

Chapter 11

Performing Disability Rights: State Reporting and Turkey's (Non)Engagement with the CRPD

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Introduction

In October 2019, the United Nations Committee on the Rights of People with Disabilities (hereafter 'the Committee') issued its concluding observations on the initial report of Turkey.² The general concerns of the Committee focussed on 'the prevalence, in practice, of the medical, charitable and paternalistic approaches to disability'³ and the lack of transparent information and recorded progress on the rights of persons with disabilities in the country. On Article 12 of the United Nations Convention on the Rights of People with Disabilities (CRPD) on equal recognition before the law, the Committee documented its concerns on:

- (a) The guardianship regime in the Civil Code that limits the capacity to act of persons with disabilities on the basis of psychosocial, intellectual or hearing impairments, and that at least 13,934 persons with disabilities are reported to remain under guardianship and institutionalized in public and private institutions;
- (b) The reported ongoing practice of having two witnesses for notarial acts for persons with visual, hearing or speech impairments, despite amendments in 2005 to the notary proceedings prohibiting it;

¹ I would like to express my gratitude to the Oñati International Institute for the Sociology of Law for hosting our 'Supporting Legal Capacity in Socio-Legal Context' workshop in July 2019, to all workshop participants for their contributions, and to Mary Donnelly and Rosie Harding for being such great collaborators and for their comments on this chapter.

² UN Committee on the Rights of People with Disabilities, *Concluding observations on the initial report of Turkey*, 1 October 2019, CRPD/C/TUR/CO/1, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2fCO%2f1&Lang=en (last accessed 16 June 2020).

³ *ibid*, 1.

(c) The lack of transparent and effective data on safeguards and remedies, as well as access to information in cases of violations of the right to legal capacity of persons with disabilities, in particular with regard to the rights to marry and to vote;

(d) The lack of information on the planned transition from substitute decision-making to supported decision-making.⁴

The recommendation of the Committee noted the need to revise legislative measures that deprive disabled people of their legal capacity and to ensure that equal recognition before the law is reflected in institutional and legal practice, including through capacity building and awareness raising about supported decision-making in consultation with national, regional and local disability rights organisations.

Echoed in these recommendations is the CRPD's call to States Parties to ensure the enjoyment of legal capacity by disabled people on an equal basis with others in all aspects of life. By detaching legal capacity (the formal ability to hold and to exercise rights and duties) from mental capacity (decision-making skills of a person), Article 12 of the CRPD has called into question systems that deny disabled people legal capacity on the basis of disability or impairment. It has also provided an important push into thinking about decision-making by intellectually disabled people beyond persistent medical approaches to intellectual disability. The CRPD foregrounds a support paradigm to protect disabled people's right to legal capacity and introduces an obligation on States Parties to 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.'⁵ The Committee has been clear that States Parties must replace regimes of substituted decision-making by systems of supported decision-making.⁶

The tensions between the global aspirations of the CRPD and restrictions of intellectually disabled people's legal capacity by domestic capacity laws have been acknowledged in a burgeoning body of legal and socio-legal scholarship.⁷ Over the last decade, these studies have shown the myriad ways in

⁴ *ibid*, 6.

⁵ UN Convention on the Rights of Persons with Disabilities (UN CRPD) Article 12(3).

⁶ UN Committee on the Rights of Persons with Disabilities, General Comment No 1 (2014) Article 12: Equal Recognition before the Law, CRPD/C/GC/1, adopted 11 April 2014 <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx>> (last accessed 16 June 2021).

⁷ A Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future' (2007) 34 *Syracuse J Int'l L & Com* 429; M Donnelly, 'Capacity assessment under the Mental Capacity Act 2005: delivering on the functional approach?' (2009) 29(3) *Legal Studies* 464; E Flynn and A Arstein-Kerslake, 'Legislating personhood: realising the right to support in exercising legal capacity' (2014) 10 *International Journal of Law in Context* 81; A Arstein-Kerslake and E Flynn, 'The General Comment on Article 12

which intellectually disabled people have been stigmatized and excluded from decision-making in their own lives, and dealt with the question of how supported decision-making can be achieved as an alternative to the existing substituted decision-making models that have curtailed intellectually disabled people's legal capacity in law and practice. Another line of inquiry has focused on the ratification process of the CRPD by States Parties and the tensions that arise in the relationship between the CRPD and its interpretation by the Committee on the one hand and domestic laws and reservations of national governments on the other.⁸

As part of their treaty obligations, states that have signed and ratified the CRPD are required to submit to the Committee regular state reports on the steps that they have taken on the implementation of their obligations under the CRPD.⁹ The Committee seeks comprehensive review of all the measures the States Parties have taken to harmonise national law and policy and the progress made in that regard in relation to each CRPD article.¹⁰ In recent years, as the monitoring and reporting of States Parties expands, scholars have sought to gain a deeper understanding of the reporting process and dynamics involved therein.¹¹ In this chapter, I aim to add to this developing body of work by focusing on Turkey's State Party report to the Committee on its progress on disability rights. By examining the State Party report alongside Turkish laws on disability rights and legal capacity, I demonstrate the deep chasm between CRPD's paradigm for the realisation of

of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law' (2016) 20(4) *The International Journal of Human Rights* 471; C de Bhailís and E Flynn, 'Recognising legal capacity: commentary and analysis of Article 12 CRPD' (2017) 13(1) *International Journal of Law in Context* 6; R Harding and E Taşcıoğlu 'Supported Decision-Making from Theory to Practice: Implementing the right to enjoy legal capacity' (2018) 8 (25) *Societies* 1.

