UNION OF TURKISH BAR ASSOCIATIONS REVIEW

TÜRKİYE BAROLAR BİRLİĞİ DERGİSİ

The Selected Articles

UNION OF TURKISH BAR ASSOCIATIONS REVIEW
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CONTENTS / İÇİNDEKİLER

Dear Colleagues

As the Union of Turkish Bar Associations, we are happy to launch a new publication. We are presenting the *Union of Turkish Bar Associations Review* to our readers, for the first time.

Union of Turkish Bar Associations Review is a project that we have initiated to bring our authors' articles to a wider circle of readers. The *Review*, which is designed to be published once a year among the articles written in English in the previous year's issues, will be published in full text in pdf format on our website and will be scanned by search engines and will enable the articles to reach readers in English.

We believe that the works reaching a wider network of readers in this way will contribute more to the literature and the articles will receive more citations. I would like to take this opportunity to invite our authors to submit their articles in English to the editors of the *Review.*

Although we are publishing a selection of four articles in our first issue, I sincerely believe that we will have the opportunity to publish more articles in future issues. In the future, I hope that the *Union of Turkish Bar Associations Review* will become an international review that accepts articles on its own.

I wish that the *Union of Turkish Bar Associations Review*, which is a product of the pioneering mission of the the Union of Turkish Bar Associations in the field of academic law publishing, will be beneficial to our legal world, and I congratulate our team for coming up with the idea of such a review and implementing this idea by pushing the possibilities.

Best regards

Attorney R. Erinç SAĞKAN

President of the Union of Turkish Bar Associations

Değerli Meslektaşlarım,

Türkiye Barolar Birliği olarak, yeni bir yayını hayata geçirmenin mutluluğunu yaşıyoruz. Union of Turkish Bar Associations Review ile ilk kez karşınıza çıkıyoruz.

Union of Turkish Bar Associations Review yazarlarımızın makalelerini daha geniş bir okur çevresine ulaştırmak üzere hayata geçirdiğimiz bir projedir. Yılda bir kez, bir önceki yıl içerisinde yayınlanmış makaleler arasından bizlere makalelerinin tercümelerini ileten yazarlarımızın çalışmalarını İngilizce olarak da yayınlamak üzere tasarladığımız Review, internet sitemizde PDF formatında tam metin olarak yayınlanmak suretiyle arama motorlarınca taranacak ve çalışmaların İngilizce dilinde de okurlara ulaşmasını sağlayacaktır.

Bu şekilde daha geniş okur ağına ulaşan eserlerin literatüre daha fazla katkı yapabileceğini, makalelelerin daha fazla atıf alacağını da düşünüyoruz. Bu vesileyle, yazarlarımızı, makalelerinin İngilizcelerini de dergi editörlerimize ulaştırmaya davet ediyorum.

İlk sayımızda dört makalelik bir seçki yayınlıyorsak da bundan sonraki sayılarda daha fazla makale yayınlama imkanı bulacağımıza canı gönülden inanıyorum. Bir vadede, Union of Turkish Bar Associations Review, müstakil makale kabul eden bir uluslararası dergi olacaktır diye umut ediyorum.

Türkiye Barolar Birliği Dergisi, akademik hukuk yayıncılığı alanındaki öncülük görevinin bir ürünü olan Union of Turkish Bar Associations Review'un hukuk dünyamız için hayırlı olmasını diliyor, böyle bir dergi fikrini ortaya koyan ve olanakları zorlayarak bu fikri hayata geçiren dergi ekibimizi kutluyorum.

Saygılarımla

Av. R. Erinç SAĞKAN

Türkiye Barolar Birliği Başkanı

HUNGER STRIKE IN THE PENDULUM OF ETHICS AND LAW

ETİK İLE HUKUK SARKACINDA AÇLIK GREVİ

Süleyman ÖZAR*

Abstract: Hunger which could occur in various contexts, but they result in important legal and ethical dilemmas for health-care professionals caring for hunger strikers who are imprisoned or detained. Hunger strikes in prisons present clinical, ethical, legal and human rights challenges to practitioners.

Physical integrity of the person cannot be infringed without his or her consent. The consent of the person will justify the intervention. However, rules of hunger strike in prisons introduce certain exemptions with respect to this general rule.

This study will try to provide an insight into the domestic law and international standards regarding the management of hunger strikes. In that sense, the study will make an analysis of the Law on the Execution of Penalties and Security Measures (Law no. 5275) and its conformity with the constitutional framework, ECHR's jurisprudence and ethical principles.

Keywords: Hunger Strike, Total Fasting, Force-Feeding, Individual Autonomy, Informed Consent, Medical Intervention, Consent

Özet: Çok çeşitli bağlamlarda görülebilecek olan açlık grevleri, cezaevleri için çok daha önemli sonuçlara yol açar. Çünkü bu kurumlarda sağlık çalışanları etik ile hukuk arasında bir ikilemde kalabilirler. Cezaevlerindeki açlık grevleri, sahadaki uygulamacılar için etik, hukuk, tıp, insan hakları gibi pek çok açıdan türlü zorluklar taşımaktadır.

Kişinin rızası olmadan vücut bütünlüğüne dokunulamaz. Kişinin rızası ise yapılan müdahaleyi hukuka uygun hale getirecektir. Fakat cezaevinde açlık grevine ilişkin kurallar, bu genel kaideye yönelik bazı istisnalara sahiptir.

Bu çalışmada açlık grevinin yönetimi konusunda iç hukuk ve uluslararası standartlar bakımından bir inceleme yapılacaktır. Bu bağlamda 5275 sayılı Ceza ve Güvenlik Tedbirlerinin İnfazı Hakkında Kanun düzenlemesi ve bunun anayasal çerçeve, AİHM içtihatları ile etik ilkelere uyumu irdelenecektir.

Anahtar Kelimeler: Açlık Grevi, Ölüm Orucu, Zorla Besleme, Bireysel Özerklik, Aydınlatılmış Onam, Tıbbi Müdahale, Rıza

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Introduction

Article 82 of Law no. 5275 on the Execution of Penalties and Security Measures (Law no. 5275) lays down the steps required to be taken in cases where a convict or detainee refuses nourishment voluntarily for any reason. Among the most frequent reasons is the protest activities that emerge as a hunger strike. Through this statutory provision, the Turkish legislation intends to make a distinction, in terms of forced intervention with physical integrity, between the hunger strike embarked on by a prisoner and the one embarked on by those who are not deprived of liberty. In this paper through which we will dwell on the causes and consequences of such distinction, hunger strike and/or death fast will be discussed in the light of this statutory regulation that allows for an intervention under certain circumstances.

In this sense, we will firstly address the legal nature and ethical basis of hunger strike. We consider that this basis will offer an accurate and reasonable insight into this study on the basis of human dignity and freedom of will. The second section of this paper is intended to provide an explanation as to various issues such as the definition of medical intervention, the conditions of a valid consent and the consent process between patient and physician. In the third and last section, the legal and ethical aspects of medical intervention in case of a hunger strike will be addressed.

In this paper, the question of an invention in case of a hunger strike will be examined separately in respect of individuals who are not deprived of liberty and are free and those who are imprisoned. The intervention in case of a hunger strike by prisoners will be discussed on the basis of the distinction between force-feeding and medical intervention. The underlying reason for handling force-feeding and medical intervention under seperate headings is not only our intend to follow the systematic established in the law but also our desire to put a special emphasis on the consideration that force-feeding amounts to an interference with human dignity which can in no way be infringed.

This study will also touch upon the controversial position of the statutory arrangements concerning the force-feeding or forced treatment of a convict *vis-à-vis* medical ethics. Thereby, an answer will be sought to ascertain the lawful step required to be taken by the physician being stuck between the ethics or the law.

It is natural that hunger strike occurs mostly in the prisons. The aim of the prisoners involving in this modern way of protest, which is an inherent consequence of the major confinement/imprisonment understanding of the modern era, is to make themselves heard outside and to attract attention. The extent to which a hunger strike attracts public attention is dependent directly on the extent to which human life is regarded as a supra-political value in the relevant society.

I- HUNGER STRIKE

1. Definition and Scope

Hunger strike is a prolonged refusal to receive nourishment, engaged in by individuals so as to protest a certain event or ensure the fulfilment of their certain demands. As set forth in the World Medical Assembly's Declaration of Malta, hunger strike is a way of protest adopted by persons who have no other opportunity to voice their demands. Hunger striker is the person who voluntarily refuses to eat for a considerable period of time in order to attain his aims by putting public pressure on the administration and who is eligible to form a judgment regarding his health.[1]

In Türkiye, the stage when hunger strike reaches an irreversible phase is called as "death fast"[2], which is also the notion used in Law

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1 The Declaration of Malta on Hunger Strikers adopted by the 43rd World Medical Assembly held in Malta in 1991 ("Malta Declaration"): https://www.wma.net/policies-post/wma-declaration-of-malta-on-hunger-strikers/ (date of last pageview: 09.04.2021)

2 As regards the criticism that death fast is an improper notion and used in this way only in the Turkish legislation across the world and a proposal for a more proper notion, "hunger strike to die", see Ahmet Taşkın "Ceza ve Güvenlik Tedbirlerinin İnfazı Hakkında Kanun'da Beslenmenin Reddi (Refusal to eat under the Law on the Execution of Penalties and Security Measures)", *Türkiye Barolar Birliği Dergisi*, Issue: 62, 2006, p. 239. We are of the opinion that the problem with respect to the "death fast" is not the notion fast but the death. The fact that fast is a religious term does not preclude its being used in other situations where a person refuses to eat. In the Anglo-Saxon literature where the notion hunger strike arose, this notion means the refusal to eat enough to sustain life, whereas the acts where the striker abstains completely from food and fluid intakes or accepts to drink only water are defined as "total fasting" (for an example and definition, see World Health Organisation "Health in Prisons" https:// www.euro.who.int/_data/assets/pdf_file/0009/99018/E90174.pdf). As could be inferred therefrom, death should not be used so as to refer to any type of strike. That is

no. 5275 (Article 82 § 2). An individual may either proceed to a death fast when his hunger strike is of no avail[3] or embark on a death fast from the very beginning. There is no distinction between hunger strike and death fast in terms of subject-matter, motive and aim. However, the methods are different. In case of a hunger strike, hunger strikers continue feeding alternately, receiving certain vitamins and various liquids, even to a slight extent, whereas in case of a death fast, they refuse to eat anything or drink water merely to the extent sufficient for maintaining consciousness. Thus, death fast must be regarded as a form of hunger strike. As indicated in medical reports, death takes place within a period lasting 42 to 79 days.[4] However, it is a known fact that even at the very beginning of a hunger strike, there may be a life-threatening situation or even death may occur due to insufficient nutrition and sudden complications.[5]

As inferred from these definitions, hunger strike comprises the following four elements:[6]

(1) Full or partial refusal to eat, (2) voluntary basis, (3) a specific motivation, and (4) a certain period of time to the extent that will have an adverse impact on health.

The condition of having a voluntary basis plays a critical role notably in case of common and systematic protests. In such cases, the question whether the decision to embark on a hunger strike or death fast has been taken by the person concerned individually is, as a matter of course, a controversial issue. It should always be kept in mind

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because when death is used in naming a strike, this is not only contrary to the definition and motivation of strike but also reflects a language that would, from the very beginning, legitimise any probable intervention therewith. Despite our reservation in this sense, we prefer using "death fast" in this paper in order to be in keeping with the Law. Taking this occasion, we would like to express that in case of an amendment to the Law in question, the notion, death fast, should be replaced with a new notion such as complete/total/absolute hunger strike.

3 Taşkın, p. 239; Özge Sırma, "Açlık Grevi (Hunger Strike)", *Fasikül Hukuk Dergisi*, Vol. 4, Issue 26, January 2012, p. 20.

4 Amanda Gordon, "The Constitutional Choices Afforded to a Prisoner on Hunger Strike: Guantanamo", *Santa Clara Journal of International Law*, vol. 345, 2011, p. 350.

5 Taşkın, p. 238.

6 Cochav Elkayam Levy, "Facing the Human Rights Challenge of Prisoners' and Detainees' Hunger Strikes at the Domestic Level", *Harvard International Law Journal*, Vol. 57, 2015, p. 9.

whether the convict has embarked on the protest on his own free will or against his will. In case of a hunger strike which is not based on free will, the hunger is real, whereas the strike is a pseudo-protest. Therefore, the State is liable to inquire whether the protest is based on the free will of the person concerned. The burden of proof is on the State. If it is found established that the protest is not based on the striker's free will, it is the State's duty to intervene with the situation and to protect the striker against the organisations putting pressure on his real will.[7]

2. History

The first hunger strike in the history is shown as the protest of the exiled political convicts in the Czarist Russia at the end of the 19th century, which was of a modern-political nature. However, the time when hunger strikes set the world alight and attracted attention is the very beginning of the 20th century when the women seeking voting rights in England embarked on a strike.[8] In London in 1909, a convicted woman named Marion Wallace Dunlop, who had been sentenced to one month's imprisonment for her failure to pay the fine imposed on her as she had written a passage[9] from the 1689 Bill of Rights on the wall of the House of Commons, was released in the 91st hour of her death fast.[10] This event was the first sensational case which demonstrated that hunger strikes might be resorted as an effective protest against the administration. In the subsequent period, several hunger strikes drawing world-wide attraction and passing into history took place in Ireland, India, the USA, Spain and South Africa. The hunger strike em-

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7 Şahin Akıncı, "İrade Muhtariyeti İlkesi ve Şahsiyet Hakları Açısından Ötenazi, Açlık Grevi ve Ölüm Orucu (Euthanasia, Hunger Strike and Death Fast in terms of Principle of Party Autonomy and Personal Rights", *Selçuk Üniversitesi Hukuk Fakültesi Dergisi*, Prof. Dr. Süleyman Arslan'a Armağan, Issue 6, 1998, p. 755.

8 For the history of hunger strike, see Murat Sevinç, "Bir İnsan Hakları Sorunu Olarak Açlık Grevleri (Hunger Strikes as a Human Rights Issue)", *Ankara Üniversitesi SBF Dergisi*, 57-1, 2002, p. 114-116.

9 "It is the right of all citizens to submit a petition to the King, and all commitments and prosecutions for such petitioning are illegal." https://www.exploringsurreyspast.org.uk/themes/subjects/womens-suffrage/suffrage-biographies/marion-wallace-dunlop-1864-1942/

10 https://www.museumoflondon.org.uk/discover/six-things-you-didn't-know-about-suffragette-hunger-strikes

barked on by Gandhi in India as a part of his passive resistance is one of the outstanding milestones of the history of hunger strike. [11]

In Türkiye, the first known case of hunger strike is the protest of poet Nazım Hikmet in 1950 at the Bursa Prison.[12] The common political protests in Türkiye were those taking place at the Metris Prison at the end of 1970s.[13] During the death fast embarked on in 1982 for protesting the acts of torture inflicted at the Diyarbakır Prison, four detainees died at the end of the 43rd day of their death fast.[14] Following these years, hunger strike has become a type of protest resorted every period, and even in increasing numbers sometimes. In 1996 during which the most systematic and comprehensive protest was organised, the hunger strikes embarked on by 1500 detainees and convicts at 41 prisons located in 38 cities resulted in the death of 12 strikers.[15]

3. Considerations as to the Legal Nature of Hunger Strike

Hunger strike is a way of "expressing" an objection against the State or the Government or the administration. Therefore, the motivation is generally political; however, the striker seeks to take advantage of the society's supra-political emotions by waiving his most fundamental right, namely the right to a healthy life. The striker also intends to ensure the fulfilment of his/her political demands by means of making the case as a matter of conscience for the State authorities who do not want to be just an onlooker to the death of a person.[16]

In this sense, the act of the hunger striker, as a form of expression of thought, may be considered to fall into the scope of the "freedom

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11 Metin Feyzioğlu, "Açlık Grevi (Hunger Strike)", *Ankara Üniversitesi Hukuk Fakültesi Dergisi,* Vol. 43, Issue 1-4, 1993, p. 160.

12 See İstanbul Bilgi Üniversitesi Yayınları, Nâzım Hikmet'in Açlık Grevi (Millete Verdiğim Açık İstidaya Canımı Pul Yerine Kullanıyorum) (Nâzım Hikmet's Hunger Strike – I Use My Life as a Stamp on the Petition Submitted to the Nation), 2011.

13 Sırma, p. 21.

14 Nalan Ova, "Türkiye'de Köşe Yazılarında Açlık Grevi Tartışmaları (Discussions on Hunger Strike in the Columns in Türkiye)", *Mülkiye Dergisi*, 37/3, 2013, p. 107.

15 Turkish Medical Assosiation website "Hunger Strike of May 1996, Clinical Evaluation on Death Fast" https://www.ttb.org.tr/eweb/aclik_grevleri/turkce4.html (last pageview: 10.02.2021)

16 Feyzioğlu, p. 157.

of expression and dissemination of thought" laid down in Article 26 of the Turkish Constitution.[17] The limitations of the right as well as the enjoyment and abuse thereof must be determined according to the provisions of Article 26 and the framework set in Article 13 of the Constitution.[18] This acknowledgement is also in accordance with the case-law of the European Court of Human Rights ("ECHR"), which sets forth that freedom of expression enshrined in Article 10 of the European Convention on Human Rights ("Convention"), which applies not only to the content of expression but also to the means of its dissemination.[19]

There is no controversial issue up to this point: the "problem" comes into play when the hunger strike leads to a life-threatening situation. Some of the jurists argue that in case of a life-threatening situation, it is the State's duty to put an end to the hunger strike by way of medical intervention with recpect to the striker, whereas some others argue that such a medical intervention would constitute a violation of human rights. We will thoroughly discuss this issue in the subsequent parts of this paper within the scope of the distinction made in terms of prisoners and those who are not deprived of liberty.

It should be also considered whether the hunger strikers intend to commit an act of suicide. It should be primarily noted that the right to life is undoubtedly the most basic right that the State is to protect. Moreover, the State must protect this right even against the person himself, when necessary. For this very reason, it is incumbent on the State to prevent persons from committing suicide, and assisting a person to commit suicide constitutes an offence. However, it should be ascertained whether death fast is a suicide and whether the person

17 Feyzioğlu, p. 162.

18 Article 13 of the Constitution reads as follows "Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality".

19 Oberschlick v. Austria, 23.5.1991 (Hasan Tahsin Gökcan, "Hasta Haklarının Bireysel Başvuru Yoluyla Korunması", Sağlık ve Tıp Hukukunda Sorumluluk ve İnsan Hakları ("Protection of Patients' Rights through Individual Application Mechanism", Responsibilities and Human Rights in Health and Medical Jurisprudence), edited by Özge Yücel & Gürkan Sert, Ankara 2018, p. 171.

concerned refuses to eat for ending his life. The replies to these questions will reflect the ideational stance to be adopted in case of an intervention with a hunger strike.

A person intending to commit suicide performs this act at a place and time he determines and in a way he chooses. In case of a hunger strike, the striker refuses to eat and receive treatment until he obtains a result regarding the issue that has triggered his protest.[20] The motivation is not to end his life but to urge, through public pressure, the respondent to take a certain action, at the cost of his life.[21] As hunger strike is not a form of suicide, instigating the commission of this act will not amount to the offence of inducement to suicide.[22] Given the acknowledgement that hunger strike is a fundamental right that may be regarded to fall into the scope of merely Article 26 of the Constitution and that the underlying motivation is not "to die", there will be no room for considerations regarding an abuse of the right to life.[23]

II- MEDICAL INTERVENTION

1. The Meaning of Medical Intervention

Every intervention with physical integrity may not amount to a medical intervention. For instance, the acts such as doing a tattoo on someone else's body or piercing the ears to wear earring are the forms of non-medical interventions. On the other hand, any medical inter-

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20 Çağatay Üstün & G. Ayhan Aygörmez Uğurlubay, "Sağlık Hukukunda Bireyin Kendi Geleceğini Belirleme Hakkı ve Bu Hakkın Etik Açısından Değerlendirmesi (The Right to Self-Determination under the Health Law and Assessment of this Right in terms of Ethics)", *Fasikül Hukuk Dergisi*, Vol. 6, Issue 53, April 2014, p. 32.

21 Hernan Reyes, "Force-Feeding and Coercion: No Physician Complicity", *American Medical Association Journal of Ethics*, Volume 9, Number 10, October 2007, s. 703; Sondra S. Crosby & Caroline M. Apovian & Michael A. Grodin, "Hunger Strikes, Force-feeding, and Physicians' Responsibilities", *The Journal of the American Medical Association*, Vol. 298, No: 5, 2007, p. 563; Rıfat Murat Önok, "İnsan Hakları ve Türk Ceza Hukuku Açısından, İnfaz Kurumları ve Tutukevlerindeki Açlık Grevlerine Müdahale Etme Yükümlülüğü ve Bunun İhmalinden Doğan Sorumluluk (Liability to Intervene with Hunger Strikes at Prisons and Detention Centres and Responsbility Arising from Any Failure to do so, in terms of Human Rights and Turkish Criminal Law)", İKÜ Hukuk Fakültesi Dergisi, Vol. 4, Issue. 1-2, İstanbul, 2005, p. 141.

22 Taşkın, p. 249.

23 Sevinç, p. 162.

vention is a type of act which is certainly directed against the physical integrity of the person concerned. Therefore, it should be reasonable to make a precise definition of medical intervention before dwelling on the issue of consent to medical intervention.

As set forth in Article 4 (g) of the Patient Rights Regulation, medical intervention is "*any kind of physical and mental attempt of the medical professionals, which is performed within the limits of medicine, for the protection of health as well as medical diagnosis and treatment of diseases, in accordance with the professional obligations and standards*". The Constitutional Court defines medical intervention as "*the acts and activities performed by the medical professionals for the diagnosis, treatment or prevention of diseases*". [24]

These definitions are patient- and disease-oriented and also accurate in their specific context. However, they are indeed incomplete in so far they relate to the notion of interference with the right to physical integrity. That is because the underlying aim of medical intervention may not at all times be medical treatment and recovery, and it may pursue various aims regarding *inter alia* the collection of criminal evidence, scientific research, population planning, plastic surgery, tradition and religion.[25] Likewise, there is no hesitation to include the operations such as transfer of tissue and organ for transplantation based on the consent of the person concerned also within the scope of the notion of medical intervention.[26]

Accordingly, medical intervention should be considered, in the broadest sense, as "*any kind of intervention with human body by medical professionals or through biological methods*".[27] The professionals author-

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[24] Halime Sare Aysal, no. 2013/1789, 11/11/2015, § 52. For an assessment as to the judgment, see Eda Demirsoy Aşıkoğlu, "Kişi Dokunulmazlığı Hakkı Bağlamında Rıza Olmaksızın Yapılan Tıbbi Müdahaleler (Medical Interventions beyond Consent within the context of the Right to Physical Integrity)", *Türkiye Adalet Akademisi Dergisi*, Year 9, Issue 35, July 2018, p. 326-328.

[25] Özge Yücel, "Sağlık ve Tıp Hukukuna İlişkin Temel Kavramlar ve Özneler, (Basic Concepts and Subjects concerning the Health and Medical Jurisprudence)", Sağlık ve Tıp Hukukunda Sorumluluk ve İnsan Hakları, edited by Özge Yücel & Gürkan Sert, Ankara 2018, p. 33.

[26] İsmail Atak, "Tıbbi Müdahalelerin Hukuka Uygunluk Şartları (Legality Conditions of Medical Interventions)", *Türk Ortopedi ve Travmatoloji Birliği Derneği Dergisi*, 19/4, 2020, p. 20.

[27] Yücel, s. 33; Burcu G. Özcan & Çağlar Özel, "Kişilik Hakları-Hasta Hakları Bağlamında Tıbbi Müdahale Dolayısıyla Çıkan Hukuki İlişkide Hekimin Hastayı

ised to perform medical intervention are generally physicians; however, it is wrong to say that those who are solely authorised in this sense are the physicians. Any intervention by auxiliary health-care staff such as emergency care technician, health officer, midwife or nurse, sometimes under normal conditions and sometimes as required by the exigency of the situation, also constitute medical intervention.[28]

2. Elements of Consent to Medical Intervention

Consent means the permission granted by a right-holder for the infringement of any of his rights.[29] A valid consent that renders any medical intervention lawful shall consist of these four elements: capacity to give consent, subject-matter requiring consent, informed consent and declaration.[30]

a. Capacity to Give Consent

An individual may give consent only when he is the holder of a given legal interest, which is under the protection of a norm, and he has the capacity to express his consent.[31] The capacity to express consent shall be exercised by the individual whose right is affected by a given act.[32] This capacity, which is an intrinsic value, can in no way be delegated by any other person.[33] Everyone having mental capacity is eligible to give consent. An individual's decision whether to make use of any of his right is a preference inherent in his personal right. That is because this issue is related to the individual's right to protect and

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Aydınlatma Yükümlülüğü ve Aydınlatılmış Rızaya İlişkin Bazı Değerlendirmeler (The Physician's Liability to Inform the Patient and Certain Assessments concerning Informed Consent within the meaning of the Legal Relationship arising from the Medical Intervention in terms of the Personal Rights and Patients' Rights)'', *Hacettepe Sağlık İdaresi Dergisi*, Vol. 10, Issue: 1, 2007, p. 55.

28 Aşıkoğlu, p. 320.

29 Yener Ünver, Ceza Hukukuyla Korunması Amaçlanan Hukuksal Değer (Legal Value Intended to be Protected through Criminal Law), Ankara 2003, p. 976.

30 Özlem Yenerer, Tıbbi Müdahaleye Rızanın Ceza Hukuku Açısından İncelenmesi (Assessment of Consent to Medical Intervention under Criminal Law), İstanbul 2002, p. 26 et seq.

31 Kayıhan İçel, Ceza Hukuku Genel Hükümler (General Provisions of the Criminal Law), İstanbul 2018, p. 394.

32 Nur Centel & Hamide Zafer & Özlem Yenerer Çakmut, Türk Ceza Hukukuna Giriş (Introduction to the Turkish Criminal Law), İstanbul 2020, p. 333.

33 İçel, p. 397; and Centel & Zafer & Çakmut, p. 337.

improve his own personality and identity, right to self-determination, in other words his right to respect for his/her personal autonomy.[34] If the person concerned is a minor or an interdict, the capacity to give consent shall belong to the parent or guardian (Article 24 § 1 of the Regulation on Patients' Rights).[35]

b. Subject-matter requiring consent

In order for an act infringing a right to be considered lawful in terms of consent, there must be primarily a right that could be enjoyed.[36] In other words, if a person is entitled to exercise any of his rights, it means that he shall have the capacity to give consent to the infringement of the given right. In that case, the act to which consent has been granted shall not constitute an unjust treatment.[37]

In Article 26 § 2 of the Turkish Criminal Code ("TCC") titled "*Exercise of a right and consent of the person concerned*", it is set forth: "*No*

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34 Özge Yücel, "Medeni Hukuk Bakış Açısıyla Tıbbi Müdahalenin Hukuka Uygunluğunun Koşulları (Conditions of Lawfulness of Medical Intervention form the Perspective of Civil Law), Sağlık ve Tıp Hukukunda Sorumluluk ve İnsan Hakları, edited by Özge Yücel & Gürkan Sert Ankara 2018, s. 197.

35 The issue of parental consent comes into play in respect of the minor's vaccination. Article 6 § 2 of the European Convention on Human Rights and Biomedicine, titled "Protection of persons not able to consent", Article 70 § 1 of Law no. 1219 on the Performance of the Art of Medicine and Dentistry and Article 24 § 1 of the Regulation on Patients' Rights explicitly necessitate the authorisation by his or her representative in case of any medical intervention with a minor. In its judgment, the Constitutional Court found a violation, recalling that the consent to the vaccination of babies could be granted merely by the parents (Halime Sare Aysal, 2013/1789, 11/11/2015). On the other hand, it must be discussed whether this situation is in keeping with the best interest of the child, the principle adopted by the 1959 UN Declaration of the Rights of the Child and the 1989 UN Convention on the Rights of the Child. Likewise, as set forth in Article 41 § 2 of the Constitution, the State is liable to protect "especially mother and children". In that case, it is not always easy to certainly accept the child's parents as the sole authority in this sense.

36 Centel & Zafer and Çakmut, p. 335; Nevzat Toroslu, Ceza Hukuku Genel Kısım (Criminal Law, General Section), Ankara 2019, p. 189; Mahmut Koca and İlhan Üzülmez, Türk Ceza Hukuku Genel Hükümler (General Provisions of the Turkish Criminal Law), Ankara 2017, p. 291; Doğan Soyaslan, Ceza Hukuku Genel Hükümler (General Provisions of the Criminal Law), Ankara 2016, p. 374. Timur Demirbaş, Ceza Hukuku Genel Hükümler (General Provisions of the Criminal Law), Ankara 2020, p. 339; İzzet Özgenç, Türk Ceza Hukuku Genel Hükümler (General Provisions of the Turkish Criminal Law), Ankara 2014, p. 347.

37 Centel & Zafer and Çakmut, p. 332.

punishment shall be imposed due to an act committed with the consent given by the person concerned with respect to any of his rights that he is able fully to exercise".

For instance, no one has the capacity to take an action with respect to his/her right to life. An unlimited exercise of this right or ending someone's life by choice is not approved in legal and ethical terms.[38] Therefore, the consent given by the person concerned shall be null and void. Assisting a patient, who is suffering an unrecoverable disease, in ending his/her life so as to cease sufferings or in cases where he/she wants to die of own free will shall even amount to the criminal act of deliberate killing.[39] This instance naturally brings to mind the act of euthanasia and the associated arguments.[40]

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38 Koca, Mahmut, İntihara Yönlendirme Suçu (TCK m. 84) (Offence of Encouraging Suicide (Article 84 of the Turkish Criminal Code), *Ceza Hukuku Dergisi*, Vol. 5, Issue: 12, 2010, p. 20.

39 Demirbaş, p. 342; M. Emre Tulay, "Türk Ceza Hukukunda İntihara Yönlendirme Suçu (Offence of Encouraging Suicide in the Turkish Criminal Law)", *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi*, Vol. 26, Issue: 2, December 2020, p. 827.

40 In cases where the death of a patient is caused with the direct and active involvement of the physician but with the patient's consent, it amounts to active euthanasia. When it is caused as the physician remains inactive, that is to say due to physician's negligence, passive euthanasia comes into play (Muharrem Özen & Meral Ekici Şahin, Ötanazi (Euthanasia), *Ankara Barosu Dergisi*, Issue: 4, 2010, p. 17).
There is no clarity in the European Convention on Human Rights as to whether euthanasia may be regarded as a right (Sibel İnceoğlu, İnsan Hakları Bakımından Ötanazi (Euthanasia in terms of Human Rights), *Yeditepe Üniversitesi Hukuk Fakültesi Dergisi*, Vol. III, Issue: 2, Y. 2006, p. 292). It should be noted that as regards active euthanasia, the ECHR adopts an approach that predominates the right to life as well as sacred nature and inviolability of life over the party autonomy. In its judgments in the cases of Pretty v. United Kingdom, Nicklinson and Lamb v. United Kingdom and Haas v. Switzerland, the ECHR adopted an approach in line with the above-mentioned evaluation. Besides, it is always possible for the countries to legalise the active euthanasia in their domestic law, and such a regulation will comply with the human rights standards.
As a matter of fact, it should have been separately considered whether the relative or health-care officer who unfortunately puts an end to the life of a person demanding to be killed due to his sufferings is faulty given the appeal and pain of the latter (Özgenç, p. 348, footnote 563).
Indeed, Article 140 of the Ministerial Bill concerning the Turkish Criminal Code no. 5237, titled "To Cease Sufferings", lays down such a regulation: "A person who has caused death of a patient suffering from an incurable and painful disease upon the latter's insistent demands when he is fully conscious and reasonably controls his motions and solely for the purpose of ceasing the patient's sufferings

shall be sentenced to imprisonment from one year to three years." This provision, which was extracted from the text at the Parliamentary Commission on Justice, had been formulated in a way that would address both active and passive forms of euthanasia.

Active euthanasia has been legalised in the Netherlands, Belgium, Luxembourg, Italy and Canada as being considered to fall into scope of the human dignity (Kutluhan Bozkurt, "Ötanazi ve Destekli İntihar-Uluslararası Düzenlemeler ve Farklı Ülkelerdeki Uygulamalar (Eeuthanasia and Assisted Suicide – International Regulations and Practices at Different Countries", *Yeditepe Üniversitesi Hukuk Fakültesi Dergisi*, Vol. 14, Issue: 2, December 2017, p. 241-270).

It however appears that the countries adopt a more flexible approach regarding passive euthanasia that occurs through assistance by negligence. For instance, in Germany which bans active euthanasia ("killing upon request") through a regulation, passive euthanasia is permitted (Tülay, p. 829).

In its judgment dated 10.02.1993 in the case of Widmer v. Switzerland, the ECHR noted that Article 2 of the Convention cannot be construed in a way that necessitate the criminalisation of the acts amounting to passive euthanasia (Gökcan, p. 164).

In Türkiye, passive euthanasia is also prohibited through Article 13 of the Regulation on Patients' Rights. However, Article 5 of the European Convention on Biomedicine, to which Türkiye is a party, sets forth that a patient is entitled to withdraw, at any time, the consent he has given to his treatment and does not exclude passive euthanasia from the scope thereof. It is therefore argued that Article 13 of the Regulation shall not be applicable (Barış Atladı, "Tedaviyi Ret Hakkının Sınırları Açısından Ölme Hakkı (Right to Die in terms of the Boundaries of the Right to Refuse a Medical Treatment)", *Güncel Hukuk Dergisi,* February 2008, p. 38).

On the other hand, it is also argued that "the patient's right to refuse a medical treatment", which is already enshrined in the Turkish law, indeed amounts to passive euthanasia (Korkut Kanadoğlu, ''Türk Anayasa Hukukunda Sağlık Alanında Temel Haklar (Basic Rights relating to Health in the Turkish Constitutional Law'', *Türkiye Barolar Birliği Dergisi,* Vol. 119, 2015, p. 32).

According to Ünver, the acts that are called as passive euthanasia and that indeed refer to the exercise by a patient of his right to refuse medical treatment may be considered to be lawful under Article 26 of the Turkish Criminal Code ((Ünver, "Türk Tıp Hukukunda Rıza ("Consent in the Turkish Medical Jurisprudence)", *Yeditepe* Üniversitesi Hukuk *Fakültesi Dergisi*, Vol. III, Issue: 2, 2006, p. 264).

Ekici Şahin also considers that in case of passive euthanasia, the physician cannot be subject to a punishment as the patient is entitled to refuse medical treatment; and that according to Article 14 of the Medical Deontology Regulation, the physician's act shall not constitute an offence. (Meral Ekici Şahin, Ceza Hukukunda Rıza (Consent in Criminal Law), Ankara Üni. Doktora Tezi, Ankara 2010, p. 258).

Besides, the consideration to the effect that in case of passive euthanasia, a sentence should be imposed not for the act of deliberate killing but assisting someone in committing suicide (Tulay, p. 830) should be also taken into consideration.

As set forth by Soyaslan, in case of euthanasia, the judge should apply the provisions regarding discretionary mitigation under Article 62 of the Turkish Criminal Code by taking into consideration the victim's sufferings and consent (Soyaslan, Genel Hükümler (General Provisions), p. 160).

However, all these opinions which are intended for defending the conscientious

c. Informed Consent

The right to informed consent is the key difference between declarations giving consent to medical intervention and the expressions of consent specific to non-medical intervention. Due to the technical and sophisticated nature of medical intervention, the consent sought for medical interventions must also require sufficient elucidation. The person to declare his/her consent should be fully aware of the scope and content of the act or action to which he consents. Thus, as regards medical interventions, the notion "informed consent" comes into play in addition to the general conditions of a valid consent.

In the very essence of volunatarily enduring the infringement of a right, there are the right to self-determination and the principle of human dignity.[41] At this stage, informed consent enables a person to freely form his/her judgment about his own life, body, future and to determine his/her own destiny.[42] Therefore, informed consent is a right that serves the purpose of protecting not only free will but also physical integrity.[43]

In this sense, it is set forth in Article 5 of the European Convention on Human Rights and Biomedicine[44] that the consent to be given to a

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justification underlying the passive euthanasia remain insufficient vis-à-vis the applicable Turkish Criminal Code and cannot eliminate the need for a separate statutory arrangement that pay regard to the tortuous nature of this act, its arguable nature and anti-social degree. It is still uncertain whether the patient's right to refuse medical treatment amounts to passive euthanasia. We consider that, within the framework of the patient's right to medical treatment, there is a need, in Turkish Criminal Code, for a ground legalising merely passive (indirect) euthanasia.

41 Gülsün Ayhan Aygörmez, "Hukuki Kurum Rızanın, Tıp Ceza Hukukunda Geçerli Olarak Kurulması (Valid Functioning of Consent, as a Legal Institution, in the Medical Criminal Law", *Yeditepe Üniversitesi Hukuk Fakültesi Dergisi*, Vol. 6, Issue: 2, December 2009, p. 138.

42 Yücel, "Medeni Hukuk Bakış Açısıyla… (… from the perspective of Civil Law)", p. 197.

43 Munise Gülen Kurt, "Tıbbi Müdahalelerde Aydınlatılmış Onam (Informed Consent in Medical Interventions)", *Türkiye Barolar Birliği Dergisi*, Issue: 146, 2020, p. 199.

44 "The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine", which was open for signature by the Council of Europe on 4 April 1997, was ratified by the Turkish Parliament on 3 December 2003 and took effect upon being promulgated in the Official Gazette dated 20 April 2004. This Convention comprehensively dealing with human rights issues in the health-care services, has a direct bearing on the Turkish domestic law pursuant to Article 90 of the Constitution.

medical intervention must be genuinely free and informed. According to the Convention, such enlightenment must be made "*in advance*" and provide "*necessary information about the purpose and nature of the intervention as well as its probable outcomes and risks*".[45]

Informed consent, a highly important procedure also under the Codes of Ethics of Medical Science issued by the Turkish Medical Association,[46] means that the person concerned be fully and properly informed of all facts concerning his/her situation in order to enable him/her to form a judgment about the initiation, continuation, suspension or refusal of any medical intervention.[47]

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45 The provisions regarding informed consent in the Turkish legislation include but are not limited to: Article 7 of Law no. 2238 on the Removing, Storage, Grafting, and. Transplantation of Organs and Tissues; Article 31 § 1 of the Regulation on Patients' Rights; Article 14 § 2 of the Medical Deontology. Article 70 of Law No 1219 on the Method of Execution of the Medicine and Medical Sciences also make an implicit reference to the physician's liability to inform the patient (Özcan & Özel, p. 59).

46 Article 26 of the Codes of Ethics of Medical Profession, titled "Informed Consent", reads as follows: "The physician shall inform the patient about the latter's state of health and the diagnosis in question, the method of the recommended treatment, prospect of success and duration of this treatment, the risks involved in the recommended treatment, the administration of the prescribed drugs and their probable side effects, the probable outcomes if the patient refuses the recommended treatment, as well as about any alternative treatment options and risks. The informing process should be in accordance with the cultural, social and mental circumstances of the patient. The information should be provided in a way that will be easily comprehended by the patient. The patient himself shall designate any other persons who will be informed of his disease. Any health-related action may be taken only upon the free and informed consent of the person concerned. If the consent is obtained under pressure, threat, through misinformation or deception, it shall be deemed null and void. In emergencies or in cases where the patient is under age or he is unconscious or he is not able to form a judgment, the authority to give consent shall be his legal representative. If the physician considers that the legal representative refuses to consent with malicious intent and such refusal endangers the patient's life, the situation must be notified to the judicial authorities so as to obtain consent. If it is not possible to notify the situation to the judicial authorities, the physician shall consult with another physician, or shall take an action merely for the purpose of saving the patient's life. In case of an emergency, it is at the physician's discretion to make the necessary interventions. As the diseases, the treatment of which is necessitated by laws, poses a risk to public health, the necessary treatment shall be performed even in the absence of the consent of the patient or his legal representative. The patient may at any time withdraw his informed consent he has already given."
(https:// www.ttb.org.tr/mevzuat/index.php?option=com_content&id=65& Itemid=31) (date of last pageview: 11.04.2021).

47 Sibel İnceoğlu, Ölme Hakkı (Right to Die), İstanbul 1999, p. 160.

The person informed about the given medical intervention is entitled *"to refuse, or request the suspension of, the medical treatment which he will intend to undergo or are undergoing"*, save for the circumstances prescribed by law (Article 25 of the Regulation on Patients' Rights). Accordingly, through this provision, the Regulation on Patients' Rights has gained a position that secures respect for the patient's personality in terms of his right to refuse medical treatment and is in keeping with the contemporary developments.[48]

d. Expression of consent

The person concerned must express his will in any way, either explicitly or implicitly, or either in writing or orally.[49] Unless required by a special arrangement, the form in which consent is expressed does not matter.[50] All in all, the given act must have been committed upon the expression of consent. The consent expressed following the performance of an act does not legalise the act. The consent must be expressed, at the latest, during the performance of the given act.[51]

3. Medical Interventions of Lawful Nature even without Consent

In principle, any intervention with physical integrity requires consent. Article 17 § 2 of the Constitution, which sets forth *"The corporeal integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law"*, lays down both the rule and the exemptions thereto. Accordingly, there are two exceptions to the necessity of consent in case of a medical intervention: Medical necessity and any case prescribed by law. If there is a medical necessity and/or a case prescribed by law, medical intervention may be performed without seeking consent.

