DISABILITY RIGHTS IN GERMAN TENANCY LAW

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Abstract: Approximately 650 million disabled people live worldwide. This number corresponds to approximately 10 percent of the world population. Unfortunately, these people are often victims and they have been discriminated. European Tribunal for Human Rights regularly deals with complaints from disabled persons with human rights conventions. In Germany, the Article 554a of the German Civil Law (BGB) has been inserted through a modernization of obligation law. This standard aims to improve the legal position of disabled people in tenancy situations while the tension between them is different and divergent forlegal entities and legal goods. There is no such provision in the many legal systems. It is therefore necessary to examine the standard in detail and to establish whether such a norm is also necessary in the other legal systems.

Keywords: Human rights, Disability Rights, Tenancy Law, German Law, Housing Right

Introduction

Disability is an umbrella term covering impairments, activity limitations and participation restrictions. Impairment is a problem regarding the functioning or the structure of the human body. The second one, the activity limitation, refers to a difficulty in performing a task or an action.[1] And finally, a participation restriction is a problem experienced by individuals in their daily life. It is well-known that the disability is not only a health problem. It is also a complex phenomenon reflecting the interaction between features of a person's body and features of the society in which she or he lives.

According to the data provided by the United Nations Development Program (UNDP), a huge number of disabled people live in developing countries. Due to economic situation in which these states find themselves, disabled people mainly suffer from poorer health, lower education achievements, fewer economic opportunities and higher rates of poverty (Zengin, 2014: 24). Although there is a considerable amount of disabled people in every country, it is hardly difficult to see a comprehensive research on the rights of these people. In the past times, generally women, children, black people, sexual minorities or foreigners were labelled as disabled people. And they were categorized as „less human than others".[2] Even sterilization and euthanasia were explicitly covered by disabled people, however, they remained largely 'invisible' in the society, and unfortunately they could not fairly enjoy the human rights. As previously pointed out, disability is not only a public health issue, but also a matter of human rights.

The number of disabled people is increasing. Senility is one of the reasons for this: Elderly people are at higher risk of disability and chronic health problems such as diabetes, cardiovascular diseases, and mental illness. Environmental and other factors; such as traffic accidents, natural disasters, conflicts, and nutrition and substance abuse, are also increasing and the increase effect the number of disabilities in a negative way. Disabled people are the weakest and most disadvantaged social group in accessing and using their rights. The obligation preventing and eliminating grievances, further deepened by disability-based discrimination, has placed on the agenda the need to combat internationally disadvantaged rights with more effective weapons. That is why today, more is explicitly spoken about the rights of the disabled (Zengin, 2014: 25; Genç & Çat, 2013: 364). Regardless of the international agreements, many countries are also trying to improve and legalize the rights of disabled people in their domestic legal system. One of these laws is the German Tenancy Law. Disabled people are constantly trying to reach equilibrium in their lives. Housing for the disabled is one of their most important needs. The right of housing is a general problem for the people and it has been mentioned in many international agreements. But for disabled people, barrier-free apartments play an enormous role. Article

[1] *For more Information: http://www.who.int/topics/disabilities/en/*
[2] *For more Information: http://www.ohchr.org/Documents/Publications/HRDisabilityen.pdf*

554a of German Civil Law (BGB) regulates barrier-free housing for disabled people and it can serve as a significant example for other countries as well.

General Development of Disability Rights

There are regulations in many international documents that emphasize the rights of disabled people. For example, Article 25 of the Universal Declaration of Human Rights has emphasized the rights of disabled people. According to this article "Everyone has the right to a standard of living, adequate for the health and wellbeing of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control". And Article 2 clarifies that no one can be discriminated because of his race, origin, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. It does not explicitly mention disability, but other status includes disability as well.[3]

In recent years, there has been a revolutionary change globally in the approach to filling the gap in protection and ensuring that disabled people are granted the same standards of equality, rights and dignity as everyone else. The Convention on the

Rights of Disabled Persons, which was adopted in 2006 and entered into force in 2008, is an international human rights instrument.[4] This Convention aims to protect the dignity and rights of disabled individuals. All parties which ratified convention have to protect, promote and ensure the accomplishment of the rights of disabled people. The party states have to provide equal rights to these individuals and they have to respect their dignity. The Convention entered into force on 3 May 2008, with the Optional Protocol foreseeing the individual complaints mechanism.

In Turkey the Convention entered into force on 18 December 2008.[5]

Disibility Rights in Germany

a) In General

Germany, after the Second World War, was in extreme need of the implementation of human rights. To establish this further, an amendment was made to the constitution in 1994. "No one may be disadvantaged because of its disability" was added to Article 3 of the German constitution (Rips, 2003: 16, 48; BT-Drucks 14/2913: 3 ff.). This regulation is very important as all state institutions must respect the fundamental rights and the people cannot be disadvantaged. Today, even the effects of the fundamental rights on private people were discussed and it was also accepted that the fundamental rights are also important between private people (Rips, 2003: 44; Belling & Ince, 2014: 11, 29, 35).

