

PROTECTION OF PERSONS WITH DISABILITIES IN  
TURKISH LAW

*LA PROTECCIÓN DE LAS PERSONAS CON DISCAPACIDAD EN LA  
LEGISLACIÓN TURCA*

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**RESUMEN:** Los derechos de las personas discapacitadas desde la perspectiva del derecho privado; si pueden hacer valer y disfrutar de algún derecho o trato especial en el marco del derecho civil y ante los tribunales civiles nunca se han evaluado en la doctrina turca. En este estudio, hemos intentado tomar como punto central la práctica de los tribunales civiles y nos hemos centrado en la legislación de derecho privado que suele ser objeto de jurisprudencia. En consecuencia, hemos abordado ciertos derechos de las personas con discapacidad previstos en la CDPD, es decir, la igualdad de reconocimiento ante la ley, el acceso a la justicia, el respeto al hogar y a la familia, el trabajo y el empleo, que pueden tener aspectos de derecho privado, y hemos investigado si la ley y su práctica están en consonancia con la CDPD. Además, la igualdad y la no discriminación han sido objeto de varias decisiones del Tribunal Europeo de Derechos Humanos (TEDH) en las que los demandantes son ciudadanos turcos con discapacidades. Por lo tanto, hemos dedicado una sección de este estudio a estas decisiones y a su impacto en las recientes decisiones del Tribunal Constitucional turco dictadas en relación con solicitantes en circunstancias similares.

**PALABRAS CLAVE:** Personas con discapacidad; igualdad de reconocimiento ante la ley; acceso a la justicia; respeto al hogar y a la familia; igualdad y no discriminación.

**ABSTRACT:** *The rights of disabled persons from a perspective of private law; whether they can assert and enjoy any rights or special treatment under the civil law and before the civil courts have never been evaluated in the Turkish doctrine. In this study, we tried to take civil court practice as our center point and focused on private law legislation which frequently constitute subject of case-law. Consequently, we have dealt with certain rights of the disabled people provided in the CRPD; i.e., equal recognition before the law; access to justice; respect for home and the family; work and employment, which may have private law aspects and inquired whether the law and its practice is in concord with the CRPD. Additionally, equality and non-discrimination have been subject to a number of European Court of Human Rights (ECtHR) decisions where the applicants are Turkish citizens with disabilities. We have, therefore, devoted a section in this study, to these decisions and their impact on the recent Turkish Constitutional Court decisions rendered concerning applicants in similar circumstances.*

**KEY WORDS:** *Persons with disabilities; equal recognition before the law; access to justice; respect for home and the family; equality and non-discrimination.*

**SUMARIO.- I. INTRODUCTION.- II. EQUAL RECOGNITION BEFORE THE LAW.- I. Legal Capacity.- 2. Binding Effect of the Signatures of Disabled Persons.- 3. Legal Transactions before Notaries.- III. ACCESS TO JUSTICE.- IV. RESPECT FOR HOME AND THE FAMILY.- I. Marriage.- 2. Custody of Children.- 3. Adoption.- V. WORK AND EMPLOYMENT.- VI. EQUALITY AND NON-DISCRIMINATION.- I. Decisions of the European Court of Human Rights.- A) Çam v. Turkey.- B) Enver Şahin v. Turkey.- C) Ozan Barış Sanlısoy v. Turkey.- 2. Decisions of the Turkish Constitutional Court.- A) U.D.K. and Others.- B) Cevat Sargin and Others.- VII. CONCLUSION.**

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## I. INTRODUCTION.

United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD) became binding for the Republic of Turkey on 28 September 2009. This is followed by the ratification of the Optional Protocol of the CRPD on 2015<sup>1</sup>.

According to Art. 90 of the Turkish Constitution<sup>2</sup>, CRPD and the Optional Protocol have the same force with the Constitution as they both concern human rights. Therefore, the CRPD not only forms a basis for all legal and administrative arrangements, but also constitutes a principle of law to which independent Turkish courts can directly refer<sup>3</sup>.

There are a significant volume of legislation concerning persons with disabilities in Turkish law. The Act on Disabled People<sup>4</sup> forms the basic legislation on the protection of persons with disabilities; however, this is not the only piece of legislation relevant with persons with disabilities. It is not possible to list and explain in detail all relevant legislation as the rights and protection of persons with disabilities take place in different pieces of Turkish legislation in varying forms and

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1 Initial Report submitted by Turkey on the CRPD. [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=TUR&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=TUR&Lang=EN)

2 OG. 09.11.1982/17863 (Duplicate).

3 Initial Report submitted by Turkey on the CRPD. [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=TUR&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=TUR&Lang=EN)

4 OG. 07.07.2005/25868. This Act, which was first adopted in 2005, provides advanced and comprehensive protection to people with disabilities especially after its reform made in 2014. Karan, U.: *Right to Education - National Report Turkey*, ETHOS consortium, 2019, p. 16, [https://www.ethos-europe.eu/sites/default/files/tu\\_right\\_to\\_education.pdf](https://www.ethos-europe.eu/sites/default/files/tu_right_to_education.pdf) (24.02.2022).

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extension. Social Services Act<sup>5</sup>, Social Security and General Health Insurance Act<sup>6</sup>, Labor Law<sup>7</sup>, Turkish Civil Code<sup>8</sup>, Municipality Act<sup>9</sup> can be listed as examples to pieces of Turkish legislation which include special provisions for disabled people in order to protect them and ensure that they enjoy their rights provided by the international law and the CRPD<sup>10</sup>.

The rights of disabled persons from a historical point of view<sup>11</sup>; from a constitutional law perspective<sup>12</sup>; within the context of prohibition of discrimination<sup>13</sup> and the concept of reasonable accommodation<sup>14</sup>; the CRPD<sup>15</sup> and its effects on the rights of disabled persons in Turkish law<sup>16</sup> have been dealt with in the Turkish doctrine.

However, the rights of disabled persons from a perspective of private law; whether they can assert and enjoy any rights or special treatment under the civil law and before the civil courts have never been evaluated. In this study, we tried to take civil court practice as our center point and focused on private law legislation which frequently constitute subject of case-law<sup>17</sup>. Consequently, we have dealt with