Article 75 § 1 of the Code of Criminal Procedure no. 5271 ("CCP"), which allows for performing internal body examination and collect-

48 Sevinç, p. 121.
49 Koca & Üzülmez, p. 293.
50 Toroslu, p. 190. For instance, the validity of the consent sought for organ transplantation is dependent on its compliance with the conditions laid down in Law no. 2238 on the Removing, Storage, Grafting, and. Transplantation of Organs and Tissues, which is dated 29.05.1979.
51 Centel & Zafer & Çakmut, p. 335.

ing sample from the body for the purpose of obtaining evidence, is an example of the exceptional case stemming from the law. As indicated in the CCP, the competent body to order such an intervention is either judge or the prosecutor in cases where delay is prejudicial. Upon this order, the medical intervention amounts to the performance, by the physician, of his duty (Article 24 § 2 of the TCC). Likewise, Article 72 of the Public Health Law no. 1593, which entails the mandatory vaccination in case of the diseases cited in Article 57 thereof, is one of the medical interventions prescribed by law. In that case, conducting the mandatory vaccination process, the physician will thus fulfil the relevant statutory provision (Article 24 §1 of the TCC).

As regards the medical necessity, which is another exception to the consent requirement, there is an explanation in Article 24 § 7 of the Regulation on Patients' Rights. Pursuant to the Regulation, in case of an emergency where no consent can be sought, if the patient is unconscious and he/she is in a life-threatening situation, no consent will be required for performing a medical intervention. In the same vein, if it is necessary to extend the scope of a medical intervention due to a circumstance that will lead to loss of an organ or prevent an organ's proper functioning, no consent will be required for medical intervention. In both cases, the patient's consent shall be sought for the medical interventions that will be carried out from the moment he regains consciousness (Article 24 § 7 *in fine* of Regulation on Patients' Rights). Also Article 70 § 1 of Law no. 1219 sets forth "*if the person to undergo an operation is unable to express his opinion*", the consent requirement must be disregarded.

It is stated that in case of an intervention by the physician, who cannot seek the consent of the patient in life-threatening emergency cases, such intervention shall not entail any civil liability due to "*genuine benevolent intervention in another's affairs*" (*gerçek* vekâletsiz iş görme).[52] In terms of criminal liability, this situation is generally explained with the notion "*presumed consent*".[53] Accordingly, the presumption that the

[52] Musa Furkan Şahin, "Hekimin Gerçek Vekâletsiz İş Görmeden Kaynaklanan Sorumluluğu (Physician's Liability stemming from Genuine Benevolent Intervention in Another's Affairs)", *Ankara Sosyal Bilimler Üniversitesi Hukuk Fakültesi Dergisi*, Vol. 1 Issue:1, 2019, p. 145.

[53] Centel & Zafer & Çakmut, p. 335.

patient would have, in any case, consented to the medical intervention if he had not been in this situation is considered as a ground justifying the intervention.[54] Koca and Üzülmez notes that in such cases, a conclusion must be reached not on the basis of a *"factitious notion"*, namely presumed consent, but through rules such as the exercise of a right or performance of a task.[55] As a matter of fact, this must be regarded as the performance of duty in that the physician exercises his right inherent in the medical profession, which already makes the process lawful.[56] As a matter of fact, the Regulation on Patients' Rights is formulated in a way that assigns not a recommendation but a task to the physician.

It should be noted that the notion, presumed consent, is not a means to be used for setting aside the patient's right to self-determination. This theory has come into prominence in cases where the patient is unable to give consent but presumed to do so and for enabling the physician to perform his profession peacefully and protecting the patient's interests.[57] In this sense, medical necessity should not be regarded as a general justification for the inability to obtain patient's consent but relied on as a basis only for the cases where it is not possible to take the patient's consent and where delay is deemed prejudicial.[58] In fact, it will be unreasonable to think that it is not necessary to seek the consent of every patient taken to the emergency department. It is necessary to receive patient's consent as far as possible.[59] In cases where the patient clearly refuses a medical treatment, his/her physical integrity must not be infringed on the ground of a "medical necessity".[60]

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54 Ceyda Ümit, "Hekimlerin Mesleklerinin Uygulanmasından Doğan Ceza Sorumluluğu (Criminal Liability of the Physicians resulting from the Performance of Their Profession)", *Türkiye Adalet Akademisi Dergisi*, Year: 8, Issue. 32, October 2017, p. 209.

55 Koca & Üzülmez, p. 294; Sulhi Dönmezer & Sahir Erman, Nazari ve Tatbiki Ceza Hukuku (Theoretical and Practical Criminal Law), Vol.2, İstanbul 1994, p. 53.

56 Ahmet Gökcen, "Organ ve Doku Nakli Üzerine Düşünceler (Considerations on the Organ and Tissue Transplantation)", *SÜHFD Milenyum Armağanı*, Vol.8, Issue.1-2, 2000, p. 64; Özlem Çakmut, Tıbbi Müdahaleye Rızanın Ceza Hukuku Açısından İncelenmesi (Assessment of Consent to Medical Intervention in terms of Criminal Law), İstanbul 2003, p.157.

57 Barış R. Erman, "Türk Hukukunda Tıbbi Müdahaleye Rıza ve Tedaviyi Ret Hakkı (Consent to Medical Intervention and Right to Refuse Treatment in the Turkish Law)", *Fasikül Hukuk Dergisi*, Issue: 4, March 2010, p. 32.

58 Ümit, p. 209.

59 Erman, "Türk Hukukunda… (In Turkish Law…)", p. 33.

60 Ümit, p. 209. In this respect, there are striking cases where the religious group,

III- MEDICAL INTERVENTION IN CASE OF HUNGER STRIKE

A. Medical Intervention in case of Hunger Strike by Free Persons

The underlying ground of the argument that justifies the intervention in case of a hunger strike by a free person is the very nature of the right to life, as the indispensable basic right that entails responsibilities also towards the family and society.[61] In this framework, Article 12 § 1 of the Constitution[62] is relied on, and accordingly the emphasis is put on the inalienable and indispensable nature of the right to protect and improve the corporeal existence, which is enshrined along with the right to life in Article 17 of the Constitution.[63] In this sense, the cases where a person causes permanent damage to his/her corporeal existence, endangers or ends his/her life will be contrary to Articles 12 and 17 of the Constitution. According to this approach, the hunger strike will be legitimate unless it gives rise to permanent damage.[64] From then on, the impugned act will lose its legitimacy (the freedom of expression and dissemination of thought). Besides, when hunger strike is considered as an abuse of right, it will not be even necessary to await for the deterioration of health, to a significant extent, for intervening with the situation.[65]

The underlying ground of the argument that finds unlawful any intervention with the hunger striker is the right to personal autonomy that refers to the individual's ability to freely take an action, of his own

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Jehova's Witnesses, objected to blood transfusion on account of their faith. For instance, in an incident taking place in England, Emma Gough suffered from haemorrhage after giving birth to her babies. The doctors found necessary an immediate blood transfusion. The mother, refusing blood transfusion due to her faith, marked the section "I do not consent to blood transfusion" in the information form necessary for the transfusion process. At the end, she lost her life (Aşıkoğlu, s. 340).

61 Doğan Soyaslan, "Türk Hukuk Düzeni ve Açlık Grevi Yapan Kişilere Müdahale Sorunu (Turkish Legal Order and Issue of Intervention with respect to Hunger Strikers)", *Yargıtay Dergisi*, Vol. 16 Issue: 3, July 1990, p. 273.

62 "Everyone possesses inherent fundamental rights and freedoms that are inviolable and inalienable.
Fundamental rights and freedoms also contain the individual's duties and responsibilities towards the society, his family and other individuals."

63 Feyzioğlu, p. 163.

64 Feyzioğlu, p. 163.

65 Akıncı, p. 753.

free will, regarding any legal value he possesses.[66] This right also brings along the freedom of self-determination and is predicated on the inviolability of human dignity and the principle of a person's self-respect.[67] From the standpoint of this understanding, the principle of respect for human dignity overrides even the State's obligation to protect life.[68] Accordingly, a patient's desire, of his own will, to be let die in a natural way or his refusal of a medical treatment in spite of the presence of a life-threatening situation is called as "veto power in medicine", which is predicated on the principle of the person's self-respect.[69]

Out of these two approaches, we agree with the latter, which is autonomy-oriented. We are of the opinion that the illusion on the part of those arguing that intervention is necessary in case of a hunger strike, following a certain stage, is their consideration that this act is intended for death. However, it is always possible to reverse the situation, and the striker relies on this opportunity. The hunger striker acts on the basis of his right to self-determination and puts his body and health at risk, as a way of expressing his/her thought, without causing damage to others. In that case, to permit a hunger strike until, so to say, the striker gets hungry does not comply with the nature of the freedom of expression or the hunger strike.

As a matter of fact, Article 9 of the European Convention on Human Rights and Biomedicine lays down, in principle, that the previously expressed wishes relating to a medical intervention by a patient shall be taken into account. This principle is to be applied also in terms of the hunger striker, who is now a patient. The legal practitioner must disregard any contradictory norm in the domestic law and apply the provisions of this Convention.[70] In this sense, the Regulation on Patients' Rights, amended in 2014, adopted an approach that is parallel to that of the Convention by stipulating that "*The previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention, in a state to express his wishes shall be taken into account*" (Article 24 § 5).

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66 Aygörmez, p. 138.
67 Üstün & Uğurlubay, p. 29.
68 Akıncı, p. 754.
69 Aygörmez, p. 147.
70 Erman, "Türk Hukukunda… (in Turkish Law…)", p. 35.

As also acknowledged by the World Medical Association, the refusal of medical treatment by the patient is a basic right that must be respected by the physician. Even if the striker's life is at risk, no medical treatment should be provided in line with the final decision he/she has given when he/she was fully conscious.[71]

Therefore, it should be beyond doubt that a free person on death fast will possess and enjoy all rights that a patient has. The approach that no one may waive, of his own will, his fundamental rights and freedoms and that accordingly it is possible to intervene also with the hunger strike of free persons[72] is no longer adopted. That is because, over the long years, there has been a shift, regarding the hunger strike, from a focus on the protection of right to life to the human dignity and personal autonomy. The incorporation of the principle of autonomy into the medical ethics and legal texts is not coincidental but a consequence of the stage that the human relations and personal rights have currently attained.[73] From this standpoint, we consider that the views that no legal liability may be incurred in case of an intervention with the hunger striker due to state of necessity[74] or legitimate self-defence[75] in favour of a third person will no longer be applicable. Any involuntary medical intervention with hunger strike by free persons at any stage must entail legal and professional liability.

B. Medical Intervention in case of Hunger Strike by a Convict or Detainee

1. Hunger Strike in Prisons from the standpoint of Turkish Legislation

a. Article 298 of the Turkish Criminal Code

In Article 298 § 2 of the Turkish Criminal Code no. 5237, titled *"Prevention of the Exercise of Rights and Feeding"*, it is set forth that the acts of

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71 The report of 44th Assembly of the World Medical Association on September 1992; conveyed by Can Çelik, "İnsan Hakları Boyutuyla Zorla Besleme (Force-Feeding from the perspective of Human Rights)", *Fasikül Hukuk Dergisi*, Vol.: 6, Issue: 53, April 2014, p. 53.

72 Feyzioğlu, p. 164.

73 Kurt, p. 200.

74 Soyaslan, "Açlık Grevi… (Hunger Strike…)", p. 269.

75 Feyzioğlu, p. 166; Nur Centel & Hamide Zafer & Özlem Çakmut, Kişilere Karşı İşlenen Suçlar (Offences Committed against Persons), İstanbul 2007, p. 84.

encouraging, convincing or directing a prisoner or person under arrest to embark on a hunger strike or death fast shall constitute the criminal act of preventing feeding. Paragraph 3 thereof also lays down that in cases where the prevention of feeding causes an aggravated intentional injury or death, an additional liability shall be incurred pursuant to the provisions regarding intentional injury or intentional killing. As is inferred, hunger strike has been criminalised, like the act of suicide, not in terms of the very conduct of the striker himself, but due to the inducement of others to engage in such a strike. In this sense, it appears that the law-maker regards the hunger strike as one of the forms whereby the striker makes full use of his right to life.

b. Article 40 of the Law on the Execution of Penalties and Security Measures

The most distinct indication that the hunger strike is not considered to fall into the scope of any rights and freedoms is Article 40 § 2 (g) of Law no. 5275 on the Execution of Penalties and Security Measures (Law no. 5275).[76] Pursuant to this provision, a hunger strike embarked on by a convict or detainee is an unlawful conduct that entails the disciplinary sanction of "*preventing the convict or detainee from participating in certain activities*". At the very moment when the prisoner embarks on a hunger strike, he shall be deemed to have committed this disciplinary offence.

In individual applications lodged with the Constitutional Court due to the disciplinary sanctions imposed pursuant to this provision, the Constitutional Court found no violation of the freedom of expression.[77] Stressing the State's obligations to maintain security and order at penitentiary institutions as well as to protect the health of prisoners, who are to be incarcerated at these institutions that are under the absolute control of the State, the Constitutional Court has also noted that his incarceration imposes certain responsibilities on the convict.[78] Accordingly, Article 40 of Law no. 5275 is regarded as a ground justifying restriction within the framework of Article 26 § 2 of the Constitution.

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76 Çelik, p. 45.

77 Kahraman Güvenç, no. 2016/15659, 23/6/2020, Mehmet Ayata, no. 2013/2920, 7/7/2015.

78 Kahraman Güvenç, § 37-39.

We are of the opinion that this statutory arrangement, which completely excludes hunger strike from the scope of a form of the freedom of expression for prisoners, is contrary to the requirements of a democratic society and the proportionality principle. Rendering such a decision, the Constitutional Court has also contradicted with its own acknowledgement that the hunger strikes at penitentiary institutions may be a form of freedom of expression.[79] Undoubtedly, freedom of expression is not an absolute right. Besides, as regards the prisoners, the pertaining restrictions may be more different and excessive. However, the statutory arrangement in question goes beyond a restriction, denying the freedom of expression from the very beginning.[80] If the reintegration of the prisoner into the society is one of the underlying aim of the execution of imprisonment sentences, the question to which extent the democratic activities, which are an aspect of the freedom of expression, will be restricted should be subject to a rights-oriented assessment.[81]

c. Article 82 of Law no. 5275

Article 82, titled "*Refusal of food and drinks by the convict*", of Law no. 5275, which sets the basic regime with respect to convicts' hunger strike, is formulated in line with the approach that does not classify this act as a right. This provision to be comprehensively discussed below is an example of the exception, "*prescribed by law*", which is laid down in the Constitution with respect to the principle of inviolability

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79 Mehmet Ayata, § 24; Kahraman Güvenç § 31.

80 The ECHR's judgment in the case of Kara v. Türkiye (no. 22766/04, 30 June 2009) should be noted in this context. In the impugned incident taking place on November 2000, the Anatolian Association for Solidarity with Families of Prisoners (Anadolu Tutuklu ve Hükümlü Aileleri Yardımlaşma Derneği) called its members to embark on a hunger strike for an indefinite period of time in order to support the prisoners on a hunger strike. By its decision of 27 December 2002, the domestic court convicted the applicant for organising a hunger strike and distributing brochures, which constituted the offence of performing an act not included in the Association's Charter. The applicant's imprisonment for a term of six months was converted to a fine. Finding the sentence imposed on the applicant not necessary in a democratic society, the ECHR found a violation of Article 10 of the Convention.

81 For a study providing a comprehensive assessment as to the issue, see Çiğdem D. Sever, "Hapishane İdarelerinin Yetkileri ve Hapsedilen Haklarının Sınırı (Powers of the Prison Administrations and Limits of the Rights of the Prisoners)", *Türkiye Barolar Birliği Dergisi*, Issue: 122, 2016, p. 141-192.

of physical integrity. The first paragraph of Article 82 of Law no. 5275, which also covers those detained at prisons by reference to Article 110 thereof, is related to force-feeding, whereas the second paragraph concerns medical treatment.

d. Regulation

"The Regulation on the Administration of the Penitentiary Institutions and Execution of Penalties and Security Measures", which was issued by the President and took effect on 29 March 2020, contains a reiteration of the statutory regulation on hunger strike and death fast (Article 101). The principles and procedures as to the implementation of a statutory provision regarding a matter of particular concern to human rights should be laid down through a regulation.

e. The Circular

The Circular no. 172, of 6 January 2020, on the *"Ensuring Access of Prisoners to Human Rights-Based Health Care and Treatments complying with International Standards, Their Transfers for Medical Treatment and Suspension of Their Penalties"*, which was issued by the Ministry of Justice, contains no regulation regarding hunger strike or death fast. Nor is there any direct explanation with respect to the refusal of food and fluids.[82] However, a reference is made to Article 82 of Law no. 5275 in two sections within the Circular. Accordingly, it is envisaged that in cases where the convicts and detainees who suffer from contagious diseases but refuse medical examination and treatment are in a life-threatening situation, Article 82 § 2 of Law no. 5275 shall be applied. Secondly, if the prisoner referred to a hospital for treatment refuses medical treatment, not Article 82 of Law no. 5275 but general provisions shall be applied. The Circular does not allow the hunger strikers to refuse a medical treatment, which is quite natural in consideration of the relevant provision in Law no. 5275. What attracts attention at this point is the explicit regulation whereby the prisoners who are not on a hunger strike but merely suffer from a disease are entitled to refuse medical treatment at hospital. The lack of a statutory provision on this

[82] Full text of the Circular is available at https://cte.adalet.gov.tr/Resimler/Dokuman/2212020114623172%20genelge.pdf (09.02.2021).

matter in Law no. 5275 cannot be eliminated through a regulatory act of the administration or by relying on the ethical principles. Instead, it would be reasonable for the Law to embody relevant provisions in line with the same understanding.

f. Triple Protocol

Finally, the Triple Protocol on "Management, External Protection and Rendering Health-Care Services Functional at Penitentiary Institutions and Detention Centres", which was signed by and between the Ministries of Justice, Internal Affairs and Health on 17 January 2000, should be touched upon. Article 19 of the initial version of the Protocol lays down the practice concerning intervention with respect to, and medical treatment of, those who are in a critical state of health for being on a hunger strike.[83] The Turkish Medical Association brought an action for annulment, maintaining that the relevant provision was in breach of the Regulation on Patients' Rights. The action was rejected by the Council of State. Upon appeal, the Board of the Administrative Law Chambers, upholding the decision of the 10th Chamber of the Council of State, dated 20 November 2002, by a majority, considered the ethical principles as a *recommendation* but laid stress on the State's positive obligation within the meaning of the protection of the right to life under Article 17 of the Constitution and Article 2 of the Convention. In this decision, the Board of the Administrative Law Chambers did not mention of the European Convention on Biomedicine.[84] This Protocol was replaced by a new triple protocol dated 19 August 2011, which does not contain any regulation concerning hunger strike.[85]

2. Force-Feeding (Article 82 § 1 of Law no. 5275)

As set forth in Article 82 § 1 of Law no. 5275, "*if convicts insist on refusing the nourishment given to them for whatever reason, they shall be informed by the physician at the penitentiary institution about the harmful*

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83 Full text of the Protocol is available at https://www.ttb.org.tr/mevzuat/2005ek/Cilt1.pdf (05.02.2021)

84 Decision of the Board of the Administrative Law Chambers of the Council of State, no. E 2003/501 K 2006/2096 and dated 7.12.2006.

85 Full text of the new Protocol is available at https://www.ttb.org.tr/mevzuat/images/stories/Yeni_l_ protokol.pdf (05.02.2021).

consequences of their act and the physical and mental damage it may cause to them. The psycho-social service unit shall also take the necessary actions to ensure them to discontinue this act, and if such initiatives are of no avail, the process for their feeding shall be started in an appropriate environment according to the regime determined by the physician at the institution."

Within the framework of this statutory arrangement, force-feeding is a process that may be performed by a physician or officers at the penitentiary institution in any appropriate place at the penitentiary institution and that is intended for ensuring intake of nourishment by the person concerned.[86] Therefore, force-feeding of a striker who is still conscious and is not a patient may not amount to a medical intervention. Article 82 of Law no. 5275 is not formulated in a way that would necessarily require the performance of this process through medical methods. This process always constitutes an intervention with physical integrity but is not always in the form of a medical intervention. If this process involves any medical methods such as vascular injection by a physician, it will then constitute a medical intervention.

In the Law, the notion *act* is used instead of the words strike or death fast. That is because the prisoner may refuse to take food for any other reason such as a psychological problem or desire to commit suicide. However, it is a well-known fact that the refusal to take nourishment may be associated, by the vast majority, with the probability of hunger strike.

In cases where the prisoner consistently[87] refuses to take nourishment in order to protest, it should be accepted that the hunger strike process starts. At this very stage, the State is to take an action. The physician at the penitentiary institution informs the person concerned and

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86 Ayşe Özge Atalay, "İnfaz Kurumlarındaki Açlık Grevlerine Devlet Müdahalesi Sorunu (Matter of State Intervention with the Hunger Strikes at the Penitentiary Institutions)", *Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi*, Issue:109 – 110, September - October 2013, p. 71.

87 Any certain period is not specified in the Turkish legislation. At the Federal Penitentiary Institutions in the USA, this period is envisaged as 72 hours. Upon the expiry of 72nd hour, the person concerned is considered as a hunger striker (Gordon, p. 350). According to the opinion with which we also agree, it is not reasonable to determine a certain period of time in this sense. The starting period of hunger strike should be determined on the basis of the physical characteristics that may vary by person (Levy, p. 9).

provides information on the physical and mental damages that may result from his/her act. The psychosocial service unit at the penitentiary institution also takes necessary steps so as to persuade the prisoner to discontinue his/her act.

As regards the force-feeding process at the penitentiary institution, the existence of a life-threatening situation is not required as a condition, but the continuation of the act in spite of all persuasive efforts is deemed sufficient. In this case, the Law entails the feeding of the concerned prisoner in an appropriate environment according to the regime designated by the physician of the penitentiary institution. Although the notion "forced" is not used in the statutory regulation, it is not possible to define the feeding process, which is against the will of the prisoner, with another adjective.

This statutory regulation, which concerns the person himself, his dignity and self-respect, should not be taken into consideration separately but in conjunction with the framework set by the jurisprudence of the ECHR. The standards set by the ECHR in the cases such as *Nevmerzhitsky v. Ukraine* (2005) and *Ciorap v. Moldova* (2007) where it found a violation are as follows:[88]

Force-feeding must:

- Be medically necessary;
- Be intended for saving the life of the person concerned;
- Involve safeguards such as right to challenge, judicial review, the adoption of the force-feeding process on the basis of a written report, and the conduct of the process by a competent physician;
- Be conducted, through the most lenient method of intervention, in a way that would not infringe human dignity and self-respect;
- Not turn into a means of pressure and punishment so as to put an end to the strike.

As is seen, the ECHR does not find the lack of consent problematic in the provision of food ad fluids provided that the intervention with the strike must not degrade human dignity. Human dignity is a basic

88 Levy, p. 30.

value that must be respected by the State in its all acts and actions. The last paragraph of Article 82 of Law no. 5275 also entails that the coercive measures to be taken must not be of derogatory nature. This requirement laid down therein is the citation of the known facts. If it had not been cited, there would be still nothing to decrease the State's obligation to respect human dignity under the Constitution and international conventions.

At this point, it should be useful to take into consideration the recommendation given to the physicians by the World Medical Association in the Tokyo Declaration, which was last updated in 2016:[89] *"Where a prisoner refuses nourishment and is considered by the physician as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially, as stated in WMA Declaration of Malta on Hunger Strikers. The decision as to the capacity of the prisoner to form such a judgment should be confirmed by at least one other independent physician. The consequences of the refusal of nourishment shall be explained by the physician to the prisoner."*

As is seen, force-feeding is categorically rejected even if it will be performed for the sake of the prisoner in terms of medical ethics.[90]

In the same vein, in the report issued by the United Nations Committee against Torture in 2016 with respect to Israel, it was considered that pursuant to the Israeli legislation, the force-feeding of a hunger striker (even if he has full capacity to form a judgment) without his consent constituted a violation of the prohibition of ill-treatment and was found in breach of the UN Convention against Torture (Article 16).[91]

In the report of the UN Human Rights Committee regarding Guantanamo,USA, it is stated that force-feeding is in itself a violation of human rights; and that in cases where this violation is accompanied

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89 Turkish version of the WMA Declaration of Tokyo, with official name "Guidelines for Physicians Concerning Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in relation to Detention and Imprisonment", is available at https://www.ttb.org.tr/images/ stories/haberler/file/DTB_Tokyo_Bildirgesi_2016.pdf (08.02.2021)

90 Levy, p. 22.

91 The report is available at https://www.refworld.org/docid/57a99c6a4.html (08.02.2021).

with use of disproportionate force, the impugned act will amount to torture and ill-treatment. According to the report, force-feeding not only infringes the right to health of the person concerned but also amounts to the violation of the ethical principles in respect of the physician taking a role in the force-feeding process.[92]

In fact, it should be questioned whether force-feeding would, by its very nature, infringe human dignity in that human dignity is at the core of the law. Is it possible to conduct the force-feeding process without infringing the human dignity, when the person concerned is conscious, by disregarding his preference that is strictly based on his own will? In consideration of the minimum standards set by the ECHR, it may be concluded that Article 82 § 1 of Law no. 5275 does not fall foul of the Convention. However, when human dignity comes into play in this context, it should be acknowledged that it is not so easy to properly apply this statutory provision and similar ones. We therefore consider that it is partly this difficulty that makes the tendency -whereby, in practice, the striker who cannot be persuaded is taken to the hospital (as a subsequent stage) instead of being force-fed at the prison- predominant. We argue that this tendency in practice must be incorporated into the legislation as a provision and that the force-feeding of a prisoner, who is fully conscious, must be completely abandoned. In cases where it is found established that the prisoner is fully conscious and insists on his decision to refuse nourishment with his/her free will, the desire and will of that person should be respected. Therefore, Article 82 § 1 of Law no. 5275 should be amended accordingly.[93]

3. Forced Medical Treatment (Article 82 § 2 of Law no. 5275)

a. Legal Framework

Article 82 § 2 of Law no. 5275 sets forth "*Regarding any convicts who refuse nourishment and carry on a hunger strike or "death fast" and who are diagnosed, by the institution physician, to be in a life-threatening situation or*

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92 Pages 88 and 94 of the Report. The report, titled "Situation of detainees at Guantánamo Bay", is available at https://undocs.org/E/CN.4/2006/120 (08.02.2021).

93 In the same vein, Ünver, ''Türk Tıp Hukukunda Rıza (Consent in the Turkish Medical Jurisprudence)'', p. 284.

to have lost consciousness despite the measures taken and the efforts made under the first paragraph, medical tests, treatment, feeding and other measures for medical examination and diagnosis shall be conducted in the institution or, if not possible, by immediately taking them to a hospital, regardless of their will, provided that such measures and interventions do not pose a danger to their health and life."

Accordingly, at the time when the prisoner who is still on a hunger strike is diagnosed, through the report issued by the physician, to be in a life-threatening situation or have lost his consciousness, he will be provided with medical treatment at the penitentiary institution or, if not possible, at a hospital, without his consent being sought. This practice is applied mainly in cases of death fast. The matter of medical intervention comes into play mainly also at this stage.

At this stage, certain measures such as *medical tests, treatment and feeding for the purpose of medical examination and diagnosis* will be taken with respect to the striker. In the meantime, a distinction must be made between the force-feeding that may be performed by everyone as set forth in Article 82 § 1 of Law no. 5275 and the force-feeding for the purpose of medical treatment laid down in Article 82 § 2 thereof. As the feeding process to be conducted by a physician or health-care staff is also a part of medical treatment, this process should be regarded as a medical intervention. It is beyond any doubt that the feeding of a person who is in a life-threatening situation may be ensured through medical methods.

The difference in approach adopted in the Turkish legal system with respect to the hunger strike by a free person and the one by a prisoner becomes apparent at this very stage. Article 82 § 2 of Law no. 5275 does not confine the relationship between the prisoner and the physician merely to a patient-physician relationship and does not accordingly respect the will of the striker after a certain stage.

In the light of the international documents, it appears that this issue is left to the discretion of the domestic legislation within the scope of certain standards. For instance, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") notes in the instrument, titled the CPT Standards, which was issued in 2002: "*In the event of a hunger strike, public authorities or*

professional organisations in some countries will require the doctor to intervene to prevent death as soon as the patient's consciousness becomes seriously impaired. In other countries, the rule is to leave clinical decisions to the doctor in charge, after he has sought advice and weighed up all the relevant facts."[94] In the same vein, the Resolution of the Council of Europe, Committee of Ministers also endorses the Turkish legislation.[95]

It is important and necessary for the domestic legislations to contain provisions with respect to the actions that must be taken or avoided in case of a hunger strike at prisons. The Report on the Netherlands issued by the Committee against Torture of the Council of Europe in 2007 is a guideline on this matter. According to the Report, there must be clear and comprehensible rules regarding the steps to be taken in the event of a hunger strike at prisons, and these rules must make a substantive reference to the supervisory power conferred upon the health-care staff.[96]

In comparative law, many countries adopt an approach which deems necessary medical intervention with respect to a prisoner on hunger strike just after the strike entails a risk to the prisoner's life.[97] On the other hand, pursuant to "Law on Provisional Release on Medical Grounds" enacted in 1913 by England, which does not make any distinction between hunger strikes of a prisoner and a free person, the prisoners on a hunger strike are released when their health deteriorates.[98] Through another law issued in 1974 in England, any medical

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94 The Turkish version of the document is available at the UNHCR's website: https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.PDF?reldoc=y&docid=4d78827e2 (05.02.2021)

95 According to the Appendix to the Recommendation no. R (98) 7 concerning the Ethical and Organisational Aspects of Health Care in Prison, issued by the Council of Europe Committee of Ministers, "If, in the opinion of the doctor, the hunger striker's condition is becoming significantly worse, it is essential that the doctor report this fact to the appropriate authority and take action in accordance with national legislation (including professional standards). The Recommendation is available at https://cte.adalet.gov.tr/Resimler/Dokuman/1982019151705tavsiye_kararlari.pdf (05.02.2021).

96 The CPT's Report on the Netherlands (2007), https://rm.coe.int/168069780d (07.02.2021).

97 Radu-Florin Geamanu, Hunger Strikes and Force-Feedıng in Prisons, Challenges of the Knowledge Society; Bucharest 2016, p. 64.

98 https://www.parliament.uk/about/living-heritage/transformingsociety/electionsvoting/womenvote/case-study-the-right-to-vote/the-right-to-vote/winson-green-forcefeeding/cat-and-mouse-act/ (09.02.2021)

treatment and force-feeding against the will of the prisoner on a hunger strike is prohibited.[99] In the USA, the decision is taken through a court decision, and medical interventions, including force-feeding, with respect to a hunger striker is mainly allowed.[100] The American Supreme Court finds acceptable the force-feeding that does not infringe the prohibition of ill-treatment and torture and differentiates between those who are at prisons and those who are not in terms of the boundaries of hunger strike.[101]

b. Medical Ethics and the Turkish Medical Association's Approach to the Matter

In the documents of the universal medical ethics, a hunger striker with deteriorating health is, in any case, regarded merely as a patient, and no distinction is made between those who are and are not placed at prison. For instance, the Malta Declaration treats equally the hunger strikes of free persons and those of the prisoners and puts forward its perspective on this matter as follows: "*Hunger strikes occur in various contexts but they mainly give rise to dilemmas in settings where people are detained (prisons, jails and immigration detention centres). There is a physician-patient relationship between the hunger striker and the physician. As is the case for any patient, the physician may conduct the process through recommendations or treatment.*" The Declaration advises that individuals' autonomy should be respected, noting that the decision given by the striker of his own free will when he is fully conscious should be taken into consideration at the subsequent stages. As a result, it is suggested that a convict refusing medical treatment be left to die *in dignity*, without any restriction, reservation or exception.

"The Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", issued by the UN in 1999 (the Istanbul Declaration) took the ethical standards of patient-physician relationship a step further. Accordingly, it is recommended that in case of any contradiction between

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99 James Welsh, "Responding to Food Refusal: Striking the Human Rights Balance", Interrogations, Forced Feedings, and The Role of Health Professionals (eds. Ryan Goodman&Mindy J. Roseman), Harvard University Press, 2009, p. 147.

100 Gordon, p. 348.

101 Gordon, p. 358 et seq.

the ethical obligations incumbent on the health-care staff and domestic legislation, not the legislation but the ethical principles be abided by.[102]

In this sense, as also indicated in the principles declared by the Turkish Medical Association, "*if the hunger striker loses his consciousness or falls into a coma, the physician shall take an action in consideration of the final decision of the hunger striker.*" At this stage, making a distinction on the basis of whether the striker is a prisoner would fall foul of the Physician's Pledge, Declaration of Geneva adopted by the World Medical Association, which would amount to discrimination.[103]

According to the ethical principles of the Turkish Medical Association, the physician should check the striker's state on a daily basis and inform him/her of the probable consequences of his/her refusal to eat. The physician should also keep a medical follow-up form where it should be certainly indicated whether the person concerned will consent to medical treatment in the event of loss of consciousness.[104]

The opinion of the Ethical Board of the Medical Association, which is dated 24 September 2018, also points out that the medical profession does not entail the duty of keeping the person alive at all costs but primarily requires respect for his personal autonomy and dignity. According to the Ethical Board, in the event of hunger strikes, ethical values such as respect for personal autonomy, informed consent, privacy and right to refuse medical treatment within the framework of physician-patient relationship that is based on trust should be taken into consideration.[105] The physician may administer medical treatment only when he considers that the previous expressions whereby the person concerned has refused medical treatment were uttered under duress. In that case,

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102 https://tihv.org.tr/wp-content/uploads/2020/04/istanbul-protokolu.pdf (p. 15).

103 Onur Naci Karahancı & Nüket Örnek Büken, "Evrensel Etik İlkeler Işığında Açlık Grevleri ve Hekimlik (Hunger Strikes and Medical Profession in the light of Universal Ethical Principles)", *Sürekli Tıp Eğitimi Dergisi*, Vol. 26 Issue 4, 2017, p. 170.

104 Turkish Medical Association, "Açlık Grevi Sırasında Tıbbi Etik İlkeler ve Bunun Yansımaları (Ethical Principles in Medicine during a Hunger Strike and Repercussions)": https://www.ttb.org.tr/aclik_grev/tibbi.html (10.02.2021).

105 Turkish Medical Association, "Özgürlüğünden Yoksun Bırakılanların Sağlık Hakkı ile İlgili Etik Kurul Görüşü (Ethical Board's Opinion on the Right to Health of Those Deprieved of Liberty)": https://www.ttb.org.tr/makale_goster.php?Guid=cca66a7e-bff9-11e8-bd56-00aa55ab5dcd (10.02.2021)

it is suggested that if the hunger striker still intends to continue his/her strike after his/her life is saved and he/she regains his/her competence to form a judgment, his/her will must be respected.[106]

As is seen, the approach adopted by the Turkish Medical Association regarding the force-feeding of prisoners are in keeping with the international instruments (notably the Tokyo and Malta Declarations).[107]

c. May the pertaining statutory provision be disregarded?

Given the statutory provision which necessitates medical intervention with respect to the convicts and detainees who are on a hunger strike and who are currently in a life-threatening situation, the requirements of medical ethics run counter to the provisions of domestic law. In that case, the physician may disregard an applicable statutory provision only when the State is a party to a Convention that directly refutes this provision. At this very moment, there is no superior normative provision that would set aside the application of the relevant law. In this framework, we should also note that we disagree with the argument that the provisions in Law no. 5275 have become unlawful as the European Convention on Biomedicine, a part of Turkish domestic law, embody different provisions[108]. The provisions of this Convention have no direct bearing on the medical intervention with respect to the convicts and detainees on hunger strike.

The Law no. 5275 may be found to fall foul of ethical standards and criticised as it in its current form sets aside the will of the person concerned.[109] However, these criticisms cannot undoubtedly have the capacity to change a statutory rule within the legal order that is to be

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106 Turkish Medical Association, "Açlık Grevleri ve Hekimler Klinik, Etik Yaklaşım ve Hukuksal Boyut (Hunger Strikes and Physicians: Clinical and Ethical Approach and Legal Aspect)" Manual, Ankara 2012, p. 19.

107 Serkan Cengiz, "Mahpusların Açlık Grevi ve Zorla Besleme Parodoksu Işığında Hekim Sorumluluğu (Physician's Responsibility in the light of the Paradox of the Prisoners' Hunger Strike and Force-Feeding)", *Türkiye Barolar Birliği Dergisi*, Issue 88, 2010, p. 431.

108 Cengiz, p. 437; Yücel, "Medeni Hukuk Bakış Açısıyla… (… from the perspective of Civil Law)", p. 200.

109 For certain criticisms in this sense, see Yener Ünver, "Hekim ve Hasta Haklarının Ulusal ve Uluslararası Hukuk Açısından Konumlandırılması (Assessment of Physicians' and Patients' Rights in terms of National and International Law)", *Ceza Hukuku Dergisi*, Y. 2, Issue: 1, April 2007, p. 208 et seq.

abided by. Then, if a conflict is at stake, the common ground to be found must be not the ethical but the legal ground.[110] Ethical principles may have a compelling effect that would require a change with respect to a statutory provision but cannot substitute itself for such a change.

In that case, the application of the approach based on personal autonomy also with respect to the convicts and detainees whose lives are at risk would constitute an infringement of law. That is because the Turkish legal order introduces a clear exception to the principle of personal autonomy, which is conferred on patients, in respect of those who are held in prisons.

On the other hand, the fact that medical intervention with respect to a convict is deemed legitimate after a stage when his life is at risk should not be construed to the effect that the State may be indifferent to the situation until that moment. As both the Constitutional Court and the ECHR qualifies this act as a form of the freedom of expression, the administration should henceforth incorporate this approach into its process management. In this sense, the State is expected to conduct the strike process in a transparent manner which is subject to supervision. The independent watchdog institutions and human rights agencies should be allowed to get in contact with the administration and strikers as well as to make public the justified expectations of the strikers. Likewise, the ombudsman should effectively scrutinise the complaints raised by the convict.[111] In brief, it should be acknowledged that hunger strike is a means of expression for convicts and detainees. Accordingly, there may be some cases where this right is abused, confined to the circumstances where "hunger strike is embarked on by the person concerned solely for relieving himself of punishment".[112]

4. Physician's Responsibility

In consideration of all elements of a medical intervention, it appears that the medical intervention with respect to a convict on hunger strike does not comprise the right to informed consent. As explained above, the gap resulting from the lack of consent of the person concerned is eliminated and filled in by the relevant Law.

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110 Ekici Şahin, p. 231.
111 Levy, p. 45.
112 Sevinç, p. 162.

In the event where the hunger striker's life is at risk or he losses his consciousness, the physician must initiate the medical treatment without the consent of the striker being sought, pursuant to Article 82 § 2 of the Law no. 5275.[113] The failure to engage in medical intervention with the convict, who is in a critical state of health, even in line with his current or previous explicit will, may give rise to the offence of intentionally causing death by negligence. The non-intervention may be considered to constitute a direct and active involvement of the physician in cases where, as set forth in Article 83 of the TCC, "*the physician has an obligation, deriving from law or a contract, to perform certain acts with his direct and active involvement and has previously endangered the life of another person due to his behaviour*". In this sense, a statutory regulation or a convention provision creates a form of guarantor relationship between patient and physician.[114] The *guarantor* underlying the physician's obligation to make medical intervention with respect to a hunger striker is Article 82 § 2 of Law no. 5275.

In cases where the convict, who is unconscious, loses his life in spite of the medical intervention, the physician will incur no responsibility. Moreover, even if the death results from the risky medical intervention, no responsibility should be placed on the physician. That is because every health-care service involves, by its very nature, risks, and the obligation incumbent on the physician in this sense is confined to the prevention of any increase in the risk.[115] This incident may be explained through the theory of "objective imputation", which prevents the imputation of criminal liability on the offender despite the causal link, and the hypothesis of "permissible risk", a standard inherent in the former theory.[116] Permissible risk is the maximum extent to which

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113 For an assessment to the effect that the right to self-determination should be enjoyed not merely by free persons but by everyone and that accordingly, the physician should not be obliged to make a medical intervention, see Ömer Çelen, "Ölüm Yardımı Açısından Hekimin Sorumluluğu (Physician's Liability in terms of Assistance to Die)", *Erzincan Üniversitesi Hukuk Fakültesi Dergisi*, Vol. II, Issue. 3- 4, 2007, p. 68.

