

## **An Analysis of the Turkish Constitutional Court's Recent Decision on Religious Marriage**

Under the Turkish Criminal Code, those who have a religious marriage without an official civil marriage license are to be imprisoned from two to six months. In addition, state officials who conduct religious marriages without seeing a civil marriage certificate are also to be imprisoned from two to six months. The Turkish Constitutional Court, with its decision numbered 2015/51 of May 27 2015, has ruled that such punishment is disproportionate interference with the rights to privacy and freedom of religion and therefore annulled the law regulating such punishment. Although the Court refers to the proportionality standard (as explained below), it does not properly apply the standard in its arguments. While the result - annulment of the law - would and should have been the same had the proportionality standard been applied properly, the Court's lack of a proper, detailed application of the standard has denied the system future opportunities to use the decision to examine less restrictive alternatives such as age restrictions, which could later be taken into consideration by legislators.

According to the Court, where living together and having children are not actions punishable under Turkish law, punishing living together with a religious marriage in place violates the rights to privacy and freedom of religion. The Court argues that the legitimate reason for punishing those who carry out religious marriages without having an official/civil marriage is to protect family life, but finds that there are less restrictive means to protecting family life though it does not expound on them. No type of marriage – except civil marriage – provides any legal protection under Turkish law, including inheritance rights. The Court therefore finds that punishing one type of marriage – in particular here, religious marriage that is based on an

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individual's religious choices rooted in their freedoms – is not proportional interference. The Court decides that while civil marriage will continue to be the only type of marriage that affords legal rights, religious marriage that occurs prior to a civil marriage will no longer be punishable under law simply for lacking a civil certificate.

In its decision, the Constitutional Court relies on proportionality as a principle of constitutional analysis. Proportionality requires (i) a rational connection between the means and purpose of a law, (ii) the least restrictive means to achieve that purpose (called “necessity”), and (iii) a proportional relationship between the purpose and the means (called “balancing”).<sup>1</sup> However, in this case the Court does not undertake a clear and straightforward application of the proportionality standard. It focuses only on the issue of whether the rights of individuals who have a religious marriage without having a civil marriage first are infringed beyond what is necessary. Although this question should be examined separately for each of the rights to privacy and free exercise of religion, the Court finds punishing religious marriage without seeing the civil marriage certificate disproportional against both the rights to free exercise of religion and privacy without undertaking a separate analysis. Yet the substance of these two rights is different. The Court should have distinguished between disproportional infringement of the right to privacy and the disproportional infringement of the right to free exercise (these arguments are expanded on below). Finally, the Court should have made it clear whether it found that the punishment did not specifically satisfy the necessity and/or balancing prongs.

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<sup>1</sup> Vicki Jackson, *Transnational Challenges to Constitutional Law: Convergence, Resistance, Engagement*, 35 Fed. L. Rev. 161, 167 (2007); see also David M. Beatty, *The Ultimate Rule of Law*, 159-164 (2004); Donald L. Beschle, *Does a Broad Free Exercise Right Require a Narrow Definition of “Religion”* 39:2 Hastings Constitutional Law Quarterly 357, 387, 388 (2012); see judgment of Justice A. Barak in *Beit Sourik Village Council v. Government of Israel*, June 30 (2004), HCJ 2056/04, Supreme Court of Israel, in Vicki J. Jackson, Mark Tushnet, *Comparative Constitutional Law*, 701-715 (2014); George A. Bermann, *The Principle of Proportionality*, 26 Am. J. Comp. L. Sup. 415, 415-432 (1977-1978); Francis G. Jacobs, *Recent Developments in the Principle of Proportionality in European Community Law in The Principle of Proportionality in the Laws of Europe 1* (Evelyn Ellis ed., 1999).

According to the Court, the state's interest in this case is that of protecting family life. Thus, the question turns on whether the state's interest in punishing religious marriage not preceded by civil marriage in order to protect family life justifies infringing the right to privacy. I believe that if the Court were to apply the proportionality doctrine properly to this question, it would have still found the punishment to be disproportional, but it would have expanded on its arguments by including a discussion of less restrictive alternatives. The right to privacy protects individual autonomy and respect for family life. With regard to the question posed above, particularly the second and third prongs of the proportionality doctrine should have been examined carefully. The second prong, necessity, requires that the means used must infringe on the individual as little as possible. Thus, the Court should have determined whether there were less restrictive ways to restrict the right to privacy of people who had a religious marriage without a civil certificate. Evaluation of this second prong, the necessity test, requires the state to introduce an alternative. In its opinion, the Court does not ask whether the state introduces a less restrictive way to restrict the right to privacy, such as an alternative punishment to imprisonment. One example of a less restrictive means that the Court could have cited could be to punish only those who are under a certain age under certain conditions – this would be proportional since under Turkish law even civil marriage is only valid for those under 18 with family consent and under certain conditions. This would protect not only individual choice and autonomy, but would also protect children from being married off in religious ceremonies before they are of age for legal marriage. In sum, the Court should have addressed the requirement that the state pursue less restrictive means where available by applying the necessity test. The law punishing religious marriage without a preceding civil marriage would also likely fail under a proper application of the third prong, balancing, to the right to privacy. The balancing prong would require weighing the benefits to the state of achieving the purpose of the law (protecting the family unit) against the harm caused to people who would like to have a religious marriage without a civil marriage. The harm to private and family life could be considered more extensive than the benefit to the state of punishing religious marriage without a civil marriage, particularly where the stated goal/state

