

Turkish Civil Code and CEDAW: Never Shall the Twain Meet?*

Assist. Prof. Dr. Seda İrem Çakırca**

Abstract

Although Turkey became a party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1986, it originally included very extensive reservations, most of which arose from the former Turkish Civil Code's (fTCC) incompatibility with CEDAW. However, in 1999, Turkey withdrew a substantial portion of its reservations due to revisions to the Turkish Civil Code. Nevertheless, regrettably, even today it cannot be said that the new Turkish Civil Code is entirely compatible with CEDAW. This paper firstly aims to explore these incompatibilities between CEDAW and the Turkish Civil Code by analysing changes to the Code in comparison with related Articles of CEDAW. The paper will then recommend

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** Istanbul University Faculty of Political Sciences, Department of Law. [icakirca@istanbul.edu.tr].

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what should be done in order to make the Turkish Civil Code (TCC) completely compatible with CEDAW with *de lege feranda* suggestions.

Keywords: Turkish Civil Code, CEDAW, reservations, gender equality, family law.

Öz

Her ne kadar Türkiye 1986 yılında Kadınlara Karşı Her Biçimiyle Ayrımcılığı Ortadan Kaldırılması Sözleşmesi'ne (CEDAW) taraf olmuşsa da, Türk Medeni Kanunu'nun CEDAW ile uyumsuzluğu sebebiyle anlaşmaya oldukça geniş çekinceler koymuştur. Türkiye 1999 yılında Medeni Kanun'da yapmayı düşündüğü ve hali hazırda yaptığı değişiklikler ışığında CEDAW'a koyduğu çekincelerin önemli bir kısmını kaldırmıştır. Maalesef bugün dahi, Türk Medeni Kanunu'nun CEDAW ile tam olarak uyumlu olduğunu söylemek mümkün değildir. Bu bağlamda, çalışma ile ilk olarak amaçlanan CEDAW ve Türk Medeni Kanunu arasındaki uyumsuzlukları incelemektir. Bu amaçla çalışma içerisinde Türk Medeni Kanunu'nun CEDAW ile uyumlu kılınması adına yapılan değişiklikler ilgili CEDAW hükümleriyle karşılaştırmalı olarak incelenecektir. Son olarak Türk Medeni Kanunu'nun CEDAW ile tamamen uyumlu olabilmesi için yapılması gereken değişikliklere dair *de lege feranda* öneriler ortaya koyulacaktır.

Anahtar Kelimeler: Türk Medeni Kanunu, CEDAW, çekinceler, cinsiyet eşitliği, aile hukuku.

Introduction

Although human rights are discussed worldwide, women's rights in international human rights initiatives are almost invisible. Unfortunately, women are still largely absent from the political decision-making process and treated as "second class citizens". Furthermore, they are specifically restricted from the public sphere in certain countries.¹ The concept of women's *human* rights originated from criticisms of the claim that human rights are universal.² The term 'women's human rights' is intended to cover a wider area than the term 'women's rights'.³

All of the general or specific human rights treaties adopted since the Second World War have tried to dissolve women's human rights within the notion of human rights. However, their resulting structure meant that they paid attention to men's life experiences and their priorities, rendering them incapable of embracing women's problems.⁴ Inasmuch as human rights law has been mainly developed by male jurists it has unfortunately been gendered as male.⁵ However, through the tremendous effects of the women movement and feminist rights lawyers around the world, it has been possible to constitute a treaty only for women. In 1979, women's human rights became the subject of a treaty of their own: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

CEDAW, the most comprehensive treatment of women's international human rights, was adopted by the United Nations General As-

¹ Fran P. HOSKEN, "Towards a Definition of Women's Human Rights", 3 *Hum. Rts. Q.*, 1981, p. 1.

² Although the term 'human rights' includes everyone and has no intentional discriminatory meaning, in actuality "*everyone*" was used in reference to white males.

³ Andrew C. BYRNES, "Women, Feminism and International Human Rights Law - Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation?", 12 *Austl. Y.B. Int'l. L.*, 205, 1992, p. 215.

⁴ Hilary CHARLESWORTH, "What are 'Women's International Human Rights?'," in Edited Rebecca J. Cook, *Human Rights of Women National and International Perspectives*, University of Pennsylvania Press, Philadelphia Pennsylvania, 1994, pp. 58-84.

⁵ Elisabeth Jay FRIEDMAN, "Bringing Women to International Human Rights", *Peace Review: A Journal of Social Justice*, 18, 2006, p. 480.

sembly to remedy the pervasive and structural nature of violations of the human rights of women.⁶ There are 30 articles that cross the traditional boundaries between public and private life and expose for remediation harms to women that have previously been denied full definition.⁷ The Convention is also able to address the particular nature of women's disadvantages.⁸

In international law, an intention to commit to the treaty is implied by its ratification in that, after ratification, states accept responsibility for activities that violate the treaty—whether those activities are carried out by the state directly or are simply culturally pervasive violations.⁹ Ratification means that state parties have to enact or modify domestic legislation and their constitutions to accord with the substantive articles of the Convention.¹⁰

This paper focuses on Turkey's ratification of CEDAW and its effects on the Turkish Civil Code. While other national legislation, like the Turkish Criminal Code, also changed due to Turkey's ratification of CEDAW, this paper's scope is limited to the Turkish Civil Code and Turkey's reservations related to this code.

Part I of this study will describe the purpose of CEDAW, before briefly examining Turkey's participation in it and its reservations. Part II will describe the process of reviewing the Turkish Civil Code and the changes made before 2002, when the new Turkish Civil Code came into force. Part III explains the changes made concerning equality before

⁶ Ekaterina Yahyaoui KRIVENKO, **Women, Islam and International Law Within the Context of the Convention on the Elimination of All Forms of Discrimination Against Women**, Brill, Martinus Nijhoff, Leiden, 2009, p. 18.

⁷ Diane G. ZOELLE, **Globalizing Concern for Women's Human Rights The Failure of the American Model**, St. Martins Press, New York, 2000, p. 31.

⁸ Rebecca J. COOK, "Women's International Human Rights Law: The Way Forward", in Edited Rebecca J. Cook, **Human Rights of Women National and International Perspectives**, University of Pennsylvania Press, Philadelphia, 1994, p. 11.

⁹ ZOELLE, 2000, p. 55.

¹⁰ Vedna JIVAN/Christine FORSTER, "Challenging Conventions: In Pursuit of Greater Legislative Compliance with CEDAW in the Pacific", **Melbourne Law Journal**, Vol. 10, 2009, p. 2.

the law and civil matters, while Part IV will discuss the changes made concerning marriage and family relations. The article will conclude by recommending what needs to be done *de lege feranda* in order to make the Turkish Civil Code completely compatible with CEDAW.

I. CEDAW, Turkish Ratification and Reservations

A. CEDAW

The United Nations Charter of 1945¹¹ recognizes that all human beings have human rights for the simple reason of being human,¹² and therefore forbids discrimination on the basis of race, sex, language or religion.¹³ The reference to “all men” in the original draft of the charter was heavily criticized and an agreement was ultimately reached amongst United Nations (UN) members to refer to all human rights.¹⁴ In its preamble, the treaty refers to “the equal rights of men and women”, while Article 1 (3)¹⁵ includes among the purposes of the UN the promotion of and encouragement of respect for human rights and for fundamental freedoms for all without distinction, *inter alia*, as to sex.¹⁶

When the UN was founded in 1945, there was a desire among female delegates to build a permanent body to deal with women’s rights.¹⁷

¹¹ The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945.

¹² UN Charter pmb. , cl. 2.

¹³ UN Charter, Art. 1, para. 3.

¹⁴ Fleur van LEEUWEN, **Women’s Rights Are Human Rights the Practice of the United Nations Human Rights Committee and the Committee on Economic, Social and Cultural Rights**, Intersentia, Antwerp, 2010, p. 3.

¹⁵ See also UN Charter, Art. 55 (c), 56.

¹⁶ Christine CHINKIN/Marsha A. FREEMAN, “Introduction”, in Edited Marsha A. Freeman, Christine Chinkin, Beate Rudolf, **The UN on the Elimination of All Forms of Discrimination against Women A Commentary**, Oxford University Press, New York, 2012, p. 4.

¹⁷ Elizabeth Evatt, “Finding a Voice for Women’s Rights: The Early Days of CEDAW”, **34 Geo. Wash. Int’l. L. Rev.** , 2002, p. 515.

Due to these female delegates' efforts, the Commission on the Status of Women (CSW) was established in 1946. Among its activities, the CSW drafted several conventions and declarations, including the Declaration on the Elimination of Discrimination Against Women (DEDAW)¹⁸ in 1967. The CSW also promoted an International Women's Year in 1975, the Women's Decade and major women's conferences, such as those held in Mexico (1975), Copenhagen (1980), Nairobi (1985) and Beijing (1995).¹⁹ The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)²⁰ was adopted in 1979 and came into force in 1981. Focusing solely on the enjoyment of human rights by women, the Convention is the most comprehensive international treaty on women's issues, requiring nations to end sex-based discrimination and ensure equality between men and women.²¹

The Convention defines discrimination against women as "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."²² It is thus directed against both public and private discrimination, and also calls for affirmative action.

¹⁸ UN GA, res. 2263 (XXII), 7 November 1967.

¹⁹ CHINKIN/FREEMAN, 2012, pp. 5-6. The UN World Conference on Human Rights (1993) was also targeted by 90 women's NGOs. They gathered 300,000 signatures from 123 countries, including Turkey, and declared that the conference should "comprehensively address women's human rights at every level of its proceedings" and recognize gender-based violence as "a violation of human rights requiring immediate action". FRIEDMAN, 2006, p. 482; Laura PARISI, "Feminist Praxis and Women's Human Rights", *Journal of Human Rights*, Vol. : 1, No. : 4, December 2002, p. 581.

²⁰ Convention on the Elimination of All Forms of Discrimination Against Women, GA, res. 34/180, 34 UN GAOR Supp. (No. 46), at 193, UN Doc. A/34/46, entered into force Sept. 3, 1981.

²¹ Susan Deller ROSS, *Women's Human Rights the International and Comparative Law Casebook*, University Press of Pennsylvania Press, Philadelphia, 2008, p. 11; LEEUWEN, 2010, p. 3.

²² Article 1 CEDAW.

