REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

Application No: 2013/3434

Date of Judgment: 25/6/2015

SECOND SECTION

JUDGMENT

President	: Alparslan ALTAN
Judges	: Serdar ÖZGÜLDÜR
	Celal Mümtaz AKINCI
	Muammer TOPAL
	M. Emin KUZ
Rapporteur	: Şebnem NEBİLOĞLU ÖNER
Applicant	: HAYRİYE ÖZDEMİR
Counsel	: Att. Abdulkadir SAYIKAN

I. SUBJECT OF APPLICATION

1. The applicant alleged that her right to respect for family life was violated as the court dismissed the case filed by her for changing the surname of the child whose right of custody was given to her after the divorce case; that her right to a reasoned decision vas violated as the allegations effecting the result of the judgment were not sufficiently responded by the court of instance; and that her right to access to a court was violated as a civil fine was imposed on her upon the rejection of her request for revision of decision.

II. APPLICATION PROCESS

2. The application was lodged through Diyarbakır 6th Civil Court of First Instance on 20/5/2013. In the result of the preliminary examination of the application form and its annexes, it was found out that there was no deficiency that would prevent referral thereof to the Commission.

3. It was decided by the First Commission of the Second Section that the examination of admissibility of the application be conducted by the Section and the file be sent to the Section.

4. It was decided by the President of the Section on 11/7/2014 that the examinations for admissibility and merits of the application be conducted together

5. A copy of the application documents and their annexes were sent to the Ministry of Justice (Ministry) for its opinion. The opinion letter presented by the Ministry of Justice on 12/9/2014 was notified to the applicant on 25/9/2014 and the applicant did not submit counter-opinion.

III. INCIDENTS AND FACTS

A. Incidents

6. As expressed in the application form, the annexes thereof and the contents of the case file subject to application, the incidents are summarized as follows:

7. The applicant was divorced with the writ of Diyarbakır 1st Family Court (Judgment No. 2003/46, Reg. No. 2002/768) and the right of custody for joint child was given to the applicant as the mother of the child.

8. The applicant filed a petition at Diyarbakır 5th Civil Court of First Instance on 24/2/2002 and requested for changing the surname of the child, whose right of custody was given to her after the divorce case, into her surname "*Özdemir*" instead of that of her divorced husband.

9. Diyarbakır 5th Civil Court of First Instance decided for acceptance of the case on 16/4/2012 (Judgment No.2012/56, Reg. No.2012/246) and the justifications of this judgment stated that the phrase "*in cases of annulment of marriage or divorce, the child shall adopt the surname chosen/to be chosen by father even if right of custody was given to mother*" under paragraph two of Article 4 of the Law No. 2525 on Surname of 21/6/1934 was annulled by the Constitutional Court on 8/12/2011 (Judgment No. 2011/165, Reg. No. 2010/119) and the decision of annulment was published in the Official Gazette. The court stated that, therefore, there is justified grounds in the mother's request for changing the child's surname into her own surname.

10. Upon appeal of the judgment, it was quashed by the 18th Civil Chamber of the Court of Cassation on 6/6/2012 (Judgment No. 2012/7122, Reg. No. 2012/5587). The justifications of the judgment for quash states that, under the provisions of Article 321 of Turkish Civil Code No. 4721, dated 22/11/2001, a legitimate child shall have the surname of the father (family), that the right of custody given to mother upon divorce or death shall not change the surname, that the child's surname shall not change unless the father's or child's (when he comes of age) surname is changed by a duly filed court judgment.

11. After the decision quashing the judgment, Diyarbakır 5th Civil Court of First Instance carried out the trial of case registered under Reg. No. 2012/814 and dismissed the case on 24/9/2012 (Judgment No. 2012/359, Reg. No. 2012/814). The court made reference to the decision of the Court of Cassation in the justifications of its judgment.

12. Upon appeal of the judgment, it was upheld by the 18th Civil Chamber of the Court of Cassation on 17/1/2013 (Judgment No. 2013/412, Reg. No. 2012/14097). The applicant's request for revision of decision was rejected by the same Chamber on 8/4/2013 (Judgment No. 2013/5688, Reg. No. 2012/39345) and such decision was notified to applicant's counsel on 3/5/2013.

