

The Surname of Women and Children in Turkish Law

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§ 1 Introduction

- **In Turkish law, it is insufficient to consult the provisions of the Turkish Civil Code to determine the legal rules about the surname of women and children.**
- **In order to determine the legal situation in this regard, in addition to the provisions of the Turkish Civil Code of 2001,**
 - **Turkish constitution,**
 - **international conventions,**
 - **several national legislative and administrative enactments,**
 - **case law of the Constitutional Court and the Court of Cassation****have to be considered.**



§ 1 Introduction

- **The complexity of the legal situation is increased by the facts that**
 - **provisions of national enactments conflict(ed) with each other and with provisions of international conventions,**
 - **case law of the Constitutional Court and the Court of Cassation did not develop consistently and in conformity with each other,**
 - **developments in the case law are not reflected in legislative and administrative enactments, and**
 - **administrative practices do not comply with the case law since they are based solely on national enactments.**



§ 2 The Surname of Women

I. After Marriage

➤ **Article 187 of the Turkish Civil Code:**

The woman takes her husband's surname with marriage; however, she can also use her previous surname before her husband's surname by a written application to the marriage officer or to the civil registry administration thereafter. A woman who previously used two surnames can use this right only for one surname.

- **The woman has to bear the surname of her husband after marriage (with or without her previous surname).**
- **The European Court of Human Rights held that this provision violates the prohibition of discrimination in connection with the right to respect for private and family life (in the case of *Ünal Tekeli v. Turkey* and other cases).**



§ 2 The Surname of Women

I. After Marriage

- **In (two) cases for the annulment of the respective provision of the Turkish Civil Code, the Constitutional Court**
 - **held that the differential treatment of women and men is justified by public interest and public order,**
 - **did not annul the relevant provision due to its unconstitutionality.**
- **However, in individual complaints, the Constitutional Court decided that**
 - **the surname of women relate to their the constitutional right to protect and develop their immaterial (spiritual) existence,**
 - **Article 187 of the Turkish Civil Code cannot constitute the statutory basis for interference with this fundamental right, since the relevant provisions of international conventions should be applied.**
- **Indeed, the Turkish Constitution stipulates (since 2004) that the provisions of an international convention related to fundamental rights and freedoms prevail over provisions of national statutes in case of conflict.**



§ 2 The Surname of Women

I. After Marriage

- **Relevant international conventions:**
 - **European Convention of Human Rights**
 - **Article 8 (prohibition of discrimination) in connection with Article 14 (right to respect for private and family life)**
 - **Article 5 of Additional Protocol No. 7 (ratified by TR in 2016) (equality between spouses)**
 - **International Covenant on Civil and Political Rights, Article 23(4)**
 - **Convention on the Elimination of All Forms of Discrimination against Women, Article 16(1)(g)**



§ 2 The Surname of Women

I. After Marriage

- **After the decisions of the Constitutional Court in individual complaints, the Court of Cassation began to rule that women can use solely their premarital surname after marriage.**
- **Women can obtain a court order from civil courts to have their premarital surname registered in the civil registry as their sole surname after marriage.**
- **Despite the case law of the Constitutional Court and the Court of Cassation, the civil registry administration still applies Article 187 of the Turkish Civil Code.**
- **The Bylaw on the Implementation of Civil Registry Services of 8 May 2020 disregards the case law of the Constitutional Court and the Court of Cassation and regulates the surname of women solely on the basis of Article 187 of the Turkish Civil Code.**



§ 2 The Surname of Women

II. After Divorce

➤ **Article 173 of Turkish Civil Code:**

In case of divorce, the woman retains her personal status; however, she takes her surname prior to the marriage again. If the woman was a widow prior to the marriage, she may request permission from the judge to bear her birth surname.

If it is proven that the woman has an interest in using the surname of her ex-husband and that this causes no harm to the [ex-]husband, the judge grants her permission to bear her [ex-]husband's surname upon her request.

In case of a change in the circumstances, the [ex-]husband may request the repeal of this permission.