- 5 OG. 27.05.1983/18059. The purpose of this Act is relevant with the social services provided to the families, children, disabled or elder persons who need protection, care or assistance (Art. 1).
- 6 OG. 16.06.2006/26200. This Act is relevant with the social security rights of the disabled persons providing them with a disability insurance.
- 7 OG. 10.06.2003/25134. Relevant provisions of this Law will be explained in detail below.
- 8 OG. 08.12.2001/24607. Relevant provisions of this Code will be explained in detail below.
- 9 OG. 13.07.2005/25874. According to this Act, providing services special for disabled persons, establishing a center for disabled persons, organizing social services and aids to the those who are poor or in need of assistance, cooperating with associations or foundations of disabled people to develop mutual organizations are among the duties of municipalities (Articles. 14/5, 38/n, 60/i).
- 10 For more information on international and Turkish law on the rights of disabled people, see, GÖKÇEK KARACA, N: "Uluslararası İlke ve Standartlar Bağlamında Engelli Hakları", *Anadolu Üniversitesi Hukuk Fakültesi Dergisi*, 2019, V. 5, No. 1, pp. 1-34.
- 11 ÇITIL, M, ÜÇÜNCÜ, MK: "Türkiye'de Engelli Hakları ve Engelliler Hukukunun Durumu", *Türkiye Adalet Akademisi Dergisi*, 2018, V. 9, No. 35, pp. 233-278.
- 12 İSİR, EG, ÇUBUK, H: "Engellilerin Anayasal Haklarını Kullanmalarını Zorlaştıran Sebepler," *Aydın Üniversitesi Hukuk Fakültesi Dergisi*, 2018, V. 4, No. 1, pp. 1-30.
- 13 DENİZ, B.: *Engelli Hakları ve Ayrımcılık Yasası*, Seçkin 2020.
- 14 ERSÖZ, E: "Engellilere Yönelik Ayrımcılık ve Makul Uyumlaştırma Kavramı", *Necmettin Erbakan Üniversitesi Hukuk Fakültesi Dergisi*, 2020, V. 3, No. 2, pp. 149-163.
- 15 ÇELİK, E: "Onuncu Yılında Birleşmiş Milletler Engelli Kişilerin İnsan Hakları Sözleşmesi ve Sözleşme Ruhu", *İnönü Üniversitesi Hukuk Fakültesi Dergisi*, 2016, V. 7, No. 1, pp. 219-246.
- 16 AZARKAN, E, BENZER, E: "Birleşmiş Milletler Engelli Kişilerin Haklarına Dair Sözleşme ve Türkiye'de Engelli Hakları", *Dicle Üniversitesi Hukuk Fakültesi Dergisi*, 2018, V. 23, No. 38, pp. 3-29.
- 17 It must be noted that the CRPD is very seldom mentioned by the civil courts. One situation is where the Ankara Family Court and the Court of Cassation discussed the compliance of the prohibition of marriage for mentally ill or defective persons with the relevant provisions of the CRPD. This caselaw is explained in detail below. Another decision belongs to 12th Civil Chamber of the Court of Cassation where the court reviewed whether a motor car specially designed for a disabled person shall be exempt from attachment within the meaning of Art. 82/2 of the Execution and Bankruptcy Law. Before its amendment in 02.07.2012, belongings of a person which is necessary for his/her personal or professional use were exempt from attachment according to Art. 82/2. The decision of the Court of Cassation is dated 25.04.2011. Even in this decision, at the time when Art. 82/2 referred to personal belongings, the Court rejected the argument that a motor car specially designed for a disabled person shall be exempt from attachment as there is no express prohibition in the CRPD or the national law; a motor car is not strictly necessary for a disabled person to

not all but only certain rights of the disabled people provided in the CRPD which may have private law aspects and be exercised not only by the state authority but also individuals.

On the other hand, equality and non-discrimination have been subject to a number of European Court of Human Rights (ECtHR) decisions where the applicants are Turkish citizens with disabilities. We have, therefore, devoted a section in this study, to these decisions and their impact on the recent Turkish Constitutional Court decisions rendered concerning applicants in similar circumstances.

## II. EQUAL RECOGNITION BEFORE THE LAW.

### I. Legal Capacity.

According to the Turkish Constitution Article 10/I, everyone is equal before the law without distinction as to his/her language, race, color, gender, political opinion, philosophical belief, religion, sect or any similar grounds. Article 10/III is added to this provision in 2010, providing that measures to be taken for children, elder or disabled people, widows and orphans of martyrs and veterans shall not be considered as violation of the principle of equality.

According to the Turkish Civil Code, legal capacity includes capacity to hold rights (*hak ehliyeti*) and capacity to act (*fiil ehliyeti*). All persons possess the capacity to hold rights and they are equal before the law in using rights and fulfilling obligations (Art. 8). Therefore, the principles of generality and equality are accepted in the Civil Code<sup>18</sup>. This provision ensures that “persons with disabilities have the right to recognition everywhere as persons before the law” and they enjoy “equal right ... to own or inherit property” as provided in Article 12/I and 12/5 of the CRPD.

The capacity to act includes possession of rights and undertaking obligations by one’s own will and actions (Art. 9). Any mature person<sup>19</sup> who has distinguishing power<sup>20</sup> and is not restricted possesses full capacity to act (Art. 10). Persons who are mentally defective or suffering from mental illness are deemed not to have

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move as is a wheel chair; and a motor car’s economic value is such that it shall be deemed as a luxurious belonging. Court of Cassation, 12<sup>th</sup> Civil Chamber, 25.04.2011, E.2011/7964, K.2011/7497. Lexpera Caselaw Database. As of 25.04.2012, this provision of Art. 82/2 is amended so that the personal belongings of any type or value are not within the exemption; but only professional belongings of those whose economic activity mainly rely on their physical activities are considered within the exemption from attachment.

18 AĞCA Demiray, L.: *Engellilerin Yasa Önünde Eşit Tanınma Hakkı Çerçevesinde Vesayet Hükümlerinin Değerlendirilmesi*, Yıldırım Beyazıt Üniversitesi Sosyal Bilimler Enstitüsü, Yayınlanmamış Yüksek Lisans Tezi, 2015, p. 15. YÖK Dissertation Database. <https://tez.yok.gov.tr/UlusalTezMerkezi/tezSorguSonucYeni.jsp>

19 Maturity is reached by fulfilling the age of 18 (Article 11 of the Turkish Civil Code).

20 For further information on distinguishing power and its effects on one’s capacity to act, see, ERKAN, VU, YÜCER, İ: “Ayrırt Etme Gücü”, *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, 2011, V. 60, No. 3, pp. 485-522.

distinguishing power (Art. 13). The actions of those who do not have distinguishing power do not give rise to any legal consequence (Art. 15). The minors and those who are under guardianship, who have distinguishing power, need the consent of their legal representatives in order to undertake any obligations except use of rights strictly attached to a person (Art. 16).

Persons who suffer from a mental illness or are mentally defective; and therefore can not lead their daily routines, or who need assistance to be protected or cared, or who put third persons in danger shall be restricted (Art. 405). Mental illness or defect shall be determined by an official health report (Art. 409). Physical illnesses or disabilities which do not effect one's mental state are not within the scope of this provision<sup>21</sup>. Mere existence of a mental illness or defect is not enough to be restricted but the sufficiency of the relevant person to lead his/her life and the possible danger he/she poses to the other people shall be taken into consideration by the court<sup>22</sup>. The health report shall provide information on the symptoms, type and stages of the mental illness and indicate whether the mental illness or defect is permanent or not; whether there is a possibility of healing<sup>23</sup> as a temporary state of mental weakness due to an illness or disability do not give rise to restriction<sup>24</sup>.

Article 408 of the Civil Code provides that a person may request to be restricted by his/her own will if he/she demonstrates that he/she can not manage his/her personal or economic affairs due to old age, disability, inexperience or severe illness. Disability includes physical disabilities such as blindness, inability to hear or speak, having a stroke or dementia<sup>25</sup>. The free will of a person is very significant in the application of this provision, therefore, the person requesting to be restricted shall be aware of his/her insufficiency to manage his/her affairs and capable of understanding the legal consequences of restriction<sup>26</sup>.

Persons whose capacity to act have been restricted by court either due to conditions provided in Article 405 or upon his/her own will, need the consent of their legal representatives within the meaning of Article 16. The competent peace court of first instance will appoint a guardian/legal representative to such persons<sup>27</sup>.

21 AÇIKGÖZ, A.: *Dar Anlamda Vesayeti Gerektiren Haller ve Vesayet Altına Almanın İşlem Ehliyeti Bakımından Sonuçları*, On İki Levha, 2017, p. 105.

