



PERSON

Country Report on Legal Capacity
TURKEY

EU-PERSON PROJECT

COUNTRY REPORT on LEGAL CAPACITY

TURKEY

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ABBREVIATIONS

CSOs	Civil Society Organisations
CRPD	Convention on Rights of Persons with Disabilities
DG	Directorate General of Services for the Elderly and the Disabled of Ministry of Family and Social Affairs of Republic of Turkey
RUSİHAK	Ruh Sağlığında İnsan Hakları Girişimi Derneği Mental Health in Human Rights Initiative Association
TCC	Turkish Civil Code

Background

According to 2015 statistics circa 78,741 million people live in Turkey¹. The last census designed to have a thorough knowledge on the situation regarding people with disability in Turkey was completed in 2002. The 2002 census declared that 12.29% of the Turkish population is composed of disabled persons.² In this census, there was no section dedicated to people with psycho-social disabilities. In respect to people with intellectual disabilities, the census reported that they make up 0.48% of the total population. However with respect to people with intellectual disabilities, the survey only focused on people who have difficulties in learning, remembering and using basic math. These statistics indicate that 2% of the disabled population have difficulties in learning, remembering and using basic math³.

In 2014, the Rights of the Disabled Monitoring Group Project published its monitoring report. According to the data in the section dedicated to education, 57.50% of persons with intellectual disabilities in Turkey are illiterate. We read from the report that schooling of this group is very low and only up to 2% of them are graduates of high schools and graduate schools. Data shows that around 30% of persons with “mental and emotional”⁴ disabilities graduated primary school and 10% of them found opportunity to continue their education in secondary and higher schools. The data also reveals that more than 20% of persons with “mental and emotional” disabilities are illiterate. The same report suggests that women are always in a more disadvantaged situation in comparison to men, no matter which disability group they fall into⁵.

In Turkey the services provided for citizens with psychosocial disabilities are still mainly given through hospitals and rehabilitation centres. However, the Ministry of Family and Social Policies of Republic of Turkey- Directorate General of Services for the Elderly and the Disabled (DG from hereinafter) has recently reported that a medicalised approach to disability is now being phased out in favour of a community-based approach to disability services⁶. The policy

¹ You can see this page for basic statistics on Turkey: <http://www.tuik.gov.tr/UstMenu.do?metod=temelist>

² Please see this page for details: http://www.tuik.gov.tr/PreTablo.do?alt_id=1017

³ For more information on the survey referred here, “Nüfus ve Konut Araştırması 2011” you can visit these addresses: <http://www.tuik.gov.tr/PreHaberBultenleri.do?id=15843> and

http://www.tuik.gov.tr/Kitap.do?metod=KitapDetay&KT_ID=11&KITAP_ID=276

⁴ This definition is put in quotation since it is used by the source referred here. In Turkish the definition used is: “Ruhsal ve duygusal engel”.

⁵ “Mevzuattan Uygulamaya Engelli Hakları İzleme Raporu 2013–Rapor Özeti: Erişilebilirlik, Eğitim, Çalışma Hayatı ve Sağlık Verileri-Analizler”, Toplumsal Haklar ve Araştırmalar Derneği (TOHAD) İstanbul 2014, p. 24.

⁶ “Services for mental health are being Improved” (“Ruh Sağlığı için Hizmetler Geliştiriliyor”, 10th October 2013, <http://www.eyh.gov.tr/tr/25388/Ruh-Sagligi-Icin-Sunulan-Hizmetler-Gelistiriliyor>. (Last seen on 11.11.2013).

statement emphasised that this shift is occurring especially with respect to mental health services.

The social model of disability is not a common approach in Turkey, and most Civil Society Organisations (CSOs) do not adopt this approach. The shift from medical to social model of disability that is promoted by the DG, represents a significant change in the Ministry's approach. RUSİHAK welcomes this approach and views the DG's announcement as a significant advancement in government policy.

Despite the positive announcement from the DG, RUSİHAK has reservations as to the extent to which this policy is being implemented in practice. The current system still operates primarily through hospitals. It is difficult to identify functioning, community based support services in Turkey which are available to all people regardless of their social status, or where they live. Often, this means that people who leave hospital after receiving treatment for mental health crises end up without any community support services and end up being re-hospitalised as a result. This leads to a vicious (and costly) cycle for people with psychosocial disabilities, which remains a major problem in Turkey.

In December 2015 RUSİHAK, in collaboration with European Network of Independent Living and Centre for Independent Living – Sofia, published an independent living manual within the framework of Independent Living Network Project: Promoting the Right to Independent Living of People with Disabilities in Turkey (ILNET). The manual is both in Turkish and English and can be downloaded from the following address: <http://ilnet.enil.eu/tr/resources/turkce-engelli-bireylerin-bagimsiz-yasami-icin-el-kitabi/>. The ILNET Project also concludes that currently in Turkey it is the charity model which prevails instead of the rights-based model and the medical and care model – instead of the social model.

RUSİHAK does not know how many persons in Turkey are under guardianship. In July 2013, RUSİHAK requested from the DG the number of people in Turkey who are under guardianship. The Directorate General of the time, Ms. Aylin Çiftçi has responded in writing that there were 5258 people with disabilities who stay in the state rehabilitation centres and nursing homes according to the June 2013 data. According to the same data, the number of people who stay in private nursing centres and received treatment were 10389. She stated that the information on their legal status concerning guardianship is personal data which can only be found in their private files and that the DG does not have access to these files or collect such data. There may be an opportunity for RUSİHAK to pursue this request for data under the Right to Information

Act. According to the procedures under the Turkish Right to Information Act, if the applicant does not receive any answer to the question posed or cannot receive an adequate answer by the end of the process, he or she can bring the matter in front of Right to Information Assessment Board.⁷ If the applicant is not satisfied with the Board's answer, he or she can apply to Ombudsman. Under the circumstances depicted above there is a chance for RUSİHAK to ask the same question once again to the DG and take all available actions to reach a satisfactory or conclusive answer.

This report will discuss the main laws which regulate the rights of people with mental disabilities in Turkey. It should be noted that Turkey does not have mental health legislation. The Law on Disabled People (Law No. 5378), which entered into force in 2005, still defines the main legal framework in Turkey. Apart from this Law, the lives of people with psychosocial and intellectual disabilities are regulated by the Constitution, Civil Code, Health Services Basic Law, Criminal Code, Law on the Execution of Penalties and security Measures, Social Security and General Health Insurance Law, and various decrees having the force of law and/or statutory decrees. On the 6th February 2014, law No. 6518 entered into force. This is the omnibus law that includes amendments to several laws which affect the rights of persons with intellectual and psychosocial disabilities (Law Envisaging Changes to Some Laws and Decrees with the Power of Law). The Law No. 6518 affects several laws from taxation law to social services law, and has 125 articles in total. It contains a government decree with the power of law that defined the structure and duties of the Ministry of Family and Social Policies and amendments in some government decrees with the power of law. As noted, RUSİHAK was not involved in the development of this law. Nonetheless, it is necessary that we understand and examine Law No. 6518 given its significance for people with intellectual and psychosocial disabilities in Turkey.

Last but not least we would like the reader not to cite this report until the end of 2016. In Autumn 2016 RUSİHAK will review this report's Chapter 2 and update it if necessary.

⁷ For details you can visit this site <http://www.mevzuat.gov.tr/Metin.Aspx?MevzuatKod=3.5.20047189&MevzuatIliski=0&sourceXmlSearch=>

1. Current Law on Legal Capacity in Turkey

In Turkey the principle of equal recognition before the law is assured in Article 10 of the Constitution, which reads as follows:

Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.

A Constitutional amendment made in 2010 added a paragraph to Article 10 which states that measures taken for the children, the elderly and the disabled, orphans and widows of martyrs as well as veterans cannot be considered to be contrary to the principle of equality. These actions cannot be considered a violation of principle of equality.⁸

The concept of legal capacity in Turkish legal system differs from the definition of ‘legal capacity’ used in the UN Convention on the Rights of Persons with Disabilities (CRPD). Unlike Article 12 of CRPD, Turkish civil law has two separate concepts in respect to legal capacity: capacity to enjoy rights and capacity to act.⁹

⁸ **The full text of Article 10 of Constitution of Republic of Turkey is as follows:** Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.(Paragraph added on May 7, 2004; Act No. 5170) Men and women have equal rights. The State has the obligation to ensure that this equality exists in practice. (Sentence added on September 12, 2010; Act No. 5982) Measures taken for this purpose shall not be interpreted as contrary to the principle of equality.(Paragraph added on September 12, 2010; Act No. 5982) Measures to be taken for children, the elderly, disabled people, widows and orphans of martyrs as well as for the invalid and veterans shall not be considered as violation of the principle of equality. No privilege shall be granted to any individual, family, group or class.State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings. To read Constitution of Republic of Turkey in English you can use this link: https://global.tbmm.gov.tr/docs/constitution_en.pdf.

