



THE CHILD BEING “RES PUBLICA”? AN ANALYSIS OF CONTEMPORARY TURKISH DEBATES ABOUT THE COMPULSORY PRESCHOOL EDUCATION AND LEGAL PROBLEMS THEREIN

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The compulsory preschool education is a highly conflicted topic both in educational sciences and law. The topic has started to gain attention in 2009 when the Turkish Government declared that in 32 cities the preschool education will be compulsory and aimed to spread compulsory preschool education nationwide as of 2009. However, the plans have failed to be realized due to the rapidly and constantly changing educational system. Additionally, legal problems arose. Even when there was no significant constitutional directive, in October 2016 the new Education Minister declared that this year's priority will be compulsory preschool education in the whole country. Beside legal and constitutional restraints the rising numbers of private preschool entities is putting pressure on the whole educational system. The paper aims to analyze the legal problems and the perspective of the Turkish State on the right to preschool education by referring to the republican thought. As method of the study, Turkish Constitutional Court decisions, the decisions of the Council of the State, codes, regulations and progress plans of the governments in the field of education will be examined.

Keywords: Compulsory preschool education, Education, Turkish law, Republicanism.

Introduction

Whether preschool education should be compulsory or not is an ongoing debate among the scholars of educational sciences. In legal sciences it is gaining the attention, too, mainly when a dispute is brought to the courts. The discussion then quickly addresses the role or duties of a state. Although the design of the economic, social and cultural institutions in a society is highly depending on that state's main philosophy, the implicit aim of “eternal existence” of every state draws the attention to the desire of educating its citizens or members. In most cases the question is how far the state may interfere in the area of personal development of a child as well as how far the parents may interfere in the same area? Therefore, the controversial issue from a legal point of view is the role or duties of the state and the role or duties of the parents. The debates on these conflicting fields are shaped differently by two main approaches: by the classical liberal democratic theory and the republican thought. In my paper I aim to examine the relationship between the state's aim to form its own citizens and the custody rights of the parents in the Turkish Republic with a special reference to republican thought. Thus I will suggest two different solutions to the question: “is the child being res publica?”

A. Preschool Education and the child being “res publica”

Education plays a special role in the formation of the Turkish Republic¹ after the collapse of Ottoman Empire. In the first decade of the republican era Turkey, being a centralized, unitary and a nation state, has mainly focused –besides the economic and political reforms – on the revolution in the cultural field.² Mustafa Kemal Atatürk has given a special importance to education in creating the republic’s citizens³ and therefore one of the first republican codes was the Unity of Education Code (*Tevhid-i Tedrisat*) which was abolishing the *medrese* schools and unifying the whole Turkish educational system⁴. After those radical reforms in the educational field during the early Republican period attention was again directed to the preschool education in the year 1961– let aside the developments in the Ottoman State and the early republican period⁵ –when the Code of Primary Education (No. 222) was enforced. According to this code the preschool education was defined non obligatory, depending on the parents’ decision.

Educational scientists in Turkey agree on the necessity of preschool education emphasizing on its benefits for the child, for the parents and for the society both in short term and long term⁶. According to the American educational psychologist Benjamin Samuel Bloom who is still cited a lot in Turkey, the most important personal development occurs until the age of 13⁷. Furthermore, there seems to be a

¹The main aim was creating a unified education system to form a “nation” as a reaction to the Ottoman Empires’ Janus-headed education system which was creating masses who were having contradicting life views in the basic areas and therefore having the danger of collapsing in the beginning of the 20th Century’s nation-state waves.

² Mustafa Kemal Atatürk, the founder of the Turkish Republic emphasized: “There can be no Revolution successful without music.” when establishing the new Conservatories which would educate the new Republic’s westernized musicians. His revolutions took place in every area such as the legal system, the educational system, in the museums of Turkish History, in the institutions of Turkish language and in the architectural design of the new capital of the Republic. The effects of those revolutions are still vital today. The present-day education and higher education codes and regulations are defining therefore the aims of the Turkish education as “creating the citizens in accordance to Atatürk’s principles”. The Turkish National Education Code (No. 1739), Article 2; The Turkish Higher Education Code (No. 2547), Articles 4/(a)-1 and 5/(a). Principles of Atatürk are Republicanism, Nationalism, Populism, Statism, Laicite and Revolutionism. For more see **Shaw**, Stanford J., *From Empire to Republic, The Turkish War of National Liberation 1918-1923 A Documentary Study*, Vol. IV, Atatürk Supreme Council for Culture, Language and History Publications of Turkish Historical Society, Serial XVI – No. 84d, Ankara 2000; **Sonyel**, Salahi R., *Atatürk-The Founder of Modern Turkey*, Atatürk Supreme Council for Culture, Language and History Publications of Turkish Historical Society, Serial XVI – No. 55, Ankara 1989.