By accepting the Convention, states commit themselves to undertake a series of measures to end discrimination against women in all forms, including to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women,²³ establish tribunals and other public institutions to ensure the effective protection of women against discrimination,²⁴ and ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.²⁵ State agencies are obliged to address prevailing gender relations and the persistence of gender-based stereotypes that affect women, both through individual acts and also in laws, legal and societal structures and institutions.²⁶ In short, participating states must ensure both formal (*de jure*) and substantive (*de facto*) equality.²⁷ In order to accelerate the realization of the *de facto* equality, they can also take temporary special measures,²⁸ such as introducing quotas in education, political representation and employment, or granting short-term bank loans to enable women to start new businesses.²⁹

The Convention established an independent monitoring body, the CEDAW Committee, composed of twenty-three elected experts. The

²³ Article 2 (f) CEDAW.

²⁴ Article 2 (c) CEDAW.

²⁵ Article 2 (e) CEDAW.

²⁶ Committee on the Elimination of Discrimination against Women, General Recommendations No. 25 (2004), Article 4 paragraphs 1 of the Convention (temporary special measures), UN doc HRI/GEN/1/Rev. 8, pp. 337-345, para. 7.

²⁷ Simone CUSACK/ Rebecca J. COOK, "Combating Discrimination Based on Sex", in Edited Catarina Krause and Martin Scheinin, **International Protection of Human Rights: A Text Book**, Abo Akademi University, 2009, p. 206; Aldo FACIO/Martha I. MORGAN, "Equity or Equality for Women? Understanding CEDAW's Equality Principles", **Alabama Law Review**, Vol. : 60, No. : 5, 2009, p. 1154.

²⁸ Temporary special measures are described by COOK as follows: "time limited positive measures intended to enhance opportunities for historically and systemically disadvantaged groups, with a view to bringing group members into mainstream of political economic, social, cultural and civil life. Rebecca J. COOK, "Obligations to Adopt Temporary Special Measures under the CEDAW Convention" in Edited I. Boerefijn, **Temporary Special Measures**, Intersentia, 2003, p. 119.

²⁹ CUSACK/COOK, 2009, p. 207.

Committee's primary function is to receive and consider reports from participating state, explaining what they have done to put CEDAW into effect and the difficulties they have encountered in fulfilling their obligations.³⁰ The Committee adopts a "dialogue" approach, questioning state representatives on specific portions of their reports, and on deficiencies and discrepancies between their reports and information received from other sources.³¹ After considering a state's report and other information gathered, the CEDAW Committee compiles its Concluding Comments, which it then submits to the UN General Assembly through the Economic and Social Council.³² The Committee may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations are included in the reports of the Committee together with comments, if any, from the States Parties.³³ The purpose of the general recommendations³⁴ is to provide clear guidance for applying CEDAW articles.

As mentioned earlier, the original convention's weakness lay in its legal instrument that prevented it dealing with individual complaints. However, following intensive lobbying by women's human rights organizations and other NGOs, CEDAW now has an individual complaints procedure.³⁵ The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women³⁶ came into force on December 22, 2000. As of October 2013, 104 states have ratified or acceded to the protocol, thus becoming state parties and bound by it. The Optional Protocol to the Convention strengthens the enforcement powers of the CEDAW Committee.³⁷ It allows individuals or groups of individuals to submit individual complaints to the CEDAW

³⁰ CUSACK/COOK, 2009, p. 211.

³¹ JIVAN/FORSTER, 2009, p. 5.

³² Article 21 para. 1 CEDAW.

³³ Article 21 para. 1 CEDAW.

³⁴ CUSACK/COOK, 2009, p. 214.

³⁵ ROSS, 2008, p. 15.

³⁶ GA res. 54/4, 54 UN GAOR Supp. (No. 49) at 5, UN Doc. A/54/49 (Vol. 1) (2000).

³⁷ JIVAN/FORSTER, 2009, p. 6; CUSACK/COOK, 2009, p. 215; PARISI, 2002, p. 583.

Committee,³⁸ while the inquiry procedure empowers the committee to undertake inquiries where it receives information indicating grave or systematic³⁹ violations by a participating state of the rights protected under the Convention.⁴⁰ According to Article 17 of the Optional Protocol to the Convention, unlike CEDAW, state parties cannot make any reservations to the protocol.

As of October 2013, 54 states parties to CEDAW still have one or more reservations or declarations in place, making it one of the most heavily reserved human rights treaties.⁴¹ In particular, state parties have made numerous reservations to Article 2, 9, 15 and 16, which are very important for successful enforcement of the Convention.

The Convention formally comprises a Preamble followed by six main sections. Part I (Articles 1-6) deals with states parties' general obligations; Part II (Articles 7-9) with public life and civil and political rights; Part III (Articles 10-14) with economic and social rights; Part IV (Articles 15-16) with legal status, including within the family, Part V (Articles 17-22) with the committee; and Part VI (Articles 23-30) with the final provisions. A major criticism of CEDAW is that there are no special provisions⁴² about gender-based violence, especially domestic violence,

³⁸ CUSACK/COOK, 2009, pp. 215-219.

³⁹ See Articles 8-10 of the Optional Protocol.

⁴⁰ CUSACK/COOK, 2009, pp. 219-221; Ineke BOEREFJN, "Establishing State Responsibility for Breaching Human Rights Treaty Obligation: Avenues under UN Human Rights Treaties", *NILR*, Vol. : LVI, 2009, p. 193; Aaron Xavier FELLMETH, "Feminism and International Law: Theory, Methodology and Substantive Reform", *Human Rights Quarterly*, Vol. : 22, 2000, p. 679.

⁴¹ ROSS, 2008, p. 24.

⁴² Although CEDAW has no special provisions about violence against women, the CEDAW Committee covered this gap with General Recommendations. See Committee on the Elimination of Discrimination against Women, General Recommendation No. 19 (11th session, 1992). This general recommendation has had a profound impact on international, regional and comparative jurisprudence. CUSACK/COOK, 2009, p. 215; Felice D. GAER, "Implementing International Human Rights Norms: UN Human Rights Treaty Bodies and NGOs", *Journal of Human Rights Law*, Vol. : 2, No. : 3, September 2003, p. 348.

female genital circumcision⁴³ and reproductive rights.⁴⁴ The treaty is also weakened by the lack of consequences for infrequent reporting (non-reporting or late reports) and the reservations system.⁴⁵

The scope of this study is limited to examine the relationships between CEDAW and the Turkish Civil Code concerning equality before the law, legal capacity, freedom of movement (Article 15) and the family (Article 16). Articles 15 and 16 of CEDAW allow women to realize their rights to equality within the “private” arena of the family and private contractual arrangements. Therefore, the Turkish Civil Code plays an important role to achieve gender equality in the family and public life. In this respect, Turkey’s participation in CEDAW, and its reservations, are significant factors for analysing state of women’s human rights in Turkey concerning civil matters.

B. Turkish Ratification and Reservations

Although it has been claimed⁴⁶ that there is no clear evidence of any large-scale civil society efforts, whether from women’s groups or others specifically lobbying the Turkish Government to ratify CEDAW, Turkey’s feminist movement has dramatically increased public awareness about CEDAW. First of all the convention was known about and

⁴³ Samar EL-MASRI, “Challenges facing CEDAW in the Middle East and North Africa”, *The International Journal of Human Rights*, Vol. : 16, No. : 7, October 2012, p. 938.

⁴⁴ The Convention was also criticized by feminist scholars for its weakness in defining and protecting women’s rights in the private sphere and paying no attention at all, except for its provision on rural women, to the experiences of women. KRIVENKO, 2009, pp. 42-43; FELLMETH, 2000, p. 698.

⁴⁵ FELLMETH, 2000, p. 713; Rachael Lorna JOHNSTONE, “Feminist Influences on the United Nations Human Rights Treaty Bodies”, *Human Rights Quarterly*, Vol. : 28, 2006, p. 151; Hanna Beate SCHÖPP-SCHILLING, “Treaty Body Reform: the Case of the Committee on the Elimination of Discrimination against Women”, *Human Rights Review*, Vol. : 7, No. : 1, 2007, pp. 203-205; EL-MASRI, 2012, pp. 937-938.

⁴⁶ Feride ACAR, “Turkey”, in Edited M. McPhedran, S. Bazilli, M. Erickson, and A. Byrnes, *The First CEDAW Impact Study: Final Report*, Toronto: The Centre for Feminist Research, York University, and the International Women’s Rights, 2000, p. 205; Brian MELLO/Michael STRAUSZ, “International Norms and Women’s Rights in Turkey and Japan”, *Journal of Women, Politics & Policy*, 32: 4, p. 343.

discussed in intellectual and feminist circles prior to its ratification by Turkey.⁴⁷ Given that there was a military coup in 1980, the lack of evidence that women's groups and other NGOs pressured the state to ratify the treaty is easily understandable. During this period of military rule, every social movement, including the feminist movement, had to keep their voices down and their records hidden in order to survive. However, that does not mean there were no efforts concerning ratification of CEDAW. During that time, the military junta was strongly suppressed social activism, closing several labour unions, imprisoning thousands of activists and disbanding all existing political parties.⁴⁸ Despite this apolitical atmosphere, Turkish women began to demand their rights.⁴⁹ That is, there was important and undeniable domestic pressure on the Turkish government to ratify CEDAW. At the same time, the state itself also had an interest in ratification because Turkey wanted to turn its face towards Europe and the West. Ratifying CEDAW was therefore a chance to show western states that Turkey was modern, secular and European.⁵⁰

Turkey became party to CEDAW, not by signing the Convention but through accession on July 25, 1985⁵¹, with certain reservations since some of the articles of the Convention contradicted national laws, especially the Turkish Civil Code. The Convention was ratified on October 14, 1985⁵², with the text being published in the Official Gazette without any reservations. Turkey deposited its own instrument of ratification on December 20, 1985 and, according to Article 27 paragraphs 2, the Convention entered into force on January 19, 1986. However, the text that Turkey submitted to the UN Secretary of General differed from the one published in Official Gazette, by including reservations, specifically⁵³

⁴⁷ ACAR, 2000, p. 205.

⁴⁸ MELLO/STRAUSZ, 2011, p. 343.

⁴⁹ Yeşim ARAT, "Women's Rights as Human Rights: The Turkish Case", **Human Rights Review**, October- December 2001, p. 28.

⁵⁰ MELLO/STRAUSZ, 2011, p. 345.

⁵¹ Official Gazette No. : 18792.