Turkish text of Article 10 is as follows: Kanun önünde eşitlik, MADDE 10 - Herkes, dil, ırk, renk,cinsiyet, siyasî düşünce, felsefî inanç, din, mezhep ve benzeri sebeplerle ayırım gözetilmeksizin kanun önünde eşittir. (Ek fıkra: 7/5/2004-5170/1 md.) Kadınlar ve erkekler eşit haklara sahiptir. Devlet, bu eşitliğin yaşama geçmesini sağlamakla yükümlüdür. (Ek cümle: 12/9/2010-5982/1 md.) Bu maksatla alınacak tedbirler eşitlik ilkesine aykırı olarak yorumlanamaz. (Ek fıkra: 12/9/2010-5982/1 md.) Çocuklar, yaşlılar, özürllüleri, harp ve vazife şehitlerinin dul ve yetimleri ile malul ve gaziler için alınacak tedbirler eşitlik ilkesine aykırı sayılmaz. Hiçbir kişiye, aileye, zümreye veya sınıfa imtiyaz tanınmaz. Devlet organları ve idare makamları bütün işlemlerinde kanun önünde eşitlik ilkesine uygun olarak hareket etmek zorundadırlar.

⁹ **Turkish Civil Code Article 8:** Every person is entitled to a vested right. Accordingly, all the persons are equal in using rights and fulfilling obligations within the legal limits. Turkish Text of the same article is as follows: Her insanın hak ehliyeti vardır. Buna göre bütün insanlar, hukuk düzeninin sınırları içinde, haklara ve borçlara ehil olmada eşittirler.

Turkish Civil Code Article 9: The person having capacity to act may possess any right by his/her own will and may undertake any obligation thereof. Turkish text of the same article is as follows: Fiil ehliyetine sahip olan kimse, kendi fiilleriyle hak edebilir ve borç altına girebilir. The translation of these articles are taken from TÜSEV’s document which can be found from this link:

The Civil Code (law NO. 4721, TCC from here onwards) states the “capacity to enjoy rights” refers to all the rights that a person has by birth. Therefore, according to Turkish legal system, the meaning of having the capacity to enjoy rights means being a person. Article 8 of TCC states that all people are equal in exercising these rights and fulfilling obligations within the lawful limits.¹⁰ The capacity to enjoy rights ends only when the person dies.

TCC’s article 10 makes the actual use of the capacity to enjoy rights conditional. Article 10 states that every person who is at the age of 18 and possesses distinguishing power and who is not under legal guardianship has legal capacity.¹¹ In other words, TCC stipulates that certain obligations must be adhered to the person in order to possess the right to enjoy legal capacity.

“Capacity to act” refers to the fact that when a person acts, this action has a legal result. At this very point, the “ability to distinguish” stands out as an important factor with regards to the person's capacity to act. Certain conditions listed in TCC’s article 13 help to define what it means to ‘lack the ability to distinguish.’¹² The conditions listed in article 13 of TCC include mental disability as a condition which will lead to inability to act reasonably.

Article 14 of TCC clearly states that minors, persons without ability to distinguish and persons under legal guardianship do not possess capacity to act.¹³ In this respect, persons with disabilities are equated to minors and are considered by virtue of their status as a person with a disability that they lack the capacity to act. People who are diagnosed with a mental illness fall under this category.

¹⁰**Turkish Civil Code Article 8:** Every person is entitled to a vested right. Accordingly, all the persons are equal in using rights and fulfilling obligations within the legal limits. Turkish Text of the same article is as follows: Her insanın hak ehliyeti vardır. Buna göre bütün insanlar, hukuk düzeninin sınırları içinde, haklara ve borçlara ehil olmada eşittirler. The translation of these articles are taken from TÜSEV’s document which can be found from this link: http://www.tusev.org.tr/usrfiles/files/Turkish_Civil_Code.pdf

¹¹ **Turkish Civil Code Article 10:** Every major who possess distinguishing power and not under guardianship has capacity to act. Turkish text of the same article is as follows: Ayırt etme gücüne sahip ve kısıtlı olmayan her ergin kişinin fiil ehliyeti vardır. The translation of the article into Turkish is made by RUSİHAK. In case the translation is found to be wrong, please contact RUSİHAK.

¹² **Turkish Civil Code Article 13:** Every person who may act reasonably without being a minor; have mental disabilities or mental illnesses; or being intoxicated deemed to possess ability to distinguish according to this Code. Turkish Text of the same article is as follows: Yaşının küçüklüğü yüzünden veya akıl hastalığı, akıl zayıflığı, sarhoşluk ya da bunlara benzer sebeplerden biriyle akla uygun biçimde davranma yeteneğinden yoksun olmayan herkes, bu Kanuna göre ayırt etme gücüne sahiptir. The translation of the article into Turkish is made by RUSİHAK. In case the translation is found to be wrong, please contact RUSİHAK.

¹³ **Turkish Civil Code Article 14:** Persons without ability to distinguish, minors and persons under legal guardianship persons do not have capacity to act. The translation of the article into Turkish is made by RUSİHAK. In case the translation is found to be wrong, please contact RUSİHAK. Turkish Text of the same article is as follows: Ayırt etme gücü bulunmayanların, küçüklerin ve kısıtlıların fiil ehliyeti yoktur.

Article 15 of TCC underlines that the acts of those who lack ability to distinguish may not lead to legal consequences, as they do not possess capacity to act.¹⁴ This approach to the restriction of legal capacity is based on simply having a diagnosis of disability (disability status) and is in direct contradiction of the rights set out under the CRPD.

Article 16 of TCC states that minors with the ability to distinguish and persons under legal guardianship cannot not undertake any obligation by their own will unless they receive the consent of their legal representatives although such consent is not necessary for accepting 'uncovered earnings and use of rights strictly bound to that person'.¹⁵ The same article also states that minors with the ability to distinguish and persons under legal guardianship are deemed responsible from a tort arising out of a wrongful act¹⁶.

In summary, TCC uses two concepts related to legal capacity, and uses disability as an explicit category for denying or restricting a person's 'capacity to act.' The concept of legal capacity in Turkish legislation is in direct contradiction to the concept of legal capacity set out in the CRPD. It is important to note that Paragraph 5 of Article 90 of the Turkish Constitution stipulates that international agreements duly put into effect have the force of law, therefore obliging Turkey to take necessary steps to implement the directives of the CRPD.¹⁷

¹⁴ **Turkish Civil Code Article 13:** Without prejudice to the provisions of the Code, actions of persons who are without ability to distinguish do not have legal effect. The translation of the article into Turkish is made by RUSİHAK. In case the translation is found to be wrong, please contact RUSİHAK. Turkish Text of the same article is as follows: Kanunda gösterilen ayırkdurumlar saklı kalmak üzere, ayırt etme gücü bulunmayan kimsenin fiilleri hukukî sonuç doğurmaz.

¹⁵ www.tusev.org.tr/usrfiles/files/Turkish_Civil_Code.pdf English text of Turkish Civil Code. These rights are very basic legal arrangements related to personal, professional or artistic activity of the person which is permitted by the guardian.

¹⁶ **Turkish Text of Turkish Civil Code Article 16:** Ayırt etme gücüne sahip küçükler ve kısıtlılar, yasal temsilcilerinin rızası olmadıkça, kendi işlemleriyle borç altına giremezler. Karşılıksız kazanmada ve kişiye sıkı sıkıya bağlı hakları kullanmada bu rıza gerekli değildir. Ayırt etme gücüne sahip küçükler ve kısıtlılar haksız fiillerinden sorumludurlar.

¹⁷ **Article 90, paragraph 5 of Constitution of Republic of Turkey:** International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. (Sentence added on May 7, 2004; Act No. 5170) In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail. To read Constitution of Republic of Turkey in English you can use this link: https://global.tbmm.gov.tr/docs/constitution_en.pdf

Turkish Criminal Law and Legal Capacity for Persons with Mental Disabilities

Another noteworthy issue concerning equality before the law is criminal responsibility. Article 32 and 33 of the Turkish Criminal Code establish that a mental disorder, as well as deafness and muteness are among the reasons for releasing or reducing criminal responsibility. With regard to ‘Mental Disorder’, Article 32 states:

(1) A person lacking ability to perceive the legal meaning and consequences of the offense, or having considerably lost the capacity to control his actions due to a mental disorder may not be subject to any punishment. However, selected security precautions are imposed for such individuals.