13. The applicant filed an individual application on 20/5/2013.

B. Relevant Law

14. Article 321 of Law No. 4721 titled "*Surname*" is as follows:

"The child holds the surname of family if the mother and father are married (...). However, if the mother holds two surnames due to her previous marriage, then the child holds her maiden name."

15. Article 27 of Law No. 4721 titled "*Change of name*" is as follows:

Change of name may only be claimed from the judge upon justified grounds.
Any change made in the name is registered in the birth record and announced officially.
Change of name does not result with change in the status of a person.
The person suffering damage due to change of name may litigate within one year as of the date of knowledge of this fact claiming abrogation of the judgment given for change of name.

16. The first sentence of paragraph two Article 4 of the Law No. 2525 annulled by the Constitutional Court on 8/12/2011 (Judgment No. 2011/165, Reg. No. 2010/119) was as follows:

"In cases of annulment of marriage or divorce, the child shall hold the surname chosen/to be chosen by father even if right of custody was given to mother"

IV. EXAMINATION AND JUSTIFICATION

17. The individual application of the applicant dated 20/5/2013 and numbered 2013/3434 was examined by the Court on 25/6/2015 and the following were ordered and adjudged:

A. Allegations of the Applicant

18. The applicant stated that the right of custody of their joint child was given to her after divorce; that she deals in person with all transactions related to child including legal transactions and that she is constantly required to present family register and divorce decree as they hold different surnames and that both the child and herself suffer from this. The applicant stated that, in the case that she filed for changing the surname, her requests based on the decision of the Constitutional Court annulling the relevant part of Article 4 of Law No. 2525 were not sufficiently responded; that the judgment rendered in that case violated the principle of equality and that she was imposed civil fine upon rejection of her request for revision of decision. The applicant alleged that her rights defined under Article 10, 36, 40 and 153 of the Constitution were violated.

B. Evaluation

19. The Constitutional Court is not bound by the legal qualification of the fact made by the applicant. Although the applicant alleged that her rights defined under Article 10, 36, 40 and 153 of the Constitution were violated, the Court considered it appropriate to examine the applicant's said allegations of violation from the point of Article 10, 20 and 36 of the Constitution.

1. In Terms of Admissibility

a. Allegations on the Violation of Right to a Reasoned Decision

20. The applicant stated that, although her requests in the trial process were based on the annulment decision of the Constitutional Court, this issue was not considered in the judgments of the courts of instance and she alleged that her right to a reasoned decision was violated.

21. In the opinion by the Ministry, referring to the previous judgments of the Constitutional Court and opinions presented in that context, it is stated that no opinion will be presented with regards to this part of the application.

22. The sub-principles and rights, which stem from the text of the European Convention on Human Rights (Convention) and the judgments of the European Court of Human Rights (ECtHR) as manifestations of the right to a fair trial, are the elements of the right to a fair trial stipulated under Article 36 of the Constitution as well. The right to a reasoned decision is also one of the manifestations of the right to a fair trial. In many of its decisions (over which it carries out an examination in accordance with Article 36 of the Constitution), the Constitutional Court ruled that principles and rights such as the right to a reasoned decision which is stipulated in the wording of the Convention and included within the scope of the right to a fair trial through the case law of the ECtHR within the scope of Article 36 of the Constitution by way of interpreting the relevant provision in light of Article 6 of the Convention and the case law of the ECtHR (*Güher Ergun and others*, App. Nr: 2012/13, 2/7/2013,§ 38). Besides, the right to a reasoned decision, being an element of right to a fair trial, is regulated under paragraph one of Article 141 of the Constitution as an obligation to be fulfilled by the courts.

23. The fact that court decision must be reasoned relates to interests of both the parties and the public as it ensures effective use of appeal rights and the public trust in courts. If the parties are not informed of the reasons, this may render the appeal rights non-functional. Therefore, it is obligatory that the grounds of the court judgments must be provided sufficiently clear (*Tahir Gökatalay*, App. Nr: 2013/1780, 20/3/2013,§ 67).

