 142 and 143 of the Law Nr.4721) and the provision of this law has been protected in the field of criminal law since 1936 (Article 237/3-4 of Turkish Penal Code Nr. 765; Article 230/5-6 of Turkish Penal Code); **that** “freedom of religion and conscience” can not be given precedence against this reform law as Article 174/4 of the constitution must be interpreted together with the principles stated in the Preamble and Article 2, 4, final paragraph of 24 and 41 of the Constitution; **that** the contested provision of law directed towards preventing the attitudes and behaviors contrary to this reform law, which aims to raise Turkish women to the level of contemporary civilization and adopt the principle of “civil marriage” for the protection of women and family and to safeguard the secular order of the country, is nothing but a penal sanction aiming to

protect this constitutional principle; **that** even the legislative organ itself notes in the reasoning of the contested provision of law that these regulations emphasize paragraph (4) of Article 174 of the Constitution; **that** the application for the annulment of the same regulation in the previous(abrogated) Turkish Penal Code was rejected by the Constitutional Court as it was found constitutional; **that** alleging the contested provision of law does not comply with the freedom of religion and conscience through an interpretation which may undermine the Reform Law indirectly is unacceptable as the referred provisions of the Constitution must be interpreted jointly; **that** the referred ruling of the Constitutional Court do not support this, on the contrary, they suggest just the opposite; **that** this regulation, which protects the family law, private life, freedom of religion and conscience and the principle of civil marriage, can not be described disproportionate when considered together with the second sentence of paragraph (5) of the contested provision of law which prescribes “However, both the public action and the punishment imposed thereof is abated with all its consequences when the civil marriage ceremony is accomplished”. Therefore, we have concluded that the contested provision of law is not contradictory to any of the provisions of the Constitution and the application for the annulment of the law must be rejected. Accordingly, we dissent the opinion of majority for the annulment of the contested provision of law.

Member
Serdar ÖZGÜLDÜR

Member
Serruh KALELİ

Member
Recep KÖMÜRCÜ

DISSENTING OPINION

For the following reasons explained below, I dissent the majority decision on the application for the annulment of paragraph (5) of Article 230 of Turkish Penal Code Nr. 5237 which regulates the crime of marriage by arranging religious ceremony without executing official marriage transactions and paragraph (6) of the same Article which regulates the crime of conducting such a religious marriage ceremony:

Turkish Civil Code, which adopts the equality of man and woman, is one of the foundations for the recognition of the Republic of Turkey in the world of modern nations after its establishment through a revolution on the basis of independence and national sovereignty gained with the national liberation war. After the termination of multiple marriages by adopting the civil marriage in Turkish Civil Code, some measures were introduced to support and sustain these new legal institutions. Imposing certain sanctions on marriage by arranging religious ceremony without executing official marriage transactions also falls within the scope of these measures. When we review the issue just on the legal and constitutional grounds, the justifications of the ruling of Constitutional Court (Register Nr.1999/27, Judgment Nr. 1999/42) adopted UNANIMOUSLY and published in the Official Gazette Nr. 24743 on 2.5.2002, which rejected the annulment action against paragraph four of Article 237 of Turkish Penal Code Nr. 765 applies to this annulment action as well since the contested provision of law contains almost the same regulation as that one. Therefore, the annulment action must be rejected. However, as this ruling of the Constitutional Court handles the issue from a perspective of human rights and reaches to a different conclusion, it would be useful to

make a new comparison between the legal values protected by the contested provision of law and the provisions of the Constitution that the contested law is alleged to be contradictory to.

A vast majority of our people combines perfectly the requirements of modern secular life and social order with the commands of our sacred religion and, while executing their marriage contract, they have developed the habit of conducting their legal, religious and social responsibilities altogether. Accordingly it has become a custom to complete the official transactions of civil marriage first and then to conduct the religious rituals and wedding ceremonies.

Although, the first sentence in paragraph (5) of Article 230 of the Law prescribes that those who marry by arranging religious ceremony without executing official marriage transactions are sentenced to imprisonment from two months to six months, the second sentence of the same paragraph states *“However, both the public action and the punishment imposed thereof, is abated with all its consequences when the civil marriage ceremony is accomplished.”* We see that this regulation imposes a sanction in nature of *“coercive detention”* on the said crime which is different from effective repentance and extenuating circumstances relating to other crimes defined in the criminal law. The purpose of this regulation is by no means to punish someone for conducting a religious ritual but to ensure that the religious ceremony is conducted after the official proceedings of the civil marriage. In doing so, this regulation aims to prevent possible losses of rights of women and children which may arise when the religious marriage remains ineffective due to deferral of the official civil marriage.