22 AĞCA DEMİRAY, L: *Engellilerin Yasa*, cit., p. 30-31; AÇIKGÖZ, A.: *Dar Anlamda*, cit., p. 103.

23 AĞCA DEMİRAY, L: *Engellilerin Yasa*, cit., p. 30-31; AÇIKGÖZ, A.: *Dar Anlamda*, cit., p. 106.

24 ERKAN, VU, YÜCER, İ: "Ayırt Etme Gücü", cit. p. 491.

25 AÇIKGÖZ, A.: *Dar Anlamda*, cit., p. 173.

26 AÇIKGÖZ, A.: *Dar Anlamda*, cit., p. 163.

27 Requirements for appointment of a guardian and appointment procedure are provided in detail in Articles 413-425 of the Turkish Civil Code.

By way of restriction and appointment of a guardian, a person with a disability is protected against possible abuse of third persons and his/her personal and economic rights are safeguarded from a possible loss or damage. Therefore, restriction, even if against the will of the relevant person, actually intends not to restrict his/her actions but to enable them in a harmless manner<sup>28</sup>.

Legal consequences of restriction on one's capacity to act and legal representation of restricted person in different types of legal actions such as those strictly attached to a person or those relevant with his/her profession or art are beyond the scope of this study<sup>29</sup>. However, it must be noted that legal representative of a restricted person is not free to act as he/she wishes in all legal transactions involving the restricted person. He/she will act under the supervision of peace courts and of civil courts in certain significant legal transactions as provided in the Civil Code. Any legal transaction involving property rights over immovables or valuable assets, loan agreements, agreements over matrimonial property or inheritance rights will require consent from the peace court (Art. 462); whereas, consent of the civil court will also be necessary for the restricted person to become a shareholder to a company, accept or reject his/her inheritance rights or to enter into any agreement with his/her legal representative (Art. 463). Therefore, persons with disabilities are equipped with the opportunity "to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit" and they are "not arbitrarily deprived of their property" as provided in Art. 12/5 of the CRPD.

## 2. Binding Effect of the Signatures of Disabled Persons.

Signature of a person demonstrates his/her identity and personality isolating him/her from the other persons. It is a writing or mark made by hand ensuring that an expressed will belongs to a person who made it<sup>30</sup>. Therefore, signature is very important for a person to undertake obligations and acquire rights both in substantial and procedural law.

Despite its importance, the only provision concerning the binding effect of signature of disabled persons is Article 15/III of the Code of Obligations<sup>31</sup>. Accordingly, a witness may be present with blind people upon their request while they are signing a document. Otherwise, signature of blind people is binding. This provision is not sufficient to safeguard disabled people in general, let alone those who are blind, as it leaves presence of a witness to the will of the blind person. A

28 AÇIKGÖZ, A.: *Dar Anlamda*, cit., p.. 95-96.

29 For further information see, AÇIKGÖZ, A.: *Dar Anlamda*, cit., pp. 179-315.

30 TAŞPINAR AYYAZ, S: "Türk Borçlar Kanunu ve Hukuk Muhakemeleri Kanunu'nun İmza Atamayanlarla İlgili Yeni Düzenlemesine Eleştirel Bir Bakış", *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, 2012, V. 61, No.1, p. 323.

31 OG. 11.01.2011/27836.

subsequent claim of a blind person that he/she was not aware of the content of the document he/she had signed is not upheld by the courts as he/she could have required presence of a witness and bound by his/her signature if he/she omitted to do so<sup>32</sup>.

### 3. Legal Transactions before Notaries.

Although the Code of Obligations does not protect the interests of disabled persons, they can enjoy protection in their legal transactions that should be performed before notaries. Article 206 of the Turkish Code of Civil Procedure<sup>33</sup> (“TCCP”) concerns the evidentiary power of documents which are marked by people who are not capable of making a signature. Accordingly, interference of a notary public is necessary for those documents to have any evidentiary power<sup>34</sup>. The document shall be prepared by the notary public if the relevant person is not capable of reading or writing; and approval of the notary public is sufficient if he/she is capable of reading or writing but incapable of making a signature.

According to Article 73 of the Notaries Act<sup>35</sup>, legal transactions shall be performed before a notary public in presence of two witnesses if the notary understands that the relevant person has a hearing, speaking or seeing disability upon the request of the disabled person. In the event that the relevant person has a hearing or speaking disability and is not capable of communicating via writing, presence of a sworn translator is necessary along with two witnesses.

In the event that Article 73 is not complied with, the document issued by the notary public and any legal transaction performed based on that document is nullified by the courts. It is decided in a decision of the Court of Cassation that establishment of mortgage over immovable property based on a power of attorney given by a blind person before the notary without presence of two witnesses shall be invalidated<sup>36</sup>.

The identity and impartiality of these two witnesses is important. In a case before the Council of State<sup>37</sup>, an elder person who has speaking and walking disabilities issues a power of attorney to his wife entitling her to sell his immovable

32 Court of Cassation, 19th Civil Chamber, 16.04.2019, E.2017/4744,K.2019/2605; 25.04.2016, E.2016/402,K.2016/7335. Lexpera Caselaw Database.

33 OG. 04.02.2011/27836.

34 It is opined in the doctrine that the freedom of entering into written agreements of the people who are incapable of making a signature is restricted by these provisions of the Code of Civil Procedure and they contradict with the relevant provision in the Code of Obligations. TAŞPINAR AYYAZ, S: “Türk Borçlar”, cit., pp. 348-349.

35 OG. 05.12.1972/14090.

36 13th Civil Chamber, 26.06.2014, E.2014/2696,K.2014/21378. Lexpera Caselaw Database.

37 8th Chamber, 22.02.2016, E.2015/12755,K.2016/1597. Lexpera Caselaw Database.



property. The transaction is performed before two witnesses. One of the witnesses is the person working for household work for the elder person and his wife; and the other witness has a photocopy and photography shop inside the same building as the notary public. The Court decided that these witnesses are not trustworthy nor impartial; thus, the notary abused his official position and criminal proceedings shall be started against him.

### III. ACCESS TO JUSTICE.

According to Article 36 of the Turkish Constitution, everyone has the right of litigation either as claimant or respondent and the right to a fair trial before the courts through legitimate means and procedures; and national courts shall not refuse to hear a case within their jurisdiction. Access to justice and right to a fair trial protect one's right to claim or defend his/her arguments; which can only be possible if he/she is given the opportunity to fully exercise the right to prove<sup>38</sup>. There are special provisions for persons with disabilities in the various articles of the Turkish Code of Civil Procedure which provide for different means of proof.

Interrogation is one of the means of proof<sup>39</sup> provided in Articles 169 -175 of the TCCP. In order to clarify whether the arguments of the parties and the content of other means of proof are genuine, the judge may directly interrogate the parties. According to Article 172/2 of the TCCP, persons who cannot attend to hearings due to disabilities, illnesses or similar other reasons shall be heard at the places where they reside.

Taking an oath is another means of proof provided in Articles 225 - 239 of the TCCP. According to Article 225, the subject of the oath shall be facts that are important for resolution of the dispute and contested among the parties and are related with the parties. A fact is related with a party in the event that he/she has knowledge of the fact. The procedure for taking an oath is provided in a detailed manner in the TCCP. There are two different articles concerning people with hearing or speaking disabilities and people with disabilities. According to Article 234, literate persons with hearing or speaking disabilities shall take an oath by way of signing his/her declarations and those who are illiterate shall take an oath by the help of a sign language interpreter. According to Article 235, if the person to

38 Court of Cassation 3rd Civil Chamber, 11.09.2011, E.2011/12921, K.2011/18468. Kazancı Caselaw Database. For a thorough examination of the relationship between access to justice and right to prove, see, ÇİFTÇİ, P.: *Medeni Yargılama Hukukunda İspat Hakkı ve Sınırlamaları*, Adalet, 2018, pp. 143-146.

