

**THE TURKISH CONSTITUTIONAL COURT’S FIRST
DECISION ON ABORTION:
IS IT TOO EARLY TO DRAW CONCLUSIONS?**
*(TÜRK ANAYASA MAHKEMESİNİN KÜRTAJ KONUSUNDAKİ İLK KARARI:
BİR SONUCA VARMAK İÇİN ÇOK MU ERKEN?)*

Bezar Eylem Ekinci*
İlker Gökhan Şen**

ABSTRACT

Turkish Constitutional Court (TCC) gave its first decision on abortion in July 2020 (App. No. 2017/31619-R.G.). TCC found a violation of the right to protect and improve the corporal and spiritual existence safeguarded by Article 17 of the Turkish Constitution. The R.G case concerned the right to corporal and spiritual integrity of the applicant, as per the Article 17 of the Turkish Constitution, because of the procrastination, by lower courts, of deciding on the request on the authorization of termination of pregnancy as a result of a crime (“sexual intercourse with a minor by force and threat”, that is, sexual abuse).TCC also made some general evaluations regarding the right to abortion in the decision. According to TCC, Article 17 of the Constitution does not contain a clear right or guarantee regarding the termination of pregnancy and it is not possible to interpret the mentioned article as including such a right. Therefore, TCC stated that legislator had a wide discretion in terms of the regulations on termination of pregnancy. However, the Court did not discuss the limits of this discretion.

Keywords: Constitutional Court, Right of Abortion, Individual Application, Right to Life, Margin of Appreciation.

* Bezar Eylem Ekinci, Assistant Professor of Constitutional Law at the Faculty of Law of Eastern Mediterranean University. ORCID ID: 0000-0002-5507-730X

** İlker Gökhan Şen is a researcher at Chr. Michelsen Institute, Bergen/Norway. ORCID ID: 0000-0001-5800-4360

ÖZ

Anayasa Mahkemesi kürtajla ilgili ilk kararını Temmuz 2020’de vermiştir (Başvuru No. 2017/31619). Anayasa Mahkemesi, Anayasa’nın 17. maddesiyle güvence altına alınan kişinin maddi ve manevi varlığını koruma ve geliştirme hakkının ihlal edildiğine karar verdi. Karar, kürtaj hakkına erişimin engellenmesiyle ilgilidir. Anayasa Mahkemesi kararda kürtaj hakkına ilişkin bazı genel değerlendirmeler de yapmıştır. Anayasa Mahkemesi’ne göre Anayasa’nın 17. maddesi gebeliğin sonlandırılması ile ilgili açık bir hak veya güvence içermemekte olup anılan maddenin böyle bir hakkı ihtiva ettiği biçiminde yorumlanması da mümkün değildir. Bu bakımdan Anayasa Mahkemesi, gebeliğin sonlandırılmasına ilişkin düzenlemeler açısından kanun koyucunun geniş bir takdir yetkisine sahip olduğunu belirtmiştir. Ancak Mahkeme, bu takdir yetkisinin sınırlarının ne olacağına ise değinmemiştir. Bu çalışmada, Avrupa İnsan Hakları Mahkemesi kararları da dikkate alınarak ilgili karar kapsamında kürtaj hakkı incelenecektir.

Anahtar Kelimeler: *Anayasa Mahkemesi, Kürtaj Hakkı, Bireysel Başvuru, Yaşama Hakkı, Takdir Marjı.*

Introduction

Turkish Constitutional Court (TCC) gave its first decision on abortion on 23 July 2020¹, which was published in the Official Gazette on September 2020. This note will start by a brief information about the right to abortion in Turkey. Then, an evaluation of the scope of the Constitutional Court’s decision on abortion will follow. We argue that the decision of the TCC includes a very limited issue on the right to abortion. We will also discuss some accounts of the Court regarding the right to abortion.

¹ The R.G. Decision, App. No. 2017/31619, 07/23/2020. <<https://www.anayasa.gov.tr/en/news/individual-application/press-release-concerning-the-judgment-finding-a-violation-of-the-right-to-protect-the-corporeal-and-spiritual-existence-due-to-the-procrastination-of-the-victim-s-request-for-termination-of-her-pregnancy-resulting-from-a-criminal-act/>>, 6 December 2020.