24. While a reasoned decision is one of the elements of the right to a fair trial, this right cannot be understood as requiring a detailed answer to every argument. For this reason, the scope of the obligation to show a justification may vary depending on the nature of a decision. Nevertheless, if the claims of the applicant as regards to procedure or merits which require a separate and clear response are left unanswered, this will result in violation of a right. Besides, the fact that the judgments by the appellate courts are not detailed cannot be construed as a violation of this right. It must be considered that such judgments of the appellate courts simply endorse the reasons in the judgment of instance court, thereby, the higher court incorporates the reasons of the previous courts' judgments (*Muhittin Kaya and Muhittin Kaya İnşaat Taahhüt Madencilik Gıda Turizm Pazarlama Sanayi ve Ticaret Limited Şirketi*, App. No: 2013/1213, 4/12/2013, §

25. In the incident which is the subject matter of the application, the Constitutional Court comes to conclude as follows: The applicant filed a case and requested for changing the surname of the child whose right of custody was given to her; the judgment by the court of first instance states that the phrase "*in cases of annulment of marriage or divorce, the child shall adopt the surname chosen/to be chosen by father even if right of custody was given to mother*" under paragraph two Article 4 of the Law on Surname No. 2525 dated 21/6/1934 was annulled by the Constitutional Court on 8/12/2011 (Judgment No. 2011/165, Reg. No. 2010/119) and the decision of annulment was published in the Official Gazette. The court stated that, therefore, there is justified grounds in the mother's request for changing the child's surname into her own surname. Upon appeal of this judgment, the judgment was

quashed (by the Court of Cassation) stating that, under the provisions of Article 321 of Law No. 4721, a legitimate child shall have the surname of the father (family), that the right of custody given to mother upon divorce or death shall not change the surname, that the child's surname shall not change unless the father's or child's (when he comes of age) surname is changed by a duly filed court judgment. After the decision quashing the judgment, the court of first instance dismissed the case by referring to the decision of the Court of Cassation in the justifications of its judgment. The judgment was finalized upon its review by the appellate court as the judgment and justifications were found lawful. Although the judgments of the appellate court did not provide detailed reasons, it is understood that the reasons in the judgment of the court of first instance were incorporated by the appellate court. Accordingly, the applicant's allegations that her right to a reasoned decision protected under Article 36 of the Constitution has been violated is "*manifestly ill-founded*" and, therefore, it should be decided that such allegation is inadmissible.

b. Allegations on the Violation of Right to Access to Court

26. The applicant alleged that her right to a fair trial was violated as a civil fine was imposed on her upon the rejection of her request for revision of decision by the Court of Cassation.

27. No assessments were made in the opinion of the Ministry on the said allegations.

28. It is understood that, in the proceedings subject to individual application, a civil fine of 219,00 TRY was imposed in accordance with Article 442 of Code of Civil Procedure No. 1086, of 18/6/1927 as the applicants request for revision of decision was rejected.

29. The allegations that civil fine imposed upon the rejection of request for revision violates the right to a fair trial was examined on many occasions by the Constitutional Court within the scope of right to access to court. The court observed that the said regulation ensures that the individuals make a small contribution to the costs of proceedings in return for the judiciary services that they receive, thereby, prevents unnecessary applications to revision of decision. Ill-founded disputes and excessive expenses are prevented and excessive workload of the judiciary is avoided through this practice. Thus, it has the legitimate aim of good management of the judiciary, better procurement of judicial service and ensure the protection of all individuals' rights by proper administration of judiciary in general (*Tahir Gökatalay*, §§ 36-44).

30. For the present application, it has been concluded that there is no reason to diverge from the said findings; that the applicant had the opportunity to assert her request for legal protection before a two-instance trial procedure, one being the court of first instance and the other appellate court, and that the civil fine imposed on the applicant upon the rejection of her request for revision of decision does not constitute a heavy economic burden on her. Therefore, the Court concluded that the civil fine imposed on the applicant upon the rejection of her request for revision of decision does not prevent actual and effective use of her right to access to court. Accordingly, the applicant's allegations that her right to access to court has been violated is "*manifestly ill-founded*" and, therefore, it should be decided that such allegation is inadmissible without further examination of other admissibility criteria.

c. Allegations on the Violation of Right to Respect for Family Life

31. In the result of the examination, it has been understood that the application is not manifestly ill-founded and there is no other reason to declare the application inadmissible, it should be decided that this part of the application is admissible.

2. In Terms of Merits

32. The applicant alleged that her right defined under Article 20 of the Constitution has been violated as the court dismissed her case for changing the surname of the child whose right of custody was given to her after the divorce case.