⁸ S Doyle and E Flynn, 'Ireland's ratification of the UN convention on the rights of persons with disabilities: challenges and opportunities' (2013) 41(3) *British Journal of Learning Disabilities* 171; E Flynn, 'The Long Road to Ratification: Ireland and the CRPD' in EJ Kakoullis and K Johnson (eds.) *Recognising human rights in different cultural contexts: The United Nations convention on rights of persons with disabilities* (Springer Nature, 2020); EJ Kakoullis 'A Consultative Culture? The Ratification Process for the CRPD in Cyprus' in EJ Kakoullis and K Johnson (eds.) *Recognising human rights in different cultural contexts: The United Nations convention on rights of persons with disabilities* (Springer Nature, 2020); AS Kanter 'The failure of the United States to Ratify the CRPD' in EJ Kakoullis and K Johnson (eds.) *Recognising human rights in different cultural contexts: The United Nations convention on rights of persons with disabilities* (Springer Nature, 2020).

⁹ UN CRPD Article 35.

¹⁰ UN CRPD Article 36.

¹¹ A Dhandu, 'The Process of State Party Reporting to the CRPD Committee: The Indian Experience' in EJ Kakoullis and K Johnson (eds.) *Recognising human rights in different cultural contexts: The United Nations convention on rights of persons with disabilities* (Springer Nature, 2020); D Afrianty, 'The Role of Disabled People's Organisations in Promoting the CRPD in Indonesia' in EJ Kakoullis and K Johnson (eds.) *Recognising human rights in different cultural contexts: The United Nations convention on rights of persons with disabilities* (Springer Nature, 2020).

disability rights and the paradigm within which Turkish legal framework and self-reporting practice operate.

More specifically, I trace Turkey's "ritualistic" acquiescence to the formal expectations of the CRPD's human rights regime, while discarding its aspirations to comprehensively address violations and obligations of the States Parties with regard to disability rights. In making this statement, I am engaging the concept of "regulatory ritualism"¹² that refers to the formal forms of participation in a human rights mechanism (domestic or international) by States Parties, but while discarding its substantive, transformative goals to achieve legal and societal change. I argue that Turkey's ritualistic (non)engagement with the CRPD in its report prioritises the satisfaction of formal criteria over reflection and focus 'on substance and practical realities, and problems encountered.'¹³ As such, the reporting process in Turkey's practice turns into a mere performance of disability rights for an international audience, that fails to facilitate a meaningful engagement with the CRPD and accountability for a rights-based policy implementation of disability rights. In what follows, the chapter first provides an overview of the Turkish legal framework on disability in general and on the regulation of intellectually disabled people's decision-making in particular, before moving to discuss Turkey's submission to the Committee about its work and progress on the rights of disabled people and its international legal commitments under the CRPD against this background.

Disability Legislation and Policy in Turkey

Since the decline of the Ottoman Empire, modern law has been an integral part and parcel of Turkey's political, economic and social history and its aspirations to belong to the European order. The abolition of the Sultanate, the constitution of the Turkish Republic in 1923, the abrogation of the Caliphate¹⁴ in 1924 and the outlawing of the religious orders in 1925 followed by the adoption of Swiss Civil and Italian Criminal Codes in 1926 aimed to mark a decisive break with the Ottoman past and shape the country into a modern and secular 'European' nation state. Turkey's European Union (EU) candidacy since 1999 has stimulated further political and legal reforms for the promotion and incorporation of EU norms into the domestic legal order. In one of the most dramatic amendments

¹² H Charlesworth and E Larking (eds.), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press, 2014); H Charlesworth and others, 'Strengthening the International Human Rights System: Rights, Regulation and Ritualism' Australian Research Council Project (Centre for International Governance and Justice, Australian National University) (2010-2015) available at <<http://regnet.anu.edu.au/research/research-projects/details/535/strengthening-internationalhuman-rights-system-rights>> (last accessed 16 June 2021).

¹³ CH Heyns and FJ Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level', *Human Rights Quarterly* 23 (2001): 483, 485.

¹⁴ The spiritual leadership of the Muslim world that had resided with the Ottoman Empire since 1571.

made to the Turkish Constitution in 2004, international treaties were given supremacy over domestic law in case of a conflict between domestic law and international agreements in the area of fundamental rights and freedoms.¹⁵

Although disability rights and legislation did not form part of Turkey's EU accession negotiations, significant improvements in the field of disability rights took place in the 2000s alongside extensive nationwide legal and judicial reforms, mainly those pertaining to human rights intensified by the EU harmonisation process. In 2007, Turkey became one of the first signatories of the CRPD, which it ratified alongside the Optional Protocol in 2009. In accordance with the specific status accorded to international treaties by the Constitution, the ratification of the CRPD made it legally binding on domestic law and courts and gave rise to obligations on the Turkish state to realise disability rights in line with the CRPD.

Following the ratification of the CRPD, one of the most dramatic steps taken by the Turkish government about disability rights were the amendments made to the Turkish Disability Act no 5378 (TDA) in 2014. The TDA, that originally came into force in 2004, was heavily reliant on a derogatory term for disabled people (*özürlü*)¹⁶ and a medicalised understanding of disability as a deficit that 'limits a person's inclusion into social life and ability to fulfil their daily needs.' The 2014 amendments replaced this term with 'person with disability' (*engelli*) to refer to 'a person who is impacted by attitudes and environmental conditions that limit their full and effective participation in society on an equal basis with others due to their various levels of physical, intellectual, physiological or sensory impairments.'¹⁷ The TDA prohibits all forms of discrimination based on disability,¹⁸ and mandates public entities to offer accessible services.¹⁹ In developing a framework for the protection

¹⁵ Until 2004, Article 90 of the Turkish Constitution on ratification of international treaties accorded international agreements duly put into effect the force of law, but without clearly defining their role in national legislation or rank within the hierarchy of laws. The amendment of Article 90 in 2004 granted international human rights treaties 'in the area of fundamental rights and freedoms' preferential treatment over domestic law 'in the case of a conflict between international agreements duly put into effect and the domestic laws.' On the status of international laws and transnational legal arrangements in Turkish law, particularly in the context of Turkey's international commitments deriving from the ECHR, see E Özücü, 'The Turkish Experience with Judicial Comparativism in Human Rights Cases', in E Özücü (ed.), *Judicial Comparativism in Human Rights Cases* (BIICL 2003); K Başlar, 'Uluslararası Antlaşmaların Onaylanması, Üstünlüğü ve Anayasal Denetimi Üzerine' (2004) 24(1-2) *Milletlerarası Hukuk ve Milletlerarası Özel Hukuku Bülteni: Prof. Dr. Sevin Tolner'e Armağan* 285; L Gönenç and S Esen, 'The Problem of the Application of Less Protective International Agreements in Domestic Legal Systems: Article 90 of the Turkish Constitution' (2006) 8 *European Journal of Law Reform* 485.

