



THE CONCEPT OF WOMEN'S HUMAN RIGHTS AND ISTANBUL CONVENTION

1. THE CONCEPT OF HUMAN RIGHTS

The concept of human rights embodies rights which all people have merely for being human and as a result of the value carried intrinsically by human beings. The intellectual aspect of the concept of human rights has been developing since Ancient Greece and Rome.

The natural law doctrine has emerged in the 16th century. This doctrine puts forth the view that people have innate inalienable rights and freedoms and that the political powers are limited by these rights. The natural law doctrine has become the dominant thought in development of human rights, played a crucial role in defense of human rights. It formed the basis of the human rights declarations that emerged in the 17th and 18th centuries. The most important ones among those instruments were the United States Declaration of Independence 1779 and the French Declaration of Human and Citizen Rights 1789. Both declarations are underpinned by the natural law doctrine and the thought that people have innate inalienable and unassignable rights. As being the early steps of documentation of the human rights, these declarations are instruments created with an individualist understanding.

As of the 19th century, the criticisms that the individualist human rights understanding had fallen short in terms of all people benefiting from the rights have gained strength, and the importance of social and economic rights came to the forefront. The social law and social state understanding prescribing the realization of these rights was documented for the first time by the French Constitution 1848. Thus, the understanding that the states are obliged and responsible not only for recognizing the human rights, but also for ensuring that all people benefit from these rights, became dominant.

While the issue of human rights had previously been regarded as a domestic issue of the states, it was carried into the international arena following the Second World War. Upon establishment of the United Nations in 1945, studies have been conducted for protection of the human rights internationally. The Universal Declaration of Human Rights was adopted by the United Nations ("UN") on December 10, 1948. The universal declaration of human rights includes arrangements protecting not only individual rights, but also the economic, social and cultural rights. Since the Universal Declaration of Human Rights, the UN has adopted numerous conventions within the framework of protection of the human rights internationally. In addition, there are international conventions concerning the protection of the human rights at regional level. Some of these are the European Convention on Human Rights (1950), the American Declaration of the Rights and Duties of Man (1948), the African Charter Human and Peoples' Rights (1981).

2. THE CONCEPT OF WOMEN'S HUMAN RIGHTS

The concept of human rights is based on the premise that all people are equal. All human rights conventions incorporate the principle of equality and acknowledge that all people have innate

rights and that everyone is equal in terms of benefiting from these rights and before the law. In all human rights conventions, gender-based discrimination has been prohibited with regard to the rights granted to people and secured.

However, in the classical sense, the principle of equality falls short of preventing discrimination and violations of rights resulting from the concept of social gender, which is based on the biological differences of women and defined as the roles and behavioral patterns thought to be suitable for women and men in a society. *The concept of equality appears to be a right which is applicable when identical rights are in question for women and men but does not bear an equally strong nature when identical rights are not in question. ...When the concept of equality is applied absolutely, it can exist among the same entities, whereas discrimination will remain in respect of different entities despite the principle of equality.* (Songül Atak, Women's Human Rights, Doctorate Marmara University Institute of Social Sciences Department of Public Law, 2000, p.175)

The roles and behavioral patterns attributed to women and men promote almost in every society that women are in a secondary position vis-as-vis men. This means that there is an inequality in social terms between women and men. The understanding based on social gender inequality has positioned women in a lower status compared to men in economic, cultural, social, political and legal fields in most countries. This results in women suffering various violations of rights arising merely from being woman. The violations of rights based on social gender may be either aimed directly at the right to live and physical integrity, such as gender-based violence, domestic physical-psychological-sexual violence, rape, marital rape, female genital mutilation, honor killings, forced abortion, or in the form of hindrance of social and economic rights such as the right to education and right to work.