33. In the opinion of the Ministry, it is stated that the requests for changing surname have been a subject matter of ECtHR's case-law under the scope of the child's and woman's surname; that this issue falls within the field of protection under Article 8 of the Convention; that the Constitutional Court examined similar issues within the scope of Article 17 of Constitution; that similar allegations of violation were considered by the ECtHR within the scope of Article 8 of the Convention in connection with Article 14 prohibiting the discrimination and that many international conventions require men and women have equal rights and obligations while marrying, during the marriage or after the termination of marriage. In the opinion of the Ministry, it is also stated that the provision "in cases of annulment of marriage or divorce, the child shall adopt the surname chosen/to be chosen by father even if right of custody was given to mother "under paragraph two Article 4 of the Law No. 2525 was found contrary to Article 10 and 41 of the Constitution and such provision was annulled by the Constitutional Court on 8/12/2011 (Judgment No. 2011/165, Reg. No. 2010/119). The Ministry stated that these facts must be taken into consideration in examining the application.

34. According to paragraph three of Article 148 of the Constitution and paragraph (1) of Article 45 of the Law No. 6216 on the Establishment and Trial Procedures of the Constitutional Court of 30/3/2011, in order for the merits of an individual application that is lodged at the Constitutional Court to be examined, the right, which is claimed to have been interfered by public force, must fall within the scope of the Convention and the additional protocols to which Turkey is a party to, in addition to it being guaranteed in the Constitution. In other words, it is not possible to decide on the admissibility of an application which contains a claim of violation of a right that is outside the common field of protection of the Constitution and the Convention (*Onurhan Solmaz*, App. Nr: 2012/1049, 26/3/2013, § 18).

35. Article 20 of the Constitution titled "*Privacy of private life*" is as follows:

"*Everyone has the right to demand respect for his/her private and family life. Privacy of private or family life shall not be violated.*

Unless there exists a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, or unless there exists a written order of an agency authorized by law, in cases where delay is prejudicial, again on the above-mentioned grounds, neither the person, nor the private papers, nor belongings of an individual shall be searched nor shall they be seized. The decision of the competent authority shall be submitted for the approval of the judge having jurisdiction within twenty-four hours. The judge shall announce his decision within forty-eight hours from the time of seizure; otherwise, seizure shall automatically be lifted.

Everyone has the right to request the protection of his/her personal data. This right includes being informed of, having access to and requesting the correction and deletion of his/her personal data, and to be informed whether these are used in consistency with envisaged objectives. Personal data can be processed only in cases envisaged by law or by the person's explicit consent. The principles and procedures regarding the protection of personal data shall be laid down in law."

36. Article 41 of the Constitution titled "*Protection of the family, and children's rights*" is as follows:

"*Family is the foundation of the Turkish society and based on the equality between the spouses.*

The State shall take the necessary measures and establish the necessary organization to protect peace and welfare of the family, especially mother and children, and to ensure the instruction of family planning and its practice.

Every child has the right to protection and care and the right to have and maintain a personal and direct relation with his/her mother and father unless it is contrary to his/her high interests.

The State shall take measures for the protection of the children against all kinds of abuse and violence."

37. Article 8 of the Convention titled "*Right to respect for private and family life*" is as follows:

"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

38. In the incident subject matter of the application, the applicant alleged that her constitutional rights were violated as the court dismissed her case for changing the surname of the child whose right of custody was given to her.

39. The right of custody is an institution which consists of the rights and obligations vested in the father and mother of the minor child for his/her care and custody. In this context, it constitutes a legal basis for the child's care and education, legal representation, management of his/her assets and the protection of child's interests. The guardianship, which was considered as father's or mother's domination over the children until a recent past, is accepted today to be both an obligation and a right at the same time.

40. In the opinion of the Ministry, it is stated that the "right to name" is considered under Article 17 of the Constitution.