⁵² Official Gazette No. : 18898.

⁵³ The original reservation reads as follows:

"Reservations of the Government of the Republic of Turkey with regard to the articles

regarding Article 15 paragraphs 2 and 4 and Article 16 paragraphs 1 (c), (d), (f), (g), as these provisions were incompatible with the existing family law section of the Turkish Civil Code, particularly those pertaining to women's legal capacity, such as their right to enter into contractual relationships, responsibilities concerning children, and choice of domicile, family name, work and job.⁵⁴ However, legally, these reservations were not binding on legislators, policy makers, civil servants or anyone else, so far as domestic law was concerned, because they were never published in the Official Gazette. That is, the state must implement the Convention without reservations.⁵⁵ These reservations were later withdrawn, on September 1999, following the review and amendments resulting in the new Civil Code.⁵⁶ Initially, Turkey also included reservations for Article 29 and made a declaration concerning Article 9.⁵⁷ On January 2008, it withdrew its declaration regarding Article 9 following the amendments

of the Convention dealing with family relations which are not completely compatible with the provisions of the Turkish Civil Code, in particular, article 15, paragraphs 2 and 4, and article 16, paragraphs 1 (c), (d), (f) and (g), as well as with respect to article 29, paragraphs 1. In pursuance of article 29, paragraphs 2 of the Convention, the Government of the Republic of Turkey declares that it does not consider itself bound by paragraph 1 of this article”.

⁵⁴ Demet ÖZDAMAR, **Türk Hukukunda Özellikle Türk Medeni Kanunu Hükümleri Karşısında Kadının Hukuki Durumu (Eski-Yeni Türk Medeni Kanunu Karşılaştırması)**, Ankara, 2002, p. 188.

⁵⁵ Aysel ÇELİKEL, “Kadınlara Karşı Her Türlü Ayrımcılığın Önlenmesi Sözleşmesi ve Türkiye'nin Koyduğu Çekinceler”, **MHB.**, Vol. 10, No. : 1-2, 1990, p. 63.

⁵⁶ On 20 September 1999, the Government of Turkey notified the Secretary-General of a partial withdrawal as follows:

“[...] the Government of the Republic of Turkey has decided to withdraw its reservations made upon [accession to] the Convention on the Elimination of All Forms of Discrimination Against Women with regard to article 15, paragraphs 2 and 4, and article 16, paragraphs 1 (c), (d), (f) and (g).

[...] the reservation and declaration made upon [accession] by the Government of Turkey with respect to article 29, paragraph 1, and article 9, paragraph 1 of the Convention, respectively, continue to apply”.

⁵⁷ The original declaration reads as follows:

“Article 9, paragraph 1 of the Convention is not in conflict with the provisions of article 5, paragraph 1, and article 15 and 17 of the Turkish Law on Nationality, relating to the acquisition of citizenship, since the intent of those provisions regulating acquisition of citizenship through marriage is to prevent statelessness”.

to the Turkish Nationality Law. Thus, Turkey currently has only one reservation, on Article 29.

Three state parties objected to several of Turkey's reservations. The Federal Republic of Germany, the Government of the United Mexican States and the Government of the Kingdom of the Netherlands considered that Turkey's reservations regarding Article 15, paragraphs 2 and 4 and 16, paragraphs 1 (c), (d), (f) and (g) were incompatible with the object and purpose of the Convention (Article 28, paragraph 2) and therefore objected to them on March, 3, 1987, May, 7, 1986 and July, 14, 1994 respectively. Although Turkey's reservation to Article 9 was also incompatible with the object and purpose of the convention, there were no objections to its declaration⁵⁸, even though in principle it represented a reservation to Article 9. The objecting states offered no extended explanations besides that Turkey's reservations were incompatible with the object and purpose of the Convention. It should be noted these states also had their own reservations and declarations concerning the Convention.⁵⁹

The Turkish government signed the Optional Protocol to the Convention on September 8, 2000, which was ratified by the parliament on July 30, 2002,⁶⁰ and came into force in January 2003. In adopting the Optional Protocol, the Turkish Government probably wanted to show its commitment to women's advancement and full compliance with the convention to western states, most importantly the EU.

II. The Review Process of the Turkish Civil Code

The first efforts to reform the former Turkish Civil Code to ensure greater gender equality took place in 1951. Over the following 45 years, several commissions formed by the Ministry of Justice prepared

⁵⁸ Mehmet Semih GEMALMAZ, "Kadınlara Karşı Ayrımcılığın Her Biçimiyle Kaldırılması Sözleşmesi: Çekinçeler Sorunu Işığında Haklar Analizi", **Prof. Dr. İl Han Özyay'a Armağan, İÜHF**, Vol. LXIX, No. : 1-2, 2011, p. 210.

⁵⁹ GEMALMAZ, 2011, pp. 210- 211.

⁶⁰ 18. 09. 2002, Official Gazette No. : 24880.

numerous proposals, none of which became even a draft law.⁶¹ In 1986, Turkish feminists began to organize small groups to support CEDAW with a petition campaign.⁶² However, this time they did not want it to become a blank paper like every other international human rights instrument that Turkey had become party to.⁶³ They were able to gather 6,000 signatures for their petition. While certainly not every signatory knew what CEDAW was, it indicated that Turkish women, whatever their background or job were ready to speak up in their own name.⁶⁴

In 1990, The Directorate General on the Status and Problems of Women (DGSPW) was founded in order to improve women's statutes as a national mechanism.⁶⁵ Although there was a widespread campaign during the fall of 1994, requesting reform of the Turkish Civil Code presented to the National Assembly, complete civil law reform did not take place until 2002.⁶⁶ Since the ratification of the Convention by the Turkish Government in 1985, and prior to the reforms of 2002, several legal reforms helped increase gender equality.

Article 159 of the fTCC, which required the permission of the husband for married women to work outside the home, was annulled by the Constitutional Court in 1990,⁶⁷ while Article 438 of the Turkish Criminal Code, which imposed only up to two-thirds of the normal punishment for a rapist if the victim was a professional sex worker, was annulled by

⁶¹ Ela ANIL/Canan ARIN/Ayşe BERKTAY HACİMİRZAOĞLU/Mehveş BİNGÖLLÜ/Pınar İLKKARACAN/Liz ERÇEVİK AMADO, **Turkish Civil and Penal Code Reforms From a Gender Perspective: The Success of Two Nationwide Campaigns**, Women for Women's Rights- NEW WAYS, 2005, p. 5.

⁶² ARAT, 2001, p. 29; ANIL/ BERKTAY HACİMİRZAOĞLU/ BİNGÖLLÜ/ İLKKARACAN/ ERÇEVİK AMADO, 2005, p. 6.

⁶³ Şirin TEKELİ, "80'lerde Kadınların Kurtuluş Hareketinin Gelişimi", **Birikim**, Vol. 3, 1989, p. 38.

⁶⁴ TEKELİ, 1989, p. 39; ARAT, 2001, p. 30.

⁶⁵ ARAT, 2001, p. 31.

⁶⁶ ANIL/BERKTAY HACİMİRZAOĞLU/BİNGÖLLÜ/İLKKARACAN/ERÇEVİK AMADO, 2005, p. 7.

⁶⁷ The Constitutional Court dated 29. 11. 1990, E. 1990/ 30, K. 1990/ 31. (http://www.kararlar.anayasa.gov.tr/kararYeni.php?l=manage_karar&ref=show&action=karar&id=923&content=, Last accessed: 25. 10. 2013) 02. 07. 1992, Official Gazette No. : 21272.

the Turkish Grand Assembly in 1990.⁶⁸ In 1996, Articles 440 and 441 of the Turkish Criminal Code that considered adultery by women and men separately were came under discussion as they imposed unequal measures for the two sexes. Article 440 defined adultery by women simply as sexual relations between a married woman and a man other than her husband, while Article 441, defining adultery by men, required additional proof that a married man was openly living with another woman. Article 441 was annulled by the Constitutional Court in October 1996⁶⁹, and the legislature was given one year to either replace the annulled article with a new one, or to annul article 440 regarding adultery by women. In the latter case, which is the option supported by most women's groups, adultery would no longer be considered a criminal offense, merely remaining one of the valid legal grounds for divorce as in the Civil Code. When the Turkish General Assembly failed to act on Article 440, the Constitutional Court annulled the article in June 1998.⁷⁰

In general, the option of ratifying the Convention with reservations aims to allow participating states the time necessary to make the required changes in their legal and administrative systems in line with the object and purpose of CEDAW. States parties agree to take all appropriate measures, including legislation and temporary special measures, so that women can enjoy all their human rights and fundamental freedoms. In order to comply with CEDAW, Turkey had to take all appropriate mea-

⁶⁸ Unfortunately, the Turkish Constitutional Court did not annul this provision in 1989. See The Constitutional Court dated 12. 01. 1989, E. 1988/4, K. 1989/3. (http://www.kararlar.anayasa.gov.tr/kararYeni.php?l=manage_karar&ref=show&action=karar&id=846&content=, Last accessed: 25. 10. 2013). 10. 01. 1990, Official Gazette No. : 20398. Act numbered 3679 Article 28 was annulled former Turkish Criminal Code Article 438. See 29. 11. 1990, Official Gazette No. : 20710.

⁶⁹ The Constitutional Court dated 23. 09. 1996, E. 1996/15, K. 1996/34. (http://www.kararlar.anayasa.gov.tr/kararYeni.php?l=manage_karar&ref=show&action=karar&id=1281&content=, Last accessed: 25. 10. 2013). 27. 12. 1996, Official Gazette No. : 22860.

⁷⁰ The Constitutional Court dated 23. 06. 1998 T., E. 1998/3, K. 1996/28. (http://www.kararlar.anayasa.gov.tr/kararYeni.php?l=manage_karar&ref=show&action=karar&id=1396&content=, Last accessed: 25. 10. 2013). 13. 03. 1999, Official Gazette No. : 23638.

asures, modifying or abolishing existing laws, regulations, customs and practices that constitute discrimination against women.

Most of the discriminatory clauses were amended in compliance with the norm of non-discrimination, thereby bringing the Civil Code in line with the convention. The new Civil Code was adopted by the Turkish Parliament on November 22, 2001 and came into effect on January 1, 2002.⁷¹

Additionally, in October 2001, Article 41 of the Constitution was amended to define the family as an entity that is “based on equality between the spouses”.⁷² Other amendments made to the Turkish Constitution after 2001, concerning gender equality and abiding international human rights instruments, will be explained in relevant sections of this paper.

