

**THE END IN A PRACTICE AGAINST HUMAN DIGNITY:  
REPEAL OF THE ‘CONTACT CONCERNING CHILDREN  
THROUGH ENFORCEMENT LAW’ IN TURKEY\***

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**ABSTRACT**

With a new legal regulation brought in Turkey regarding the contact concerning child, the 90-year method through enforcement law about contact concerning child, which hurt the public’s conscience, came to an end. This practice, which the media called child lien, represented an approach that contradicted human dignity, as it treated the child as a monetary issue like a property and adopted an backward method. With the amendment made within the scope of the judicial reform package, the practice of contact concerning child through enforcement was removed from the Turkish Enforcement and Bankruptcy Code and new provisions were introduced regarding the contacting concerning children.

**Keywords:** contact concerning children, child rights, human dignity, the best interests of the child, Turkey.

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## **INTRODUCTION**

A judicial reform has recently been carried out in Turkey regarding the establishment of contact concerning children. The articles in the Execution and Bankruptcy Code No. 2004, which include enforcement procedures regarding the contact concerning children (Article 25, Article 25/a, Article 25/b, Article 341), abolished with the Law No. 7343. The Law No. 7343 have also made new regulations in the Child Protection Code No. 5395 regarding the issue. After the aforementioned legal amendment, contact concerning children began to be fulfilled in accordance with the provisions of the Turkish Child Protection Code No. 5395.

According to the previous system on contact concerning child, the parent whose child was not shown during or after the divorce could take their child through enforcement by applying to the enforcement officials. In the system established by the new regulation, which will end contact concerning children through enforcement law, it is foreseen that the procedures will be carried out by psychologists, pedagogues and teachers, including experts from the justice system.

## **I. THE CONTEXT OF THE ISSUE WITH HUMAN DIGNITY AND HUMAN RIGHTS**

It is essential in terms of human dignity and human rights to prevent the children from being affected by psychological and disturbing factors in contact concerning children, and to realize this contact in an environment of love and respect, taking into account the best interests of the child. Writs and verdicts of enforcement courts’ on contact concerning children according to the provisions of the Turkish

Enforcement and Bankruptcy Code have been constantly criticized in Turkish doctrine<sup>1</sup>. The necessity of making a new regulation in this regard was frequently mentioned<sup>2</sup>. In particular, there have been frequent critiques about the use of concepts such as “child delivery”<sup>3</sup> and the evaluation of children as objects. Additionally the suitability of the means and measures for contact concerning children in line with the principle of proportionality has been opened to discussion<sup>4</sup>. It is seen that this situation is reflected in the reports of official institutions such as the Ombudsman<sup>5</sup> and Ministry of Justice<sup>6</sup>. In the face of the fact that children are not movable property, these procedures, which were established in accordance with the legal legislation, revealed practices that did not comply with human dignity and human rights. In this respect, the issue should be examined in line with national and international legal texts, especially in terms of child rights.

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<sup>1</sup> İbrahim Özbay. “Türk Hukukunda Çocuk Teslimi ve Çocukla Kişisel İlişki Kurulmasına İlişkin İlamların İcrası Hakkındaki Sorunlar ve Çözüm Önerileri”. *Türkiye Noterler Birliği Hukuk Dergisi* 4, no. 2 (2017): 108.

<sup>2</sup> Derya Belgin Güneş. “Mağdur Hakları Kanunu Taslağı’nın Çocuk Teslimi Ve Çocukla Kişisel İlişki Kurulmasına İlişkin Hükümlerinin Değerlendirilmesi”, *Selçuk Üniversitesi Hukuk Fakültesi Dergisi* 29, no. 2 (2021): 929.

<sup>3</sup> Ibid. 928.

<sup>4</sup> Taner Emre Yardımcı. “Ölçülülük İlkesi Bakımından Çocuk Teslimine ve Çocukla Kişisel ilişki Kullanılmasına Yönelik Cebri İcra Araçları”, *Terazi Hukuk Dergisi* 15, no. 167 (2020): 1485 ff.