(2) Even if not to such an extent stated in the first subsection, a person lacking ability to control or direct his actions in respect of offense committed by him is sentenced to twenty five years imprisonment instead of heavy life imprisonment and to twenty years imprisonment instead of life imprisonment. In other cases, one sixth of the punishment to be imposed may be abated. The entire or part of penalty inflicted may be applied as security precaution specific to insane persons, provided that the sentence period remains the same.^{18,19}

Regarding ‘Deafness and Muteness,’ Article 33 states:

(1) The provisions of this Law relating to minors who have not attained the full age of twelve on the commission date of offence is also applicable for deaf and mute persons who have not attained the full age of fifteen; the provisions relating to those attained the full age of twelve but not yet completed the age of fifteen are applicable for deaf and mute persons who have attained the full age of fifteen but have not yet completed the age of eighteen; the provisions relating to those attained the full the age of fifteen but not yet completed the age of eighteen are

¹⁸ **Turkish text of Article 32 of Turkish Criminal Code** is as follows: (1) Akıl hastalığı nedeniyle, işlediği fiilin hukukî anlam ve sonuçlarını algılayamayan veya bu fiille ilgili olarak davranışlarını yönlendirme yeteneği önemli derecede azalmış olan kişiye ceza verilmez. Ancak, bu kişiler hakkında güvenlik tedbirine hükmolunur. (2) Birinci fıkrada yazılı derecede olmamakla birlikte işlediği fiille ilgili olarak davranışlarını yönlendirme yeteneği azalmış olan kişiye, ağırlaştırılmış müebbet hapis cezası yerine yirmi beş yıl, müebbet hapis cezası yerine yirmi yıl hapis cezası verilir. Diğer hâllerde verilecek ceza, altıda birden fazla olmamak üzere indirilebilir. Mahkûm olunan ceza, süresi aynı olmak koşuluyla, kısmen veya tamamen, akıl hastalarına özgü güvenlik tedbiri olarak da uygulanabilir.

¹⁹ English Text at <http://www.legislationline.org/documents/action/popup/id/6872/preview>

*applicable for the deaf and mute persons who attained the full age of eighteen but not yet completed the age of twenty.*²⁰

These positions on criminal responsibility in the Turkish Criminal Law are also contrary to Article 12 of the CRPD, which prohibits the removal of legal capacity solely on the basis of disability and these laws constitute a form of direct discrimination against persons with disabilities. Therefore, reform of these Articles is necessary to bring the Turkish Criminal Law into compliance with international law as provided for by Paragraph 5 of Article 90 of the Turkish Constitution.

²⁰ **Turkish text of Article 33 of Turkish Criminal Code** is as follows: (1) Bu Kanunun, fiili işlediği sırada on iki yaşını doldurmamış olan çocuklara ilişkin hükümleri, on beş yaşını doldurmamış olan sağır ve dilsizler hakkında; on iki yaşını doldurmuş olup da on beş yaşını doldurmamış olanlara ilişkin hükümleri, on beş yaşını doldurmuş olup da on sekiz yaşını doldurmamış olan sağır ve dilsizler hakkında; on beş yaşını doldurmuş olup da on sekiz yaşını doldurmamış olanlara ilişkin hükümleri, on sekiz yaşını doldurmuş olup da yirmi bir yaşını doldurmamış olan sağır ve dilsizler hakkında da uygulanır.

Adult Guardianship in Turkey

TCC states that legal capacity restriction must be applied and a guardian must be appointed for any adult who falls under the description in article 405. According to article 405, paragraph 1 of TCC, any adult who is not able to manage his/her affairs due to “mental illness²¹” or “mental weakness²²” or who is in permanent need of care and protection or any adult who puts other people’s safety at risk must be appointed a guardian²³. This article also means that minors who are under 18 years of age are under the guardianship of their families.

Those who have been declared as "persons under legal guardianship" cannot undertake any legally binding acts without the consent of their legal representatives. However, such consent is not required for 'uncovered earnings and use of rights strictly bound to that person'. Furthermore, according to the Article 16 of TCC, minors and persons under legal guardianship possessing “ability to distinguish” (or 'power of judgement')²⁴ are legally responsible for their own wrongful acts in civil law²⁵. The same article stresses that these persons may not undertake any obligation by their own will unless they receive the consent of their legal representatives.

In Turkey, the restriction of legal capacity may be applied upon the person's own request as well. This right is enshrined in article 408 of TCC. According to this article, an adult may ask for the appointment of a guardian if s/he proves that s/he is not capable of duly managing his/her affairs. The reasons for this inability may be old age, disability, inexperience or serious disease.²⁶ Although the TCC does not specifically state who can apply for guardians to be appointed apart from the person themselves, in practice anyone may apply for guardianship, including family members, neighbours etc. Further, a duty is imposed on public officials (administrative authorities, public notaries or courts) whereby if in the course of their duties

²¹ This is a literal translation of the term “akıl hastalığı” in Turkish legal system.

²² This is a literal translation of the term “akıl zayıflığı” in Turkish legal system.

²³ **Turkish text of Article 405, paragraph 1 of Turkish Civil Code** is as follows: Akıl hastalığı veya akıl zayıflığı sebebiyle işlerini göremeyen veya korunması ve bakımı için kendisine sürekli yardım gereken ya da başkalarının güvenliğini tehlikeye sokan her ergin kısıtlanır.

²⁴ term used in this website explaining guardianship in Turkish law: <http://www.alzheimer-europe.org/Policy-in-Practice2/Country-comparisons/Legal-capacity-and-proxy-decision-making/Turkey>.

²⁵ Turkish Text of **Turkish Civil Code Article Article 16**: Ayırt etme gücüne sahip küçükler ve kısıtlılar, yasal temsilcilerinin rızası olmadıkça, kendi işlemleriyle borç altına giremezler. Karşılıksız kazanmada ve kişiye sıkı sıkıya bağlı hakları kullanmada bu rıza gerekli değildir. Ayırt etme gücüne sahip küçükler ve kısıtlılar haksız fiillerinden sorumludurlar.

²⁶ **Turkish text of Article 408 of Turkish Civil Code** is as follows: Yaşlılığı, engelliliği, deneyimsizliği veya ağır hastalığı sebebiyle işlerini gerektiği gibi yönetemediğini ispat eden her ergin kısıtlanmasını isteyebilir.

they notice that someone is in need of guardianship, they must immediately inform the competent guardianship authority.²⁷

Whether it is against person's will or it is upon her/his request, any decision to restrict legal capacity due to "mental illness" or "mental weakness" will be made upon an official medical board report as Article 409 of TCC dictates. The decision of the court should be based on this report. Article 409 of TCC clearly prohibits the restriction of persons' legal capacity without a court hearing from the person concerned if the case is opened because the person in question is spending extensive funds, or is addicted to substances including alcohol, or has a bad lifestyle, or mismanages funds, or where the person requested the appointment of a guardian herself/himself. However, the same article suggests that if a person will be put under guardianship due to "mental illness" or "mental weakness", the judge "may" hear the person before taking any decision. Therefore, it is up to the judge whether to listen to the person in question or not. Despite these two different arrangements in the same article, article 409 of TCC requires the court to base its decision on the medical report given by a board of doctors.²⁸ Thus it might be concluded that medical approach rules in TCC and persons do not have a say in their own lives if they are diagnosed.

If a person is under guardianship due to "mental illness" or "mental weakness", then the guardianship orders can be removed only when an official medical board report states that the reason for the guardianship no longer exists, as set by article 474 of TCC.²⁹ Therefore, it is again only upon a medical report to decide whether a person has legal capacity or not. If a person was put under guardianship on her/his own request, TCC's article 476 demands that the guardianship order can be removed if the reason for guardianship is not valid anymore.³⁰

In Turkish law, guardianship mechanisms are believed to be regulated for the purpose of protecting the person's rights. The term "protected" is also used by the DG, showing its approach towards people with intellectual and psychosocial disabilities. The guardian is obliged

²⁷ TMK Art. 405/2; Yargıtay 2nd Chamber for Civil Law, E. 1996/4511, K. 1996/5252, T. 17.05.1996)

²⁸ **Turkish text of Article 409 of Turkish Civil Code** is as follows: Bir kimse dinlenilmeden savurganlığı, alkol veya uyuşturucu madde bağımlılığı, kötü yaşama tarzı, kötü yönetimi veya isteği sebebiyle kısıtlanamaz. Akıl hastalığı veya akıl zayıflığı sebebiyle kısıtlamaya ancak resmî sağlık kurulu raporu üzerine karar verilir. Hâkim, karar vermeden önce, kurul raporunu göz önünde tutarak kısıtlanması istenen kişiyi dinleyebilir

²⁹ **Turkish text of Article 474 of Turkish Civil Code** is as follows: Akıl hastalığı veya akıl zayıflığı yüzünden kısıtlanmış olan kişi üzerindeki vesayetin kaldırılmasına, ancak kısıtlama sebebinin ortadan kalkmış olduğunun resmî sağlık kurulu raporu ile belirlenmesi hâlinde karar verilebilir.

³⁰ **Turkish text of Article 476 of Turkish Civil Code** is as follows: Kendi isteğiyle kısıtlanmış olan kişi üzerindeki vesayetin kaldırılması, kısıtlamayı gerektiren sebebin ortadan kalkmasına bağlıdır.

to ‘protect’ assets and all other interests of the individual with “mental illness” or “mental weakness”. The guardian has to represent him/her in legal proceedings.