In order for the international systems created for the protection of the rights and universal human rights secured in the constitutions of the states, the human rights declarations, to be able to protect the women effectively, these rights need to be interpreted considering the social and economic positions of women in the society. The concept and movement of women's human rights has emerged within this perspective. The movement of women's human rights has demonstrated that women's human rights cannot be fully realized with the equality understanding of the human rights law in the classical sense. With the strengthening of the women's movements, a need for analyzing the problems experienced by women in terms of social gender and looking at the human rights from a social gender perspective has emerged. The movement of women's human rights emphasizes that the violations of rights involving women and women's human rights problem is not an agenda out of the mainstream agenda, that these violations are the problem of half of the humanity. In this context, the movement of women's human rights addresses the violations of rights resulting from the social gender discrimination and suffered by women merely due to being woman. *"These abuses suffered by women due to being woman have been the most prominent and biggest issue that the movement has to overcome. The great majority of the violation of women's human rights are based on social gender discrimination. In many cases, the forms of discriminations and abuses which ignore women's human rights take place since the victim is a*

woman.” (Özge Çelik, The Movement of Women’s Human Rights, Gazi University Journal of the Faculty of Economics and Administrative Sciences, 14/1, 2012, 149-170)

With this consciousness, international conventions have started to be created considering the secondary positions of women in the society and the violations of rights they suffer merely due to being woman. The United Nations has declared the years 1975 to 1985 “Women’s Decade”, World Women’s Conferences have started to be held in this framework. The Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) has been signed in 1980. CEDAW prohibits the discrimination against women, and imposes obligation of taking legal measures for prevention of the discrimination made against women and protection of women’s human rights o the signatory states. Accordingly, the signatory states are obliged to arrange their domestic laws in line with this goal. CEDAW has defined the discrimination against women in its article 1 as *“For the purposes of this Convention, the term “discrimination against women” means any discrimination, exclusion or restriction based on gender, which aims or results in preventing grant of the human rights and fundamental freedoms based on equality of women and men in political, economic, social, cultural, personal or other fields to women regardless of whatever marital status they have, women’s benefiting from or using these rights, or voiding these rights.”*. In addition to these legal measures, CEDAW has imposed liabilities such as taking economic and social measures, elimination of the prejudices and traditions against women, on the state parties. A Committee commissioned with monitoring the developments regarding implementation of the Convention has been formed. Turkey has ratified CEDAW in 1985 without reservation. After that date, amendments have been made in the domestic law, primarily the civil code and penal code, education of girls has been put on the country’s agenda.

In the years following adoption of CEDAW, it was continued to conduct studies and create texts for prevention of discrimination and violence against women in the international domain. Some of these are the Additional Protocol No. 7 to the European Convention on Human Rights (1984), Declaration on the Elimination of Violence Against Women (1993) The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, also known as Istanbul Convention (2011).

3. THE COUNCIL OF EUROPE CONVENTION ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE (ISTANBUL CONVENTION)

1. Purpose and Scope

Istanbul Convention is an international human rights convention focusing on the problem of violence against women and domestic violence, which is the most visible form of discrimination against women. The Convention is also the first international instrument to address mainly the discrimination based on social gender and to define the social gender. In article 3 of the Convention social gender is defined as *“the socially constructed roles, behaviors, activities and attributes that any society considers appropriate for women and men”*.

The purposes of the Convention are as follows:

- a. protecting women against all forms of violence, and preventing, prosecuting and eliminating violence against women and domestic violence;
- b. contributing to the elimination of all forms of discrimination against women and promoting substantive equality between women and men, including by empowering women;
- c. designing a comprehensive framework, policies and measures for the protection of and assistance to all victims of violence against women and domestic violence;
- d. promoting international cooperation with a view to eliminating violence against women and domestic violence;
- e. providing support and assistance to organizations and law enforcers to effectively cooperate in order to adopt an integrated approach to eliminating violence against women and domestic violence.

The Convention prohibits all forms violence in the public and private sphere. Article 3 of the Convention has defined violence against women as “*all acts of social gender-based violence whether occurring in public or in private life*”. By way of article 4, an obligation is imposed on member states to take legal and other measures necessary for ensuring and protecting all individuals’, particularly women’s right to live without being exposed to violence both in public and private sphere.

In this framework, the convention aims to eliminate the common perception that violence committed in the family-domestically is closed to state’s interventions since it is the “*private sphere*”. It imposes the obligation on signatory states to protect women from violence they suffer in the private sphere.

The Convention has also defined economic violence as one of the forms of violence against women (Articles 3/a, b). The Convention has arranged the requirement for the state parties to consider the special needs of women who are in difficult situation, who have become vulnerable to violence due to certain circumstances. (Articles 12/3; 18/3)

The Convention also makes mention of domestic violence against men and children in its preamble, and incorporates special arrangements for girls and boys who are victims of violence. In order to monitor whether member states fulfill their obligations under the Convention, a monitoring mechanism executed by the Group of Experts on Action against Violence against Women and Domestic Violence (“GREVIO”) has been established.