114 Veli Özer Özbek & Koray Doğan & Pınar Bacaksız, Türk Ceza Hukuku Özel Hükümler (Special Provisions in the Turkish Criminal Law), Ankara 2020, p. 168.

115 Hakan Hakeri, Tıp Hukuku (Medical Jurisprudence), Ankara 2012, p. 191.

116 As regards the "permissible risk", which prevents the attribution of any liability due to an act performed, see Bahri Öztürk & Mustafa Ruhan Erdem, Uygulamalı Ceza Hukuku ve Güvenlik Tedbirleri Hukuku (Applied Criminal Law and Secu-

posing a risk is legally allowed.[117] Accordingly, within the extent of risk allowed by law, any liability resulting from a medical intervention performed with due diligence for treatment is not objectively imputed on the physician.[118]

At the time when the convict regains consciousness (and there is no life-threatening situation), Article 82 of Law no. 5275 must no longer be applied, and Articles 24 and 25 of the Regulation on Patients' Rights must be fully applied. Therefore, if the convict refuses medical treatment, it will be necessary to discontinue the treatment pursuant to "patient's" veto power in medicine.[119] If the discontinuation of treatment results in death, the physician cannot be objectively held responsible on account thereof. Besides, it is not true to attribute any fault to the administration on the ground that there has been a violation of the right to life. It is necessary and sufficient for the State to take the necessary measures for saving the convict's life.[120]

Medical intervention with respect to those who are on a death fast is an outcome of the relation between detainee/convict and the State that involves special care, protection and discipline.[121] This relation will be at stake also for the convict/detainee receiving treatment in a hospital. However, if the detainee/convict is released under Article 16 § 2 of Law no. 5275[122], Article 82 of the same Law will be no longer applicable to the striker, and the impugned act will not be different than a hunger strike or death fast embarked on by free persons.

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rity Measures Law), Ankara 2020, p. 234-238.

117 Centel & Zafer & Çakmut, p. 284.

118 Centel & Zafer & Çakmut, p. 284.

119 At this point, there is a probability for occurrence of vicious circle. That is to say, when the convict, being fully conscious, refuses medical treatment will then lose his consciousness, and therefore, he may once again undergo a medical treatment. Accordingly, the cycle of refusal -losing consciousness – medical treatment – regaining consciousness – refusal may be repeatedly at stake. The only way in the Turkish legal order to avoid such vicious circle is the suspension of execution of sentence or discontinuation of detention.

120 ECHR's judgment Horoz v. Türkiye, (no. 1639/03, 31.03.2009).

121 Barış R. Erman, Tıbbi Müdahalelerin Hukuka Uygunluğu (Lawfulness of Medical Interventions), Ankara 2003, p. 199.

122 "In case of other diseases, the execution of the sentence is continued at the wards allocated for prisoners in the official health-care institutions. However, the execution of the imprisonment sentence constitutes, even under these circumstances, a certain risk to the prisoner's life, the execution of his sentence shall be suspended until recovery."

In this context, in practice, there are some cases where the person on a death fast is released (if he is a detainee, through conditional bail[123]; and if he is a convict, through a decision suspending the execution of sentence) when his/her state of health deteriorates to a critical extent. In its relevant judgment, the Court of Cassation also ordered, pursuant to Article 16 § 2 of Law no. 5275, *"the suspension of the execution of the sentence until recovery"* regarding a prisoner on remand who refused medical treatment despite the high life-threatening risk.[124] This

[123] We are of the opinion that the law-maker, incorporating the opportunity of conditional bail in case of a fatal disease into Article 109 of the Code of Criminal Procedure through Law no. 7242 and dated 14.4.2020, needs to recall this procedural practice that has been already applicable. This provision in question reads as follows: "(4) it may be decided that the suspects who are found, pursuant to Article 16 § 3 of Law no. 5275 on the Execution of Sentences and Security Measures, dated 13.12.2004, to be unable to maintain his life alone under the conditions of the penitentiary institution on account of a fatal disease or a disability he suffers and the female suspects, who are pregnant or who have given birth in the last six months be granted conditional bail, instead of being detained on remand."

[124] "A report was issued on 02.09.2020 by the Chief Physician's Office of the İstanbul Kanuni Sultan Süleyman Training and Research Hospital in reply to the letter of the same date, which sought information as to whether Aytaç Ünsal, a prisoner on remand pending appeal at the time when his case was under appeal examination, was still on a hunger strike, whether he consented to a medical treatment, whether he was in a life-threatening situation, and as well as about his current state of health. In this report, it is noted that the patient, who has been on a hunger strike for 212 days, refuses every kind of intervention for both medical diagnosis and treatment; that however, given the patient's state of health and literature data, it is considered that his life is at risk and he is under the risk of a sudden cardiac arrest due to electrolyte imbalance resulting from hunger strike. The provision allowing for the suspension of the execution of sentence due to a life-threatening disease, which is laid down in Article 399 § 2 of Law no. 1412 on Criminal Procedure, is embodied in the same way in Article 16 of Law no. 5275. It has been observed that the prison administration has taken all necessary measures and thus referred the patient to a fully-equipped hospital for treatment so as to ensure the accused to suffer from hunger strike to a minimum extent, but as he refused medical treatment, his state of health deteriorated; and that the accused going on the hunger strike by refusing all recommendations for termination of hunger strike and for a medical treatment is still in a life-threatening situation. The law-maker, which does not make a distinction as to whether the life-threatening disease, which posed an obstacle to his continued placement in the prison, has been due to the own fault of the accused or due to natural causes, allows for the suspension of the execution of sentence until recovery. In the light of these explanations and previous judicial practices, it has been decided that as Aytaç Ünsal's continued placement in the prison or the special ward in a hospital allocated for prisoners endangers his life, the execution of his sentence would be suspended under Articles 16 § 2 and 116 § 1 of Law no. 5275 and he would be granted conditional bail…" (Judgment no. E. 2020/1499 K. 2020/3679 and dated 03/09/2020, delivered by the 16th Criminal Chamber of the Court of Cassation).

practice has a little bit smoothed the way for physicians getting stuck between ethical principles and the legislation.

It should be also added that if a forensic report -which finds inconvenient continued execution of the sentence in prison in case of medical diagnoses such as Korsakoff syndrome or cachexia- does not make a reservation in respect of the detention ward in hospitals, the execution of the sentence may be continued in the hospital. In that case, the medical intervention with respect to the person concerned will not fall foul of the Convention.[125] We consider that this situation must be considered as a minimum standard, and the forensic report may ensure the release of the person concerned also in that case. In the same vein, it should be born in mind that the patient suffering from Korsakoff syndrome is in need of not treatment but nursing care. Therefore, it should be re-considered whether the continued execution of the sentence imposed on the convict-patient, who has almost no prospect of recovery, is necessary given the expected benefit of the execution.[126]

Conclusion

1. Hunger strike is an act of protest that falls into the scope of the freedom of expression as a means of raising an objection or expressing a request.
2. The hunger strike or death fast embarked on by free persons cannot be terminated, without the striker's consent, even at the most critical stage. The European Convention on Human Rights and Biomedicine, a part of the Turkish domestic law, and the Regulation on Patients' Rights embodying provisions in parallel with the former attach utmost importance to personal autonomy on this matter.
3. As there is no contradiction, with respect to the conditions of medical intervention in case of a hunger strike of free persons, between ethics and law, the physician may also follow the ethical principles.

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125 ECHR's judgment in the case of Özgül v. Türkiye (no. 7715/02, 06.03.2007).

126 Manual on Health-Care Services in the Penitentiary Institutions, edited by Prof. Dr. Zafer Öztek, Ministry of Justice, 2012, p. 190.

4. It is a legal requirement that the will of the prisoner on a hunger strike will no longer be respected at the very moment when his/her state of health attains a critical stage. In other words, a medical intervention is necessary with a hunger strike by the prisoners, even against their will, when their life is at risk or they lose consciousness.

5. A physician performing a medical intervention with respect to a convict/detainee on hunger strike without his/her consent has acted in breach of ethical principles but in accordance with the law. In that case, there is no liability incurred by the physician in that the physician applies the statutory provision.

6. If a decision ordering the suspension of the execution of sentence is given with respect to a convict/detainee, who is on a hunger strike, the question whether medical intervention is necessary will be ascertained according to the general rules of the physician-patient relationship.

7. Article 40 § 2 (g) of Law no. 5275, which envisages the imposition of a disciplinary sanction on the hunger striker in prison, is compatible neither with the essence, in legal terms, of the act nor with the *requirements of a democratic society*.

8. As regards force-feeding, the relevant Law does not seek even the condition that life of the convict/detainee has been endangered or he has lost consciousness. It is almost impossible to force-feed a conscious person without harming his/her dignity. This statutory regulation must be amended in line with the documents of medical ethics and the standards set by the ECHR.

9. In the circular of the Ministry of Justice, it is set forth in an explicit and accurate manner that a convict/detainee who is not on a hunger strike but merely a patient has the right to refuse medical treatment in hospital. However, it is not sufficient to regulate this matter only through the regulatory act of the administration or with reference to ethical principles. The Law no. 5275 should necessarily embody provisions within the framework of the same understanding.

10. Given the consideration that the actual aim of a hunger striker,

who is even on a death fast, is not to die but to ensure that his desire be properly taken into consideration by the administration and the public, the question as to the lawfulness of the impugned intervention will continuously remain on the agenda. This kind of consideration will also direct the administration to dwell upon the means that will restrict the act of hunger strike but solutions that will ensure the prevention of the taking place, from the very beginning, of such act or the voluntary termination thereof.

11. In case of any contradiction between an ethical principle and a statutory provision, it is not reasonable to argue that the physician must disregard the law. Besides, such a case is extremely prejudicial in terms of the principles of foreseeability and legal certainty. In case of such contradiction, the step required to be taken should be to implement the applicable statutory provision as well as to raise awareness, with respect to the issue in question, among the public and politicians for ensuring an amendment to the provision in question.

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EVALUATION OF ACTUAL AGGREGATION AND CONCEPTUAL AGGREGATION RULES IN TERMS OF THE CRIME OF DISTURBING THE INDIVIDUALS' PEACE AND HARMONY

KİŞİLERİN HUZUR VE SÜKUNUNU BOZMA SUÇU BAKIMINDAN GERÇEK İÇTİMA VE FİKRİ İÇTİMA KURALLARININ DEĞERLENDİRİLMESİ

Bahar TOPSAKAL*

Abstract: The crime of disturbing individuals' peace and harmony enacted in Article 123 of the Turkish Criminal Code (Turkish Law No 5237) is mostly accepted as a "general and complementary" type of crime in doctrine and judicial decisions. According to these, if the actions that constitute the crime in question also constitute another crime, they will be evaluated within the scope of the relevant crime first and the perpetrator will not be convicted of the crime of deterioration of peace and order. This pre-acceptance in practice is far from always producing fair and just results; giving the verdict of one crime without a meticulous evaluation in terms of the uniqueness of the act is incompatible with the aim of the lawmaker while preparing the law of the arrangement of conceptual aggregation. In this study, a general framework regarding the crime of disturbing the individuals' peace and harmony was firstly included, and then the rules of actual aggregation and conceptual aggregation were elaborated. Subsequently, practices of actual aggregation and conceptual aggregation in terms of this crime were shown and criticisms and proposals towards these practices were given in the light of the Court of Cassation's decisions.

Keywords: Peace and Harmony, Actual Aggregation, Conceptual Aggregation

Özet: 5237 sayılı Türk Ceza Kanunu'nun 123. maddesinde hüküm altına alınan kişilerin huzur ve sükununu bozma suçu, doktrinde ve yargı kararlarında ekseriyetle "genel ve tamamlayıcı" bir suç tipi olarak kabul edilmektedir. Buna göre söz konusu suçu oluşturan eylemler, aynı zamanda başkaca bir suçu da oluşturuyorsa öncelikle ilgili suç kapsamında değerlendirme yapılacak ve fail hakkında ayrıca kişilerin huzur ve sükununu bozma suçundan hüküm tesis edilmeyecektir. Tatbikatta işbu ön kabul, daima hakkaniyetli ve adaletli sonuçlar doğurmaktan uzak olup; fiilin tekliği bakımından titiz bir

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değerlendirme yapılmadan tek suçtan hüküm kurulması, kanun koyucunun fikri içtima düzenlemesini hüküm altına alırken güttüğü amaç ile de bağdaşmamaktadır. Çalışmada öncelikle kişilerin huzur ve sükununu bozma suçuna ilişkin genel bir çerçeveye yer verilerek, gerçek içtima ve fikri içtima kuralları detaylandırılmış; akabinde atıf yapılan suç bakımından Yargıtay kararları perspektifinde içtima uygulamalarına ve bu uygulamalara yönelik eleştiri ile önerilere yer verilmiştir.

Anahtar Kelimeler: Huzur ve Sükûn, Gerçek İçtima, Fikri İçtima

INTRODUCTION

Conceptual aggregation which is defined as "a person who commits more than one offense through a single act shall only be sentenced for the offense with the heaviest penalty" in Article 44 of the Turkish Criminal Code No. 5237 and which is one of the exceptions to the actual aggregation that can be briefly defined as "*the number of crimes should be equal to the number of acts, and the number of punishments should be equal to the number of crimes*" [1] can be defined as the collection of more than one crime in a single act, or it can also be expressed as "one act, more than one crime, one punishment". The crime of disturbing individuals' peace and harmony, which provides protection for the spiritual aspect of personal liberty, is a type of crime in which the provisions of conceptual aggregation are often applied in practice. In this context, if the acts that constitute this crime also constitutes any other crime, the evaluation shall be made first taking into consideration the other crime, and the perpetrator shall not be convicted of the crime of disturbing individuals' peace and harmony. Although the justification of this practice is is stated in the doctrine as the fact that the crime in question is accepted as a "general and complementary" type of crime, both this acceptance and the reasoning of the Court of Cassation's decisions for conceptual aggregation are not consistent with the aim of the legislator in defining aggregation. As it will be explained in detail in this study, the most important condition for accepting the existence of conceptual aggregation is the "single act", and it is not possible to apply the provisions of the conceptual aggregation if the existence of more than one act is accepted in the legal sense. In the study, it is criti-

[1] https://www.mevzuat.gov.tr/

cized that the criterion of "sameness of the act" is not taken into account in the implementation of aggregation carried out by referring to the "general and complementary" crime type in terms of the crime of disturbing individuals' peace and harmony; in this context, it is recommended in the study that, in the event that there are groups of acts that are not considered as the same, the perpetrator be prosecuted and convicted of both the crime of disturbing individuals' peace and harmony and the other related crime by applying the provisions of actual aggregation if the conditions exist. In the study, respectively, a morphological examination of the crime of disturbing individuals' peace and harmony was made, the conditions of existence of actual aggregation and conceptual aggregation were explained, and finally, the practice of aggregation applied for the type of crime and the criticism of and suggestions for these practices were explained.

I. Crime of Disturbing Individuals' Peace and Harmony

The crime of disturbing individuals' peace and harmony is defined in Article 123 of the Turkish Criminal Code No. 5237 as follows; "*Where a person persistently makes phone calls, creates noise, or otherwise acts in an unlawful manner, with the aim of disturbing a person's peace and harmony the offender shall be sentenced to a penalty of imprisonment for a term of three months to one year, upon the complaint of the victim*";[2] this norm protects the right of individuals to live in peace of mind and under the assurance of not being disturbed.[3] As is clearly stated in Articles 17 and 56 of the Constitution of the Republic of Turkey numbered 2709, everyone has both the right to protect and improve his/her corporeal and spiritual existence and the right to live in a healthy and balanced environment.

In this context, in order for individuals to actively and efficiently use their aforementioned rights, acts intended to violate these rights

[2] https://www.mevzuat.gov.tr/

[3] Similar to this article, a crime of misdemeanor was defined in Article 547 of the TCC no. 765... For the crime defined in Article 547 of the TCC No. 547, a light prison sentence of up to fifteen days or a light fine was foreseen, and the crime was subject to ex officio prosecution. "Recep Gülşen, "Kişilerin Huzur ve Sükununu Bozma Suçu (TCK m.123) [Crime of Disturbing Individuals' Peace and Harmony (TCC Art.123)]", *Zirve Üniversitesi Hukuk Fakültesi Dergisi*, 2012, p. 6-7)

have been defined as crimes by the legislator, and thus, a protection was created for the moral aspect of personal freedom, in other words, the moral liberty of the individual.[4]

In fact, when a comparison is made in terms of the crimes stipulated in the Turkish Criminal Code No. 5237, special criminal laws or other laws containing criminal provisions, it will be noticed that the crime of disturbing individuals' peace and harmony is a type of crime that is frequently encountered in the ordinary flow of life. In this context, it can be said that the crime referred to is in close connection with the privacy of private life, the honor and dignity of the individual, sexual immunity, inviolability of the domicile, inviolability of workplace, freedom of residence, and freedom of work and contract.

The aforementioned connection stems from the fact that acts carried out with the sole aim of disturbing individuals' peace and harmony often affect other areas that are under legal protection.

For example, in the event an individual has to change his job as a result of being persistently tracked on the route to/from the workplace, a relationship will emerge in terms of the peace and harmony of the individual and the freedom of work and contract. Similarly, in the event an individual whose room is spied out from the window of the opposite house every night has to move to another place, a relationship will emerge in terms of the peace and harmony of the individual, the privacy of private life and the freedom of residence. This connection between various legal protection areas clearly reveals that the crime of disturbing individuals' peace and harmony has a protection with a broad perspective. [5]

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[4] Özlem Yenerer Çakmut, Kişilerin Huzur ve Sükununu Bozma ve Gürültüye Neden Olma Suçları [Crimes of Disturbing Individuals' Peace and Harmony and Causing Noise], Beta Yayınları, Istanbul 2014, p. 52.; Moreover, considering that the crime referred to was included in the seventh chapter of the second part of the second book of the Law No. 5237, which was titled "Crimes Against Liberty", there is no doubt that the provision contains a protection for the liberty of the individual.

[5] "In this way, criminal law sanctions can be applied against violations that cannot be considered within the scope of any crime, such as psychological violence in the workplace, telephone terrorism or persistent stalking, but that interfere with inner peace of an individual." (Rezzan Itişgen, "Kişilerin Huzur ve Sükununu Bozma Suçu [Crime of Disturbing Individuals' Peace and Harmony]", *Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi,* 2014, p. 109)

The crime of disturbing individuals' peace and harmony differs from the crime of "causing noise" defined in Article 183 of Law No. 5237 and from the misdemeanor of "noise" defined in Article 36 of the Misdemeanor Law No. 5326, which are thought to have similar characteristics. [6] In this context, the fact that the victim of the crime of disturbing individuals' peace and harmony must be a specific person, [7] the insistence on the act is a condition for the occurrence of the crime, and the fact that the crime can only be committed with a special intention are the distinguishing features.[8]

In the article, the material (act-action) element of the crime is expressed as persistently making phone calls, making noise or executing any other unlawful behavior for the same purpose. [9] As can be clearly understood from the wording of the provision here, the element of insistence is valid for all the actions specified as elective. [10] In other

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6 Ümit Kocasakal, "Kişilerin Huzur ve Sükununu Bozma Suçu (TCK 123) [Crime of Disturbing Individuals' Peace and Harmony (TCC Art.123)]", *Ankara Barosu Dergisi,* 2015/2, p. 116.

7 "There is no specific victim of the crime of causing noise. Anyone living in the society can be a victim of this crime. The fact that the noise is made against an unknown person distinguishes this crime from the crime of disturbing individuals' peace and harmony defined in Article 123 of the TCC. While the perpetrator of the crime defined in Article 123 of the TCC targets a certain person, the perpetrator of the crime in the Article 183 of the TCC does not target a specific person." (18th Criminal Chamber of Court of Cassation, 2016/14794, 2019/31, 01/0/2019, www.kazanci.com)

8 On the other hand, it is stated by some authors in the doctrine that the legal interests targeted by the above-mentioned crimes are also different, and in this respect, the crimes should be considered separately: Gökhan Taneri, Ne Bis İn İdem ve Kanunilik İlkesine Göre Çevreye Karşı Suçlar İdari Yaptırımlar-Kabahatler [Crimes Against Environment According to Ne Bis İn İdem and Legality Principle Administrative Sanctions- Criminal Misdemeanors], Seçkin Yayıncılık, 2021, p.186 and 293.; Ahu Karakurt Eren, "Türk Ceza Kanunu'nda Gürültüye Neden Olma Suçu [Crime of Making Noise in Turkish Criminal Code]", *Türkiye Barolar Birliği Dergisi*, Edition 132, 2017, p. 60-61)

9 In the doctrine, some authors (Meral Ekici Şahin, "Kişilerin Huzur ve Sükununu Bozma Suçu [Crime of Disturbing Individuals' Peace and Harmony]", *Ceza Hukuku Dergisi,* 2013, p.21.) consider the material element of the crime, especially the part of "another act against the law for the same purpose" as problematic in terms of the principle of clarity and definiteness of criminal law. Again, Şen underlines that a provision contrary to the principle of legality was created, with the expression of "another unlawful behavior". (Ersan Şen, "Özel Hayata Karşı Suçlar [Offences Against Private Life]", İstanbul Barosu Dergisi, 2005/3, p.711.)

10 Muharrem Özen/Atacan Köksal, "Kişilerin Huzur ve Sükununu Bozma Suçu [Crime of Disturbing Individuals' Peace and Harmony]", *Ankara Üniversitesi Hukuk*

words, performing the act only once is not enough for the crime to occur, but the existence of more than one insistent action is required for the occurrence of the crime. The insistence is evaluated according to the characteristics of the concrete case. On the other hand, although crime is accepted as a general and complementary type of crime by some authors in the doctrine [11] it is not possible to agree with this view. Because, in the text of the article, there is no expression stating this nature of the crime, and it is not mentioned in the justification of the article that the crime is of a general and complementary nature. [12] In the light of these facts, in our opinion, it is not appropriate to accept an issue that is not mentioned in the text and justification of the article as a quality-element of the crime, and to create a case-law and opinion with the justification that "*the act should not constitute another crime*", in a way that will harm the principle of legality, especially in terms of aggregation practices. Because, as explained in detail below, such a presupposition regarding the crime may lead to the fact that the perpetrator cannot be punished for some of his/her actions and this is not appropriate in terms of criminal justice.

On the other hand, if an evaluation is to be made in terms of the moral element of the crime, first of all, it should be stated that the crime cannot be committed by negligence. [13] In this context, although the moral element of the crime is the intent, general intent is not sufficient. In order for the crime to occur, the perpetrator must be acting with the

Fakültesi Dergisi, 2019, p. 484-485)

11 Kocasakal, p. 131.; In some of its decisions, the Court of Cassation considered the crime of disturbing individuals' peace and harmony as a general and complementary crime and pointed out that the act should not constitute another crime for the proof of the crime. "The crime of disturbing individuals' peace and harmony defined in Article 123 of the TCC is a general and complementary crime, and for any act to be defined within the scope of this crime, the act must not have been defined as a separate crime in the Law." (18th Criminal Chamber of Court of Cassation, 2017/1471, 2019/4815, 03/12/2019, www.kazanci.com)

12 For example, this issue is clearly stated both in the text of the article and in the justification of the article of the crime of "misuse of public duty". It is agreed upon in the doctrine and the practice of the Court of Cassation, that this crime is regulated as a general, secondary and complementary crime. However, it is not possible to see the presence of the same clear attitude regarding the crime of disturbing individuals' peace and harmony.

13 Murat Yılmaz, Kişilerin Huzur ve Sükununu Bozma [Disturbing Individuals' Peace and Harmony], Legal Yayıncılık, 2017, p. 29.

sole aim of disturbing the peace and harmony of the victim. [14] In the doctrine, this necessity appears as "special intent", which can also be expressed as a purpose or motive and is classified as a form of direct intent. [15] In this context, phone calls made to insult or threaten the person will not constitute this crime in principle, since the existence of a special intent is sought for the occurrence of the crime referred to; in these cases, if the conditions exist, the perpetrator will be prosecuted for other related crimes. [16]

"Exercise of a right and the consent of the person concerned", which are stipulated in Article 26 of the Law No. 5237, are the most common reasons of eliminating the unlawfulness of the act for the crime in question. Because an individual's right to peace and harmony is an absolute right that he/she can benefit from. For this reason, if the relevant person consents to the violation of his/her right, the crime in question will not occur. Again, in the case of exercising a right arising from the law or custom, it will be possible to argue that the crime does not occur, considering that the action is not directed to a particular victim and there is no special intent. For example, cases such as a wedding organization, repairing, or moving house can be considered in this scope.

Finally, the crime is an offense prosecuted on complaint, and the sanctions to be imposed is stipulated in the text of the article as imprisonment from three months to one year. We consider as a deficiency the fact that no qualified versions of the crime in question is defined.[17]

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14 Ali Parlar/Muzaffer Hatipoğlu, Cezai ve Hukuki Sorumluluk Boyutlarıyla Çevre Hukuku [Environmental Law with Criminal and Legal Responsibility Dimensions], Adalet Yayınevi, Ankara 2010, p. 309.

15 Veli Özer Özbek/Koray Doğan/Pınar Bacaksız, Türk Ceza Hukuku Genel Hükümler [Turkish Criminal Code General Provisions], Seçkin Yayıncılık, Ankara 2021, p.265.

16 Veli Özer Özbek/Koray Doğan/Pınar Bacaksız, Türk Ceza Hukuku Özel Hükümler [Turkish Criminal Code Special Provisions], Seçkin Yayıncılık, Ankara 2021, p.487.

17 For example, it would have been more appropriate in terms of the criminal justice system if the Law had included some qualified versions of the crime such as the crime being committed at night or the perpetrator being a public official.

II. Actual Aggregation - Conceptual Aggregation

Aggregation, which is defined as "conjoining, gathering, meeting" in the current Turkish dictionary [18] of the Turkish Language Institution, refers to two separate institutions in terms of criminal law: the first is the "consolidation of penalties" and the second is the "aggregation of crimes". The consolidation of penalties is as an institution that enables the collection of more than one sentence ruled in a single or different proceedings against a perpetrator, [19] which cannot be evaluated within the scope of material criminal law and which has importance in the execution of penalties.[20] In this context, the consolidation of penalties primarily depends on the presence of more than one crime. [21]

The aggregation of crimes is included in the general theory of crime, and causes some of the penalties of aggregated crimes not to be imposed on the perpetrator. [22] In other words, if an act that constitutes a crime violates or seems to violate more than one norm at the same time, the institution of the aggregation of crimes comes to the fore in solving the problem of which norm will apply to the event. [23] In the

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18 http://www.tdk.gov.tr.

19 The reason for not including the consolidation of punishments procedure, which was clearly stipulated in Article 68 of the Abolished Criminal Code No. 765, in the Turkish Criminal Code No. 5237 is expressed as follows: "One of the basic rules of criminal law is expressed as 'the number of crimes should be equal to the number of acts, and the number of punishments should be equal to the number of crimes. Exceptions to this rule are specified in the aggregation of offenses part. Apart from these exceptions, a separate punishment must be imposed for each crime committed. In this way, each penalty imposed will maintain its independence. Accepting the opinion that the question of how to execute more than one punishment of the same or different nature should be regulated in the execution law, it was decided by the Commission to remove the provisions regarding the 'consolidation of punishments' from the text." (İzzet Özgenç/Cumhur Şahin, Türk Ceza Hukuku Gazi Külliyatı [Turkish Criminal Law Gazi Collection], Ankara 2005, p. 48)

20 "Consolidation of punishments is a process of execution institution; crimes the punishments of which are consolidated maintain their legal independence and each crime has separate consequences." (6th Criminal Chamber of Court of Cassation, 2014/8126 E., 2014/20012 K., 11/17/2014, www.kazanci.com)

21 Mehmet Emin Artuk/Ahmet Gökcen/Caner Yenidünya, Ceza Hukuku Genel Hükümler II (Yaptırım Hukuku) [Turkish Criminal Law General Provisions II (Sanctions Law)], Seçkin Yayıncılık, Ankara 2003, p. 169.

22 Fatma Karakaş Doğan, "Türk Ceza Hukukunda Cezaların İçtiması Kurumunun Düzenlenmesi Gerektiği Üzerine ["On the Necessity of Including the Procedure of Consolidation of Punishments in Turkish Criminal Law]", *Ankara Barosu Dergisi,* 2011, p. 87.

23 9th Criminal Chamber of Court of Cassation, 2020/7817, 2020/2297, 11/25/2020,

doctrine, on the other hand, İçel gives the following definition of "the problem of how the responsibility will be determined in the crimes committed whether there is a final conviction or not" in terms of the combination of crimes (competition, aggregation). [24]

The basic principle that dominates the Turkish Criminal Law is the actual aggregation, and according to this principle, "the number of crimes should be equal to the number of acts, and the number of punishments should be equal to the number of crimes". [25] According to this principle, in case of violation of more than one norm by the same person, the perpetrator shall be held separately responsible for each violation, in other words, the criminal responsibility of the perpetrator shall be determined according to the number of crimes committed. [26] The "aggregation of crimes" defined in Articles 42, 43 and 44 of the Turkish Criminal Code No. 5237 is an exception to the principle in question, and apart from these exceptions, a separate sentence should be imposed for each crime committed. In this context, it is not legally possible to implement principles of actual aggregation, and aggregation of crimes at the same time. Because in the presence of actual aggregation, there are more than one act, more than one crime and more than one punishment. [27]

As referenced in the paragraph above, "conceptual aggregation of different kinds",[28] which is one of the exceptions to the principle of actual congregation and defined with the compound offenses and successive offenses in the fifth chapter titled "Aggregation of Crimes" of the second part titled "Principles of Criminal Liability" of the first

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www.kazanci.com.

24 Kayıhan İçel, Ceza Hukuku Genel Hükümler[Criminal Law General Provisions], Beta Yayıncılık, 2021, p. 579.

25 Mahmut Koca, "Fikri İçtima [Conceptual Aggregation]", Ceza Hukuku Dergisi, 2007, p. 197-198)

26 Fatih Birtek, Ceza Hukuku Genel Hükümler ["Criminal Law General Provisions], Adalet Yayınevi, Ankara 2018, p. 23-24)

27 Berrin Akbulut, Ceza Hukuku Genel Hükümler [Criminal Law General Provisions], Adalet Yayınevi, Ankara 2021, p. 757.

28 In the doctrine, the use of the concept in question by some authors as in the abolished Penal Code period is considered problematic in terms of the principle of choosing a plain language. "The same principle could have been used by using the term 'formal aggregation' instead of conceptual aggregation." (Mustafa Özen, "Ceza Hukukunda Fikri İçtima [Conceptual Aggregation in Criminal Law]", *Türkiye Barolar Birliği Dergisi*, 2007, p. 133) 29 https://www.mevzuat.gov.tr/

book titled "General Provisions" of the Turkish Criminal Code No. 5237, defined in Article 44 as follows; "*A person who commits more than one offense through a single act shall only be sentenced for the offense with the heaviest penalty*."[29],[30] Accordingly, in order for the existence of conceptual aggregation of different kinds to be accepted, the following conditions must be met:

1- There must be an act, [31]

2- More than one crime must have been committed with this act,

3- The perpetrator must have been sentenced for the offense with the heaviest penalty, [32]

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[29] https://www.mevzuat.gov.tr/

[30] Conceptual aggregation can also be defined as the combination of more than one crime in a single act. In this context, "If the crimes are the same, there is a conceptual aggregation of the same kind, and if the crimes are different, there is a conceptual aggregation of different kinds." (Neslihan Göktürk, "Türk Hukuku'nda Suçların İçtimaı [Aggregation of Crimes in Turkish Law]", *Ceza Hukuku ve Kriminoloji Dergisi*, 2014, p.44.) Conceptual aggregation of the crimes of same kind is defined in Article 43/2 of the Turkish Criminal Code No. 5237.

[31] "...There definitely must be only one act in both conceptual aggregation of the crimes of same kind and of the different kinds." (Muhammed Demirel, Karar Analizi Tehlike Suçları Zarar Suçları Arasındaki İlişkinin İçtima Kuralları Kapsamında Değerlendirilmesi [Decision Analysis, Evaluation of the Relationship Between Endangerment Crimes and Crimes Causing Harm in the Scope of the Rules of Aggregation], İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, 2013, p.1482.)

[32] In a recent decision of the 9th Criminal Chamber of the Court of Cassation, the following is stated about the method to be followed in terms of the implementation of the rule of conceptual aggregation in cases where more than one crime are committed with a single act of the perpetrator but these crimes are subject to the same type and amount of punishment; "With the amendment made in Article 241 of the TCC with Article 14 of the Law No. 7242, which was published in the Official Gazette dated 04/15/2020, the lower limit of the judicial fine in the article was changed to five hundred days, and the upper limit of the imprisonment sentence was changed to 6 years. It is clear that Article 241 of the TCK, which stipulates the heaviest penalty must be imposed pursuant to Article 44 of the TCC for POS usury actions committed after this date. In the concrete case, regarding the problem of which law should be applied, since the same type and amount of penalties are specified in Article 241 of the TCC in force and Article 36 of the BKKK (Bank Cards and Credit Cards Law) Law No. 5464 as of the date of the crime : As discussed in detail above under the heading "Examination of the Legal Relationship Between the Parties According to the Law of Obligations", in the case of POS usury, although there is a contract of sale in appearance and the credit card is used as a tool in committing the crime, the real intention of the parties consists of making an interest agreement. The perpetrator, who is the owner of the card acceptor enterprise, charges the card holder's credit card the sum of the interest and the loan amount subject to the agreement using the POS device installed in the workplace, thus guarantees his

receivable, and then he pays a less amount than the amount he charges the credit card and collects (i.e. the loan amount subject to the agreement) in cash to the card holder. The lending of money is based on the pretended sales agreement that is present in appearance. The collusion here is a relative collusion. Pursuant to Article 19 of the TCO, in cases of relative collusion, the transaction in appearance shall be invalid because it does not reflect the real will of the parties, and the hidden transaction that reflects the real will of the parties shall have legal consequences.
In POS usury, the sale transaction in appearance that does not reflect the real will (Intention) of the parties shall be invalid, but the hidden transaction (loan contract) that reflects their real purpose shall still exist. When the act is evaluated in the light of these explanations, in POS usury, the intent of the perpetrator is to gain benefit by usury, and the intended crime is usury. The perpetrator makes more than one move acts when committing this crime. Although the perpetrator also commits the crime defined in Article 36 of the Law No. 5464 with some of these acts aiming to secure his receivables, more than one acts in question constitutes a "single act" in the legal sense. As emphasized in the decision of the assembly of criminal chambers of the Court of Cassation dated 07/06/2010 and numbered 2010/8-51 E., 2010/162 K., "With Article 44 of the TCC, the legislator has adopted the 'melting system'. Accordingly, in POS usury, the crime of violating Article 36 of the Law No. 5464, which the perpetrator commits with some acts while committing the crime, melts into this act, since the act of usury, which is the main purpose of his intent, is the only act. For this reason, the article defining the crime of usury, which the the real intend of the accused, in other words, to which the accused's intention is directed, should be applied. Moreover, considering the provisions of the TCO, it is a result of the legal logic that the criminal law, which pursues the material truth, should take the hidden transaction (loan contract) into account that the parties ultimately want to achieve (Intention), not the transaction in appearance in the evaluation of the act. VII - CONCLUSION Considering that the legal value protected by Article 241 of the TCC, which is applicable to the POS usury acts, and the legal value protected by Article 36 of the Law No. 5464 are different, and the victims of both crimes are different, it is not possible for the dispute to be resolved in the light of the principle of "the special norm precedes", which is one of the principles of aggregation in appearance, as requested by the Supreme Court Chief Public Prosecutor's Office, in other words, Article 36 of the Law No. 5464 cannot be applied. In POS usury, the intent of the perpetrator is to gain benefit by usury, and the intended crime is usury. Although the perpetrator makes more than one acts when committing this crime and he also commits the crime defined in Article 36 of the Law No. 5464 with some of these acts that he performs to guarantee his receivables, since the above mentioned multiple acts constitute a "single act" in the legal sense, the acts violating Article 36 of the Law No. 5464 melt in usury act which is the intention of the perpetrator. It was understood from the content of the file and the reasoning in the decision of our chamber that the provision of the article defining the crime of usury, which the perpetrator intended to commit, should be applied to the perpetrator; for this reason, the objection of the Office of the Chief Public Prosecutor of the Court of Cassation was not deemed appropriate. Thus, although the types and terms of punishments for the crimes are the same, it has been stated that the legal identification should be made correctly in terms of issues such as amnesty, complaint, right to participate, and determination of the competent chamber of appeal. The aforementioned decision states that in cases where more than one crime are committed with a single act of the perpetrator and

4- The dispute must not be a dispute that can be resolved within the framework of the principles of aggregation in appearance.[33]

Here, within the framework of the dissolution system and in the light of the principle of "non bis in idem", the legislator has concluded that punishing the perpetrator more than once, taking into account the sameness of his act conflicts with the criminal justice. According to this, the legislator found it adequate to impose the heaviest penalty on the perpetrator. The said approach of the legislator is quite appropriate. However, it should be emphasized here that the conceptual aggregation provision is only a provision that regulates the imposition of punishment. For this reason, it is necessary to accept that every crime is independent except the imposition of punishment.[33]

The most important issue in terms of the fair application of the principle of conceptual aggregation is the appropriateness of the legal assessment to be made on the sameness of the act (action). Because, in every principle within the scope of the aggregation of crimes, the concept of "act" has been given a special legal value and in this context, different meanings have been attributed to the concept in the doctrine.[34] Although different opinions have been put forward in the doctrine in terms of the sameness of the act (action),[35] in our opinion, it is the sameness in the legal sense that should be taken as the basis here. According to this, the fact that an act is single in the natural sense does not mean that it is single in the legal sense as well. In this context,

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where the provisions of the conceptual aggregation will be applied, if the penalties specified in the law for the crimes are of the same type and amount, an evaluation shall be made taking into account the perpetrator's intent. (9th Criminal Chamber of Court of Cassation, 2020/7817, 2020/2297, 11/25/2020, www.kazanci.com)

33 Nur Centel/Hamide Zafer/Özlem Yenerer Çakmut, Türk Ceza Hukukuna Giriş [Introduction to Turkish Criminal Law], Beta Yayıncılık, 2020, p. 486.

34 Tuğçe Özkan, Yargı Kararları Işığında Türk Ceza Hukukunda İçtima Kavramı [Concept of Aggregation in Turkish Criminal Law in the Light of Judicial Decisions], T.C İstanbul Kültür Üniversitesi Lisansüstü Eğitim Enstitüsü, Master's thesis, April 2019, p.4.

35 For detailed explanations regarding these opinions, see: Emrah Öz demir, Türk Hukukunda Yargıtay Kararları Işığında Fikri İçtima [Conceptual Aggregation in Turkish Law in the Light of Court of Cassation Decisions], Akdeniz Üniversitesi Sosyal Bilimler Enstitüsü, master's Thesis, Antalya 2012, p. 17-39.; Mustafa Özen, Suçların İçtimaı (Zincirleme Suç-Fikri İçtima-Bileşik Suç) [Aggregation of Crimes (Successive Offense- Conceptual Aggregation- Compound Offenses)], Ankara Üniversitesi Sosyal Bilimler Enstitüsü, Doctoral Thesis, Ankara 2008, p.26-40.

although each bodily action performed constitutes a separate movement, the issue that is meant to be expressed by the fact that the movement is single in the legal sense is different. Accordingly, even if there is more than one act performed, these acts form unity in the evaluation due to legal reasons and are hereby accepted as a single act. [36] In other words, although more than one action is taken during the commission of some crimes, these behaviors constitute a single act in the legal sense specified in the legal definition of the crime. [37]

III. Implementation of the Principle of Aggregation for the Crime of Disturbing Individuals' Peace and Harmony

As stated above within the explanations regarding the crime of disturbing individuals' peace and harmony, the said crime is accepted as a "general and complementary" crime in the doctrine by some authors and in some decisions of the Court of Cassation. According to this opinion, if the actions of the perpetrator constitute any other crime, first of all, the evaluated shall be made within the scope of the relevant crime, and in this case, the perpetrator shall not be separately convicted of the crime of disturbing individuals' peace and harmony.[38] Although the Court of Cassation has mostly justified the said practice within the framework of the principle of conceptual aggregation, [39] it is not acceptable to define the crime as a general and complementary type of crime and, hereby, to introduce a condition of occurrence incompatible with the condition of legality, namely that the act not constitute another crime, and to implement conceptual aggregation rules without performing a rigorous evaluation in terms of the sameness of the movement. Because, as mentioned under the relevant headings above, the existence of an act that can be considered as a single act in the legal sense

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[36] Assemly of Criminal Chamber of Court of Cassation, 2019/14-44, 2020/510, 12/8/2020, www.kazanci.com

[37] Mahmut Koca/İlhan Üzülmez, Türk Ceza Hukuku Genel Hükümler [Turkish Criminal Law General Provisions], 14. Baskı, Seçkin Yayıncılık, Ankara 2021, p. 492.

[38] Kocasakal, p. 131.