39 There are differing opinions in the Turkish doctrine concerning the legal nature of interrogation. For further information on these discussions, see, YAĞCI, U: "İsticvaba İlişkin Olarak Hukuk Muhakemeleri Kanunu ile Getirilen Düzenlemeler", *Erzincan Üniversitesi Hukuk Fakültesi Dergisi*, 2012, V. 15, No. 1-2, pp. 287-290. For information in English on the concept of interrogation in Turkish law, see, NAMLI, M: "The Evidential Value of Interrogation in the Law of Civil Procedure," *Annales de la Faculte de Droit d'Istanbul*, 2019, No. 68, pp. 69-83.

take an oath is so ill or disabled to prevent his/her attendance to the hearing, the judge shall take his/her oath at the place where he/she stays. The other party and the attorneys of both parties may be present. 9<sup>th</sup> Civil Chamber of the Court of Cassation considers any breach of provisions concerning an oath as a breach of right to be heard and fair trial including those provisions on people with hearing, speaking or other disabilities<sup>40</sup>.

The principle of directness requires that a witness is personally heard by the court that is hearing the merits of a case<sup>41</sup>. According to Article 259/3, witnesses who cannot attend a trial due to disabilities or illnesses are heard at the place where they reside. In case a witness is literate but has a speaking or hearing disability, the questions are directed to him/her in written form and the answers are provided in writing by the witness. In case he/she is illiterate, the judge hears him/her through a sign language interpreter (Art. 263/2). Article 263 also applies in case of interrogation of the parties (Art. 175). In a case before the 2<sup>nd</sup> Civil Chamber of the Court of Cassation<sup>42</sup>, the court of first instance hears a new witness whose name has not been previously submitted to the court without resorting to Article 259/3. In other words, the court ignored the opportunity of hearing an ill or disabled witness where he/she resides and heard another witness. The Court of Cassation decided to annul the decision of the court of first instance due to this procedural flaw.

In July 22, 2020, Article 149 of the TCCP is completely amended to enable the court hearings to be held via sound and video transmission<sup>43</sup>. Therefore, it is now possible for a party to attend hearings and take other procedural actions online. Similarly, the court may order or the parties may request that a witness or an expert is heard online. Based on this new provision, the Regulation on Hearings Via Sound and Video Transmission in Civil Procedure<sup>44</sup> has entered into force on June 30, 2021<sup>45</sup>. The Regulation defines online hearings as e-hearing. Article 9/3 of the Regulation provides that if it will be burdensome for a party, witness, expert or other related persons to attend an hearing in person due to his/her illness, age or disability, e-hearing shall be decided upon his/her request. According to

40 9<sup>th</sup> Civil Chamber, 27.03.2018, E.2015/22277, K.2018/6775. Lexpera Caselaw Database.

41 For further information on witnesses in Turkish law, see, KARAMERCAN, F: "Medeni Usul Hukukunda Tanik ve Tanıklık", *Ankara Barosu Dergisi*, 2018, No. 3, pp. 151-191.

42 2<sup>nd</sup> Civil Chamber, 01.04.2019, E.2018/1516, K.2019/3723. Lexpera Caselaw Database.

43 Act Amending Code of Civil Procedure and Several Other Acts, OG. 28.07.2020/31199.

44 OG. 30.06.2021/31527.

45 Due to infrastructural deficiencies, the e-hearings could not be held immediately upon entry into force of the Regulation. VAROL KARAOSMANOĞLU, G: "Ses ve Görüntü Nakli Yoluyla Duruşma Yapılmasına İlişkin Olarak 7251 Sayılı Kanunla Yapılan Değişikliklerin Doğrudanlık İlkesi Kapsamında Değerlendirilmesi", *Anadolu Üniversitesi Hukuk Fakültesi Dergisi*, 2022, V. 8, No. 1, p. 76. However, according to the Turkish Union of Bar Associations, by November 2021, 1400 civil courts of first instance in all cities of Turkey started holding e-hearings. <https://www.barobirlik.org.tr/Haberler/e-durusma-bugun-itibariyle-81-ilde-baslatildi-82051>.

Article 11 of the Regulation, parties and their attorneys may attend an e-hearing from the office of the attorney, special rooms dedicated to e-hearings by the bar associations or courts. If the party will be interrogated or take an oath, he/she shall attend the e-hearing from the rooms dedicated to this purpose by the courts or prisons. Same applies for witnesses or experts. However, if the party, witness or expert is attending the e-hearing because of his/her illness, age or disability, he/she may attend from his/her own residence or institution. Article 12/4 provides that the verification of the identity of those who attend an e-hearing due to their illness, age or disability are performed via use of secure electronic signature or mobile signature.

All of the above provisions indicate that “effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings” is ensured as provided in Article 13/1 of the CRPD.

#### **IV. RESPECT FOR HOME AND THE FAMILY.**

##### **I. Marriage.**

According to Art. 23/1/a of the CRPD, the right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses shall be recognized by the contracting states. According to Art. 145 of the Turkish Civil Code, if one of the spouses is permanently incapacitated or has a mental disease that can hinder marriage, the marriage shall be absolutely null and void.

The consistency of these two regulations has been subject to the case law of the Court of Cassation. The case concerns a married couple who are both diagnosed with mere mental retardation and who are both under guardianship. The couple got married in 1979. In 2009, the wife applied to the court for the cancellation of the marriage due to the spouses' mental diseases. Ankara Family Court<sup>46</sup> rejected the argument that the marriage is null and void arguing that Art. 145 of the Civil Code is in contrast with the CRPD. According to Art. 90/V of the Turkish Constitution, if the national laws are in contrast with international agreements concerning fundamental rights and freedoms, international agreements prevail. Relying on this constitutional rule, the Family Court refused to cancel the marriage. The wife applied to the Court of Cassation<sup>47</sup> which annulled the decision of the Family Court. Family Court insisted on its decision, therefore, the case

<sup>46</sup> Ankara 1st Family Court, 12.02.2013, E.2011/654,K.2013/116. Lexpera Caselaw Database.

<sup>47</sup> 2nd Civil Chamber, 12.11.2013, E.2013/12635,K.2013/26132. Lexpera Caselaw Database.

went to the scrutiny of the General Assembly of Civil Chambers of the Court of Cassation. The General Assembly<sup>48</sup> decided that Art. 145 is not in contrast with the CRPD. According to the Court, contracting states of the CRPD undertake to take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage and family; but the right of persons with disabilities to marry shall be recognized on the basis of free and full consent of the spouses. Those people who are fully incapacitated, however, can't express their free will or consent. Therefore, Art. 145 of the Civil Code is not contrary to the CRPD<sup>49</sup>.

## 2. Custody of Children.

Custody of children, which will be granted to the parents unless a legal ground to decide otherwise exists, is provided in Articles 335-351 of the Civil Code<sup>50</sup>.

Article 340 includes a special provision for disabled children. Accordingly, providing education to the child is within the scope of custody. Especially if the child has a physical or mental disability, the parents shall provide general and professional education to him/her that is appropriate for his/her abilities and tendencies. According to Article 347/I, if the physical or mental development of a child is endangered, the court may decide to deprive the parents of their right of custody and place the child with another family or an institution.

The above provisions are in line with Article 23/3-5 of the CRPD especially as "abandonment, neglect and segregation of children with disabilities" is prevented; a "child shall not be separated from his or her parents ... except when ... subject to judicial review determine ... that such separation is necessary for the best interests of the child"; and "where the immediate family is unable to care for a child with disabilities ... every effort to provide alternative care" is undertaken.

