


Education of special children within the scope of custody rights in the Turkish civil code

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Abstract

The education of the child is both a right and an obligation for the mother and father who have the right of custody. For this reason, when exercising parental authority, the best interests of the child should be prioritized. Provisions regarding the education of children are regulated in the second book of the Turkish Civil Code titled Family Law, in the sixth section titled Custody under the second subsection titled Kinship. This study aims to discuss the education of special children within the scope of custody rights according to the Turkish civil code. The legislation has introduced a clear regulation to ensure that the educational rights of children with special education needs are not violated, even by the parents who have custody rights. The Turkish Civil Code reveals that when parents exercise their right of custody, which is both a right and an obligation, they must take into account the principle of protecting the interests of the children, and that the care and education of the children must be carried out with the decision taken in the light of this principle.

Keywords: Custody; education; family union; special child; special education; Turkish civil code

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1. Introduction

Provisions regarding the education of children are regulated in the second book of the Turkish Civil Code titled " Family Law ", in the sixth section titled " Custody " under the second subsection titled " Kinship ". The education of the child is both a right and an obligation for the mother and father who have the right of custody. For this reason, when exercising parental authority, the best interests of the child should be prioritized. Article 339/I of the Turkish Civil Code clearly states that the parents shall take and implement the necessary decisions regarding the care and education of the child, taking into account his/her interests.

Article 340/II of the Turkish Civil Code states that " Parents shall provide children, especially those with physical and mental disabilities, with general and vocational education to the extent appropriate to their abilities and inclinations ". This provision indicates that parents should provide education to special children on their abilities. According to Article 336/I of the Turkish Civil Code, the right of custody over the child shall be exercised jointly by the parents as long as the marriage continues. Since the education of the child is also regulated within the scope of the right of custody, it is expected that the spouses will make decisions regarding the education of the child together as long as the family union continues. However, if the joint life of the spouses has ended or separation has occurred, the right to education of the child also passes to the spouse to whom the custody is given. If one of the spouses has died, then the surviving spouse will also undertake the education of the child within the scope of parental authority.

Article 340/I of the Turkish Civil Code states that education should also be beneficial for the physical, mental, intellectual, moral, and social development of the child. The education to be provided includes both general and vocational education. However, since education must not only be provided at home with the parents but must also continue at school, there are some regulations in the legislation for children with special educational needs. In this context, The Regulation on Special Education Services was published in the Official Gazette dated 07.07.2018 and numbered 30471, and measures were taken to ensure that children with special education needs are not deprived of this right. On the other hand, the education of the child should be provided according to the means of the parents.

Purpose of study It is stated in the Turkish Civil Code that parents who have the right to custody will educate the child according to their means and must ensure the child's physical, mental, moral, and social development. Thus, decisions regarding the care and education of children are evaluated within this scope, and parents are obliged to provide all their children with the spiritual, social, vocational, and religious education they need, without making any distinction between them. However, the need for special education arises not only in cases where the child who will be studying with older students cannot keep up with some of the spatial differences in the upper grades due to his or her intelligence being higher than normal but also in cases where the child has difficulty in dressing himself due to his physical disability or has difficulty in perception even though there is no obstacle in his sensory organs due to his cognitive deficiency. The situation, which is generally against children, can be turned to their advantage with some regulations. At this point, it is seen that the special education to be given differs from general education in terms of subject, method, and legislation. This study aims to discuss the education of special children within the scope of custody rights according to the Turkish civil code.

2. Results

2.1. Legal Regulations Regarding the Education of Special Children

The definition of education is not made in the Turkish Civil Code. However, in general terms, education can be expressed as a conscious and planned intervention in the behavior of the child to develop and reinforce the desired behavior in the personality development process of the child to raise him as a self-sufficient, independent, and responsible individual (Affolter-Fringeli et al., 2016; Hall-Mills, 2021). Sometimes those with higher-than-normal intelligence, sometimes those with mental or physical disabilities, and sometimes children with learning difficulties may need special education. In

fact, from time to time, some of these children may need to be taught various skills systematically and gradually. For example, it may be difficult for a child with a loss of sensory organs to learn by perceiving, reacting, or imitating due to the deficiency in the stimulus senses during the imitation learning phase (Mengi, 2018). Thus, international and national legal regulations are being made to provide different opportunities and opportunities in education to especially disadvantaged children.