[39] "Without considering that the crime of disturbing peace and harmony would not occur according to the conceptual aggregation rules, since it is accepted that the accused had insulted and threatened the intervening party by telephone, calling and texting..." (4th Criminal Chamber of Court of Cassation, 2012/16788, 2013/30595, 6/3/2013, www.kazanci.com)

is essential for the implementation of the provisions of the conceptual aggregation. However, in the implementations of the provisions of aggregation by the Court of Cassation as a presupposition in terms of the crime of disturbing individuals' peace and harmony, it is observed that the sameness of the act (movement) is not evaluated separately in each concrete case, and in cases where the provisions of Article 123 of the TCC come to the fore, the conviction provisions for the other crime committed are automatically applied.[40] In our opinion, in cases where the crime of disturbing individuals' peace and harmony and another crime are committed, the acts should be evaluated according to the criteria of full sameness and partial sameness, and in this context, actual aggregation / conceptual aggregation rules should be applied.

Because, in practice, it is observed that the crimes of sexual harassment, threats, blackmail, violation of dwelling immunity, insults, violation of privacy of private life and causing noise are discussed together with the crime of disturbing individuals' peace and harmony.[41]

In determining the sameness of the act in conceptual aggregation, the exact sameness of the acts should be sought, and all the execution

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[40] "The crime of disturbing individuals' the peace and harmony defined in Article 123 of the TCC must have been committed with the sole intend of disturbing the peace and harmony of a specific person. Since this crime is a general and complementary crime, if the act constitutes any other crime, the crime of disturbing individuals' peace and harmony shall not occur. In the concrete case, it was understood that the accused YÖ had sent sexual messages to the mobile phone of the intervening party on different dates. Imposing penalty on the accused with the justifications that are non-statutory and not deemed appropriate without considering the fact that the acts of the accused are the acts defined in articles 105/1 and 43 of the TCC…" (4th Criminal Chamber of the Court of Cassation, 2013/6856, 2014/32599, 11.11.2014, www.kazanci.com); "In case the perpetrator commits crimes such as threats, insults, blackmail, sexual harassment through the phone call or the messages he sent, investigation and prosecution should be carried out only for these crimes, and should not be punished for committing the crime of disturbing individuals' peace and harmony which is a general crime." (4th Criminal Chamber of Court of Cassation, 2013/40149, 2014/35879, 12/11/2014, www.kazanci.com)

[41] In our opinion, another reason why the crime of disturbing individuals' peace and harmony cannot be described as "general" compared to the crimes in question is the difference between the legal values protected by the crimes in question and by the crime of disturbing individuals' peace and harmony. "The first condition to be able to take into account the "special norm-general norm relationship" is that both norms protect the same legal value. In other words, the legal value protected by the special norm and the legal value protected by the general norm are the same. (9th Criminal Chamber of Court of Cassation, 2020/7817, 2020/2297, 11/25/2020, www.kazanci.com)

actions should be common for all types of crimes.[42] In this context, just intersection, in other words, partial sameness, is not sufficient for the application of the rules of aggregation. [43] Because in the case of partial sameness, it is not possible to apply the rules of conceptual aggregation, since it is not possible to accept the singleness of the act. In our opinion, in case of partial sameness, each act should be evaluated as separate act, and a separate penalty should be sentenced for each crime by applying the real actual aggregation.

To give an example about the sameness (full-partial) of the acts; assume that the perpetrator sent a message to a person five times at intervals of one hour, and all of these messages also contained insulting expressions. In such a case, it is clear that all of the acts are exactly the same. Because although there is more than one act in the natural sense, due to the legal reasons, these acts form the singleness in the evaluation, and all of the acts meet definitions of both crimes at the same time. In other words, in terms of the crimes that are committed, there is no action that is not taken into consideration, so to speak. In this case, since there is an act that can be considered as a single act in the legal sense and more than one crime were committed by this single act, the provisions of the conceptual aggregation will be applied and the perpetrator will be penalized only for the crime of insult and also the provisions of the successive crime will be applied. In our opinion, since the act can be accepted as one a single act in the case of complete sameness, the application of conceptual aggregation does not create an unfairness. However, this is not the case in the case of partial sameness. For example, assume that the perpetrator sent a message to a person five times at one-hour intervals, but only two of these messages contain insulting expressions. In the presence of such a situation, since it cannot be argued that the crime of insult has been committed in terms of the other three messages, it cannot be stated that the crime types are common in terms of all acts. [44] In other words, it is not possible to accept

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42 Göktürk, p. 46.

43 Kayıhan İçel/Füsun Sokullu Akıncı/İzzet Özgenç/Adem Sözüer/Fatih Selami Mahmutoğlu/Yener Ünver, Suç Teorisi [Crime Theory], Beta Yayınevi, İstanbul 2000, p. 423.

44 "In order for the conceptual aggregation to take place, for each crime, the act must match the type, be unlawful and faulty. If there is an act with these characteristics for only one of the crimes, it means the conditions of conceptual aggregation have not been met, and the provisions of actual aggregation should be applied. (Assem-

that all acts constitute a single act in a legal sense. Because, the other three messages that do not contain insulting expressions are not evaluated. As in the second example given, if there is a partial sameness in terms of acts, applying the provisions of the conceptual aggregation by accepting the crime of disturbing individuals' peace and harmony as a "general and complementary" crime type and making a decision for only the other relevant crime committed will not contribute to criminal justice. Because, on the basis of the principle of conceptual aggregation, the singleness of the perpetrator's act is taken into account, and in this context, the perpetrator is prevented from being punished for the same act more than once. However, in the case of partial sameness, it is not possible to cause a situation in which the perpetrator is not punished for the acts that are not taken into account on the grounds of "conceptual aggregation" in terms of the crimes that the perpetrator has committed with separate actions. [45] In this context, in the second possibility mentioned above, in our opinion, if all the conditions of the crime are present, the actual aggregation provisions should be applied and a conviction should be established for both the crime of insult and crime of disturbing individuals' peace and harmony.

We have mentioned above that, in practice, the sameness of the act (movement) is not evaluated separately in each concrete case, and in cases where the provisions of Article 123 of the TCC come to the fore, the conviction provisions for the other crime committed are automatically applied (by making reference to general and complementary crime type). In this context, we believe that we should mention two separate decisions of the Court of Cassation, which also contains opinions supporting this understanding, and our criticisms about it. In this context, first of all, the Court of Cassation decision will be referred to in which aggregation provisions were applied for the crime of "causing noise", which is thought to have similar characteristics with the crime of disturbing individuals' peace and harmony. The relevant part of this decision is as quoted below; [46]

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bly of Criminal Chamber of Court of Cassation, 2014/12-516, 2018/47, 2/20/2018, www.kazanci.com)

45 In our opinion, applying conceptual aggregation rules and non-applying separate punishment for the crime of disturbing individuals' peace and harmony in cases where there is partial sameness will lead to the existence of previous or subsequent actions that are not punished.

46 18th Criminal Chamber of Court of Cassation, 2016/15421, 2017/2171, 2/27/2017,

"As can be seen, there are different provisions in our law regarding noise, that are subjected to different conditions. In this case, it is necessary to determine the areas they cover in order to evaluate all the regulations regarding noise together and to determine the sanction to be applied.

1-) If the source of environmental noise is "transportation vehicles, building sites, plants, workshops, workplaces, recreation locations, service buildings, dwellings" as explained in Article 14 of Law No. 2872, the penalties stated in each paragraph must be imposed in the conditions stated in the same paragraphs;

A-) If the noise is capable of harming the health of another person, the penalty specified for the crime defined in Article 183 of the TCC must be imposed based on the provision of Article 14 of Law no. 2872,

b-) Even if the noise is made only for the purpose of disturbing the peace and harmony, if it is capable of harming the health of another person, the penalty of the crime with the heaviest penalty between the crimes defined in Articles 123 and 183 of the TCC must be imposed, based on Article 14 of Law no. 2872 and Article 44 of the TCC,

c-) If the noise is not made by the perpetrator for the sole purpose of disturbing peace and harmony, is not capable of harming the health of another person but can disturb peace and harmony of the victim, the administrative fine specified for misdemeanor defined in Article 14, 20/h of Law No. 2872 must be imposed,

2-) Regardless of its source, if the environmental noise is made only for the purpose of disturbing peace and harmony and is not capable of harming the health of another person, the penalty for the crime in Article 123 of the TCC must be imposed,

3-) If the source of environmental noise is any other place than "transportation vehicles, building sites, plants, workshops, workplaces, recreation locations, service buildings, dwellings" specified in Article 14 of Law No. 2872, or is not made with the sole purpose of disturbing peace and harmony or is not capable of harming the health of another person, the penalty specified for misdemeanor defined in Article 36 of the Misdemeanor Law No. 5326 must be imposed,

4-) If the vehicles of motor vehicle drivers make noise in a way to disturb the people around them, if the noise does not have the qualifications described in the paragraph (1) above, in accordance with the aggregation rules in Article 15/1 of the Law No. 5326, the heavier administrative fine of the fines specified in article 30/b of the Highway Traffic Law No.2918 and in Article 36 of Law No. 5236 must be imposed."

According to this, even if the noise is made only for the purpose of disturbing the peace and harmony, if it is capable of harming the health of another person, the penalty of the crime with the heaviest penalty between the crimes defined in Articles 123 and 183 of the TCC must be imposed in accordance with conceptual aggregation rules. In our opinion, the aforementioned pre-acceptance is not appropriate in terms of conceptual aggregation rules. Because, in order for the conceptual aggregation rules to be applied, first of all, there must have been a single act and this single act must have caused more than one different crime to be committed. However, according to the acceptance in the above-mentioned decision, it is not possible to say that the acts constituting the crimes can always be considered as one in the legal sense. In other words, the complete sameness may not always come to the fore here. For example, assume that the perpetrator owns a manufacturing factory and there is an apartment adjacent to this small factory, that the perpetrator has made noise above the legal level on five different nights, and that all of this noise is capable of harming the health of the resident of the adjacent apartment. In such a case defined above, it is clear that there is complete sameness in terms of acts and that the acts causing the crimes are common in terms of all related crime types. In this case, since there is an act that can be considered as a single act in the legal sense, the provisions of the conceptual aggregation will be applied and the penalty of the crime with the heaviest penalty among the related crimes will be imposed. [47] But assume that only two of the noises made by the same perpetrator on the nights of five different days are capable of harming the health of the resident

[47] "According to the current system of the TCC, conceptual aggregation of different kinds provisions can be applied if the conditions are met for the crimes of causing noise and of disturbing individuals' peace and harmony." (Gülsün Ayhan Aygörmez Uğurlubay, Çevreye Karşı Suçlar-Türk ve Alman Çevre Ceza Hukukunda Güncel Sorunlar [Crimes Against the Environment-Current Issues in Turkish and German Environmental Criminal Law], Yetkin Yayınları, 2015, p. 477)

of the flat, and the other three are noises that only [48] are only capable of disturbing the peace and harmony. In such a possibility, in our opinion, there are two separate sets of acts: Accordingly, since all acts are not common in terms of all related crimes, the provisions of actual aggregation should be applied, and if the conditions are met, both the penalties of the crime of disturbing individuals' peace and harmony and the crime of causing noise should be imposed. Moreover, in the doctrine, it is stated that the key concept in the assessment of conceptual aggregation in terms of the crime of causing noise, as exemplified above, is the "singleness of the movement".[49]

On the other hand, in the decision 2014/20501 merits and 2014/32250 decision of 4th Criminal Chamber of the Court of Cassation in which assessment for aggregation was made in terms of the crime of disturbing individuals' peace and harmony, it was stated that;

"The crime of disturbing individuals' peace and harmony is a general and complementary crime. It is argued that the crime of disturbing individuals' peace and harmony will not be committed if the acts that must be carried out in order for this crime to occur, constitute the commission of another crime. In the concrete case, it was understood that the accused ... using the phone number 05332850322 had disturbed the intervening party by constantly and persistently calling the phone number 05398529621 used by the intervening party, and that had taken actions to disturb the intervening party, who had rejected his marriage proposal, and to force her to do what he had wanted. In our opinion, in the event that the perpetrator's single act causes more than one result, undoubtedly, if the act was committed with a single intent, he must be held responsible for the crime with the heaviest penalty within the scope of Article 44 of the TCC, and if the intent of the accused is directed to the commission of both crimes, even if there is single act, conceptual aggregation rules cannot be applied and it must be accepted that the two crimes were committed separately. It must be accepted that the accused acted with the intention of both disturbing and insulting in the actions he took after the marriage proposal was rejected by the intervening party, and that, even if the accused's acts were considered as a single act, the accused has separate intents

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[48] Here, in terms of the crime of disturbing individuals' peace and harmony, the fact that whether the perpetrator's actions is directed to a specific victim, and the specific intent to disturb the individuals' peace and harmony should be evaluated separately in each concrete case.

[49] Karakurt Eren, s. 108.

and wanted more than one outcome to occur separately. Within the framework of the provisions of actual aggregation, it should be accepted that the accused have committed both crimes separately. It is not correct in legal sense to seek whether the accused acted with the sole special intent of "disturbing peace and harmony" in the appeal examination made by the Supreme Court only for the crime of disturbing individuals' peace and harmony. It is clearly understood from the scope of the file that his intent had been to commit more than one crime",[50] and it was stated that, even if there is only one act, if the intent of the perpetrator had been to commit both crime, conceptual aggregation rules could not be applied. In our opinion, the justification of the said decision, which states that the actual aggregation rules should be applied for the crime of insult and the crime of disturbing individuals' peace and harmony, is not legally appropriate. Because Article 44 of Law No. 5237, which regulates the actual aggregation rules, is clear and no assessment has been made in this article in terms of the perpetrator's intent for the crimes. In this context, when the above-mentioned conditions of conceptual aggregation are met, it is not legally possible to apply the provisions of actual aggregation on the grounds that the perpetrator's intent is directed to all crimes. Because the conceptual aggregation is based on the singleness of the act of the perpetrator, the quantity of his/her intention is not important here. For the reasons explained, the grounds for objection of the Office of the Chief Public Prosecutor of the Court of Cassation in the decision to which reference was made is not appropriate, and it would have been more reasonable to make an assessment according to the criterion of the sameness of the acts in the concrete case.

IV. Conclusion

The crime of disturbing individuals' peace and harmony defined in Article 123 of the Turkish Criminal Code No.5237 is accepted as a "general and complementary" type of crime in doctrine and some decisions of the Court of Cassation. It is not possible to agree with this opinion. Because the aforementioned nature of the crime was not specified in the text of the article, nor was it mentioned in the justifica-

[50] The part of the decision referred to above is the grounds of appeal of the Office of the Chief Public Prosecutor of the Court of Cassation. The Chamber, considering the reasons for the objection in question appropriate, accepted the objection and upheld the decision of the local court.

tion of the article that the crime was of a general and complementary nature. In light of these facts, it is not appropriate to accept an issue that is not mentioned in the text and justification of the article as a quality-element of the crime, and to create a jurisprudence and opinion with the justification that "the act should not constitute another crime", especially in terms of aggregation practices. In our opinion, in the event that other crimes come to the fore together with the crime of disturbing individuals' peace and harmony, the issue of whether the actual aggregation rules or conceptual aggregation rules will be applied should be determined according to the singleness of the act within the framework of the sameness of the acts. Accordingly, if there are groups of acts that do not form singleness in the evaluation, the perpetrator should be convicted of both the crime of disturbing individuals' peace and harmony and the other related crime by applying actual aggregation rules, if the conditions are met.[51]

In practice, in our opinion, it is not fair in terms of criminal justice to establish a verdict for another related crime on the grounds that the crime of disturbing individuals' peace and harmony is a general and complementary crime. Again, contravening the criterion of the singleness of the act and making an evaluation only for the intent of the perpetrator does not comply with the general principle of the aggregation rules. Therefore, we believe that it is necessary to prevent the acceptance of crime as a general and complementary type of crime, without prejudice to the principle of legality in crime and punishment, and in this context, the aggregation rules should be evaluated within the framework of the "singleness of the act" criterion.

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THE LEGAL RESPONSIBILITY OF NURSES IN THE LIGHT OF THE TURKISH COURT OF CASSATION JURISPRUDENCE

YARGITAY KARARLARI IŞIĞINDA HEMŞİRENIN HUKUKÎ SORUMLULUĞU

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Abstract: Nurses work in various fields related to human health. While performing their duties, their acts must be in accordance with the requirements of medical science. The actions taken by nurses to contribute to a patient's health may not always have positive outcomes. The *nurse's lack of legal responsibility for complications* is the rule. A nurse is responsible for medical malpractice, not for complications. The *nurse's legal responsibility for medical malpractice* is simply based on professional misdeeds.

In this study, the legal responsibility of nurses is examined and relevant cases that have been the subject of the decisions of the Turkish Court of Cassation are analysed. Considering the decisions of the Turkish Court of Cassation in relation to nurses, injuries that occur upon a nurse's injection are frequently encountered. The *problem of injection in the legal responsibility of nurses* has reached disturbing dimensions as a societal phenomenon. A *multidisciplinary approach to injection* is highly recommended. Injection problems must be minimized, particularly with the cooperation of medical and legal science.

Keywords: Nurse's Lack of Legal Responsibility for Complications, Nurse's Legal Responsibility for Medical Malpractice, Problem of Injection in the Legal Responsibility of Nurses, Multidisciplinary Approach to Injection

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Özet: Hemşire insan sağlığını ilgilendiren farklı alanlarda görev yapar ve bu görevlerini yerine getirirken tıp biliminin gereklerine uygun hareket eder. Hemşirenin hastanın sağlığına katkı sağlamak amacıyla yaptığı her eylem ve/veya işlem olumlu sonuçlanmayabilir. *Hemşirenin komplikasyondan sorumsuzluğu* kuraldır. Buna karşılık, tıbbî malpraktisten mesuliyetine gidilebilir. *Hemşirenin tıbbî hatadan hukukî sorumluluğu*, meslekî hatasına dayanır.

Bu çalışmada hemşirenin özel hukuktan doğan hukukî sorumluluğu Türk Hukuku'yla sınırlı vaziyette incelenirken konuyla ilintili Yargıtay kararları analiz edilmektedir. Böylesine incelemede hemşirenin enjeksiyon yapması üzerine meydana gelen rahatsızlıklara sıklıkla rastlanmıştır. *Hemşirenin hukukî sorumluluğunda enjeksiyon sorunu*, sosyal fenomen boyutundadır. *Enjeksiyona çok disiplinli yaklaşılması* önerilmektedir. Özellikle tıp bilimiyle hukuk ilminin entegrasyonuyla, enjeksiyon sorunu minimize edilmelidir.

Anahtar Kelimeler: Hemşirenin Komplikasyondan Sorumsuzluğu, Hemşirenin Tıbbî Hatadan Hukukî Sorumluluğu, Hemşirenin Hukukî Sorumluluğunda Enjeksiyon Sorunu, Enjeksiyona Çok Disiplinli Yaklaşılması

INTRODUCTION

Each agent has a unique function and value in the spectrum of healthcare professionals ranging from caregivers to physicians. Nursing is one of the noble professions that has emerged in line with the medical needs of human beings. Nursing Law No. 6283 (HK) and Nursing Regulation (HY) determine the duties and authorities of nurses.[1] Apart from these, the primary and secondary duties of nurses are defined in many laws and regulations. For instance, Law No. 657 on Civil Servants Law (DMK), Law No. 1219 on the Mode of Execution of Medicine and Medical Sciences (TİDK), Regulation on Patient's Rights (HHY) and the Operation of Inpatient Treatment Institutions Regulation (YTKİY) regulates the details of the topic (article 6 of DMK; article 63 of TİDK; article 14 of HHY; article 132 of YTKİY).[2]

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1 Nursing Regulation, Official Journal 8.3.2010, 27515. Nursing Law No. 6283, Official Journal 2.3.1954, 8647.

2 Law No. 657 on Civil Servants Law, Official Journal 23.7.1965, 12056. Law No. 1219 on the Mode of Execution of Medicine and Medical Sciences, Official Journal 14.4.1928, 863. Regulation on Patient's Rights, Official Journal 1.8.1998, 23420. Operation of Inpatient Treatment Institutions Regulation, Official Journal 13.1.1983, 17927.

The importance of the nurse among healthcare professionals is undeniable. Nursing is a scientific discipline equipped with lofty duties. So much so that, it is also the duty of nurses to protect, promote and improve the health of the individual, family and society. The nursing duty, which is coordinated with science and art, does not consist of only assisting the physician (medical doctor). They also have independent duties and powers. It should also be added that they have an important mission in terms of family planning and family medicine.[3] Hence, the Nursing Law defines the nurse and the title attached to this status as follows: "The title of nurse is given to those who graduated from faculties and colleges of universities providing undergraduate education related to nursing in Turkey and whose diplomas were registered by the Ministry of Health, and those who have completed their education abroad in a state-recognized school related to nursing, whose equivalence has been approved and whose diplomas have been registered by the Ministry of Health" (article 1 of HK). Nursing Regulation defines this title worded as follows "Health personnel authorized to practice the nursing profession according to the Nursing Law" (article 4/1-b of HY). The aforementioned regulation also details the services, duties, authorities and responsibilities offered by this profession (article 5, 6 of HY). On the other hand, nurses graduated from at least a medical vocational high school have high-level duties that require a lot of knowledge and experience, from asking the patient's health and well-being to measuring their temperature, even giving their medication to administering their injections (article 132 of YTKİY). The detailed task schedule makes it natural for the nursing profession to seek quality standards for personality and emotional resilience as well as talent. In addition, a benevolent and self-sacrificing character who can constantly take care of the patient both physically and spiritually is essential. In addition, a benevolent and self-sacrificing character who can constantly take care of the patient both physically and spiritually is essential.

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3 Halil Kalabalık, "Ebe ve Hemşirelerin İdare Hukuku Açısından Sorumluluğu", 3. Sağlık Hukuku Kurultayı, Ankara Barosu, Ankara, 2011, p. 334. Zekeriya Kürşat, "Hemşirelerin Hukukî Sorumluluğu", *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası*, 2008, 66/1, p. 293, 294. Hakan Hakeri, Tıp Hukuku, Seçkin, Ankara, 2021, Vol. 1, p. 209. Belkız Karabakır, Hemşirelerin Tâbi Oldukları Mevzuat ve Hukukî Sorumlulukları Konusundaki Farkındalıkları, İstanbul Üniversitesi Adlî Tıp Enstitüsü Sosyal Bilimler Anabilim Dalı, Master Thesis, Supervisor: Gürsel Çetin, İstanbul, 2011, p. 1, 5.

Legal definitions of the nursing profession should be fed with descriptions in the health sciences; such that the nurse tries to help the patient to survive without help and regain his independence in his personal competence. With this wish, nurses make scientific and artistic interventions leading to health, recovery or peaceful death. At this point, the current definition of Virginia Henderson is adopted in Turkey as well as accepted by the International Nurses Association.[4]

In the history of medicine, major disasters, especially epidemics and wars, emphasized the importance and indispensability of nursing. The Roman head nurse, Saint Fabiola, was kind enough to dedicate her enormous wealth to the poor patients. She not only treated people who were excluded from society due to their disgusting diseases like leprosy, but also provided "hospice (hospiz)" service to patients on their deathbed and helped them migrate to the next world with honour.[5] Florence Nightingale not only established modern nursing by undertaking the treatment and care of soldiers injured in the war but also played an invaluable role in the medical literature as a social reformer and statistician.[6] Today, in the epidemic management, nurses have shown examples of heroism in the fight against the crisis. So much so that they worked like secret angels in the operation of epidemic hospitals.[7] Well then, what are the professional mistakes that such valuable professionals should avoid?

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4 Rukiye Pınar Bölüktaş/Zülfünaz Özer/Dilek Yıldırım, "Uluslararası Hemşirelik And'ının Meslekî Değerler Açısından İncelenmesi", *Çekmece İZÜ Sosyal Bilimler Dergisi*, 2018, 6/13, p. 86. See also Kürşat, p. 293, 302, fn. 7. Karabakır, p. 4, 5. Kalabalık, p. 334-337. Hakeri, Vol. 1, p. 205, 209.

5 Vikipedi-1, "Saint Fabiola", https://en.wikipedia.org/wiki/Saint_Fabiola (Date of Access 26.6.2021). See also Nuray Demirci Güngördü, "Hospiz Anlayışında Hasta Bakımı ve Hemşirenin Rolü: Bir İnceleme Çalışması", Tıp-Etik-Hukuk Boyutuyla Hospiz, Ed. Çağatay Üstün, Ege Tıp, İzmir, 2016, p. 13.

6 Vikipedi-2, "Florence Nightingale", https://tr.wikipedia.org/wiki/Florence_Nightingale (Date of Access 17.6.2021). Aysun Yerköy Ateş/Figen Okur, "Covid-19 Pandemisinde Gizli Kahramanlar: Hemşire Liderler", *Uluslararası Sağlık Yönetimi ve Stratejileri Araştırma Dergisi*, 2020, 6/3, p. 626.
Bayraktaroğlu Taner/Fidan Emine, "Kriz ve Pandemide Hemşirelik Hizmetleri Önerileri", *Batı Karadeniz Tıp Dergisi*, 2020, 4/2, p. 45. Karabakır, p. 3, 4.

7 Mersin İl Sağlık Müdürlüğü, "Pandemi Kahramanı Hemşireler", https://mersinism.saglik.gov.tr/TR,183252/pandemi-kahramani-hemsireler.html (Date of Access 17.6.2021). Anadolu Ajansı, "Kovid Hemşireleri Salgınla Mücadelede En Ön Cephede Savaşıyor", https://www.aa.com.tr/tr/koronavirus/kovid-hemsireleri-salginla-mucadelede-en-on-cephede-savasiyor/1836356 (Date of Access 17.6.2021). Bayraktaroğlu/Fidan, p. 46, 47. Ateş Yerköy/Okur, p. 628, 632.

Types of medical errors can absolutely lead to the responsibility of healthcare professionals. Nurses may have three different responsibilities such as criminal, administrative and legal for their unlawful medical actions. In this study, the focus is on the legal responsibility of the nurse for professional mistakes, which is limited to Turkish Law and the practice of the Turkish Court of Cassation. In the payment of compensation on the grounds of professional error of the nurse, it is necessary to briefly remind the concepts of malpractice, including primarily medical intervention, and then medical error and damage. Then, based on reasons of the legal liability, breach of debt and wrongful act are explained bilaterally; in particular, examples that illuminate the legal responsibility of the nurse are given. At this point, the jurisprudence of the Turkish Court of Cassation regarding the legal responsibility of the nurse is analyzed. It is hoped that by collecting decisions of the jurisprudence of the Court of Cassation regarding the legal responsibility of nurses, it will be easier for colleagues to access appellate division precedents similar to their concrete disputes. In fact, in the light of a substantial number of precedents on the subject, an opportunity arises to approach the problem of medical error in nursing as a social and legal phenomenon. In addition, the attention of the concerned parties is drawn to the problems in which the nurse's medical error is concentrated, and a consultation environment for the solution of these is encouraged.

I- A BRIEF OVERVIEW OF MEDICAL INTERVENTION AND MALPRACTIS IN NURSING

In order to distinguish the cases that lead to the legal responsibility of nurses, first of all, malpractice should be defined in a large scale that will include medical intervention, medical error, complication and damage. After conceptual clarification, complications and malpractice possibilities that concern nurses should be mentioned. Of course, while the aforementioned terms are mentioned briefly, it is not possible to explain all the possibilities of nurse error one by one. However, eliminating terminological concerns from the beginning may facilitate the determination of legal issues in the decisions of the Court of Cassation, which will be examined in the following.

A- CONCEPTUAL FRAMEWORK

Under this heading, the terms of medical intervention, medical error and malpractice will be explained. Medical intervention is any activity directed at the physical and mental integrity of the person for the purpose of diagnosis, treatment or prevention of diseases by authorized persons practicing the medical profession.[8] However, although medical intervention is included in the superior purpose of protecting and maintaining health, it is directed towards the physical integrity of the person. As a rule, any unauthorized medical intervention to physical or spiritual values that the legal order considers absolute and inviolable is illegal.[9]

The intentional defining of medical intervention is to diagnose and treat the bodily, physical or psychological disease, deficiency, or to alleviate the disease or relieve the suffering even if full treatment cannot be provided, or to protect people from such diseases.[10]

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8 Mustafa Kılıçoğlu, "Yargı Kararları Işığında Doktorun Tıbbî Müdahaleden Doğan Hukukî Sorumluluğu", *Terazi Hukuk Dergisi*, 2006, 1/4, p. 17. Mehmet Ayan, Tıbbî Müdahalelerden Doğan Hukukî Sorumluluk, Kazancı, Ankara, 1991, p. 5. İsmail Atak, "Tıbbî Müdahalenin Hukuka Uygunluk Şartları", *Türk Ortopedi ve Travmatoloji Birliği Derneği Dergisi*, 2020, 19, p. 20. Zafer Kahraman, "Medenî Hukuk Bakımından Tıbbî Müdahaleye Hastanın Rızası", *İnönü Üniversitesi Hukuk Fakültesi Dergisi*, 2016, 7/1, p. 480. Ölcay Işık, Yargıtay Kararları Işığında Hekimin Hukukî Sorumluluğu, Atatürk Üniversitesi Sosyal Bilimler Enstitüsü Özel Hukuk Anabilim Dalı, Master Thesis, Supervisor: Metin İkizler, Erzurum, 2010, p. 54-65. Berna Özpınar, "Tıbbî Müdahaleden Doğan Hukukî Sorumluluğun Türleri", Sağlık Hukuku Kurultayı, Ankara Barosu, Ankara, 2008, p. 269, 270. Hayrunnisa Özdemir, "Hekimin Hukukî Sorumluluğu", *Erciyes Üniversitesi Hukuk Fakültesi Dergisi*, 2016, 11/1, p. 39, 45. Sera Reyhani Yüksel, "Hekimin Uyguladığı İlaç Tedavisinden Doğan Zararlardan Hastanın Tüketicinin Korunması Hakkında Kanun Kapsamında Korunması", 5. Tüketici Hukuku Kongresi Sektörel Bazda Tüketici Hukuku ve Uygulamaları, Eds. Hakan Tokbaş ve H. Fehim Üçışık, Bilge, Ankara, 2016, p. 367. Hakeri, Vol. 1, p. 94, 259, 260. Bayraktaroğlu/Fidan, p. 48.

9 M. Kemâl Oğuzman/Özer Seliçi/Saibe Oktay-Özdemir, Kişiler Hukuku (Gerçek ve Tüzel Kişiler), Filiz, İstanbul, 2020, p. 179, 225-229. Mustafa Dural/Tufan Öğüz, Kişiler Hukuku, Türk Özel Hukuku, Vol. II, Filiz, 2017, § 531. Sibel Adıgüzel, "Hekimin Aydınlatma Yükümlülüğü", *Türkiye Adalet Akademisi Dergisi*, 2014, 5/19, p. 945, 946. Mehmet Ayan/Nurşen Ayan, Kişiler Hukuku, Adalet, Ankara, 2020, p. 99, 116, 117. Hüseyin Hatemi, Kişiler Hukuku, On İki Levha, İstanbul, 2020, p. 69-72. Yüksel Ersoy, "Tıbbî Hatanın Hukukî ve Cezaî Sonuçları", *Türkiye Barolar Birliği Dergisi*, 2004, 53, p. 83, 184. Hayrunnisa Özdemir, "Teşhis ve Tedavi Sözleşmesinde Kayda Geçirme ve Sır Saklama Yükümlülüğü", Ankara Barosu Sağlık Hukuku Digestası, 2009, 1, p. 153. Atak, p. 21, 22. Kahraman, p. 480, 483. Işık, p. 65. Özdemir, Hekimin Hukukî Sorumluluğu, p. 39, 45.

10 Aysun Altunkaş, "Ceza Hukukunda Tıbbî Müdahalenin Hukuka Uygunluk Ko-

The aim of healing alone is not enough to eliminate the illegality of medical intervention. Even if action is taken with the aim of healing, the legality of every intervention towards the patient's physical integrity requires the cumulative realization of competent health personnel, informed consent, compliance with the most up-to-date level of medical science and meticulous service conditions.[11] In light of this information, the Supreme Court has mentioned the following conditions in its rulings since 1977: The physician should have legal authority to practice the medical profession, patient's informed consent, and the action to remain within the objective and subjective limits of medical science.[12]

In addition to blood, tissue or organ transplantation, anaesthesia, x-ray, radiation treatments, blood tests and vaccines; sex-oriented intervention, termination of pregnancy, putting IUD into womb for birth control; fillings, tooth extraction, prosthetics as well as implants and orthodontics, stem cell and infertility treatment; many activities, from relatively simple kinds of medical support to pregnancy applications to difficult surgical interventions are included in the concept of medical intervention.[13] Moreover, medical interventions, even aesthetic sur-

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şulları", II. Ulusal Sağlık Hukuku Tıbbî Müdahalenin Hukukî Yansımaları Sempozyumu, Seçkin, Ankara, 2015, p. 52. Alvina Gojayeva, "Avrupa Biyotıp Sözleşmesi ve Türk Tıp Hukuku'na Etkileri", Ankara Barosu Sağlık Hukuku Digestası, 2009, 1, p. 34. Atak, p. 20. Kahraman, p. 480. Işık, p. 54, 55, 149. Dural/Öğüz, § 531.

11 Perihan Çetinkaya, Hemşirelikte Tıbbî Uygulama Hataları ve Hukukî Sonuçları, Seçkin, Ankara, 2016, p. 38 ed seq. Verda L. Ersoy, "Tıbbî Malpraktis", *Toraks Dergisi*, p. 30, https://torakp.org.tr/site/sf/books/pre_migration/c68713cbd3e-5aef1177da489dc1a646d1645271e69486ea3bb79c144ff909737.pdf (Date of Access 16.6.2021). Merve Duysak, "Hekimin Tıbbî Uygulama Hatalarından Doğan Cezaî Sorumluluğu", *Ankara Barosu Hukuk Gündemi*, 2009, 5/3, p. 25, 26. Murat Akbaba/Vedat Davutoğlu, "Sağlık ve Hukuk Kıskacında Hekim: Ne Yapmalı?", *Türk Kardiyoloji Derneği Arşivi*, 2016, 44/7, p. 610, 611. Gürcan Altun/Abdullah Çoşkun Yorulmaz, "Yasal Değişiklikler Sonrası Hekim Sorumluluğu ve Malpraktis", *Trakya Üniversitesi Tıp Fakültesi Dergisi*, 2010, 27/1, p. 8, 10. Zarife Şenocak, "Hekimin Hukukî Sorumluluğunda Özel Sorunlar", Sağlık Hukuku Kurultayı, Ankara Barosu, Ankara, 2008, p. 244. Özdemir, Hekimin Hukukî Sorumluluğu, p. 39-41, 55-64. Özdemir, Kayda Geçirme ve Sır Saklama Yükümlülüğü, p. 153, 154. Kahraman, p. 484-502. Oğuzman/Seliçi/Oktay-Özdemir, p. 179, 225-229. Ersoy Y., Tıbbî Hatanın Hukukî ve Cezaî Sonuçları, p. 167-172. Atak, p. 20-24. Dural/Öğüz, § 531-560. Ayan, p. 7 ed seq. Gojayeva, p. 35-42. Işık, p. 54-65. Adıgüzel, p. 949. Hakeri, Vol. 1, p. 88, 94, 259 ed seq. Yüksel Reyhan, p. 367.

12 4th Civil Chamber of the Court of Cassation, 1976/6297, 1977/2541, 7.3.1977. Işık, p. 62, 63.

13 İlhan Gülel, "Tıbbî Müdahale Sözleşmesine Uygulanacak Hükümler", *Türkiye Adalet Akademisi Dergisi*, 2011, 1/5, p. 586. Hayrunnisa Özdemir, "Diş Hekimle-

geries, that do not cause physical distress but cause mental distress are medical interventions.[14]

In the Patient Rights Regulation, medical intervention is a physical and spiritual attempt aimed at protecting health, diagnosing and treating the disease, and it is also carried out within the boundaries of medicine (article 4 of HHY). The Law on the Mode of Execution of Medicine and Medical Sciences refers to persons qualified to perform medical interventions. According to this law, not only medical doctors and dentists, but also midwives, circumcisers and nurses are authorized in this regard (article 1, 2, 3, additional article 13, 29, 30, 47, 58, 68 of TİDK). Persons authorized to perform medical interventions are listed in the law, and nurses are among them. Only physicians (medical doctors) have the authorization to plan and prescribe treatment.[15]

The legality of the medical intervention is independent of the physician or nurse's goodwill and patient satisfaction. The legally expected conditions must be realized cumulatively. Particularly competent health personnel, compliance with the current level of medical science, attentive service and informed consent of the patient are required. Possible error during medical intervention may arise from the physician as well as from other staff members, especially nurses or health technicians. So, the opposite of legality in medical intervention is medical error, and the perpetrator of this is any or some person who is legally authorized to perform medical intervention.[16]

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rinin Hukukî Sorumluluğu", *Erzincan Üniversitesi Hukuk Fakültesi Dergisi,* 2011, 15/1-2, p. 182-183. Atak, p. 20. Kahraman, p. 481, 484, 488. Özdemir, Hekimin Hukukî Sorumluluğu, p. 45, 46, 48. Oğuzman/Seliçi/Oktay-Özdemir, p. 180-187. Yüksel Reyhan, p. 367. Dural/Öğüz, § 561, 599.

14 Gülel, p. 586. Atak, p. 20. Kahraman, p. 480, 481. Özdemir, Hekimin Hukukî Sorumluluğu, p. 46. Oğuzman/Seliçi/Oktay-Özdemir, p. 180.

15 Ulaş Can Değdaş, "Hatalı Tıbbî Uygulamadan (Malpraktis) Doğan Hukukî ve Cezaî Sorumluluk", *Anadolu Üniversitesi Hukuk Fakültesi Dergisi*, 2018, 6/1, p. 43, 44. Filiz Yavuz İpekyüz, Türk Hukukunda Hekimlik Sözleşmesi, Yetkin, Ankara, 2006, p. 23. Mine Kaya, "Hekimin Hastayı Aydınlatma Yükümlülüğünden Kaynaklanan Tazminat Sorumluluğu", *Türkiye Barolar Birliği Dergisi*, 2012, 100, p. 49. Füsun Terzioğlu/Fatma Uslu Şahan, "Hemşirelerin Tıbbî Müdahalede Karar Verme Yetkisi ve Konumu", *Sağlık ve Hemşirelik Yönetimi Dergisi*, 2017, 3/4, p. 137. Bahu Güneş Kılıç, Hekimin Hukukî Sorumluluğu, Legal, İstanbul, 2016, p. 15, 16. Gülel, p. 590. Kahraman, p. 480, fn. 1. Gojayeva, p. 54. Özdemir, Diş Hekimlerinin Hukukî Sorumluluğu, p. 179-181. Özdemir, Diş Hekimlerinin Hukukî Sorumluluğu, p. 43.

16 Oğuz Polat, Tıbbî Uygulama Hataları, Seçkin, Ankara, 2005, p. 25. Ersoy Y., Tıbbî

According to the reports of the Turkish Medical Association, medical error is the failure to complete the planned work as intended and hoped, or the wrong plan to achieve the goal or the wrong application of the right plan.[17] Medical malpractice is that the health personnel who are competent in medical intervention cause harm to the patient due to ignorance, inexperience or indifference. Poor or unskilful practice of medicine or nursing, as well as not presenting the standard practice to the patient at all, are considered malpractice because it also causes the patient's detriment.[18] Although medical error and malpractice are basically same, the definition of malpractice seems broader as it also includes carelessness, damage and/or misconduct.[19]

Hatanın Hukukî ve Cezaî Sonuçları, p. 167-172. Kahraman, p. 480, fn. 1. Hakeri, Vol. 2, p. 1018 ed seq.

17 Füsun Sayek, TTB Kitapları/Raporları-2010 Hasta Güvenliği Türkiye ve Dünya, Türk Tabipler Birliği, Ankara, 2011, p. 17. Murat Şaşı, "Enjeksiyon Nöropatisinden Kaynaklı Tam Yargı Davalarında Risk İlkesi Uyarınca İdarenin Kusursuz Sorumluluğunun Uygulanabilirliği", *Türkiye Barolar Birliği Dergisi*, 2021, 152, p. 71. Levent Mustafa Özgönül/Berna Arda/Necati Dedeoğlu, "Tıp Etiği ve Hukuk Açısından Tıbbî Hata, Malpraktis ve Komplikasyon Kavramlarının Değerlendirilmesi", *Türkiye Klinikleri Tıp Etiği-Hukuku-Tarihi Dergisi*, 2019, 27/1, p. 49. Hakeri, Vol. 2, p. 1049. Değdaş, p. 41, 52. Ersoy V., Tıbbî Malpraktis, p. 30. Işık, p. 65-67. Özdemir, Hekimin Hukukî Sorumluluğu, p. 64, 65. Akbaba/Davutoğlu, p. 611, 612. Nesrin Özkaya/Burcu Elbüken, "Sağlık Profesyonellerinin Hatalı Tıbbî Uygulamalarından Doğan Yasal Sorumlulukları: Hekim Haricindeki Sağlık Meslekleri Özelinde", *Sağlık ve Sosyal Politikalara Bakış Dergisi*, Güz 2018, p. 110, 111. Yılmaz Yördem, "Hekim Meslekî Sorumluluk Sigortasında Hatalı Tıbbî Uygulama Sorumluluğuna İlişkin Yargı Kararlarına Genel Bakış", *Journal Of Institute Of Economic Development and Social Researches*, 2018, 4/12, p. 540. Nesrin Özkaya, "Hemşirelik Mesleğinde Tıbbî Uygulamalardan Doğan Sorumluluklar", http://www.saglikcalisanisagligi.org/sunumlar/avnesrin.pdf (Date of Access 21.6.2021). See also İstanbul Tabip Odası, "Tıbbî Uygulama Hatası", https://www.istabip.org.tr/site_icerik_2016/haberler/aralik2016/iyihekimlik/sunumlar/dr_ali_demircan.pdf (Date of Access 16.6.2021).