Both the Directorate General on the Status and Problems of Women (DGSPW) and the feminist women movement⁷³ played an active role in the long and difficult process of drafting the new Civil Code, bringing to the attention of the commission mandated by the Ministry of Justice to draft the Civil Code, the issues that needed to be addressed in order to eliminate discriminatory clauses and those that sustained discriminatory

⁷¹ 08. 12. 2001, Official Gazette No. : 24607.

⁷² In 2010 two paragraphs also added to Article 41. Article 41 of the Turkish Constitution reads as follows:

Article 41- (Paragraph added on October 3, 2001; Act No. 4709) The family is the foundation of Turkish society and based on equality between the spouses. The State shall take the necessary measures and establish the necessary organizations to protect the peace and welfare of the family, especially

(Paragraph added on September 12, 2010; Act No. 5982) Every child has the right to protection and care and the right to have and maintain a personal and direct relation with his/her mother and father unless it is contrary to his/her high interests.

(Paragraph added on September 12, 2010; Act No. 5982) The State shall take measures for the protection of children against all kinds of abuse and violence.

⁷³ See ANIL/BERKTAY HACİMİRZAOĞLU/BİNGÖLLÜ/İLKKARACAN/ERCEV-İK AMADO, 2005, pp. 7-8

practices and restricted women's enjoyment of their fundamental rights and freedoms.⁷⁴

TCC has taken a new approach to the family and women's role within the family. Along with this approach it is targeted to eliminate gender discrimination where it is continually reproduced in a very intimate level. TCC has much more simplified and accessible language that public can understand it easier than fTCC. TCC tried to establish equality between the spouses in several ways. First of all the concept of the male head of the family union has been replaced by equal partnership where the spouses manage their family life with equal decision making authority. Furthermore spouses have equal rights over the family domicile and equal representational powers.⁷⁵ Other important change is that the minimum age of marriage has been raised and equalized for both sexes. The most significant but unfortunately not totally completed amendment under TCC is the regime regarding the Ownership of Acquired Property as the legal property regime (Articles 218-241 TCC).

Although the legal basis for this completely revised code was to build gender equality between men and women, some provisions still violate gender equality and CEDAW provisions.⁷⁶ The scope of this study only allows us to examine the compatibility of Articles 15 and 16 of CEDAW and Turkish Civil Code. The following sections will critically discuss the changes in the Turkish Civil Code regarding these two articles.

III. Equality before the Law and in Civil Matters

A. Article 15 (1)

Article 15 paragraphs 1 of CEDAW states that states parties shall accord to women equality with men before the law. Article 15 paragraphs 1 is followed by additional provisions dealing with equality in regard to women's legal capacity in specific areas of civil law, such as acquiring a

⁷⁴ CEDAW/C/TUR/4-5, p. 4.

⁷⁵ CEDAW/C/TUR/4-5, p. 4.

⁷⁶ CEDAW/C/TUR/4-5, p. 4.

domicile, freedom of movement and residence.⁷⁷ Turkey did not put any reservations on Article 15 paragraphs 1 in light of its existing constitutional provisions on equality. Article 10 of the Turkish Constitution states in its first paragraph that everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or on any other such grounds. Turkey's participation in CEDAW, following the CEDAW Committee's Concluding Comments, together with the European Union integration process, has forced the Turkish government to make certain amendments to its national legislation, starting from the Constitution.

Changes made to the Constitution, the Civil Code and other legislation have produced considerable advances in the equality of women and men before the law. After the combined second and third periodic reports on Turkey,⁷⁸ the CEDAW Committee⁷⁹ made its first concluding comments regarding Turkey. In response to these concluding comments, Articles 41 and 66 of the Constitution were amended, effective as of October 2001, to abolish the legal supremacy of the husband by adding to the clause "family is the basis of society" the phrase "and it relies on the equality of husband and wife" (Article 41).⁸⁰ Article 66 was amended to remove the clause "the nationality of a child born to a Turkish mother and foreign father is regulated by law" to eliminate the former inequality between women and men.⁸¹ Beside these amendments, in 2004, a new sentence was added to Article 90 paragraphs 5 of the Constitution⁸² stating that "no appeal to the Constitutional Court shall be made with regard

⁷⁷ Savitri W. E. GOONESEKERE, "Article 15", in Edited Marsha A. Freeman, Christine Chinkin, Beate Rudolf, **The UN on the Elimination of All Forms of Discrimination against Women A Commentary**, Oxford University Press, New York, 2012, p. 388.

⁷⁸ CEDAW/C/TUR/2-3.

⁷⁹ http://www2.ohchr.org/english/bodies/cedaw/docs/TurkeyCO16_en.pdf (Last accessed: 25. 10. 2013)

⁸⁰ See *supra* note 72.

⁸¹ Article 66 paragraph 2 of the Constitution reads as follows: "The child of a Turkish father or a Turkish mother is a Turk. (Sentence repealed on October 3, 2001; Act No. 4709)".

⁸² Sentence added on May 7, 2004; Act No. 5170.

to these agreements, on the grounds that they are unconstitutional”⁸³ This sentence ensured the supremacy of international conventions, including the CEDAW, over national legislation, which entails that if national legislation, such as the Turkish Civil Code contradicts CEDAW then CEDAW’s articles should be applied instead of the Turkish Civil Code.

Amendment of Article 10 of the Constitution in May 2004⁸⁴ made the state responsible both for ensuring non-discrimination between women and men and taking the necessary measures to provide equal rights and opportunities in practice for women in every field. These amendments were commended by the CEDAW Committee in its concluding comments⁸⁵ for the combined fourth and fifth periodic report for Turkey.⁸⁶ However, the Committee further recommended Turkey to include in its Constitution a definition of discrimination against women in line with Article 1 of the Convention, or else in its relevant laws.⁸⁷ Unfortunately, Turkey has not yet amended Article 10 of the Constitution in line with Article 1 of the Convention, although it made several changes in 2010.

⁸³ Article 90 paragraph 5 of the Constitution reads in full as follows:

“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”.

⁸⁴ Article 10 of the Constitution 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.

(Paragraph added on May 7, 2004; Art No. 5170) Men and women have equal rights. The state has the obligation to ensure that women have equal rights. The state has the obligation to ensure that 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”.

⁸⁵ CEDAW/C/TUR/CC/4-5, paragraph 17.

⁸⁶ CEDAW/C/TUR/4-5 and Corr.1.

⁸⁷ CEDAW/C/TUR/CC/4-5, paragraphs 23-24.

The CEDAW Committee made clear in its last concluding comments that it was concerned at the lack of specific prohibition of discrimination against women in all areas of life in Turkey's national legislation in line with Articles 1 and 2 of the Convention.⁸⁸ Although equality between women and men is ensured by the Constitution, actual legislative norms do not always allow for real equality in practice. Therefore, both customs and minds will also need to be changed for the full implementation of the Convention to take place.

Although Turkey did not put any reservations on this paragraph of Article 15, the fTCC was incompatible with this norm too because it systematically placed married women in a secondary, subordinate position to their husbands. On November 22 2001, the Turkish Parliament adopted the new Turkish Civil Code, which came into force on January 1 2002. The TCC's main goal was to ensure gender equality between spouses, especially in its family law section. The following sections will present the differences between fTCC and TCC in order to evaluate their compatibility.

B. Article 15 (2) and 15 (3)

Article 15 paragraphs 2 and 3 of CEDAW are strongly connected to each other, so they will be analysed together. Article 15 (2)⁸⁹ sets out the general norms regulating legal capacity in civil matters, while Article 15 (3)⁹⁰ prohibits contracts that are contrary to the rules set out in Article 15 (2). The standards stated in Article 15 (2) are clearly limited to civil matters and exclude criminal matters. By "civil", the Convention means legal

⁸⁸ CEDAW/C/TUR/CO/6, paragraph 10.

⁸⁹ Article 15 paragraphs 2 of CEDAW reads as follows:

"15. 2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals".

⁹⁰ Article 15 paragraphs 2 of CEDAW reads as follows:

"15.3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect, which is directed at restricting the legal capacity of women, shall be deemed null and void".

relations between private persons as opposed to legal relations between a private person and holder of state power.⁹¹ The CEDAW Committee in its General Recommendation 21 stressed that “when a woman cannot enter into a contract at all, or have access to financial credit, or can do so only with her husband’s or a male relative’s concurrence or guarantee, she is denied legal autonomy. Any such restriction prevents her from holding property as the sole owner and precludes her from the legal management of her own business or from entering into any other form of contract. Such restrictions seriously limit the woman’s ability to provide for herself and her dependents”.⁹² The Committee further added “when countries limit a woman’s legal capacity by their laws, or permit individuals or institutions to do the same, they are denying women their rights to be equal with men and restricting women’s ability to provide for themselves and their dependents”.⁹³

Turkey put reservation on Article 15 paragraphs 2 because of conflicts between fTCC’s regulations and CEDAW. Article 152 of the fTCC stated that the husband was the head of the family and that the selection of the home, nutrition and other requirements of his spouse were his responsibility. According to Article 154 of the fTCC, the husband solely represented the family union. Even if property division principles had been accepted by both partners, the husband was personally responsible for any actions taken. Article 155 of the fTCC further stated that for the on-going requirements of the home, the wife was equally entitled to represent the family along with the husband. However, the husband was still responsible for all her actions so long as she did not go beyond her authorities. Article 21 of the fTCC indicated that the husband’s residence was deemed to be that of his wife and the residence of the parents was to be that of any children under their guardianship. The place where the court was located was considered to be the residence of the persons under legal responsibility.

⁹¹ GOONESEKERE, 2012, p. 395.

⁹² General Recommendation 21 (on Articles 9, 15, 16), 1994, para 7.

⁹³ General Recommendation 21 (on Articles 9, 15, 16), 1994, para 8.

In contrast, the new Turkish Civil Code provides women and men with equal legal capacity and the right to exercise that capacity. Women and men also share equal representational authority (Article 189), as well as equal entitlement to engage in legal transactions with each other or third parties (Article 193).⁹⁴ Spouses have equal rights over matters relating to the family domicile (Article 194).⁹⁵ Thus, neither of the spouses alone can annul a rental agreement related to the family home, transfer ownership of the house nor limit rights related to the domicile without the consent of the other partner.⁹⁶ The law, in this regard, of the spouse who is not the legal owner of the family domicile ensures the right to live there. Women, without any restriction, may also purchase, manage and sell property or goods. Articles 167, 168, 169 of the fTCC have been dropped from the new Turkish Civil Code due to their incompatibility with gender equality.⁹⁷ According to these former provisions, compulsory execution between spouses was forbidden and a wife had to get court approval before signing as a guarantor for her husband.