The Concept of Right of Abortion

The issue of abortion is among the most controversial issues in law and there is no consensus on this issue. In addition to the dichotomy of the moral debate (i.e., pro-choice vs pro-life,) there are also views that take into account the specific conditions of abortion and see abortion as a necessity of public health.² Parallel to this, one may observe diverse regulations and legal regimes regarding the abortion in different countries.³

In the countries with permissive legal frameworks, the implementation of the legal regulations and especially the right to access safe abortion may generate different problems in practice. Turkey is not exempt from these problems, hindering the women from accessing to free and safe abortion, despite its liberal legal framework.⁴ According to the Turkish law, abortion on demand (without any condition of reason or indication) can be done within the ten weeks of conception. If ten weeks have passed, abortion is allowed under certain conditions specified in the law.⁵ For example, when the pregnancy threatens the life of the woman; or it is the result of an offense (i.e., rape or sexual abuse). Except these circumstances, if a woman with a pregnancy period of more than ten weeks willingly abort her child, she is sentenced to imprisonment up to one year or a judicial fine.⁶

² “Declare Abortion a Public Health Issue During Pandemic, WHO Urged”, <<https://www.theguardian.com/global-development/2020/apr/10/declare-abortion-a-public-health-issue-during-pandemic-who-urged>>, 6 December 2020.

³ Reva B. Siegel, The Constitutionalization of Abortion, in Michel Rosenfeld and Andrés Sajó (Eds) *The Oxford Handbook of Comparative Constitutional Law* (2012), <https://law.yale.edu/sites/default/files/documents/pdf/Faculty/Siegel_ConstitutionalizationAbortion.pdf>, 6 December 2020.

⁴ Mary Lou O’Neil, Bahar Aldanmaz, Rosa Maria Quirant Quiles, Fatih Resul Kılınç, Legal But Not Necessarily Available: Abortion Services at State Hospitals in Turkey, (Kadir Has University Gender and Women’s Studies Research Center 2016), <<https://gender.khas.edu.tr/sites/gender.khas.edu.tr/files/inline-files/Abortion%20English.pdf>>, 6 December 2020.

⁵ Law on Population Planning No: 2827 Art. 5, <<https://www.legislationline.org/documents/action/popup/id/6989>>, 6 December 2020.

⁶ Turkish Penal Code Art. 99-100: <https://www.legislationline.org/download/id/6453/file/Turkey_CC_2004_am2016_en.pdf>, 6 December 2020.

Particularly in case of the violations of the right to access to safe abortion as allowed and regulated by laws, the remedy of constitutional complaint and the approach of the courts to the abortion are decisive. This is the case in Turkey, where recently, the Constitutional Court gave its first decision on abortion.⁷ The decision is quite positive in terms of access to abortion right. However, one should be reminded of the fact that this decision covers a very limited topic. Indeed, the Court opined that the applicant had not had a constitutionally protected right to abortion. It merely admitted a blatantly unlawful procrastination of the lower courts, hindering the applicant from enjoying her abortion right as plainly provided by law.

The facts as presented in the case file, demonstrate how national authorities in Turkey may hinder women from enjoying their right to abortion. The applicant was under 18 years old when she was forced to have sexual intercourses with several people by coercion and threat and consequently became pregnant. As her pregnancy was over ten weeks, she needed an authorization from state authorities to terminate her pregnancy. Yet procedural procrastination by the judicial authorities on giving the relevant authorization caused the applicant to give birth in the time that followed. The court found that there had been a violation of article 17 of the Constitution and awarded the highest compensation in the violation decisions it has given so far with a sum of 100,000 TL.

Summary of the Case

The applicant, who was under 18 at the time of the impugned events, became pregnant as a result of the sexual intercourses she had had by force and threat. The applicant maintained that her right to protect and improve her corporal and spiritual existence had been violated as her applications with the relevant courts for termination of her unwanted pregnancy had been rejected (and/or procrastinated), and she had been therefore made to bear the burden of pregnancy.