41. Article 17 of the Constitution states that everyone has the right to protect and improve his/her corporeal and spiritual existence. The "the right to protect and improve corporeal and spiritual existence" under this provision corresponds to the right to physical and spiritual integrity and the right to realize oneself and to take decisions relating to his/herself

secured under the scope of the right to respect for private life under Article 8 of the Convention. It is clear that the surname, which identifies with the life of the individual, becomes an inseparable element of his/her personality, is one of the important differentiating factors in determining his/her identity as an individual and a personal right that is inalienable, indispensable and closely tied to the individual, is within the framework of the individual's spiritual existence. In addition to the right to identity information such as gender, birth registry and information pertaining to family ties as well as the right to request changes and corrections to be made in these, the right of name is also considered by the Constitutional Court within the scope of Article 17 of the Constitution (Constitutional Court, Reg. No. 2011/34, Dec. No. 2012/48, dated 30/3/2012; Constitutional Court, Reg. No. 2009/85, Dec. No. 2011/49, dated 10/3/2011). Nevertheless, the applicant's request to change the surname of the child whose right of custody was given to her, as it is the case in this application, is a legal issue which must be considered under the scope of Article 20 of the Constitution as it is related to right of custody and the exercise of authority in this context.

42. The right of custody is defined as right to protect, care and supervise or other similar terms in various legal systems and the right to determine the child's surname is within the scope of this right. This legal value, due to its function in the exercise of right of custody and the maintenance of family ties, falls within the field of guarantee for the right to respect for family life.

43. Right to respect for family life is secured under paragraph one of Article 20 of the Constitution. Considering the legislative intention of this Article, it is seen that this Article refers to the prevention of interference by the official authorities to private life and family life of the individual and the need to allow the individual to regulate and to live his/her personal and family life in the way s/he wishes. The said regulation constitutes the constitutional equivalent of the right to respect for family life protected under Article 8 of the Convention. As a requirement of the principle of integrity of the constitution, Article 41 of the Constitution must be taken into consideration especially within the context of the assessment of positive obligations regarding the right to respect for family life.

44. The basic relations in a family life are those among the woman and man, and parents and children. The official marriage unions, as a rule, are guaranteed under the scope of right to respect for family life and the children born in wedlock are considered to be a natural element of the conjugal union. Accordingly, it must be recognized that a "family life" is established among the child and parents from the very beginning of child's birth (for a similar decision of the ECtHR, see *Gluhakovic/Croatia,* App. Nr: 21188/09, 12/4/2011, §§ 54 and 60). In the case subject to application, the applicant's child is born in wedlock and is a member of the legally existing family. In this context, the said relationship between the child and the applicant who is given the right of custody after the divorce action is sufficient to establish a family union.

45. Article 335 of the Law No. 4721 on the right of custody indicates that the right of custody and the obligations under this scope shall be exercised jointly throughout the marriage union by stating that minor is under the custody of his/her parents and that custody shall not be taken from the parents unless there is a legal reason. Article 336 of the Law states that parents shall use the custody together as long as marriage lasts; that the judge may entrust the custody to one of the spouses if the common life is terminated or parents are divorced. It also states that custody shall be entrusted to the party who is alive in the case where one of the parents dies, and to the party with custody in the case of divorce.

46. The issue of determining child's surname, which is among the powers under the right of custody, in case of marriage's termination or divorce was regulated under the first sentence of paragraph two of Article 4 in Law No. 2525, which was annulled by the Constitutional Court on 8/12/2011 (Judgment No. 2011/165, Reg. No. 2010/119). The said annulled provision stated that, in cases of annulment of marriage or divorce, the child shall hold the surname chosen/to be chosen by father even if right of custody was given to mother. As a matter of fact, the said regulation was based on the recognition that husband was the head of the marriage union as stated in Article 152 of abrogated Turkish Civil Code No. 743, dated 17/2/1926. The said regulation was abrogated by Law No. 4721 and it was recognized that couples have equal rights and obligations in marriage union by introducing such regulations as they shall jointly decide on the residence where they live, manage their marriage union and that each of them shall represent the marriage union for the continuous needs and requirements of the family throughout their common life.

47. The issues of gender equality and gender-based discrimination, including the right of custody and the exercise of powers related to such right, are included in various international legal documents on human rights. Paragraph four of Article 23 of United Nations International Covenant on Civil and Political Rights, ratified by Turkey on 4/6/2003 states that "parties to the Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. Sentence (g) in paragraph (1) of Article 16 of Convention on the Elimination of All Forms of Discrimination against Women states that "parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women, they have the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation.