Finally, the amendment of Article 661, which formerly gave priority to male children to inherit agricultural holdings in order to prevent land fragmentation, corrected the most salient discriminatory character of the inheritance law. TCC makes no reference to either sons or daughters.⁹⁸

⁹⁴ Mustafa DURAL/Tufan ÖĞÜZ/Mustafa Alper Gümüş, *Türk Özel Hukuku Cilt III Aile Hukuku*, Filiz Kitabevi, İstanbul, 2011, p. 169.

⁹⁵ ÖZDAMAR, 2002, p. 253; ANIL/BERKTAY HACİMİRZAOĞLU/BİNGÖLLÜ/İLKKARACAN/ERCEVİK AMADO, 2005, p. 26.

⁹⁶ Demet ÖZDAMAR, *CEDAW Sözleşmesi*, Seçkin Yayıncılık, Ankara, 2009, pp. 32-323.

⁹⁷ ÖZDAMAR, 2002, p. 260.

⁹⁸ Article 598 of the fTCC stipulated that if the male heirs of the deceased did not demand any rights, such as the management of an agricultural property, the possessor's daughters or their husbands would be assigned such a property on the condition that they were capable of managing it. Although this provision aimed to avoid the division of agricultural land into uneconomic fragments, since the majority of the women in Turkey were/are unpaid family workers, there is no doubt that this provision contradicted gender equality.

C. Article 15 (4)

Article 15 paragraphs 4⁹⁹ of the Convention addresses the specific circumstances in which women's rights to freedom of movement may be restricted. Domicile is a concept in common law countries referring to the country in which a person intends to reside and to whose jurisdiction she will submit. Domicile is originally acquired by a child through its parents but, in adulthood, denotes the country in which a person normally resides and in which she intends to reside permanently.¹⁰⁰ According to the Committee, "domicile, like nationality, should be capable of change at will by an adult woman regardless of her marital status. Any restrictions on a woman's right to choose a domicile on the same basis as a man may limit her access to the courts in the country in which she lives or prevent her from entering and leaving a country freely and in her own right."¹⁰¹

The Convention rejects the principle of dependent domicile, which led Turkey to put a reservation on Article 15 (4) of CEDAW. When Turkey first ratified the Convention, Article 21 of the fTCC was incompatible with this provision because, according to Article 21 of the fTCC, as mentioned above, a married women's domicile was dependent on her husband's domicile, making this article a clear violation of Article 15 paragraphs 4 of CEDAW. TCC denotes that spouses jointly choose the place of domicile (Article 186), while the clause in fTCC that established the wife's place of domicile as the domicile of her husband has been removed from the definition of legal domicile. TCC now states that spouses reside together (Article 185 TCC),¹⁰² and that women, whether single or married, have the same rights of movement as men. A woman carrying a valid passport may travel abroad whenever she wishes. Follow-

⁹⁹ Article 15 (4) states as follows:

"15.4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile".

¹⁰⁰ General Recommendation 21 (on Articles 9, 15, 16), 1994, para 9.

¹⁰¹ General Recommendation 21 (on Articles 9, 15, 16), 1994, para 9.

¹⁰² CEDAW/C/TUR/4-5, p. 46.

ing these changes, Turkey withdrew its reservation on 15 paragraphs 4 of CEDAW.¹⁰³

IV. Equality in Marriage and Family Law

Historically, human activity in public and private life has been viewed differently and regulated accordingly. In all societies, women, who have traditionally performed their roles in the private or domestic sphere, have long had those activities treated as inferior.¹⁰⁴ However, since such activities are essential for the survival of society, there can be no justification for applying different and discriminatory laws or customs to them. The CEDAW Committee denoted in General Recommendation 21 that “reports of states parties disclose that there are still countries where *de jure* equality does not exist. Women are thereby prevented from having equal access to resources and from enjoying equality of status in the family and society. Even where *de jure* equality exists, all societies assign different roles, which are regarded as inferior, to women. In this way, principles of justice and equality contained in particular in article 16 and also in articles 2, 5 and 24 of the Convention are being violated”¹⁰⁵

Article 16 of the Convention provides for equality between women and men in all aspects of marriage and dissolution of marriage, prohibits child marriage, and requires states parties to introduce a minimum age for marriage and to require marriage registration.¹⁰⁶ In conjunction with Articles 2, 5 and 24, Article 16 requires state parties to prohibit discrimination, to eliminate discrimination in personal status law, and to address gender stereotyping and customary and religious law and practices that support persistent gender inequality in the family.¹⁰⁷

¹⁰³ ÖZDAMAR, 2009, p. 324-329.

¹⁰⁴ General Recommendation 21 (on Articles 9, 15, 16), 1994, para 11.

¹⁰⁵ General Recommendation 21 (on Articles 9, 15, 16), 1994, para 12.

¹⁰⁶ Marsha A. FREEMAN, “Article 16”, in Edited Marsha A. Freeman, Christine Chinkin, Beate Rudolf, **The UN on the Elimination of All Forms of Discrimination against Women A Commentary**, Oxford University Press, New York, 2012, p. 410.

¹⁰⁷ FREEMAN, 2012, p. 411.

Turkey put reservations on Article 16 paragraphs 1 (c), (d), (f), (g) as these provisions were incompatible with the family law section of fTCC particularly those pertaining to women's legal capacity, such as the right to enter into contractual relationships, responsibilities concerning children, and choice of domicile, family name, work and job. These provisions and their incompatibility with the fTCC's regulations will be examined further below.

A. Article 16 (1) a

Article 16 paragraphs 1 (a)¹⁰⁸ requires states parties to grant women and men the same rights to enter marriage. In Turkey, *de jure*, women and men share an equal right to enter into marriage under the law. Since 1926, religious marriage has been a crime if done before civil marriage. Couples wishing to get married apply jointly to the marriage registry office located in the place of residence of either one of the partners and openly declare their free choice in the presence of the official performing the marriage and two witnesses.

According to Article 88 of fTCC, marriages cannot be realized unless the man has reached eighteen and the woman has reached sixteen years of age. However given justifiable reasons, a competent court may approve the marriage of a fifteen-year-old man a fourteen-year-old woman, after having the parents or guardians permission. Although Turkey did not put a reservation on this provision, Article 88 fTCC contradicted CEDAW because it included different minimum ages for marriage for men and women below the age of legal competence. Article 124 of TCC therefore raised and equalized the minimum age of marriage, such that women and men may only get married when they are 17 years old, although parental consent is required as this remains below the age of legal competence. While minors who are 16 years old may get married with

¹⁰⁸ Article 16 (1) a states as follows:

“Article 16. 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

a. *The same right to enter into marriage;*”

the permission of their legal guardian and the decision of a judge of the Court of Peace (Articles 126 and 128 TCC).¹⁰⁹

Turkish law seems to provide at least *de jure* equality between spouses in entering marriage. However, women's *de facto* enjoyment of their right to enter marriage is limited by religious and customary practices and social attitudes, for example, the right of divorced or widowed women to remarry. Article 132 TCC requires a waiting period, of almost a year (300 days), for women before remarriage. Similar restrictions are not mandated for men because this waiting period is deemed necessary to determine a potential child's father. However, in the 21st century this waiting period is unacceptable since tests are available that can prove whether a widowed or divorced woman is pregnant or not.¹¹⁰ In its Concluding Comments, the CEDAW Committee expressed its concerns about this regulation.¹¹¹

B. Article 16 (1) b

Article 16 paragraphs 1 (b)¹¹² provides a freedom to choose a spouse and freely consent to marriage. A woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being.¹¹³ Arranged or forced marriages must be forbidden.

In Turkey, civil marriage is one of the fundamental principles underlying the law regulating marriages, which was adopted with the establishment of the Turkish Republic in 1926, when the fTCC came into force. This principle is still reflected in Articles 142 and 143 of the new Civil

¹⁰⁹ ANIL/BERKTAY HACİMİRZAOĞLU/BİNGÖLLÜ/İLKKARACAN/ERCEVİK AMADO, 2005, p. 18.

¹¹⁰ ANIL/BERKTAY HACİMİRZAOĞLU/BİNGÖLLÜ/İLKKARACAN/ERCEVİK AMADO, 2005, pp. 21-22.

¹¹¹ CEDAW/C/TUR/CO/6, 2010, paragraphs 40-41.

¹¹² Article 16 paragraph 1 (b) reads as follows:

“(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent”

¹¹³ General Recommendation 21 (on Articles 9, 15, 16), 1994, para 16.

Code, which state that the basic condition of marriage is the full and free consent of those getting married, whether minors or an adults.¹¹⁴

Yet, although Turkey provides *de jure* equality regarding this provision, in rural areas young girls so called child brides are still forced to marry older men for payment.¹¹⁵ There are still nationwide campaigns to end early marriages, especially for young girls.

C. Article 16 (1) c

Article 16 paragraphs 1 (c) denotes that, from the beginning to the end of a marital relationship, the partners are equal in capacities and rights.¹¹⁶ The CEDAW Committee stated in its General Recommendation 21 that “the husband being accorded the status of head of household and primary decision maker and therefore contravene the provisions of the Convention”.¹¹⁷ CEDAW General Recommendation 21 did not offer any explanations about matters relating the divorce process as opposed to the property aspects.

According to Article 186 of the TCC, the spouses jointly make decisions regarding the marriage union and contribute to the expenditure of the family according to their capability. This clause replaces and eliminates the principle contained in fTCC that the husband, as the household head, is responsible for the sustenance of the household and the

¹¹⁴ CEDAW/C/TUR/4-5, p. 47.

¹¹⁵ ANIL/BERKTAY HACİMİRZAOĞLU/BİNGÖLLÜ/İLKKARACAN/ERCEVİK AMADO, 2005, pp. 23-24.

In Eastern and South Eastern Anatolia, berdel (exchange), child marriage, marriage with dowry, marriage to end blood feuds, polygamy, brother-in-law marriage and consanguineous marriage are considered normal within the context of local traditions and customs. See The Shadow NGO Report on the 4th and 5th Combined Periodic Country Report for Turkey, the Executive Committee for NGO Forum on CEDAW-TURKEY: November 2004, pp. 9-10.