<sup>5</sup> See. Kamu Denetçiliği Kurumu. “Çocuk Tesliminde Hak İhlallerine ve Yoksulluk Nafakasına İlişkin Özel Rapor”. Ankara: Aralık 2019. Date of Access 2 April, 2022. <https://www.ombudsman.gov.tr/kdk-pdf/icra-teslim-raporu/icra-iflas.pdf>.

<sup>6</sup> See. Mağdur Hakları Daire Başkanlığı. “Çocuk Teslimi Sürecinde Mağ- duriyet Odaklı Yaklaşım Raporu”. Ankara: 2017. Date of Access 2 April, 2022. [https://magdur.adalet.gov.tr/Resimler/Dergi/22102020134332cocuk\\_teslimi\\_raporu7\\_7\\_2017\\_.pdf](https://magdur.adalet.gov.tr/Resimler/Dergi/22102020134332cocuk_teslimi_raporu7_7_2017_.pdf).

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***A. Its Dimension on Child Rights in the Axis of the Best  
Interests of the Child***

Contacting concerning children must not be contrary to the best interests of the child. In this sense, the prerequisite for the contacting is the best interests of the child. In contact concerning children, the best interests of the child principle is always at the forefront, and the source of the powers and rights of the parents stems from their obligations regarding the healthy growing, upbringing and protection of the child’s interests<sup>7</sup>.

While healthy interaction between the parents and the child is very important for the child, it should not be ignored that there are problems arising from the parents or the child that will negatively affect the child, since the contacting with the child is attempted by applying to the enforcement office. For this reason, all precautions should be taken preventive appropriate legal, administrative, etc., to take care of the best interests of the child. Because taking measures only for children in need of protection will not be a preventive attitude. Here, the decisions to be taken by the competent authorities will be very important for the best interests of the child to be observed<sup>8</sup>.

It is usual to evaluate the principle of the best interests of the child considering that the social, economic and cultural conditions of each

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<sup>7</sup> S. Hülya İmamoğlu. “Yeni Medeni Kanundaki Düzenleme ve Velayete Hakim İlkeler Çerçevesinde Tedip Hakkının Değerlendirilmesi”, *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 54, no. 1 (2004): 165 ff.

<sup>8</sup> Ömer Mavi. “İcra Takibiyle Çocukla Kişisel İlişki Kurulmasının Sebepleri, İcra Uzmanının Rolü ve Çocuğun Durumu”, *Türkiye Barolar Birliği Dergisi*, no. 74 (2008): 280.

country vary. However, when it comes to child rights, cultural relativism should be interpreted narrowly. As a matter of fact, the United Nations Convention on the Rights of the Child stipulates that the state parties cannot deny the rights guaranteed in the Convention, arguing that the concept of the best interests of the child has cultural relativity<sup>9</sup>.

### ***B. Its Place in Primary International and National Legislations***

In Turkish national legislation the Turkish Civil Code and Child Protection Code come to the fore on the subject. According to Article 336 of the Turkish Civil Code, in case of divorce custody can be given to one of the spouses by the judge. In this case, the parent who is primarily responsible for the care, and is in constant personal contact with the child, is also determining the residence of the child, education, development and supervision of the child. The other parent can contact with the child as determined by the court. In this regard, the main thing is the principle of the best interests of the child<sup>10</sup>.

