

## **12.11.2002, E.1999/35, K.2002/104**

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**Subject** : Separation of powers, Equality, Security of the person, Independence, Right to family life, Family, constitutional protection /Violence, domestic, injunction /Measure, warning, obligation for court.

### Headnotes:

In order to protect the family in society, the Parliament may take the necessary measures against violence within the family.

It is not unconstitutional to oblige a court to warn a spouse at fault to comply with the measures taken by the judge and to warn him/her that if he/she does not do so, he/she shall be subject to a detention order and imprisonment.

### Summary:

The Gülyalý Peace Court brought an action in the Constitutional Court alleging that the provisions of Article 1.1 and 1.2 of the Law on the Protection of The Family (4320) were contrary to the Constitution.

Article 1.1 of the Law 4320 states that where one of the spouses, children or other members of the family living in the same home reports that he/she was subjected to violence within the family, the judge shall take one or more of the measures listed in the article. According to that article, the measures may be directed against one of the spouses, but not against the children or other members of the family.

Article 1.2. of that Law provides that the measures taken by the judge may not exceed 6 months. The spouse is to be informed that if he/she does not comply with the terms of the injunction(s), he/she shall be detained and shall be sentenced to three-to-six months' imprisonment.

The Peace Court alleged that the article did not provide for an injunction if the violence came from the children or other members of the family. According to that Court, that was contrary to the equality principle set out in Article 10 of the Constitution.

The reasoning of the article is: "... it is beyond doubt that the idea of the family protection is first of all to form families within the meaning of the Civil Code... The family is a sacred basis from the point of national life. Therefore, the State shall protect the welfare and peace of the family".

Article 41 of the Constitution stresses that the family is the foundation of the Turkish society. That same article provides that the state must take the necessary measures and establish the necessary organisation to ensure the peace and welfare of the family. That article, whose aim is to ensure the constitutional guarantee of the family, imposes on the State some duties related to the family. Those duties concern the improvement and the development of conditions within the family. The aim is to protect the unity and the integrity of the family consisting of the spouses and children. Consequently, the Law 4320 constitutes one of the regulations provided for by Article 41 of the Constitution.

Since the responsibilities and duties of the spouses differ from those of other members of the family, an equal comparison cannot be made between them. Moreover, the Parliament may at any time take the necessary measures against the violent acts of other members of the family.

Consequently, the Constitutional Court found that Article 1.1 was not contrary to Article 10 of the Constitution and the request had to be rejected.

Secondly, Article 1.2 of the Law 4320 states that the spouse at fault is to be informed that if he/she does not comply with the measures taken by the judge, he/she shall be detained and sentenced to imprisonment. The Peace Court alleged that that provision was contrary to Article 138.2 of the Constitution.

Article 138.2 of the Constitution states: "...[n]o organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, make recommendations or suggestions".

Since in the Turkish legal system, detention is a preventive measure, a judge uses his/her discretionary power on the subject, after taking into account the provisions of the Criminal Procedure Code.

The sentence "the spouse at fault shall be warned that he/she shall be detained and sentenced to imprisonment in case he/she acts against the measures" in Article 1.2 amounts to a special warning regulation. The spouse is informed that if he/she does not comply with the order aimed at preventing violence within the family, the consequences of his/her behaviour will come into effect.

Where the public prosecutor subsequently requests that the spouse at fault be detained, the judge freely evaluates whether the necessary general or special conditions for detention exist. Therefore, the impugned provision is not contrary to the principle of the separation of powers or to Article 138 of the Constitution. The Constitutional Court unanimously rejected the request.