HUNGER STRIKE IN THE PENDULUM OF ETHICS AND LAW

ETİK İLE HUKUK SARKACINDA AÇLIK GREVİ

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Abstract: Hunger strikes occur in various contexts, but they result in important legal and ethical dilemmas for health-care pro- fessionals caring for hunger strikers who are imprisoned or detai- ned. 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 thus 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 is comprised of 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 mat-

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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.

ter of course, a controversial issue. It should always be kept in mind whether the convict has embarked on the protest of 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 poem 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 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 keeping 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") 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

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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 choices. 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 persons 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

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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

authorised 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 im-

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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.

prove his own personality and identity, right to self-determination, in other words his right to respect for his 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 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 life so as to cease his sufferings or in cases where he wants to die of his 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 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 judgment about his own life, body, future and to determine his 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 situation in order to enable him 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, the patient is unconscious and he 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 patient would have, in any case, consented to 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.

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 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 corporeal existence, endangers or ends his 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 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 has given when he is 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. 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

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

provision on this 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 make 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 act. The psychosocial service unit at the penitentiary institution also takes necessary steps so as to persuade the prisoner to discontinue his 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 problematic the lack of consent 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 of his 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*

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 of the probable consequences of his 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

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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)

duress. In that case, it is suggested that if the hunger striker still intends to continue his strike after his life is saved and he regains his competence to form a judgment, his 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 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 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 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 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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