As a matter of fact, the Court of Cassation, in its decision dated 07.10.2003<sup>51</sup>, decides against granting a mentally disabled child's custody to his father regardless of the fact that both parents insist on refusing to take the custody. The Court states that granting the custody to one of the parents despite their unwillingness

48 General Assembly of Civil Chambers, 15.11.2018, E.2017/2672,K.2018/1717. Lexpera Caselaw Database.

49 For an analysis of the decision, see, TEKBEK, T: "Evliliğin Mutlak Butlanına İlişkin Bir Yargıtay Kararının Değerlendirilmesi", *Yeditepe Üniversitesi Hukuk Fakültesi Dergisi*, 2019, V. XVI, No. 2, pp. 163-213. The author opines that a person with a mere mental retardation may have sufficient capacity to understand the idea of marriage and maintain marital life, thus, the Court should not have decided on the cancellation of the marriage in this case. However, she agrees with the conclusion of the Court regarding the conformity of Civil Code Art. 145 with the CRPD. Tekben, pp.199-205.

50 Turkey is also party to the UN Convention on the Rights of the Child since 1995. <https://indicators.ohchr.org/>.

51 2nd Civil Chamber, 07.10.2003, E.2003/11644,K.2003/12972. Lexpera Caselaw Database. For a more recent similar decision, see, Court of Cassation, 2nd Civil Chamber, 19.04.2012, E.2011/12595,K.2012/10297.

will endanger the physical and mental development of the child and will be harmful for him instead of serving to his interest.

Furthermore, in determining which parent shall have the right of custody of a child, in case of termination of mutual life by the parents, the courts take into account the special needs of the disabled children and their relationship with each of their parents. In a decision of Ankara Court of Appeal<sup>52</sup>, the Court took into consideration that the mother attends patiently to her disabled child who frequently is distracted and therefore screams, cries and fidgets due to her disability; that the mother assists the child in eating and other needs; has a healthy relation with the child, is able to comfort the child; and therefore remaining with her mother will contribute to the child's emotional and personal development. Similarly, İstanbul Court of Appeal decided that the right of custody of a child with hearing disability and is merely mentally retarded, shall be given to the father, as the child ceases to attend regularly to school and rehabilitation center when she is with her mother<sup>53</sup>.

### 3. Adoption.

Ensuring the rights and responsibilities of persons with disabilities, with regard to adoption of children is one of the obligations of the contracting states according to Art. 23/2 of the CRPD. The adoption of people who permanently need the help of others due to his/her physical or mental disability is specially regulated in Art. 313/II of the Turkish Civil Code. Furthermore, according to Art. 313/III, the requirements that must be met in case of adoption of minors, must be met in case of adoption of persons with disabilities.

The requirements provided in Art. 313 are as follows:

If the adoptee is fully incapacitated and under guardianship, then his/her legal representative shall express his/her consent. Additionally, the approval of the court of peace and the approval of the civil court of first instance shall be taken (Art. 463 of the Civil Code). If the adoptee is not fully incapacitated and is able to express his/her free will, he/she must consent to adoption. If he/she is also under custody or guardianship, Art. 463 of the Civil Code applies.

If the adopter has descendants of his/her own, they must consent to adoption<sup>54</sup>.

52 Ankara Court of Appeal, 28th Civil Chamber, 05.03.2020, E.2019/1590,K.2020/252. Lexpera Caselaw Database.

53 İstanbul Court of Appeal, 38th Civil Chamber, 30.09.2020, E.2020/467,K.2020/1223. Lexpera Caselaw Database.

54 If the descendants are minors or not fully incapacitated; and are under the custody or guardianship of their parents, a special representative shall be appointed to evaluate and express consent on their behalf; and the approval of court of peace and civil court of first instance shall be taken. TEKBEN, T., YÜNLÜ, S.: "Erginlerin

If the adoptee is married, his/her spouse must consent to adoption.

The adopter shall be taking care of the adoptee for a continuous period of at least five years. The adopter shall provide for accommodation, nutrition, education and health of the adoptee; and shall care for his/her moral, social, physical and mental development<sup>55</sup>.

## V. WORK AND EMPLOYMENT.

According to Art. 50 of the Constitution, no one shall be required to perform labor unsuited to his/her age, gender, or capacity. Minors, women, and persons with physical and mental disabilities, shall enjoy special protection with regard to working conditions.

Article 14 of the Act on Disabled People concerns employment. Accordingly, during the employment, no discriminative practices can be performed against the disabled people in any stage including job selection, application forms, selection processes, technical evaluation, and suggested working periods and conditions. Disabled people cannot be subject to any different treatment than the other people with respect to their disability such that it could cause a result which is unfavorable for the disabled people. It is obligatory that measures in the employment processes in order to reduce or eliminate the obstacles and difficulties that may be faced by the disabled people who work or who apply for a job are taken and the physical arrangements are done by the establishments and organizations. Art. 14 also provides that Ministries of Labor and Social Security, Finance, Family and Social Services shall regulate the status and conditions of sheltered work places<sup>56</sup>.

Art. 5/I of the Labor Law<sup>57</sup> bans discrimination based on language, race, color, sex, disability, political opinion, philosophical belief, religion, sect or similar reasons within employment relationship.

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veya Kısıtlıların Evlat Edinilmesi”, in AA.VV.: *Prof. Dr. Necla Giritlioğlu'na Armağan* (coord. by H. ERMAN, T. ÖGÜZ, Ş. ŞİPKA, E. İNAL, B. BAYSAL), On İki Levha, İstanbul, 2020, p. 588. Another view is that, in such a case, their consent shall not be required. DURAL, M., ÖGÜZ, T., GÜMÜŞ, M.A.: *Türk Özel Hukuku*, Cilt III, Aile Hukuku, Filiz Kitabevi, İstanbul, 2021, p. 4 et seq.

55 TEKBEN, T., YÜNLÜ, S.: “Erginlerin”, cit., p. 600.

56 See The Regulation on Sheltered Work Places. OG. 26.11.2013/28833. Not only persons with physical disabilities but persons with mental and psychological disabilities can be employed at sheltered work places. The Regulation sets forth some conditions to acquire the status of a sheltered work place. At least eight persons with disabilities shall be employed; and the ratio of the number of persons with disabilities who will be employed at a sheltered work place to the number of total employees should not be less than 75%. The Regulation stipulates certain physical conditions (safety, traffic safety, fire protection etc.) to be met at the sheltered work places. Certain part of the remunerations of the persons with disabilities shall be paid by the state. For further information see, KÖME AKPULAT, A: “İşverenin Engelli İşçi Çalıştırma Yükümlülüğü”, *İstanbul Hukuk Mecmuası*, 2019, V. 77, No. 2, pp. 548-550. The existence of this Regulation implies that Turkey undertook its obligation to “ensure that reasonable accommodation is provided to persons with disabilities in the workplace” within the meaning of Article 27/I/i of the CRPD.

57 OG. 10.06.2003/25134.

Therefore, the Constitution and the statutory provisions aim to ensure that all kinds of discrimination against disabled workers are prevented as provided in Article 27/I/a-c of the CRPD.

However, Article 5/VII of the Labor Law has a diminishing effect of the prohibition of discrimination as it puts the burden of proof of discriminatory behavior of the employer upon the employee. The Court of Cassation, in its decision dated May 12, 2011<sup>58</sup>, refused the allegation that the disabled employee receives lower salary compared to other employees based on the fact that such an allegation was not set forth by the disabled employee during the proceedings; and concluded that the court can't take into account allegations of discrimination on its own motion. Allegations of discrimination, however, shall be considered so disagreeable that its claim or proof shall not be left to the employee.