¹⁶ Handicapped. *Özürlü* literally means 'with excuse' or 'with defect'.

¹⁷ Turkish Disability Act no 5378 (TDA), Article 3.

¹⁸ TDA, Articles 14 and 15.

¹⁹ TDA, Provisional Articles 2 and 3.

of rights of disabled people, the TDA's key aims are grounded in fostering and providing fundamental rights and freedoms for disabled people and 'strengthening the respect to their dignity acquired by birth' in order to ensure their inclusion in social life on an equal basis with others.²⁰ Importantly, the TDA also recognises the inviolability of disabled people's pride and dignity and foregrounds respect for freedom and independence of disabled people, including intellectually disabled people, to make their decisions on their own lives.²¹

Despite its marking an important milestone towards a rights-based approach to disability, the extent to which the TDA contributes meaningfully to the promotion and protection of rights of disabled people is questionable. A lack of statistical and research data about disabled people is a foundational problem in Turkey, as pointed out by the Committee in their concluding observations.²² Turkey does not collect systematic data on the number of disabled people, their living conditions or barriers to accessing their rights with a human rights approach supported by disaggregation of data by gender, age, region and ethnic identification etc. The "2002 Turkey Disability Survey" of the Statistical Institute of Turkey (TÜİK), the primary source of country-level data on disability to this date, states that disabled people constituted 12.29 percent of the total population.²³ The survey defined disabled person as 'a person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical capabilities.'²⁴ Nine years later, in 2011, a second TÜİK survey found out that 6.9 percent of the Turkish population is disabled.²⁵ This survey defined a disabled person as 'a person over 3 years old with a minimum of one impairment (in seeing, hearing, speaking, walking, climbing up the stairs, carrying and gripping things, learning and memory).' As such, the two nationwide disability surveys conducted by TÜİK used different (and problematic) criteria to define and measure disability, and include inconsistent and noncomparable information. Without good quality, consistent and accessible data on disability, the number of disabled people in the country is unknown, and the

²⁰ TDA, Article 1.

²¹ TDA, Article 4.

²² Above n. 3, para. 62.

²³ Statistical Institute of Turkey (TÜİK), 2002 Turkey Disability Survey (2002), available at <<https://kutuphane.tuik.gov.tr/pdf/0014899.pdf>> (last accessed 16 June 2021). According to this survey, 78.3 percent of the adult disabled population did not participate in the labour force; 36.3 percent were illiterate; and 34.4 percent of them had never been married.

²⁴ *ibid.*, p. X.

²⁵ Turkey Statistical Institute, 2011 Population and Housing Census (2011) available at <<https://ailevecalisma.gov.tr/media/5677/nufus-ve-konut-arastirmasi-engellilik-arastirma-sonuclari.pdf>> (last accessed 16 June 2021).

prospects of identifying problems experienced by disabled people, devising and implementing policies to address those problems and monitoring progress in disability rights remain poor.

The implementation and enforcement of the positive aspects of the TDA has been very limited as well. Perhaps the most visible shortcoming of the TDA can be seen in its failure to ensure one of its main targets to ensure accessibility in public spaces and transport. The TDA, in its initiation in 2004, had stipulated a legal requirement for all public entities to meet certain accessibility criteria in seven years.²⁶ Failure to meet these criteria by this deadline would be faced with administrative fines. Yet not only did the lengthy period offered to institutions initially mean a significant delay for the provision of the accessibility, but the deadline to comply with this requirement had been extended six times by 2020. As this chapter goes to press, the most recent extension has postponed the deadline to 2023.²⁷ The accessibility requirement is in this way put off periodically and shelved until the next deadline, diminishing the TDA's effectiveness to encourage compliance and ensure accountability, while inaccessibility remains a major problem in disabled people's everyday lives.²⁸

The limitations of the TDA are evident in the absence of enforcement mechanisms as well as of a set of processes with the ability to influence the broader legal framework and institutional behaviour. Historically, the country's welfare regime has offered little social support for disabled citizens, assigning them to the sphere of familial care and charity.²⁹ The provision of social care continues to be family centred and to depend on a highly medicalised approach to disability, based on 'assessments of loss of organ or functional ability' in percentages.³⁰ Disability-related allowances are largely intended for family members of disabled people who are paid as care providers based on a means test of the household income of the people with 'severe' disability and do not facilitate independent living.³¹ Despite the TDA's anti-discrimination clauses, discrimination against disabled people remains embedded in many laws. To this day, for example, disabled people cannot serve as judges or prosecutors according to the Law of Judges and Prosecutors 1983. This law mandates that judges and prosecutors shall not have any 'physical and mental illness, or disability that would prevent them from fulfilling their duties on a permanent basis around the country,' including

²⁶ TDA, Provisional Articles 2 and 3. The accessibility standards are set by the Turkish Standards Institution (TSE).

²⁷ Omnibus Bill (no 31119) 28 July 2020, Article 7.