According to Article 182 of the Turkish Civil Code, “... *The benefits of the child, especially in terms of health, education and morals, are taken as a basis in the arrangement of the personal relationship of the spouse with the child, who is not given the custody...*” According to Article 324 of the Turkish Civil Code, after

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<sup>9</sup> Rachel Hodgkin and Peter Newell. *Çocuk Haklarına Dair Sözleşme Uygulama El Kitabı*. 2. Edition, Ed. Şebnem Akipek, (Ankara: UNICEF, 2003) 44. Date of Access 10 April, 2022. [https://www.unicef.org/turkiye/media/2321/file/TURmedia\\_Uygulama%20Elkitabı%20TR.pdf](https://www.unicef.org/turkiye/media/2321/file/TURmedia_Uygulama%20Elkitabı%20TR.pdf)

<sup>10</sup> Bilge Öztan. *Aile Hukuku*. 4. Edition, (Ankara: Turhan Kitabevi, 2004) 457.

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United Nations Convention on the Rights of the Child<sup>12</sup> is the most important global convention in the context of observing the best interests of the child while contacting concerning children. Article 3 of the Convention emphasizes that the best interests of the child always takes precedence. In Article 3, the best interests of the child are emphasized as follows: “*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*”<sup>13</sup> Article 3 stands out as one of the general principles of the Convention<sup>14</sup>.

In accordance with the Convention, it must be demonstrated that the best interests of the child are primarily examined and taken into account<sup>15</sup>.

The concept of the best interests of the child is not a new principle, it has been emphasized for a long time and is accepted as a

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<sup>11</sup> Ibid. 470.

<sup>12</sup> See. United Nations Convention on the Rights of the Child. 1989. Date of Access 10 April, 2022. <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>.

<sup>13</sup> See also. Tekin Akıllıođlu. *Çocuk Haklarına Dair Sözleşme*. (Ankara: Ankara Üniversitesi SBF İnsan Hakları Merkezi Yayınları, 1995) 6.

<sup>14</sup> Hodgkin and Newell. *Çocuk Haklarına*, 41.

<sup>15</sup> Ibid.

priority<sup>16</sup>. According to the Principle 2 of the 1959 United Nations Declaration of the Rights of the Child, which is accepted as the first and most fundamental international legal text on child rights, “*The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.*”<sup>17</sup> In this context, the benefit of the child is expressed in terms of interest<sup>18</sup>.

Article 6/2 of the Convention underlines that State Parties shall ensure to the maximum extent possible the survival and development of the child<sup>19</sup>. In addition, Pursuant to Article 9/3, the duty of the State Parties is to respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests<sup>20</sup>.

Another essential law documents in the field of child rights related the issue are European Convention on the Exercise of Children’s

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<sup>16</sup> Derya Belgin. *Çocuk Teslimi ve Çocukla Kişisel İlişki Kurulmasına Dair İlâmların İcrası*. Master Thesis. (Ankara: Ankara Üniversitesi Sosyal Bilimler Enstitüsü, 2019): 10.

<sup>17</sup> See. United Nations Declaration of the Rights of the Child. 1959. Date of Access 15 April, 2022. <https://digitallibrary.un.org/record/195831>.

<sup>18</sup> Belgin, *Çocuk Teslimi*, 10.

<sup>19</sup> Hodgkin and Newell. *Çocuk Haklarına*, 108.

<sup>20</sup> Ibid. 135 ff.

The End in a Practice Against Human Dignity:  
 Repeal of the ‘Contact Concerning Children Through Enforcement Law’ in Turkey Rights<sup>21</sup> adopted by the Council of Europe in 1996 and Convention on Contact Concerning Children<sup>22</sup> by the Council of Europe in 2003. It is obvious that the Convention on Contact Concerning Children has been codified as a very detailed and specific legal regulation on the subject. This Convention, which deals with the issue of contact concerning children from the perspective of child rights, has brought many protection mechanisms. Article 10 of the Convention states the safeguards and guarantees to be taken concerning contact<sup>23</sup>.