³ The relationship of the state and its people during the Ottoman Empire was referring to *kul* and *tebaa* rather than the western concept of *citizen*. The people in the Ottoman Empire were the *tebaa* of the emperor which is called the *Sultan*. The word *tebaa* is rooting from the Arabic language and referring to *taba* meaning “the people who are bound to a sovereign and *tabi* meaning “to be bound to somebody or something”. In Arabic language *taba* means “to follow”. *Kul* in old Turkish means “slave or servant”. Compared to the western concept of *citizen* a *kul* was not having political rights and the state was belonging to the Sultan who was representing the God. *Türkçe Etimolojik Sözlük*.

⁴For more information see **Akyüz**, Yahya, *Türk Eğitim Tarihi M.Ö. 1000-M.S. 2012*, Pegem Akademi, 2012.

⁵See **Akyüz**, Yahya, *Türk Eğitim Tarihi M.Ö. 1000-M.S. 2012*, Pegem Akademi, 2012; **Dağlı**, Yeşil Ümmühan, **Dağlı**, Arif, “Early Childhood Education in Turkish Laws and Strategic Plans from the 1950s to Today”, *Journal of Theoretical Educational Science*, 5 (4), pp. 454-467, October 2012; **Çelik**, Meryem, **Gündoğdu**, Kerim, “Historical Process of Early Childhood Education in Turkey”, *Journal of Kazım Karabekir Education Faculty*, Nr. 16, Year 2007, pp. 172-190.

⁶ See the National Education Council decisions on early childhood education and for a summary see **Altay**, Sadet, **İra**, Nejat, **Ünal Bozcan**, Elif, **Yenal**, Hakan, “Preschool Period and Its Current State in National Educational Council Since the Foundation of Turkish Republic”, *e-Journal of New World Sciences Academy*, Vol. 6, Nr. 1, 2011; for the early childhood education policies in 5 Year’s Development Plans see **Gül**, Ebru Deretarla, “Meşrutiyet’ten Günümüze Okul Öncesi Eğitim”, *Çukurova Üniversitesi Sosyal Bilimler Enstitüsü Dergisi*, Cilt 17, Sayı 1, 2008, pp. 275-277.

⁷**Bloom**, Samuel Benjamin, *Stability and Change in Human Characteristics*, Wiley, 1964, p. 68; “it is possible to say, that in terms of intelligence measured at age 17, at least 20% is developed by age 1, 50% by about age 4, 80% by about age 8 and 92% by age 13. Put in terms of intelligence measured at age 17, from conception to age 4, the

positive correlation between so-called developed societies and preschool rates⁸. This correlation of the higher rates in preschool education and economic and social development points to the societal effects of the preschool education. States that facilitate preschool education think of it as an investment in their human capital⁹. The idea is that the preschool education is essential for the *common good*¹⁰, for the *res publica*.

Instead of using a critical approach towards “education as an ideological tool of the state”¹¹, I will rather try to discuss the issue from the point of republicanism. The republican thought starts with the ancient Greek’s “res publica” concept and refers to the “problems of the public”, “events or activities of the public”, “the belongings of the public”, “public matters”, “the things which are belonging to the public”, “public goods”. The archaic thought of the republic finds its roots in the concept of “eleutheria”, which is the antithesis of slavery, freedom¹². However, the *common good* is hard to define. The representative of the classical republican thought Machiavelli defined common good as: “*It is neither the good / interest of all citizens nor a higher good that all citizens are supposed to identify by detaching themselves from their special interests. It is the good of the citizens who do not want to be oppressed and have no ambition to dominate*”¹³. This definition issues the power of deliberation in a society.

The republican theory’s liberty concept is different from the classical liberal liberty concept. According to Viroli¹⁴, while the republican liberty is referring to emancipating the people from conditions of dependence, the classical liberal liberty aims to protect the individuals only from interferences. Here the difference between “independence” and “being free from interference” becomes evident. In independence there is no domination. In being free from interference, a person may be dependent (and therefore being dominated) but still can choose without interference. Viroli gives an example: the decisions of a research student. He/she may decide on her actions regarding the research without any interference by her professor, but she is still dependent on and potentially dominated by her professor and there is always a potential of interference; so she is not independent.¹⁵

Pettit argues that the main idea in the republican thought is the lack of domination rather than the lack of interference. For him, republicanism, if it wants to be strong, must ensure that its ideals and institutions become resident in the habits and hearts of the citizens¹⁶. Maynor stresses that the maintenance of the republican project depends on a robust form of civic education and on prevailing social norms. The civic education aims to teach its citizens how not to be dominators: non-domination as a republican social norm. This principal points to the citizens having not only rights but also obligations towards each other. That obligation is emerging as respect that prevents citizens from trying to dominate others. This virtue (of respect) can be established as a social norm most easily through education. Maynor states that: “...[The] civic education cultivates specific virtues that help them [citizens] cast their end in a non-dominating fashion and play the active role in articulating their interests so that they are not dominated”¹⁷.

individual develops 50% of his mature intelligence, from ages 4 to 8 he develops another 30% and from ages 8 to 17 the remaining 20%”.