²⁸ For an account on everyday experiences of inaccessibility of disabled people in Istanbul, Turkey, see: S Yardımcı and D Bezmez, 'Disabled Istanbulites' everyday life experiences as "urban citizens": accessibility and participation in decision-making' (2018) 22(5) *Citizenship Studies* 475.

²⁹ V Yılmaz, *The Political Economy of Disability in Turkey* (LAP Lambert, 2011).

³⁰ The Regulation on Disability Assessment for Adults (no 30692) 2019.

³¹ Above n. 27.

‘disability in speaking in an unusual way that can be considered odd by the community and problems in controlling limbs.’³² A similar language of deficiency dominates legal regulations around intellectual disability³³ and is used to withhold from intellectually disabled people the right to exercise legal capacity, which the chapter now turns its focus to.

Legal Capacity in Turkish Laws

The Turkish Constitution declares ‘equality before the law’³⁴ and every citizen’s ‘inherent fundamental rights and freedoms, which are inviolable and inalienable.’³⁵ However, the Turkish Civil Code delineates the strictly demarcated limits of access to legal capacity. As in many other civil law jurisdictions,³⁶ the Turkish legal system relies on a two-tiered approach to legal capacity, setting up two forms of capacity: Capacity to be the holder of rights³⁷ and capacity to act.³⁸ Article 8 of the Civil Code declares that capacity to be a rights holder applies to each and every citizen. And yet, Articles 9 and 14 of the Civil Code directly remove the capacity to act from people who do not have ‘power of discernment’ and from those who are ‘restricted’. By decoupling the capacity to act from the capacity to be a holder of rights, the Civil Code removes from the holder of rights the right to exercise those rights.³⁹ This poses a material conflict between the CRPD and Turkish laws. The Committee has made clear that legal capacity means that all people, including disabled people, ‘have legal standing and legal agency simply by virtue of being human’.⁴⁰ In contrast to this understanding of legal capacity by the CRPD, the Turkish state continues to insist on removing legal agency from the definition and understanding of ‘legal capacity’ and deny legal agency on a number of grounds linked to disability.

³² Law of Judges and Prosecutors [Hakimler ve Savcılar Kanunu] (no 2802), Article 8.

³³ The Turkish system does not distinguish between intellectual disability, neurodegenerative conditions like dementia and mental health conditions, which are instead subsumed in law under categories of ‘mental illness’, ‘mental infirmity’ or ‘mental condition’. As such, the regulations that I discuss in this chapter also apply to people with dementia and mental health conditions, although my focus here is on the legal conceptualisations of and responses to intellectually disabled people and their decision making.

³⁴ The Constitution of the Republic of Turkey, Article 10.

³⁵ Ibid, Article 12.

³⁶ For a discussion on the Spanish law’s historical approach to ‘capacity’ and its recent law reform on the legal capacity of intellectually disabled people, see P Gomez, this volume.

³⁷ Turkish Civil Code [Turk Medeni Kanunu] (no 4721) 2001, Article 8.

³⁸ Ibid, Article 9.

³⁹ The official translation of the CRPD into Turkish reflects this bifurcated understanding of legal capacity. Legal capacity (*hukuk ehliyeti*) is translated as ‘capacity to be the holder of rights’ (*hak ehliyeti*), excluding ‘right to act’ (*fiil ehliyeti*) and undermining legal capacity to holding of rights. In this way, the translation of the concept of legal capacity into Turkish law differs from the definition of ‘legal capacity’ used by the CRPD.

⁴⁰ UN Committee on the Rights of Persons with Disabilities (n 5), para 14.

The first ground for the denial of 'capacity to act' for a person under Turkish law is 'lack of power of discernment'. 'Power of discernment', a similar concept to the one of 'mental capacity' often used in common law jurisdictions, is presumed to be held by every citizen unless one lacks 'the ability to act reasonably [...] due to reasons like mental illness, mental infirmity and intoxication.'⁴¹ From this legal formulation two conditions emerge for a person to be found not to have the 'power of discernment': The first is that the person should be unable to act 'reasonably'. The Court of Cassation has clarified to some extent what 'acting reasonably' means in law: one's capacity to understand, weight up and discern the reasons and consequences of their actions.⁴² The second condition is that there should be a causal connection between the person's failure to act reasonably and their 'mental condition'.⁴³ 'Mental infirmity' is not defined in the Civil Code but has been understood by the courts as 'developmental deficit or regression in mental functions.'⁴⁴ A person who cannot act reasonably due to their condition is thus deemed to be without 'power of discernment' and stripped of their capacity to act by the courts.⁴⁵

The lack of power of discernment is not the only way through which one's legal capacity can be restricted under Turkish laws. The Turkish Civil Code has one further category for the removal of legal capacity of persons who retain power of discernment, either *ex officio* or upon the request of the person.⁴⁶ According to Article 405, 'every person who, due to mental illness or mental infirmity', is in a condition where they (i) are not able to fulfil their tasks, (ii) require permanent support for their protection and care, or (iii) put other people's safety at risk, must be 'restricted'. The demeaning implications of the language aside, this resonates with a common juxtaposition of disability with need for care and protection and/or dangerousness.⁴⁷ The danger a person poses to others purportedly due to their intellectual disability is seen as a legitimate reason to restrict them and curtail their legal capacity. Furthermore, the care and support that a person may need in their daily life are also posited as a ground to remove their legal capacity and subject them to guardianship. In contrast to the support requirement in the CRPD, receiving support in daily tasks or permanent care become the very reason that an intellectually disabled person can be deemed as incapable of exercising their right to act. 'Restricted' people with power of discernment are called in

⁴¹ Turkish Civil Code, Article 13.

⁴² The Court of Cassation 14.HD. 2007/2003 E.-2007/3315.

⁴³ The Court of Cassation HGK. 12. 11. 1969 3/ 3-1185.