2. Obligations of the State Parties

For the purposes of the Convention; the Convention imposes obligations on member states such as prevention, protection, making the legal arrangements, ensuring effective investigation and prosecution, and producing policies in line with the prevention of discrimination and violence.

Article 12/1 of the Convention lays down the general framework of the obligation to prevent violence against women and domestic violence. Accordingly, “*Parties shall take the necessary*

measures to promote changes in the social and cultural patterns of behavior of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men.”.

Hence, member states have several obligations which will transform the society and improve the role of women within the society, such as training the society and professional staff, increasing the awareness on violence, in addition to making necessary legal arrangements. The Convention also prescribes encouragement of the private sector and media to cooperate with the state in making these preventive efforts.

Under the Convention, the forms of violence which require preventive and protective measures to be taken have been listed as physical violence, psychological violence, sexual violence acts including rape, stalking, forced marriage, female genital mutilation, sexual harassment, forced abortion or sterilization.

The member states also have responsibilities such as of forming complaint lines, establishing support mechanisms, opening shelters for victims of violence. It has been prescribed that the justifications for the crimes committed including the crimes committed in the name of so-called “honor” should not be accepted and the relationship between the perpetrator and the victim should not be taken into account when trying the crimes under the Convention. This arrangement has also been introduced with a view to preventing the violations of rights arising as a result of discriminative prejudices and traditions against women.

4. THE CODE NO. 6284

Following the signature of Istanbul Convention by Turkey, the Turkish Grand National Assembly has drafted and adopted the Code on Protection of the Family and Prevention of the Violence against Women, No. 6284, in parallel to the Convention.

The purpose of the Code is defined in article 1 reading as *“The purpose of the Code is defined as setting out the procedures and principles regarding the measures to be taken for protecting women, children, family members and victims of stalking, who have been subjected to violence or the risk of violence, and preventing violence against such individuals.”.*

The Code has emphasized that it grounds on Istanbul Convention by stipulating in article 1.2. *“The Constitution of Republic of Turkey and international conventions which Turkey is a party to, particularly **The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence**, and other applicable legal arrangements, are taken as basis in implementation of the Code and provision of the necessary services.”.*

The Code has introduced preventive and protective measures in respect of the protected person and the perpetrator of violence. Accordingly, preventive measure has been prescribed for persons who perpetrate or likely to perpetrate violence, whereas protective measure has been prescribed for persons who are victim of violence or at the risk of suffering violence.

According to the Code, a decision of protective measure can be made by a civilian authority or judge, and in cases where its delay is unfavorable, by law enforcers. The decision of measure taken by law enforcers becomes void automatically unless it is approved by the civilian authority within forty eight hours (Article 3/2). The purpose of protective measures is to stop the violence or risk of violence immediately, without delay. Protective measures are important also in terms of developing an understanding in the society that there are rules protecting the victims of violence.

According to the Code, protective measure decisions that may taken by a civilian authority are as follows: (Article 3)

- a. Provision of suitable shelter to her and the children accompanying her, at the place where he is present or at another place;
- b. Without prejudice to the aids to be provided under other codes, provision of temporary financial aid;
- c. Provision of guidance and consultancy service in psychological, professional, legal and social terms;
- d. In case of life-threatening situation, putting the concerned person under temporary protection upon request of the concerned person or ex-officio;
- e. If necessary, provision a nursery for the children of the protected person.

According to the Code, the protective measure decisions that may taken by a judge are as follows: (Article 4)

- a. Change of the workplace;
- b. If the person is married, determination of a residence other than the joint residence;
- c. If the circumstances in the Turkish Civil Code are present and upon request of the protected person, placing an annotation of matrimonial home on the title deed;
- d. In case of existence of a life-threatening situation in respect of the protected person and where it is understood that other measures will not be sufficient for avoiding this risk, change of the identity and other relevant information and documents of the concerned person based on her informed consent, according to the provisions of the Witness Protection Code dated 27/12/2007 and no. 5726.