## II. EXAMINATION OF THE ISSUE IN COMPARATIVE LAW

While considering the subject in terms of comparative law, the legal practices of English law, which is the representative of the Anglo-Saxon legal system, and the German law, which is the representative of the Continental European legal system, can be analyzed. Because these

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<sup>21</sup> See. European Convention on the Exercise of Children’s Rights. 1996. Date of Access 17 April, 2022. <https://rm.coe.int/european-convention-on-the-exercise-of-children-s-rights/1680a40f72>. According to the Article 6 of the Convention: “*In proceedings affecting a child, the judicial authority, before taking a decision, shall: a) consider whether it has sufficient information at its disposal in order to take a decision in the best interests of the child and, where necessary, it shall obtain further information, in particular from the holders of parental responsibilities; b) in a case where the child is considered by internal law as having sufficient understanding: - ensure that the child has received all relevant information; - consult the child in person in appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly contrary to the best interests of the child; - allow the child to express his or her views; c) give due weight to the views expressed by the child.*”

<sup>22</sup> See. Convention on Contact Concerning Children. 2003. Date of Access 17 April, 2022. <https://rm.coe.int/convention-on-contact-concerning-children/1680a40f71>.

<sup>23</sup> According to the Article 6 of the Convention: “*Each State Party shall provide for and promote the use of safeguards and guarantees...*”

practices offer the opportunity to compare with the reformed legal regulations in Turkish law and give an idea about the orientation of the new system brought with the amendments.

English law is in principle based on case law, and therefore, although there are not many laws, the Children Act 1989 takes the lead in the legislation on this subject<sup>24</sup>. According to Section 8 of the Children Act 1989, the courts are authorized to make various decisions regarding the child; decisions about contact concerning children is one of them. However, as stated in a national report on this subject declared in England, the decisions that determine the place of residence of the child are not custody decisions. These are decisions regarding the determination of the place of residence of the child, that is, with whom the child will stay in cases where the custody is shared.

It is mentioned in this report that the courts consider the application of punishment as a last resort and that the parties are inclined to resolve the dispute through cooperation and agreement; it has been also emphasized that the enforced execution of court decisions made in order to ensure the best interests of the child, is contrary to the above mentioned purpose<sup>25</sup>.

It is stated that the state policy and the general practice of the courts are to direct the parties to reconciliation and mediation, whereby the state provides for this through both the telephone hotline and

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<sup>24</sup> See. Gordon Jack and Paul Stepney. "The Children Act 1989 - protection or persecution? Family support and child protection in the 1990s", *Critical Social Policy: A Journal of Theory and Practice in Social Welfare* 15, no. 43 (1995): 26 ff.

<sup>25</sup> Çağrı Mardin. *Çocuk Teslimi ve Çocukla Kişisel İlişki Kurulmasına İlişkin İlamların İcrası*. Master Thesis. (Ankara: Ankara Üniversitesi Sosyal Bilimler Enstitüsü, 2019): 25-26.

## The End in a Practice Against Human Dignity:

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In Germany, the Law on Procedures in Family Matters and in Matters of Non-Contentious Jurisdiction (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*) includes provisions on the cases and proceedings arising from family law matters in general<sup>28</sup>. Provisions on the execution of decisions on contact concerning child are also regulated. The Law, on the one hand, regulates coercive methods for the execution of the court decision, and on the other hand, there are provisions regarding the reconciliation of the parties through the court. In Article 86 of the Law, it is stated that court decisions and agreements approved by the court have the ability to be enforced<sup>29</sup>.

If a parent applies to the court with the allegation that the other party has violated the requirements of a decision on contact concerning children or the requirements of the approved agreement, according to

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<sup>26</sup> Ibid. 26.

<sup>27</sup> Ibid.

<sup>28</sup> See. Roland Proksch. “Reform des familiengerichtlichen Verfahrens durch das FamFG-Möglichkeiten für Mediation”, *Zeitschrift für Konfliktmanagement* 13, 2 (2010): 39 ff.

<sup>29</sup> Çağrı Mardin. *Çocuk Teslimi*, 28-29.