Regulation of above cited provision under the Constitution is significant, as the judges may apply this provision in order to make a broad interpretation. Constitutions are objective world orders. Even the laws, which contain offense against the disability rights, can be found by Constitutional Court as unconstitutional (Rips, 2003: 46; Belling & Ince 2014, 29).

Furthermore, the Equal Treatment Act of Disabled people has come into force in 2002 in Germany. Social law is a part of public law which obliges the government to support the disabled people (Frehe, 2013:17). The Social Housing Act Art. 1, 6 and 24 makes it possible to provide the elderly and disabled people with social housing. The law also provides support for people and of course, disabled people who do not have financial opportunity. The aim of these arrangements is clear. By means of these rules, the lawmaker would like to protect people with handicap and to make them participate in the society, but more significantly is that the the lawmaker can protect the disabled tenant between two private individuals.

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[3] *For more Information: http://www.un.org/esa/socdev/enable/dispaperdes1.htm*

[4] *For more Information: https://www.un.org/development/desa/disabilities/convention-on-the-rightsof-persons-with-disabilities.html*

[5] *http://www.ankarabarosu.org.tr/Siteler/2012yayin/2011sonrasikitap/engelli-haklari-birlesmismilletler.pdf*

b) Tenancy Law

Article 554a, which has been newly created as a part of the reformation of the tenancy laws, enables disabled housing tenants with the right to the landlord's consent and access to a rented property intended for the disabled by the tenant (Rips, 2003: 28; Welti & Sulek, 2001: 131; Mersson, 2002: 313; Drasdo, 2002: 213 ff). The aim of this regulation is to grant an opportunity to the disabled people to live in a place which is appropriate for disabled people. It means that this provision, in the legal and socio-political context, is governed by other laws of this nature such as
Social Law IX and the Equal Opportunities Act. Only 4.5% of all disabled people are disabled from birth (Derleder, 2004: 119). Accidents, illness, and beyond all, senility are other additional causes of disability (Barfknecht, 2012: 252; Mersson, 2002: 313). These people need care facilities, such as suitable kitchens, furniture, beds, and floors. Constructional measures are not only primarily necessary for access to the house, but also for the apartment door, bathroom, kitchen and the living area (Barfknecht, 2012: 253; Derleder, 2004; 119). Substantial interventions are necessary in order to provide sufficient freedom of movement which would ease their life. Living in one's own home without constant help is not only a matter of individual desirability; however, in the face of the overburdening experiences of institutional care services by the welfare state in a society with a reversed population pyramid and steadily growing expense, it has become a compulsion (Rips, 2003: 189; Mersson, 2002: 313). Accessibility, thus, also has had a whole social backwind (Welti, 2013: 24).

c) The History and Purpose Behind the Regulation

The decision of the Federal Constitutional Court has influenced the German legislator to codify such a norm. This act was put into action based on the following Reasons: (Mersson, 2002: 313). The plaintiff in question has been living together with his paraplegic partner in a rented apartment in Berlin since 1992. The apartment is on the second floor. His partner is dependent on the wheelchair for movement and must be carried daily through the stairwell (BverfG, WM 2000:298 ff.).
For this reason, he asked the landlord for permission to build an electrical stair lift. The applicant offered to install the stair lift at his own expense and promised to restore it back before he moves out of the apartment. However, the landlord rejected his offer. In the main case, the applicant brought an action against the lessors in the context of a refusal to grant permission to build the lift. His application failed in both instances (BverfG, WM 2000:298 ff).

According to the opinion of the German Federal Constitutional Court:

- the property rights under Article 14 GG also includes the right of co-use of the stairwell leading to the apartment, both for the tenant himself and for the partner in life admitted to the property.
- If the partner is hampered and is not in a position to commit the stairwell without any mechanical help, the civil courts are obliged to find under Art. 242 BGB (German Civil Law), individual weighing of the conflicting interests in the tenancy relationship to the tenant's and his /her partner's rights under Article 14 of the Basic Law (BverfG, WM 2000:298 ff).
- In weighing of interests, the tenant cannot be referred to a disabled-friendly housing; as Article 14 of the Basic Law protects the specifically rented apartment and not the availability of an apartment on the rental market.