⁸See the report of OECD PF3.2: Enrollment in Childcare and Pre-school, updated: 9.10.2016, OECD – Social Policy Division – Directorate of Employment, Labor and Social Affairs.

⁹UNICEF, Starting Strong II, Early Childhood Education and Care, OECD Publishing 2006, p. 19-40.

¹⁰UNICEF, Starting Strong II, Early Childhood Education and Care, OECD Publishing 2006, p. 36, 37; Cleveland, Gordon, Krashinsky, Michael, Financing ECEC Services in OECD Countries, OECD, Paris, 2003.

¹¹ **Althusser**, Louis, *İdeoloji ve Devletin İdeolojik Aygıtları*, Çeviren: Alp Tümertekin, İthaki Yayınları, 2016; **İnal**, Kemal, *Eğitim ve İktidar, Türkiye’de Ders Kitaplarında Demokratik ve Milliyetçi Değerler*, Ütopya Yayınevi, Nisan 2004, pp. 35-61.

¹² **Audier**, Serge, *Cumhuriyet Kuramları*, İletişim Yayınları, İstanbul 2006, p. 14.

¹³Cited in **Viroli**, Maurizio, *Republicanism*, Hill and Wang, New York, 2002, p. 3-4.

¹⁴ **Viroli**, 2002, p. 12.

¹⁵ **Viroli**, 2002, p. 36, 41.

¹⁶ **Pettit**, Philip, *Cumhuriyetçilik, Bir Özgürlük ve Yönetim Teorisi*, Ayrıntı Yayınları, 1998, p. 241.

¹⁷ **Maynor**, John W., *Republicanism in the Modern World*, Polity Press, 2003, p. 182.

The republican thought brings up two points regarding the compulsory preschool education. The **first** one is focusing on the crucial role of preschool education in creating the values and norms necessary for a free democratic republic. The states should use education for spreading the social norm of non-domination among its citizens so that it can form a true republic. The **second** point is the potential of a republican state to solve conflicts between the state and its people or between individuals within the scope of non-domination. I will give an example regarding the debate about the preschool education at the end of my paper by referring to the republican thought.

B. The Problems Arising from the Legal System and Doctrine

The Technical Term of Preschool in Turkey

The term “preschool” refers to the years from birth until the start of primary education which is age 0-6 in Turkey. For some, however, it is referring to the education of children at the ages 3, 4, and 5. Most discussions of compulsory preschool education in Turkey are aiming at the age of 5, which is one year before the compulsory primary education¹⁸. Turkey is one of the countries in which the attendance to preschool (3-5-year-old children) is the lowest among the OECD countries (with a rate of 37%)¹⁹. The preschool institutions can be established both as public and private legal institutions. They can be established under the names preschool, preschool class, nursery class, application class, crèche, daily child care house and children’s club²⁰. They are being supervised by The National Educational Ministry, but not regulated in a unified code.

Thus, when discussing the legal debates on a compulsory preschool education, the lack of clarity in the current status must be addressed. Namely, there are four main malfunctions: first the problems arising from the Turkish legal doctrine, second the problems arising from the Turkish educational codes and regulations, third the problems arising from the contradicting court decisions and fourth the political problems.

¹⁸ The preschool attendance ages in fact differ due to the new changes in the National Education Code. The so called “4+4+4” code was highly criticized among the Turkish educational and legal scholars and among the public. This code introduced a gradually school starting age which I will mention in the following chapter of my paper.

¹⁹OECD PF3.2: Enrollment in Childcare and Pre-school, updated: 9.10.2016, OECD – Social Policy Division – Directorate of Employment, Labor and Social Affairs. According to the report:

Participation rate for 0-2 year olds in formal childcare and pre-school services in 2014

Highest: Denmark: 65% app. (Data: day care institutions and local authority family care)

Germany: 35% (Data: registered center-based services, registered family care services)

Turkey: no information.

OECD average: 35%

Participation rate for 3-5 year olds in pre primary education or primary school in 2014

Highest: France: 99% app.

Germany: 98% app.

Turkey: 37% app.

OECD average: 85% app.

EU average: 88% app.

Enrollment rates for 3, 4, 5 year olds in pre primary education or primary school:

Highest: France: for all ages 99%

Germany: For all ages between 90% and 99%

Turkey: age 3 - 10% , age 4 - 35%, age 5 - 70% (in the general attendance rates of that 37%)

OECD average: age 3-70%, age 4-88%, age 5-95%

²⁰ The National Education Code article 21 defines only preschool (ana okulu), preschool class (ana sınıfı) and application class in a school (uygulama sınıfı). Therefore, daily child care houses (gündüz bakım evi), crèches (kreş, yuva) and children’s clubs (çocuk kulübü) are regulated in various regulations and not considered as a part of the national education system.