2.1.1. *International Regulations*

It was accepted by the League of Nations in 1924, and after that, states were ensured to take into account the rights of the child. Among these regulations, the most important document on children's rights and approved by most countries (Uran, 2014) is the United Nations Convention on the Rights of the Child (UNÇHDS), which was adopted by the United Nations General Assembly with the resolution 44/25 on 20.11.1989. It is stated in UNÇHDS article 23/1 that the state parties accept that children with mental or physical disabilities have conditions that enable them to secure their dignity, develop their self-confidence, and participate effectively in social life. In the last paragraph of the provision, it is noted that financial assistance should be provided to the parents or caregivers of the children in need of special care and that this assistance should include the general and vocational education of the child, as well as the preparatory activities to bring him or her into a position to work in a job, in addition to the medical care of the child (UNÇHDS article 23. /3).

In addition, it is stated in the UNÇHDS article 28 that the state parties accept the right to education to develop the personality, mental, and physical abilities of the children as much as possible by providing equal opportunities for all children. It should be concluded that the right to education of special children is also protected since the talents of all children are mentioned without any exception in the provision. On the other hand, the provision that "no one can be deprived of the right to education" in Article 2 of Protocol No. 1 to the Convention on the Protection of Human Rights and Fundamental Freedoms also protects the right to education of all children. The importance of this is that in UNCLOS Article 4, the party states have to implement the necessary legal, laws to implement the rights they recognize in this text. Because they stated that they will take measures to implement the rights in the contract, it is seen that the contract will be implemented in case of disputes that may arise in domestic law, according to the provision of Article 90 of the Constitution (Uran, 2014).

2.1.2. *National Regulations*

According to Turkish Civil Code Article 8/I, every person born fully and alive has legal capacity. In the second paragraph of the provision, it is stated that all people are equal in having rights and obligations, without the need for preconditions. The principle of equality is among the "Basic Principles of Turkish National Education", with the statement in Article 4 of the Basic Law of National Education (METK) No. 1739, adopted on 14th June 1973, that educational institutions are open to everyone, regardless of language, religion, race, gender, and disability. is also located. However, it is possible to make some concessions from the principle of equality in cases where serious reasons exist or special conditions require it (Sprecher & Sutter 2006). For example, for an orthopedically disabled child to receive education, private classrooms must be accessible to him/her. For this reason, METK Article 8/III states that special measures must be taken for the upbringing of children in need of special education and protection.

Since the 1950s, in the light of the principles of inclusive and egalitarian education, it has been aimed for children with disabilities or in need of special education to receive education together with other students within the normal education process instead of special education, and for this reason, other students in the classroom, teachers, school environment and administrators have aimed to provide special education to special students. Sensitive preparation has begun to be brought to the agenda (Ayar, 2022). On the other hand, in Article 12 of the Primary Education and Training Law No. 222, adopted on 05.01.1961, " *Children who are mentally, physically, spiritually and socially disabled, although they are at the age of compulsory primary education, are provided with special education and*

training." With this statement, it can be seen that importance is given to the education of disabled children, especially in primary education.

In addition, the Special Education Services Regulation was published in the Official Gazette No. 30471 on 07.07.2018. In the regulation, measures have been put forward to ensure that children with special education needs are not deprived of their right to education, and the principles regarding the education and training services to be provided to all individuals with special education needs have been regulated. It is stated in the regulation that individual differences, developmental characteristics, and educational needs should be taken into account when providing educational services.

Despite the positive developments in the Turkish Civil Code and other legislation and the laws and regulations enacted, it can be said that many regulations, such as insurance, as in this example, are required to be made by the state to facilitate access to the care and education rights of special children.