48. In parallel with the said regulations in domestic and international law, the first sentence of the second paragraph in Article 4 of Law No. 2525, which states that the child shall adopt the surname chosen/to be chosen by father even if right of custody was given to mother in cases of annulment of marriage or divorce, was annulled by the Constitutional Court on 8/12/2011 (Judgment No. 2011/165, Reg. No. 2010/119). The reasons of this annulment decision, referring to the provisions of international agreements on equal rights and obligations of man and woman during the marriage or after the termination of marriage, state that couples have equal legal status as to their rights and obligations throughout the marriage union and after the divorce. The Constitutional Court decided for the annulment of said provision of law finding it contrary to Article 10 and 41 of the Constitution and stated that granting father with the right to choose child's surname as a part of right of custody and depriving mother of such a right leads to gender-based discrimination with regards to exercise of right of custody. This decision of annulment entered into force upon its publication in Official Gazette No.28204 on 14/2/2012.

49. Furthermore, Turkish legal system provides for changing the name or surname on certain grounds. Article 27 of Law No. 4721 states that changing the name may be requested on reasonable grounds and that the person suffering damage due to change of name may litigate within one year as of the date of knowledge of this fact claiming abrogation of the judgment given for change of name.

50. For the present application, the court judgment dismissing the case filed by the applicant for changing the surname of the child whose right of custody was given to her constitutes an explicit interference to the applicant's right to respect for family life.

51. Article 20 of the Constitution enumerates a number of reasons for restricting this right which are not inclusive to all aspects of the right and, although no specific restrictions are envisaged for some of the rights, there may be certain limitations on such rights which stem from the very nature of these rights. These rights may be restricted on the basis of the rules in other articles of the Constitution as well. At this point, the criteria of guarantee under Article 13 of Constitution have functional quality (*Sevim Akat Eşki*, App. No.:2013/2187, 19/12/2013, § 33).

52. Article 13 of the Constitution titled "*Restriction of fundamental rights and freedoms*" is as follows:

"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."

53. The said provision of the Constitution has fundamental importance with regards to restriction of rights and freedoms and the regime of guarantees. It establishes which criteria must be considered by the legislative power in restricting the constitutional rights and freedoms. Within the context of the principle of integrity of constitution, the constitutional provisions must be interpreted all together and by taking into consideration the general principles of law. Therefore, all criteria of guarantee in the said regulation, especially the criterion of being restricted only by law, must be taken into consideration in determining the scope of right under Article 20 of the Constitution (*Sevim Akat Eşki*, § 35).

54. The criterion that fundamental rights and freedoms may be restricted only by law has an important role in constitutional adjudication. In case of an interference to a right or freedom, the first question to be answered is whether there is a provision of law which authorizes such an interference, i.e. whether the interference has legal grounds or not (*Sevim Akat Eşki*, § 36).

55. As per the wording of the Convention and the case-law of the ECtHR, the legitimacy of an interference to be made under Article 8 of the Convention depends primarily on whether the said interference is "in accordance with the law". If the interference does not meet the criterion of being "in accordance with the law", then it is declared a violation of relevant Article without further reviewing other criteria of guarantee under paragraph (2) of Article 8 of the Convention (*Bykov/Russia*, App. No.:4378/02, 10/3/2009, § 82).

56. In order to accept that an interference meets the criterion of being "in accordance with the law" under Article 20 of the Constitution, it must have legal basis in the first place. Notwithstanding this, the formal existence of law is not sufficient *per se* for the restriction of fundamental rights and freedoms. The criterion of lawfulness also requires a substantive content and the characteristics of the law become crucial at this point where the criterion of "being restricted by law" means certainty and accessibility. With regards to the restriction of fundamental rights and freedoms, the relevant legal regulation must be certain in terms of its contents, aim and scope and it must have a sufficient degree of clarity so that the respondents of the said legal regulation can comprehend their legal status. It is self-evident that a provision of law which does not meet the principle of certainty means an unconstitutional interference to the rights and freedoms of individuals.

57. When the restriction of fundamental rights is at issue, an uncertainty on the legal status of the subjects of the rights may render the guarantees related to such right non-functional. In this context, the principle of certainty, which may be considered a derivative or sub-principle of the principle of rule of law, is directly linked with legal security. As a matter of fact, if the relevant legal regulation provides a certain degree of certainty as to which legal consequences are stipulated for which acts and actions and what type of interference is authorized for public authorities, then the individuals can foresee their rights and obligations and regulate their conducts accordingly.