d) Conditions in the Regulation

Disability

The term "disability/ obstructed" should not to be interpreted in the strict sense of social law, as in Article 2 Social Law (SGB IX). In particular, any significant and permanent restriction of the freedom of movement, regardless of whether it already existed at the beginning of the rental period or only occurred during the course of the tenancy (e.g. due to an accident or the aging process), should be considered (Rips, 2003: 97 ff; Barfknecht, 2012: 256; Mersson, 2002: 314). The nature of the disability does not matter; a disability is not counted only of the tenant but also of a family or household member or of any other person who has a special personal relationship with the tenant (Rips, 2003: 95 ff; Barfknecht, 2012: 256; Mersson, 2002: 314). It could be argued that whether the disabled visitors of tenants can ask for such changes to § 554a BGB. Some argue that it cannot be possible. As rental agreement has two parties and only singed by lessee and lessor
(Blank/Börstinghaus, 2001: § 554a: 6 (Nr)). Giving this right to the third parties definitely goes beyond Article 554a BGB which is regulated as an exceptional provision. On the other hand, some may assert that the purpose of this norm (§ 554a BGB) is to protect disabled people (Barfknecht, 2012: 256). Thus, it should be interpreted broadly and should also include visitors (Pfeifer, 2002: 41). Visitors of the tenant should be also considered the use of the apartment as a rule also includes the possibility of attending disabled persons, at least if the handicapped visitor has a special relationship with the tenant (Barfknecht, 2012: 256, Pfeifer, 2002: 41).

Structural Changes and Other Facilities

The term "structural change" applies to the building internally and externally and it covers all the construction made inside or outside the building (Rips, 2003: 110 ff). The term "other facility" covers the measures which do not interfere massively with the structural substance. It merely serves to install devices reconstructions within the rented housing as well as outside, as far as access to the housing is to be made possible or improved (Mersson, 2002: 314; Drasdo, 2002: 123 ff). For example, lighting elements, motion detectors, emergency switches, bell systems, parts of the kitchen furniture and door frames apart from structural changes. This covers the entire range of housing assistance for disabled people. Article 554a of the German Civil Law (BGB) is thus directed to the possibility of using all areas of life around the apartment without avoidable difficulties and largely without the help of others (Drasdo, 2002: 123 ff).

Necessity

The measures sought by the lessee are necessary, if the measure geared to the specific handicap of the resident concerned; if the measure is also suitable to enable and facilitate the life of the disabled. This does not exclude the possibility of being useful to others; if reasonably, no other measures are possible to fulfil these purposes with a lower substantial effect (Barfknecht, 2012: 257; Mersson, 2002: 314).
It is always necessary to examine whether a minor interference with the rights of the landlord can lead to a legitimate change in the legal status of the landlord or can be achieved in the same way without some type of destruction. Article 554a of the German Civil Law (BGB) contains the constitutional principles which is necessary to weigh the interests of the tenant, the landlord and the other tenant (Mersson, 2001: 956). In principle, all general and concrete circumstances of the individual case are included in the consideration process (Barfknecht, 2012: 257; Mersson, 2002: 314). This allows a reasonable balance between the owner's freedom of disposal resulting from the property protection the claim of the disabled tenant resulting from the human dignity and the prohibition of discrimination (Barfknecht, 2012: 257; Mersson, 2002: 314).

Weighing of Interests

However, the tenant's rights are not unlimited. The landlord may refuse his consent in accordance with Article 554a, Paragraph 1, Sentence 2 of German Civil Law (BGB), if his interest in the preservation of the rented property or of the building predominates that of the tenant. It is therefore a matter of weighing interests (Rips, 2003: 125; Barfknecht, 2012: 257; Mersson, 2002: 314). In this respect, as it is clear from sentence 3 of the

regulation, the legitimate interests of other tenants in the building must also be adequately taken into consideration. Since the landlord is only allowed to refuse consent if his or the other tenants' interests are overlooked, the landlord must be given an equivalent interest (Mersson, 2001: 956). The provision does not provide a clear guideline in which circumstance the balancing must be carried out. Examples are also not enumerated. The legislature has worked exclusively with so-called undefined legal provisions. Thus, it can be concluded that a making a general conclusion is not possible, as every individual case will have different dynamics (Mersson, 2002: 314). The type, duration and severity of the disability as well as the scope and necessity of the measure must be taken into consideration while making a decision. It is also the duration of the construction period, the associated impairment of other house residents and the possibility of dismantling. Ultimately, the rebuilding measures also do not violate any existing laws or impose an unacceptable liability risk on the landlord. According to Article 554a, Paragraph 1, Sentence 3 of German Civil Law (BGB), the interests of the other tenants in the building must also be taken into account in the weighing-up. In doing so, these restrictions must be tolerated, so that the provision can still have a meaning. In particular, optical impairments, which do not correspond to the particular taste of the individual tenant, must be ignored.

Conditions Against the Tenant

According to the justification of the legislature, it is permissible for the landlord to impose conditions on the renter because of the conversions should be carried out (Mersson, 2001: 956). Provisions of a different structure may be made in such a way that the landlord requires that the works must be carried out professionally and that liability insurance must be taken for the hazards arising from the alterations for the duration of their maintenance (Barfknecht, 2012: 257; Mersson, 2002: 315).