2.2. Right of Custody

2.2.1. Generally

With the birth of the child, the duties of the parents to provide the necessary education for the child to complete his/her physical, spiritual, mental, and social development with health and reintegrate into society begin, and these duties stem from the right of custody and are covered by the interest of the child (Grassinger Elçin, 2010). The right of custody regulates the extent to which parents can and should decide on issues such as the child's upbringing, representation, place of residence, and assets. In other words, custody is all of the duties, rights, and powers of the parents over their personalities and properties, to ensure the care and protection of minor or limited children (Tekinay, 1982).

While the mother and father exercise their right of custody by Turkish Civil Code Article 339/I, they will take and implement the necessary decisions regarding the care and education of the children, considering their interests. When making these decisions, the child should be allowed to organize his life according to his maturity, and the child's opinion should be taken into account on important issues. In return, the child is obliged to listen to the parents' words .

After the scope of custody is generally stated in Article 339 of the Turkish Civil Code, there is a special regulation regarding the education of the child in the subsequent provision. In Article 340 of the Turkish Civil Code, "*Mother and father educate the child according to their means and ensure and protect his physical, mental, spiritual, moral and social development. Mother and father provide general and vocational education to the child, especially those with physical and mental disabilities, to the extent appropriate to their abilities and tendencies,*" provision is included. Accordingly, the right to education is the responsibility of the mother and father, and children with physical and mental disabilities are specifically mentioned in the second paragraph of the provision. However, when it comes to children's access to the right to education, the financial means of the parents, in a sense, draw the limits of the right of custody. On the other hand, deprivation of compulsory and basic education for reasons such as making the child work, even though the financial means of the parents are sufficient, means abuse of the right of custody, as well as criminal sanctions.

Although the parents who have the right of custody are obliged to ensure the education of the children, the right of custody may be taken from the mother or father despite the establishment of lineage. In this case, the mother or father, who does not have the right of custody, may, on the one hand, request a personal relationship with the child, and on the other hand, is obliged to cover the child's care and education expenses (TURKISH CIVIL CODE, 323, 327). Thus, as with all children, regardless of whether or not they have the right of custody for the care and education of special children, the mother and father are expected to participate in these expenses of the children, even if they do not have the right of custody. In addition, parents may need to make more financial expenses to ensure the education of special children than their other children. For this reason, this situation

should be taken into consideration by the judge when determining the contribution of the mother or father who does not have the right to custody.

2.2.2. *Special Children*

The education to be given to the child is based on educational science, pedagogy, and psychology. However, the relationship between education and the right of custody, in other words, who is obliged to provide education, its boundaries, and scope is determined by the Turkish Civil Code and other legal regulations. Children with special needs, briefly called special children, may need some additional measures not only because they are physically or mentally disabled, but also because they have a different perception and consciousness capacity than ordinary children - due to various reasons - or are superior to ordinary children, even though they are not disabled as inferred in research by Al-Hendawi et al. (2023).

Mothers and fathers must educate their children according to their means and help their physical, spiritual, mental, moral, and social development (Uddin & Ashrafun 2023). At this point, it is seen that the legislator attaches special importance to children with physical and mental disabilities. In Article 340/II of the Turkish Civil Code, it is clearly stated that children with physical and mental disabilities must be given an education that is appropriate to their abilities and tendencies, based on the idea that they may have more difficulty in accessing some opportunities compared to other children. In other words, it is stated in the Turkish Civil Code Article 340/II that special children, including disabled children, have the right to receive general and vocational education appropriate to the conditions in the concrete case, just like other children.

On the one hand, the education of the child, which includes compulsory education taken outside the home, and on the other hand, to provide the necessary suggestions for the child to grow up as an honest, virtuous, honorable and honorable person, to direct the child towards what is good, to take measures to ensure that he does not stray into bad paths and does not acquire bad habits, and it means making an effort (Akintürk et al., 2022). The education to be given aims to support the physical and mental development of the child and to ensure that his/her personality is formed in a balanced manner, and while doing this, to provide the child with the ability to act respectfully, freely, and independently in his/her individual and social life (Saeed et al., 2023; Mondri et al., 2021). The education given to children if they are disabled may not lead them to full economic independence, but education should still aim to ensure that children have the highest possible quality of life according to their characteristics (Affolter-Fringeli et al., 2016). On the other hand, the term "special children" does not only include disabled children, but also includes gifted children whose ability to learn faster and perform better than their creative peers, who have leadership capacity, and who can understand abstract ideas are also considered within this scope. These children also need special education.