⁴⁴ *ibid.*

⁴⁵ Turkish Civil Code, Article 14.

⁴⁶ Turkish Civil Code, Article 408.

⁴⁷ R Sandland 'Sex and Capacity: The Management of Monsters?' (2013) 76(6) *Modern Law Review* 981.

law 'persons with limited incapacity'. As a rule, they do not hold but exceptionally are given the right to act. While people who are deemed to lack power of discernment cannot make any legally binding decision, persons with limited incapacity are able to exercise their rights in relation to 'gratuitous acquisitions and exercising strictly bonded personal rights.'⁴⁸

In sum, under the current legal regime an intellectually disabled person can be appointed a guardian (i) if the person is deemed to lack the power of discernment, or (ii) the person retains the power of discernment but is deemed 'restricted'. In both cases, the Civil Court of Peace, as the guardianship authority, adjudicates the matter based on an official medical board report and appoints the guardian. The guardian should be the spouse or close relative of the person, unless there are good reasons not to follow this rule, and a person appointed by the courts as guardian is required to accept the role if they live in the same address with the person.⁴⁹ As such, the Turkish guardianship regime assumes the presence and suitability of families for guardianship and organises decision-making on behalf of intellectually disabled people accordingly. Families, around which the welfare system is structured, are expected not only to provide care to their disabled family members but also assume the guardian role and make decisions on their behalf.

There are certain limitations and requirements on who can be a guardian. Persons who themselves are 'restricted', who have an obvious conflict of interest with the person placed under guardianship, and judges of the guardianship authority cannot be appointed as guardians.⁵⁰ Added to this list are persons who lead 'a dishonourable life' and those banned from public service. These two conditions point to the moralistic evaluations on who can be given by the courts the power to act on someone else's behalf. The gendered implications of leading 'a dishonourable life' are clear in light of the legal normalisation of the culture of honour in Turkey and the social and legal marginalisation of those who do not comply with the accepted codes of honour.⁵¹ The exclusion of those who are dismissed from public service also indicates the selective delegation of decision-making power by the law to certain type of citizens. Given that mass dismissals from the public sector are a historically used

⁴⁸ Turkish Civil Code, Article 16

⁴⁹ *ibid*, Article 414. According to Article 417, persons who are over the age of 60, who have physical disability or permanent disease, who parent more than four children, or who are already a guardian, may refrain from accepting to the guardianship role. President of Turkey, members of the Turkish Grand National Assembly and the Cabinet, and judges and prosecutors can also be exempted from the role.

⁵⁰ Turkish Civil Code, Article 418.

⁵¹ D Koğacıoğlu, 'The Tradition Effect: Framing Honor Crimes in Turkey' (2004) 15(2) *differences: A Journal of Feminist Cultural Studies* 119; A Zengin, *Iktidarın Mahremiyeti: İstanbul'da Hayat Kadınları, Seks İşçiliği ve Şiddet* (Metis Publishing 2011); A Parla, 'Revisiting 'honor' through migrant vulnerabilities in Turkey' (2020) 31(1) *History and Anthropology* 84.

punishment mechanism by the Turkish state against its political opponents,⁵² only those who align with the political codes of the Turkish state are trusted to be guardians and make decisions on behalf of their incapacitated family members. Notwithstanding the problems with the guardianship regime, being cut from their close networks of support on these grounds poses additional limitations on intellectually disabled people's access to support to enjoy legal capacity.

Guardians are responsible for the protection of the personality and property interests of the person who has been put under guardianship and for representing them in legal affairs.⁵³ The provisions of the Civil Code regarding the administration of guardianship primarily deal with financial matters.⁵⁴ There are certain financial transactions that cannot be made solely by guardians on behalf of the person and must be authorised by courts of law or otherwise are deemed invalid. These are decisions considered to have significant financial or personal consequences –such as buying or selling property, moving to an education, care or health institution, or changing residence– which require the additional permission of the guardianship authority, the local Civil Court of Peace.⁵⁵ Some other personal and financial decisions need, in addition, permission of the supervisory authority, that is the local Court of General Jurisdiction. These include decisions relating to adoption, certain inheritance issues as well as contracts between the 'restricted' person and their guardian.⁵⁶ Being a guarantor, establishing a foundation and making significant donations on behalf of the 'restricted' person are banned.⁵⁷ Decisions on personal matters, like marriage, cannot be done on behalf of people without power of discernment, as these are considered to be executable only by the rights holder and cannot be transferred to someone else to be exercised on their behalf.⁵⁸ Those whose legal capacity has been restricted on grounds other than lack of power of discernment may marry with the permission of their guardians.⁵⁹ One other fundamental right that Turkish citizens

⁵² In the most recent wave of purge from public service in Turkey, more than 100,000 public sector workers, including police officers, teachers, soldiers, doctors, judges, prosecutors and academics, were dismissed under the powers of the state of emergency following the coup d'état attempt in July 2016 against AKP (Justice and Development Party) government. See Amnesty International, *No End in Sight: Purged Public Sector Workers Denied a Future in Turkey*, 2017 <<https://www.amnesty.org/download/Documents/EUR4462722017TURKISH.PDF>> accessed 17 November 2020.

⁵³ Turkish Civil Code, Article 403.

⁵⁴ Turkish Civil Code, Articles 438-445.

⁵⁵ Turkish Civil Code, Article 462.

⁵⁶ Turkish Civil Code, Article 463.

⁵⁷ Turkish Civil Code, Article 449.

⁵⁸ Turkish Civil Code, Article 125.

⁵⁹ Turkish Civil Code, Article 136; Regulation on Marriage (no 85/9747) [Evlendirme Yönetmeliği] 1985, Article 14/2.

under guardianship cannot exercise is voting. The right to vote that is given to every citizen over 18 years old by the Constitution⁶⁰ is withdrawn from people under guardianship by the Act on Essential Principles of Elections and Registries of Electors 1961⁶¹ in direct contradiction with Article 29 of CRPD on participation in political and public life.