18 İştar Cengiz/Alper Küçükay, "Tıbbî Malpraktis, Tıbbî Malpraktisin Psikolojik Boyutları ve Özel Hastanede Çalışan Hekimin Tıbbî Malpraktisten Doğan Hukukî Sorumluluğu", *Türkiye Adalet Akademisi Dergisi*, 2019, 37, p. 110. Cantürk Gürol, "Tıbbî Malpraktis ve Tıbbî Bilirkişilik", Uluslararası Sağlık Hukuku Sempozyumu, Eds. Hakan Hakeri ve Cahit Doğan, Türkiye Barolar Birliği, Ankara, 2015, p. 303. Oktay Ahşen E., "Tıbbî Malpraktis Kavramı ve Sonuçları", http://www.turkhukuksitesi.com/makale_1183.htm (Date of Access 17.6.2021). Değdaş, p. 41, 42, 49-51. Duysak, p. 28. Özkaya/Elbüken, p. 111. Ersoy V., Tıbbî Malpraktis, p. 31. Ersoy Y., Tıbbî Hatanın Hukukî ve Cezaî Sonuçları, p. 167-172. Yördem, p. 540. İstanbul Tabip Odası, ibidem, fn. 17. Şaşı, p. 71. Işık, p. 67. Özdemir, Hekimin Hukukî Sorumluluğu, p. 64, 65. Özkaya, ibidem, fn. 17.

19 Değdaş, p. 49. Özgönül/Arda/Dedeoğlu, p. 49. İstanbul Tabip Odası, ibidem, fn. 17. Oktay Ahşen, ibidem, fn. 18. Cengiz/Küçükay, p. 109-111. Özkaya/Elbüken,

B- DIFFERENCE BETWEEN THE COMPLICATION AND MALPRACTIS

The golden rule of medical science is the principle of "first, do not harm (*primum non nocere*)". According to this, any medical intervention is firstly based on not doing damage.[20] In that case, medical intervention aimed at healing should not at least worsen the patient. As a result, it is possible for the patient to recover or the problem to continue or worsen.[21] Here, if the patient has been harmed by the fault of the physician and/or nurse, and if his condition has deteriorated, the questioning of responsibility begins. If the damage resulting from deterioration is subject to a claim, compensation is essential. On the other hand, the rule in complication is the perfection (clean hands) and irresponsibility of the physician and/or nurse. The distinction between malpractice and complications is like a magic wand that resolves most of the controversies in medical law. Physician and/or nurse, all persons capable of medical intervention can absolutely be held liable for malpractice. Complications do not cause liability. Due to the definition of permissible risk, complication is an acceptable hazard. That means, what counts as malpractice or complication in the attribution of legal responsibility is critical.[22]

C- OTHER APPEARANCES OF MALPRACTICE IN NURSING

Problems arising from healthcare professionals, especially the legal responsibility of physicians and nurses for medical errors, cannot be isolated from the political and economic conditions of the relevant

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p. 111. Tıbbî Hata, "Tıbbi Hata-Malpraktis Nedir?", http://www.tibbi-hata.com/Türkçe/Blog/Blog_Detay/Tıbbi_Hata-Malpraktis_Nedir%3F/1434543120.html (Date of Access 17.6.2021).

20 Çağatay Üstün, "Tıp'ta Etiğin Yerini Belirlemek", Ankara Barosu Sağlık Hukuku Digestası, 2009, 1, p. 116. Cengiz/Küçükay, p. 108, 109, 111. Yördem, p. 539. See also Vikipedi-3, "Primum Non Nocere", https://tr.wikipedia.org/wiki/Primum_non_nocere (Date of Access 17.6.2021).

21 Hüseyin Cem Barlıoğlu, Defansif Tıp Unsuru Olarak Tıbbî Malpraktis, Seçkin, Ankara, 2020, p. 26. Değdaş, p. 42, 56, 57, 60. Özgönül/Arda/Dedeoğlu, p. 49.

22 Ünal Kuzgun, "Komplikasyon mu? Malpraktis mi?", *Türk Ortopedi ve Travmatoloji Birliği Derneği Dergisi*, 2019, 18, p. 98. Hakeri, Vol. 2, p. 1023. İstanbul Tabip Odası, ibidem, fn. 17. Ersoy V., Tıbbî Malpraktis, p. 31. Özgönül/Arda/Dedeoğlu, p. 49. Değdaş, p. 41, 42, 49-51. Oktay Ahşen, ibidem, fn. 18. Şaşı, p. 71, 72. Altun/Yorulmaz, p. 8. Işık, p. 67-69. Güneş Kılıç, p. 32 ed seq.

society, nor can they be isolated from the quality of education and training. In the training of health personnel, choices should be based on objective scientific reasons rather than political motives.[23]

A nurse plays an important role in every moment of the treatment, from the simple injection in the emergency room to the severe surgical intervention. Nurses should act in accordance with medical standards in all their practices. His/her lack of knowledge and skills, imprudence, violation of standard patient care practices, carelessness and negligence, incorrect drug administration, inadequate follow-up, failure to prioritize patient safety, and non-compliance with existing protocols are among the frequently encountered reasons for malpractice.[24]

According to one project study, one in five nurses per shift falls into a medical error.[25] Most of the nurses' responsibility can be attributed to the violation of the duty of care as well as the lack of communication with the physician.[26] In particular, non-compliance with the minimum cleaning conditions during the intervention, that is, the sterilization problem, is itself a cause of medical error. Besides that, improper movement of the patient, behaviour that distracts the physician during the intervention, forgetting the gauze and/or tampon in the patient's stomach during the operations, not following the rules during the shift deliveries, being careless while conveying information to the patient may lead to the responsibility of the nurse.[27] Like that, the issues of administering the medicine prepared by someone else, voidable peripheral venous line changing and dropping the patient should

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23 Ersoy Y., Tıbbî Hatanın Hukukî ve Cezaî Sonuçları, p. 162, 163.

24 İ. Hamit Hancı/Yurdagül Erdem/Sevinç Polat, Adlî Hemşirelik, Seçkin, Ankara, 2020, p. 236.

25 Kahriman/Öztürk/Babacan, p. 5, 55.

26 Kürşat, p. 294. Hakeri, Vol. 2, p. 1110. Hakan Hakeri, "Hemşirelerin Yasal Sorumlulukları-II", https://www.medimagazin.com.tr/authors/hakan-hakeri/tr-hemsirelerin-yasal-sorumluluklari-II-72-64-1271.html (Date of Access 9.5.2021). Yahya Deryal, "Hemşirelerin Hukukî Sorumluluğu", 3. Sağlık Hukuku Kurultayı, Ankara Barosu, Ankara, 2011, p. 428. İlknur Kahriman/Havva Öztürk/Elif Babacan, "Hemşirelerin Tanı, Tedavi ve Bakım Uygulamaları Sırasında Tıbbî Hata Oranlarının Değerlendirilmesi", Vehbi Koç Vakfı Hemşirelik Fonu, Proje 2014/2, Trabzon, 2015, https://sanerc.ku.edu.tr/wp-content/uploads/2017/04/Hemşirelerin-TanıTedavi-ve-Bakım-Uygulamaları-Sırasında-Tıbbi-Hata-Oranlarının-Değerlendirilmesi.pdf (Date of Access 2.7.2021).

27 Kürşat, p. 294. Hakeri, Vol. 2, p. 1110. Hakeri, "Hemşirelerin Yasal Sorumlulukları-II", ibidem, fn. 26. Deryal, p. 428.

also be considered.[28] Moreover, vaccinating a child for tuberculosis instead of measles, not writing one of the drugs on the discharged patient's medication use card, inadvertently administering an anesthetic drug to the patient coming out of the operation, giving HIV-containing blood to an eighteen-month-old baby who was treated for burns are the cases that refer to malpractice in nursing.[29] On the other hand, mild pain and redness at the catheter or entry site may be considered a complication after the medically appropriate catheter is inserted in the right place and sterile.[30] In summary, the nurse's legal responsibility for medical error is simply based on professional error. A nurse may be held liable for medical malpractice. However, a nurse's irresponsibility for complications is the rule.[31]

In the research conducted on nurses who are responsible for medical errors; it is remarkable that the workload is high, the number of nurses working is low, the nurses are loaded with non-duty jobs, and they are worked under stress and fatigue.[32] Inadequate job descriptions of nurses, low wages, limitation of promotion opportunities, lack of communication with the manager and with each can create the ambiance of medical errors peculiar to them.[33]

The probabilities and causes of medical errors of nurses were examined, especially from the perspective of drug administration. In this review, necessary precautions to be taken are listed to prevent injection application errors and to ensure safe injection. Fatigue, excessive

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28 Kahriman/Öztürk/Babacan, p. 56.

29 Derya Şahin et al., "Hemşirelikte Malpraktis: Olgu Sunumları", *Adlî Tıp Bülteni*, 2014, 19/2, p. 101.

30 Arzu Karayavuz, "Kateter Hemşireliği", Türk Hematoloji Derneği-Hematoloji Pratiğinde Uygulamalı Kateterizasyon Kursu, p. 60, http://www.thd.org.tr/thdData/userfiles/file/KATATER__KURS_14.pdf (Date of Access 17.6.2021).

31 For the distinction between malpractice and complication, see Kuzgun, p. 98. Ersoy V., Tıbbî Malpraktis, p. 31. Özgönül/Arda/Dedeoğlu, p. 49. Değdaş, p. 41, 42, 49-51. İstanbul Tabip Odası, ibidem, fn. 17. Oktay Ahşen, ibidem, fn. 18.

32 Musa Özata/Handan Altunkan, "Hastanelerde Tıbbî Hata Görülme Sıklıkları, Tıbbî Hata Türleri ve Tıbbî Hata Nedenlerinin Belirlenmesi: Konya Örneği", *Tıp Araştırma Dergisi*, 2010, 8/2, p. 106. Cumhuriyet, "Yargıtay'dan Sağlık Çalışanlarına Emsal Niteliğinde Fazla Mesai Kararı", https://www.cumhuriyet.com.tr/haber/yargitaydan-saglik-calisanlarina-emsal-niteliginde-fazla-mesai-karari-1796111 (Date of Access 21.6.2021).

33 Sema Kuğuluoğlu et al., "İlaç Uygulamalarında Hemşirenin Meslekî ve Yasal Sorumluluğu", *Maltepe Üniversitesi Hemşirelik Bilim ve Sanat Dergisi*, 2009, 2/2, p. 88.

workload, length of working hours, inexperience, stress and lack of professional knowledge and skills were counted among the factors causing medical errors. In addition, the lack of fixed or clear protocols and procedures, the irregularity of the records and the lack of attention to information transfer in shifts are among the factors that pave the way for malpractice.[34] Moreover, errors such as not washing hands, not using gloves, breaking the bulb with a solid object, interfering with the sciatic nerve, reusing the used needle, wiping the already sterile end of the needle with cotton should also be included.[35]

The drug administration process under the responsibility of the nurse needs to be evaluated. When the physician examines the patient, he determines which drug will be administered, how and at which dose. He conveys his requests in this direction to the nurse. A nurse should administer medications as they are communicated to her, he/she should monitor and record any after effects. The nurse plays a very effective, active and prepotent role in the drug administration process. The leading mistakes of the nursing activities are related to injection, that is, to administer drugs with a needle. Injection error can be caused by reasons such as inappropriate application point, incorrect dosage adjustment, wrong mixing and dilution, not paying attention to sterilization, using tools and equipment that are not suitable for the service, and daring to apply despite lack of technical knowledge and artistic skills.[36] If there is a causal link between the failure to comply with the dose or timing in the doctor's instructions and the harm in drug administration, the nurse may be held responsible.[37] As a result of careless and inattentive intramuscular injection, undesirable results such as nerve damage, regression in foot functions, crippling and/or skipping may occur. In intravenous injections, in addition to physical distress due to vein damage and/or infection, weakness or loss of

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34 Fatma Er/Serap Altuntaş, "Hemşirelerin Tıbbî Hata Yapma Durumları ve Nedenlerine Yönelik GörüşlerininBelirlenmesi", *Sağlık ve Hemşirelik Yönetimi Dergisi*, 2016, 3/3, p. 132-139.

35 Esin Çetinkaya Uslusoy/Emel Duran Taşçı/Medet Korkmaz, "Güvenli Enjeksiyon Uygulamaları", *Hacettepe Üniversitesi Hemşirelik Fakültesi Dergisi*, 2016, 3/2, p. 50, 51, 53. Kürşat, p. 294, 295.

36 Çetinkaya Uslusoy/Taşçı Duran/Korkmaz, p. 50-57.

37 Deryal, p. 432, 433.

a limb is unfortunately encountered.[38] Negative consequences on the injection problem are not just injuries. It is possible for the patient to go into a coma after the medicine is given quickly by the nurse, which should be given at least two hours under the control of the doctor. It should also be mentioned that the patient whose surgery was completed and because of repeated narcosis medication could fall into a vegetative state.[39]

II- LEGAL RESPONSIBILITY OF A NURSE

First of all, the legal responsibility of the nurse will be discussed in general. The purpose of such a summary is to remind the subject. Then, the jurisprudence of the Court of Cassation concerning legal responsibility in nursing will be chronologically conveyed. Academic quality in the analysis of the cases subject to the judicial decisions can be achieved by duplicating examples as well as by having a good command of terminology. The issues that the Supreme Court has focused on, both in the form of complications and malpractice, should be examined legally at the level of social facts and with communal awareness.

A- SUMMARY OF RESPONSIBILITY FOR NURSE'S MALPRACTICE

A nurse's faulty violation of the rules of medicine and medical law due to his/her profession may result in her administrative, legal and criminal liability. The legal responsibility characterized by paying compensation is directed towards the elimination of the damage done to the patient. In the responsibility of the nurse, it is necessary to clarify the definitions of nurse, patient, complication and malpractice in each concrete case. Once the malpractice description is fixed, the institutions of breach of debt or tort in Turkish law of obligations direct the nurse's legal responsibility for medical error. Moreover, the nurse's responsibility for breach of debt includes also fault in contract negotiations (*culpa in contrahendo*). Responsibilities of nurses arising from

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38 Çetinkaya Uslusoy/Duran Taşçı/Korkmaz, p. 53. Kürşat, p. 294, 295. Hakeri, "Hemşirelerin Yasal Sorumlulukları-II", ibidem, fn. 26. Halide Savaş, Yargıya Yansıyan Tıbbî Müdahale Hataları Tıbbî Malpraktis Tıbbî Davaların Seyri ve Sonuçları, Seçkin, Ankara, 2009, p. 83-84.

39 Şahin et al., p. 101.

tortious acts and breach of contract due to their professional activities remain. It is also possible to assign responsibilities to the nurse based on acting without authority (*negotiorum gestio*).[40]

In disputes originating from private law, it is not possible to cover the legal responsibility of the nurse in a few pages. Nevertheless, the

[40] Fahriye Oflaz, "Hemşirenin Görev ve Yetkileri", 3. Sağlık Hukuku Kurultayı, Ankara Barosu, Ankara, 2011, p. 411. Pınar Aksoy Gülaslan, "Tıbbî Kötü Uygulamaya İlişkin Zorunlu Malî Sorumluluk Sigortası", Uluslararası Sağlık Hukuku Sempozyumu, Eds. Hakan Hakeri ve Cahit Doğan, Türkiye Barolar Birliği, Ankara, 2015, p. 269, 270. Çelik Ahmet Çelik, Tazminat ve Alacaklarda Sorumluluk ve Zamanaşımı, Seçkin, Ankara, 2018, p. 848 ed seq. Murat B. Alkanat, "Tıbbî Müdahalelerden Doğan Hukukî Sorumluluk", *Sürekli Tıp Eğitimi Dergisi*, 2002, 11/5, 177-180. Hakeri, Vol. 2, p. 961 ed seq. Kaya, p. 59, 60, 70. Terzioğlu/Şahan, p. 139, 140. Çetinkaya Uslusoy/Duran Taşçı/Korkmaz, p. 51, 54. Gülel, p. 587 ed seq. Kalabalık, p. 344-352, 355-358. Hakeri, "Hemşirelerin Yasal Sorumlulukları-II", ibidem, fn. 26. Kuğuluoğlu et al., p. 89. Kürşat, p. 303-308. Şenocak Z., Hekimin Hukukî Sorumluluğunda Özel Sorunlar, p. 242-251. Cengiz/Küçükay, p. 123. Oktay Ahşen, ibidem, fn. 18. İstanbul Tabip Odası, ibidem, fn. 17. Şahin et al., p. 100. Özkaya/Elbüken, p. 118-122. Duysak, p. 29-38. Akbaba/Davutoğlu, p. 611-613. Altun/Yorulmaz, p. 7-11. Deryal, p. 426-439. Dural/Öğüz, § 560, fn. 337. Oğuzman/Seliçi/Oktay Özdemir, p. 225-229. Özpınar, p. 270-291. Özdemir, Diş Hekimlerinin Hukukî Sorumluluğu, p. 183-229. Özdemir, Kayda Geçirme ve Sır Saklama Yükümlülüğü, p. 151, 163. Karabakır, p. 12-39. Özkaya, ibidem, fn. 17. Ayan, p. 51 ed seq. Yüksel Reyhan, p. 368-377. Güneş Kılıç, p. 67-99. About culpa in contrahendo, see also Fikret Eren, Borçlar Hukuku Genel Hükümler, Yetkin, Ankara, 2020, p. 40. Aydın Zevkliler/K. Emre Gökyayla, Borçlar Hukuku Özel Borç İlişkileri, Vedat, İstanbul, 2020, p. 678-680. Ahmet Kılıçoğlu, Borçlar Hukuku Genel Hükümler, Turhan, Ankara, 2021, p. 57. Andreas Furrer/Markus Muller-Chen/Bilgehan Çetiner, Borçlar Hukuku Genel Hükümler, On İki Levha, İstanbul, 2021, p. 584-589. Şener Akyol, Dürüstlük Kuralı ve Hakkın Kötüye Kullanılması Yasağı, Filiz, İstanbul, 1995, p. 53, 54. Huriye Reyhan Demircioğlu, Güven Esası Uyarınca Sözleşme Görüşmelerindeki Kusurlu Davranıştan Doğan Sorumluluk (Culpa In Contrahendo Sorumluluğu), Yetkin, Ankara, 2009, p. 43 ed seq. Mustafa Arıkan, "Culpa in contrahendo Sorumluluğu", *Selçuk Üniversitesi Hukuk Fakültesi Dergisi*, 2009, 17/1, p. 69-89. Aylin Görener, "Culpa in contrahendo Sorumluluğu", *İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi*, 2019, 36/2, p. 67-80. Hamdi Yılmaz, "Sözleşme Görüşmelerinde Kusur-Culpa In Contrahendo- ve Sorumluluğun Hukuksal Niteliğinde Yeni Görüşler", *Yargıtay Dergisi*, 1975, Ocak-43, p. 234-252. Özgür Güvenç, "Culpa in Contrahendo Sorumluluğu Bağlamında Sözleşme Görüşmelerinin Kesilmesi", *Gazi Üniversitesi Hukuk Fakültesi Dergisi*, 2014, 18/3-4, 364-370. For negotiorum gestio, see also Belgin Erdoğmuş, Roma Borçlar Hukuku Dersleri, Der, İstanbul, 2014, p. 125-128. Kübra Erçoşkun Şenol, "Gerçek Olmayan Vekâletsiz İş Görmenin Sistematik Açıdan Türk Borçlar Kanunu'ndaki Yeri ve 2020 İsviçre Borçlar Kanunu Tasarısı'ndaki Durum", *Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi*, 2018, 12/4, p. 38-50. Fikret Eren, Borçlar Hukuku Özel Hükümler, Yetkin, Ankara, 2021, p. 909 ed seq. Sera Reyhani Yüksel, "Hekimin Vekâletsiz İş Görmeden Doğan Sorumluluğu", *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi*, 21/2, Mehmet Akif Aydın'a Armağan, p. 793-804.

legal reasons that give rise to such responsibility in accordance with the Turkish Code of Obligations No. 6098 (TBK) will be addressed from a bird's eye view.

First of all, it should be explained that there are dependent, independent and semi-dependent roles in nursing. Indeed, the nurse's spectrum of duties is not limited to merely following the physician's instructions. At the same time, a nurse can enter into a contractual relationship directly with the patient. A nurse works dependent on the physician in terms of administering treatment. However, a nurse is equipped with independent decision-making abilities in terms of nursing diagnosis process and nursing care.[41] Nursing Regulation illuminates these roles as follows: "based on evidence within the framework of the needs determined within the scope of the nursing diagnosis process plans, implements, evaluates and supervises" (article 6/1-a of HY).

In the first case, the nurse may be held liable pursuant to the provisions of tort (article 49 et seq. of TBK). The conditions for the nurse's conviction to pay compensation arising from the wrongful act can be listed as follows within the framework of the general provisions: A nurse's unlawful act or inaction when necessary, attribution of fault to the nurse, harm to the patient, causality between the harm and the unlawful act. Indeed, the nurse's wrongful act targeting the patient violates the physical integrity, in other words, the physical and/or mental health, which is an element of the right of personality. Therefore, such interventions are illegal as a rule. Damage may occur upon the violation of personal rights by the unlawful intervention of the wrongful nurse. If there is a causal link between the harm and the unlawful behaviour of the nurse, it can now be said that the patient can receive compensation arising from the wrongful act. A contractual relationship is not sought in the patient's claim for compensation based on the tortious act. As a rule, a claim for compensation can only be brought against the self-employed nurse herself/himself. A lawsuit can also be brought to the hospital for the wrongful act of the dependent nurse related to her profession, in that case the strict liability of the employer comes to the fore (article 66 of TBK). In the second possibil-

41 Kuğuluoğlu et al., p. 89. Terzioğlu/Şahan, p. 136, 140.

ity, the compensation in the legal responsibility of the nurse may arise from the breach of the debt. The conditions for this should be classified as follows: The existence of a contract between the nurse and the patient, the breach of the debt arising from this contract by the nurse, the nurse being deemed at wrongful, damage to the patient and the causal link between the damage and the breach of the debt. The legal nature of the contract between the nurse and the patient is mostly mandate (*mandatum*) (article 502 of TBK). Here, it is not the typical appearance of the *mandatum*, but the modest version of a fee for work. If a nurse does not fulfil or perfoms late or poorly regarding the obligation of providing the medical service that is within the province of him/her in accordance with the patient's will and health benefit, the general provisions regarding the breach of contract shall be applicable in addition to the special provisions regarding the mandate contract (article 502, 112 of TBK). On the other hand, the principle of honesty, which is expressed in the Turkish Civil Code No. 4721 (TMK), imposes culpa in contrahendo responsibility on future contracts that come into contact to make a contract (article 2 of TMK). Although the legal nature of this liability is still discussed in the doctrine, it is mostly considered as a breach of debt. Therefore, the nurse's failure to act honestly in pre-contract negotiations, as a rule, with the application of special provisions regarding the mandate contract; the blanks are resolved by filling in the general provisions regarding the breach of contract (article 502, 112 of TBK; article 2 of TMK). In the preparation phase, if the nurse damages the patient with careless statements and/or behaviours attributed to are wrongful, it may result in compensation. Although it is rare, it should be pointed out that the nurse may act without authority. If the nurse's act without authority is in accordance with the patient's interests and his hypothetical will, then it is in favour of the patient's interest namely substantial (real) agency without authority; otherwise, it is mentioned about insubstantial (unreal) acting without authority (article 526 et seq. of TBK). Even if it is not based on a contract, the degree of the nurse's duty of care does not change. He/she should always show the care expected from his/her profession in all his medical interventions. The nurse acting without authority is responsible for all kinds of negligence. However, the responsibility of healthcare professionals aiming to protect the patient from greater damage who act

without authority, is considered lighter as per the law (article 527/1 of TBK). The nurse's liability arising from private law, especially for tortious act or breach of contract, ensures that the patient's damage is compensated with material and/or moral compensation.[42]

In emergency situations, the treatment of the patient without obtaining his/her permission may be subject to the provisions of agency working without authority. Like that, tort (wrongful act) and/or violating the rules of good faith during pre-contract negotiations are within the scope of breach of debt from the *culpa in contrahendo* point of view. It is in this manner that the patient's condition who linger by creating the expectation that he will be treated, worsens.[43] Finally, the possibility of wrongful behaviour and acting without authority can be exemplified in covenant negotiations. It is sufficient for the nurse to use her/his medical knowledge in the best way and to choose the most appropriate method for treatment. Otherwise, a nurse does not guarantee a curative result such as healing. It is known that a nurse can provide health services independently of the physician. It is important for a nurse to be honest while the covenant negotiations are going on to undertake the care and supervision of the patient. For this reason, vain promises such as rapid recovery or life extension should not be voiced. The legal order does not protect medical knowledge and nursing status for being used as a hope-monger (article 502, 102 of TBK.; article 2 of TMK). In addition, a nurse, who is out of duty and gives medical treatment to a lonely person who was injured and unconscious in a traffic accident can be considered to be acting without authority. Similarly, when a patient who is unconscious and is brought to the emergency room by third parties, the urgent medical intervention of the physician and the nurse can be thought as the agency with-

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42 Kürşat, p. 303, fn. 9, 304, 307-317. Çetinkaya Uslusoy/Duran Taşçı/Korkmaz, p. 54. Karabakır, p. 155-20. Aksoy Gülaslan, p. 269, 270. Özkaya/Elbüken, p. 118-124. Duysak, p. 25. Akbaba/Davutoğlu, p. 611. Altun/Yorulmaz, p. 7, 8, 10. Yüksel Reyhan, p. 368-377. Hakeri, "Hemşirelerin Yasal Sorumlulukları-II", ibidem, fn. 26. Ersoy Y., Tıbbî Hatanın Hukukî ve Cezaî Sonuçları, p. 183-187. Terzioğlu/Şahan, p. 139, 140. Cengiz/Küçükay, p. 120-127. Kuğuluoğlu et al., p. 89. Alkanat, p. 177-180. Arıkan, p. 69-89. Demircioğlu, p. 43 ed seq. Güvenç, p. 364-370. Akyol, p. 53, 54. Görener, p. 67-80. Erçoşkun Şenol, p. 38-50. Zevkliler/Gökyayla, p. 678-680. Eren, Özel Hükümler, 909 ed seq. Eren, p. 40. Kılıçoğlu, p. 57, Erdoğmuş, p. 125-128. Yüksel Reyhani, Vekâletsiz İş Görme, p. 794-802. Güneş Kılıç, p. 67-99.

43 Yüksel Reyhani, Vekâletsiz İş Görme, p. 794, 802.

out authority. In these examples, the nurse is, as a rule, liable for any negligence. Nevertheless, it is at the judge's discretion to evaluate the responsibility of the nurse as a slight liability, who only aims to save the patient or the injured from greater damage (article 527/1 of TBK; article 4 of TMK).

B- VERDICTS OF THE JURISDICTION CLARIFYING NURSES' LEGAL RESPONSIBILITY

Verdicts under this heading are related to compensation cases filed due to medical error with the claim of nurses' wrong**.** In fact, due to the nurse's wrongful act, in addition to the weakness or loss of limbs in the patient, even coma, vegetative life and death stand out in concrete events. Besides, there are jurisprudences pointing to the separation of duties between the administrative and judicial judiciary. Similarly, it should be mentioned that the recourse by the State Treasury to the offending civil servant nurse is possible. Based on the various verdicts of the Court of Cassation, the legal responsibility of nurses can be analyzed realistically. Objectivity is valuable in the analysis of events that paved the way for nurses to pay compensation. Because, in such sensitive matters, a methodological approach to social and legal events ensures avoidance of bias and provides permanent solutions with a multidisciplinary perspective. The compilation from 1973 to 2020 is listed below.

In 1973, anaphylaxis shock and death as a result of penicillin allergy were evaluated. Antibiotics such as penicillin can cause death in some individuals due to an allergic reaction. The importance of this jurisprudence is that it questions the workload distribution between the physician and the nurse. The Court of Cassation was sceptical that only the nurse, not the doctor, was held responsible for the sudden injection of a full dose of allergic shock drugs rather than gradually.[44]

[44] "As the purpose of the profession of the doctor and auxiliary health personnel is to protect human life, eliminate diseases and prolong life, it is necessary for the physician to warn the patient and the auxiliary personnel and, if necessary, to give the injection himself when giving a drug that can cause shock. The fact that the council of health determines that the fatal result is possible with this drug and on the other hand does not consider the doctor responsible depends on the fact that the doctor, in this application, clearly determines that there is no other method of manner that can prevent this result. However, this aspect is not mentioned in

In 2002, it was evaluated to be written 36.5 degrees as if the fever of the kidney patient was checked even though no fever was measured. Twenty minutes later, it was noticed that the patient's temperature approached 39 degrees. The General Assembly of Civil Chambers in the Court of Cassation has confirmed that this behaviour, which is incompatible with truth, is wrongful.[45]

When a lawsuit was filed against the physician due to the medical error of the nurse in 2003, the fault of the physician and the nurse together or separately was discussed; it has been decided that the employer is responsible for the employee's breach of contract. In fact, it was based on the provision of the repealed Turkish Code of Obligations No. 818 (EBK), which deals with the absolute liability of the employer for the employee's infraction (article 100 of EBK).[46] In this case, it is jurisprudence that the physician is absolute liable for the wrong of the assistant nurse.[47]

In 2004, for the first time, the injury of the sciatic nerve with the injection and the fact that the incident took place in the state hospital resulted in the lack of jurisdiction of the judiciary. Persons who do not have personal wrongs, have worked in a public hospital and left their jobs may not be prosecuted in the civil jurisdiction.[48]

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the report. Drugs that cause allergies or shock, and thus pose or may pose a very serious danger to life, should be administered to prevent this, even if the danger is rare. As far as it is known, this can be implemented in the following way; after the drug to be applied is applied in a very small amount and injected in trace amounts or in the amount required in general, the patient's reaction should be waited, and if no reaction is shown and thus it is understood that there is no danger for the patient, it can be injected completely. Otherwise, the act done is not treatment, but ignorance and causing death with gross negligence… The Council of Health reports, which determine the doctor's irresponsibility in the file, are far from apprehending in terms of the quality and quantity of the problem in all details and are insufficient, and do not bind the court under the provisions of Articles 275 and next articles of the proceeding. The decision should be examined by the university professor, whose knowledge and impartiality the court trusts, and the degree of fault should be determined according to the result. Otherwise, the decision made with incomplete examination should be reversed" (4th Civil Chamber of the Court of Cassation, 1973/2684, 1973/2978, 13.3.1973).

45 Court of Cassation, General Assembly of Civil Chambers, 2002/9-550, 2002/561, 26.6.2002.

46 Abolished Turkish Code of Obligations No. 818, Official Journal 29.4.1926, 359.

47 13th Civil Chamber of the Court of Cassation, 2003/2333, 2003/6348, 22.5.2003.

48 21st Civil Chamber of the Court of Cassation, 2004/7439, 2004/8136, 11.10.2004.

In 2004, the capacity to sue for damages against the obstetrician and his nurse was evaluated. The doctor did not supervise the nurse, the nurse did not follow the doctor's instructions, the doctor left the plaintiff's birth and went to another birth, the nurse tried to deliver the pregnant woman without waiting for the doctor, the nerves in the new-born's arm were damaged, and as a result of the strong pressure on the pregnant woman's abdomen, the baby's arm was disabled. The Court of Cassation decided that the case should be accepted because it was based on the defendants' personal wrong. So much so that just because personal fault is mentioned in the petition, the court should enter the merits of the case and a judgment should be made according to this determination after determining whether the defendants have personal wrongs.[49]

In 2004, the lawsuit was filed against the obstetrician and his nurse for causing the death of the mother and the baby. However, this time, since the lawsuit was not based on the personal wrongs of the civil servant defendants working in the public hospital, it is obvious that the administrative jurisdiction was directed.[50]

In 2005, it was mentioned that in the lawsuit of complete loss of sensation in the left foot following the pain that started after the injection, the provisions of the agency contract (*mandatum*) and the absolute liability of the employer could be applied.[51]

In 2005, new-borns were mixed-up by nurse error. Because the name bands of the babies of the plaintiff mother and another mother who gave birth in the same hospital were changed somehow. The mother, who stayed away from her own baby unknowingly breastfed someone else's child until she learned the truth. The decision had to be reversed due to the amount of non-pecuniary compensation determined without investigating the social and economic conditions of the parties.[52]

In 2005, the fake prescription incident written by the nurse is interesting. Defendant nurse arranged forged prescriptions on behalf of

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49 4th Civil Chamber of the Court of Cassation, 2004/11762, 2004/10881, 30.9.2004.
50 21st Civil Chamber of the Court of Cassation, 2003/10347, 2004/765, 9.2.2004.
51 4th Civil Chamber of the Court of Cassation, 2005/5837, 2005/5679, 26.5.2005.
52 13th Civil Chamber of the Court of Cassation, 2004/15903, 2005/3133, 2.3.2005.

two beneficiaries of health benefits. However, these patients did not use these fake written prescriptions medicines.[53]

In 2007, this jurisprudence is again about injection. The plaintiff, who came to the emergency room with severe kidney pain, was given a painkiller injection. The injection was prescribed by the physician, and the administration was carried out by the nurse. However, the needle that came into the nerve caused paralysis of the plaintiff's right leg. The fact that the plaintiff's body is very weak, that is, lean, is mentioned among the reasons for the defendants to defend themselves. The decision of the first-instance court ruling on compensation was overturned by the Supreme Court. Because the report from the Council of Forensic Medicine is insufficient. The wrongful acting rate of 4/8 was attributed to the nurse. However, it is not discussed why the defendant doctor did not have the rest of the wrongful acting rate of 4/8. It is not possible to establish a judgement based on an incomplete report.[54]

In the 2011 jurisprudence, the faultiness of the nurse was indisputable. Because she caused the paralysis of the right foot of a seven-year-old child by injecting the injection needle to the vein, which was supposed to be applied to the muscle and in which's prospectus has a warning that it may not be applied to the vein. However, since the action was carried out by the nurse working in the state hospital, the aforementioned case was rejected due to the lack of jurisdiction and the administrative jurisdiction was pointed out.[55]

In 2012, it was jurisprudence that the civil jurisdiction was not responsible for the liability of the nurse for intramuscular injection, who works in the state hospital.[56] In 2013, the degree of wrongful act of the nurse who gave the wrong injection was determined as 4/8 in criminal proceedings. This rate was also taken into account in the civil proceedings and half of the damage was compensated to the nurse who performed the faulty injection.[57]

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53 4th Civil Chamber of the Court of Cassation, 2004/6066, 2005/290, 25.1.2005.
54 13th Civil Chamber of the Court of Cassation, 2007/7502, 2007/9890, 9.7.2007.
55 Court of Cassation, General Assembly of Civil Chambers, 2011/4-64, 2011/200, 20.4.2011.
56 4th Civil Chamber of the Court of Cassation, 2012/6576, 2012/10015, 7.6.2012.
57 4th Civil Chamber of the Court of Cassation, 2012/8778, 2013/8959, 16.5.2013.

In three separate jurisprudences in 2014 and 2015, in the case brought against the nurse due to the wrongful acting of the public servant nurse, while the local court should have dismissed the case due to lack of capacity, its rejection in terms of duty and base was found to be wrong.[58] However, dissenting opinion were written in the decisions. In the dissenting opinions, it was criticized that the civil servant's personal wrongful acting was not separated. As a result, if it is understood from the material facts that the lawsuit is based on the defendant's personal wrongful act, hereupon the evidence must be collected and evaluated in line with this claim, and thus a legal conclusion must be reached.[59]

In 2016, the Supreme Court evaluated whether the criminal sentence regarding the nurse who was convicted of reckless injury binds the civil judge. For this, it was based upon the provision of the repealed Turkish Code of Obligations, which regulates the relationship between civil and criminal judges (EBK article 53 of EBK). Based on the true-life material facts mentioned in the sentence, the legal responsibility of the nurse can be applied.[60]

In 2016, the injection administered by the nurse is still on the agenda as a legal issue. This time, the decision of the local court was overturned because the patient's consent form, signed by the plaintiff, was not sent to the file so that the nurse's wrongful acting could not be determined from the aforementioned injection.[61]

In another jurisprudence in 2016, the plaintiff, who could not step on his foot after the injection, did not heal despite receiving physical therapy. In order to determine whether the nurse has a professional wrongful acting in the case, experts with academic careers from the neurologists of the universities should be selected and a committee report should be obtained from them. The Court of Cassation preferred the way of reversal, since there was no expert examination of this quality.[62]

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58 4th Civil Chamber of the Court of Cassation, 2015/9285, 2015/9678, 10.9.2015. 4th Civil Chamber of the Court of Cassation, 2015/4017, 2015/4876, 16.4.2015. 4th Civil Chamber of the Court of Cassation, 2014/7428, 2014/10382, 23.6.2014.

59 4th Civil Chamber of the Court of Cassation, 2014/620, 2014/1593, 4.2.2014. 4th Civil Chamber of the Court of Cassation, 2011/1694, 2012/4172, 15.3.2012.

60 13th Civil Chamber of the Court of Cassation, 2014/43885, 2016/2467, 2.2.2016.

61 13th Civil Chamber of the Court of Cassation, 2015/30631, 2016/7474, 10.3.2016.

62 13th Civil Chamber of the Court of Cassation, 2015/4491, 2016/9749, 6.4.2016.

In 2016, another jurisprudence showing that the injection problem continues should be mentioned. The defendant nurse administered painkillers intramuscularly to the left hip of the plaintiff who had undergone plastic surgery. However, the plaintiff's left leg was injured. The expert's report states that the clinical picture is compatible with injection neuropathy, and nerve damage occurs with the intra-tissue spread of the injected medicine. If the administration is not made in the wrong place, that is, if the injection is suitable for the medical technique, unforeseen and unpreventable symptoms may occur. According to the report, despite all care and attention, there are complications that are not caused by any wrongful act. However, the fact that even the hospital's irresponsibility was expressed in this expert report necessitated the reversal of the decision of the first instance court due to incomplete examination.[63]

In 2017, after the abortion procedure, numbness occurred in the right leg and foot as a result of painkillers administered from the calf. In the report prepared by the Council of Forensic Medicine, the current picture is described as a complication that can occur despite all care and is not based on any wrongful act. Medical incompatibility in the injection place and technique, and therefore, a wrongful act attributable to the healthcare personnel who administered the injection was not detected. However, the Supreme Court overturned the first-instance court decision due to incomplete examination. Because this report coming from the Council of Forensic Medicine is not enough and should not be contented with. The court should form an expert committee of three academicians, who are experts in their fields and have academic careers. Whether the injection subject to the case is suitable for medical science in terms of its place and technique should be clarified by a committee with academic competence. In addition, the committee should also enlighten whether the negative result grows after the necessary medical interventions are withheld from the patient after this injection, whether it is a mistake or not. It is against the procedure and the law to decide that there are no wrongful act attributable to the defendants, without obtaining such a qualified committee report, with an incomplete examination.[64]

63 13th Civil Chamber of the Court of Cassation, 2015/19241, 2016/13610, 26.5.2016.
64 13th Civil Chamber of the Court of Cassation, 2015/18038, 2017/3975, 5.4.2017.