When we consider the issue sociologically, according to the data by Turkish Statistical Institute for the year 2011, the percentage of couples married by conducting both civil and religious marriage is 93.7%, those who married only by conducting civil marriage proceedings is 3.3% and those who married only by conducting religious marriage is 3%. When the distribution of the types of marriages to geographical regions is examined, we see that conducting of religious marriage without official transactions of civil marriage is most prevalent in the Southeastern Anatolia region (8.3%) and that the least in Western Marmara region (0.9%). (Bulletin of Turkish Statistical Institute, Volume: 13662, 12 May 2013).

Similarly, in family research conducted by Civelek and Koç in 2005, the percentage of those who are married only by religious marriage without official transactions of civil marriage was 15% in 1968, 12% in 1978, 8% in 1988, 7% in 1998 and 5.8% in 2003. According to these findings, there has been a decrease by 61% percent in the number of couples with only religious marriage between 1968-2003. The findings of the same study suggest that the rate of religious marriage varies according to regional and socio-cultural factors. In this context, it increases from west to east in geographical terms, it is inversely correlated to the level of education, and it is more widespread in rural areas than the urban areas. It is also related to the household welfare level, i.e. religious marriage rate is 15% in families with low welfare, 4% in average welfare families and 1% in high welfare ones. The conclusion to be drawn from these findings is that the marriage institution based on the equality of man and woman as one of the basic principles of social order, i.e. the official marriage proceedings executed in accordance with the Civil Law, needs to be supported by certain sanctions to be imposed by the State; that this need is need inversely proportional to the level of development. However, such sanctions are still required for certain segments and regions of the country and the contested provision of law serves for an important public interest to this end.

Article 2 of the Constitution states that the Republic of Turkey is a democratic, secular and social state governed by rule of law, Article 5 enumerates the fundamental aims and duties of the State, Article 10 regulates the principle of equality, Article 17 regulates the right to protect and improve his/her corporeal and spiritual existence and Article 41 regulates the protection of family and children's rights. A paragraph added in 2004 to Article 10 which guarantees the principle of equality prescribes "*Men and women have equal rights. The State has the obligation to ensure that this equality exists in practice.*" And the sentence added to this paragraph in 2010 states "*Measures taken for this purpose shall not be interpreted as contrary to the principle of equality*". As the contested provision of law protects women primarily, disregarding this aspect of the issue in constitutionality review may yield misleading results.

According to the sociological researches, the rate of couples leading a family life without any form of marital contract is lower than those who are married with a religious ceremony. On the other hand, it is not possible to make a comparison on the equality of people in this category and those who deem themselves married by conducting religious ceremony. As a matter of fact, while the termination of the *sui juris* marriage between the couples with higher education and economic levels upon the wish of either of the couples does not have a negative effect on the social peace in general sense, the termination of the marriage between the couples who consider themselves as married by their religious beliefs may lead to very serious problems and may cause serious crimes that harm the larger families and the social peace. It is self-evident that no comparison of equality can be made between those who have different conditions and status.

The penalty prescribed by the contested rules can not be alleged to constitute a disproportionate interference to the fundamental rights in Article 20 and 24. Because, the interference here is towards the timing of a certain religious ceremony and it is based on valid grounds. As both the public action and the punishment imposed thereof is abated with all its consequences when the civil marriage is accomplished and because this further relieves the punishment, the interference can not be described disproportionate interference. As it is stated in the majority opinion, the freedoms in Article 20 and 24 have some limitations by their very own nature. If there is a justified ground and an outstanding public interest in imposing certain conditions on the people before conducting a religious ceremony, then certain regulations may be laid down by the State provided that they are proportionate. As a matter of fact, a vast majority of our people has abided by these rules without neglecting their religious responsibilities and there has not been a significant social demand on the legislative organ to lift these regulations. We see that those who have problems with these rules try to evade the legal responsibilities of marriage institution and they exploit the moral force of the religion to persuade their partners, especially if s/he is a religious person, to live together without a legal form of marriage. It is evident that they have no legitimate legal interest to be protected under the freedoms.

The application for the annulment of the contested provision of law with regards to those who conduct the religious marriage ceremony must be rejected on the same grounds. Moreover, there is no such religious obligation to carry out a religious marriage ceremony.

For the reasons explained above, the application for the annulment of contested provisions of law must be rejected as those provisions are not contradictory to Article 10, 20 and 24 of the Constitution

Member

Osman Alifeyyaz PAKSÜT

This text may be subject to editorial changes