Security Deposit

Under Article 554a of the German Civil Law (BGB), the landlord may make his consent to the establishment of the facilities depending on the tenants' providing adequate additional security for the restoration of the former condition (Mersson, 2001: 956). The tenant's claim to accessibility is thus not unconditional. If the tenant is unable or cannot afford the deposit, the landlord is entitled to prohibit the execution of measures, even if the tenant is dependent on them or to demand the removal (Barfknecht, 2012: 257; Mersson, 2002: 317; Derleder, 2004; 120). Costs and security must be borne by the beneficiaries of the social assistance as soon as the tenant has no financial possibility (Barfknecht, 2012: 257).

Conclusion

Recent developments in the rights of disabled people have been made and 2003 has been accepted as a year of disabled people. Many have tried to create awareness on this issue.
Social development is essentially determined by two trends: Individualization and globalization. Both developments reinforce the company's decolidation, polarization between young and old, healthy and sick and intensify economic and individual competition, the pace of the work processes and the yield-oriented performance. The winners of this change consciously and unconsciously use the liberties resulting from liberalization. In such a situation, the legal order, especially private law, must increasingly take over the management of social behaviour instead of generalizable moral forms, thereby providing multifaceted alternatives for differentiated markets and social spheres. Article 554a of the German Civil Law (BGB) is a private statute which constitutes a major contribution to the social balance. In the elementary important area of housing, it provides a certain degree of life security for people who are particularly dependent on it. 554a BGB is therefore more than a "white ointment" and more than a "populist bow before socialfundamental considerations." Article 554a BGB improves the legal status of disabled people in existing rents and is an important basis for the fact that disabled people outside of homes can lead a self-determined life (Barfknecht, 2012: 257). Disabled people must be supported not only by state organs by creating adequate housing, they must also be supported in private law and from discrimination by private people. In the German legal system, there are many standards which protect disabled people. In this context Article 554a of German Civil Law (BGB) is extremely important. For the handicapped people should not be removed from their habitual environment,

but should be integrated more into the society. The state must create many new apartments with accessibility. But the people who have become disabled later due to old age, are more protected by this standard. Only under these circumstances they can live in the same social, familiar surroundings and in peace where they feel secure (Rips, 2003: 188).

In cases in which one of the parties of the Contract is weaker in terms of social economic and similar reasons, it is common for the legislator to make relative mandatory arrangements in favor of the weaker party. It is possible to encounter the rules for protection of the weaker party of the contract in consumer law, labor law and rental law. In our opinion, it is pleasing that the German legislator goes one step further with norms that protect the tenant in the renting law and protects the disabled tenant. Although yet general regulations for protecting disabled people are included in the law, there is a need for regulations that protect the disabled people in private law in order to put these in practice in real terms.

We do not think that this arrangement made in German law in favor of the disabled tenant damages of the proprietary right of the lessor. Because, as stated in the constitutions of many countries, the proprietary right may be restricted without touching the essence of the right, provided that it will not unbounded due to the public interest. That the tenant receives permission from lessor to make proper changes in accordance with its own disability, the tenant meets the costs itself and that the tenant returns the housing to its previous condition when the rental contract ends show that the interests of the lessor are also taken into consideration. In many countries, for example in France, UK and Belgium, arrangements have been made in private law for the rights of disabled individuals. Although, most of these regulations are related to the labor law. In civil law, especially in rental law, the provisions that protect the rights of disabled individuals after the establishment of the rental contract are so few if any. Also in the new Turkish Code of Obligations that entered into force in 2012 many new regulations were included in favor of the tenant. However, in parallel with the Article No. 554a of German Civil Law (BGB), the rights for the disabled persons to make changes in the rented housing has not been given. Today, it is an unignorable reality that the number of disabled persons in the society, especially in old age, increases continuously. Also in private law relations, we think that the legal arrangements, that will protect the disabled individuals by taking the interests of the other party of the contract into consideration, are extremely required. While making legal arrangements on the rights of disabled persons, also the interests of the other contracting party (especially the fundamental rights and freedoms arranged in constitutions) should be taken into consideration. One of the most fundamental rights for individuals to live in a way proper to the human dignity is the housing right and this right is a must for many rights included in the constitutions. Housing right; is in association with the rights such as right to life, the right to health, the right to environment, the right to education, the right to develop the person's own material and spiritual existence. It is very important for the disabled persons, who are tenants, to make changes in the rented housing in accordance with their own disabilities. Therefore, it is not enough for the government to construct only social housing for the barrier-free housing.

In our opinion, in addition to the task of creating the new barrier-free social housing, the lawmakers must also support disabled people in private law, as laid down in Article 554a of German Civil Law (BGB).

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