The Problems Arising from the Legal Doctrine

Turkish legal doctrine does not have a distinctive field of educational law which has its own theory and specific principles. This lacking of a general theory of educational law²¹ makes the legal debates regarding all educational matters vulnerable to rapid changes in the educational system. First of all the fundamental concepts such as “education”, “schooling”²², “preschool”, “student”, “teacher”, “exam” are lacking of a unified or ideal definition. As the education entities are bound to the Ministry of Education and education is considered as a public service, these concepts are mostly discussed, understood and explained in terms of administrative law. Therefore, disputes in education are solved in administrative jurisdiction. Furthermore, in the course of an overall privatization of public services and states being rather regulatory than service providers, education services are increasingly privatized in Turkey as well²³. This shift is affecting the approach to the basic rights in the field of education. The understanding of “the right to education of a person - as the citizen” is replaced by “the right to education of a person - as a customer”. This customer-service provider relationship is undermining the possibility of creating a long term tradition in the educational law. This is resulting in the erosion of the basic educational concepts that are consequently filled with the mainstream political ideology.

The Problems Arising from the Codes and Regulations

The Turkish codes and regulations in the field of education are repeating usually the same sentences and concepts. They are appearing tangled and lacking of a unity for a fundamental understanding or philosophy of the concept “preschool” and “preschool education”²⁴.

Therefore, preschool entities vary in form and have different legal statuses. The Turkish legal system is distinguishing the preschools which are established according to the Basic Law of National Education from other ones. Art. 21 of the Basic Law of National Education defines only three types of preschool institutions: the preschools (ana okulu), preschool classes (ana sınıf) and application classes (uygulama sınıfları). Consequently, daily child care houses (gündüz bakım evi), crèches (kreş, yuva) and children’s clubs (çocuk kulübü) are regulated in various other regulations and are usually not considered as part of the national educational system due to their “child care” focus rather than “education”. These institutions

²¹ Lindner, J. Franz, “Was ist und wozu brauchen wir eine Theorie des Bildungsrechts?“, *DÖV*, 2009.

²² In Turkish, eğitim: education; öğretim: teaching, öğrenim: study.

²³ The Prime Ministry, Directorate of Privatization Administration has published two strategy plans. According to the first plan which was referring the years 2009-2013, social services such as education and health are the third wave privatizations in Turkey (p. 72). The second plan which is referring the years 2014-2018 has stated that the social services will be structured by the model of web administration where education is one of them and the plan is designing the providing of the education services by a cooperation of administration, entrepreneurs and families (p. 51). For more detailed privatization road see **T.C. Başbakanlık Özelleştirme İdaresi Başkanlığı**, *Stratejik Plan 2009-2013* and **T.C. Başbakanlık Özelleştirme İdaresi Başkanlığı**, *Stratejik Plan 2014-2018*; for privatization policies in Turkish education see **İnal, Kemal, Akkaymak, Güliz** (Ed.), *Neoliberal Transformation of Education in Turkey, Political and Ideological Analysis of Educational Reforms in the Age of the AKP*, Palgrave MacMillan, 2012.

²⁴ There are several codes and regulations which are mentioning early child education and care institutions:

-The Basic Law of National Education No. 1739 (Articles 19, 20, 21)

-The Public Servant Code No. 657 (Article 191)

-The Primary Education and Education Code No. 222 (Article 6)

-The Private Education Institutions Code No. 5580 (Article 2)

-The Ministry of Education, Preschool Education and Primary School Education Institutions Regulation, Official Gazette No. 29072, 26.07.2014 (also changed by the Regulation No. 29744, 16.06.2016)

-The Ministry of Education Private Education Institutions Regulation, Official Gazette No. 28239, 20.03.2012

-The Regulation about Child Care Houses which are going to be established by Public Law Entities, No. 19658, 08.12.1987

are often established by public or private entities in order to provide child care service for the children of their personnel.

In the last decade a shift can be observed towards an understanding of mutual responsibilities of both parents and the states and therefore an increasing number of countries are providing early childhood education that is integrated in the childcare service (as of age 4) for working parents. The reason is that the traditional division between “education” and “care” services has not always been beneficial to the child. The concept of “educare” is used to define the integrated services or a coordinated, multiparty approach to early childhood services²⁵. So rather than competing, both parties (states and parents) are to extend cooperation when it comes to their particular rights and obligations. In Turkey all of the preschool institutions are controlled and supervised by the Ministry of Education in regard of their educational program, but, due to the distinction of child education and child care, are not treated equally. Even though problems and disputes in those entities may be the same, due to the differences in their legal status, court decisions dealing with those disputes vary. Thus, courts are defining different rights and obligations for preschool institutions.