¹¹⁶ Article 16 paragraph 1 (c) reads as follows:

“(c) The rights and responsibilities during marriage and at its dissolution”

¹¹⁷ General Recommendation 21 (on Articles 9, 15, 16), 1994, para 17.

maintenance of its members, particularly, the wife and the children.¹¹⁸ The equal rights and responsibilities granted to women and men during marriage under the law are also foreseen in case of divorce. The law refers to “irretrievable breakdown of marriage”, which comprises a wide range of issues that may lead either one of the spouses to file for divorce (Article 166).¹¹⁹ Additionally, the law specifies particular situations, such as adultery, desertion, insanity, detrimental treatment or commitment of a humiliating crime, which may provide grounds for divorce (Articles 161-165 TCC). Besides these reasons, “severely degrading attitude towards either spouse” became grounds for divorce for the first time (Article 162 TCC).

In the event of a divorce, the law protects the personal legal status that a woman obtained during marriage, for instance nationality. That means that women can return to their surnames that they had before the marriage after the divorce (Article 173 TCC). With this regulation, in contrast to Article 141 fTCC, women can now have three surnames after the divorce: her unmarried name, her previous husband’s surname and her last husband’s surname. However, the fact that only women have to change their surnames depending on any change in their personal lives, is not compatible with either the Convention or the Turkish Constitution. This gap in the Turkish Civil Code will be broadly explained further below. The law also regulates, in a non-discriminate manner, matters with regard to alimony (Articles 175 to 178) and compensation for potential or actual damages resulting from the divorce (Articles 174 and 176).¹²⁰ Before these changes, only men had to pay alimony.

Finally, Article 170 of the fTCC should be explained regarding Article 16 paragraphs 1 (c). According this, the legal matrimonial property system was “Separation of Property”, as long as spouses had made a contract before entering the marriage. Women could not claim any rights on the properties registered in the husband’s name even if she

¹¹⁸ ANIL/BERKTAY HACİMİRZAOĞLU/BİNGÖLLÜ/İLKARACAN/ERCEVİK AMADO, 2005, p. 25.

¹¹⁹ CEDAW/C/TUR/4-5, p. 47.

¹²⁰ CEDAW/C/TUR/4-5, p. 47.

had contributed to the acquisition of the property. A great majority of women consequently suffered losses in case of divorce. This regulation was completely incompatible with the Convention and that was one of the reasons that Turkey put a reservation on Article 16 paragraphs 1 (c). The legal property regime adopted by the new Civil Code is the Regime Regarding the Ownership of Acquired Property (Articles 218-241 TCC). This regime introduces the provision that the added value of all property acquired during marriage shall be shared equally in the case of divorce. By adopting an egalitarian matrimonial property regime, the new law not only recognizes the monetary contributions made by the partners to the marriage, but also acknowledges the value of the physical and mental labour that goes into the reproduction of the daily life of the family. Thus, the new property regime recognizes the unpaid work of women within the household. The new property regime is valid so long as couples do not choose another regime in writing before or after they get married.¹²¹ Further explanations about these regulations will be given later sections, including its application. With these new regulations, Turkey was able to withdraw its reservations on Article 16 paragraph 1 (c) of the Convention.

D. Article 16 (1) d

Article 16 paragraphs 1 (d) relates to the determination of child custody upon the dissolution of marriage or other *de facto* union.¹²² Each parent's ability of care for the children should be evaluated without recourse to gender stereotypes relating to parenting capabilities.¹²³ Article 5 (b) of the Convention also requires the shared responsibility of parents for the care, protection and maintenance of children. The principle that "the best interests of the child shall be the paramount consideration" is

¹²¹ CEDAW/C/TUR/4-5, p. 49.

¹²² Article 16 paragraphs 1 (d) states as follows:

"(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount".

¹²³ FREEMAN, 2012, p. 428.

included in the Convention on the Rights of the Child¹²⁴ and universally accepted.

Both parents share equal parental authority over their children. The clause in fTCC that gave the final authority to the father over matters related to children in the event of a disagreement between the parents has been removed from the TCC. Parental authority over children born out of wedlock belongs to the mother (Article 337) and the issue of the legitimacy of such children has been discarded, with the term “illegitimate” to refer to children born out of wedlock being eliminated. Article 321 of the TCC denotes that a child born to an unwed woman bears the mother’s surname, unless there is another public acknowledgment of paternity or court ruling. Nevertheless in 2006 legislator made a change in special law regarding register of births services.¹²⁵ Article 28 paragraphs 4 of Act. 5490 stated that a child born out of wedlock would automatically take his/her father’s surname after father’s public acknowledgment of paternity. In conjunction with this regulation, content of Article 321 has been changed indirectly.¹²⁶ However, although the legislators took one step forward and two steps back regarding this matter, in 2009 the Constitutional Court annulled the sentence allowing an unwed mother to give her surname to her child.¹²⁷ The Constitutional Court claimed as legal ground for this decision that it is the best interest of the child to carry his/her father’s surname and with this annulment there would

¹²⁴ GA res 44/25 of 20 November 1989, entry into force 2 September 1990.

¹²⁵ Act No 5490, 29. 04. 2006, Official Gazette No. : 26153.

¹²⁶ Serkan AYAN, “Anayasa Mahkemesi Kararları ve Çocuklar ve Kadının Soyadına İlişkin Değişiklik Tasarısı Taslağı Işığında Soyadının İlk Kez Edinilmesi, Kendiliğinden Değişmesi, Değiştirilmesi”, **Gazi Üniversitesi Hukuk Fakültesi Dergisi**, Vol. : XVI, No. : 4, 2012, p. 27; DURAL/ÖĞÜZ/GÜMÜŞ, 2011, p. 316; Cem BAYGIN, **Soybağı Hukuku**, İstanbul, 2010, p. 99.

See counterinterview: Saibe OKTAY-ÖZDEMİR, “Aile Hukukunda Eşitliğe Aykırı Hükümler”, **Prof. Dr. Zahit İmre’ye Armağan**, İstanbul, 2009, p. 298.

¹²⁷ The Constitutional Court dated 02. 07. 2009, E. 2005/114, K. 2009/105. (http://www.kararlar.anayasa.gov.tr/kararYeni.php?l=manage_karar&ref=show&action=-karar&id=2787&content=, Last accessed: 28. 10. 2013). 07. 10. 2009, Official Gazette No. : 27369.

be no discrimination towards a child who born out of wedlock.¹²⁸ This decision obviously is not in the best interests of the child¹²⁹ due to fact that having a different surname to the mother would lead to unnecessary questions in many situations regarding the child's health, education and social institutions, their relations with their peers. Furthermore there is no logical explanation to as in the Constitutional Court's decision stated that the social protection level would be increased when the child bears his/her father's surname. Why has the child lower level of social protection when he/she carries his/her mother's surname? Additionally when single mother has the sole custody of the child, why the father who was forced to give his public acknowledgment of paternity by a court decision should give his surname to the child? At that point it must be stressed that if Turkey really wants to make its legislations compatible with CEDAW and other international human rights instruments, first the patriarchal mind of the legislator and the Constitutional Court should change.

E. Article 16 (1) e

Article 16 paragraphs 1 (e)¹³⁰ makes connections to Articles 10, 12, 14 of the Convention in reaffirming the right freely to choose the number and spacing of children and the obligations of states parties to provide education and services to fulfil this right.¹³¹ The Committee also denoted that “the responsibilities that women have to bear and raise children affect their right of access to education, employment and other activities related to their personal development. They also impose inequitable

¹²⁸ M. Kemal OĞUZMAN/Özer SELİÇİ/Saibe OKTAY-ÖZDEMİR, **Kişiler Hukuku (Gerçek ve Tüzel Kişiler)**, 11. Edition, İstanbul, 2011, p. 103.

¹²⁹ Compare *see*: Ayça AKKAYAN YILDIRIM, “Evlilik Dışı Çocuğun Soyadı ve 02.07.2009 Tarih 2005/114 E. 2009/105 K. Sayılı Anayasa Mahkemesi Kararının Bu Bağlamda Değerlendirilmesi” **Prof. Dr. Rona SEROZAN’a Armağan**, C. I, İstanbul 2010, p. 83. Ayan, 2012, p. 29; Rona SEROZAN, “Soybağı Üzerine Çeşitlemeler”, **Prof. Dr. Bilge Öztan’a Armağan**, Ankara, 2008, p. 770.

¹³⁰ Article 16 paragraphs 1 (e) states as follows;

“(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights”.

¹³¹ FREEMAN, 2012, p. 429.

burdens of work on women. The number and spacing of their children have a similar impact on women's lives and also affect their physical and mental health, as well as that of their children. For these reasons, women are entitled to decide on the number and spacing of their children".¹³² Furthermore, forced pregnancies, abortions or sterilization must be eliminated. Decisions to have children or not, while preferably made in consultation with the spouse or partner, must nevertheless not be limited by a spouse, parent, partner or government.¹³³

Abortion was legalized in Turkey in 1983¹³⁴. Under the Turkish Law an abortion can usually only be carried out during the first 10 weeks of pregnancy (Article 5 of Act Numbered 2827). However Article 6 of Act Numbered 2827 compels married women to get their husband's consent in order to have an abortion or sterilization or hysterectomy. Whereas married woman's decision to have an abortion is her right to decide about matters concerning her own body and that right cannot be taken away from her. Unfortunately there was a debate concerning to impose stricter limits for abortion in 2012. However, there was a massive public campaign against rumour of this draft law. Fortunately, consideration of the draft law has been postponed so it has not yet come into force.

F. Article 16 (1) f

Article 16 paragraphs 1 (f)¹³⁵ should be read in connection with Article 16 paragraphs 1 (d). The Committee stated in General Recommendation 21 that "the shared rights and responsibilities in the Convention should be enforced at law and as appropriate through legal concepts of guardianship, wardship, trusteeship and adoption. States parties should ensure that by their laws both parents, regardless of their marital status

¹³² General Recommendation 21 (on Articles 9, 15, 16), 1994, para 21.

¹³³ General Recommendation 21 (on Articles 9, 15, 16), 1994, para 22.

¹³⁴ Act No 2827, 27. 05. 1983, Official Gazette No. : 18059.