The judge may decide upon one or several of these measures where he/she deems necessary. The judge competent to make the decision of protective measure is the Family Court Judge (Article 3). No evidence or document as to commitment of violence is sought to be able to make a decision of protective measure (Article 8/3).

The preventive measure decisions against the person who commits or who is likely to commit violence are made by judge, or in cases where its delay is unfavorable, by law enforcers. The preventive measures decisions made by law enforcers are submitted for approval by the judge within 24 hours, measures not approved by the judge within 24 hours become void automatically (Article 5/2). The preventive measure decision is made without delay. Making of this decision may not be delayed in such a way that endangers achievement of the purpose of the Code.

The preventive measure decisions to be made by a judge are as follows: (Article 5)

- a. Not committing words and behaviors involving threat of violence, defamation, insult or contempt against the victim of violence;
- b. Sending away immediately from the joint residence or the place where it is present, and allocation of the joint residence to the protected person;
- c. Not approaching the protected persons, the residence, school or workplace where these persons are present;
- d. If there is a previously made decision of establishment of personal relationship regarding the children, conduct of the personal relationship with a companion, limitation of the personal relationship or its complete revocation;
- e. If deemed necessary, not approaching the relatives, witnesses, and without prejudice to the cases involving establishment of personal relationship, children, of the protected person, even if she has not suffered violence;
- f. Not damaging personal effects and household goods of the protected person;
- g. Not disturbing the protected person through communication means or otherwise;
- h. Handing the weapons legally permitted to be kept or carried to law enforcers.
- i. Even if performing a public office where carrying weapon is compulsory, handing the weapon entrusted to him due to this office to his organization;
- j. Not using drugs or stimulants at the place where the protected persons are present or not approaching the protected persons or the places where they are present while being under influence of these substances, if having addiction, provision of his examination and treatment including hospitalization;
- k. Applying to a health institution for examination or treatment and provision of his treatment.

The judge may decide upon one or several of these measures or **other similar measures considered suitable** where he/she deems necessary.

The Code has prescribed preventive detention in case of breach of the measure decisions made. Accordingly; in case the perpetrator of violence, against whom a measure decision is made according to the provisions of the Code, acts in breach of the requirements of this decision, is subjected to preventive detention of three days to ten days with judge's decision according to the nature of the violated measure and severity of the breach even if his act constitutes a crime. Every time the requirements of the measure decision are breached, duration of the preventive detention is fifteen days to thirty days according to the nature of the violated measure and severity of the breach. However, total duration of the preventive detention shall not exceed six months. (Article 13)

It has been prescribed under the Code to establish violence prevention and monitoring centers (ŞÖNİM) with a view to preventing violence and effectively monitoring the measure decisions made.

5. CONCLUSION

The understanding of equality in the classical sense which is the foundation of human rights is not equally effective in protection of women and men, who are not in equal positions within the society. In the face of social-gender based discrimination against women, women cannot have access to fundamental human rights protected in the national and international domain in the same way as men, and the rights cannot be realized at the same rate. The insufficiency of the classical understanding in preventing the violations of rights faced by women has brought about the concept of “women’s human rights”. Approaches have been introduced to the human rights from the perspective of the problems faced by women based on social gender. In this context, conventions centering on women’s human rights have been adopted.

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) is the most comprehensive convention in the international domain which centers on the violence against women and domestic violence, one of the most visible forms of discrimination against women. The Convention imposes obligations on the member states in regard to prevention of physical, psychological, sexual and economic violence against women and stalking. In addition, the Convention also incorporates arrangements in regard to elimination of discriminative traditions and prejudices against women in the society, carrying out the necessary efforts for training and transforming the society.

Turkey is party to the Istanbul Convention. Pursuant to article 90/5 of the Constitution of the Republic of Turkey, Istanbul Convention has the force of law. In case of its conflict with other codes, Istanbul Convention shall prevail.

The Code on Protection of the Family and Prevention of the Violence against Women, No. 6284, has been drafted based on Istanbul Convention, and comprises important arrangements in regard to the taking of protective and preventive measures for the purpose of preventing violence against women.

Implementation of Istanbul Convention and the Code No. 6284 is of vital importance for enabling realization of women’s human rights, elimination of the discrimination against women and protection of women from violence.

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