In case of the guardian’s failure to protect the person’s interests, replacement of the guardian may always be requested by the person concerned or other interested parties in a petition to the court. In cases where a person cannot perform his duties or cannot appoint a representative because of his/her illness, a curator may be appointed according to article 426 of TCC.³¹ The same article declares that in cases where there is conflict of interest between the minor or person under legal guardianship and the legal representative and/or in cases when the legal representative cannot fulfil his/her duties for whatsoever reason, a trustee may be appointed³².

A guardian is appointed to manage the conservation of assets, protect the person’s interests and to legally represent the person under guardianship (TCC 403/1). A curator is appointed as a partial guardian to manage certain affairs, management of wealth /or legal representation of a person. A curator has the powers of a guardian, but only in certain areas of decision-making. The main difference between a guardian and a curator is that a guardian is permanent, while a curator is appointed to do a certain job, either to manage wealth or legal representation of the person. Another role is that of trustee or legal consultant. Where there is no obvious reason to incapacitate a person, a trustee might be appointed for legal consultation to protect him/ her. A trustee deals with financial issues and acts only as an advisor to the person, not a substitute decision-maker. Trustees can also be appointed on a permanent basis.

Article 414 of TCC assumes that the spouse or one of the relatives will be the guardian of the person who will be put under guardianship, as long as they hold the criteria set for the guardians. The two important elements which are taken into consideration are the proximity of the residence of the guardian and the person who will be put under guardianship and their personal

³¹ A guardian is responsible more or less for all affairs of the restricted person whereas a curator (kayyim) is appointed only for urgent, specific, temporary affairs of importance (TMK Arts. 403, 426-428), either ex officio or upon an adult’s own justified request when s/he, for example, cannot personally take care of an urgent affair due to illness or is unable to personally appoint someone else to represent him/herself. The appointment of a curator (kayyim) for a person does not affect that person’s right to exercise his/her rights. <http://www.alzheimer-europe.org/Policy-in-Practice2/Country-comparisons/Legal-capacity-and-proxy-decision-making/Turkey>.

³² **Turkish text of Article 426 of Turkish Civil Code** is as follows: Vesayet makamı, aşağıda yazılı olan veya kanunda gösterilen diğer hâllerde ilgisinin isteği üzerine veya re’sen temsil kayyımı atar:

1. Ergin bir kişi, hastalığı, başka bir yerde bulunması veya benzeri bir sebeple ivedi bir işini kendisi görebilecek veya bir temsilci atayabilecek durumda değilse,
2. Bir işte yasal temsilcinin menfaati ile küçüğün veya kısıtlının menfaati çatışıyorsa,
3. Yasal temsilcinin görevini yerine getirmesine bir engel varsa.

relationships.³³ Unless there are just causes to decide otherwise, article 415 of TCC states that either the person who will be put under guardianship or her/his parents will designate the guardian. In this respect it may be said that the will of the person on who should represent him/her is taken into consideration.³⁴

Mental Health Law in Turkey

As noted previously, Turkey does not have mental health legislation. The lack of a mental health law has been noted as an issue by a range of commentators.³⁵ In the 1990s, two mental health law drafts were prepared. However, these drafts were developed by psychiatrists' representative organisations and drew upon a medical model as a result. No consultation with people with disabilities occurred, and a human rights and disability-based perspective was absent from the law reform activity.

Between May 2011 and April 2012, RUSİHAK was a part of an initiative which aimed to write a draft mental health law. RUSİHAK was joined in a series of meetings by the Turkish Psychiatrists' Association, independent lawyers and psychologists, an international expert (Arlene Kanter), representatives of WHO and the Turkish Ministry of Health. The group issued recommendations which should be taken into consideration while preparing mental health law. Although in 2015 a workshop was organised by the CSOs and activists who wanted to push for mental health legislation in Turkey, no progress has been achieved so far. However, given the jurisprudence of the CRPD Committee, it seems clear that the introduction of a mental health law which would provide for forced treatment in Turkey would not be in compliance with Articles 12, 14 and 25 CRPD.

³³ **Turkish text of Article 426 of Turkish Civil Code** is as follows Haklı sebepler engel olmadıkça, vesayet makamı, vesayet altına alınacak kişinin öncelikle eşini veya yakın hısımlarından birini, vasilik koşullarına sahip olmaları kaydıyla bu göreve atar. Bu atamada yerleşim yerlerinin yakınlığı ve kişisel ilişkiler göz önünde tutulur.

³⁴ **Turkish text of Article 426 of Turkish Civil Code** is as follows: Haklı sebepler engel olmadıkça, vasilığe, vesayet altına alınacak kişinin ya da ana veya babasının gösterdiği kimse atanır

³⁵ See for example, Derya İren Akbiyik, 'The Doors Are Open: Mental Health Law and Organization of Services in Turkey' (2007) 36(3) *International Journal of Mental Health* 4; see also, Mehtap Tatar, 'Challenges in mental health policy and practice in Turkey' (presentation), London School of Economics, London, 27 September 2007 <http://www.lse.ac.uk/LSEHealthAndSocialCare/pdf/MHEEN%20LSE%20Sept%2007_%20Turkey.pdf> (viewed 22 may 2014).

2. Other Areas of Law and Compliance to Article 12 of the Convention on Rights of People with Disabilities

Voting

Article 10 of the Constitution would appear to enable everyone in Turkey to enjoy the right to vote and to be elected. According to Article 10, there is no legal restriction on the rights of the disabled to vote and to be elected. The Constitution, with paragraph 1 of its article 12, guarantees that all persons possess inherent fundamental rights and freedoms which are “inviolable and inalienable”.³⁶ The Constitution also declares that everyone has the freedom of thought and opinion.³⁷

According to the last paragraph of Article 90 of the Constitution, “international agreements duly put into effect have the force of law”. It is clearly stated that “no appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional”. According to the sentence added on May 7 2004 to Article 90 of the Constitution under the Act No. 5170, it is stated that “in the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail”.³⁸ Taking these Articles into consideration and reading Article 29 of

³⁶ **The full text of Article 12 of Constitution of Republic of Turkey** is as follows: Everyone possesses inherent fundamental rights and freedoms, which are inviolable and inalienable. The fundamental rights and freedoms also comprise the duties and responsibilities of the individual to the society, his/her family, and other individuals. To read Constitution of Republic of Turkey in English you can use this link:

https://global.tbmm.gov.tr/docs/constitution_en.pdf

Turkish text of Article 12 is as follows: Herkes, kişiliğine bağlı, dokunulmaz, devredilmez, vazgeçilmez temel hak ve hürriyetlere sahiptir. Temel hak ve hürriyetler, kişinin topluma, ailesine ve diğer kişilere karşı ödev ve sorumluluklarını da ihtiva eder.

³⁷ **The full text of Article 25 of Constitution of Republic of Turkey** is as follows: Everyone has the freedom of thought and opinion. No one shall be compelled to reveal his/her thoughts and opinions for any reason or purpose; nor shall anyone be blamed or accused because of his/her thoughts and opinions.

To read Constitution of Republic of Turkey in English you can use this link:

https://global.tbmm.gov.tr/docs/constitution_en.pdf

³⁸ **Article 90, paragraph 5 of Constitution of Republic of Turkey**: International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. (Sentence added on May 7, 2004; Act No. 5170) In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail. To read Constitution of Republic of Turkey in English you can use this link:

https://global.tbmm.gov.tr/docs/constitution_en.pdf

Turkish text of Article 90 is as follows: Türkiye Cumhuriyeti adına yabancı devletlerle ve milletlerarası kuruluşlarla yapılacak anlaşmaların onaylanması, Türkiye Büyük Millet Meclisinin onaylamayı bir kanunla uygun bulmasına bağlıdır. Ekonomik, ticarî veya teknik ilişkileri düzenleyen ve süresi bir yılı aşmayan anlaşmalar, Devlet Maliyesi bakımından bir yüklenme getirmemek, kişi hallerine ve Türklerin yabancı memleketlerdeki mülkiyet haklarına dokunmamak şartıyla, yayımlanma ile yürürlüğe konabilir. Bu takdirde bu anlaşmalar, yayımlarından başlayarak iki ay içinde Türkiye Büyük Millet Meclisinin bilgisine sunulur.

CRPD (ratified by Turkey in 2009), we expect that persons with psychosocial and intellectual disabilities who are under guardianship should have the right to vote. Yet, this is not the case. In contrast with the Constitution, in Turkey persons with psychosocial and intellectual disabilities under adult guardianship are not recognised as voters.