In the face of such drastic measures that deprive a person of their capacity to make decisions in their own life, this web of regulations around legal capacity of intellectually disabled people lack the necessary safeguards. Most of the safeguards in the law focus on the management of financial affairs. Before making any 'restriction' decision, the judge *may*, but is not required to, hear the person subject to restriction.⁶² The guardians are required to ask the restricted person for their opinion only if they have 'ability to form and express an opinion'.⁶³ Guardianship orders can be removed when an official medical board reports that the reason for the restriction no longer exists, or if the guardian abuses their position.⁶⁴ There is not a clear pathway for objections to guardianship orders or to a decision-maker making substitute decisions, however. Nor is there a nominated supporter scheme or a mechanism for independent advocacy.

From this account, the dissonance between Turkish disability laws and the CRPD is clear. Despite some positive developments through the amendments to the Turkish Disability Act, in legal discourse disability and intellectual disability in particular remains associated with deficiency and is reduced to a state of being in need of protection and care. The Turkish legal framework also does not comply with the CRPD requirement under Article 12 that States Parties need to provide disabled people access to the support necessary to enable them to make decisions that have legal effect. It retains a strict substituted decision-making regime where 'power of discernment' and additional 'restriction' conditions are used as basis for withholding intellectually disabled people's legal capacity. Moreover, the support needs of an individual are framed in law as a reason that they must be restricted in contrast to the CRPD's call for provision of support for the enjoyment of legal capacity. Guardians are designated by the courts to protect the 'interests' of people put under guardianship, rather than supporting them to make decisions in line with their will and preferences. The next section looks at Turkey's state report to the Committee in this legal landscape on its

⁶⁰ The Constitution of the Republic of Turkey, Article 67.

⁶¹ Law no 298 [Seçimlerin Temel Hükümleri ve Seçmen Kütükleri Hakkında Kanun] 1961, Article 8.

⁶² Turkish Civil Code Article 409/2; The Court of Cassation E. 2004/6402, K. 2004/7656, 10.6.2004.

⁶³ Turkish Civil Code Article 450.

⁶⁴ Turkish Civil Code Article 474.

progress regarding disability rights and on the measures that it has taken to realise its obligations under the CRPD, especially Article 12 mandates.

Turkey's State Report: Performing Disability Rights

Having ratified the CRPD in 2009, the Turkish government submitted its initial report, due in 2011, in August 2015. A response to the list of issues in relation to the initial report raised by the Committee was additionally submitted in January 2019. This section, focusing on Turkey's submissions on its progress on disability rights, examines the Turkish state's (self-)representation of the state of disability rights in the country and the extent it engages with the CRPD mandates, particularly of Article 12.

For this chapter, Turkey's submission is of interest in three respects: First, States Parties submissions to the Committee offer an opportunity for states to review and provide a comprehensive account of the work that a state has done in the field of disability rights. The reviews can serve to identify the country's achievements as well as failures, problems and shortcomings in ensuring CRPD compliance. In this sense, States Parties' submissions produce and share information on the current social, legal and political landscape for disabled people in the country and point to areas and issues that require development of relevant policies and practices. Secondly, the submissions are also a venue for investigating States Parties' practice of self-reporting, giving insights into their understandings and approach to disability rights. Finally, given the huge gap between CRPD principles and the disability and legal capacity laws in Turkey that the previous section demonstrated, Turkey's state report also raises questions on the benefits and limitations of the state reporting practice under the CRPD.

Turkey's disinclination in monitoring and reporting of the implementation of the CRPD was highlighted by the 4-year delay in the submission of its initial report to the Committee. Eventually, Turkey's state report was produced by governmental institutions, the General Directorate of Services for Persons with Disabilities and the Elderly of the Ministry of Family, Labour and Social Services of Turkey. In other words, despite the CRPD's requirement that states should set up independent monitoring mechanisms to monitor its implementation, the monitoring was not carried out by an independent body or by the active involvement of disability rights organisations of the country. There was not a clear mechanism set up to ensure the participation of civil society organisations (CSOs) working on disability rights in a meaningful way in the monitoring process; some CSOs were given only 12 days to submit their comments on the draft report and without any

guidance or support from the government.⁶⁵ The state report, the list of issues submitted to Turkey by the Committee and the replies of Turkey to the list of issues had not been shared with the public in Turkish or in an accessible format by the State Party. As a result of these barriers, some disability rights organisations could not deliver their opinions on the draft report, or their contributions were severely limited. They have largely been left to their own means with limited time and resources to contribute to Turkey's monitoring by the CRPD.

In terms of the substance of Turkey's submission to the Committee, it far from provided a substantive review of the measures that it had taken towards CRPD compliance, or their shortcomings. The 52-page long document merely lists legal regulations and provisions, lists action plans, initiation of projects, and numerous conferences and seminars organised by governmental or non-governmental organisations, e.g. "2011-2013 Strategy and Plan of Action on Care Services", "1st Strategy Paper and Plan of Action on the Rights of Children (2013-2017)" or "Year of Action for Accessibility for All". Expressions of intent such as "planned" and "envisaged" dominate the submission. There is no indication of the tangible outcomes of these activities or endeavours in terms of the real impact they have had on disabled people and their living conditions. This emphasis on form without substance, action without impact, is reflected in the report's presentation of the mere passing of laws or signing of international conventions as achievements in ensuring disability rights without any detail on their implementation and/or transformations they brought about. Consider the statement in relation to the ratification of the CRPD which, according to Turkey's state report:

[...] brought forth significant opportunities for protection, promotion and enhancement of rights of PwDs [people with disabilities] in Turkey. Besides, it has attributed to enhancement of rights of PwDs, carrying national implementations to the level of internationally accepted standards, promotion of monitoring the