¹³⁵ Article 16 paragraphs 1 (e) states as follows;

"(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount".

and whether they live with their children or not, share equal rights and responsibilities for their children”.¹³⁶ By this, the Committee intends that the legal concepts of guardianship, wardship, trusteeship and adoption are applied to biological children as well.¹³⁷

In Turkey, children who have not reached majority remain in the custody of their both parents unless this right is revoked for legal reasons in accordance with Article 335 TCC. Custody is shared equally between the parents as long as the marriage union continues. However, in the event of a divorce the judge may grant custody of the child to one of the spouses. Neither of the parents hold any superiority over the other regarding this matter. The parent who has not been granted custody is obligated to share the financial burden of raising the children. The court also determines visitation rights in view of the interests of the children. In practice, judges tend to award guardianship of younger children to the mother unless there are exceptional circumstances.¹³⁸

TCC does not make any clear statement about joint custody of the child after the divorce. Even so if Article 182 paragraphs 2 and Article 336 paragraphs 3 of TCC are construed in conjunction with Article 1 paragraphs 2 of TCC, divorced couples can share joint custody.¹³⁹ Joint custody will be in every way for the best interest of the child.

Women and men who are 30 years of age and above have the right to adopt a child as a single person or jointly as a couple married for at least five years. Unmarried couples cannot adopt jointly. A new article added to TCC denotes that spouses are also under the obligation to care for and show compassion for their young stepchildren (Article 338 TCC).¹⁴⁰

¹³⁶ General Recommendation 21 (on Articles 9, 15, 16), 1994, para 20.

¹³⁷ FREEMAN, 2012, p. 430.

¹³⁸ CEDAW/C/TUR/4-5, p. 48.

¹³⁹ İlknur SERDAR, “Birlikte Velayet”, *Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi*, Vol. : 10, No. : 1, 2008, pp. 169-185.

¹⁴⁰ CEDAW/C/TUR/4-5, p. 48.

F. Article 16 (1) g

Article 16 paragraphs 1 (g)¹⁴¹ has two aspects: one which Turkey has consistently failed to fulfil, and one which, since 1990, has been compatible with the Convention. The right to choose a family name enables married woman to keep her maiden name as part of her identity and transmit it to her children. The Committee stated “partners should have the right to choose their name, thereby preserving their individuality and identity in the community and distinguishing them from other members of society. When by law or custom a woman is obliged to change her name on marriage or at its dissolution, she is denied these rights”.¹⁴²

Article 153 fTCC emphasized that the wife had to bear her husband’s name, while men never had to change their surname their entire life. In the 1997 amendment¹⁴³, which allows a woman, upon marriage, to retain and use her surname before her husband’s surname or to take his, has been retained in the new Turkish Civil Code (Article 187 TCC). According to Article 187 of the TCC, a married woman can use her former surname between her first name and her husband’s surname provided that she makes the necessary applications to the authorities at the time of marriage or any time after. Nevertheless, this provision is regarded as insufficient in Turkey with respect to equality between women and men, taking into consideration Articles 10, 41 and 90 of the Turkish Constitution and the provisions of the CEDAW, as well as the European Convention on Human Rights. The European Court of Human Rights (ECHR) held that the difference in treatment in question contravened Article 14 taken in conjunction with Article 8.¹⁴⁴ Unfortunately, however, the Turkish Constitutional Court rejected applications concerning Article 153

¹⁴¹ Article 16 paragraph 1 (e) states as follows;

“(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation”.

¹⁴² General Recommendation 21 (on Articles 9, 15, 16), 1994, para 24.

¹⁴³ Act No. :4248, 22. 05. 1997, Official Gazette No. : 22996.

¹⁴⁴ In 2004 Ünal Tekeli v. Turkey Application No. : 29865/96 and most recently in 2013 Tuncer Güneş v. Turkey Application No. : 26268/08.

fTCC and Article 187 TCC, in 1998¹⁴⁵ and 2011 respectively.¹⁴⁶ In its recent decision, the court mentioned neither CEDAW nor the ECHR's judgment against Turkey.¹⁴⁷

Married women in Turkey cannot use their maiden name alone even if both spouses agree to such an arrangement. The possibility made available by the Turkish legislature on November 22, 2001 of putting the maiden name in front of the husband's surname does not alter that position. Thus, the interests of married women who do not want their marriage to affect their name have not been taken into consideration. Despite the enactment of TCC in 2001, the provisions concerning the family name after marriage, including those obliging married women to take their husband's name, have remained unchanged. One of the reasons was to maintain family unity by using the husband's surname as a family name, although it should be noted that family unity can be reflected just as well by choosing the wife's surname or a joint name chosen by the couple.¹⁴⁸ Family unity will also be preserved and consolidated where a married couple chooses not to bear a joint family name. The ECHR stated explicitly "the obligation on married women, in the name of family unity, to bear their husband's surname – even if they can put their maiden name in front of it – has no objective and reasonable justification. Society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the name they have chosen"¹⁴⁹

¹⁴⁵ The Constitutional Court dated 29. 09. 1998, E. 1997/61, K. 1998/59. (http://www.kararlar.anayasa.gov.tr/kararYeni.php?l=manage_karar&ref=show&action=-karar&id=1427&content=, Last accessed: 28. 10. 2013). 15. 11. 2002, Official Gazette No. : 24937.

¹⁴⁶ The Constitutional Court dated 10. 03. 2011, E. 2009/85, K. 2011/49. (http://www.kararlar.anayasa.gov.tr/kararYeni.php?l=manage_karar&ref=show&action=-karar&id=3399&content=, Last accessed: 28. 10. 2013). 07. 10. 2009, Official Gazette No. : 28091.

¹⁴⁷ For detailed comments about this decision *see*: Seda İrem ÇAKIRCA, "Evli Kadının Soyadına İlişkin Güncel Gelişmelerin Değerlendirilmesi", *İÜHFİM*, Vol. : 70, No. : 2, 2012, pp. 145- 164.

¹⁴⁸ Ünal Tekeli v. Turkey Application No. : 29865/96, paras. 63-64.

¹⁴⁹ Ünal Tekeli v. Turkey Application No. : 29865/96, parar. 67.

Therefore, Article 187 TCC needs to be amended immediately in order to be compatible with higher legal norms. A draft law on the amendment of the Turkish Civil Code in accordance with this need and pursuant to the relevant decision of the European Court of Human Rights should be issued immediately to enable married women to use solely their own surname after marriage, if they wish to do so. As the draft law which has its own deficiencies¹⁵⁰, is still under legislative process, a new law came into force on January 2013 in Switzerland regarding married women's surnames. The Swiss Civil Code now allows married women to retain their maiden name so there is no longer an obligation for spouses to have a joint family name. Swiss legislators took the ECHR's decisions¹⁵¹ concerning this matter very seriously and made this change. Turkish legislators should also take this reform into consideration due to the fact that the Turkish Civil Code is founded upon the Swiss Civil Code.

Article 159 of the fTCC, which required women to get the permission of the husband to work outside the home, was annulled by the Constitutional Court in 1990.¹⁵² Since then, in the absence of a replacement law, women's right to work has been governed only by the Constitution, which declares that every individual has the right and duty to work. This principle of the right to work has been incorporated into TCC. In accordance with Article 192, spouses do not have to get permission from each other regarding choice of work or profession. There is, however, a clause in the same article, which denotes "the harmony and welfare of the marriage union should be borne in mind when choosing and performing a job or profession". This clause may jeopardize women's independent decision making concerning her professional life. Forasmuch as if the traditional values and gender structure in Turkey is considered, then it can easily be considered that this clause can lead to a discriminatory situation in family life.¹⁵³

¹⁵⁰ AYAN, 2012, pp. 71-72.

¹⁵¹ Burghartz v. Switzerland Application No. : 16213/90.

¹⁵² See *supra* note 67.

¹⁵³ CEDAW/C/TUR/4-5, p. 48.

G. Article 16 (1) h

The CEDAW Committee stated the rights provided in Article 16 paragraphs 1 (h)¹⁵⁴ overlap with and complement those in article 15 paragraphs 2, in which an obligation is placed on states to give women equal rights to enter into and conclude contracts and to administer property.¹⁵⁵ Article 15 paragraphs 1 guarantees women equality with men before the law. The right to own, manage, enjoy and dispose of property is central to a woman's right to enjoy financial independence.¹⁵⁶ Any law or custom that grants men the right to a greater share of property at the end of a marriage or *de facto* relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman's practical ability to divorce her husband, to support herself or her family, and to live in dignity as an independent person.¹⁵⁷ Turkey put a reservation on this article because the legal matrimonial property system was "Separation of Property" in the fTCC. This regime was the legal matrimonial property system unless the spouses had made a contract before entering the marriage. According to this regime, women could not claim any rights on the properties registered in the husband's name even if she had contributed to the acquisition of the property.

The UN Report on the World's Women 2010 Trends and Statistics shows that women are disadvantaged by statutory and customary laws in their access to land ownership and other types of property in most countries in Africa and about half the countries in Asia.¹⁵⁸ Different kinds of

¹⁵⁴ Article 16 paragraph 1 (h) reads as follows;

"(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration."

¹⁵⁵ General Recommendation 21 (on Articles 9, 15, 16), 1994, para 25.

¹⁵⁶ General Recommendation 21 (on Articles 9, 15, 16), 1994, para 26.

¹⁵⁷ General Recommendation 21 (on Articles 9, 15, 16), 1994, para 28.

¹⁵⁸ Elements of gender inequality with regard to inheritance rights were identified in 45 out of the 48 African countries reviewed and in 25 out of the 42 Asian ones. With regard to entitlements to ownership of land, gender inequality was identified in 43 African countries and 21 Asian countries. Better conditions were observed for Latin America and the Caribbean and for Eastern Europe. (UN Report on the World's Women 2010 Trends and Statistics).

women's rights violation, especially violation of property rights, exist in many traditional societies, including Turkey. Violation of women's property rights is expressed in different forms in social practices. It begins in the family from the time of birth through adolescence and married life to widowhood. Globally, men own more property overall than women. Women are seriously disadvantaged in terms of both moveable and immoveable property, but even more so in terms of immoveable property. Whatever her financial support and contribution to the matrimonial home, it is usually men (husbands) that have ownership of the moveable or immoveable property.¹⁵⁹ However, this, *de facto* practice does not match the *de jure* situation of women's property rights in Turkey. The feminist movement, the EU accession process and CEDAW's monitoring process have forced Turkish legislators to make necessary changes to protect women's property rights in matrimonial family and inheritance in Turkish Civil Code.