In two verdicts corresponding to 2018 and 2020, the responsibility of the nurse in charge of the cold chain in the immunization activities of the family health centre was evaluated. The cold chain aims to preserve the effectiveness of the vaccine. Because of the nurse who did not fulfil this duty, the vaccines were become dysfunctional and the relevant institution suffered a loss. However, the lawsuit was dismissed on the grounds that the damage was caused by the lack of adequate equipment. On the other hand, the Supreme Court stated that the lack of sufficient equipment did not constitute sufficient grounds for dismissing the case, and this situation could only be considered as a reason for deduction from compensation.[65]

In 2019, the Supreme Court reiterated that the nurse is responsible for all kinds of her wrongful acts, including slight negligence.[66] In another incident that was reflected in the case in the same year, the patient under the influence of narcosis was taken to his room by the nurses after he came out of the operation. However, because the nurses did not raise the safety armrests of the bed, the semi-conscious patient fell to the ground. After the re-operation was performed on the patient whose spleen ruptured, the responsibility of the nurses came to the fore.[67]

In two lawsuits in 2019, the Court of Cassation found the report issued by the Council of Forensic Medicine incomplete. The court, finding its justification insufficient because "the technique of injection and its incompatibility with the area applied" could not be identified with medical evidence, requested "sufficient and satisfactory explanation on whether the health personnel who performed the procedure showed the necessary care". In addition, although loss of work and strength, recovery time and disability rate, if any, are requested, the court criticizes the interim decision not to include these issues in the report. The Court of Cassation requested the judge of the first instance court to "obtain a report open to parties and judicial review from a committee of three experts, who will be composed of expert lecturers in medical faculties of universities". Due to incomplete examination, the Supreme Court went to the way of reversing.[68]

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65 4th Civil Chamber of the Court of Cassation, 2016/11513, 2018/7622, 5.12.2018. 4th Civil Chamber of the Court of Cassation, 2019/1856, 2020/199, 22.1.2020.

66 13th Civil Chamber of the Court of Cassation, 2016/24615, 2019/12860, 19.12.2019.

67 13th Civil Chamber of the Court of Cassation, 2018/4890, 2019/11954, 2.12.2019.

68 13th Civil Chamber of the Court of Cassation, 2016/10242, 2019/5070, 18.4.2019.

Another jurisprudence in 2019 is about State recourse to a nurse whose personal wrongful act has been proven. So much so that the compensation paid by the State Treasury was collected through recourse from the deliberate nurse who killed the patient with a potassium injection. Because the nurse caused the death of the patient by injecting potassium through the neck path without the knowledge of the medical doctor following the patient.[69]

In the case of injury to the sciatic nerve by injection in 2020, the fact that the incident took place in a state hospital paved the way for the rejection of the case in the judicial court. The reason is for that is, enmity may not be directed at the people who work in a public hospital and whose personal wrongful acts cannot be proven in the judicial court.[70]

In 2020, the Court of Cassation stated that the focus should be primarily on the medical benefit of the patient: "All the faults of the nurse and the hospital, even if they are slight, should be accepted as an element of responsibility…In cases that cause hesitation even at the minimum level, a nurse is obliged to carry out research to eliminate this hesitation and to take protective measures in the meantime. While choosing between various treatment methods, it is necessary to consider the characteristics of the patient and the disease, to avoid attitudes and behaviours that will put the patient at risk, and to choose the safest way".[71]

In 2020, the case of forgetting gauze on the patient's body was submitted to the Court of Cassation. Although the defendants, including a nurse, were deemed to be at wrongful act by forgetting the gauze on the patient's body during the operation, the Supreme Court reversed the decision of the court of first instance on the grounds that it did not consider equity while determining the amount of non-pecuniary damage. That is, the local court should decide on reasonable compensation by taking into account the social and economic conditions of the parties, the degree of pain and suffering caused by the wrongful act at the victim, the place of the plaintiff in the society, his personality and his degree of sensitivity".[72]

13th Civil Chamber of the Court of Cassation, 2016/13768, 2019/6769, 29.5.2019.

69 4th Civil Chamber of the Court of Cassation, 2018/3874, 2019/3615, 26.6.2019.

70 4th Civil Chamber of the Court of Cassation, 2020/3974, 2020/8071, 26.6.2020.

71 13th Civil Chamber of the Court of Cassation, 2016/31093, 2020/2079, 12.2.2020.

72 3rd Civil Chamber of the Court of Cassation, 2020/3289, 2020/5633, 8.10.2020.

In 2020, the medical error of the nurse in the home care service carried out by a metropolitan municipality was the subject of the Supreme Court case law. Naturally, a referral was made to the administrative jurisdiction with reference to neglect of duty.[73]

Another case examined in 2020 is the nurse's wrongful injection after tonsillectomy. According to the Court of Cassation, the report of the Council of Forensic Medicine is not enough. An additional report should be requested from the expert committee of independent academics working at State universities. Thus, it should be determined whether the physician has a wrongful act with the nurse.[74] Finally, in relevant jurisprudence, although physical therapy is recommended in case of temporary paralysis of the leg because of the injection, the responsibility of the nurse for all kinds of wrongful acts is mentioned.[75]

C- ANALYSIS OF THE VERDICTS AND THE INJECTION PROBLEM

A nurse, who has duties attached to and independent of the physician, also has sole responsibility. Each attendant must be held accountable within his realm of authority.[76] Bringing a lawsuit against the physician due to the nurse's medical error can be based on the strict liability for auxiliary persons (article 100 of EBK; article 116 of TBK). In addition, it is possible to file a lawsuit to the hospital for the wrongful act of the nurse (article 66 of TBK). The Court of Cassation is well aware that the nurse has duties attached to and independent of the physician. With this awareness, the physician's fault with the nurse or separately is determined by experts.[77] After all, if there is authority, responsibility can be mentioned. It may be appropriate for the physician not to be held responsible for the action of the nurse, which is not included in the reason for his or her employment.

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73 13th Civil Chamber of the Court of Cassation, 2017/8615, 2020/4264, 12.6.2020.
74 13th Civil Chamber of the Court of Cassation, 2016/30032, 2020/25, 13.1.2020.
75 13th Civil Chamber of the Court of Cassation, 2017/6263, 2020/3386, 25.3.2020.
76 Kürşat, p. 302, 303. See also Çelik, p. 876.
77 4th Civil Chamber of the Court of Cassation, 1973/2684, 1973/2978, 13.3.1973. 13th Civil Chamber of the Court of Cassation, 2003/2333, 2003/6348, 22.5.2003. 13th Civil Chamber of the Court of Cassation, 2017/6263, 2020/3386, 25.3.2020.

While assessing and determining whether nurses fulfil their duty of care, the requirements of medical science and legal science are jointly taken into account, that is, the law mentions the level of "behaviour that must be displayed by a prudent attorney who undertakes work and services in a similar field" (article 506/3 of TBK). In some of the reviewed cases of the Court of Cassation, nurses are incapable of showing the necessary importance and sensitivity. For example, falling of the patient to the ground who is under the influence of narcosis due to being left on the bed with the safety armrests not lifted; paralyzing of the child's right foot due to the injection of the needle although it is written ''may not be administered to the vein" on it; harming to the nerves in the arm of the new-born as a result of severe pressure on the pregnant woman's abdomen; forgetting the gauze on the patient's body during the surgery are some of the disturbing examples of the violation of the duty of care within the scope of the Supreme Court verdicts.[78]

As stated by the Court of Cassation, if the nurse's reckless injuring or killing actions are proven as a material fact in the criminal prosecution, they are of course taken into consideration in the civil court as well. Undoubtedly, civil and criminal judges are not subject to each other. Turkish Code of Obligations also regulates this issue (article 53 of EBK; article 74 of TBK). Therefore, as it is determined that it took place during the investigation and prosecution process, tangible (cold/material) facts bind the judge of civil court.[79]

The expression "it also takes into account the title of the parties, the position they occupy and their other social and economic conditions" in the repealed Turkish Code of Obligations has not been included in the current Turkish Code of Obligations (article 49/2 of EBK; article 58 of TBK). The degree of pain and suffering is included in the evidentiary activities carried out by the parties.[80] For example, in severe conse-

78 13th Civil Chamber of the Court of Cassation, 2018/4890, 2019/11954, 2.12.2019. Court of Cassation, General Assembly of Civil Chambers, 2011/4-64, 2011/200, 20.4.2011. 4th Civil Chamber of the Court of Cassation, 2004/11762, 2004/10881, 30.9.2004. 3rd Civil Chamber of the Court of Cassation, 2020/3289, 2020/5633, 8.10.2020. See also Kürşat, p. 294, 295.

79 13th Civil Chamber of the Court of Cassation, 2014/43885, 2016/2467, 2.2.2016.

80 Oğuzman/Seliçi/Oktay-Özdemir, p. 275, fn. 925. Dural/Öğüz, § 803, 808.

quences such as paralysis, higher non-pecuniary compensation may be awarded as the suffering of the victim is high.[81] According to an opinion in the doctrine, the title of the parties and the position they occupy can only be taken into account if it creates an obligation to bear more. The social and economic situation of the parties may constitute the maximum and minimum measure for the obligator of compensation[82] The opposing view opposes this calculation method of immaterial compensation. Considering the social and economic status of the plaintiff in determining the moral compensation in the jurisprudence of the Turkish Court of Cassation is a total violation of the principles of social equality and justice.[83] In another opinion in the same direction, there is no parallelism between the explanations of the Supreme Court about the function of immaterial compensation and the criteria that it recommends to be taken into account in determining the amount of non-pecuniary damage.[84] It is possible to agree with the last two views. The assumption that the severity of pain varies according to the social status and economic situation of the parties is also reflected in the Supreme Court verdicts regarding the legal responsibility of the nurse.[85] When it comes to immaterial compensation in the case of the mixing-up of new-borns with the fault of the nurse, the Court of Cassation demands that the social and economic conditions of the parties to be taken into account. In the concrete case, the plaintiff mother breastfed someone else's baby until she reunited with her real baby. Moreover, until she learned the truth, she had to put up with that her baby was fed by someone else, maybe even starved. The amount of such suffering, if the claimant mother is rich, educated, middle class; if she is poor, uneducated; if she is working class, does it increase or decrease? Or, can the amount of immaterial compensation deserved by the aforementioned mother vary

81 Kürşat, p. 317, fn. 52.

82 Dural/Öğüz, § 806, 807.

83 Gökhan Antalya, "Manevî Zararın Belirlenmesi ve Manevî Tazminatın Hesaplanması-Türk Hukuku'na Manevî Zararın İki Aşamalı Olarak Belirlenmesine İlişkin Bir Model Önerisi", *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi*, 2016, 22/3, Prof. Dr. Cevdet Yavuz'a Armağan, p. 241. Gökhan Antalya/Murat Topuz, *Medenî Hukuk* (Giriş-Temel Kavramlar-Başlangıç Hükümleri), Vol. 1, Seçkin, İstanbul, 2015, p. 320.

84 Hülya Altan, "Beden Bütünlüğünün İhlâlinde Manevî Tazminat Miktarının Belirlenmesi", *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, 2016, 65/4, p. 2667.

85 13th Civil Chamber of the Court of Cassation, 2004/15903, 2005/3133, 2.3.2005. 3rd Civil Chamber of the Court of Cassation, 2020/3289, 2020/5633, 8.10.2020.

according to the position occupied by the defendant? Again, according to the plaintiff's or his opponent's social and economic situation, changing of the amount of immaterial compensation deserved by the plaintiff, in whose body a gauze had been forgotten, who lived with the gauze bandage until this situation was noticed and faced the misfortune of being re-operated, is not an example of jurisprudence balancing the interests of the parties. On the contrary, it is the unlawful continuation of the exercise of judicial discretion that the law no longer grants to the judge. The amount of compensation to be paid by the nurse to the patient whose gauze had been forgotten in his/her body cannot change according to the status occupied by the patient and/or the nurse, his/her place in the society and/or the belongings the patient/the nurse owns. In fact, before the Supreme Court, it is advocated that the process of clarifying the amount of immaterial compensation should not even be revived, but should be reconstructed from the beginning all over again. The amount of immaterial compensation should be isolated from the criteria such as the recognition of the plaintiff and/or the defendant in the society, living on rent, owning a car, working as a deputy/engineer/manager, living abroad, having dependents. These criteria can be taken into account in determining the amount of child support. However, this important issue should be postponed to a comparative study of the amount of non-pecuniary damage in another study. These criteria can be taken into account in determining the amount of alimony (payment). However, this important issue should be postponed to a comparative study exclusively about the amount of immaterial compensation in another study.

Half of the thirty-six case-laws collected are about intramuscular or intravenous injection. The specific medical problem that caused half of the disputes should be deemed as high rate and be considered important. In many jurisprudences of 2003, 2004, 2005, 2007, 2011, 2012, 2013, 2016, 2017, 2019 and 2020; disability, loss of sensation or drop foot as a result of intramuscular injection have been examined. Besides, studies reflect the medical error of the nurse at the rate of twenty percent in each shift. In fact, preventing malpractice requires addressing mistakes in the first place. However, it has been written by some authors that nurses tend to hide their mistakes.[86] If the bodily harm as a result

[86] Kahriman/Öztürk/Babacan, p. 5, 55.

of the injection is purely due to the complication, the nurse's fault is not mentioned. The nurse is irresponsible in the injection neuropathy which is characterized as complication. Conversely, sciatic nerve damage leads to malpractice if it is due to error in needle technique or incorrect choice of medicine, dose, or area.[87] This is why the Court of Cassation attaches great importance to expert examination in cases of injection neuropathy. However, the competent person may characterize the concrete event as malpractice or complication. The court should obtain a scientifically reasoned committee report that is suitable for adjudicating. Reports from the Council of Forensic Medicine are mostly seen as insufficient. In addition, a committee report prepared based on academic expertise such as EMG and/or MR is expected from independent neurologists occupying positions at universities.[88]

"It is not a coincidence that the number of lawsuits filed alleging medical malpractice has increased. With the technological and scientific developments, the education level and social interaction of the society has increased… Along with the social awareness, the expectations of the patients who receive service from the health industry have also increased…".[89] Like that, the opinion that explains the physician in the consciousness of the victim in the clamp of law and attributes the frequency of malpractice cases to the physician's lack of minimum physical conditions to provide ideal health care should be mentioned.[90]

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87 Kaya Kenan/Necmi Çekin, "Enjeksiyon Sonrası Gelişen Nöropati: Komplikasyon/Malpraktis Ayrımında İnce Bir Çizgi", *Kahramanmaraş Sütçü İmam Üniversitesi Tıp Fakültesi Dergis*i, 2018, 13/2, p. 64, 65. See also Şaşı, p. 70, 86.

88 21st Civil Chamber of the Court of Cassation, 2004/7439, 2004/8136, 11.10.2004. 4th Civil Chamber of the Court of Cassation, 2005/5837, 2005/5679, 26.5.2005. 13th Civil Chamber of the Court of Cassation, 2007/7502, 2007/9890, 9.7.2007. Court of Cassation, General Assembly of Civil Chambers, 2011/4-64, 2011/200, 20.4.2011. 4th Civil Chamber of the Court of Cassation, 2012/6576, 2012/10015, 7.6.2012. 4th Civil Chamber of the Court of Cassation, 2012/8778, 2013/8959, 16.5.2013. 13th Civil Chamber of the Court of Cassation, 2015/30631, 2016/7474, 10.3.2016. 13th Civil Chamber of the Court of Cassation, 2015/4491, 2016/9749, 6.4.2016. 13th Civil Chamber of the Court of Cassation, 2015/19241, 2016/13610, 26.5.2016. 13th Civil Chamber of the Court of Cassation, 2015/18038, 2017/3975, 5.4.2017. 13th Civil Chamber of the Court of Cassation, 2016/10242, 2019/5070, 18.4.2019. 13th Civil Chamber of the Court of Cassation, 2016/13768, 2019/6769, 29.5.2019. 13th Civil Chamber of the Court of Cassation, 2016/30032, 2020/25, 13.1.2020. 4th Civil Chamber of the Court of Cassation, 2020/3974, 2020/8071, 26.6.2020. 13th Civil Chamber of the Court of Cassation, 2017/6263, 2020/3386, 25.3.2020.

89 Yördem, p. 539. Özkaya/Elbüken, p. 110. See also Cantürk, p. 304.

90 Akbaba/Davutoğlu, p. 609.

The reasons for the increase in the malpractice cases which are estimated by the cited authors are not substantial. If we look from the view of nurses, it is absolutely impossible to agree with these estimates. The reason for the increase in malpractice-related lawsuits in Turkey is not the fact that patients' increasing awareness to claim their rights through the media and other technological opportunities. Participation of some foundation (private) universities in the health education system should be taken into account. Medicine, dentistry and nursing education should not be organized as inadequate, inattentive and most importantly with a focus on making money; on the contrary, it should closely follow the developments in the scientific knowledge and technological advances. When it comes to nursing education, one-to-one and face-to-face training should be carried out in the skilled artistry aspect of medical intervention, for example in practices such as vascular access, branule or catheter insertion, injection into muscle or vein.

It is obvious that nursing education should be given importance. The sociological research on nurses shows that they do not know the legislation and legal responsibilities they are subject to, and that their level of knowledge on this subject does not rise depending on their professional experience; however, as their education level increases, it shows that they have answered the survey questions correctly.[91] In addition, the nurse's working hours and workload should be decided in accordance with justice and conscience. It can be suggested to standardize the nursing service by preparing the instructions, to strengthen the communication between the physician and the nurse, and to focus on the science of nursing.[92]

Post-injection neuropathy is one of the common health problems. It is the cause of high "morbidity/disease (morbidity)" and "death (mortality)" in developing countries. Although intramuscular injection may seem like a very simple procedure, the practitioner should be equipped with adequate training to reduce the possibility of malpractice and complications.[93] Equipping the injecting personnel with adequate training may play an important role in preventing neuropathy as well as sciatic nerve damage.[94]

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91 Karabakır, p. 114-125.
92 Şahin et al., p. 103.
93 Kaya/Çekin, p. 63, 65.
94 Şaşı, p. 86.

In the Supreme Court verdicts reviewed between 1973 and 2020, post-injection neuropathy resulting from nurse's malpractice is surprising in terms of its frequency. The problem of injection in the legal responsibility of nurses has reached disturbing dimensions as a societal phenomenon. Injection should be approached multidisciplinary so that radical solutions can be produced. In particular, while educating nurse candidates about injection, medical science and legal wisdom should work together. In nursing education, it is recommended that nurse candidates be subjected to stricter exams on injection and that they are both medically and legally enlightened about the negative consequences of this practice.

Finally, the claim that the nurse administered the wrong injection, as a rule, is not a personal fault; but that is neglect of duty (service failure).[95] As a rule, administrative jurisdiction is in charge in cases of malpractice caused by a civil servant nurse in state hospitals. The Court of Cassation has repeatedly stated this rule.[96] The exception to the rule has been the subject of the provision clause and the dissenting votes. Indeed, attributing personal fault to a civil servant nurse in substantive law may reverse the conflict of competence from administrative into civil procedural law.[97]

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95 Erkin Göçmen, "Yargıtay, Hemşirenin Hatalı Enjeksiyon Davası İçin Ne Karar Verdi?", https://www.medikalakademi.com.tr/yargitay-hemsire-hatali-enjeksiyon-dava-karar-ceza-erkin-gocmen/ (Date of Access 21.6.2021). For the exact same short article, see also Taner Onay, "Yargıtay, Hemşirenin Hatalı Enjeksiyon Davası İçin Ne Karar Verdi?", http://dijitalhemsire.net/yargitay-hemsirenin-hatali-enjeksiyon-davasi-icin-ne-karar-verdi/ (Date of Access 21.6.2021). "Different approaches are seen in the case law of the Court of Cassation in cases of droopy foot injury after intramuscular injection applications". In this short article, the distinction between criminal and private law is not clear. The identity of the said Supreme Court decision is not certain. Some statements violate the fundamental principles of the liability law. In addition, it gives rise to unexpected conclusions as if the Supreme Court no longer holds the nurse responsible for the intramuscular injection or its decisions are unstable. In fact, for the distinction between personal and service (duty) faults in the legal responsibility of the physician, see Çelik, p. 879-883, 901 ed seq. Hakeri, Vol. 2, p. 979-992.

96 21st Civil Chamber of the Court of Cassation, 2003/10347, 2004/765, 9.2.2004. Court of Cassation, General Assembly of Civil Chambers, 2011/4-64, 2011/200, 20.4.2011. 4th Civil Chamber of the Court of Cassation, 2015/9285, 2015/9678, 10.9.2015. 4th Civil Chamber of the Court of Cassation, 2015/4017, 2015/4876, 16.4.2015. 4th Civil Chamber of the Court of Cassation, 2014/7428, 2014/10382, 23.6.2014. 13th Civil Chamber of the Court of Cassation, 2017/8615, 2020/4264, 12.6.2020.

97 4th Civil Chamber of the Court of Cassation, 2004/11762, 2004/10881, 30.9.2004. 4th Civil Chamber of the Court of Cassation, 2014/620, 2014/1593, 4.2.2014. 4th Civil Chamber of the Court of Cassation, 2011/1694, 2012/4172, 15.3.2012.

CONCLUSION

The nurse contributes to care and therapy in all treatment processes by focusing on protecting and improving individual, family and community health. Unfortunately, even nurses who perform such a lofty task can make professional mistakes that malpractice may lead to their legal, administrative and/or criminal responsibilities. Of course, nurses are also irresponsible for complications, just like any health personnel qualified for medical intervention.

The nurse's legal responsibility for medical error can find its source in torts and/or breach of contract. In addition, it is among the rare possibilities that the nurse acts against the obligation of good faith in pre-contractual negotiations (*culpa in contrahendo*) and acts without authority (*negotiorum gestio*). Charges can be preferred against the nurse, who has duties both attached to and independent of the physician. As a rule, physicians and nurses are separate within their realm of authority and jointly responsible when these areas intersect. In fact, it can be argued that the physician should not be held responsible for the action of the nurse, which is not included in the reason for their employments. On the other hand, when certain conditions are occur together, a lawsuit may be brought against the physician or hospital due to the medical error of the nurse, on the grounds of the strict liability of the employer (article 66 of TBK) and the strict liability for auxiliary persons (article 116 of TBK).

The fact that the social status and economic situation of the parties are still taken into account in determining the amount of non-pecuniary damages in the Court of Cassation decisions violates the principle of social equality. The Supreme Court's resurrection of the repealed legislation against the law and recommending the courts of first instance to evaluate the amount of moral compensation according to criteria contrary to the principle of social equality, unfortunately affected the jurisprudence about the legal responsibility of the nurse. The fact that this method is contrary to the statements and spirit of the current Turkish Code of Obligations is exemplified by concrete cases regarding the request for moral compensation from the defendant nurse. It is considered that there is no correlation between the place or profession of the parties in the society, the position they occupy, their economic qualifications and the amount of non-pecuniary compensation.

Under the responsibility of civil servant nurses working in public hospitals, the qualification of neglect of duty (service failure) is essential and the place of competent court is administrative jurisdiction as a rule. The only exception to this rule is the personal fault attributed to the civil servant nurse.

The legal liability of the nurse has frequently been the subject of Supreme Court jurisprudence. In Turkey, when the legal responsibility of the nurse for medical error is mentioned, the main problem can be called injection. Half of the ruling-cases of the Court of Cassation between 1973 and 2020 focus on the injection problem. This issue preoccupies the Court of Cassation.

Of course, the number of nurses who are unknowing and incapable of injection is very low compared to the total. However, the injection problem is suspicious in terms of its frequency and has the status of a social phenomenon. This situation reveals the necessity of better training of nurses in their specific medical knowledge, professional experience and artisanal intervention. In jurisprudence, disability, loss of sensation, drop foot, or more precisely, accumulation in sciatic nerve damage after injection is observed as a result of bad intramuscular injection. The inadequacy and lack of reports from the Council of Forensic Medicine is the reason why many local court decisions are overturned. The Court of Cassation requests the courts not to be contented with the report from the Council of Forensic Medicine and requests a committee report from independent neurologists working at respectable state universities. Injection should be approached multidisciplinary so that radical solutions to this problem can be produced. A multidisciplinary approach to injection is highly recommended. Injection problems must be minimized, particularly with the cooperation of medical and legal science.

Extra sensitivity should be given to medicine (drug) administration in nursing education. Nurse candidates should be subjected to stricter examinations regarding injection and should be informed both medically and legally about the negative consequences of this medical intervention. In nursing practices that require artisanship one-to-one and face-to-face lessons should be preferred, not group training nor online lessons.

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PHYSICIAN'S COMPULSORY LIABILITY INSURANCE ACCORDING TO JUDICIAL AND ARBITRAL DECISIONS*

YARGITAY VE HAKEM KARARLARINA GÖRE HEKİMİN ZORUNLU MALİ SORUMLULUK SİGORTASI

Hacı KARA**

Abstract: According to the additional article 12 of the Law No. 1219, on the Law of "The Law on the Style of Application of the Medicine and Medical Sciences (LAMMS)", physicians, dentists and specialists as per specialist legislation, who are working in public health institutions and organisations are obliged to have an insurance against the damages that can be claimed from them by the third parties due to medical malpractice and against the recourse to be made to them by their own institutions. Half of this insurance premium is paid by themselves and the other half is paid from the revolving funds in institutions with revolving funds, and in institutions which do not have revolving funds, it is paid from the institution's budget. Those persons who work in private health institutions and organizations or who perform their profession freely are obliged to take out professional liability insurance in order to cover the damages that may be caused to persons due to medical malpractice and therefore the recourse to be made to theart. Compulsory professional liability insurance is made by those who perform their profession freely, and those working in private health institutions and organizations, by the relevant private health institutions and organizations. Half of the insurance premiums of the employees working in private health institutions and organizations are paid by themselves and half by the employers. In this study, the application of compulsory financial liability insurance of the physician's will be examined in the light of the decisions of the Court of Cassation and the Insurance Arbitration Appeal Arbitrator Board.

Keywords: Liability Insurance, Physician's Compulsory Financial Liability Insurance, the Features of Physician's Compulsory Financial Liability Insurance, the Decisions of Court of Cassation and the Insurance Arbitration Appeal Arbitrator Board Regarding Physician's Compulsory Financial Liability Insurance

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Özet: 1219 sayılı "Tababet ve Şuabatı San'atlarının Tarzı İcrasına Dair Kanun"un, Ek 12'inci maddesine göre Kamu sağlık kurum ve kuruluşlarında çalışan tabipler, diş tabipleri ve tıpta uzmanlık mevzuatına göre uzman olanlar, tıbbi kötü uygulama nedeniyle kendilerinden talep edilebilecek zararlar ile kurumlarınca kendilerine yapılacak rüculara karşı sigorta yaptırmak zorundadırlar. Bu sigorta priminin yarısı kendileri tarafından, diğer yarısı döner sermayesi bulunan kurumlarda döner sermayeden, döner sermayesi bulunmayan kurumlarda kurum bütçelerinden ödenir. Özel sağlık kurum ve kuruluşlarında çalışan veya mesleklerini serbest olarak icra eden bahse konu kişiler de tıbbi kötü uygulama sebebi ile kişilere verebilecekleri zararlar ile bu sebeple kendilerine yapılacak rücuları karşılamak üzere mesleki malî sorumluluk sigortası yaptırmak zorundadır. Zorunlu mesleki malî sorumluluk sigortası, mesleklerini serbest olarak icra edenlerin kendileri, özel sağlık kurum ve kuruluşlarında çalışanlar için ilgili özel sağlık kurum ve kuruluşları tarafından yaptırılır. Özel sağlık kurum ve kuruluşlarında çalışanların sigorta primlerinin yarısı kendileri tarafından, yarısı istihdam edenlerce ödenir. Bu çalışmada hekimin zorunlu mali sorumluluk sigortası uygulaması, Yargıtay ve Sigorta Tahkimi İtiraz Hakem Kurulu Kararları ışığında incelenecektir.

Anahtar Kelimeler: Sorumluluk Sigortası, Hekimin Zorunlu Mali Sorumluluk Sigortası, Hekimin Zorunlu Mali Sorumluluk Sigortası Özellikleri, Hekimin Zorunlu Mali Sorumluluk Sigortası Hakkındaki Yargıtay ve Sigorta Tahkimi İtiraz Hakem Kurulu Kararları

INTRODUCTION

The concept of malpractice is derived from the Latin words "male" and "prakxis", meaning "bad, malpractice". In the 44th General Assembly of the World Medical Association in 1992, medical malpractice was defined as "harm caused by the physician's failure to apply standard treatment during the treatment of the patient or the lack of skill and negligence in caring for the patient, which is the direct cause of the patient's harm".[1] According to the US doctrine, medical malpractice; "An act of negligence or executive action committed by a healthcare professional that causes harm or complications to the patient". Medical malpractice is the failure of the work to be done as planned and/or performed. However, the concept of complication refers to the undesired result that occurs despite the fulfilment of the duty of care and attention.[2]

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1 World Medical Association, Statement on Medical Malpractice; Marbelle, Spa- in 1992, Art. 2/a, http://hrlibrary.umn.edu/instree/malpractice.html, (Date of Access: 20.08.2019).

2 Özlem Özer et al., "Medical malpractices", Dicle Medical Journal, Y. 2015, p. 42/3, p. 395, https://dergipark.org.tr/tr/download/article-file/54610, (Date of Access: 09.09.2019).

In the 13th article of the Turkish Medical Association's Code of Professional Ethics, medical practice is defined as any kind of physician intervention that does not seem appropriate for the event, due to the lack of due diligence in accordance with the standard of medical science, that is, the professional rules and experience generally recognized and accepted in medical science. Therefore, failure to follow the standard practice during the diagnosis and treatment of the patient, lack of knowledge and skills and not applying appropriate treatment to the patient are considered as medical malpractice.

Medical practice errors, non-compliance with the standard of care for the treatment of the patient, lack of skill, negligence in providing care to the patient, the intervention foreseen and/or applied by the health care personnel during the delivery of the health service, the patient's illness going out of the normal course as a result of the faulty medical technique used, the decrease in the quality of life means that there is an increase in the number of patients (morbidity)[3] diagnosed with a certain disease and that diseases can even result in death (mortality).[4],[5]

Medical malpractice is basically divided into four parts, depending on medical treatment, negligence and practice: diagnosis, treatment, preventive treatment and other errors. Diagnostic errors arise due to the application of wrong and/or invalid tests and techniques, misapplication or interpretation of appropriate tests, incomplete or delayed diagnosis, resulting in misdiagnosis, inadequate and wrong treatment resulting in treatment errors. Treatment errors may be in the form of incorrect or inadequate treatment, or it may be related to the choice of surgical intervention technique and delaying the treatment due to the error in the dose of the drug applied. Preventive treatment errors, on

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3 The number (or proportion) of patients diagnosed and diagnosed with a particular disease within a specific group and within a specified tim–e period. http://www.floradergisi.org/ getFileContent.aspx?op=html&ref_id=53&file_name=1996-1-3-208-209.htm&_ pk=6621c429-dcf6-43a9-88af-54455e811987, (Date of Access: 09.09.2019).

4 The number (rate) of deaths from a particular disease in the general population. (In particular, this rate is not only the mortality rate within the cases). http://www.floradergisi.org/ getFileContent.aspx?op=html&ref_id=53&file_name=1996-1-3-208-209.htm&_ pk=6621c429-dcf6-43a9-88af-54455e811987, (Date of Access: 09.09.2019).

5 Özer et al, p. 394.

the other hand, come to the fore due to inadequate monitoring, wrong and/or inadequate treatment and disease follow-up, and delayed or incomplete drug treatment. In addition to these, errors related to the equipment used or related to the system also cause various medical malpractices. Medical malpractices can be analysed by dividing them into medication errors and surgical errors. Medication errors are the most common errors in inpatients and outpatients. Errors associated with the administration of drugs and most of them are preventable.[6]

Medical malpractice includes all of the conditions in a wide range from the delay of the recovery to the death of the patient, going beyond the normal course of the disease, as a result of the suggestions and/or practices of the physician providing the services, the nurse and the health personnel such as the physiotherapist, psychologist or dietitian who are authorized to intervene in the patient's decision according to the relevant law.[7] The basic criterion in terms of legal responsibility is the standard of an experienced specialist. In other words, the physician should be in a position to foresee any harm to the patient's health, objectively according to the normal development of events and subjectively according to his personal experience, personal skills, personal professional knowledge, quality, and degree of education. In other words, the physician has to comply with the duty of care while performing his profession. For example; Wound infection is a complication of an operation, but if antibiotics are necessary to prevent infection and the physician does not prescribe it, it turns into malpractice based on lack of care. On the other hand, if the patient develops a pulmonary embolism after a simple operation despite all precautions being taken, and therefore the patient is lost, this event is not considered malpractice.[8]

In this study, the physician's compulsory liability insurance will be examined in the light of the Supreme Court and Insurance Arbitration Appeal Board Decisions.

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6 Özer et al, p. 395.

7 Gürol Cantürk, "Tıbbi Malpraktis ve Tıbbi Bilirkişilik", Uluslararası Sağlık Hukuku Sempozyumu, 16-17 Ekim 2014, p. 303, http://tbbyayinlari.barobirlik.org.tr/TBB Books/536.pdf (Erişim Tarihi: 20.09.2017).

8 Yılmaz Yördem, "Overview of Judicial Decisions on Liability for Malpractice in Physician Professional Liability Insurance", Journal of Institute of Economic Deandlopment and Social Researches, 2018 Vol. 4, Issue 12, pp. 540, http://iksadjournal.org/Makaleler/1857965187_1.%204_12_ID78.%20 Y%c3%b6rdem_539-546.pdf, (Date of Access: 16.08.2019).

I. PHYSICIAN'S MANDATORY FINANCIAL LIABILITY INSURANCE

A. LEGAL REGULATION

In order to guarantee the responsibilities of all physicians, dentists and specialists in accordance with the legislation on specialization in medicine, against the damages resulting from malpractice, in accordance with the Annex 12 of the Law No. 1219 on the Practice of Medicine and Medical Arts (LAMMS)[9], " Compulsory Liability Insurance for Medical Malpractice" has been regulated.[10] Accordingly, physicians, dentists and specialists working in public and private health institutions and organizations or practicing their professions independently are obliged to take out professional liability insurance to cover the damages they may cause to individuals due to medical malpractice and the recourses to be made to them for this reason. The liability insurance of people working in the public sector should also cover the recourses to be made to them by their institutions. Employees in private health institutions and organizations must be insured by their institutions. Half of the insurance premiums of the aforementioned persons working in public health institutions and organizations are paid by themselves, the other half is paid from the revolving fund in institutions with revolving funds, and from the budgets of institutions that do not have revolving funds. Half of the premiums of employees working in private health institutions and organizations are paid by their institutions and by the freelancers themselves.[11]

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9 Additional article 12 has been added to the Law No. 1219 with the 8th article of the Law No. 5947 on the "Full-time Work of University and Health Personnel and Amendments to Some Laws" published on 30.01.2010 D. and 27478 No. OG.

10 "Medical compulsory liability insurance", "physician liability insurance", "physician professional liability insurance", "compulsory physician professional liability insurance", "Mandatory Physician Liability Insurance" and similar names are used to express insurance in the doctrine and in the practice of the Supreme Court.

11 "It is misleading to present compulsory insurance against medical malpractice as a guarantee of patients' rightp. From the position of the co-provider, the doctor's fault was brought forward, as if he were the sole administrator of the right to health. Howeandr, in the world, it is important to moand from the domineering doctor type who does not want to take risks, to the participatory doctor type who cooperates with the patient. Making an insurance that reduces the pressure on the doctor and insures the patient directly is on the agenda of the world." Tennur Koyuncuoğlu, "Doctor Insurance or Patient Insurance?", TBB Journal, Y. 2011,

With the "Communiqué on the Procedures and Principles Regarding the Institution's Contribution in Compulsory Liability Insurance Regarding Medical Malpractice" and "Mandatory Liability Insurance Tariff and Instruction regarding Medical Malpractice" the Annex to the Communiqué on the implementation of the Law No. 1219. Compulsory Liability Insurance General Conditions for Medical Malpractice"[12] was published and entered into force as of 30.07.2010.[13] Thus, the compulsory liability insurance of the physician, which is referred to as "Compulsory Liability Insurance for Medical Malpractice" in the provisions of the relevant law, has been implemented in our country since 2010.

B. PHYSICIAN'S MANDATORY FINANCIAL LIABILITY INSURANCE

1- In General

The compulsory liability insurance of the physician is a "loss insurance" and "passive liability insurance" in terms of securing the assets due to possible damages that may arise in the future.[14] The risk in liability insurance does not occur on the life of the policyholder or anyone else notified by the policyholder; on the contrary, it takes place on their property. Therefore, it is not a life insurance. Physician compulsory liability insurance cannot be made in the form of group insurance.[15]

I. 92, p. 433, http://tbbdergisi.barobirlik.org.tr/m2011-92-682, (Date of Access: 16.08.2019).

12 In the Communiqué published in 21.07.2010 T. and 27648 I. OG, 19.7.2011 T. and 27999 I. OG, 26.07.2014 T. and 29072 I. OG, 23.5.2015 T. and 29364 I. OG, 28.10. Amendments have been made with the Communiqués published in 2015 T. and 29516 I. OG and most recently 16.4.2016 T. and 29686 I. OG.

13 Communiqué on Procedures and Principles Regarding Institutional Contribution in Compulsory Liability Insurance Regarding Medical Malpractice, which regulates the procedures and principles of corporate contribution to insurance premium, was published in 21.7.2010 T. and 27648 I. OG and entered into force on 30.7.2010. With the Communiqué published on 26.07.2014 T. and 29072 I. OG, the ANNEX 1 risk groups were amended with the tariff in the previous Communiqué.

14 Rıza Ayhan/Hayrettin Çağlar/Mehmet Özdamar, Insurance Law Textbook, 3. B., Ankara 2020, p. 301; "The new general conditions brought regulation in accordance with the technique known as "claims made" in practice". Samim Ünan, "Compulsory Physician Liability Insurance General Conditions Commentary", Turkish Association of Insurance Law, Istanbul 2012, p. 10.

15 TCC art. 1496/1: "Insurance can be made with a single contract in favor of per-

The purpose of liability insurance is to provide compensation claims that the insured may face due to the damage that may be caused to third parties. The insurer takes over the burden arising on the assets of the insured due to liability. Therefore, they do not mention the insurer's obligation to pay a certain amount agreed in the contract.[16]

The purpose of physician liability insurance, on the other hand, is to provide assurance against compensation claims in lawsuits filed against physicians against the damages they may cause to their patients as a result of error, negligence and misapplication while fulfilling their professional duties and obligations, in other words, it saves them from the financial burden that physicians may be exposed to due to legal liability. Thanks to this insurance, those who have suffered damage have the opportunity to apply to an institution (insurer) with a high financial power to meet the compensation receivables against the doctor who harmed theart.[17] The physician, whose responsibility is claimed, transfers the indemnity liability to the insurer, which, in some cases, reaches very high and unmanageable amounts. By making a payment to the third party, the insurer removes both the loss suffered by this person and the burden that the insured has incurred due to liability.[18] The state that employs a physician will transfer the responsibility arising from the action of the physician it employs to the insurer.

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sons belonging to a group of at least ten persons, who have the opportunity to determine who they are according to certain criteria, by the policyholder. During the continuation of the contract, everyone included in the group benefits from the insurance until the end of the group insurance contract. If the group falls below ten people after the conclusion of the contract, it does not affect the validity of the contract".

16 An insurance amount does not necessarily have to be agreed in the contract. The insurer can also provide "unlimited" coverage. It serves the purpose of determining the maximum amount that the insurer will be responsible for, calculating the insurance premium in a healthy way, and marketing the liability insurance product "for an affordable premium". Samim Ünan, Annotation on the Turkish Commercial Code, Book 6, Insurance Law, V. II, 1st B., Onikilevha Publishing, Istanbul 2016, p. 263.

17 In compulsory liability insurances, the protection of the interests of the injured rather than the insured comes to the fore. The purpose of compulsory insurance is to protect the public interest, unlike voluntary insurancep. Rauf Karasu, "Evaluation of the Provisions of the Turkish Commercial Code No. 6102 Regarding Liability Insurance", *İnönü University Faculty of Law* Journal Special Edition, Vol. 2, Y. 2015, p. 695.

18 Ünan, TCC Annotation, p. 263.

Likewise, the private health institution that employs a physician will be freed from the financial burden of its responsibility arising from the physician's actions. Because compulsory insurance covers not only the requests of those receiving treatment, but also the recourse requests of the public or private institution that employs the physician.[19]

2- Mandatory Physician Professional Liability Insurance Agreement

Physician's professional liability insurance is a contract that imposes obligations on both parties (sinallagmatic). The policyholder's obligation is to pay premiums, and the insurer's responsibility is to compensate the insured's loss when the risk occurs. In professional liability insurance, the insurer undertakes to pay the justified claims of third parties claiming compensation and to eliminate the claims of unfair compensation.[20] The insurance contract is signed on behalf of the insurer by the authorized person of the company or the agency[21] that made the contract.[22]

3- Persons Who Will Have Compulsory Physician Professional Liability Insurance

According to the law, all physicians who practice their profession in public or private health institutions or in their practice, dentists and those who are specialists (insured) according to the legislation on specialization in medicine[23] are obliged to take out compulsory professional liability insurance. Other health workers or those who do not engage in professional activities despite having the titles listed in

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19 Ünan, Mandatory Physician Insurance, p. 5.