⁶⁵ Association for Monitoring Equal Rights (2018) 'An Alternative Report from the Association for Monitoring Equal Rights in relation to the State Report of the Republic of Turkey for the 21st Session of the Committee on the Rights of Persons with Disabilities', available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fICO%2fTUR%2f32174&Lang=en (last accessed 16 June 2021); Disability Rights Monitoring Group (2018) 'Report and List of Questions on the Current Situation of Disabled Persons in Turkey: Submission to the United Nations Committee on the Rights of Persons with Disabilities' available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fICO%2fTUR%2f32006&Lang=en (last accessed 16 June 2021).

implementation processes, activation of disability laws and policies in Turkey and elimination of possible shortcomings in the implementation of such policies.⁶⁶

In a similar way, the signing of the European Convention on Human Rights is put forward as a key measure in securing of Article 22 right to respect for privacy.⁶⁷

Turkey's submission on Article 12 follows a similar approach. It almost exclusively recites the legislation around decision-making by intellectually disabled people and 'the conditions of incapacity'⁶⁸ in Turkish laws that were detailed in the previous section. As discussed above, the Turkish Civil Code restricts legal capacity of individuals on the basis of 'mental infirmity' and 'mental illness' and does not explicitly refer to disability as a basis of restriction of legal capacity. It is in Turkey's state report that disability emerges as a condition of legal incapacity and disabled people as the targets of such restrictions. The report names 'persons who are in a state of disability or lack distinguishing power'⁶⁹ as persons 'regarded as *non sui juris*' whose acts 'may not lead to legal consequences'.⁷⁰ This formulation of the reasons for incapacitation that uses disability and 'lack of distinguishing power' almost interchangeably is followed by the report's merging of disabled people with persons who are 'restricted' and 'have limited incapacity'. The report states that 'disabled persons with distinguishing power may not undertake any obligation by their own will unless they receive the consent of their legal representatives.'⁷¹ The submission, in this way, not only indirectly admits that legal capacity includes the exercise of rights which is bound to specific conditions in Turkish law, but also that disabled people are legally incapacitated because of their disability. This dissonance between Turkish capacity law and Article 12 is left unproblematised, rather than confronted, addressed, or even acknowledged. Instead, the discourse of protection is yielded in the report to announce the rationale for the guardianship regime to the Committee, alongside pathologized, deficient views of intellectual disability:

Guardianship mechanism was regulated in Turkish Law with the purpose of protecting the rights of persons. Guardians are liable for protecting the interest

⁶⁶ Government of Turkey, Initial report submitted by Turkey under article 35 of the Convention, 3 August 2015, [CRPD/C/TUR/1], para. 3.

⁶⁷ *ibid*, para. 164.

⁶⁸ *ibid*, para. 88.

⁶⁹ Turkey's state report uses the phrase 'distinguishing power' for power of discernment.

⁷⁰ *ibid*, para. 89.

⁷¹ *ibid*, para. 90. This is a reference to Article 405 of the Civil Code.

of persons with mental disabilities or infirmities (including interests on assets) and representing them in legal actions.⁷²

The discourse of protection which undermines intellectually disabled people as objects of protection flattens the distinction between being a subject of rights and of best interests decisions made on one's behalf.

The Committee's request for further information in the "List of issues in relation to the initial report of Turkey" did not lead to a deeper engagement with Article 12 on Turkey's side. Turkey's response ignores the Committee's query on the steps taken to repeal provisions of the Turkish Civil Code that deprive disabled people of their legal capacity or on measures to establish a supported decision-making system.⁷³ An EU funded study in 2016 that aimed 'to identify and provide solutions for the problems faced in placing under guardianship the PwDs who stay in institutions affiliated with [Ministry of Family, Labour and Social Services]' is cited without any further detail about the project than the preparation of 'a draft guidebook covering frequently asked questions and a report on examples of good practice.'⁷⁴ However, it is telling that this study, quoted as a response to the Committee's query on the move from guardianship to supported decision-making, did not problematise guardianship, but focused on problems in placing disabled people under guardianship. Turkey's response to the question on the 'number of persons with disabilities who are still under tutorship and guardianship (plus the percentage of the total number of persons with disabilities that they represent) and of those who are still subject to processes to re-establish their full legal capacity', on the other hand, demonstrates the extent of the lack of information and a monitoring system in the country: 'By October 2018, the numbers of PwDs under guardianship are 612 persons in care centers affiliated with the Ministry and 13,872 persons with mental/psychological disabilities in private care centers supervised by the Ministry.' The source of the data, and how it compares to the total number of disabled people and to the number of those under guardianship but not living in public or private institutions are not shared. If we take into account that a relatively smaller number

⁷² *ibid*, para. 92.

⁷³ UN Committee on the Rights of People with Disabilities (UNCRPD), *List of issues in relation to the initial report of Turkey*, 9 November 2018, [CRPD/C/TUR/Q/1], available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CRPD%2fC%2fTUR%2fQ%2f1&Lang=en (last accessed 16 November 2020), para. 13

⁷⁴ Government of Turkey, *Replies of Turkey to the list of issues*, 21 January August 2019, [CRPD/C/TUR/Q/1/Add.1] available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CRPD%2fC%2fTUR%2fQ%2f1%2fAdd.1&Lang=en (last accessed 16 November 2020), para. 29

of disabled people stay in institutions in Turkey,⁷⁵ we can only assume that these numbers represent a small proportion of people under guardianship.