58. On the other hand, the legal regulation cannot propose a solution to all possible situations and the level of guarantee expected of a legal regulation is closely related to the contents of the field regulated by that norm as well as the number and characteristics of its respondents. Therefore, the fact that a norm is complicated or abstract to a certain degree and requires legal aid for a clear understanding of it or that the meaning of the concepts used in the wording of the norm becomes clear only through a legal analysis cannot be considered contrary to the principle of legal foreseeability *per se*. Besides, the degree of certainty to be required for legal regulations in relevant fields may vary depending on the characteristics of the rights which may be attributed different degree of importance by means of systematic interpretation of the constitution. In this context, the degree of certainty to be required for a legal regulation increases proportionate to the amount of interference to fundamental rights by that regulation.

59. In this scope, a regulation interfering to a right or freedom may, of course, provide a margin of appreciation to a certain extent to those implementing it. However, the limits of such margin of appreciation must be defined clearly and the regulation the norm must contain a minimum level of certainty. If the principle of certainty is not observed, then legislative and executive organs may exercise a power which is not authorized by the constitution. Accordingly, in order to provide an efficient protection of fundamental rights, a minimum level of certainty must be ensured with regards to the wording and interpretation of a law constituting the basis of an interference.

60. If the legislation technique does not make it possible to use more concrete concepts and regulations, then it may resort to concepts which may be defined through trial and legal interpretation methods. However, the limits of such a legal interpretation must also be defined in the wording of the relevant legal regulation. Accordingly, if a uniform implementation is not ensured for the relevant legal regulation, this may be considered a sign of uncertainty.

61. Although it is not the function of the Constitutional Court to interpret the legal provision constituting the basis of interference, the public authorities and especially the judicial organs must interpret the provision of law in accordance with the Constitution. In this context, the duty of the Constitutional Court is limited to controlling the constitutionality of such interpretation and implementation.

62. In the present application, the applicant contested the legal basis of the said interference before the courts of instance making reference to the provision of Law No. 2525 annulled by the Constitutional Court.

63. The applicant’s request for changing the surname of the child, whose right of custody was given to her after the divorce case, into her own surname was accepted by the court of first instance on 16/4/2012 and the justifications of this judgment stated that the phrase *“in cases of annulment of marriage or divorce, the child shall adopt the surname*

chosen/to be chosen by father even if right of custody was given to mother" under paragraph two of Article 4 of the Law on Surname (No. 2525 dated 21/6/1934) was annulled by the Constitutional Court on 8/12/2011 (Judgment No. 2011/165, Reg. No. 2010/119) and the decision of annulment was published in the Official Gazette. The court stated that, therefore, there is justified grounds in the mother's request for changing the child's surname into her own surname. Upon appeal of the judgment, the judgment was quashed (by the Court of Cassation) stating that, under the provisions of Article 321 of Law No. 4721, a legitimate child shall have the surname of the father (family), that the right of custody given to mother upon divorce or death shall not change the surname, that the child's surname shall not change unless the father's or child's (when he comes of age) surname is changed by a duly filed court judgment. After the decision quashing the judgment, the court of first instance dismissed the case referring to the decision of the Court of Cassation in the justifications of its judgment. This judgment was finalized upon after being upheld by the Court of Cassation.

64. In this context, Article 321 of Law No. 4721, which constitutes the legal basis of this judgment, states that *"The child holds the surname of family if the mother and father are married. However, if the mother holds two surnames due to her previous marriage, then the child holds her maiden surname (...)."* It is seen that neither Law No. 4721 nor other special laws contain a specific regulation on determining the child's surname after the termination of marriage union. A specific regulation on determining child's surname in case of marriage's termination or divorce was regulated under the first sentence of paragraph two of Article 4 of Law No. 2525. However, it had been annulled by the Constitutional Court on 8/12/2011 (Judgment No. 2011/165, Reg. No. 2010/119) before the judicial proceedings were commenced. On the other hand, Article 27 of Law No. 4721 states in general that it is possible to request changing name and surname under certain conditions and that changing the name may be requested on reasonable grounds.