2.3. *Right to Education in the Turkish Civil Code*

2.3.1. *Generally*

In Article 340 of the Turkish Civil Code, it is states that parents will educate their children according to their means, ensure and protect their physical, mental, moral, and social development, and that if children are physically or mentally disabled, vocational and general education must be provided by their abilities and tendencies. Thus, providing education to the child and drawing the boundaries of the education to be given are left to the responsibility of the parents who have the right of custody.

On the other hand, providing education to the child is both a right and an obligation for the mother and father. The content of the education to be provided can be freely determined by the parent or, if the parental right is exercised by one of them, or by the adopter and guardian, if any, within the framework of the legal and moral order. Undoubtedly, some limits must be observed when making this determination. First of all, it should be taken into consideration that the general limits of the right of custody should be used to protect the best interests and interests of the child. After this, article 340/I of the Turkish Civil Code, where the specific limits of the right to education are drawn,

should be taken into consideration. According to Turkish Civil Code Article 340/I, the child's education must be planned according to the means of the mother and father. In the Turkish Civil Code article 340/I, it is stated that the expenses necessary for the care, education, and protection of the child will be covered by the parents. Accordingly, parents will make expenses related to their children's education according to their financial means. In other words, parents have no obligation to provide their children with an education beyond their means. However, when parents have more than one child, they must treat siblings equally and share opportunities equally. However, children with disabilities may deviate from the principle of treating siblings equally because they need special food and tools or various physical and mental support measures (Sprecher & Sutter 2006).

The possibilities of parents include their lifestyle as well as their financial situation. However, in addition to raising their children according to their lifestyle and outlook on life, parents should not put pressure on the child who is not willing and capable, such as obliging them to continue their profession or to do certain jobs. Similar pressures may result in the right of custody not being used properly. Because, on the other hand, the boundaries of education are drawn by the child's wishes, abilities, capabilities, and abilities. Parents are expected to listen to the child when deciding on the profession he/she will pursue and to take his/her opinion and make decisions within the scope of custody rights. When making this determination, the child's intelligence, capacity, talents, and abilities are evaluated together. In Article 340/II of the Turkish Civil Code, attention is drawn to this obligation with the statement " *Mother and father shall provide general and vocational education to the child, especially those with physical and mental disabilities, to the extent appropriate to their abilities and tendencies.*"

2.3.2. Education of Special Children

The purpose of education is to support the child's physical and mental development and to ensure the balanced development of his personality (Luca, 2021, 694). Education should, on the one hand, be aimed at the child's personal, social, daily development and behavior within the family, and on the other hand, at the same time, it should be aimed at helping the child gain a profession. As stated in the Turkish Civil Code, education includes both general and vocational education. For example, while the emotional development of the child and the acquisition of practical life skills such as healthy nutrition and budget planning are included in general education (Breitschmid & Jungo, 2016; McCormick et al., 2019), the process until the child is directed to apprenticeship and technical schools after compulsory primary education or until he receives a university education is also included in vocational education. includes education.

With the education and opportunities provided by the parents, the child's abilities should be developed and his tendencies supported, and when he becomes an adult, it should be ensured that he can continue his life without needing others. This purpose manifests itself more in special children. Thus, the aim of the education given by parents should be to enable special children to live independently and self-sufficiently in the future, just like others, to the extent their talents and abilities allow.