interest is to protect family life. Therefore, under the balancing test, the punishment could more easily be considered disproportional infringement of the right to privacy. However, it is not as easy to make the same argument under the balancing test for the infringement of the free exercise of religion. Here, the third prong, balancing, needs to be examined in more detail.

The doctrine of proportionality was not carefully analyzed in regard to the question of whether the punishment is an unconstitutional infringement of the free exercise of religion. What has been said above about the necessity prong could also be said here. Less restrictive means such as alternative punishments or age limitations, which the Court should have explored, could also be applicable under the necessity test for the infringement of the free exercise of religion. Therefore, it could be said that the infringement on the right to free exercise would also have failed the necessity test were the proportionality standard properly applied. However, it is more difficult to argue the same for the balancing test. According to the Court, the goal of the law punishing religious marriage without a civil marriage is to protect family life, but, Turkish law already provides such measures, for example by not legally recognizing religious marriages. Thus, the punishment provides infringement beyond what is necessary to achieve the goal of the law (protecting family life) and is therefore not proportional. Under the balancing test, the Court has to evaluate both the benefit and harm of the state action. One consideration the Court could have explored could be whether the punishment would excessively burden people who have a religious marriage because of their religious sensibilities (as opposed to having one for the purpose of avoiding age limits or other reasons). First, it needs to clearly be stated that the law was not punishing religious marriage. It was punishing religious marriage without a legally binding civil marriage. Second, the Court should have looked at the balancing prong in more detail, weighing such interests as: (i) protecting social, economic, political, and legal orders of the state on secular tenets and (ii) protecting children and women from being religiously married without any legal rights. These are only a few of the reasons for penalizing religious marriage without a civil certificate. In a Muslim majority country, it could be argued that people might have a tendency to have only Islamic/religious

marriage. Being solely religiously married could potentially be used as a way to abuse Turkish women in not only underage marriages, but paid marriages which have no legal rights, which is of particular concern when considering the social circumstances in the Eastern part of Turkey<sup>2</sup> as mentioned in one of dissenting opinions. In this judgment, the Court failed to weigh the benefits of achieving the state goal against the harm caused to religious people by its achievement. It could be argued that the harm to the religious sensibilities of the person who wanted to have a solely religious marriage is no more severe than the harm to the state's interest to protect family life and women's rights.

In the current political context, it would be difficult to argue that this decision is a part of the more general political push towards Islamization of civil life in Turkey; there have even been members of the majority Justice and Development Party as well as the Cabinet who have criticized the decision.<sup>3</sup> Moreover, the decision does not replace or push to supplement civil marriage with religious marriage. Under Turkish law, the only type of marriage with legal protection and benefits remains civil marriage. The decision's only effect is removing penalties for having a religious marriage before having a civil marriage in the Turkish legal system.

In conclusion, it could be argued that the law penalizing a religious marriage without a preceding civil marriage would and should have been annulled even if the proportionality standard were applied properly. Under the facts, since there are less restrictive means of restricting the rights to privacy and the free exercise of religion, the punishment would not satisfy the necessity requirement and therefore would not be considered proportional. I believe the result would be same if proportionality were properly applied, but the reasoning of the Court would have been different with proper application. The Court does not find it necessary to evaluate the infringement of the rights to privacy and free exercise of religion separately. Moreover, although protecting family life is used as the relevant state interest in the reasoning, the

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<sup>2</sup> For statistical information please see <http://www.turkstat.gov.tr/PreHaberBultenleri.do?id=16056>, July 20, 2015.

<sup>3</sup> Please see <http://www.hurriyetdailynews.com/top-court-ruling-on-religious-marriages-sparks-debate-in-turkey.aspx?pageID=238&nID=83167&NewsCatID=341>, July 30, 2015.

Constitutional Court does not carefully weigh the state's interest against the interests of the people who solely have a religious marriage as an exercise of their belief in Islam. Therefore, the Court focuses on the punishment being excessive, but it should have questioned that under the balancing test - as to whether punishing religious marriage without a civil marriage is an excessive burden on people with religious sensibilities; the Court should also have examined the rights to privacy and freedom of religion separately and expounded on the less restrictive means that it based its decision on, which would have provided the system with an opportunity to use them for later decisions and legislation.