20 Kemal Şenocak, Professional Liability Insurance, Turhan Bookstore, Ankara 2000, p. 141.

21 It is the agency that has the authority to make a contract on behalf of the insurer.

22 Rayegan Kender, Private Insurance Law in Turkey, Arıkan Publishing, 14. B., 2014, p. 142.

23 According to article 3/(r) of the "Regulation on Specialization Training in Medicine and Dentistry" published on 26.04.2014 D. and 28983 I. OG, Specialist: "The right to practice his art in that branch and the authorization to use the title of specialization by completing specialized training in one of the branches in the schedules. According to article 3/(s), Specialization education means "the education and training required to become a specialist in medicine or dentistry".

the Law are not obliged to take out insurance.[24] In the event that the professional activity defined in the policy is terminated, the insurance contract is terminated and the premium for the days not having worked is returned to the policyholder, without prejudice to the special provisions (General Conditions C. 6).

The person who is obliged to take out the insurance, that is, the insured and the physician whose liability is covered by the insurance, are not always the same person. Compulsory professional liability insurance is taken out by the relevant private health institutions and organizations for those who practice their profession independently and for those who work in private health institutions and organizations (LAMMS Annex Article 12/3).

If there is a voluntary insurance for these persons in accordance with the General Conditions of Professional Liability Insurance and this optional insurance is not made for the top of the coverage given with the compulsory insurance, multiple insurance provisions of the Turkish Commercial Code (TCC) are applied between this insurance and the compulsory insurance.

4- Features of Insurance

a) Scope of Risk

Physician's "Compulsory Financial Liability insurance" contract covers, indemnity payment of the physicians, dentists, and specialists[25] who work in public or private health institutions and organizations, during the contract period depending on the damages caused by their professional activities, while performing their professional activities within the scope of the policy. It provides coverage within the limits set in the policy against the claims. The insurant has to notify the insurer within ten days of the events that will necessitate his liability, and immediately to the insurer about the claims against him (TCC art. 1475).

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[24] Mustafa Çeker, Insurance Law, 10. B., Karahan Publishing House, Adana 2014, p. 304.

[25] Changed phrase: OG: D. 26.7.2014 and N. 29072.

aa) Risks Covered by Insurance

With this insurance contract, physicians, dentists and those who are experts in accordance with the legislation on specialization in medicine:

1) Damages arising as a result of the event[26] occurring during the contract period and claimed in accordance with the liability provisions, within the contract period or after the contract,[27]

2) Claims that may arise against the insured only during the contract period due to an event that occurred before the contract was made or while the contract was in force,

3) Litigation expenses related to this damage or claim,

Coverage is provided up to the specified insurance limits.[28] In other words, compulsory physician professional liability insurance covers all professional activities of the insured within the borders of the Republic of Turkey. In addition, special conditions may be agreed in the contract, not to the detriment of the policyholder and the insured.[29]

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[26] "The incident must be the cause of the damage. Liability must also occur due to this incident." Ünan, TCC Annotation, p. 286.

[27] "Damage is the deterioration of the property of the injured person, which is not the result of his will." Ünan, TCC Annotation, p. 288.

[28] It is 200 thousand TL for the first risk group, 400 thousand TL for the second risk group, 600 thousand TL for the third risk group, and 800 thousand TL for the fourth risk group. In any case, the amount of compensation to be paid under the contract cannot exceed 1.800.000 TL.

[29] In this way, the following risks may be covered by the special conditions (clauses) to be included in the contract: 1) Claims for damages arising from genetic engineering practices, 2) Claims for damages arising from all kinds of experiments or researches, 3) Directly or indirectly occurring as a result of all kinds of blood bank activities. Claims for compensation, 4) Compensation claims arising from all medical interventions without diagnostic or therapeutic purpose and all kinds of aesthetic surgeries performed by plastic surgeons for beautification purposes, 5) Compensation arising from all kinds of health services that assist reproduction (infertility treatment) or prevent reproduction (sterile treatment). claims, 6) Claims for damages that may arise from the willful actions of those whose actions the insured is responsible for, 7) All kinds of damage that may be due to AIDS or its pathogens or hepatitis A, B or C, or caused by them, or caused by their contribution, and mental health problems arising as a result of theart. comfort 8) Human and animal organs, blood, cells, all kinds of excretions, derivatives, genes, biosynthesis and related products are tested, modified, obtained, acquired, prepared, processed, handled, distributed, stored, substituted. 9) Claims against the insured due to being a manager or operator in a health institution (Professional Liability Insurance General Conditions Vol. 10/III (23.05.2013 D. and 28658 I. OG) and Genel Şartlar art. Vol. 10).

bb) Excluded Risks

The following cases are not covered by the insurance coverage:

1) Indemnity claims arising from the activities of the insured outside of his professional activity, which are covered by the policy and the limits of which are determined by legal rules or ethical rules,
2) Indemnity claims of the insured arising from the activities outside the scope of responsibility of the organizations covered by the policy, excluding the fulfillment of humanitarian duty,
3) All kinds of penalties and penal conditions, including administrative and judicial fines,
4) Compensation claims arising from all kinds of experiments, excluding those performed as a requirement of medical professional activity, within the framework determined by the relevant legislation (General Conditions A.3),
5) Compensation claims arising from the application of general anesthesia by dentists and surgeons, unless it is done in a licensed health institution or organization and except in emergencies and under the supervision of a duly authorized anesthesiologist,
6) Compensation claims arising from all kinds of treatment and health services provided during the period temporarily banned from the profession, excluding first aid and emergency response,
7) Indemnity claims arising from not having sufficient and necessary equipment and equipment due to personal fault of the insured in places where first aid or emergency aid services are provided,
8) Claims for damages due to the dangerous properties of a radioactive, toxic, explosive or any explosive nuclear compound or nuclear part thereof, other than for medical purposes,
9) Except for medical purposes, all kinds of diseases (including cancer) or asbestos-related indemnities arising from the use of diethylstibesterol (DES), dioxin, urea formaldehyde, asbestos, asbestos-containing products or asbestos-containing products (Professional Liability Insurance General Conditions C. 10/ II).

b) Receivables Covered by the Insurance

The coverage amount of the physician's compulsory liability insurance, the pecuniary and non-pecuniary compensation demanded in the event that an event requiring compensation occurs during the contract period while the insured is performing his/her professional activity specified in the policy, the litigation expenses related to this claim, the interest to be awarded and the reasonable expenses related to the claim claim against the insured, *(Litigation expenses to be decided by the court, the court fees imposed in the judicial decision against the insured, expert, discovery and witness expenses, attorney's fees in favor of the plaintiff)*[30] (2010 Communiqué art. A.2, IGC article A.1). Claims such as the payment of judicial fines related to criminal liability are not covered by the insurance.

c) Application Time of Insurance and Notification

According to art. 1473 of TCC, "*The insurer pays indemnity up to the amount stipulated in the insurance contract to the insured due to the liability of the insured arising from an event stipulated in the contract and that occurs during the insurance period, even if the loss occurs later, unless the contract provides otherwise*". With this provision, it is accepted that the insurance coverage will be valid for the events that have occurred between the agreed retroactive effect date and the date of the insurance contract, if the event is within the insurance period or if the policyholder (provided that he does not know that the event giving rise to his liability) has obtained retroactive insurance coverage. In other words, the TCC has adopted the event-based insurance (occurrence basis-event occurrence).[31] However, this provision is not a

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30 The assumption here is that the insurer was not sued and these amounts were not collected from him. If the claimant has also sued the insurer and these amounts are awarded against the insurer, the insurer will already pay them "its own liability" to the claimant. Ünan, Mandatory Physician Insurance, p. 11.

31 The event is an unlawful act that is the cause of the damage that requires the liability of the insured. Ünan, TCC Annotation, p. 288-290; A general definition of liability insurance has been made with this article. In the regulation introduced, the occurrence of the event constituting the basis for the risk within the contract period is taken as a basis. If the principle that the insurer is responsible for the losses incurred in his own period due to an event that occurred in the past was adopted, it was thought that the applicability of such insurance would be greatly reduced in practice. Because, when making a contract, the insurer will want to

mandatory provision. Therefore, the parties may agree otherwise in the insurance contract.[32]

Physician professional liability insurances can be made in three ways: claims made, occurrence basis-event occurrence or hybrid contracts.[33] For claims-based insurance, only medical malpractices that occur during the contract period are covered by the contract.[34] For example, a claim for compensation related to an incident that occurred in 2015 must be submitted by the end of 2015.[35] If the demand-based insurance is renewed without interruption (for example, if the contract

know all the past works and transactions of the insured and will want to control how they were done. Otherwise, it may face the danger of encountering very big risks. In addition, such an arrangement will pave the way for malicious applications. Namely, those who think that they may face a claim for compensation due to an error they have made will immediately go to the option of making an insurance contract: The liability of the insurer is tied to the events that will require the liability of the insured for the reasons explained above. At this point, it is not important that the loss arises or is claimed later than the contract period in order to mention the liability of the insurer. However, since the article is not mandatory, it is possible for the parties to determine the contract risk in different ways according to the types of liability insurance. TCC Article Justifications, https://www.tbmart.gov.tr/d22/1/1-1138.pdf, (Date of Access: 19.09.2019).

32 However, since the request can also be made orally, difficulties of proof may arise as to when it was made. Karasu, p. 689; Ünan, TCC Annotation, p. 291.

33 The risk is deemed to have occurred as soon as the insured learns about the subject of the insurance contract or that the injured party applies directly to the insurer (General Conditions Art. B. 1). In claims-based insurance, the risk is deemed to have occurred when the claim for compensation is made by the injured party to the policyholder. The request can also be made verbally, in which case difficulties may arise in the proof. Ünan, TCC Annotation, p. 292

34 Many liability insurances are made on a "demand basis" in our country: Environmental Pollution Financial Liability Insurance (General Conditions art. A.2); Compulsory Liability Insurance for Coastal Facilities Marine Pollution (General Conditions art. A.1); Compulsory Liability Insurance Regarding Medical Malpractice (General Conditions art. A.1 and B.1) Product Liability Insurance General Conditions. Professional Liability Insurance General Conditions, on the other hand, allow insurances made on the basis of both "incident+loss" and "incident+demand" principles, according to the agreement of the parties. Ünan, TCC Annotation, p. 292.

35 According to Çeker; "in claims made policies which cover events during the contract period, the indemnity claim can be claimed during the contract period, and the insurer has to cover the claims made within two years after the end of the insurance period, provided that it is caused by an event that occurred during the contract period. For example, if a valid contract was made between 01.04.2011 and 01.04.2012 and the patient died on 30.06.2012 after staying in the intensive care unit for a long time as a result of an erroneous surgery on 30.05.2011, the insurer becomes liable and becomes obliged to pay compensation even though the contract expires on 01.04.2012 ". Çeker, p. 309.

is renewed regularly in 2015, 2016, 2017, 2018 and 2019), the insured will be protected as there is no gap in the renewal of the contract. If there are gaps in the renewal of the contract, the insured will not be able to benefit from the protection for these periods when the contract is not signed/renewed.[36]

In event-based insurance, the insurance coverage will become operational provided that this event occurs within the insurance period.[37] TCC art. In 1473/1, the event principle is accepted in liability insurance.[38] Event-based insurance provides retroactive insurance coverage. In particular, in order to obtain insurance protection against claims for compensation for damages that may arise from faulty practices that were not known at the time of insurance, it is possible to provide insurance coverage as far back as the statute of limitations for liability (this is often the case in professional liability insurances of notaries and lawyers), so the insurer's need for retrospective review is in the event of an event. It also applies to basic insurance.[39]

In other words, the liability of the insurer and the insurance coverage continue until the statute of limitations for a claim expires. Thus, an advantage is provided to the insured. The insured (and the injured party) are entitled to benefit from this insurance, even if the damage occurs later due to the malpractice event that occurred during the insurance period and the claim for compensation is also claimed later. For example, in an event-based insurance covering the year 2014, the insurer is obliged to provide protection for this claim, even if the damage occurred in 2016 (for example, if the disability became definite on this date) and the injured party claimed compensation in 2018. In event-based insurance, it does not matter when the loss occurred. The damage may have occurred years later. Compensation process, on the other hand, can be claimed within the time limit or statute of limitati-

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36 Ünan, Mandatory Physician Insurance, p. 10.

37 Ünan, TCC Annotation, p. 288.

38 TCC art. 1473/1: "... the liability of the insured arising from an event foreseen in the contract and occurring during the insurance period, even if the loss arises later ...", Ünan, TCC Annotation, p. 288

39 If retroactive insurance coverage is obtained (provided that the policyholder does not know that the event giving rise to the liability has occurred), the insurance provides coverage between the agreed retroactive effect date and the date of the insurance contract. Ünan, TCC Annotation, p. 289.

ons stipulated for this system after the damage. The expiry of the statute of limitations does not actually prevent a claim for compensation; however, in cases where the statute of limitations occurs, it will not be possible for the creditor to proceed further, even if his claim is justified in substance, upon the defense of the statute of limitations, and his case will have to be rejected on the grounds of statute of limitations.[40]

Whereas, in claims-based insurances, the claim for compensation has to be filed until the end of the insurance contract, that is, until the end of 2014, as in the case above. However, if the claim-based insurance is renewed continuously and regularly from 2014 to 2018, the insured will be protected without any gaps.[41]

On the other hand, in mixed contracts, insurance contracts can be concluded that will include the situations that are not covered by both basic contracts. Mixed insurances limit the duration of insurance protection in terms of time. In this insurance, the right of the injured third party to claim from the insured responsible for the damage continues, while the right of claim against the liability insurer may expire. In insurances that include the condition that the indemnity claim is made within the insurance period or within a certain period following it, the liability of the insurer expires after this period, while the claim-based mixed insurance is renewed regularly and uninterruptedly every year, and in each renewal (included in the first insurance contract) the insurer's liability is valid from the start date. It is possible to apply to the insurer after the event, if it is decided that a guarantee will be provided. For example, if the liability arising from the indemnity claim against the insurant is foreseen as one year in the mixed insurance, although the statute of limitations applied is 10 years (provided that the event and the indemnity claim take place within the insurance period), the insurant will be liable for a period of approximately nine years longer than the insurer, in this case, is under threat for a long time.[42] For example, let's say that a mixed contract was made on 01.01.2017, including the events that took place a year ago. In the event that claims for damages arising from medical interventions performed within a year

40 Ünan, TCC Annotation, p. 290.
41 Ünan, Mandatory Physician Insurance, p. 13.
42 Ünan, TCC Annotation, p. 295.

ago (in 02.05.2016) or during the insurance period (in 2017) or within one year (2018) from the expiry of the insurance period, the damage is covered by the insurer.[43]

According to the IGC, the physician professional liability insurance provides coverage within the limits set in the policy against the claims made to him during the contract period due to the losses he caused due to his professional activity in the ten-year period before the contract date or during the contract period, while performing the professional activity covered by the policy. However, the beginning of the ten-year period cannot exceed 30 July 2009 and there is no insurance protection for notices made during insured periods due to events occurring during periods of more than one month of uninsured (IGC art. A.1).

Accordingly, the claim principle has been adopted with physician professional liability insurances and it has been assumed that the insurance will be renewed regularly every year. Accordingly, only the claims made to the insured during the insurance period are under insurance protection. In claims-based insurances, it is essential that the claim for compensation is brought against the insured physician, but in addition, the claim of the injured party must be "delivered" to the insurer within the insurance period. On the other hand, in the general conditions, it did not include any conditions regarding the notification, on the contrary, it deemed the request made to the insured sufficient. The sanction of not notifying the insurer of the claim immediately is stipulated in TCC art. 1475/3 by referring to art. 1446/2 of the TCC. Accordingly, if the non-delivery or late notification of the risk has led to an increase in the indemnity or price to be paid, a reduction from the indemnity or the price will be sought, depending on the gravity of the fault. In other words, when the insurer recourse to the insured in order to partially recover what he has paid after paying compensation to the injured party, a discount is made according to the severity of the fault to be applied.[44]

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43 In this type of insurance, since the insurer assumes a greater risk, the premium to be demanded will be higher. Çeker, p. 310.

44 Ünan, Mandatory Physician Insurance, p. 10.

The last sentence of General Conditions A.1/1 stipulates that "… *insurance protection will not be available for notifications made during insured periods due to events that occur during periods of more than one month of uninsurance*".[45] If a physician first takes out insurance in 2009, he will be able to benefit from this insurance for malpractice events after 2009 (it didn't happen the subject of a claim for compensation). For instance, the 2015 policy will come into effect and provide protection for claims made after the start of the insurance period in 2015, related to an incident in July 2014. Even if the same physician took out insurance for the first time in 2011, neglected to take out insurance in 2012 and 2013, and had an insurance policy issued again for 2014, for the event in July 2013, it would remain open in accordance with the general conditions (because there was a gap of more than one month), and will not benefit from the guarantee.

Assuming that the insurance contract was regularly signed from the beginning and the contract was last renewed in 2019, as insurance protection will be provided starting from 30 July 2009 until 2019 (it will also provide malpractice events that will occur from 30 July 2009 but have not yet been the subject of a claim for compensation).) The malpractice contract that occurred in 2015 will be deemed to be included in the scope and the claim for compensation brought forward in 2019 (within the insurance period) will be paid from the 2019 policy.

In the event that the insured terminates her professional activity, in addition to the retroactive coverage,[46] claims that may arise up to two years after the end of the contract due to her professional activity in the last insurance contract period are also covered.[47]

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45 It should be noted that this provision is incompatible with the feature of physician liability insurance to provide coverage for "past events". Ünan, Mandatory Physician Insurance, p. 10.

46 Physician liability insurance does not constitute fully retroactive insurance. Retroactive insurance is in question when the risk occurred before the insurance contract (but the parties did not know about this). However, in physician liability insurance, the risk occurs at the time the claim for compensation is made pursuant to Article B.1 of the General Conditions. This moment (after the contract is made) must take place within the insurance period. Ünan, Mandatory Physician Insurance, p. 11.

47 If the occupation were terminated, a two-year "additional" protection covering not only the last insurance period but the entire period up to the retroactive effect date would have been more appropriate. Ünan, Mandatory Physician Insurance, p. 10.

II. APPLICATION OF MANDATORY FINANCIAL LIABILITY INSURANCE ACCORDING TO THE DECISIONS OF THE JUDICIARY AND INSURANCE ARBITRATION OBJECTIVE COMMITTEE

A. JUDICIARY AND COURT DECISIONS

1. Jurisdiction

In the case subject to the decision of Y 11. HD, T. 13.2.2017, 2017/270 E. and 2017/765 K. ...10 With the decision of the Consumer Court dated 13.06.2016 and numbered 2016/626 E. and 2016/628 K., the local court Compulsory Financial Liability Insurance Policy for Medical Malpractice was made between the defendant and the third party, the physician to whom the case was requested, between 11.08.2015 - 11.08.2016, and the Insurance Law was regulated in the articles 1401 et al. of the TCC numbered 6102, Pursuant to Article 4 of the TCC, the issues arising from this law will be considered commercial lawsuits, considering the nature of the policy, it cannot be considered within the scope of the insurance stated in Article 3 of the Law No. 6502, since it is a compulsory policy, and since there is no proxy relationship between the defendant and the plaintiff, the defendant's It has given a decision of non-jurisdiction on the grounds that its liability arises from the insurance law and that the Commercial Court of First Instance is in charge. The decision has been appealed. The Court of Cassation decided to reject the appeals and uphold the verdict by a majority of the votes.[48]

[48] Dissenting Vote: In article 3/k of the Law on the Protection of Consumers No. 6502, the Consumer refers to "real or legal persons acting for non-commercial or non-professional purposes", and in article 3/1 of the Law, Consumer Transaction is also defined as "public legal persons in the goods or service markets". All kinds of contracts and legal transactions, including works, transportation, brokerage, insurance, proxy banking and similar contracts, established between real or legal persons acting for commercial or professional purposes or acting on behalf of or on behalf of the consumer. In Article 73/1 of the Law, "Consumer Courts are in charge in cases of disputes that may arise from Consumer Transactions and consumer-oriented practices", and in Article 83/2 of the Law, "there is a regulation in other laws regarding transactions in which the consumer is one of the parties, this transaction is a consumer transaction", and prevent the implementation of the provisions of this Law on duties and powers. It will not" is regulated. In the concrete dispute, compensation is demanded from the defendant company on the grounds that the out-of-court doctor, who is insured under the Compulsory Liability Insurance Policy for Medical Malpractice, was defective in the birth of the plaintiffs' child with a disability due to his failure to show the necessary attention

In the case subject to the decision of Y 11. HD, T. 5.12.2016, E. 2016/13640, and K. 2016/9304: In the case of the local court, the Law on the Protection of the Consumer numbered 6502 entered into force on 28.05.2014, according to the 3/1-L clause of the Law, it is stated that the "...insurance..."[49] business is a consumer transaction, and the court's lack of jurisdiction on the grounds that the consumer court is in charge and authorized in the case subject to the lawsuit, according to HMK 114/1-c and 115/2, it was decided to be rejected due to the procedure.

Upon appealing the local court decision, the Court of Cassation "the compensation case subject to concrete dispute is the risk indemnity receivable arising from insurance contracts regulated in Articles 1401 and the following of TCC numbered 6102 has decided. The liability of the defendant company has derived from article 1473 of the afo-

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and care. In case the defendant company undertakes the responsibility of the medical service provided by the non-litigation doctor to the plaintiffs under the power of attorney agreement, with the insurance policy, the plaintiffs are the "consumer" stated in article 3/k of the Law No. 6502, and the insurance policy issued by the defendant company is under the 3rd paragraph of the Law. It is the "consumer transaction" expressed in the article L, and the Consumer Courts are responsible for the dispute, according to the express provision of Article 73/1 of the Law. Insurance Law is regulated in the 6th book of the Turkish Commercial Code No. 6102, which came into force on 01.07.2012, in articles 1401-1520, in accordance with article 4/1-a of the Law, cases arising from insurance disputes are considered commercial lawsuits, and in article 5 of the Law, Commercial Courts of First Instance are assigned. However, with the article 3/k, L and 73/1 of the Law No. 6502, which entered into force on 28.05.2004, the provisions of the Law No. 6102 regarding the duty were abolished in terms of insurance disputes within the scope of the Law No. 6502. In disputes, Consumer Courts are accepted as responsible. Moreover, the explicit provision of Article 83/2 of Law No. 6502 emphasizes that the Consumer Court is in charge in the dispute, without leaving any room for doubt. "As it is understood from all these explanations, for example, if one of the parties in the transportation or insurance contracts issued in the TCC is a consumer, the transaction subject to the lawsuit will now be considered a consumer transaction, so the Law No. 6502 will be applied and its duty will be determined accordingly (National Commentary Aristo Publications p. 1280). Since the Consumer Court is in charge of the dispute, while the local court's decision should be reversed, I am against the majority opinion that the decision should be upheld by ignoring the articles 3/k, L, 73/1 and 83/2 of the Law No. 6502. www.kazanci.com, (Date of Access: 25/08/2019).

[49] Law no. 6502 art. 3/1: In the implementation of this Law, "l) Consumer transaction: A work established between consumers and real or legal persons acting for commercial or professional purposes, including public legal entities in the goods or service markets, or acting on behalf of or on behalf of them, means all kinds of contracts and legal transactions, including transportation, brokerage, insurance, power of attorney, banking and similar contracts.

rementioned Law, and since the dispute will be resolved by applying the provisions of the TCC, it has decided to overturn the decision of the local court regarding the dismissal of the case due to the procedural mandate, on the grounds that the duty to hear the case rests with the Commercial Court of First Instance."[50]

In the decision of the Istanbul Regional Court of Justice (BAM) 19. HD, 16.02.2018 T., 2018/206 E. and 2018/228 K., "In the case that is the subject of the decision of the Kocaeli 2nd Commercial Court of First Instance T., 2017/509 E. and 2017/464 K. given upon the application of the appeal procedure." The local court concluded that plaintiff ... applied to the ... hospital belonging to defendant ... during the second pregnancy period in 2015 and all her controls and examinations were carried out by the other defendant specialist physician ... during the period until the birth. Due to the fact that the child has Down syndrome, the tests during pregnancy were not fully performed, and they were not warned about this issue, the doctor filed a pecuniary and non-pecuniary damage lawsuit against the defendants with the allegation that he was negligent here, the plaintiffs are not merchants here, but they are consumers, the plaintiff party, in this case, the other defendant ... Although he claimed that the Commercial Court was in charge due to the fact that he filed a lawsuit against the insurance company within the scope of the complementary physician liability insurance he made with the Insurance Company, and because the insurance law was regulated by the TCC, in article 3/1 of the Law on Consumer Protection No. In this case, only because it is stated that it is a consumer transaction since one of the defendants is insured, it will not be necessary to be heard in the Commercial Court, since the concrete incident arises from a typical consumer transaction, the duty of hearing the case belongs to the Consumer Court in accordance with Article 3/1 of the Law on the Protection of Consumers No. and it should be taken into consideration at every stage of the proceedings, and it was decided that the file should be sent to the Kocaeli Consumer Court on Duty.

The plaintiffs filed an appeal on the grounds that the decision of non-jurisdiction given by the court was not correct and that the competent court was the Commercial Court.

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50 www.kazanci.com, (Date of Access: 25.08.2019).

According to the BAM decision, "the relationship between the plaintiff and the defendants is in the nature of a power of attorney agreement. The power of attorney agreement has been included in the scope of Law No 6502, which entered into force on 28.05.2014. The lawsuit was filed on 08.05.2017. According to the provisional article 1 of the Consumer Law No. 6502: "This Lawsuits filed before the effective date of the law will continue to be heard in the court where they were filed". Therefore, stating that no decision of non-jurisdiction can be given for lawsuits filed before it enters into force. Consumer transaction is also defined in clause I of the article. It included such transportation, power of attorney, brokerage, insurance, banking, working, etc. in the scope of the consumer contracts, which is established between the real person and legal consumers. The duty of the Commercial Courts is regulated in articles 4 and 5 of the TCC No 6102, and the plaintiffs that he was not a trader, accordingly, the relative merits of the case, since it is understood that there is no free lawsuit and there is a consumer transaction between the parties, the court in charge of this case is the consumer court. Considering the date of the dispute between the parties and the effective date of the Act No 6502, the decision of the court that the Consumer Courts are in charge is appropriate since it is a consumer transaction and the consumer Courts are in charge. Since the dispute between the parties remains within the scope of the Law on the Protection of the Consumer, the Consumer Court is responsible for hearing the case. The regulations related to the task are related to public order and are observed ex officio at every stage of the proceedings, even if the parties do not put them forward. There is no vested right in matters related to the task. Considering the reasons for the appeal and the decision made in the examination made within the scope of the file, considering the decision and its justification, it was unanimously decided to reject the appeal law application on the merits, saying that the appeal requests of the plaintiffs were not deemed appropriate, since the decision of the first instance court was in accordance with the procedure and the law.[51]

As can be seen from the decisions, in some decisions it has been decided that the court in charge of hearing the case is the "Commerci-

[51] http://emsaI.uyap.gov.tr/BilgiBankasiIstemciWeb/, (Date of Access: 28.08.2019).

al Court of First Instance", and in some decisions, the case should be heard in the "Consumer Court", because it is a consumer transaction. The issue became even more important in article 20 of the "Law on the Procedure for Initiating the Follow-up of Receivables Arising from the Subscription Agreement" dated 06.12.2018 numbered 7155, and with the addition of article 5/A, after article 5 of the "Turkish Commercial Code" dated 13.01.2011 and numbered 6102[52]. According to Article 5/A titled mediation as a condition of action: "1) Before filing a lawsuit specified that in Article 4 of this Law and other laws against claims for receivables and compensation, the subject of which is the payment of a certain amount of money from commercial lawsuits, it is compulsory for action to apply to a mediator. 2) The mediator concludes the application within six weeks from the date of his assignment. This period may be extended by the mediator for a maximum of two weeks in compulsory cases. In this case, it becomes important whether the lawsuits to be filed regarding insurance are also subject to the mediation condition.

Article 4 of the TCC states: "The cases that are clearly stated as commercial cases in the Turkish Commercial Code or special laws or that are clearly stated to be pending in the Commercial Courts are absolute commercial cases."

Since the insurance law is regulated in the TCC with Article 4 of the TCC, the lawsuits arising from these contracts are considered as commercial lawsuits. On the other hand, in article 3/1(l) of the Law on the Protection of the Consumer (LPC) No. 6502[53] "*All kinds of contracts and legal transactions, in the goods or services markets, including works (locatio conductio operis), transportation, brokerage, insurance, power of attorney, banking and similar contracts whose established between consumers and real or legal persons including public legal entities acting for commercial or professional purposes, or acting on behalf of or on behalf of them"* as defined. With Article 3/1(k) of Law No. 6502, the consumer is defined as *"a real or legal person acting for non-commercial or non-professional purposes"*. According to article 73/1 of the same Law, "*Consumer Courts are in*

[52] OG: D. 19.12.2018 and N. 30630.

[53] The Law dated 07.11.2013 and numbered 6502 entered into force by being published in the OG dated 28.11.2013 and numbered 28835.

charge of cases related to disputes that may arise from consumer transactions and consumer-oriented practices". LPC should be considered as a more specific law than the TCC when both the previous law and the next law, and the private and general law are evaluated. As a matter of fact, the concept of consumer transaction defined in LPC also supports this.

In addition, Article 83/2 of the LPC clearly states that "*The regulation in other laws regarding the transactions in which one of the parties is formed by the consumer does not prevent this transaction from being considered a consumer transaction and the implementation of the provisions of this Law regarding duty and authority.*" In this case, there is a dual distinction. First, the insured who files a lawsuit against the insurer is considered a consumer unless he "*acts for commercial or professional purposes*".[54] On the other hand, if the person filing a lawsuit against the insurance company "*acts for commercial or professional purposes*", there will be a commercial lawsuit and the lawsuit will be heard in the commercial court. In this case, compulsory mediation will be in question.[55]

Article 73/A was added to the LPC with article 59 of the "*Law on the Amendment of the Code of Civil Procedure and Some Laws*".[56] With this new article, mediation has been introduced as a mandatory litigation condition for consumer cases. According to article 73/A of LPC, "The

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54 Y 11. HD's decision dated 21.05.2018 and numbered 2016-15082/3733 "...The case is about the request for the refund of the deductions made based on the private pension insurance contract. In article 3/1-k it is regulated that the consumer will express, and in article 3/1-l the consumer transaction is regulated, and 73/1 of the same Law is stipulated. Considering that the transactions arising from the insurance contract within the scope of the Law No. 6502 are also consumer transactions and the settlement place of the disputes related to the aforementioned contracts is the consumer courts, it should be decided that the case be rejected out of procedure in accordance with Article 115/2 of the Code of Civil Procedure numbered 6100...". www.kazanci.coart.tr, (Date of Access: 19.08.2020).

55 The decision of the 11th HD, dated 16.04.2018 and numbered 2017-1010/2784: "... According to the entire scope of the file, the Court determined that the doctor who gave birth to the plaintiff and followed her pregnancy was insured with the Compulsory Liability Insurance Policy for Medical Malpractice. The case was rejected on the grounds that the doctor alleged to have caused the damage has taken out insurance due to his professional activity, he is not a consumer; there is no contract between the plaintiffs and the defendant. Therefore the insurance law provisions of the TCC should be applied in the case. In case of a request within the legal time limit, it is appropriate to decide to send the file to the Commercial Court...". www.kazanci.com.tr, (Date of Access: 19.08.2020).

56 The Law dated 22.7.2020 and numbered 7251 entered into force by being published in the OG dated 28.07.2020 and numbered 31199.

fact that a mediator has been applied before filing a lawsuit in disputes heard in consumer courts is a condition of action. Provisions regarding mediation are not applied as a condition of action in the following matters:

a) Disputes within the scope of the duty of the consumer arbitration committee,

b) Objections to the decisions of the consumer arbitration committee,

c) The cases specified in the sixth paragraph of Article 73[57],

ç) The cases mentioned in Article 74[58] and

d) Disputes in the nature of a consumer transaction and arising from the same property

Article 18/A-11 of HUAK does not apply to the detriment of the consumer.[59]

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[57] According to LPC article 73/6, consumer organizations, relevant public institutions, and organizations, and the Ministry; in order to take a preliminary injunction to prevent or stop it, or to detect, prevent or stop the unlawful situation except for the provisions regarding unfair commercial practices and commercial advertisements, in cases where there is a danger of a situation inconsistent with this Law, which generally concerns consumers, it may file a lawsuit in consumer courts.

[58] LPC article 74: (1) The Ministry, consumers or consumer organizations may file a lawsuit in order to determine that a serial product offered for sale is defective, to stop its production or sale, to eliminate the defect and to have it collected from those who hold it for sale. (2) If it is determined by a court decision that the serial goods offered for sale are defective, the court may decide to temporarily suspend the sale of the goods or to remedy the defect, depending on the nature of the defect. The manufacturer or importer is obliged to remove the defect of the goods within three months at the latest from the notification date of the court decision. In the event that it is impossible to eliminate the defect of the goods, the goods are collected by the manufacturer or the importer or have it collected. The seized goods are partially or completely destroyed or destroyed according to the risks they carry. Litigation and compensation rights of the consumer regarding the destroyed goods are reserved. (3) In the event that a series of goods offered for sale carries a defect that endanger the safety of the consumer, the provisions of the Law on the Preparation and Implementation of the Technical Legislation Regarding the Products are reserved.

[59] Civil Procedure Mediation Law article 18/A-11: "In the event that the mediation activity ends due to the failure of one of the parties to attend the first meeting without a valid excuse, the party who did not attend the meeting is stated in the final report and this party is held responsible for the entire cost of the trial, even if it is partially or fully justified in the case. In addition, no attorney's fee shall

In the event that the parties cannot be reached at the end of the mediation activity, the meeting cannot be held because the parties do not attend, or the parties come to an agreement or fail to come to an agreement, the mediation fee to be paid by the consumer is covered from the budget of the Ministry of Justice. However, in the specified cases, the mediation fee cannot exceed the two-hour fee amount according to the First Part of the Mediation Fee Schedule, annexed to the Mediation Minimum Fee Schedule. In case the lawsuit filed at the end of the mediation activity is concluded in favor of the consumer, the mediation fee is collected from the defendant in accordance with the provisions of Law No. 6183 and recorded as income in the budget.

In this case, for the cases arising from the insurance contract, which is considered as a consumer transaction, consumer courts will be in charge in accordance with the provision in LCP article 73/1; "*Consumer courts are in charge in cases of disputes that may arise from consumer transactions and consumer-oriented practices*". According to Article 73/A added to the LCP in terms of such cases, mediation will be applied before filing a lawsuit in accordance with this provision, since it is a condition to apply to a mediator before filing a lawsuit in disputes heard in consumer courts.

In this case, the regulation of the TCC and the regulation of the LPC conflict. Considering that the LPC was accepted by the Turkish Grand National Assembly on 07.11.2013 and published in the Official Gazette dated 28.11.2013, the 3/L and 73/1 provisions of Law No. 6502 and the TCC article 4 provision were tacitly abolished. In this situation, the cases are subject to the insurance contract for consumers it should be accepted that it is no longer a commercial case. For this reason, the courts in charge are the Consumer Courts, and since there is no commercial lawsuit, it is seen that they are not subject to the mediation condition.[60]

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be awarded in favor of this party. In cases to be filed after the mediation activity ended due to the failure of both parties to attend the first meeting, the litigation expenses incurred by the parties are left on their own responsibility."

60 "It is not a reasonable solution to leave the implementation of the provisions in the LPC to the commercial courts, not to the special judicial bodies established for this purpose in this law. At this point, it should be noted that when deciding on insurance disputes in which consumers are a party, both judges who are experts in consumer law and judges with expertise in insurance law are needed. In this re-

However, those who are obliged to take out compulsory physician financial insurance despite the insured consumers who have an insurance contract are not among the consumer persons defined with the phrase *"real or legal person acting for non-commercial or non-professional purposes"* in article 3/k of the Law No. 6502. According to the LPC are not considered consumers because they are in the position of taking out this insurance for professional purposes. Therefore, the lawsuits to be filed within the scope of this insurance are again within the jurisdiction of the Commercial Court of First Instance. Since the lawsuit can also be filed by third parties, the lawsuits to be filed by third parties in the position of legal successor[61] should also file a lawsuit at Commercial Court.

2. Standing to Sue

Istanbul 14th Commercial Court of First Instance, in its decision numbered 19.02.2019 T., 2017/634 E. and 2019/154 K., by the local court, Gynecology and Obstetrics Specialist Op. Upon being asked by the General Directorate of Management Services of the Ministry of Health, which insurance company issued Dr …'s physician professional liability insurance policy, in the mail-dated reply letter of the General Directorate of Management Services of the Ministry of Health, Gynecology and Obstetrics Specialist Op. It has been reported that Dr. …'s compulsory physician professional liability insurance policy was insured by … Insurance.

If public officials cause harm to persons while exercising their powers or performing their duties, it constitutes a service fault of the relevant public institution. In this regard, the Constitution art. 40/III, article 129/V, Law No. 657 art. 13 (and HGK 2011/4-592 E., 2012/25 K.) contains mandatory provisions. In this case, the responsible is the public institution under whose order the public official works, and the case should be brought against that institution. On the other hand, from the

spect, the most correct solution is to settle insurance disputes in which consumers are a party, in consumer courts, which are also specialized in insurance contract law." Samim Ünan, Sigorta Tüketici Hukuku, On İki Levha Yayıncılık, İstanbul 2016, p. 156.

61 Haluk N. Nomer, "The Relationship Between Subrogation and Recourse, Especially the Role of Subrogation in terms of Social Insurance and Private Insurance Recourse Rights", *İHFM,* Y. 1997, LV, I. 3, p. 247.

point of view of the basic principles of Responsibility Law; the fact that such a regulation is included in the legislation is an important guarantee for the loss of the injured party. In the case that is the subject of the case; the defendant, who works as a doctor in the defendant ministry and is a public officer, applied wrong diagnosis and treatment, did not have the decisive tests for the detection of Down syndrome or did not inform the family according to the results of the test, therefore, due to the life-long disability of the child, the loss of work days and severe disability. It is claimed that he inflicted damage on the claimant during his duty and due to his duty, by causing him to be constantly in need of a caregiver. 129/5 of the Constitution Article 13/1 of the Civil Servants Law No. 657 pursuant to article; claims for damages arising from the faulty actions of public officials while exercising their powers may be brought against the administration or against the compulsory physician professional liability insurance, provided that they are recoursed and in accordance with the conditions set forth in the law. The case, on the other hand, is the non-litigation of the treating physician, Dr. It was filed against the defendant Y insurance, who has compulsory physician professional liability insurance of this doctor with the claim that he is X, and as a result of the investigation made by the court, the treatment was given to Gynecology and Obstetrics Specialist Op. It was determined that Dr. X applied it, and it was determined that this doctor was not insured with the defendant's insurance with the compulsory physician professional liability insurance, and was insured with Anadolu Sigorta out of action.[62]

The lawsuit must be filed against the insurance company that last signed the insurance contract. In cases where the insurer changes, the insured must notify the new insurer of the events that occurred during the old insurance (and have not yet been the subject of a claim). If the insurance company is changed after the indemnity request is submitted, and a contract is made with another insurer, the new insurance company must be informed about the events that occurred in the previous contract periods. In other words, the new insurance company must have made a contract knowing the past claims, otherwise the case will be dismissed due to the absence of passive hostility.

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[62] http://emsal.uyap.gov.tr/BilgiBankasiIstemciWeb/, (Date of Access: 28.08.2019).

For example: If the compulsory physician liability insurance was taken out by the insurer A in 2013, 2014 and 2015, and by the insurer B starting from 2016, an event that took place in 2014 and which was within the knowledge of the insured as of the moment of occurrence, will be 10 times a year in 2014 pursuant to TTK art. 1475/1 should be notified to the insurer A within the same day, and to B in accordance with TCC 1435 when making a contract with insurer B in 2016.[63]

In addition, if it is desired to file a lawsuit not only with the doctor but against the doctor or only against the hospital, it will be decided whether the court to be prosecuted will be an administrative court or a civil court, depending on whether the doctor works in a public institution or a private institution.

3. Appeal Authority

Y 17. HD, 24.01.2014 T., 2014/13726 E. and 2014/11093 K. numbered decision is related to the claim for compensation for the damage suffered due to the application. Y 17. HD, 24.01.2014 T., 2014/13726 E. and 2014/11093 K. numbered decision is related to the claim for compensation for the damage suffered due to the application. According to this decision, the duty of reviewing the appeal belongs to the 11th Civil Chamber of the Supreme Court of Appeals, pursuant to the 14th article of the Supreme Court of Appeals Law No.[64]

As can be seen from the decision, the aforementioned decision is an explanatory decision on which appellate authority to examine the decisions of the local court, and which legal department of the Court of Cassation is authorized.

4. Obligation to Light

In the case subject to decision Y 13. HD, 9.4.2014 T., 2013/30822 E. and 2014/10772 K., the Plaintiff stated that he was treated for a bone curvature in his nose at the Private B... Hospital belonging to the defendant company, he was operated during the treatment, and that he

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63 Ünan, Mandatory Physician Insurance, p. 14-15.