The collating and listing of laws, action plans, meetings and figures in Turkey's report is not insignificant. These techniques of regulatory ritualism produce a largely self-descriptive and self-serving document, turning the satisfaction of the formal standards into the point of self-reporting.⁷⁶ Whereas the CRPD places disability within the broader context of relations in society and proposes a comprehensive programme for change of social and legal approaches to disability, Turkey's state report translates human rights norms embedded in the CRPD to quantifiable performances of disability rights devoid of context and meaning. What is more, the instance of self-reporting process reconstructs the institutional and discursive limits of the Turkish state by reproducing a conception of intellectually disabled people as objects of protection and care rather than challenging its existing values and conventions to catalyse change. Undermining in these ways the means by which disability rights need to be understood and can be substantially accomplished, the reporting process fails to instigate a shift to produce responsibility, accountability and transparency and to reshape state action and language.

Conclusion

This chapter provided an account of the Turkish state's approach to intellectual disability in its written laws and documents and demonstrated the deep chasm between the CRPD and Turkish legal framework and self-reporting practice. Intellectually disabled people receive very little recognition and protection under Turkish laws which are marked by a deficit view of intellectual disability and a rigid substituted decision-making regime. In contrast to the support paradigm embedded in Article 12 of the CRPD, the framing of intellectually disabled people as recipients of support and care becomes the way through which they are excluded from full ownership of legal capacity. These shortcomings have remained intact in the CRPD reporting process. Turkey's submission mirrors the startling failure to engage with the issues raised by the CRPD and further consolidates the

⁷⁵ According to the latest report of Ministry of Family, Labour and Social Services, 29,530 persons were staying in public or private care centres (8,075 and 21,455 respectively) in September 2020. Ministry of Family, Labour and Social Services of Turkey, *Engelli ve Yaşlı İstatistik Bülteni*, October 2020, available at https://ailevecalisma.gov.tr/media/60415/istatistik_bulteni_ekim20.pdf (last accessed 16 June 2021).

⁷⁶ G Oberleitner, 'Countering Ritualism: What Does it Mean to Follow-Up Human Rights Recommendations?', Paper delivered at 'The Rituals of Human Rights' Workshop, Centre for International Governance and Justice, RegNet, Australian National University, Canberra, Australia, 25-27 June 2014, available at <http://regnet.anu.edu.au/sites/default/files/publications/attachments/2015-08/11%20Oberleitner%2C%20Countering%20Ritualism.pdf> (last accessed 16 June 2021).

construction of disabled people as objects of care and the state's (and their families') role as protector of their 'interests'.

Sally Engle Merry argued that the reformulation of soft law norms of human rights into quantitative indicators to specify and measure compliance come 'at the cost of a simplification and decontextualization that runs counter to human rights legal thinking'.⁷⁷ In Turkey's report we can see a similar, ritualistic overreliance on quantification with a similar simplifying and decontextualising effect. The report presents a collation of laws, action plans, meetings and figures, devoid of any acknowledgement of disabled people's real-life conditions, intellectually disabled people's right to legal capacity, or of the state's obligation to provide support for the enjoyment of legal capacity by disabled and non-disabled persons on an equal basis. These repetitive and formalistic patterns of "rituals of verification"⁷⁸ turn the state report into a mere performance of disability rights for an international audience, without any substantive or meaningful engagement with the conditions of disabled people in Turkey or Turkey's international human rights obligations under the CRPD. In this way, Turkey's (non)engagement with the CRPD undermines the potential impact of the CRPD's state reporting and monitoring process as well as the broad vision of legal and societal transformation that the CRPD aims to effect.

Alternative and shadow reports by disability rights organisations shed light on some of the silences and absences in Turkish laws and state report to some extent. For instance, it is through the Shadow Report of the Confederation of the Disabled of Turkey that we (and the Committee) learn that people with visual, hearing or speech impairments are also subject to varying degrees of legal incapacitation in the practice of notaries and banks which require them to have two witnesses to carry out procedures despite the requirement being abolished in the amendments made to the Notary Law in 2005.⁷⁹ However, as discussed above, in a context such as Turkey where CSOs operate with extremely limited resources with limited support from the state, their participation in the monitoring or law and policy development processes remain limited.

These tensions raise questions about the benefits and limitations of 'soft law' regulatory processes in Turkey and similar contexts out of step with the kinds of human rights ideals and ideas that are

⁷⁷ S Engle Merry, 'Firming Up Soft Law: The Impact Of Indicators On Transnational Human Rights Legal Orders' in T Halliday and G Shaffer (eds.) *Transnational Legal Orders and Human Rights Law* (Cambridge University Press 2015), p. 375.

⁷⁸ M Power, *The Audit Society: Rituals of Verification* (Oxford University Press, 1997).

⁷⁹ The Confederation of the Disabled of Turkey, 'Shadow Report Turkey' (2018) available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fTUR%2f33877&Lang=en (last accessed 16 June 2021).

embodied by the CRPD. This is not to trivialise the potential of the CRPD and its monitoring of the States Parties which can serve as leverage for the promotion and advocacy of disabled people's rights in national and local levels. My aim is rather to point out to the complex interfaces of top-down and bottom-up impetuses for legal change. Following the constitutive socio-legal scholarship,⁸⁰ I would argue that as the CRPD norms and the idea of universal legal capacity continues to spread around the world, there is an ongoing need for more bottom-up inquiries. From disability rights advocates who translate the globalised aims of the CRPD for domestic advocacy to intellectually disabled people and their support networks who navigate the substituted decision-making regimes on a daily basis, a focus on the actors and processes on the ground opens up a rich avenue for critically engaging with how people understand concepts and principles of the CRPD, and how they engage with those understandings for social and legal change. The everyday lives of the CRPD at the intersections of the global and the local can be where much of its yet to be realised potential and promise lies in, and where we can trace and understand signs for deepening of such transformation in law and society.

⁸⁰ P Ewick and S Silbey, *Commonplace of Law: Stories from Everyday Life* (University of Chicago Press, 1998); SE Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2006); M Goodale and SE Merry, *The Practice of Human Rights: Tracking Law Between the Global and the Local* (Cambridge University Press, 2007).