According to Art. 30/I of the Labor Law<sup>59</sup>, the employers that employ 50 or more employees are under the obligation to employ disabled or formerly convicted people. The number of disabled employees shall be 3% of all employees in private sector, whereas this rises to 4% for public entities<sup>60</sup>. The following conditions shall be met by the employer to be a subject of this obligation: i) The workplace shall be included in the scope of Labor Law or Maritime Labor Law, ii) Fifty or more employees shall be working in the workplace. The employers are required to employ persons with disabilities whose rate of disability is at least 40%. Employees with disabilities should be employed through the Turkish Employment Agency; but the employer may also select a disabled person through his own means<sup>61</sup>. The private sector receives incentive for social security payments of the disabled personnel (Art. 30/VI). The sanction of violation of Art. 30 is an administrative fine which is imposed in practice<sup>62</sup>. Therefore, Article 27/I/h of the CRPD, which

58 9th Civil Chamber, 12.05.2011, E.2010/39684,K.2011/14489. Lexpera Caselaw Database.

59 Kocaeli Administrative Court applied to the Turkish Constitutional Court alleging the unconstitutionality of this regulation. According to the Administrative Court, this article is against the principles of freedom of will and freedom of employment provided in Art. 48 of the Constitution. The Constitutional Court relied on Art. 50 and Art. 61 of the Constitution. Art. 50 brings the burden of providing special protection to disabled people in working life on the state; and Art. 61 gives the duty of taking measures to ensure adaptation of the disabled people to the society. According to the Constitutional Court, "Taking into consideration the duties of the state provided in Art. 61 and Art. 48, Art. 30 of the Labor Law which is applicable both in private and public sectors protects society and is a result of being a social state. The rule does not encompass any disproportionality with regard to the private sector." 19.06.2008, E.2006/101,K.2008/126. ÖG. 19.11.2008/27059.

60 To be appointed as public personnel in Turkey, one shall be successful at a centralized written exam. Each year a special central exam (Disabled Public Personnel Selection Exam) is conducted for persons with disabilities. 62311 disabled people entered the exam in 2021 and only 1961 of these were appointed as public personnel. <https://dokuman.osym.gov.tr/pdfdokuman/2021/EKPSS/TERCIH/sayisalbilgiler26012021.pdf>.

61 For further information see, KÖME AKPULAT, A: "İşverenin Engelli", cit., pp. 535-545.

62 See, Court of Cassation 4th Civil Chamber, 22.11.2018, E.2016/8679,K.2018/7262; 26.03.2014, E.2013/18492,K.2014/5135; 23.01.2014, E.2014/305,K.2014/883; 10th Civil Chamber, 01.03.2011, E.2011/517,K.2011/2576; General Assembly of Civil Chambers, 23.06.2010, E.2010/314,K.2010/342. Lexpera Caselaw Database.

obliges the States to “promote the employment of persons with disabilities in the private sector through appropriate policies and measures” and Article 27/1/g concerning employment of disabled persons in the public sector are also met in Turkish law.

However, the number of disabled working people both in private and public sector remains low. By the end of 2021, 20615 disabled people work in the private sector in total. This number rises to 105963 in public sector<sup>63</sup>. It is estimated that approximately 13,5 million people in total are working with wages in Turkey<sup>64</sup>. Therefore, the percentage of disabled workers does not even equal to 1% of the total number of workers.

Turkish Employment Agency promotes disabled entrepreneurs by providing grants to them to build their own businesses<sup>65</sup>. Similarly, Small and Medium Enterprises Development Organization of Turkey regularly provides support for disabled entrepreneurs<sup>66</sup>. By way of these grants, Turkey meets its obligation to “promote opportunities for self-employment, entrepreneurship ... and starting one's own business” within the meaning of Article 27/1/f of the CRPD.

## VI. EQUALITY AND NON-DISCRIMINATION.

### I. Decisions of the European Court of Human Rights.

#### A) *Çam v. Turkey*.

The prohibition of discrimination based on disability is regulated in the United Nations Convention on the Rights of Persons with Disabilities and the European Union Charter of Fundamental Rights<sup>67</sup>. In the European Convention on Human Rights (“ECHR”), the prohibition of discrimination based on disability is not regulated. However, the European Court of Human Rights (“ECtHR”) contribution to the understanding of the “prohibition of discrimination” in Article 14 of the ECHR and the “general prohibition of discrimination” introduced by the 12th Protocol have resulted in decisions that observe the prohibition of discrimination based on disability.

63 <https://www.iskur.gov.tr/kurumsal-bilgi/istatistikler/>.

64 <https://www.sozcu.com.tr/2021/ekonomi/turkiyede-ucretli-calisan-sayisi-artti-6541986/>.

65 [https://www.yatirimadestek.gov.tr/haber/iskur-engellilere-yonelik-2021-2-hibe-destegi-basvurulari-baslamistir/47#:~:text=C4%B0%C5%9EKUR%20\(T%3%BCrkiye%20%C4%B0%C5%9F%20Kurumu\)%2C,ba%C5%9Fvuru%20tarihi%2016%20Nisan%202021.&text=Kooperatiflerin%20Desteklenmesi%20Program%C4%B1%20\(KOOP%20DES,kapsam%C4%B1nda%202022%20proje%20ba%C5%9Fvurular%C4%B1%20ba%C5%9Fam%C4%B1%C5%9Ft%C4%B1r.](https://www.yatirimadestek.gov.tr/haber/iskur-engellilere-yonelik-2021-2-hibe-destegi-basvurulari-baslamistir/47#:~:text=C4%B0%C5%9EKUR%20(T%3%BCrkiye%20%C4%B0%C5%9F%20Kurumu)%2C,ba%C5%9Fvuru%20tarihi%2016%20Nisan%202021.&text=Kooperatiflerin%20Desteklenmesi%20Program%C4%B1%20(KOOP%20DES,kapsam%C4%B1nda%202022%20proje%20ba%C5%9Fvurular%C4%B1%20ba%C5%9Fam%C4%B1%C5%9Ft%C4%B1r.)

66 <https://www.kosgeb.gov.tr/site/tr/genel/destekdetay/1231/girisimcilik-destek-programi>.

67 2012/C 326/02.



The ECtHR considers Article 14 together with the alleged violation of other provisions of the ECHR<sup>68</sup>. One of the cases evaluated by the ECtHR in the context of the prohibition of discrimination upon the complaint of a disabled applicant is the Çam v. Turkey<sup>69</sup> case.

The visually disabled applicant, C. E. Çam, passed the entrance exam of the Istanbul Technical University Turkish Music State Academy. Upon the school administration's request, the applicant, who learned that she had passed the exam, applied to the health institutions to certify that she was eligible to study at the Music Academy. In the medical board report drawn up in 2004 and diagnosing the applicant's visual disability, it was stated that the applicant could receive education and training at the Academy in departments that did not require vision. Declaring that none of the academy sections could be considered as not requiring eyesight, the Music Academy asked the hospital's chief medical officer to draw up a new report to clarify whether, consequently, Ms. Çam could attend lessons at the Music Academy. The Academy also rejected Ms. Çam's request for admission<sup>70</sup>. On 24 September 2004, Ms. Çam's parents applied to the Istanbul Administrative Court on their daughter's behalf, seeking to set aside the Istanbul Technical University's decision in terms of Article 42 of the Constitution, Articles 4<sup>71</sup>, 7<sup>72</sup>, 8<sup>73</sup>, and 27<sup>74</sup> of Basic Law on National Education<sup>75</sup> and Article 9<sup>76</sup> of Legislative Decree on Specialized Education<sup>77</sup>. The court upheld the university administration's decision because Ms. Çam had been unable to provide a report from a fully-equipped public hospital declaring her fit to be a student at the Music Academy. On 26 October 2004, Ms. Çam's parents appealed against that decision before the Istanbul Administrative Court of Appeal. The Court dismissed the appeal<sup>78</sup>.