§ 2 The Surname of Women

II. After Divorce

- **The Court of Cassation accepts that the woman can be given permission to use her ex-husband's surname if she made a name for herself and became well known with her ex-husband's surname.**
- **The mere fact that the woman has used (and – until recently – had to use) her ex-husband's surname for a period of time is not sufficient to continue the use of that surname.**
- **It is criticized that the use of the ex-husband's surname is subject to the condition that the interests of the ex-husband are not violated.**



§ 2 The Surname of Women

III. After Death of Husband

- **The death of a woman's husband does not – by itself – have an effect on the surname of the woman.**
- **The Turkish Civil Code contains no provisions in this regard.**
- **The Act on Civil Registry Services of 2006 and its previous bylaw provide that the widow can apply to the civil registry administration in order to bear her birth surname.**



§ 3 The Surname of Children

I. Acquisition of Surname by Birth

- **Article 321 of the new Turkish Civil Code (in its original version):**

The child bears the surname of the family, if the mother and father are married, and the surname of the mother, if the mother and father are not married.

However, if the mother bears two surnames due to her previous marriage, the child bears her birth surname.

- **The Constitutional Court annulled the phrase «and the surname of the mother, if the mother and father are not married» based on the ground that this part of the provision created inequality between children born in marriage and children born out of wedlock.**
- **Since 2006, several legislative and administrative enactments have provided that the child bears the surname of the father even if the parents are not married.**
- **Article 28 (4) of the Act on Civil Registry Services (as amended in 2017):**
Children whose kinship [with their father] is established by recognition or court decision are transferred to their father's register with their father's name and surname.



§ 3 The Surname of Children

I. Acquisition of Surname by Birth

- The surname of the child is determined *ipso iure* based on whether the kinship of the child with the father is established.
- In Turkish law, the surname of a child is not chosen by the parents.
- The Surname Act of 1934 provided for a right to choose the surname when it introduced the requirement to bear a surname.
 - Prior to the Surname Act of 1934, Turkish citizens did not have to bear a surname.
 - The Surname Act of 1934 allowed Turkish citizens to choose a surname for themselves and their underage (minor) children.



§ 3 The Surname of Children

II. Change of Surname After the Divorce of Parents

- **The divorce of the parents does not have an effect on the surname of the child.**
- **A decision of the Constitutional Court caused an inexplicable change of the legal situation.**
 - **The Constitutional Court annulled the provision of the Surname Act of 1934 that gave the father the right to choose the surname of the child even when the parents were divorced and the mother had custody of the child.**
 - **This decision should have no effect on the current legal situation.**
 - **This decision caused the misconception that women could apply to the court in order to change the surname of their child when the parents are divorced and the mother has the custody of the child.**
 - **However, the Court of Cassation did not allow women to change the surname of their children in such cases.**
 - **The decisions of the Court of Cassation caused individual complaints to the Constitutional Court.**



§ 3 The Surname of Children

II. Change of Surname After the Divorce of Parents

- **The Constitutional Court held that the right to respect for family life and the principle of equality are violated if the mother cannot change the child's surname when she has custody of the child after divorce.**
 - **The Constitutional Court accepts (erroneously) that custody gives the right to choose the child's surname.**
 - **The Constitutional Court has not considered whether the child has an interest in the change of his/her surname.**
- **After an initial insistence on its previous case law, the Court of Cassation has accepted that women can request the change of the surname of their children when they have custody after divorce.**

Unlike the Constitutional Court, the Court of Cassation considers the interests of the child.

- **It remains to be seen how the Court of Cassation will decide, if the mother requests the change of the child's surname even though the interests of the child do not require such a change.**



§ 3 The Surname of Children

III. Change of Surname in Other Cases

- **A recent decision of the Constitutional Court shows the trend of its case law.**
 - **A child was born out of wedlock and the kinship of the child with the father was established by paternity decision.**
 - **The child acquired *ipso iure* the surname of the father.**
 - **The mother had sole custody of the child.**
 - **The mother requested from the court to change the surname of the child to her surname.**
 - **The Court of Cassation decided that the request of the mother should be rejected.**
 - **The Constitutional Court held that the right to respect for family life and the principle of equality are thereby violated.**
 - **It can be expected that the Court of Cassation will change its case law.**



§ 3 The Surname of Children

III. Change of Surname in Other Cases

- **The case law of the Constitutional Court requires the change of the child's surname if the mother has custody and makes an application to the court.**
- **The recent case law of the Constitutional Court and the Court of Cassation leaves several questions unanswered. For example:**
 - **What if the child is capable of judgment?**
 - **What if the parents have joint custody after divorce?**



§ 4 Final Remarks

- **In Turkish law, legislative action is necessary in order to**
 - **establish legal clarity and security,**
 - **enable the adaptation of administrative enactments and practices to the current legal situation,**
 - **ensure equality between women and man with regard to their surnames after marriage and the ability to pass on their surnames to their child, and**
 - **last but not least, protect the best interests and personality of the child.**