All children need support from their parents. With the support to be given, it is expected that the child's sports, cultural, or academic abilities will be identified, and these will be encouraged and directed (Breitschmid & Jungo, 2016). However, not only the child's talent but also his incompetence and weakness must be identified and these must be accepted by the parents. With the determination of these areas, special children have the right to receive an education suitable for them, which will enable them to reach the level of independence and quality of life that they can reasonably achieve by their physical and mental abilities (Hegnauer, 1997).

General and vocational education of special children may vary depending on their talents, abilities, and physical or mental conditions. In addition, since their needs for individual and holistic support may be different, the person training them may need to have special knowledge and skills (Barrera-Algarín et al., 2021). For this reason, if the knowledge and skills of the parents on this subject

are not sufficient, it may be necessary to receive support from third parties to meet the educational needs of the children (Affolter-Fringeli et al., 2016).

The scope of support to be received includes, on the one hand, opening various schools according to the needs of the children, and, on the other hand, providing family training to parents on their approach to their children, or providing some financial aid to parents with inadequate means by the state. First of all, the nature of the schools that should be opened by the state for the education of special children is shown in the Special Education Services Regulation (Özel Eğitim Hizmetleri Yönetmeliği, also known as ÖEHY) published in the Official Gazette No. 30471 on 07.07.2018. In Article 2 of the ÖEHY, it is stated that there is a need to cooperate with various institutions and organizations for children with special education needs to continue their education at all types and levels. In addition, the regulation specifies not only special educational activities in schools but also the principles of education in different situations such as education at home (ÖEHY art. 14) and hospital education (ÖEHY art. 15).

In addition, parents may need to receive some training and guidance services regarding their approach to the special child and contributing to their education. For example, the behavior of the parents and the degree of education they will give to the mentally disabled child and the gifted child in the family will be different from each other. For this reason, the educational services that parents should also receive are carried out by the Ministry of National Education within the framework of the family education program according to ÖEHY article 18. In addition, some measures may be taken by the judge to protect children in case their interests and development are in danger (Turkish Civil Code Article 346). It is accepted that among these measures, although it is not written in the law, the judge will advise the parents to receive consultancy services from social service organizations, pedagogues, and psychologists regarding child upbringing, education, and development (Ceylan, 2017).

When it comes to the education of special children, some additional expenses may be required, both for material supplies, school-related, and other expenses, depending on the level and needs of the children. In other words, unless these expenses required by private education can be financed by state aid, they may cause parents to spend more. For this reason, to help severely disabled individuals with their household expenses, arrangements can be made to include expenses related to the education of special children by expanding the scope of benefits such as home care support paid to their caregivers. Undoubtedly, it should be underlined that support for transportation or material expenses alone is not enough to provide education, and it is necessary to provide a special education program to parents in line with the child's level and needs and to ensure that this program is implemented by guides who are experts in the field.

3. Conclusion

Children with special education needs include those with higher-than-normal intelligence, those with mental or physical disabilities, or those with learning difficulties. Many regulations are made to protect children, who are often disadvantaged due to their situation, and to ensure their right to education. In 1924, attention was drawn to children's rights for the first time with the adoption of the Geneva Declaration of the Rights of the Child by the League of Nations. In international regulations for the protection of children's rights, it is seen that particular importance is given to the right to education to ensure equal opportunities for all children, without exception. International regulations alone are not sufficient for the education of children with special needs. The measures to be taken by the state in this context are shown in detail in the Basic Law of National Education, the Law on Primary Education and Training, and the Regulation on Special Education Services.

The Turkish Civil Code reveals that when parents exercise their right of custody, which is both a right and an obligation, they must take into account the principle of protecting the interests of the children, and that the care and education of the children must be carried out with the decision taken in the light of this principle. Article 340/II of the Turkish Civil Code states that parents must provide general and vocational education by their abilities and tendencies, especially to their children with

physical and mental disabilities, as well as to all their children. In other words, the legislator has introduced a clear regulation to ensure that the educational rights of children with special education needs are not violated, even by the parents who have custody rights. If the parents do not fulfill their children's right to education at all or as required, alimony and compensation may be requested from them, and it will also be possible to take measures to protect the child as stated in the Turkish Civil Code Article 346 et seq.

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