Turkish Law on Basic Provisions on Elections and Voter Registers (Law no. 298) defines the citizens who are not eligible to vote based on definitions set by TCC. Article 8 of Law No. 298 declares that persons who are under legal guardianship “cannot be voters”, meaning they cannot possess the right to vote. Article 405, paragraph 1 of TCC states that any adult who is not able to manage his/her affairs due to “mental illness³⁹” or “mental weakness⁴⁰” or who is in permanent need of care and protection or any adult who puts other people’s safety at risk must be appointed a guardian.⁴¹ Therefore if a person with psychosocial or intellectual disability is under legal guardianship, they are not voters according to Turkish election law. They cannot vote in either elections or in referenda.⁴²

The Supreme Electoral Council of Turkey does not count persons with intellectual and psychosocial disabilities as “disabled citizens” who have the right to vote and thus they do not take any steps to make the election processes accessible to them. It is obvious from the Council’s decisions, statements, and directives that they strictly apply TCC and Article 8 of Law No.298. At this point we note that neither political parties nor independent candidates in Turkey discuss the voting rights of persons with intellectual and psychosocial disabilities. Consequently, neither elections nor the process leading to elections are accessible to them.

Article 67 of the Constitution of Republic of Turkey declares that “in conformity with the

Milletlerarası bir andlaşmaya dayanan uygulama andlaşmaları ile kanunun verdiği yetkiye dayanılarak yapılan ekonomik, ticarî, teknik veya idarî andlaşmaların Türkiye Büyük Millet Meclisince uygun bulunması zorunluğu yoktur; ancak, bu fıkraya göre yapılan ekonomik, ticarî veya özel kişilerin haklarını ilgilendiren andlaşmalar, yayımlanmadan yürürlüğe konulamaz.

Türk kanunlarına değişiklik getiren her türlü andlaşmaların yapılmasında birinci fıkra hükmü uygulanır.

Usulüne göre yürürlüğe konulmuş milletlerarası andlaşmalar kanun hükmündedir. Bunlar hakkında Anayasaya aykırılık iddiası ile Anayasa Mahkemesine başvurulamaz. (Ek cümle:7/5/2004-5170/7 md.) Usulüne göre yürürlüğe konulmuş temel hak ve özgürlüklere ilişkin milletlerarası andlaşmalarla kanunların aynı konuda farklı hükümler içermesi nedeniyle çıkabilecek uyuşmazlıklarda milletlerarası andlaşma hükümleri esas alınır.

³⁹ This is literal translation of the term “akıl hastalığı” in Turkish legal system.

⁴⁰ This is literal translation of the term “akıl zayıflığı” in Turkish legal system.

⁴¹ **Turkish text of Article 405, paragraph 1 of Turkish Civil Code** is as follows: Akıl hastalığı veya akıl zayıflığı sebebiyle işlerini göremeyen veya korunması ve bakımı için kendisine sürekli yardım gereken ya da başkalarının güvenliğini tehlikeye sokan her ergin kısıtlanır.

⁴² **Turkish text of Article 8 of Law. No. 298:** Aşağıdaki kimseler seçmen olamazlar:

1. Kısıtlı olanlar,
2. Kamu hizmetinden yasaklı olanlar.

conditions set forth in the law, citizens have right to vote, to be elected and to engage in political activities independently or in a political party and to take part in a referendum (...) All Turkish citizens over 18 years of age shall have right to vote in elections and to take part in referenda. The exercise of these laws shall be regulated by law”⁴³. Article 68 of the Constitution secures the right of citizens to form political parties and "in accordance with the established procedure, to join and withdraw from them." In Turkey one must be over 18 years of age in order to become a member of a party. However, in contrast to Articles 67 and 68, Article 76 of the Constitution states that, “the provisions regarding the criteria for the assessment of those who cannot be elected as a member of the parliament includes persons for whom guardians were appointed by judicial authorities due to the fact that they have mental illness”⁴⁴. In Turkey, a person with psychosocial or intellectual disability whose legal capacity is restricted with court decision cannot be elected.

In 2011, the Republic of Turkey responded to the Questionnaire of the United Nations Office of the High Commissioner for Human Rights on the participation of disabled persons in political and public life by stating that “all persons with disabilities (in Turkey) aside the ones with mental illnesses have the right to vote and to be elected.”⁴⁵

In Turkey a person with psychosocial or intellectual disability who is under guardianship cannot

⁴³ **The full Turkish text of Article 67 of Constitution of Republic of Turkey** is as follows:

Vatandaşlar, kanunda gösterilen şartlara uygun olarak, seçme, seçilme ve bağımsız olarak veya bir siyasî parti içinde siyasî faaliyette bulunma ve halkoylamasına katılma hakkına sahiptir. (Değişik: 23/7/1995-4121/5 md.) Seçimler ve halkoylaması serbest, eşit, gizli, tek dereceli, genel oy, açık sayım ve döküm esaslarına göre, yargı yönetim ve denetimi altında yapılır. Ancak, yurt dışında bulunan Türk vatandaşlarının oy hakkını kullanabilmeleri amacıyla kanun, uygulanabilir tedbirleri belirler.(Değişik: 17/5/1987 - 3361/1 md.; 23/7/1995-4121/5 md.) Onsekiz yaşını dolduran her Türk vatandaşı seçme ve halkoylamasına katılma haklarına sahiptir.Bu hakların kullanılması kanunla düzenlenir.(Değişik: 23/7/1995-4121/5 md.; 3/10/2001-4709/24 md.) Silah altında bulunan er ve erbaşlar ile askerî öğrenciler, taksirli suçlardan hüküm giyenler hariç ceza infaz kurumlarında bulunan hükümlüler oy kullanamazlar. Ceza infaz kurumları ve tutukevlerinde oy kullanılması ve oyların sayım ve dökümünde seçim emniyeti açısından alınması gerekli tedbirler Yüksek Seçim Kurulu tarafından tespit edilir ve görevli hâkimin yerinde yönetim ve denetimi altında yapılır.(Ek fıkra: 23/7/1995-4121/5 md.) Seçim kanunları, temsilde adalet ve yönetimde istikrar ilkelerini bağdaştıracak biçimde düzenlenir.(Ek fıkra: 3/10/2001-4709/24 md.) Seçim kanunlarında yapılan değişiklikler, yürürlüğe girdiği tarihten itibaren bir yıl içinde yapılacak seçimlerde uygulanmaz.

⁴⁴ **Turkish text of Paragraph 1, Article 76 of Constitution of Republic of Turkey** is as follows: (Değişik: 13/10/2006-5551/1 md.) Yirmibeş yaşını dolduran her Türk milletvekili seçilebilir.(Değişik: 27/12/2002-4777/1 md.) En az ilkokul mezunu olmayanlar, kısıtlılar, yükümlü olduğu askerlik hizmetini yapmamış olanlar, kamu hizmetinden yasaklılar, taksirli suçlar hariç toplam bir yıl veya daha fazla hapis ile ağır hapis cezasına hüküm giymiş olanlar; zimmet, ihtilâs, irtikâp, rüşvet, hırsızlık, dolandırıcılık, sahtecilik, inancı kötüye kullanma, dolanlı iflas gibi yüz kızartıcı suçlarla, kaçakçılık, resmî ihale ve alım satımlara fesat karıştırma, Devlet sırlarını açığa vurma, affa uğramış olsalar bile milletvekili seçilemezler.

⁴⁵ “The Republic of Turkey’s Responses To The Questionnaire of the Office of the High Commissioner for Human Rights, On the Participation Of Persons With Disabilities in Political and Public Life”, Communication No. 2011/BMCO/5326749, Permanent Mission of Turkey to the United Nations, September, 2011.

be elected and they cannot be voters. Persons with psychosocial or intellectual disability who are not under adult guardianship and who are enlisted in voter lists may still experience discrimination on voting days. The guides prepared for election observers indicate that persons with intellectual disabilities and older people may not use their right to vote, due to the fact that they “lack ability to distinguish”.⁴⁶ According to the guides, if an observer ‘suspects’ that a person is intellectually disabled, s/he may ask questions regarding the person's name or why he/she is there. Hence, if the person who is going to vote cannot answer those questions, the observer may object to the elections officer and ask for his/her vote to be declared as invalid. In other words, observers are given the chance to assess voters’ mental capacity and deny legal capacity accordingly.

The information outlined here on voting rights of people with psychosocial and intellectual disabilities in Turkey can be read in detail from two different sources prepared by RUSİHAK’s PERSON team. You can visit <http://www.madde12.org/lutfen-siyasi-hakkinizi-kullaniniz-ve-toplumda-yerinizi-aliniz-gurur-duyunuz-ve-guzel-bir-hayat-surunuz/> for a relatively easy text which explains the situation in Turkey in Turkish. You can also read our fact sheet in English on voting rights of persons with psychosocial and intellectual disabilities in Turkey by our national PERSON expert, attorney at law, Cansu Korkmaz, on the PERSON website.⁴⁷

⁴⁶An *Observer* denotes the person who is present during voting and counting of the ballots. The observers are representatives of a political party or a candidate. The Guide for Observers 2014, Available at: <http://www.sendika.org/wp-content/uploads/2014/03/Sandık-gözlemcileri-bilgilendirme-notu.pdf> This guide is not published by the government offices, however, most of the observers read and act accordingly with this guide due to the fact that there is no official guide.

