

Turkey and the Council of Europe's Oviedo Convention at Its 20th Anniversary

Türkiye ve 20. Yılında Avrupa Konseyi Oviedo Sözleşmesi

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International treaties are included among the sources of written law. According to Article 90 of the Constitution of the Republic of Turkey, “the ratification of treaties concluded with foreign states and international organizations on behalf of the Republic of Turkey shall be subject to adoption by the Grand National Assembly of Turkey by a law approving the ratification.” The article further states that “international agreements duly put into effect have the force of law” (1). In the legal system, international treaties are hierarchically more powerful norms than national laws. In the hierarchy of norms, international treaties are above the laws. Therefore, unlike laws, no appeal to the Constitutional Court can be made with the claim that an international treaty violates the Constitution (2).

Since 2004, “in the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws duty differences in provisions on the same matter, the provisions of international agreements shall prevail” (3).

At the end of 2003, the Turkish Grand National Assembly ratified the Convention on Human Rights and Biomedicine (law no. 5013). Theoretically, since this convention concerns human rights, it is included in the aforementioned 2004 amendment. Hence, in the case of a conflict between the Convention and the Constitution, the Convention should prevail (4).

The Convention on Human Rights and Biomedicine, opened for signature on 4 April 1997 in Oviedo, Spain, has been signed by 35 countries, 29 of which have ratified it. The full name of the convention is the

Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. The purpose of the Convention has been to guarantee respect for fundamental rights and freedoms during biological and medical interventions (5).

The essential principles of the Convention can be summarized as follows:

- a- The interests and welfare of the human being shall prevail over the sole interest of society or science.
- b- Parties, taking into account health needs and available resources, shall take appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality.
- c- Any intervention in the health field, including research, must be carried out in accordance with relevant professional obligations and standards.
- d- An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.
- e- Any form of discrimination against a person on grounds of his or her genetic heritage is prohibited.
- f- Scientific research in the field of biology and medicine shall be carried out freely, subject to the provisions of this Convention and the other legal provisions ensuring the protection of the human being.
- g- The human body and its parts shall not, as such, give rise to financial gain.

Since Article 20.2 of the Convention “on the authorization of a person who does not have the capacity to consent to the removal of regenerative tissue” is in conflict with the Turkish Law on the Removal, Storage, and Transplantation of Organs and Tissues (law no. 2238), Turkey has made a reservation on this provision. The following article of the Convention has been the basis of this ruling (no. E.2014/12-103) of the Supreme Court of Appeals of Turkey:

“Any intervention in the health field, including research, must be carried out in accordance with relevant professional obligations and standards.”

However, the ruling of the Supreme Court is controversial since a complication related to a disease should not be included amongst the obligations of a healthcare professional and therefore a healthcare professional should not be held liable for a complication (3).

Furthermore, in the decision of the 13th Civil Chamber of the Court of Cassation (E.2013/23013), the Convention has been considered as part of our internal law, mentioning the article that requires parties to protect the dignity, integrity and other fundamental rights and freedoms of human beings without discrimination, with regard to the application of biological and medical interventions, as well as the article that states that any intervention in the health field, including research, should be carried out in accordance with relevant professional obligations and standards. Similar approaches are seen in other decisions as well (4).

According to the decision of the Court of Cassation, the Convention is part of internal law. Moreover, since the Convention concerns fundamental rights and freedoms, it shall prevail in case of conflict with internal laws as well as international courts. This emphasizes the practical significance of the convention (5).

It has been twenty years since the Convention was opened for signature and fourteen years since Turkey signed it. Turkey has signed a convention of international validity that is above the law. Even though the first provision of the Convention requires that signatories should make their domestic law compatible with the Convention by making any necessary amendments, Turkey has yet not been able to achieve the complete fulfillment of this requirement. Despite the

regulations made concerning some subjects, most subjects in the Convention has remained problematic (1).

For example, the provisions on HIV infection have been revised according to the Convention. However, organ transplantation and abortion still lack the necessary changes, preventing the domestic law from being compatible with the Convention. This dichotomy leads to practical issues, and hence is a problem that should be given priority. The necessary amendments in the Turkish domestic law should be made as soon as possible. Similarly, physicians and scientists working on human tissues who are either misinformed or uninformed about the Convention should be provided with the relevant information adequately to preclude any undesired outcomes (2).

Given the insufficient knowledge of healthcare professionals about the Convention and the obligations arising from it, educational measures should be taken and enforced by the government.

REFERENCES

1. Ünver Y. Avrupa Biyo-Tıp Sözleşmesi'nin Türk Hukukuna Etkileri (The Effects of European Biomedicine Convention on Turkish Law), *Archive of Public Law*. Istanbul: 2005:182.
2. Cin O. Biyo-Tıp Sözleşmesi ve İnsan Üzerinde Deney. (The Biomedicine Convention and Research on Human Beings), *Archive of Public Law*, Istanbul: 2005:199.
3. Rosenau H. Avrupa Konseyi Biyo-Tıp Sözleşmesi'ne Göre Embriyon Araştırmaları ve Tedavi Amaçlı Kopyalama (The Researches on Embryos According to European Council Biomedicine Convention and Cloning for Therapeutic Purposes). *Archive of Public Law*. Istanbul: 2005:137.
4. Katoğlu T. European Convention on Human Rights and Biomedicine as a part of Turkish Law. *AÜHFED*. 2006;55(1):157-93.
5. de Wachter MAM. The European convention on bioethics. *Hastings Center Report*. 1997;27(1):13-23.