68 ÖZKAN DUVAN, A: "Ayrımcılık Yasağı Bağlamında Engelli Bireylerin Haklarına İlişkin Avrupa İnsan Hakları Mahkemesi Kararları", *Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi*, 2019, V. 23, p. 326.

69 Çam v. Turkey, App. No. 51500/08, 23.02.2016.

70 Çam v. Turkey, para. 8-15.

71 "Educational institutions are open to everyone regardless of language, race, gender, disability and religion. No privilege can be granted to any person, family, group or class in education."

72 "It is the right of every Turkish citizen to attend primary education. Citizens benefit from education institutions after primary education institutions to the extent of their interests, talents and abilities."

73 "Equal opportunities are provided to all men and women in education. Necessary aids are provided through free boarding, scholarships, loans and other means in order to ensure that successful students who lack financial means receive education up to the highest education levels. Necessary measures are taken to raise children in need of special education and protection."

74 "Every student who has completed primary education and has been entitled to enter secondary education has the right to continue secondary education and to benefit from secondary education opportunities to the extent of their interests, talents and abilities."

75 OG. 24.06.1973/14574.

76 "Individuals who need special education continue their secondary education in special education schools and/or other general and vocational technical secondary schools."

77 OG. 06.06.1997/23011 (Duplicate).

78 Çam v. Turkey, para. 16-20.

On 18 April 2006, Ms. Çam and her parents appealed on points of law to the Council of State, which dismissed the appeal in 2008.

Ms. Çam (the applicant) complained of an infringement of her right to education relying on Article 2 of Protocol No. 1. She also alleged that she had been discriminated against because of her blindness, in breach of Article 14 of ECHR.

The ECtHR concluded that the applicant was not allowed to study in the music department of the Academy simply because she was visually impaired, without providing an objective and reasonable justification<sup>79</sup>. The Court also accepted that discrimination because of disability includes failure to make reasonable adjustments and that such a regulation is a condition for exercising human rights<sup>80</sup>. Therefore, the Court found a violation of Article 14 of ECHR, in conjunction with Article 2 of Protocol No. 1.

*B) Enver Şahin v. Turkey.*

Another case evaluated by the ECtHR in the context of the prohibition of discrimination is the case of Enver Şahin v. Turkey<sup>81</sup>. In this case, the applicant Enver Şahin sued for a violation of Article 14 in conjunction with Article 2 of Protocol No. 1 and Article 14 in conjunction with Article 8.

During his first year of the machine teaching program, the applicant was seriously injured in an accident in 2005 while studying at Firat University, Faculty of Technical Education, which left his legs paralyzed. The applicant suspended his studies until his physical condition allowed him to return to the Faculty.

The applicant applied to the Faculty on 17 March 2007, requesting that the university buildings be arranged in such a way as to enable him to resume his studies during the 2007-2008 academic year. The response of the faculty administration to this request was that the architectural structure was not suitable for revision, but they would try to help the plaintiff continue his education<sup>82</sup>.

On 15 November 2007, the applicant applied to the Elazig Administrative Court, seeking the annulment of the university administration's replies and compensation for the pecuniary and non-pecuniary damage that he claimed to have suffered. The applicant accused the administration, according to his statement,

<sup>79</sup> Çam v. Turkey, para. 69-70.

<sup>80</sup> SİSLİ, M: "Uluslararası ve Ulusal Hukuk Çerçevesinde Özgürlüğünden Mahrum Bırakılan Engellilerin Tutulma Koşulları", *Türkiye İnsan Hakları ve Eşitlik Kurumu*, 2019, No. 2, p. 88.

<sup>81</sup> Enver Şahin v. Turkey, App. No. 23065/12, 30.01.2018.

<sup>82</sup> Enver Şahin v. Turkey, para. 6-8.

of failing to remove the physical barriers that prevented him from exercising his right to education. On 9 April 2010, the Elazig Administrative Court dismissed the applicant's objection. The Elazig Administrative Court stated in the reasoning of its decision that the buildings in question were constructed in accordance with the regulation in force in 1988. According to the Elazig Administrative Court, even if it is up to the administration to implement the technical guidelines specified in the legislation that was later adopted in favor of persons with disabilities, the defendant administration could not be accused of not complying with these guidelines during the construction of a building constructed in 1988, before the guidelines came into force. The applicant appealed against the decision of the Elazig Administrative Court before the Council of State. On 18 January 2011, the Council of State rejected this appeal and decided that the first-instance court's decision was procedural and lawful<sup>83</sup>.

In its evaluation of the case, the ECtHR referred to the definition of "accessibility" in paragraph f of Article 3<sup>84</sup> of the Act on Disabled People, and the additional provision of the Zoning Act<sup>85</sup> regarding the standards that must be followed in the zoning plans to make the physical environment accessible and livable for the disabled. The ECtHR also referred to the CRPD, emphasizing the understanding of "prohibition of discrimination based on disability." The ECtHR concludes that the Government failed to demonstrate that the national authorities, in particular the university authorities and the judicial authorities, had responded with due diligence so that the applicant could continue to enjoy his right to education on an equal basis with other students and, as a result, did not set the fair balance that had to be struck between the conflicting interests at issue. Accordingly, the Court held that there had been a violation of Article 14 of the Convention in conjunction with Article 2 of Protocol No. 1 to the Convention<sup>86</sup>.

C) *Ozan Barış Sanlısoy v. Turkey*.

In *Ozan Barış Sanlısoy v. Turkey*<sup>87</sup> case, on 1 November 2011, the applicant's family, whose son was not admitted to the school as a student by a private school they applied to enroll in because he had autism, filed a criminal complaint against the school administrators, stating that they "violated the prohibition of discrimination and the right to education". On 19 January 2012, the public prosecutor decided not to prosecute, considering that there was no evidence to support the complaints about the alleged events. The applicant's family objected to this decision, claiming

83 *Enver Şahin v. Turkey*, para. 11-18.

84 "Accessibility: Buildings, open spaces, transportation and information services, and information and communication technology are safely and independently accessible and usable by people with disabilities"

85 OG. 09.05.1985/18749.

86 *Enver Şahin v. Turkey*, para. 75.

87 *Ozan Barış Sanlısoy v. Turkey*, App. No. 77023/12, 01.12.2016.

that the public prosecutor had not given reasons for his decision and reiterating that their son was not admitted to the school because of his autism. Bakırköy High Criminal Court rejected this appeal on 7 May 2012, considering that the decision not to prosecute was in accordance with the law and procedure<sup>88</sup>.

Regarding the right to education, it is emphasized in the decision of the ECtHR that this right is indispensable and has an important place in the realization of human rights in a democratic society<sup>89</sup>. However, the Court also underlined that, in deciding how access to education is organized, the State must strike a fair balance between the educational needs of the individuals, and the limited opportunity to meet these needs, on the other<sup>90</sup>.