The Contradictory Court Decisions

Below some example cases will be presented in which courts at various levels had to define what a preschool is and discuss its specific qualifications:

- a) A public university, Atatürk University General Office of Health, Culture and Sports²⁶ was operating a preschool (ana okulu) and employing a person as a “teacher” (education services class). Personnel with this legal status are paid a type of fiscal award called “education and teaching award”. But as of March 1993, the university stopped paying the fiscal award due to the legal status of the preschool which is run by the university. The university claimed that according to the National Education Ministry Preschool, Nursery Class and Application Class Regulation, the preschool which is operated by the university is not a preschool but a crèche and therefore the personnel who are employed there cannot be classified as “teachers”. When the teacher requested an action for annulment of this administrative decision, the last instance court, the Council of State decided in favor of the teacher claiming that, although the universities are not allowed to establish preschools which are stated in the Basic Code of National Education, the current institution has *de facto* a preschool status, and the personnel employed there enjoy the status of “teachers”. So the Council of State interpreted the service being provided in the crèche is not a care service but an educational service and therefore, in terms of quality it has no difference from the activities held in preschools²⁷.
- b) In another yet similar dispute the Council of State has ruled contrary to the above mentioned decision. This time, the court claimed that crèches and daily care houses cannot be classified as preschools as defined in the Basic Law of National Education. “Teacher” (according to the very same code) are “holding a special type of profession in the education and teaching services of the state...”; “education” is here defined as “preschool education, primary and secondary school education, higher education, formal and informal education”. Thus, according to the Basic Law of National Education the “preschool” education institutions can only be established under the names preschool (ana okulu), preschool class (ana sınıfı) or application classes (uygulama sınıfı). Referring to that code the court did not approve the claim of the personnel of crèches demanding the fiscal education and teaching award²⁸.

²⁵ *UN Conventions on the Rights of the Child, General Comment No.7*, Committee on the Rights of the Child, 2005, p. 14.

²⁶ In Turkish: Atatürk Üniversitesi Sağlık, Kültür ve Spor Dairesi Başkanlığı.

²⁷ Danıştay Kararları E. 1994/3402, K. 1995/451.

²⁸ Danıştay, E. 1995/3474, K. 1997/3327.

- c) On yet another occasion an administrative court had to discuss whether a preschool institution can be regarded as an education entity. The dispute was arising due to the plans of establishing a private preschool close to a not child-friendly entity. The governor did not approve the project referring to the Private Education Institutions Code, Article 9, which is prohibiting the establishment of educational institutions closer than 150 meters to some not children-friendly entities such as bars and casinos. When the denied party requested an action for annulment of the governor's decision, the administrative court decided in favor of the denied party claiming that "preschools" are not mentioned in the Private Education Institutions Code, Article 9, distinctively as one of the educational institutions and therefore, the decision of the governor must be annulled.²⁹
- d) The fourth case presented is covering the Turkish Constitutional Court's interpretation of "preschools". It defined the concept of "preschool education and its scope and aim" when the Code of Municipality was to authorize the municipalities to establish preschools in their territories. In 2007 the President of the Republic requested an action for annulment against the code. The Constitutional Court did annul the provision that would authorize the municipalities to establish preschools in their territories. The court argued that preschool education is defined in the Basic Law of National Education and in the Primary Education and Education Code. According to those preschool education is a form of education that is given by the central state or strictly controlled by the central state whose aim is to prepare the children for the compulsory national primary school education. Therefore, the municipalities as "the local authorities" are responsible for the needs of the local population. They may not provide preschool services that are by nature highly national. This decision of the court can be seen as a political reaction to the rising number of uncontrolled religious foundations' child education centers at that time. The court claimed that establishing preschools by the municipalities is contrary to the unity of education principle, to Atatürk's Principles, to laicism, to the national unity, to the democratic state, to the principles of equality and justice and to the principle of scientific and functional education. The municipalities may therefore provide only physical facilities and financial aid in the field of preschool education³⁰.

Political Problems

Besides conflicting court decisions and tangled regulations, a new code (the so called "4+4+4 code"³¹) is installing a gradual system for the primary school beginning possibly at the age of 5. It is affecting the preschool education attendance

Age (Month)	Attendance to the Primary School
72, 73 or older	obligatory
69, 70, 71	Obligatory, unless a medical report requests otherwise

²⁹ İstanbul 2. İdare Mahkemesi, E. 2002/1524, K. 2003/511.