64 https://karararama.yargitay.gov.tr/YargitayBilgiBankasiIstemciWeb/, (Date of Access: 28.08.2019)

had undergone post-operative control. He claimed that when he went to the same hospital for the purpose of surgery, the defendant doctor learned that İbrahim had left the hospital, that he was interested in the treatment of another doctor in the same hospital, that he had permanent damage to his nose as a result of the wrong operation and that there was no possibility of recovery, that he could not work due to the wrong treatment and that he was deeply saddened. He requested the collection of material damages of TL 40,000.00 and non-pecuniary damages of TL 40,000.00 from the defendants with legal interest. In line with the forensic medicine report received, the court decided to reject the case on the grounds that there was no fault to be attributed to the defendants, and the judgment was appealed by the plaintiff.

According to the decision of the appeal, the basis of the case is the contract of attorney and it is based on the breach of the duty of care. Pursuant to articles 386 et seq (TBK 502 and sequel) of the Code of Obligations, which regulates the power of attorney, although the attorney is not responsible for the failure to achieve the result he or she intended while performing the duty of attorney. He may be liable for the damages, arising from the lack of diligence in the transactions, actions, and behaviors of his efforts to achieve this result. The responsibility of the agent generally depends on the rules regarding the responsibility of the worker. He has to act diligently like a substitute worker and is responsible for even the slightest fault. (TBK art. 396/1) Therefore, all the faults of the doctor within his professional field, even if it is slight, should be accepted as an element of responsibility. In order for the patient not to be harmed, the doctor has to fulfill all professional requirements, determine the patient's medical condition in a timely manner and without delay, take the necessary precautions in full, and determine and apply the appropriate treatment without delay. Even at the minimum level, he is obliged to carry out research to remove this hesitation and to take protective measures in the meantime, in cases of cause hesitation. While choosing between various treatment methods, the characteristics of the patient and the disease should be considered, attitudes and behaviors that would put him at risk should be avoided, and the safest way should be chosen. Indeed, the patient has the right to expect the surrogate, who is a professional doctor, to show meticulous care and attention at all stages of treatment. The attorney, who

does not show due diligence, is 394/1 of the BK. In accordance with the provision of the article (TBK article 510/1), the power of attorney must be deemed not to have been duly performed. The doctor should not be held responsible if the result has not changed even though the requirements and rules of medicine are followed.

Another important regulation is the European Convention on Biomedicine.[65] In the first article of this contract titled "Purpose; *The parties to this convention are "obligated to protect the dignity and identity of all human beings and to ensure that the integrity and other rights and freedoms of everyone are respected, without discrimination, in the practice of biology and medicine."* In Article 4 of the Convention, under the title of "Compliance with Professional Rules"; *"Any intervention in the health field, including research, must be done in accordance with relevant professional obligations and standards."* In accordance with Article 90 of our Constitution, the contract has become a part of our domestic law.

On the other hand, the subject of "Consent" is regulated in Article 5 of the Biomedicine Convention, and *"Any intervention in the field of health can be made after the person concerned gives his/her free and informed consent to the intervention. This person should be informed beforehand about the purpose and nature of the intervention, its consequences, and dangers."* Appropriate information will be given about the subject. The person concerned will always be able to freely withdraw his consent. The scope of consent has been determined and regulations have been introduced in parallel with the established practices of our Department. It is not enough to just consent to the surgery. In addition, complications must be explained. However, this consent has also been clarified as it was just emphasized above. As a matter of fact, a regulation has been made in article 26 of the Physician Ethics Regulation; and possible side effects, the consequences of the disease if the patient does not accept the recommended treatment, possible treatment options, and risks. The lighting to be made should be in accordance with the cultural, social, and mental state of the patient. Information should be given in a way that can be understood by the patient. The patient determines the

[65] "Convention on the Protection of Human Rights and Human Dignity with respect to the Application of Biology and Medicine" was approved by Law 03.12.2003 D. and 5013 N., and entered into force after being published in the OG: D. 09.12.2003 and N. 25311.

persons to be informed other than the patient. All health-related interventions can be made with the free and informed consent of the person. Consent is void if it has been obtained through coercion, threat, incomplete disclosure, or deception. In emergencies, the consent of the legal representative is obtained in cases where the patient is underage or unconscious, or unable to make a decision. With its arrangement, it is explained how the lighting will be made. In informed consent, the burden of proof is on the physician or the hospital. As such, it is imperative for the defendants to inform the patient of the possible outcome and complications prior to surgery.

In the consent document dated 06.07.2009 submitted to the file, it cannot be understood with the content of the file that the defendant informed the plaintiff about this issue and warned by making justified explanations; whether the plaintiff was sufficiently enlightened and whether the plaintiff would consent to this operation even if the complications of the operation were known. In general terms, it was reported that he was aware of the side effects and complications, and the complications of this type of surgery were not explained. On the other hand, in the report of the Forensic Medicine Institute 3rd Forensic Medicine Specialization Board dated 03.10.2012, which was taken by the court, it was stated that "... the plaintiff performed SMR surgery with the diagnosis of septum deviation in the defendant Private B... Hospital, and septum perforation occurred after the operation, it was stated that the perforation that occurred is one of the complications that may occur during this type of surgery, that the patient should be informed if perforation is detected, but it is not clear when the perforation develops. The Forensic Medicine report based on the judgment is not sufficient to determine whether the defendant physician is at fault. In that case, the court should make a decision by obtaining a report that is suitable for the inspection of the party, the court and the Supreme Court, explaining the reasons, whether the defendant physician has a fault in the nose surgery of the plaintiff and whether there is a permanent symptom after the operation, from the panel of experts to be selected from the medical faculty, where the ENT specialists are present, regarding the operation undergone by the plaintiff. If it is determined that the perforation in the claimant is a complication, it should be considered that the illumination is not sufficient and a decision should be

made in accordance with the result. The fact that the court has made a written judgment with an incomplete examination by ignoring these aspects is against the procedure and the law and requires annulment. Therefore, it was unanimously decided to reverse the decision in favor of the plaintiff.[66]

There are many decisions of the Court of Cassation in which physicians are sentenced to compensation due to non-fulfillment of the obligation to inform.[67] Even though the lawsuit was filed for the fault of the physician and it was determined that the physician did not have any fault, the violation of the obligation to inform is accepted as the main reason for the compensation. In the decisions of the Supreme Court, the simple and printed consent form was not considered sufficient. It has not been accepted as valid that the physician obtains written consent from the patient but makes the clarification verbally, and it has been accepted that the clarification was not made because it was not written. In this way, on the one hand, the burden of proving enlightenment was placed on the physician, and it was also accepted that the consent form did not mean enlightenment, in line with the views defended in the doctrine.[68]

The basic criteria for valid consent to be mentioned are, that the patient knows what he or she consents to. As a matter of fact, in order for the consent to be legally valid, the person must know the state of health, the intervention, its effects, and consequences, and be sufficiently enlightened on this issue. It is the physician who is responsible for enlightenment. This physician must be the physician administering the treatment. There is no need for the patient to make a request from the physician for clarification. With the clarification, the patient should be informed about the diagnosis made as a result of examinations,

66 www.kazanci.com.tr, (Date of Access: 25.08.2019).

67 Rıza/Çağlar/Özdamar, p. 106.

68 Obtaining the patient's consent before any kind of medical intervention is the result of respecting this right of the person who has the personality right over his/her own body. For this reason, every person who applies to a health institution to receive health care has the right to receive information about any attempt against his or her physical and mental integrity. Here, the point to be noted is that the patient will need to be in a position to freely decide on the medical intervention that is considered to be applied to him. The provision of this situation depends on the adequacy of the illumination by the physician. Informing the patient will serve to ensure the right to decide about his own future. Yördem, p. 543.

tests, and analyzes, the medical interventions that are planned to be applied, and other available treatment methods. At this point, it is up to the physician about the medical intervention, the type, form, and scope of the intervention, whether it will give a definite result, and to give information about possible complications to the patient.

According to the 26th article of the Turkish Medical Association Code of Professional Ethics, titled Informed Consent, the physician includes the patient's health status and the diagnosis, the type of treatment method proposed, the chance of success and duration, the risks of the treatment method for the patient's health, the use of the drugs given, and possible side effects, illuminates the effects of the disease, the possible treatment options, and the risks of the disease if the patient does not accept the recommended treatment. The clarification to be made should be in accordance with the cultural, social, and mental state of the patient. Information should be given in a way that can be understood by the patient. The patient determines the persons to be informed other than the patient. All health-related interventions can be made with the free and informed consent of the person. Consent is void if it has been obtained through coercion, threat, incomplete disclosure, or deception. The obligation to inform rests with the physician. This physician is the physician who administers the treatment. The fact that the obligation belongs to the physician also imposes the burden of proof on the physician.

In its decision numbered Y 13. HD, 16.1.2014 T., 2013/17487 E., and 2014/794 K., the Plaintiff stated that on 14.07.2009: the defendant was admitted to the hospital in an unconscious state as a result of falling, he was discharged after being operated on twice after intensive care, after platinum implantation. However, when his pain increased, he applied to another hospital and U.U. he claimed that all the platinum that was attached to the Faculty of Medicine was dismantled, and demanded a decision for pecuniary and non-pecuniary damages due to the defendant's fault. The defendant requested the rejection of the lawsuit, arguing that all kinds of medical procedures and interventions were carried out in the treatment and surgery of the plaintiff and that there was no fault. The court dismissed the case and the judgment was appealed by the plaintiff.

According to the Court of Cassation, the basis of the case is the attorneyship contract, in accordance with articles 386, and the following, which regulate the power of attorney, of the Code of Obligations. It is based on the breach of the duty of care. Although the attorney is not responsible for the failure to achieve the result towards which he or she is working while performing the duty of attorney. He is responsible for the damages arising from the lack of diligence in the transactions, actions, and behaviors of his or her efforts to achieve this result. The responsibility of the agent generally depends on the rules regarding the responsibility of the worker. He has to act diligently like a substitute worker and is responsible for even the slightest fault (BK. art. 321/1). Therefore, all the faults of the doctor within his professional field, even if it is slight, should be accepted as an element of responsibility. In order for the patient not to be harmed, the doctor has to fulfill all the professional requirements, determine the patient's medical condition on time and without delay, take the precautions required by the concrete situation, and determine and apply the appropriate treatment without delay. Even at the minimum level, he is obliged to carry out research to remove this hesitation and to take protective measures in the meantime, in cases that cause hesitation. While making a choice between various treatment methods, the characteristics of the patient and the disease should be considered, attitudes and behaviors that would put him at risk should be avoided, and the safest way should be chosen. Indeed, the client (patient) has the right to expect the surrogate, who is a professional doctor, to show meticulous care and attention at all stages of the treatment. The attorney, who does not show due diligence, is 394/1 of the BK. In accordance with the provision of the article, the power of attorney must be deemed not to have been duly performed. The doctor should not be held responsible if the result has not changed even though the requirements and rules of medicine are followed. Considering these explanations, it is not enough for the patient to simply consent to the surgery. In addition, the complications must also be explained, that is, this consent must be informed consent. As a matter of fact, a regulation was made in Article 26 of the Physician Ethics Rules and states that "The physician should consider the patient's health status and diagnosis, the type of treatment method proposed, the chance of success and duration, the risks of the treatment method for the patient's health,

the use of the given drugs and their possible side effects, the patients recommended illuminates the consequences of the disease, possible treatment options and risks if he does not accept the treatment. The clarification to be made should be in accordance with the cultural, social, and mental state of the patient. The information should be given in a way that can be understood by the patient. The patient himself determines who will be informed outside the patient. Any attempt can be made with the person's free and informed consent. The consent is invalid if it has been obtained through coercion, threat, incomplete illumination, or deception. In emergencies, in cases where the patient is underage or unconscious, or unable to make a decision, the permission of his legal representative is to explain how the clarification will be done with the regulation. In informed consent, the burden of proof is on the physician or the hospital. If we look at the concrete case in the light of the explanations explained above; it is understood that the plaintiff was exposed to a series of treatments and interventions after the operation in the defendant's hospital. It is against the procedure and the law that the court ignored these aspects and made a written judgment with the incomplete examination, and it was unanimously decided to overturn the decision for the benefit of the plaintiff.[69]

In the decision numbered 13. HD, 11.04.2013, T. 2013/2273 E. and 2013/9491 K., *"...If it is concluded that there is no medical error but a complication, it is decided that the defendants should be considered responsible, considering that the burden of proof is on the defendants in the informed consent, and a decision should be made in accordance with the result to be achieved."* Despite these and similar decisions, more and more lawsuits may be filed if physicians show a lack of information.[70]

5. Coverage of Insurance

In the case subject to the decision of Y 11. HD, 08.07.2019 T., 2019/2062 E., and 2019/5048 K., the Dispute Arbitrator in the decision of 17.02.2018 T. and 2018/İHK-11136 given by the Insurance Arbitration Commission Appeal Arbitration Committee By the delegation[71]; it

69 www.kazanci.com.tr, (Date of Access: 25.08.2019).
70 Yördem, p. 544.
71 Rıza/Çaglar/Özdamar, p. 116 et al.

was decided to reject the case on the grounds that the notice made by the administration to the claimant/insured did not include the claim for compensation in the General Conditions of Compulsory Liability Insurance Regarding Medical Malpractice, therefore the risk did not materialize. In the decision of the appeal arbitral tribunal; with the acceptance of the case, it was accepted that the defendant was responsible for the risk that occurred during the notification, the defense of withdrawal from the file was not appropriate since the explanations in the decision of the Aydın 2nd Administrative Court against the administration were sufficient, and the objection to the defect detection was important in terms of foreign relations. As of 2017, it was decided to collect it from the defendant together with its legal interest. Although the defendant's attorney appealed in due time, it was sent to the Court of Cassation for an appeal review by the Istanbul Anatolian 10th Commercial Court of First Instance, where it was deposited for safekeeping.

According to the Court of Cassation, pursuant to Article 61 of the TCO, if more than one person causes damage together or they are responsible for the same damage due to various reasons, the provisions regarding joint liability are applied to those responsible. According to Article 40/3 of the Constitution, the damage suffered by a person as a result of unfair actions by officials is also compensated by the State according to the law. The right of recourse to the responsible official of the state is reserved. At the same time, according to Article 129/5 of the Constitution, lawsuits for compensation arising from the faults committed by civil servants and other public officials while exercising their powers can only be brought against the administration, provided that they are recoursed; and in accordance with the forms and conditions set forth by the Law. In cases where the state jointly causes damage or is responsible for the damage due to various reasons, only the state can be prosecuted in accordance with the prevailing provision of the Constitution. If the administration is sentenced to pay compensation as a result of this lawsuit, in accordance with the last sentence of paragraph 1 of the 13th article of the Civil Servants Law No. 657, the administration has the right of recourse to the responsible person according to the general provisions. If the damage is based on the personal fault of more than one public official, the administration will only recourse to each public official at the rate of its own fault (B. Akyılmaz, The

Problem of Recourse to a Public Official in Administrative Law, Fikret Eren's Gift 2006, p. 1057). As a matter of fact, it is also stated in the doctrine that the state can recourse to the public official who caused the damage for the compensation paid to the injured person at the rate of fault according to the general principles. In the concrete case; in the file numbered T. 19.09.2012, 2011/563 E. and 2013/406 K. of Kuşadası 1 Criminal Court of First Instance, where the plaintiff caused the death of Raziye Pınar by negligence as a result of the examination and treatment performed with the non-trial doctor while she was working as a doctor in the public hospital. It is clear from the Forensic Medicine Institute report. In the full remedy action brought by the relatives of the deceased against the Ministry of Health, Aydın 2 Administrative Court, with its decision numbered 2016/463 E. and 2017/798 K., decided to pay the plaintiffs 80,000 TL of non-pecuniary damages. The Ministry of Health demanded % of the payment made to the relatives of the deceased on the grounds that he was one of the two doctors who performed the treatment, and the plaintiff/insured paid 53,090 TL from the amount paid to the Ministry out of the case. In this case, the plaintiff/insured requested the amount paid to the administration from the insurer. However, as it can be understood from the explanations above, the public official can only recourse to the doctor at the rate of his fault. As such, taking into account the defense of the defendant insurer that the insured doctor will be liable for the damage at the rate of his fault, an expert report determining the defect rate in the medical practice of the insured doctor that caused the damage in an auditable manner, is obtained in an amount corresponding to the doctor's fault rate from the compensation paid to the relatives of the deceased in accordance with the Administrative Court's decision. While the insurance company should be held responsible, it was not appropriate to hold the defendant responsible for the entire recourse payment made to the administration by the insured doctor in writing, and it was decided to reverse the decision for the benefit of the defendant.[72]

According to the decision numbered Y 11. HD, T. 13.1.2016, E. 2015/14376, and K. 2016/249: "The decision of the Court of … dated

[72] https://kararama.yargitay.gov.tr/YargitayBilgiBankasiIstemciWeb/, (Date of Access: 28.08.2019).

03.12.2014 and numbered 2014/1117-2014/613 was appealed in the case heard between the parties. The plaintiff's attorney stated that his client is a general practitioner and he is with the defendant company, that a lawsuit was filed against him for causing the death of a patient who was treated in the hospital where he worked between 18/04/2010 - 19/04/2010 and it was decided to be acquitted by him as his attorney in this case. The defense was made and a 7.000 TL attorney's fee was collected, the said fee was not paid by the defendant despite the request from the defendant, whereas the attorney's fee does not constitute a fine or penal clause, which is considered an exception in the policy, although it is not explicitly stated in the policy that the attorney's fee will be paid, as an exception. Since it is not counted in the policy, the payment should be made by accepting that it is covered by the policy, in fact, this issue is also accepted by the defendant, because it is clearly and unconditionally stated on the official website that the attorney fees are covered by insurance, and in the information form, the coverage of litigation expenses and court costs is covered. Claiming that it was clearly regulated that he was in his possession, he demanded and sued the collection of 7,000.00 TL from the defendant. The attorney of the defendant states that the claim of the plaintiff is the guarantee of the Legal Protection Insurance, that there is no such coverage in the policy subject to the lawsuit, that the scope of the insurance is stated in the policy, that if a lawsuit is filed against the plaintiff with a claim for compensation and it is accepted, the court costs related to this claim can be paid to the plaintiff, however, in such a situation. Arguing that the claim was not covered by the policy and requested the dismissal of the case. According to the court, the insurance policy subject to the lawsuit protects the damages caused by third parties due to medical malpractices related to the plaintiff's duty, and only the damages inflicted by the plaintiff to the third parties are covered, and the attorney's fee paid by the plaintiff himself and to his lawyer, who acts as his representative, is not covered by the insurance on the grounds, the case was dismissed. The plaintiff's attorney appealed the decision. According to the information and documents in the case file, and the fact that there is no procedural and unlawful aspect in the discussion and evaluation of the evidence-based on the justification of the court decision, all appeals of the plaintiff's attorney are not appropriate. For

the reasons explained, it was unanimously decided to reject all appeals of the plaintiff's attorney and to uphold the judgment found in accordance with the procedure and the law.[73]

According to the 28.05.2019 T., 2017/125 E. and 2019/358 K. of the Istanbul 7th Commercial Court of First Instance: The lawsuit filed is a lawsuit for pecuniary and non-pecuniary damages. The nature of the liability policy of the insurance policy, in which a compulsory physician professional liability insurance policy with a term of 20.02.2016-2017 was issued in the name of Dr..., who was notified by the defendant, that the birth event that took place on 13.06.2012 is covered by the policy provisions. Therefore, the issue that needs to be examined first is whether the reported Dr ..., who is alleged to have caused the damage has an effective action in the formation of the damage, whether there is a professional error; that is whether there is a physician defect, negligence, or mistake as an obstetrician. Accordingly, in the root and additional reports obtained from the expert committee selected in the field, the pregnancy process, the birth, and postpartum period were examined in detail, clearly, concretely and open to inspection. Since the doctor intervened appropriately and in a timely manner when dystocia occurred, in short, there was no physician's fault or negligence in the formation of the damage, therefore, the defendant insurance company was not responsible according to the liability insurance policy, and this issue was concretely determined, and the pediatric neurologist was included in the expert committee due to the shoulder dystocia in the child. It is not necessary to get a report because the primary issue to be examined is whether the professional error of the doctor caused the damage or not, and this has been clearly and clearly determined with the expert report[74], since the defendant's insurance company is not res-

73 www.kazanci.com, (Date of Access: 25.08.2019).

74 In the Eexpert Report dated 11.12.2017, submitted by the expert committee to the file, it is stated that "In the event, which is based on the claim for compensation by the plaintiffs, Açıkalın, the Plaintiff... , that the doctor had appropriate and timely intervention at the time of shoulder dystocia, the insured physician who delivered the baby applied the current medical interventions in place and on time, no careless and inadequate intervention was made, and it was considered flawless, by the defendant insurance company regarding Dr. ... 20.02.2016-2017 Term..., Compulsory Physician Professional Liability Insurance Policy with no.... is issued, the liability of the insurance company in accordance with the policy is dependent on the precondition of the responsibility of the insured physician, the

ponsible within the scope of the liability policy, it was understood that it was necessary to reject the lawsuit, and it was decided to reject the lawsuit within 2 weeks, with the appeal legal remedy open.[75]

6. Retroactive Insurance

In the case subject to the decision of Y 11. HD, 12.6.2017 T., 2016/4503 E. and 2017/3591 K., according to the decision of the 2nd Civil Court of First Instance, dated 20.10.2015 and numbered 2015/162-2015/772; in accordance with Article 1458 of the TCC, it is possible to take out insurance with retroactive effect, therefore the insurance policy subject to the lawsuit is valid, but in accordance with the same article; it was decided to reject the lawsuit on the grounds that it was prohibited and invalidated to conclude an insurance contract with retroactive effect due to the realized risk, that the plaintiff was aware that a compensation lawsuit was filed against him. Due to medical practice at the insurance policy issuance date and the case was dismissed on the grounds that the claimant could not claim a claim as such.

Upon the appeal of the decision, the Court of Cassation, pursuant to Article B.1 of the General Conditions of Compulsory Liability Insurance Regarding Medical Malpractice, the risk will be deemed to have occurred when the insured learns that a claim for compensation has been made from him or the injured person applies directly to the insurer; accordingly, in the concrete dispute, it was understood that the plaintiff was aware of the risk with the lawsuit filed against him before

insured physician Dr...., who gave birth in the event, does not have any defect or negligence that may cause damage, Therefore, the physician is responsible for the fault. It is also stated that the liability of the insurer will not arise from the side of the insurer. In the additional report dated 12.11.2018 taken from the expert committee for the evaluation of the objections of the plaintiff party, the answers to the questions requested by the plaintiff's attorney to be answered in the petition of objection to the root report were given in the supplementary report. no risk factors were detected before and during the period of childbirth, the labor follow-up proceeds in accordance with the current scientific data, the doctor intervenes appropriately and in a timely manner when there is shoulder dystocia, the insured physician who delivered the baby applies the current medical interventions on time and in a timely manner, and there is no careless and inadequate intervention. It was reported that the opinion on the issue was preserved".

75 http://emsal.uyap.gov.tr/BilgiBankasiIstemciWeb/, (Date of Access: 28.08.2019).

the policy issuance date, and it was decided to reject all the appeals of the plaintiff's attorney and to uphold the decision.[76]

The insurance period is indicated on the policy drawn up with the conclusion of the insurance contract. This date shows the starting time and the continuation period of the performances arising from the insurance contract. The beginning of the insurer's obligation to bear the risk is regulated by TCC art. 1421.[77] Pursuant to this article, if there is no contrary agreement, the liability of the insurer begins with the payment of the premium or the first installment; in insurances related to land and sea transportation of goods, the insurer is responsible for concluding the contract. Sometimes, however, it may come up that the events (risks) that may have occurred before the conclusion of the insurance contract are requested to benefit from insurance protection. Realization of such a request is possible within the meaning of TCC article 1421 and TCC article 1458. Because in accordance with article 1421of the TCC, a contrary contract can be made. Therefore, the parties may specify a date before the payment of the premium or the first installment or before the conclusion of the insurance contract as the beginning of the liability of the insurer. If the parties have agreed on a date prior to the conclusion of the insurance contract as the beginning of the insurer's liability and hence insurance protection, retroactive insurance will be in question in such cases.[78] In other words, retroactive

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76 www.kazanci.com, (Date of Access: 25.08.2019).

77 According to the CO, the insurance contract is established by making a proposal (offer) by the policyholder or the insurer and the acceptance of this proposal by the other party of the contract. The moment of establishment of the insurance contract also determines the starting time of the form of insurance. The technical start time of the insurance contract refers to the moment when the premium or the first installment must be paid. The beginning of the insurer's moment of bearing the risk indicates the material start time of the insurance contract, and with the beginning of this moment, insurance protection begins. M. Sadık Çapa, "Retroactive Insurance", Journal of Gazi University Faculty of Law,, Vol. XVIII, Y. 2014, I. 3-4, p. 343, http://webftp.gazi.edu.tr/hukuk/dergi/18_3-4_14.pdf, (Date of Access: 16.08.2019).

78 The provision of CC article 1458 on retroactive insurance can also be applied to liability insurances. General Conditions of Compulsory Liability Insurance Regarding Medical Malpractice m. It is located in A.1. Pursuant to this article, in the ten-year period prior to the contract date or during the contract period, the professional indemnity claims and litigation expenses related to this claim and the interest to be awarded during the contract period due to the damage caused by the activity and the reasonable expenses related to the compensation claim claimed

insurance is the conclusion of the material start time of the insurance contract starting from a date before the formal start time.[79] Retroactive insurance is established at the time of agreement between the insurer and the policyholder regarding the retroactive effect of the insurance protection, and thus, the parties extend the insurance protection to be provided with this contract to a date before the conclusion of the contract; that is, they make it possible to have a retrospective effect. [80]

In retroactive insurance, insurance protection covers a moment before the conclusion of the contract, providing assurance against the possibility that the contractual interest may be damaged. However, it provides assurance for the risk that is objectively uncertain whether this purpose is realized or not. On the other hand, if it is known by the policyholder and the insured that the risk has occurred, this purpose stipulated in TCC article 1458 disappears. The main function of retroactive insurance is to ensure the period between the claim for the conclusion of the insurance contract and the conclusion of the contract.[81]

In retroactive insurance, if the risk is known at the date of the contract, this insurance is invalid. For example, if a doctor takes out retroactive insurance to cover the date of the event after learning that a lawsuit has been filed against him for medical malpractice or a claim for compensation is made with a warning, this insurance contract does not

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against the insured, are determined in the policy. Provides guarantees within limits. Therefore, the parties to the insurance contract will be able to make insurance with retrospective effect, which can take the insurance protection back ten years from the date of the contract. Çapa, p. 359.

79 With retrospective insurance, the insurer's obligation to protect under the contract is not limited to the material beginning of the contract, but extends to a date prior to the starting time of the contract. As a rule, the insurer and the policyholder can freely agree on this date. Exceptionally, the will to set this date may be restricted. Capa, p. 354.

80 In this respect, the provision of TCC art.1458 is an exception to the rule stipulated in TCC art.1421, since it changes the material start time of the insurance. Çapa, p. 343.

81 Temporary insurance protection, which is not included in the TCC, provides temporary protection to the policyholder for a certain period of time. Temporary insurance protection arises from economic, insurance, and risk policy needs. In temporary insurance protection, the material beginning of the insurance and the beginning of the form coincide at the same time. In other words, insurance protection is carried out in a way that starts from the moment of establishment of the contract. Therefore, retroactive insurance and temporary insurance protection are different institutions. Çapa, p. 346

create any liability for the insurance company. Knowing that a lawsuit has been filed against him, the doctor is obliged to pay the premium debt arising from the insurance he has taken out for this reason, to the insurer.[82]

However, if the risk has not yet materialized despite the claim or threat that a malpractice lawsuit will be filed, it is possible for the doctor to take out insurance with retrospective effect upon a patient's statement that he or she will file a compensation lawsuit against the doctor. In this case, the insurance contract is valid since the risk has not occurred yet. The objective uncertainty of the risk is among the most important elements of the insurance contract. [83]

Therefore, if it is known by the parties of the insurance contract that the risk has occurred or that the possibility of its realization has disappeared, the insurance contract cannot be established in a valid way, since ignorance of the occurrence of the risk cannot be aforesaid. In this case, the insurance contract is invalid.[84]

Another important issue is the situation with doctors working in the public sector. As it is known, it is not possible to file a lawsuit for damages directly against doctors working in the public sector. Such cases must first be brought against the public administration. The public institution may recourse to its own faulty personnel for the compensation it has to pay later. For this reason, if health personnel who are informed that a lawsuit has been filed against the public administration, takes out retroactive insurance from now on, will this insurance

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82 The objective uncertainty of the risk is among the most important elements of the insurance contract. Therefore, if it is known by the parties of the insurance contract that the risk has occurred or that the possibility of its realization has disappeared, the insurance contract cannot be established in a valid way, since ignorance of the occurrence of the risk cannot be mentioned. In this case, the insurance contract is invalid. Çapa, p. 347.

83 The objective uncertainty of the risk is among the most important elements of the insurance contract. Therefore, if it is known by the parties of the insurance contract that the risk has occurred or that the possibility of its realization has disappeared, the insurance contract cannot be established in a valid way, since ignorance of the occurrence of the risk cannot be aforesaid. In this case, the insurance contract is invalid. Capa, p. 347.

84 Erkin Göçmen, "Can Malpractice Insurance with Retrospective Effect Be Made?", Medical Academy, https://www.medikalakademi.coart.tr/gecmise-etkili-malpraktis-sigortasi- yapilabilir mi?, p. 1, (Date of Access: 16.08.2019).

contract be valid? Whether a lawsuit has been filed primarily against the public institution employing the health personnel or the health personnel themselves, it is not possible to have retroactive insurance in both cases. Because after the health personnel learned that a lawsuit has been filed against the administration for the time being due to the realization of the risk, it is not possible to have effective insurance if it has passed on the grounds that he did not know, that the risk has occurred yet.[85]

7. Occurrence of Risk

According to the decision numbered Y 11. HD, T 25.6.2018, E 2016/11529 and K 2018/4747: Following the criminal court's finding that the accused doctors were at fault; the victims of the crime had the opportunity to make a legal claim from the date of the incident, the date of the damage/risk was determined by the court. Article A. 1.b of the General Conditions of Professional Liability Insurance, that the policy was drawn up with retroactive effect, including the previous events that the risk occurred on a date before the policy was issued, and that the risk arising from the death event is also within the scope of the policy. Pursuant to Article 2 of the TMK, the claim in the policy text that "*protection will be provided only against the claims that may arise against the insured during the contract period*" is in the nature of asserting an actually impossible condition, and in line with the same condition, the indemnity arising from the risk is not paid to the insured person based on this condition. In violation of the honesty rule in accordance with the provision, it has been decided to accept the case.

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[85] According to the contrary view, in this case, the risk did not occur within the meaning of Article B.1 of the General Conditions of Compulsory Liability Insurance Regarding Medical Malpractice, since there is no compensation case against the doctor yet. It is also possible that this lawsuit filed against the public administration may result in a defect related to the planning, organization, arrangement, and arrangement of the health service in general, to result against the administration. In this case, since the doctor will not have any responsibility to the administration, the administration will not be able to file a recourse lawsuit against the doctor. In other words, it is still indeterminate whether the doctor has a fault and recourse liability at the time of the lawsuit filed against the public administration. Göçmen, p. 1.

The case is about the claim for compensation for the damage suffered under the professional liability insurance policy. In the insurance policy concluded between the parties for the dates 31.05.2006-31.05.2007, the guarantee limit was determined as 50.000 TL, and the court should have ruled that the liability of the defendant is limited to the policy limit, but it was not correct to accept the case over 54.120 TL by exceeding the coverage limit in the policy. It was unanimously decided to overturn it. According to article B.1 of the General Conditions of Professional Liability Insurance[86], titled loss and compensation, the Contract; in case it is done as specified in subparagraph (a) of A.1. (against damages arising as a result of an event occurring during the contract period and indemnity claimed during or after the contract period in accordance with the liability provisions), due to the professional activity of the insured during the contract period, as a result of the loss of others, both during the contract period and within two years from the end of the contract, as specified in subparagraph (b) of A.1. depending on the event that occurred before the contract was concluded or while the contract was in force, provided that it is not less than one year[87]; a) Payment is made by the insured with the knowledge and written consent of the insurer, or b) In professional liability insurances, where the insurer also undertakes to provide legal assistance to the insured, upon notification of the lawsuit or legal proceeding, c) The court that the loss has occurred and that this loss arises from the liability of the insured in the event that it is decided by the company, the risk is realized. Thus, an occurrence basis-event occurrence claim has been accepted in the Professional Liability Insurance.

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86 OG: D. 26.05.2013 and N. 28658.

87 Professional Liability Insurance General Conditions article A.1 with this insurance contract, while performing the professional activity of the insured specified in the policy and the subject of which is defined by the relevant parties; a) Against the damages that arise as a result of an event occurring during the contract period and whose compensation is claimed during or after the contract period in accordance with the liability provisions, or b) Against the claims that can be made against the insured only during the contract period due to an event that occurred before the contract was concluded or while the contract was in force. Guarantee is given up to the amount specified in the contract, including reasonable expenses related to the request. The parties can make a contract to include one of the (a) and (b) clauses, or they may make a contract to include both. If it is made for the responsibility of the insured regarding the business, this insurance also covers the responsibility of the insured's representative and the people employed in the business or part of the business in the management, supervision, and business, unless there is a contrary provision in the contract.

However, according to Article B.1 of the provision of the General Conditions of Compulsory Liability Insurance Regarding Medical Malpractice, the claim is deemed to have occurred as soon as the insured learns that a claim has been made to him regarding the subject of the insurance contract or the injured party directly applies to the insurer claims made based insurance is adopted.

B. ARBITRAL AWARDS

Since the damages subject to insurance contracts are generally concluded in accordance with the arbitrator's decision in insurance arbitration, the dispute is not referred to by the Insurance Arbitration Commission Appeals Tribunal much. For this reason, the published decisions on the compulsory liability insurance of the physician are limited.

1. Insurance coverage

In another decision given by the Insurance Arbitration Commission Appeal Arbitration Committee, Z.Ç. gave birth in Private Huzur Hospital on 06.02.2010 and gave birth to a baby named A.C. ZÇ claimed that they had made an agreement with the hospital employee Dr. G.B. that he should be present at the birth before the birth, and that a faulty intervention was made during the birth, thus causing at least 32.3% of the applicant's A.C., who was not born, to be disabled; applied to the Insurance Arbitration Commission with a request for the collection of pecuniary and non-pecuniary damages for the surgery and treatment expenses that were not paid by the insurance company. The application was partially accepted by the Insurance Arbitration Committee; this decision was appealed by the Insurance Company's attorney.

However, a lawsuit was filed against Dr. G.B. by the attorney of the plaintiff party with the file number 2010/10 E. of the Istanbul 15th Civil Court of First Instance. Since the report from the General Assembly of Forensic Medicine is expected during the court proceedings during the application to the Arbitration Committee, this situation is made a preliminary issue and since the report is of a nature that will affect the decision to be made by the Arbitration Committee, it is necessary to make a preliminary issue and wait for the report to be prepared, in accordance with Article 30/16 of the Insurance Law No. 5684 and with

the consent of the parties' attorneys, it was decided to take an additional two months; and finally, the request was partially accepted.[88]

[88] The Arbitration Panel of Disputes decided that the defendant of the case in the general court, Dr. In its application for arbitration, G.B.N. rejected the procedural objection on the grounds that the defendant was an insurance company. Therefore the same case had not been brought before the general court, and the conditions were not met because the defendants were different. On the grounds that the doctor, who was less faulty in the main aspect, should be considered completely faulty, he accepted the requests for material and moral compensation differently. In the concrete case; 30/14 of the Insurance Law No. 5684. According to the article: "An application cannot be made to the Commission regarding the disputes submitted to the Court and the Arbitration Committee for Consumer Problems pursuant to the provisions of the Law on the Protection of the Consumer" and "the same lawsuit has been filed before and is still pending," as stated in article 114/1.1 of the CPC. The conditions of "not being" have not been met. For this reason, it is not wrong to reject the objection on this issue by the Arbitration Committee of Disputes; the objection of the insurance company regarding this issue had to be rejected. In terms of pecuniary and non-pecuniary damages: As a result, in the decision of the Forensic Medicine Institute 2nd Specialization Department dated 12.06.2015, it was stated that "no fault could be found attributable to the relevant physician and other health personnel". Since the general court had decided to receive a report from the General Assembly of Forensic Medicine, it was decided to submit this report if it came, or to wait for it if it did not, and the representative of the insurance company submitted the report of the General Assembly of Forensic Medicine to the file. As a result of the report of the General Board of Forensic Medicine dated 29.09.2016: "G1 P0, 39-40 weeks old, 5-6 cm, 80% effacement, a painfully pregnant woman who applied to the private X Hospital date on 06.02.2010 was in labor for about 3 hours. After the follow-up, she gave birth by applying nsd+epi with vacuum, developed posterior occiput, developed shoulder dystocia at birth, and right brachial plexus paralysis was detected in a 3770-g born baby. It is understood that the decision taken to put a vacuum in order to prevent the baby from waiting too long in a pregnant woman with a weakness for straining is medically correct, that vacuum is applied by the midwife at the instruction and control of the physician who is in another operation, that the shoulder dystocia that develops at birth and the brachial plexus damage that develops due to it can be treated with a vacuum. normal delivery of brachial plexus lesion detected in small. It has been unanimously agreed that it can be seen due to maneuvers during the removal of the baby from the vaginal route even in cases where all care is shown during the procedure and it is described as an unpredictable and unpreventable complication, therefore, no defect that can be attributed to the relevant physician and other health officials in terms of the formation of a plexus brachialis lesion in the baby during labor. It is agreed" assessment was made. In the face of the reports of the 2nd Specialization Department of the Forensic Medicine Institute and the General Assembly of Forensic Medicine, which confirmed each other and were given unanimously, the applicants' representative submitted the file and Dr. X University Medical Faculty Ordinary Medicine USA report stating that GB was defective could not be valued. Unless there is a contrary provision in the policy, the insured must be at fault in order for the insurance company to be considered liable under the Health Professionals Individual Risks Insurance Policy. Since the reports of the 2nd Specialization Department of the Forensic Medicine Institute and the General Board of Forensic Medicine, which confirm each other and received unanimously: "No fault was found attributable to the relevant physician and other health officials", the defendant insurance company is not liable under

CONCLUSION

Against damages resulting from malpractice in medicine, known as malpractice in practice; The Physician's Compulsory Liability Insurance for Medical Malpractice (Compulsory Liability Insurance for Medical Malpractice) has been regulated as compulsory insurance in order to cover the responsibilities of all physicians, dentists, and those who are specialists in accordance with the legislation on specialization in medicine.

The purpose of physician compulsory liability insurance is to relieve physicians of the financial burden they may be exposed to due to legal liability. Thanks to this insurance, those who have suffered damage have the opportunity to apply to an institution that has a strong financial power to cover the compensation receivables for the physician who harmed them. Physician's professional liability insurance is a contract that imposes obligations on both parties (synallagmatic). The insured's debt is to pay premiums, and the insurer's debt is to compensate the insured's loss when the risk occurs.

Damages arising as a result of an event that occurred during the contract period with IGC and indemnified within the contract period or after the contract in accordance with the liability provisions, claims that may arise against the insured only during the contract period due to an event that occurred before the conclusion of the contract or while the contract was in force, and this loss or damage, while the litigation expenses related to the claim are counted within the scope of the insurance, the indemnity claims arising from the activities of the insured outside of the professional activity covered by the policy and the limits of which are determined by the rules of law or ethical rules, compensation claims of the insured arising from the activities of the insured

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the Health Professionals Individual Risks Insurance Policy cannot be mentioned either. Therefore, it was not correct that the insurance company decided to pay pecuniary and non-pecuniary damages for the reasons stated in the decision. Since the objection of the defendant's insurance company on this matter was valid, it was necessary to abolish the decision of the Arbitration Committee for Disputes on 14.04.2017 and to reject the application with its acceptance. For the reasons explained: With the acceptance of the objection: Annulment of the Dispute Arbitration Committee's decision dated 05.09.2016 and numbered 2016/16881 Basis, 2016/ 25537, rejection of the application, 30/12 of the Insurance Law No. 5684. In accordance with the article, it was decided unanimously with the possibility of appeal as of the case amount insurances. Journal of Insurance Arbitration Decision, I. 30, 2017 April-June, I. 30, 2017 April-June, p. 68-75, (Erişim Tarihi: 22.08.2019).

outside the scope of responsibility of the organizations covered by the policy, excluding the fulfillment of humanitarian duty. Indemnity claims arising from all kinds of experiments are excluded from the scope of insurance, except for those performed as a requirement of medical professional activity within the framework determined by the relevant legislation and all kinds of penal and penal conditions, including administrative and judicial fines.

While determining the scope in terms of time, the claimed principle has been adopted in physician professional liability insurance and it has been assumed that the insurance will be renewed regularly every year. In demand-based insurance, only medical malpractices that occur during the contract period are covered by the contract. Therefore, if the liability insurance is interrupted and a malpractice event occurs during the interruption period for which the insurer is liable, the resulting loss will not be covered by the insurer.

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