⁴⁷ See PERSON project, Publications (2016), available at: <http://www.eu-person.com/publications/>.

Family Law

Article 133 of TCC sets out that “mentally ill” persons cannot marry unless it is understood by an official medical board report that there is no medical obstacle to that person’s marriage.⁴⁸

Article 145 of TCC mentions the conditions when a marriage is null and void. The instances where one of the spouse has “inability of judgement” due to an ongoing situation or has a “mental illness which is severe and thus disables the person to marry” are amongst the circumstances which make a marriage null and void.⁴⁹ With regards to those under guardianship, the validity of marriage is open to scrutiny if the guardian raises the issue in court that the minor and/or the adult under legal guardianship married without the consent of her or his guardian.

The Turkish public prosecutor opened a case in 2010 in line with article 146 of TCC, seeking to nullify the marriage of a man who was put under guardianship in Germany. The Civil Court of First Instance decided in 2010 that this marriage is null and void. However, the decision of the German court on putting this man under guardianship due to his severe mental illness was not validated by the Turkish authorities. Since the validation was absent, the decision given by German authorities to put him under guardianship did not have legal effect in Turkey. Therefore it was decided that the decision of German authorities could not be enforced. Based on this fact, the Turkish High Court reversed the judgment of the Civil Court of First Instance in 2011. The Turkish High Court suggested that the right move would have been to prove that this man was mentally ill at the time of marriage with an official medical board report. The court’s logic was that if the man was ill, then he must have been put under guardianship and that the appointed guardian should have been the subject of the litigation, not the man himself since the man does not have legal capacity⁵⁰. Both the preceding decision and the one which reversed it are not in alignment with Article 12 CRPD. The person in question is not viewed by the courts as a person with legal capacity. The only relevant factor for the court was the presence of a medical report on the person’s mental illness and decision on guardianship given by the German authorities.

⁴⁸ **Full Turkish text of Article 133 of Turkish Civil Code is as follows:** Akıl hastaları, evlenmelerinde tıbbî sakınca bulunmadığı resmî sağlık kurulu raporuyla anlaşılmadıkça evlenemezler.

⁴⁹ **Full Turkish text of Article 145 of Turkish Civil Code is as follows:** Aşağıdaki hâllerde evlenme mutlak batıldır:

1. Eşlerden birinin evlenme sırasında evli bulunması,
2. Eşlerden birinin evlenme sırasında sürekli bir sebeple ayırt etme gücünden yoksun bulunması,
3. Eşlerden birinde evlenmeye engel olacak derecede akıl hastalığı bulunması,
4. Eşler arasında evlenmeye engel olacak derecede hısımlığın bulunması.

⁵⁰ Case Number: 2010/4833, Date of Judgment: 13.7.2011.

Another decision on marriage as decided by a Turkish High Court shows that Turkish courts closely adhere to the TCC. One of the heirs of a deceased person claimed that the marriage of the deceased should be null and void because the deceased had mental illness during the entire period of his marriage. The disputed marriage began in August 2000 and ended in December 2000 due to the death of the husband. The heir of the deceased based the case on the fact that the deceased was mentally ill and old and thus argued that both Article 145 and Article 159 of TCC should apply. Article 159 of TCC suggests that if the court decides that one of the spouses is believed to have ill intention in marriage, they lose any benefit gained as a result of the death of the spouse. The court annulled the disputed marriage based on Article 145 of TCC⁵¹ despite the fact that the marriage was already terminated due to death of one of the partners.

These cases demonstrate that CRPD has not been taken into consideration by Turkish courts in decisions concerning legal capacity to marry, despite the existence of Article 90 of Turkish Constitution⁵². Further strategic litigation might be required to challenge the approach of the Turkish courts in this respect and encourage Turkish judges to rely on the CRPD in their decision-making.

⁵¹ **Full Turkish text of Article 159 of Turkish Civil Code is as follows:** Evlenmenin butlanını dava etme hakkı mirasçılara geçmez. Ancak, mirasçılar açılmış olan davayı sürdürebilirler. Dava sonucunda evlenme sırasında iyiniyetli olmadığı anlaşılan sağ kalan eş, yasal mirasçı olamayacağı gibi, daha önce yapılmış olan ölüme bağlı tasarruflarla kendisine sağlanan hakları da kaybeder.

⁵² Paragraph 5 of Article 90 of the Turkish Constitution stipulates that international agreements duly put into effect have the force of law, therefore obliging Turkey to take necessary steps to implement the directives of the CRPD.

Article 90, paragraph 5 of Constitution of Republic of Turkey: International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. (Sentence added on May 7, 2004; Act No. 5170) In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.

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Consent to Medical Treatment

The consent of a patient to medical treatment is required by the TCC within the scope of personal rights. The Regulation on the Rights of Patients No. 23420 refers to provisions in relation to consent to medical treatment. According to the Article 22 of Regulation No 23420, no one is subject to medical treatment contradicting with his/her consent and without consent. The exception to this are the situations indicated in law.

Article 24 of the same Regulation states once again that patients' consent is required for medical treatments. However, if the patient in question is a minor, or a person under legal guardianship, it is the parents or guardians who have to give consent. In cases where there are no parents or guardians and if the patient is not in a position to express her/his will, consent is not necessary. Despite this, Article 24 of Regulation No. 23420 emphasises that the treatment should be explained as much as possible to the patient even where the patient is a minor or under legal guardianship. The article makes it clear that participation of the patient in the treatment process is the ideal situation. Thus, measures should be taken to guarantee that the treatment process is communicated to the patient clearly and the patient's consent is sought.

Article 24 also requires the authorities, including health agencies or health institutions, to take necessary measures to communicate the information on treatment to disabled persons. Therefore we can suggest that it is in alignment with Turkish legislation to expect to see easy-to-read documents, sign-language interpreters, tactile texts and/or braille text etc to give adequate and sufficient information on treatment to disabled patients.⁵³

⁵³ **The full text of Article 24 of Regulation on the Rights of Patients No. 23420** is as follows:

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Tıbbi müdahalelerde hastanın rızası gerekir. Hasta küçük veya mahcur ise velisinden veya vasisinden izin alınır. Hastanın, velisinin veya vasisinin olmadığı veya hazır bulunmadığı veya hastanın ifade gücünün olmadığı hallerde, bu şart aranmaz.

Kanuni temsilcinin rızasının yeterli olduğu hallerde dahi, anlatılanları anlayabilecekleri ölçüde, küçük veya kısıtlı olan hastanın dinlenmesi suretiyle mümkün olduğu kadar bilgilendirme sürecine ve tedavisi ile ilgili alınacak kararlara katılımı sağlanır.

Sağlık kurum ve kuruluşları tarafından engellilerin durumuna uygun bilgilendirme yapılmasına ve rıza alınmasına yönelik gerekli tedbirler alınır.

Kanuni temsilci tarafından rıza verilmeyen hallerde, müdahalede bulunmak tıbben gerekli ise, velayet ve vesayet altındaki hastaya tıbbi müdahalede bulunulabilmesi; Türk Medeni Kanununun 346 ncı ve 487 inci maddeleri uyarınca mahkeme kararına bağlıdır.

Tıbbi müdahale sırasında isteğini açıklayabilecek durumda bulunmayan bir hastanın, tıbbî müdahale ile ilgili olarak önceden açıklamış olduğu istekleri göz önüne alınır.

Yeterliğin zaman zaman kaybedildiği tekrarlayıcı hastalıklarda, hastadan yeterliği olduğu dönemde onu kaybedtiği dönemlere ilişkin yapılacak tıbbi müdahale için rıza vermesi istenebilir.

Hastanın rızasının alınmadığı hayati tehlikesinin bulunduğu ve bilincinin kapalı olduğu acil durumlar ile hastanın bir organının kaybına veya fonksiyonunu ifa edemez hale gelmesine yol açacak durumun varlığı halinde, hastaya tıbbi müdahalede bulunmak rızaya bağlı değildir. Bu durumda hastaya gerekli tıbbi müdahale yapılarak durum kayıt altına alınır. Ancak bu durumda, mümkünse hastanın orada bulunan yakını veya kanuni

Article 24 of the Regulation No. 23420 also states that in cases where medical treatment is necessary if the guardian of the patient does not give consent, then articles 346 (in respect to minors) and 487 (in respect to adults under guardianship) of TCC apply. This means that a court decision is needed before undertaking medical treatment. Article 487 of TCC orders the court to take any measure to protect the person under guardianship.⁵⁴ In this case, the necessary measure is giving consent to the treatment.