Article 165, the parties are personally summoned to the conciliation hearing by the court<sup>30</sup>. According to Article 88 of the Law, the execution of decisions regarding the contact concerning children is carried out through the court. In appropriate cases the support of the Youth Office is also provided to the court.

In Article 89 the Administrative enforcement is regulated, which states that if an administrative fine is not considered sufficient, it is possible to give an administrative imprisonment decision. Before this decision is made, the debtor is being heard. If it is determined that the debtor's acts contrary to the decision are justified, it is decided to abolish the administrative imprisonment or fine<sup>31</sup>.

### **III. THE NEW LEGAL REGULATION ON THE ISSUE IN TURKEY**

The new legal regulation included in the judicial reform package carried out in Turkey in 2021, the practice of contact concerning children through enforcement law procedures has been ended. The new legal regulation included in the Law No. 7343 came into force in 30 November 2021.

#### ***A. What Does the New Legal Regulation Bring?***

With the temporary Article 2 added to the Child Protection Code No. 5395 and the Article 48 of the Law No. 7343, the relevant provisions are removed from the Execution and Bankruptcy

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<sup>30</sup> Ibid. 29.

<sup>31</sup> Ibid. 29-30.

## The End in a Practice Against Human Dignity:

Repeal of the ‘Contact Concerning Children Through Enforcement Law’ in Turkey Code No. 2004 and this provision brings the rules regarding the transition period that emerged in the face of the new provisions added to the Child Protection Code.

In the second paragraph of temporary Article 2 of the Child Protection Code, the implementation of the new provisions on contact concerning children will be implemented gradually throughout the country<sup>32</sup>. According to the first paragraph of the temporary Article 2 of the Child Protection Code, it is foreseen that implementation of the forth part of the Child Protection Code will begin throughout the country at the end of one year at the latest, following the publication of the regulation to be issued. In this case, until the second half of 2023, judgments regarding contact concerning children will be fulfilled by the legal support and victim services directorates throughout the country<sup>33</sup>.

In case of opposition to the execution of the judgments or injunctions regarding the contact concerning children after the date of 30 November 2021, when the Law No. 7343 came into force, Article 41/F of the Child Protection Code will come into consideration<sup>34</sup>. According to this Article, the complaint authority will be the family courts. Additionally, as of the same date, with regard to penal sanctions,

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<sup>32</sup> Hakan Pekcanitez and Mine Akkan. “7343 Sayılı Kanunla İcra ve İflâs Kanunu’nda Yapılan Değişikliklerin Zaman Bakımından Uygulanması”. *Türkiye Barolar Birliği Dergisi*, 160 (2022): 282 ff.

<sup>33</sup> Derya Belgin Güneş. “7343 Sayılı Kanun’da Çocuk Teslimi ve Çocukla Kişisel İlişki Kurulmasına Dair İlâmların ve Tedbir Kararlarının Yerine Getirilmesine İlişkin Geçiş Hükümleri Tarafından”. 6 December 2021. Date of Access 1 April, 2022. <https://blog.lexpera.com.tr/7343-sayili-kanunda-cocuk-teslimi-ve-cocukla-kisisel-iliski-kurulmasına-dair-ilamlarin-ve-tedbir-kararlarinin-yerine-getirilmesine-iliskin-gecis-hukumleri/>.

<sup>34</sup> Ibid.

Article 41/F of the Child Protection Code will be applied, instead of the repealed Article 341 of Execution and Bankruptcy Code.

The most remarkable change brought into effect by the new legal regulation is the elimination of the role of enforcement offices and enforcement courts in the process of contact concerning child. From now on, the relevant persons may apply to the Legal Support and Victim Services Directorate<sup>35</sup>. In the new system, contact concerning children will be carried out in child centers designed for the benefit of children. Until the said change, these transactions were usually carried out by the bailiffs and police officers by visiting the residences of the parents. Transactions at the child centers, which are prepared by considering the age and development levels of children, will be based on consent, not by force, but by communicating with the child and the parents, guiding them on how to behave.