65. It is understood that similar requests by the parents, who are given the right of custody after divorce, are frequently made subject to judicial decisions and the lawfulness of the interference is widely discussed in those proceedings. It is also seen that different legal interpretations arose in these proceedings and, in this context, those contradictory judgments of the courts of first instance rendered on the basis of Article 27 of Law No. 4721 and the provisions of international agreements on fundamental rights and freedoms are subjected to the decisions of The Plenary of Civil Chambers (HGK, Reg. No. 2013/18-1755, Dec. No. 2015/1039 Date of Dec. 13/3/2015).

66. In this context, the assessment of the court of first instance in its judgment on 16/4/2012 that there is justified grounds in the mother's request for changing the child's surname into her own surname is worthy of consideration. The court of first instance makes this assessment on the basis of right of custody, the obligations of protection and supervision, powers and responsibilities related thereto and the provision of Article 27 of Law No. 4721 by making reference to the fact that the first sentence of second paragraph of Article 4 of Law No. 2525 was annulled (see § 9).

67. In the light of the findings stated above and considering that there is no clear regulation on the issue of the child's surname whose custody was given to mother after divorce and there are different judicial decisions on such matters, the provision of law which was taken as the legal basis of the interference does not meet the criterion of certainty in the context of dismissing the applicant's request to change the surname of the child under her custody.

68. As it is concluded that the interference does not meet the requirement of lawfulness, it was not required to further examine whether other criteria of guarantee were observed with regards to the given interference.

69. For the reasons explained above, it must be decided that the applicant's right to respect for family life guaranteed under Article 20 of the Constitution has been violated.

70. As it is concluded that the applicant's right to respect for family life guaranteed under Article 20 of the Constitution has been violated and it is decided that a copy of the decision be sent to the relevant court in order to carry out a retrial for the removal of the violation and its consequences (see § 74), the applicant's allegations on the violation of her right defined under Article 10 are not necessary to be examined separately.

3. In Terms of Article 50 of Law No. 6216

71. The applicant requested for determination of her right's violation and, thereby, retrial of her case and a compensation of 10.000,00 TL for her non-pecuniary losses.

72. No statement was made in the opinion of the Ministry on the removal of the violation and its consequences.

73. Paragraph (2) of Article 50 of Law No. 6216 titled "*Decisions*" is as follows:

"If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favor of the applicant or the remedy of filing a case before the general courts may be shown. The court which is responsible for holding the retrial shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."

74. As it is found that Article 20 of the Constitution has been violated in the case of present application, it should be decided that a copy of the decision be sent to Diyarbakır 5th Civil Court of First Instance in order to carry out a retrial for the removal of the violation and its consequences.

75. Although the applicant claimed compensation for her non-pecuniary damages, the decision to send the file to the relevant court for retrial constitutes an adequate reparation for the violation. Therefore, the applicant's request for compensation of her non-pecuniary damages should be dismissed.

76. It should be decided that the trial expenses of 1,698.35 TL in total, composed of 198.35 TL application fee and the counsel's fee of 1,500.00 TL, incurred by the applicant and determined in accordance with the documents in the file be paid to the applicant.

V. JUDGMENT

In light of the reasons explained, it was decided **UNANIMOUSLY** on 20/6/2015 that;

A.

1. The applicant's allegation on the violation of her right to a reasoned decision is INADMISSIBLE as it is *manifestly ill-founded*,

2. The applicant's allegation on the violation of her right to access to court is INADMISSIBLE as it is *manifestly ill-founded*,

3. The applicant's allegation on the violation of Article 20 of the Constitution is ADMISSIBLE,

4. The applicant's right to respect for family life guaranteed under Article 20 of the Constitution has been VIOLATED,

B. A copy of the decision be sent to Diyarbakır 5th Civil Court of First Instance in order to carry out a retrial for the removal of the violation and its consequences,

C. The claims of the applicant for compensation of her non-pecuniary damages be DISMISSED

D. The trial expenses of 1,698.35 TL in total, composed of 198.35 TL application fee and the counsel's fee of 1,500.00 TL, incurred by the applicant be PAID TO THE APPLICANT,

E. That the payments be made within four months as of the date of application by the applicants to the Ministry of Finance following the notification of the decision; that in the event that a delay occurs as regards the payment, the legal interest be charged for the period that elapses from the date, on which this four month period comes to an end, to the date of payment.