Article 24 of the Regulation No 23420 suggests that where a patient loses her/his competency to communicate her/his will repetitively, the patient should be asked to give her/his consent to the treatment at a point in time when s/he is able to give it. RUSİHAK believes that this suggestion may be used by the patient to write advance healthcare directives which could be legally binding. As stated in Article 24 of Regulation No. 23420, for medically defined emergency cases, or when the patient is unconscious and/or there is a risk of losing the patient or losing her/his organs, consent is not necessary for emergency treatment. However if a relative or guardian of the patient is present, their consent is usually sought. In cases where no one is near the person in an emergency situation, the relatives or the legal representatives of the patient should be communicated with as soon as possible after the medical treatment and informed about the situation. After the patient regains consciousness, the consent procedure starts according to the principles set out in the Regulation.⁵⁵

There are also codes of conduct in Turkey for the doctors to follow.⁵⁶ Informing the patient on treatment including its risks, asking for consent, permitting the patient to choose her/his doctor as well as the treatment and where to have the treatment are major points in these codes of conduct. Each and every doctor should respect fundamental rights and freedoms of persons and should take international human rights treaties into consideration.

temsileci; mümkün olmadığı takdirde de tıbbi müdahale sonrasında hastanın yakını veya kanuni temsilcisi bilgilendirilir. Ancak hastanın bilinci açıldıktan sonraki tıbbi müdahaleler için hastanın yeterliği ve ifade edebilme gücüne bağlı olarak rıza işlemlerine başvurulur.

Sağlık kurum ve kuruluşlarında yatarak tedavisi tamamlanan hastaya, genel sağlık durumu, ilaçları, kontrol tarihleri diyet ve sonrasında neler yapması gerektiği gibi bilgileri içeren taburcu sonrası tedavi planı sağlık meslek mensubu tarafından sözel olarak anlatılır. Daha sonra bu tedavi planının yer aldığı epikrizin bir nüshası hastaya verilir.

⁵⁴ **The full text of Article 487 of Turkish Civil Code is as follows:** Vesayet makamı, görevden alma ve uyarıda bulunmanın yanı sıra, vesayet altındaki kişinin korunması için gerekli diğer önlemleri de almakla yükümlüdür.

⁵⁵ Please see footnote 48.

⁵⁶ See for example Turkish Medical Association Ethics Committee, Declaration on Informed Consent (2008), available at: <http://www.ttb.org.tr/images/stories/file/etik/5S.pdf>. and <https://www.ttb.org.tr/eweb/adli/1.html>.

3. Legal Capacity Law Reform Campaign in Turkey

RUSİHAK has identified the Turkish Civil Code as the priority for legislative reform to ensure recognition of legal capacity for persons with disabilities. However, since no reform proposals can currently be brought before the parliament on the Civil Code as a whole, RUSİHAK has focused on raising awareness on the concept of legal capacity and Article 12 of CRPD as much as possible. Raising awareness on the Convention and rights-based approach to disability set the basis for legal capacity law reform. From this perspective, RUSİHAK has started campaigning for legal capacity reform in Turkey. The support of PERSON partners and the steps taken within this partnership furthers RUSİHAK's efforts.

In Turkey, the Directorate General (DG) of Elderly and the Disabled of Ministry of Family and Social Affairs is the contact unit which is primarily responsible for raising awareness on CRPD. A web page⁵⁷ is their main tool to give information on the Convention. Apart from the information provided by this site, we understand that the DG organizes seminars to several target groups such as judicial officers, governmental bodies and civil society institutions (CSOs). RUSİHAK is well aware that CRPD touches the daily issues of disabled persons however the concepts enshrined within the Convention are complex and need clarification to be understood properly. RUSİHAK is also aware that some concepts such as "legal capacity" is a distant concept to the Turkish legal system and thus we need detailed information on how CRPD is changing international human rights law and how we in civil society should process the information we receive. Thus the content of the above mentioned seminars given by the DG, their duration as well as the level of their clarity have been of the utmost importance.

Turkey submitted its initial report to the UN Committee on the Rights of People with Disabilities in 2016 in accordance to Article 35 of the Convention.⁵⁸ When we read it we see that Turkey only emphasises how the concept of legal capacity in the Turkish legal system differs from the one enshrined in Article 12. The report does not reveal any information on how Turkey plans to implement the Article. There is no mention of any kind of plan for legal

⁵⁷ The web page has the following address: <http://engelli.eyh.gov.tr/sozlesme/>

⁵⁸ The report can be found from the following link:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=29

The draft version of this report was prepared in 2013. It can be read from here:

http://engelli.eyh.gov.tr/sozlesme/dosyalar/sozlesme/ulusal_rapor/

capacity law reform in Turkey in the near future.

During the PERSON project, especially in 2014 RUSİHAK realised mainstream human rights defenders and/or human rights organisations in Turkey are not aware of CRPD. RUSİHAK, with the support of its PERSON partners, launched a campaign on Article 12 in Turkey to raise awareness on the concept of legal capacity and its effects on persons' lives for the first time. Until PERSON's Right to Act Campaign, there was no widely co-ordinated campaign for legal capacity law reform in Turkey or a campaign to raise awareness on the need to discuss legal capacity at length. Neither governmental bodies nor CSOs touched upon the issue prior to April 2015.

In April 2015, RUSİHAK launched a Turkish blog called "madde12.org."⁵⁹ To launch a blog in Turkish on Article 12 of CRPD was a game-changer for Turkey. For the first time now we have a web-site which holds written documents on the meaning of Article 12. The main documents which are pinned under the top menu of the site have the utmost importance because of three main features. First of all they are all in Turkish. Secondly they set the core of Article 12 and they refrain from jargon as much as possible. Thirdly they are accessible not only because they are an open source of information and in Turkish but also they are written in a simple way. Article 12 is explained also in an easy to read text along with three videos dedicated to the first three paragraphs of Article 12. The animated version of the Article is also dubbed. This important piece of information can be accessed by a wider interested audience. The Turkish blog is an address where persons can come and get the key information on PERSON Project, its network and Article 12 anytime and anywhere they want as long as they can read and listen in Turkish. From time to time RUSİHAK updates the blog with information in relation to Article 12 as well. Today, this is the main web site we invite people to visit whenever they want to know more about CRPD and/or Article 12.

In this sense launching a Turkish source of information on Article 12 was a big step for disabled persons and disability activists in Turkey. From April 2015 until mid-March 2016, madde12.org had 5557 unique visitors. Academics and consequently university students are among these visitors. The blog helped RUSİHAK to get in touch with academia in a productive and creative way. In total 10.119 visits were made to this Turkish site within the specified period. Our blog is in fact a human rights instrument, so far the first Turkish instrument on CRPD and its Article

⁵⁹ Madde 12 means Article 12. Article 12 of CRPD is the name of our Turkish web page. The address of the blog is: www.madde12.org

12 had its pages opened 60.209 times. In total it has had 158.691 hits.

Organisations Campaigning for Legal Capacity Law Reform

RUSIHAK is an organisation committed to campaigning for legal capacity reform in line with Article 12 of the CRPD in Turkey, especially through www.madde12.org and awareness-raising. Apart from RUSIHAK, there is no other organisation campaigning for legal capacity law reform in Turkey, so RUSIHAK has been working to build capacity, both its own and the capacity of its stakeholders including self-advocates, to make such campaign a possibility.

RUSIHAK received grants from the EU for “Creating a Civic Monitoring System in the Mental Health Field” between September 2011 and March 2014. One of the aims of this action was to raise awareness on CRPD and independent living. The local teams which were active in implementing this project were present at RUSIHAK’s PERSON Project conference which was held in 2014 and thus the PERSON action has built upon the work of this previous project. A documentary called “DEPO” was produced at the end of this project. DEPO reveals the life in mental health hospitals. RUSIHAK now uses the documentary to raise awareness on CRPD, independent living and right to act as enshrined in CRPD.

Another project of RUSIHAK which should be highlighted is the Independent Living Network Project (ILNET). From October 2014 till the end of December 2015, RUSIHAK joined forces with the European Network of Independent Living (ENIL), in cooperation with the Centre for Independent Living Sofia (CIL-Sofia) to run ILNET which aimed at promoting the right to independent living in Turkey. ILNET was co-funded by the European Union and the Republic of Turkey, under the Civil Society Dialogue scheme. ILNET launched a web-site in March 2015.⁶⁰ ILNET also targeted to build self-advocates’ capacity. This project was to prepare an environment to start talking about legal capacity law reform in the future in Turkey.

In fact both of the above mentioned projects of RUSIHAK aim to raise awareness on CRPD and to enable the civil actors, stakeholders push for a legal capacity law reform in Turkey. RUSIHAK, especially after its PERSON partnership is well aware that Article 12 and thus a legal capacity law reform is a key for independent living for disabled persons and for any kind of services provided to them with a human rights based approach.

⁶⁰ ILNET’s web page is: <http://ilnet.enil.eu/tr/> It can be read both in Turkish and English.