Another notable change is the exemption from fees in terms of the fulfillment of the judgments regarding contact concerning children. Article 41/H of the Child Protection Code regulates the exemption from fees in terms of places, where the 4th part of the Child Protection Code is going to be implemented. However, in places where the 4th part of the Child Protection Code has not been implemented, the follow-up procedures to be carried out in the execution office for the fulfillment of these decisions are also exempt from the fee in accordance with the 7th paragraph of the temporary article 2 of the Child Protection Code.

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<sup>35</sup> Önder Topal. “Çocuk Teslimi ve Çocukla Kişisel İlişki Kurulmasına İlişkin İlamların veya Tedbir Kararlarının İcrasında Yeni Dönem”. *Selçuk Üniversitesi Hukuk Fakültesi Dergisi* 30, no. 3 (2022): 1346.

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All expenses for these works and transactions will be covered from the  
budget of the Ministry of Justice, excluding attorney fees.<sup>36</sup>.

### ***B. Evaluation of the New Legal Regulation***

Although the new regulation is not completely different from the previous legal provisions, it constitutes a more comprehensive and differentiated version. In the new system, the enforcement office has been replaced by the Directorate of Legal Support and Victim Services under the Ministry of Justice. The directorate is authorized and in charge of executing the decision of the family court regarding the contact concerning children. At the same time, it was decided to file a complaint against the operations of the directorate in the family court. In this case, unlike the previous system, the trial procedure specific to family courts will be applied, not enforcement courts. These kind of revisions serve the ultimate goal of realizing the principle of the best interests of the child<sup>37</sup>.

In the new system, detailed regulations on how the contact with children will take place are included. In this context, one of the most important innovations brought by considering the best interests of the child is contacting concerning children by a specialist who is an expert on child psychology. In addition, the fact that all expenses such as court and attorney fees, regarding the contact concerning children will be covered from the budget of the Ministry of Justice, is an important

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<sup>36</sup> Ibid.

<sup>37</sup> Seda Gayretli Aydın. “7343 Sayılı Kanun’un Çocuk Teslimi, Çocukla Kişisel İlişki Kurulmasına ve Velayetin Değiştirilmesine İlişkin Getirdiği Yenilikler”. *Terazi Hukuk Dergisi* 17, no. 187 (2022): 17-18.

change in terms of the principle of best interests of the child. In this framework, especially the right holder will be able to contact with the child without being crushed under the financial burden, and this will contribute to both the psychological and physical development of the child<sup>38</sup>. However, considering the best interests of the child, it would be a more functional step if the Ministry of Family and Social Policies, which has approximately sixteen thousand relevant staff throughout Turkey, would manage these processes. Because the Ministry of Justice and its affiliated centers, whose number of justice system experts consists of approximately one thousand people throughout the country, do not have sufficient means to cope with all these processes.

## CONCLUSION

The issue of contact concerning children is crucial in terms of protecting children in a weak position in society and observing child rights as a human right. Modern methods should be preferred in the determination of how to realize this situation, which is essential for children and parents. Otherwise, it may harm the public conscience by causing certain procedures incompatible with human dignity to come into play.

Giving up contact concerning children by methods that are inappropriate with human dignity and disturb the public is an notable step and an improvement compatible with the principle of the social state for modern Turkish law. It also conforms to the principles enshrined in international conventions such as the ‘United Nations

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<sup>38</sup> Topal. “Çocuk Teslimi”, 1364.

## The End in a Practice Against Human Dignity:

Repeal of the 'Contact Concerning Children Through Enforcement Law' in Turkey Convention on the Rights of the Child' and the 'European Convention on Contact Concerning Children'. However, there are some uncertainties about how the new system introduced with the said amendment will be reflected in practice. It is necessary to ensure the functionality of the procedures envisaged for the relevant proceedings, taking into account human dignity, child rights and the principle of the best interests of the child.

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