³⁰ AYM E. 2005/95, K. 2007/5; Recently, CHP (Republican People's Party, the main opposition party in the Turkish Republic) has prepared a legislative proposal according to which the municipalities are obliged to establish crèches and daily child care houses. In fact, most of the municipalities have already established crèches and daily child care houses for the children of the institution's personnel referring to the Child Care Houses of Public Institutions Regulation, Official Gazette No. 19658, 8.12.1987. This regulation is rooting in the Public Servant Code No. 657, Article 191. The Article 191 authorizes the public law entities only to establish child care houses and leisure centers for their own personnel but not nation-wide preschools.

³¹ The Code for Changing the Primary Education and Education Code and Various Codes No. 6287. This code has changed most of the provisions of the Primary Education and Education Code Nr. 222.

66, 67, 68	Obligatory, unless the parents issue a petition against the attendance
60, 61, 62, 63, 64, 65	Not obligatory, but possible in case the parents issue a petition asking for the attendance
59 or younger	Impossible

According to this chart, the primary school is starting between age 5 or 5½ latest. The primary education is compulsory when the child is 66 months old. The differing preschool ages according to this new regulation will put additional burdens on the state to provide suitable classrooms or preschool entities according to the different age groups.

In 2009 the government started already a pilot project in some cities which later would be extended nation-wide. This project was to make preschool attendance compulsory. When the 4+4+4 code became effective the project, however, stopped. That may serve as an example of how the Turkish national education system is suffering from rapid changes due to governmental or administrative personnel change. Long-term plans are altered or even cut completely by such processes and therefore, inaugurated reform periods are usually being left uncompleted. Although the above mentioned pilot project has been left uncompleted the current Turkish government³² has declared that the preschool education will be compulsory nationwide between the years 2017-2019.

The lacking of a vital cooperation between the Turkish academia and the politics is also undermining the educational system in general. In Turkey there is a tradition of gathering the National Education Councils which play a role of consultancy for the National Education Ministry. These National Education Councils³³ are being gathered every four years under the administration of the National Education Minister and the bureaucrats. The university and NGO representatives are also invited³⁴. However, the National Education Councils were not as effective as they should have been due to three problems. The first one is rooting in Article 19 of the National Education Council Regulation according to which the decisions of the councils are not boundary for the National Education Ministry. This lacking of means for the enforcement is making the decisions of the councils ineffective. The second problem is rooting in the structure of the councils. As the councils are administered by the National Education Ministry they can be controlled by a certain political party and therefore the decisions may be biased. The third problem is the inherent undemocratic character of those councils. The agenda of the councils is not set by the academics, teachers, parents or the students but by the bureaucrats³⁵.

Thus, when discussing legal elements of the compulsory preschool education one must remember these four malfunctions.

C. The Legal Status concerning Compulsory Preschool Education

The main debate on the relationship between the state, parents and the child can be portrayed in two different diagrams as shown below:

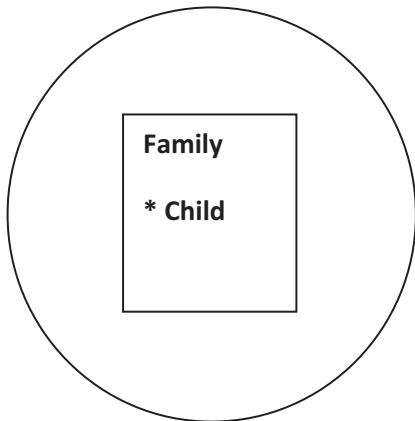
³² Prime Minister Binali Yıldırım has declared that the Medium-Term Program (2017-2019) is including the arrangement of the preschool education as compulsory. www.hurriyet.com.tr/basbakan-yildirim-okul-oncesi-egitim-zorunlu-hale-gelecek-40239062 ; accessed: 22.12.2016.

³³ In Turkish: Milli Eğitim Şurası

³⁴ The National Education Council Regulation (Official Gazette Nr. 29054, Date: 08.07.2014), Articles 5, 6, 7.

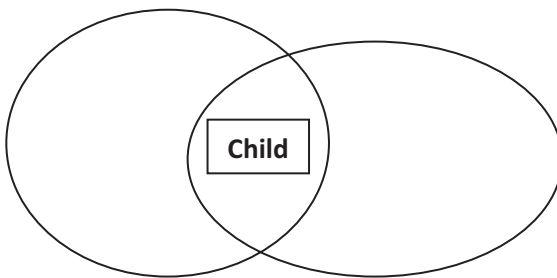
³⁵ For a detailed analysis of the Turkish National Education Councils see **Deniz**, Muzaffer, *Milli Eğitim Şuralarının Tarihçesi ve Eğitim Politikalarına Etkileri*, Süleyman Demirel Üniversitesi Sosyal Bilimler Enstitüsü, Yayınlanmamış Yüksek Lisans Tezi, 2001, p. 169-170 (unpublished master thesis).