As TCC mentioned, Article 17 §1 of the Constitution stipulates that everyone has the right to protect and improve his/her corporal and spiritual existence. The right to protect and improve corporal and spiritual existence, in the R.G. case, is related to the right to respect for bodi-

⁷ R. G., App. No. 2017/31619, 07/23/2020.

ly and mental(emotional and psychological) integrity and right to self-fulfillment and to make decisions regarding one's self, which are safeguarded under the right to respect for private life within the framework of Article 8 of the European Convention on Human Rights.⁸ In other words, the request by a woman for termination of her unwanted pregnancy is directly related to her personal autonomy as well as to her mental or physical integrity. The notion of personal autonomy and the interferences with the individual's physical integrity fall, from the aspect to private life, within the sphere of the right to protect and improve the corporal and spiritual existence enshrined in Article 17 of the Constitution.⁹

It is necessary to consider how the TCC determines, in the R.G. case, the legitimate aim concerning the legal regulations of termination of pregnancy in Turkey. The Court notes that the legitimate aim of this condition is to observe the established moral, ethical and religious values that the right to life of the fetus should be protected. According to the Court, it should be regarded as natural for the legislator to apply certain restrictions, taking into account the interests in the protection of the fetus and the interests of the woman within the scope of the right to protect and improve her corporal and spiritual existence: *"It can be said that the interest in the protection of the fetus constitutes the natural boundary of the pregnant woman's right to bodily integrity in terms of personal autonomy and mental or physical health. In this respect, it should be accepted that the termination of pregnancy is based on a legitimate aim arising from the nature of the right."*¹⁰

Interpreting the relevant legal regulations, the Constitutional Court states that the legislator provides the opportunity to terminate pregnancies, which are not more than twenty weeks, if this pregnancy is a result of a crime. Yet this abortion is subject to an official authorization. The reason for seeking such an authorization is to check whether the pregnancy has occurred as a result of a crime. Regarding this authorization the Court says: *"the legislator had tried to establish a fair balance between the rights of the woman to personal autonomy and the protection*

⁸ Mehmet Kurt, App. No. 2013/2552, 25/02/2016, § 44; B.P.O, App. No: 2015/19012, 27/03/2019, § 47; Fecir Ergün Turan, App. No. 2014/10590, 05/12/2017, § 35.

⁹ R. G., § 74.

¹⁰ R. G., § 93.

of her corporal integrity and the interests of the fetus". In this respect, the Constitutional Court states that the condition of authorization for the termination of the pregnancy between ten and twenty weeks is an interference with the right to protection of personal autonomy and corporal integrity. This interference, for the Court, is necessary in a democratic society.¹¹

On the other hand, according to the Constitutional Court: "(...) *The interference with the women's right to personal autonomy and the protection of her corporal integrity must be proportionate. In this context, interpretations and practices that make the termination of pregnancy (whenever allowed by law) impossible, or difficult, or make this possibility meaningless may make the intervention disproportionate.*"¹²

Due to the disproportionate interference with the applicant's right to protect and improve her material and moral existence, the Court concluded that there had been a violation of the right to protect and improve the corporal and spiritual existence safeguarded by Article 17 of the Constitution: "*the decision (of the relevant judicial authority) which should have been issued within the shortest time possible was not rendered within nearly 2 months during which time factor was of critical importance. This approach of the judicial authorities deprived the applicant of the opportunity to end her pregnancy and thereby placed an excessive burden on her, which upset the required fair balance to the detriment of the applicant and also rendered disproportionate the impugned interference with the applicant's right to protect and improve her corporal and spiritual existence.*"¹³

It may be argued that, with this conclusion, the Turkish Constitutional Court has rendered a landmark decision on abortion, albeit within a very limited context: the right to end the pregnancy of a minor who has been a victim a of a sexual crime. Yet, before concluding that this decision is progressive or in support of a pro-choice/pro-abortion stance, one should give a second and detailed look into the arguments.

The decision contains statements that allow us to infer that the Court is far from being in a pro-choice position. While evaluating the

¹¹ R. G., § 99-100.

¹² R. G., § 101.