The legal property regime adopted by the new Civil Code is the Regime Regarding the Ownership of Acquired Property (Articles 218-241). This regime introduces the provision that the added value of all property acquired during marriage shall be shared equally in the case of divorce.¹⁶⁰

There are four property regimes in the TCC now: Regime Regarding the Ownership of Acquired Property (legal property regime under TCC); Separation of Property (Articles 242-243); Separation of Shared Property (Articles 244-255); and Joint Property Regime (Articles 256-281). The latter two also existed under the fTCC. With the exception

¹⁵⁹ According to a 2006 Family Structure Survey consisting of 24,647 individuals aged above 18 living in 12,230 households, 80.2% of Turkish women claimed to own no property in contrast to 39.6% of men who did not have any immovable real estate or motor vehicles registered in their names. Of those remaining women who appeared to own property, the survey revealed that 5.2% of vacant land (fields, estates, or vineyards) is in the hands of women, while 0.7% of workplaces and 11.5% of homes (houses or apartment flats) belong to women. In contrast 1.4% of workplaces and 28.3% of homes belong to men. (T.C. Başbakanlık Türkiye İstatistik Kurumu, 2006).

¹⁶⁰ Özdamar, 2002, p. 291; ANIL/BERKTAY HACİMİRZAOĞLU/BİNGÖLLÜ/İLK-KARACAN/ERCEVİK AMADO, 2005, p. 29.

of the last regime, the others require settlement of common assets when the matrimonial union is terminated. The legal property regime under the fTCC was the Separation of Property.¹⁶¹ This regime recognized the individual ownership of goods registered in the name of each spouse. Accordingly, after divorce, each partner retained the property they owned prior to marriage and which they acquired in their name during marriage. Since the conventional practice in Turkey is that men, more often than not, are the legal owners of family assets, women often encounter severe deprivation under this regime in the event of divorce. Therefore, the new property regime is a contribution not only to women's economic security but also to their self-esteem and empowerment. However, the new legal property regime does not apply retrospectively.¹⁶² In addition, amendments made to certain laws with the intent of achieving gender equality lose all function when necessary changes are not made to any parallel laws and regulations. As Article 10 of the current Turkish Civil Code Enactment Law that regulates the matrimonial property regime does not apply retroactively, millions of women who were married before 2002 and unable to apply to the authorities within the following year to change their matrimonial property regime cannot enjoy the equal division of property acquired during marriage. Although a government delegation pledged to amend the provision during the Review of 2005, no corrective measures have been taken. Moreover, the appeal filed at the Constitutional Court regarding the above mentioned article of the Civil Code was rejected in 2009.¹⁶³

¹⁶¹ ANIL/BERKTAY HACİMİRZAOĞLU/BİNGÖLLÜ/İLKKARACAN/ERCEVİK AMADO, 2005, p. 30.

¹⁶² This regulation was passed over night in the male-dominated parliament because this new property regime, which not only recognizes the monetary contributions made by the partners to the marriage unity but also acknowledges the value of the physical and mental labour that goes into the reproduction of daily life of the family, received significant resistance from male parliamentarians. Feride ACAR/Gülbanu ALTUNOK/Elif GÖZDAŞOĞLU-KÜÇÜKALIOĞLU, **Report Analysing Intersectionality in Gender Equality Policies for Turkey and the EU**, QUING Project, Vienna: Institute for Human Sciences (IWM), available at http://www.quing.eu/files/results/ir_turkey.pdf, 2008, p. 28; ANIL/BERKTAY HACİMİRZAOĞLU/BİNGÖLLÜ/İLKKARACAN/ERCEVİK AMADO, 2005, pp. 31-32.

¹⁶³ The Constitutional Court dated 18. 09. 2008, E. 2006/37, K. 2008/141. (<http://>

This revision has triggered major protests from women, women's organizations and other non-governmental organizations around the country because the change of the property regime was most crucial for older women, a majority of whom have had the role of full-time homemakers imposed on them, and therefore lack an independent source of income. The younger generation of women are at a relative advantage in enjoying improved access to education and work life. As such, the amendment of the property regime in TCC, as it stands now, fails to address the very target female population who suffer from economic discrimination.¹⁶⁴

The official report, however, remarks only in passing that "the new legal property regime does not apply retrospectively", a gross understatement of the shortcomings of the new amendment. The government also misleadingly makes reference to the amendment as if it applies to all marriages.¹⁶⁵ This is particularly noteworthy in view of the fact that women's groups have been engaged in on-going campaigns calling upon the government to amend Article 10 of the Enactment Law of the Turkish Civil Code so as to make it applicable retrospectively.¹⁶⁶

As another aspect of Article 16 paragraphs 1 (h) in terms of inheritance, the surviving spouse is entitled to his/her share of the common assets in accordance with the rules governing the particular regime. The remaining portion of the assets is divided among the inheritors as stated by law (Article 499 TCC). Turkish law grants the right to both female and male children to inherit an equal share of their parent's assets.

www.kararlar.anayasa.gov.tr/kararYeni.php?l=manage_karar&ref=show&action=-karar&id=2642&content=, Last accessed: 28. 10. 2013). 23. 12. 2009, Official Gazette No. : 27089.

¹⁶⁴ Shadow NGO Report on Turkey's Fourth and Fifth combined Periodic Report to the Committee on the Elimination of Discrimination against Women for submission to the CEDAW 32nd session, January 2005, p. 12.

¹⁶⁵ CEDAW/C/TUR/4-5, p. 49.

¹⁶⁶ Shadow NGO Report, 2005, pp. 11-12.

H. Article 16 (2)

Article 16 paragraphs 2¹⁶⁷ emphasizes the offensiveness of child marriage, by stating that this kind of marriage shall have no effect.¹⁶⁸ Article 16 (2) and the provisions of the Convention on the Rights of the Child preclude states parties from permitting or legitimizing any marriage between those who have not attained their majority.¹⁶⁹ In the context of the Convention on the Rights of the Child, “a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”.¹⁷⁰ The Committee considers that the minimum age for marriage should be 18 years for both men and women. When men and women marry, they assume important responsibilities so marriage should not be permitted before they have attained full maturity and capacity to act.¹⁷¹

Turkish Civil Code has defined the minimum age of marriage and set the terms for marriage of minors. However, in extreme situations and with sufficient cause both men and women who are over 16 but under 18 can get married with the permission of the judge. The law clearly states that a religious marriage ceremony can only be held after the civil ceremony; otherwise the couple is in breach of the Criminal Code (Article 230 of the Turkish Criminal Code)¹⁷²

Early and forced marriages are both defined as crimes in the laws. According to the data of Turkish Statistics Institution (TUIK)¹⁷³, 58.7% of women and 58.2% of men got married between the ages of 18-24. However, the ratio of women who marry for the first time before 18 is

¹⁶⁷ Article 16 paragraphs 2 states as follows;

“16. 2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory”.

¹⁶⁸ FREEMAN, 2012, p. 437.

¹⁶⁹ General Recommendation 21 (on Articles 9, 15, 16), 1994, para 36.

¹⁷⁰ UN Convention on Rights of Child Article 1.

¹⁷¹ General Recommendation 21 (on Articles 9, 15, 16), 1994, para 36.

¹⁷² CEDAW/C/TUR/4-5, p. 50.

¹⁷³ Family Structure Research, 2006.

31.7%, compared to 6.9% for men. Various projects are being conducted by non-governmental organizations in order to draw attention to the issue of early and forced marriages and raise social awareness about it.

Conclusion

When the new Turkish Civil Code came into force in 2002, among with other important changes in civil law, most of the inequitable provisions concerning gender equality in family life have changed. However, it can't be said that the whole TCC promotes gender equality and is compatible with CEDAW because there are still some provisions that must be revised according to the concluding comments of the CEDAW Committee and NGOs Shadow Reports.

In particular, the Turkish Civil Code does not allow married women to use their birth last names exclusively; they may do so only together with their husband's last name. A law concerning married women's surnames has been drafted but regrettably this law has never come into force. Following the ECHR's famous Ünal Tekeli decision, a new decision is also made by ECHR in 2013 very recently regarding this matter. Turkey must take, at least this time, this new decision concerning married women's surnames in the Turkish Civil Code into account and make the necessary changes in order to provide gender equality in this matter.

Article 132 of the TCC only requires a waiting period for women before they can remarry. The 300 days of waiting period is deemed necessary to determine a potential child's father. Given the fact that in the 21st century this waiting period is unacceptable since tests are available that can prove whether a widowed or divorced woman is pregnant or not. This waiting period for women can only be lifted upon presenting a report to a judge that proves they are not pregnant. Similar restrictions are not mandated for men. This is a discriminatory regulation and should be eliminated.

Unfortunately women, whether married or single, still have no right to determine their children's last names. Instead, children may only take

their father's last name. In 2009 the Constitutional Court annulled the sentence allowing an unwed mother to give her surname to her child. The Constitutional Court claimed as legal ground for this decision that it is the best interest of the child to carry his/her father's surname and with this annulment there would be no discrimination towards a child who born out of wedlock. Although a child can change her/his name according to Article 27 TCC, an explicit new regulation is needed that gives both parents equal rights to give their children a last name in order to maintain gender equality in TCC.¹⁷⁴ This new regulation should be made in conjunction with married women's surnames.

Last but not least Article 10 of the Enactment Law of the Turkish Civil Code should also be amended to apply retroactively to the equal division of Acquired Property Regime, as is the case in the Swiss Civil Code on which Turkish Civil Code is based. After the decision of Turkish Constitutional Court in 2009, which rejected the appeal of annulment of the Enactment Law of the Turkish Civil Code Article 10, regrettably there has been any effort for drafting a new law concerning this matter in parliament to remove this inequality.

Finally, it should be pointed out that minds, customs and traditions concerning gender equality should be changed too. So long as such patriarchal customs, traditions and religious understandings continued, there will be only *de jure* compliance between the Turkish Civil Code and CEDAW not *de facto* even if the reforms discussed above are implemented.

¹⁷⁴ Shadow NGO Report on Turkey's 6th Periodic Country Report to the Committee on the Elimination of Discrimination against Women for submission to CEDAW 46th session, July 2010, prepared by the Executive Committee for NGO Forum on CEDAW-TURKEY, Women's Platform on the Turkish Penal Code, 2010, p. 8.

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