Allies for Legal Capacity Law Reform at State Level

The following governmental organizations are the bodies which should be included in any effort regarding legal reforms in relation to legal capacity. The Ministry of Family and Social Policies, Ministry of Justice, and Human Rights and Equality Institution (which was established with the Law No. 6701 on 6.04.2016) should be the first governmental bodies to be included in studies. Then, the Ministry of Health, Ministry of Education, Mayors, and the Constitutional Court are other governmental institutions with significant importance which should be included. The Turkish Grand National Assembly Constitution Committee and the Justice Committee are also important stakeholders for future reform efforts.

The Turkish Ombudsman and development agencies are other institutions which have power to contribute to legal capacity reform and should be taken into consideration although they are not governmental bodies. Likewise, municipalities should be informed on the developments at international and regional levels, as they can influence change in local policies and practices.

Organisations for a Pilot Project on Supported Decision Making

Hope Houses (Umut Evleri) are residential services for disabled people, which are currently being developed in Turkey as a community-based alternative to large-scale institutions. According to 2015 statistics of the DG, in 2015 there were eighty six (86) Hope Houses in Turkey.⁶¹ Although currently they do not have a rights based approach to the services they are providing, RUSİHAK believes that pilot projects on supported decision-making can be started within these houses. This would require collaboration from Ministry of Family and Social Policies. The Ministry also should encourage its local branches to collaborate with such a pilot project and itself should be open to work with CSOs.

⁶¹ Engelli ve Yaşlı Hizmetleri Genel Müdürlüğü, Araştırma Geliştirme ve Proje Dairesi Başkanlığı, “Engelli ve Yaşlı Bireylere İlişkin İstatistik Bilgiler,” Yıllık İstatistik Bülteni, 2015, p. 27.

Media Reporting on Legal Capacity Related Issues

To date, a few media reports have directly focused on legal capacity related issues.

On 28th May 2013, Nilay Vardar who writes for BIANET (a Turkish news website run by independent journalists) wrote an article on one of RUSİHAK's projects. In the article she underlined the fact that if you are diagnosed and put under guardianship then you are not an equal citizen anymore. The article, "Bir Teşhis Her An Başınıza Bela Olabilir," can be found at this address: <http://bianet.org/biamag/toplum/146971-bir-teshis-her-an-basiniza-bela-olabilir>

On 3rd November 2013, Gündüz Vassaf from RADİKAL wrote an article which mentions the human rights infringements of the people who have "mental illnesses". The article also mentions community based services. The article, "Türkiye'de deli olmak," can be found at this link: http://www.radikal.com.tr/yazarlar/gunduz_vassaf/turkiyede-deli-olmak-1158703

On 12th and 13th March 2015, RUSİHAK participated in *Anti-Discrimination and Equality Framework on the Way to EU* Conference which was organised in Ankara by TACSO Turkey in collaboration with Human Rights Joint Platform and KAOS GL Association. RUSİHAK found an opportunity to share PERSON Network's Right to Act Campaign with representatives from fifty eight CSOs and institutions coming from around Europe. On 13th of March, RUSİHAK made a presentation on Article 12 of CRPD. Journalist Çiçek Tahaoglu made national news on legal capacity after the presentation and published it on the same day on Bianet's web page. The article, "Kendi Adına Karar Verme ve Bunu Hayata Geçirme Hakkı" can be found at this link: <http://bianet.org/bianet/ayrimcilik/163020-kendi-adina-karar-verme-ve-bunu-hayata-gecirme-hakki-konusuldu>

National Events on Article 12 of the Convention on Rights of People with Disabilities

RUSİHAK organised a symposium in İstanbul on 15th June 2012 on Guardianship and Supported Decision Making. In 2013 and 2014 RUSİHAK organised local-level awareness-raising meetings at various hospitals focusing on CRPD. These meetings did not solely focus on Article 12 of the Convention but more on disability and human rights in general, including the important rights to legal capacity, liberty, and to live independently and be included in the community.

In June 2014, RUSİHAK organised a two day long conference in İstanbul: “Equality Before Law and Right to Independent Living: Conference on Paradigm Shift Brought by UN CRPD”. As the title of the conference reveals, the main aim was to raise awareness primarily amongst the disability CSOs on CRPD, on its philosophy and principles. More than fifty persons who attended the conference had the opportunity to listen to eighteen experts. Five of these experts were from other countries with different backgrounds and experiences. This provided a platform to bring advocates, academics and policymakers together with self-advocates. By the end of the second day of the conference, a “wrap-up session” was conducted. Based on the discussions made during this session a “Conclusions” document was produced and shared with the participants⁶².

In November 2014 RUSİHAK organised an experience sharing meeting in collaboration with NUIG. The idea was to share experience on Irish efforts to implement Article 12 of CRPD in drafting law on mental health. This gave RUSİHAK the opportunity to underline the fact that we are talking about human rights when we talk about rights of persons with disabilities and thus we need to act together. This was a closed meeting to which representatives of mainstream human rights organisations were invited. TACSO Turkey facilitated a workshop in the second half of the meeting to gather information how strong ties can be built between mainstream human rights CSOs and disabled persons organisations (DPOs). The meeting enabled RUSİHAK and thus the PERSON partnership to understand the barriers as well as opportunities to create collaboration with mainstream human rights organisations in Turkey.⁶³

⁶² The agenda of the conference can be found at PERSON’s web page:

http://www.eu-person.com/publication/rusihak-conference-istanbul-turkey-june-2014/wppa_open/

⁶³ The agenda of the meeting and the framework of the workshop can be found at PERSON’s web page:

In 2015 RUSİHAK participated in two People to People (P2P) conferences which were facilitated by TACSO Turkey. In March 2015 RUSİHAK informed the audience about the PERSON Network's (then) forthcoming Right to Act Campaign and legal capacity⁶⁴. In April 2015 RUSİHAK made a presentation at another P2P conference on *Independent Civil Monitoring of Elections and Equal Access of Disadvantaged Groups to Electoral Rights*. RUSİHAK made a presentation on its factsheet related to voting rights and citizens with psycho-social and intellectual disabilities in Turkey to the representatives of forty nine CSOs present at the conference.⁶⁵

On 8th December 2015 RUSİHAK organised a training session on Article 12 with Turkish Ombudsman in İstanbul, attended by all PERSON partners. MDRI-S and CDLP NUI Galway from the PERSON partnership supported this session in particular.

In 2015 and 2016 RUSİHAK attended meetings in Kadıköy Municipality (İstanbul) and high schools and universities to talk about disability rights and legal capacity.

RUSİHAK launched a Turkish blog on Article 12 of CRPD in April 2015. For the first time there is a web-site now in Turkey which holds written documents on the meaning of Article 12. The main documents which are pinned under the top menu of the site have the utmost importance because of three main features it has. First of all they are all in Turkish. Secondly they set the core of Article 12 and they refrain from jargons as much as possible. Thirdly they are accessible not only because they are open source of information and in Turkish but also they are written in a simple way. The blog www.madde12.org, is an address where persons can come and get main information on PERSON Project, its network and Article 12 anytime and anywhere they want to.

http://www.eu-person.com/publication/rusihak-held-a-meeting-and-workshop-in-istanbul-november-2014-heres-the-agenda/wppa_open/

⁶⁴ Please read, especially pages 16-17 of the report of this meeting (in Turkish) from the following address: http://www.tacso.org/doc/Rapor_P2P_Konferansi_AB_Katilim_Surecinde_Ayrimcilikla_Mucadele_ve_Esitlik.pdf

⁶⁵ Please read, especially pages 16 of the report of this meeting (in Turkish) from the following address: http://www.tacso.org/doc/TACSO%20P2P%20Rapor-Dezavantajl_Gruplarin_secme_secilme_konferansi.pdf

Strategic Litigation on Legal Capacity

Currently there is no ongoing cases of strategic litigation in Turkey concerning Article 12 CRPD or legal capacity. RUSİHAK has previously been involved in a case where guardianship was lifted and the ex-guardian became the trustee of the person in relation to Article 474 and 426 of TCC. RUSİHAK is in contact with the person and is aware that the person is not happy with the court decision because his former guardian, now trustee, continues to abuse his power. RUSİHAK also was not able to turn this case into a strategic litigation for a wide range of reasons but will continue to seek out possible plaintiffs for future strategic litigation cases on the right to legal capacity.

Process on Shadow Reporting on the Convention on Rights of Persons with Disabilities

Currently there is no shadow-reporting activity on CRPD in Turkey, although the State Report from the Turkish Government has now been produced.⁶⁶ However, several civil society organisations, especially TOHAD, ENKAD and RUSİHAK would like to work together on a shadow report and plan to prepare this in 2017.

⁶⁶ See Turkey Initial Report to the United Nations Committee on the Rights of Persons with Disabilities under Article 35 of the Convention on the Rights of Persons with Disabilities, Submitted by the Ministry of Family and Social Policy General Directorate of Services for Persons with Disabilities and the Elderly CRPD/C/TUR/1, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en.

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PARTNERSHIP TO ENSURE
REFORM OF SUPPORTS IN
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Partner Organisations



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