¹³ R. G., § 103.

scope of article 17 of the Constitution on abortion, the Constitutional Court made the following interpretation: “(The article 17) does not contain a clear right or guarantee regarding the termination of pregnancy and it is not possible to interpret the mentioned article as including such a right.” In what follows, the Constitutional Court infers that the legislator has a wide margin of appreciation in restricting and/or prohibiting abortion: “It should be accepted that the legislator has a wide margin of appreciation in terms of the regulations on termination of pregnancy, where sensitive moral, ethical and religious discussions are in play. Therefore, it is at the discretion of the legislator to determine until what week the pregnancy can be terminated, how and under what conditions.”¹⁴

Overall, this decision does not uphold, nor does it discuss the terms of, a general constitutional right to abortion; but rather admits a right to access to abortion where it is permitted and regulated by law: “Although the Constitution does not give an explicit right to individuals regarding the termination of pregnancy, if the legislator has regulated such a right, this right should be used effectively within the scope of Article 17 of the Constitution.”¹⁵

To summarize, the Constitutional Court notes that Article 17 of the Constitution does not guarantee the right to abortion, and this interpretation applies *a fortiori* to the abortion on demand. Therefore, for the Court, the legislator has a wide margin of appreciation regarding this issue. However, there is no discussion, in the decision, about how the limits of this margin of appreciation of the legislator will be determined.

Yet, the legislator’s discretionary power to regulate abortion is not entirely unlimited. According to widely held jurisprudential view in comparative law, several overlapping rights should be evaluated and balanced: the protection of the abortion-seeking person’s private life, their corporal and spiritual integrity, the “foetus’ right to life”, and public morality. The case-law of the ECtHR offers guidance.

The R.G. Decision in Light of The ECtHR’s case law

¹⁴ R. G., § 76.

¹⁵ R. G., § 76.

The above-mentioned accounts of Turkish Constitutional Court on the absence of a precise constitutional protection of against a possible abortion prohibition (by the Turkish legislator) may be said to follow the case law of the ECtHR.¹⁶ The ECtHR did not find any violation of the right to private life of the mother while evaluating the very restrictive abortion legal framework of Ireland, which permitted abortion only if mother's life is in danger.¹⁷ While admitting that that there is a consensus among the contracting states on liberalizing abortion, the Court thinks that "that consensus (does not) decisively narrow the broad margin of appreciation of the state".

Still, this margin of appreciation is not without its limits.¹⁸ Firstly, "While a broad margin of appreciation is accorded to the State as regards the circumstances in which an abortion will be permitted in a State, once that decision is taken the legal framework devised for this purpose should be shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention".¹⁹ Therefore, "it is for the Court, in this field also, to supervise whether a restriction is compatible with the Convention."²⁰ In other words, Courts must also supervise whether restrictions within abortion frameworks are compatible with the Convention. In the case of R.G., these are not deliberations the Turkish Constitutional Court made. In fact, it vaguely spoke

¹⁶ In 1976 the Commission recognized that Article 8 is applicable to abortion issues. According to Commission, legislation regulating the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus. *Tysic v. Polonya*, App. No: 5410/03, 20/03/2007, § 106. Ivana Roagna, Protecting the right to respect for private and family life under the European Convention on Human Rights - Council of Europe Human Rights Handbooks, (Council of Europe Strasbourg 2012), p. 21, <https://www.echr.coe.int/LibraryDocs/Roagna2012_EN.pdf>, 6 December 2020.

¹⁷ *A, B and C v. Ireland*, App. No. 25579/05, 25579/05, 16/12/2010.

¹⁸ Guide on Article 8 of the European Convention on Human Rights, Right to Respect for Private and Family Life, Home and Correspondence (Council of Europe/European Court of Human Rights 2020), <https://www.echr.coe.int/documents/guide_art_8_eng.pdf>, 6 December 2020.

¹⁹ *R. R. v. Poland*, App. No. 27617/04, 28/11/2011, § 187; *A, B and C v. Ireland*, § 249.

²⁰ *Open Door and Dublin Well Woman v. Ireland*, App. N. 14234/88, 14235/88, 29/10/1992, § 68.

of the need for proportionality of the interference.²¹ Yet this comment was made regarding the “interpretations” and “practices” of the legal framework. No such discussion took place regarding the competing constitutional rights and guarantees.