Although there is a general complaint of the ECtHR that there is a lack of educators in the education system that can take care of students with autism, the application is baseless, saying that the applicant is currently studying at a public school and that not being accepted as a student by a private school would not violate the positive obligations of the state in the context of the right to education. In its judgment, the Court considers that there was no question of the systematic refusal of the applicant's right to education because of his autism and the State's failure to fulfill its obligations under Article 2 of Protocol No. 1 combined with Article 14 of the Convention<sup>91</sup>.

## 2. Decisions of the Turkish Constitutional Court.

### A) *U.D.K. and Others*.

The decision of the Turkish Constitutional Court on the *U.D.K. and Others* individual application<sup>92</sup> relates to the claim that the State's failure to cover the special education expenses of the child in rehabilitation violates the child's right of education. *U.D.K.* was born in 2000 and lost his/her neurological function due to cancer when he/she was thirteen months old. *U.D.K.* has been rehabilitated since 2004, and evaluations have been made in the relevant health board reports that it is appropriate for him/her to receive special training. For the period between September 2009 and September 2011, the applicants filed a lawsuit for full remedy for the pecuniary and non-pecuniary damage they claimed to have suffered, stating that *U.D.K.* could not continue to get support from any private

<sup>88</sup> *Ozan Barış Sanlısoy v. Turkey*, para. 18-20.

<sup>89</sup> For a detailed review of the decision, see; BAGATUR, J.I.: *Özel Öğretimde Özel Gereksinimli Öğrencilerin Eğitim Hakkının İhlalinden Kaynaklanan Hukuki Sorumluluk*, Kadir Has Üniversitesi Lisansüstü Eğitim Enstitüsü Hukuk Anabilim Dalı, Yayınlanmamış Doktora Tezi, 2021, p. 264-285. YÖK Dissertation Database. <https://tez.yok.gov.tr/UlusalTezMerkezi/tezSorguSonucYeni.jsp>.

<sup>90</sup> *Ozan Barış Sanlısoy v. Turkey*, para. 56.

<sup>91</sup> *Ozan Barış Sanlısoy v. Turkey*, para. 69.

<sup>92</sup> *U.D.K. and Others*, App. No. 2014/19352, 24.05.2018.

educational institution due to their economic situation and lack of support from the State. Ankara 7th Administrative Court rejected the case in its decision on the grounds that the child had not been sent to any special education school or rehabilitation center during the 2009-2011 period. The applicants' claim for non-pecuniary damage was also rejected because the administrative act resulted from the misinterpretation of the legislation, the administration's fault was not severe nor obvious, and there was no evidence that the administration acted with malicious intent while rejecting the request of financial support.

Following the finalization of the decision, the applicants made an individual application to the Turkish Constitutional Court on 11 December 2014<sup>93</sup>. In its evaluation of the application, the Turkish Constitutional Court stated that not receiving special education during the 2009-2011 period did not comply with the legal framework regulating the special education expenses of the disabled individuals to be covered by the State. Nevertheless, it was concluded in the decision of the Turkish Constitutional Court that there was not enough evidence to reach a conclusion that U.D.K., as a disabled person, was systematically deprived of his/her right to education. Therefore, there was no violation in this context<sup>94</sup>.

In the doctrine, it is stated that the U.D.K. decision of the Turkish Constitutional Court shows that the legal protection for students with special needs is insufficient and that the approach of the judicial organs on this issue is in contradiction with the international conventions on disability<sup>95</sup>.

#### *B) Cevat Sargın and Others.*

The subject of Cevat Sargın and Others<sup>96</sup> individual application to the Constitutional Court relates to the claim that the right to education has been violated due to the transfer of the disabled child's enrollment in the school where she was studying to another school providing education for severe and moderate mental retardation. It was also claimed that the prohibition of discrimination related to the prohibition of ill-treatment was violated due to the ineffective conduct of the investigation made on the allegation that the disabled child was exposed to ill-treatment with a discriminatory motive in her current school due to his special situation<sup>97</sup>.

While evaluating the allegation regarding the violation of the prohibition of discrimination in connection with the prohibition of ill-treatment, the Turkish

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<sup>93</sup> U.D.K. and Others, par. 1-19.

<sup>94</sup> U.D.K. and Others, par. 60-66.

<sup>95</sup> BAĞATUR, J.I.: *Özel Öğretimde*, cit., p. 287.

<sup>96</sup> Cevat Sargın and Others, App. No. 2015/12766, 07.04.2021.

<sup>97</sup> Cevat Sargın and Others, par. 1.

Constitutional Court stated that it is very difficult to determine that constitutional rights have been violated on a discriminatory reason. According to the Turkish Constitutional Court, if the underlying purpose of the violation stems from the idea of discriminating, the reflection of this purpose in actions and attitudes is not always obvious, and therefore it may be difficult to even reveal the difference in treatment. Therefore, it is often not possible for individuals exposed to action to defend that their constitutional rights have been violated with a discriminatory motive and to provide sufficient evidence for this<sup>98</sup>.

## VII. CONCLUSION.

It is possible to say that the persons with disabilities enjoy equal recognition before the law. The main guarantee of equal recognition is Article 8 of the Civil Code which states that all persons possess the capacity to hold rights and they are equal before the law in using rights and fulfilling obligations. The capacity to act is, on the other hand, includes possession of rights and undertaking obligations by one's own will and actions. A disabled person's capacity to act may be restricted by court order or upon his/her own request under certain conditions. Restriction and appointment of a legal representative is provided in detail in the Civil Code which serve to protect the rights and interests of restricted people. All relevant provisions of the Civil Code are in line with Article 12 of the CRPD.

Not all disabled people will be under restriction, thus, protected by a guardian. For those, additional protection is provided in the Notaries Act Article 73 which states that legal transactions shall be performed before a notary public in presence of two witnesses if the notary understands that the relevant person has a hearing, speaking or seeing disability upon the request of the disabled person. Non-compliance with this provision results nullity of the legal transaction entered into by the disabled person and even criminal conviction of the notary involved.

People with disabilities have been taken into account and special provisions are prescribed for them concerning their interrogation, taking an oath from them or hearing them as witnesses by the courts. The very recent Regulation on e-hearings also have special provisions concerning people with disabilities. Therefore, Turkish procedural law is in line with Article 13 of the CRPD.

When the Turkish Civil Code provisions concerning marriage, custody of children and adoption, it is seen that they are in compliance with Article 23 of the CRPD. As long as the spouses are able to express their free will, they are eligible to get married. The duty of education of children with physical or mental disability

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98 Cevat Sargin and Others, par. 90-104.

upon the parents is specially provided. The disability of the child is taken into consideration in deciding the right of custody and its removal from the parents. The adoption of people who permanently need the help of others due to his/her physical or mental disability is also specially regulated.

The Turkish Constitution and the statutory provisions aim to ensure that all kinds of discrimination against disabled workers are prevented. Art. 30/I of the Labor Law brings the obligation of employing a certain number of disabled persons to the employers both in private and public sector. It must be noted, however, although the laws, which are in line with Art. 27 of the CRPD are accepted and they are exercised by the courts, the percentage of disabled workers remains very low in practice; it does not even equal to 1% of the total number of workers.

There are decisions of both the ECtHR and the Turkish Constitutional Court as a result of individual application regarding the violation of the prohibition of discrimination in case of violation of the right to education of persons with disabilities. The ECtHR has concluded in two of its decisions that Turkey is in breach of prohibition of discrimination of persons with disabilities. One of the cases concerns non-admission of a blind student to a public Music Academy; and the other case concerns unsuitable physical conditions of a public university for a student in a wheel chair. The decisions of the Turkish Constitutional Court also demonstrate that disabled children can not get proper protection by the courts especially because proving the fault or discriminatory motive of the administration may be very difficult for the applicants.

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