State



State

Family



As the diagrams are indicating the principal legal debate regarding the compulsory preschool education is occurring in the intersection of public and private spheres. According to the first diagram the whole family as a social institution is regulated completely by the state. The scope and limits of the parental rights on the child are regulated by the state. The state's regulations may be more or less confining. However, even if the state's regulations do have a rather liberal character, there is the potential of dominating the family. The second diagram in contrast indicates an understanding in which the state shall stay out of family matters. The state and the family have competing demands regarding the child and its education. The child becomes a point of interference in that the state's aim to form its citizens, qualify its human capital and guarantee its future existence by maintaining its own values and norms and the families' right to educate their own children are opposing each other. Before offering a solution for a republican thought's point of view, the legal status in Turkey regulating this relationship will be presented.

The rights of the parents regarding their children are regulated in the Turkish Civil Code in terms of "Custody", Art. 339, 340 and 341. The frame is "The Scope of the Custody". The topic of Art. 339 is "in general": it is defining the custody rights in general. The topic of Art. 340 is "education": it is defining the custody right of the parents on education. The right of custody is a legal tie bound by birth of the child between the child and its mother and father. When defining the scope of the custody right Art. 339 of the Turkish Civil Code is stating that the parents shall make and apply the necessary decisions about the child's care and education by considering its benefit. Parents shall also allow the child to decide on its own life according to its maturity; they shall take its opinions on important matters into consideration as much as possible. According to Art. 339 / I, the mother and the father of the child are obliged to give

decisions on the care and education of the child by guarding the child’s benefits. The child’s benefit is hence the legal limit of the parental rights³⁶.

Art. 340 is regulating the custody rights of the parents on the education of the child. This article points out that the parental rights to educate the child are not only rights but also an obligation and a responsibility³⁷. Art. 340 highlights the responsibility rather than assigning an undefined right to educate the child. The article obliges the parents to educate their child and to provide a suitable environment for its physical, mental, psychological, ethical and social development. In the process of defining this environment, the importance of providing a well prepared preschool education is becoming evident³⁸. The parents have a responsibility to cover the expenses of the education of the child according to the Art. 327 / I of the Turkish Civil Code. However, Art. 340 states that the parents shall provide the above mentioned environment and education according to their competences and resources. The article accepts that every parent does not have the same obligations when it comes to the education of the child as the financial situation plays a major role in providing such an environment. This aspect endorses the importance of a free preschool education for every child provided by the state.

The scope of the custody right is including the right to discipline the child, too. This is referring to the off-school education of the child; the education in the family; the teaching of moral values, societal values and ethics. This right shall be used again only under the circumstance of the benefit for the child³⁹.

The Turkish civil jurisdiction and civil law doctrine is also emphasizing on the “public” character of the custody rights of the parents⁴⁰. According to the Court of Cassation General Assembly of Civil Chamber’s decision⁴¹ the custody of the child, or the parenting rights in a civilized modern legal system⁴², are primarily an obligation and responsibility rather than a competence or private authority. These competences are very vulnerable to misuse which is why they should be limited strictly within the scope of the child’s benefits. The Court of Cassation declared that the Turkish Civil Code regulated the conditions of losing the custody rights and therefore the cancellation of the legal tie between a parent and its child making clear that the parents’ right of custody is closely related to the “public order /public interest.” So the state – that has entitled the parents – can take back the custody rights of the parents under the circumstance of misuse by the parents. By doing so the wellbeing of the child is in the long term guaranteeing the wellbeing of the society as a whole; it determines the success of a state in achieving eternal existence that it is striving for. When discussing this matter one should keep the above mentioned Constitutional Court decision in mind which is indicating a national and state-centered understanding of the preschool education.

³⁶For a discussion on the moral rights and obligations of the parents please see Brake, Elizabeth, Millum, Joseph, “Parenthood and Procreation”, The Stanford Encyclopedia of Philosophy, (Winter 2016 Edition), Edward N. Zalta (Ed.), adres: <https://plato.stanford.edu/archives/win2016/entries/parenthood/>, accessed: 04.01.2017; Michael W. Austin, “Rights and Obligations of Parents”, Internet Encyclopedia of Philosophy, adres: www.iep.utm.edu/parentri/, accessed: 28.12.2016.

³⁷ **Akıntürk**, Turgut, **Ateş Kahraman**, Derya, *Türk Medeni Hukuku Aile Hukuku*, İkinci Cilt, Beta Yayınları, İstanbul, Şubat 2013, pp. 412; **Köseoğlu**, Bilal, **Kocağa**, Köksal, *Aile Hukuku ve Uygulaması*, Ekin Yayınevi, 2011, p. 431-434; **Özüğür**, Ali İhsan, *Velayet-Vesayet-Soybağı ve Evlat Edinme Hukuku*, Aile Mahkemeleri, Seçkin, Ankara 2003, p. 457-458.