Secondly, a blanket criminalization of abortion defining it as an infanticide, a murder of a(n) (unborn) child, may well fail the test of proportionality as applied by the ECtHR. This may be inferred from ECtHR’s observations that there is no consensus between the states regarding the beginning of life and whether the fetus should be recognized as a “person”; and its reluctance to decide on whether the fetus is a person whose right to live should be protected under the Convention (Art.2). Although the ECtHR leaves the issue of beginning of life to the margin of appreciation of the Contracting states it, however, rejects the view that protecting the right to life of the unborn child is an overriding basis of legitimacy for the restriction of another right.²² Consequently, the court refuses to endorse the interpretation that “the measures taken by the national authorities to protect the right to life of the unborn would be automatically justified under the Convention where infringement of a right of a lesser stature was alleged.”²³

Conclusion

The R.G. decision is quite positive in terms of access to abortion right. However, the scope and content of the R.G. decision is too limited to draw conclusions about the Court’s view on the right to abortion in general. It merely provided a “minimum protection” of human rights in terms of the ECtHR, that is, the Constitutional Court followed the case-law of the ECtHR yet ignoring the important remarks of the European Court, which imply that any abortion restriction will be under its radar on a case-by-case basis.²⁴

²¹ R.G. §101.

²² R. R. v. Poland.

²³ Open Door and Dublin Well Woman v. Ireland, § 69.

²⁴ https://www.coe.int/en/web/dlapil/speeches-of-the-director/-/asset_publisher/ja71RsfCQTP7/content/europe-s-multi-layered-human-rights-protection-system-challenges-opportunities-and-risks?inheritRedirect=false#_Toc445123410

It was frivolous for the Constitutional Court to mention the State's margin of appreciation regarding abortion in this case. The applicant did not allege any violation of her rights by any law regulating or restricting abortion on a substantial basis. What the applicant argued was that there are loopholes in the current procedural regime on abortion, which allowed the lower courts to procrastinate their rendering of authorization decisions. As the highest judicial organ, it is quite legitimate for the Constitutional Court to comment on general principles. Yet, while allocating a long unprompted paragraph to the State's wide margin of discretion, it neglected to discuss its limits.

As a consequence, the Court has paved the legislator's way towards any abortion restriction falling outside the scope of the minimum protection provided by the ECtHR. Also, by avoiding a discussion on the fine-tuning of possible legal restrictions to balance competing constitutional guarantees, the Court left an argumentative void, which the legislator may construe as meaning that it can trespass even the limits of this minimum protection. If a hypothetical law toward this end was given the Constitutional Court for abstract review, it must discuss in more detail and convincingly if, how and why relevant abortion restriction were in fair balance with other constitutional rights, and whether it is a proportionate restriction as per Article 13 of the Turkish Constitution.

BIBLIOGRAPHY

Guide on Article 8 of the European Convention on Human Rights, Right to Respect for Private and Family Life, Home and Correspondence (Council of Europe/European Court of Human Rights 2020), <https://www.echr.coe.int/documents/guide_art_8_eng.pdf>.

O'Neil, Mary Lou/ Aldanmaz, Bahar, Quirant Quiles, Rosa Maria/Kılınç, Resul/Fatih; Legal But Not Necessarily Available: Abortion Services at State Hospitals in Turkey, (Kadir Has University Gender and Women's Studies Research Center 2016), <<https://gender.khas.edu.tr/sites/gender.khas.edu.tr/files/inline-files/Abortion%20English.pdf>>.

Roagna, Ivana; Protecting the right to respect for private and family life under the European Convention on Human Rights - Council of Europe Human Rights Handbooks, (Council of Europe Strasbourg 2012), <https://www.echr.coe.int/LibraryDocs/Roagna2012_EN.pdf>.

Siegel, Reva B.; The Constitutionalization of Abortion, in Michel Rosenfeld and András Sajó (Eds) *The Oxford Handbook of Comparative Constitutional Law* (2012), <https://law.yale.edu/sites/default/files/documents/pdf/Faculty/Siegel_ConstitutionalizationAbortion.pdf>.

COURT CASES

TCC:

B.P.O., App. No: 2015/19012, 27/03/2019.

Fecir Ergün Turan, App. No. 2014/10590, 05/12/2017

Mehmet Kurt, App. No. 2013/2552, 25/02/2016

R.G., App. No. 2017/31619, 07/23/2020.

ECtHR:

A, B and C v. Ireland, App. No. 25579/05, 25579/05, 16/12/2010.

Open Door and Dublin Well Woman v. Ireland, App. N. 14234/88, 14235/88, 29/10/1992.

R. R. v. Poland, App. No. 27617/04, 28/11/2011.

Tysiąc v. Polonya, App. No: 5410/03, 20/03/2007.