³⁸ **Cleveland**, Gordon, **Krashinsky**, Michael, *Financing ECEC Services in OECD Countries*, OECD, Paris, 2003, p. 7-17; **UNICEF**, *A Guide to General Comment 7: Implementing Child Rights in Early Childhood*, Bernard van Leer Foundation, The Hague, 2006, p.83; **UNICEF**, *Starting Strong II, Early Childhood Education and Care*, OECD Publishing 2006; **Akyüz**, Emine, “Çocuk Hakkı Sözleşmesinin Temel İlkeleri Işığında Çocuğun Eğitim Hakkı”, *Milli Eğitim Dergisi*, Sayı 151, Temmuz-Ağustos-Eylül, 2001, p. 20.

³⁹ **Köseoğlu**, **Kocağa**, 2011, p. 432; **Özüğür**, 2003, p. 457-458.

⁴⁰ **Akıntürk**, **Ateş Kahraman**, p. 412, **Zevkliler**, Aydın, *Medeni Hukuk Giriş ve Başlangıç Hükümleri Kişiler Hukuku, Aile Hukuku*, Savaş Yayınları, 1992, p. 921-923, **Köseoğlu**, **Kocağa**, 2011, p. 434.

⁴¹ YHGK 16.10.1991 E. 1991/2-360, K. 1991/502.

⁴² Phrase used by the court.

The custody as a responsibility of the parents can be also defined with reference to the provisions given by the Convention on the Rights of the Child of the United Nations which Turkey has signed and is bound to since 1995. The article 18 of the Treaty is explicitly ascribing responsibility for the development of the child both to the parents and to the states. It states:

- “1. Parties (the states) shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.”

The main aim of the Convention is to give responsibility to both parents and states to help the child becoming an equal member of the society by providing healthy food, apparel, a healthy social environment and possibilities for socializing such as having fun with other children. The charter is proposing and emphasizing in various articles the necessity of cooperation between the parents and the states parties when providing a healthy environment for a child and ensuring its rights. Although Art. 18 regulates that the states are to respect the parental roles and primacy of parents, they are required to render appropriate assistance to the parents in the performance of their child-rearing responsibilities⁴³. In addition, the charter explicitly emphasizes the role and responsibility of the state’s for providing parents assistance and all kinds of facilities related to the early childhood education and care of the children. On the other hand, the Convention is stressing the responsibility of the parents to provide equal opportunities for the child regarding its peers and its attendance in artistic, cultural activities with its peers.

The United Nations Committee on the Rights of the Child interprets the right to education during early childhood as beginning at birth and as closely linked to young children’s’ right to maximum development⁴⁴. Therefore, the states have a responsibility of educating the parents on the rights of the children and providing programs that are complementing the parent’s roles for their children⁴⁵.

At this point it may be referred to the importance of the preschool education period in becoming a healthy and equal member of the society according to the above mentioned Bloom’s research that highlights the importance of early childhood education for the development of the child. This early development can be ensured equally to children when it is supported or provided or at least supervised effectively by a central state. Thus, the common good is served: good quality education to the benefit of the child which the parents (should) aim at and controlled education for the young members of the society which the state pursues. The child is both situated in the public and in the private sphere. This should result however, not in a conflicting in-between position, but in a free yet secured position that is reached by cooperation of the parents and the state. As a consequence, the norm of non-domination shall be both the fundament and the outcome of the child’s education: cooperation leads to ensured early-childhood education and the education in turn ensures non-domination to be “resident in the hearts and habits of the citizens”.

⁴³UN Conventions on the Rights of the Child, General Comment No.7, Committee on the Rights of the Child, 2005, p. 8, 9.

⁴⁴Article 6 of the UN Conventions on the Rights of the Child; UN Conventions on the Rights of the Child, General Comment No.7, Committee on the Rights of the Child, 2005, p. 13.

⁴⁵UN Conventions on the Rights of the Child, General Comment No.7, Committee on the Rights of the Child, 2005, p. 13.

Two Different Solutions respecting the principle of Non-Domination for Preschool Education

1. Preschool education SHOULD NOT be compulsory, but the state should do everything necessary to secure the access to free and nationwide preschool education, invest in this field as if it was compulsory, educate the families on the importance of preschool education, and inform them about the corresponding situation in developed societies. The state should secure a preschool education policy by defining its aims. The aims should be defined independent from specific political agendas of changing governments and rather refer to general educational principals. The state should control all the pre-school services to secure the quality of these services.
2. Preschool education SHOULD be compulsory. Thus, the state interferes but shall not dominate. To avoid a domination of the specific type of early childhood education, alternative preschool education institutions such as home-based learning shall be offered. In addition, creating ways for parents to participate in the curriculum design and institutionalizing the cooperation between the state and the parents shall be provided.

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