ISTANBUL MEDENIYET UNIVERSITY
INSTITUTE OF GRADUATE STUDIES
DEPARTMENT OF PRIVATE LAW

Vaccination as a Medical Intervention Example in Turkish Civil Law

Master's Thesis

Zeynep Özge Oğuz

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Supervisor

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STATEMENTS

Style and Reference Manual Statement

Having reviewed this thesis written under my supervision, I confirm that it has been written in accordance with the Chicago Manual of Style 17th Edition and used its footnote reference format consistently throughout the entire text.

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Declaration of Originality

I hereby declare that all information in this dissertation has been obtained and presented in accordance with academic rules and ethical conduct. I also declare that, as required by these rules and conducts, I have fully cited and referenced all material and results that are not original to this work.

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Zeynep Özge OĞUZ

GENİŞ ÖZET

Bir Tıbbi Müdahale Örneği Olarak Türk Medeni Hukukunda Aşı

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Yüksek Lisans Tezi, Özel Hukuk Anabilim Dalı

Danışman: Prof. Dr. Ümit Gezder

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Aşı bir tıbbi müdahaledir. Bu tıbbi müdahale, kişinin vücuduna enjeksiyon ya da ağızdan alınan damla şeklinde gerçekleşir. Farklı uygulama yöntemleri ile uygulanan her bir aşı bir tıbbi müdahaledir. Bu kural olarak kişilerin rızasıyla yapılan bir müdahaledir. Dünyada birçok hastalığa karşı, kişi ve geniş anlamda toplum sağlığını korumak için aşılar geliştirilmiştir.

Tıbbi müdahale terimi zaman içinde değişim göstermiş ve genişlemiştir. Kişiler Hukuku perspektifinden incelendiğinde, tıbbi müdahaleler kişinin vücut bütünlüğüne ve kişilik haklarına saldırı teşkil ederler. Kişilik hakkına saldırı gerçekleştiğinde bunun hukuka aykırılığının ortadan kaldırılması için tedaviye rıza gösterilmesi gerektiği belirtilmektedir. Tedavide amaç kişinin sağlığına kavuşmasıdır. Rızanın yanı sıra, kanun tarafından yetkili kılınan kişilerce tıp bilimi verileri gözetilerek tıbbi müdahalenin uygulanması gerekmektedir. Bunun yanı sıra aydınlatılmış rıza alınarak tıbbi müdahalenin uygulanması tıbbi müdahalelerin hukukilik koşullarını oluşturur. Sağlık hizmetlerinin mutlak hedefi, bireylerin tam sağlık hali içinde olmasıdır. Bu itibarla, aşılar tarih boyunca meydana gelen pandemi ve epidemiler sonucu, bulaşıcı hastalıklarla mücadele doğal olarak önem kazanmıştır. Bulaşıcı hastalıkların ölüm oranlarını artırdığı konusunda şüphe yoktur. Bu gerçek insan oğlunun tarihsel hafızasında yer etmiştir. Kamu otoriteleri, bulaşıcı hastalıkların yayılması sonucunda ortaya çıkan yüksek oranlı ölümlere karşı önlemler almak zorunda kalmışlardır. Bu kapsamda, salgın hastalıkların önlenmesinde en önemli önlem ve buluş, aşı ve aşılama olarak ortaya çıkmıştır.

Aşılar, bulaşıcı virüs veya bakteri kaynaklı hastalıkların yayılmasının sonucu olarak ortaya çıkabilecek yükleri azaltan en büyük halk sağlığı araçlarından biridir. Ancak günümüz toplumda da aşıya şüphe ile bakılmış ve aşı karşıtı hareketler yayılmaya devam etmektedir. Aşı tereddüdü birkaç sebebe bağlı olarak ortaya çıkabilir. Bu sebepler, aşıların olası yan etkilerine yönelik korku, aşının içeriği ve bileşenleri konusundaki belirsizlik, dini nedenler veya önerilen aşılamanın devlet tarafından kapsanmaması durumlarında aşı fiyatlarına bağlı ekonomik nedenler olabilir.

Tezin ilk bölümünde Kişiler Hukuku kapsamında tıbbi müdahale kavramı incelenmiştir. Kişiler Hukuku kapsamında tıbbi müdahaleler, kişilik haklarını ihlali teşkil ederler. Aynı zamanda tıbbi müdahalede bulunulması, kişilerin temel haklarından biri olan yaşam hakkı ile doğrudan ilgilidir. Zira Türkiye Cumhuriyeti Anayasası'nın 13. maddesi bu kapsamda temel hak ve hürriyetlerin ancak kanun ile sınırlanabilir olduğunu açıkça belirtmiştir. Tez kapsamında incelenecek olan konu aşıların kanuni dayanaklarının incelenmesi Anayasa'nın bu hükmü çerçevesince önem arz etmektedir. Tıbbi müdahalelerin kanuniliğinin söz konusu olması halinde zikredilmesi gereken bir diğer Anayasal hüküm ise Anayasa'nın 17. maddesidir. Bu hüküm de Anayasa'nın 17. maddesi ile, yaşam hakkının Anayasal çerçevede korunması amaçlanmış ve kişilere kanunda belirtilen haller ve tıbben zorunluluğun bulunduğu haller dışında tıbbi müdahalelerde bulunulamayacağına dair ana ilkenin çerçevesi çizilmiştir.

4721 sayılı Türk Medeni Kanunu'nun 23. maddesi, kişilik haklarının kişiye sıkı sıkıya bağlı bir hak olduğunu açıkça ifade etmektedir. Aynı zamanda, "insan kökenli biyolojik maddelerin alınması, aşılanması ve nakli" olarak birtakım tıbbi müdahalelerin gerçekleştirilmesi de açıkça yazılı rıza beyanı verilesine bağlanmıştır. Bu madde, Anayasa'nın getirdiği temel hakkın, Özel Hukuktaki görünümü olarak karşımıza çıkar. Tıbbi müdahalelerin hukuka aykırılık teşkil etmemeleri için rızaya dayanması, kişilerin vücut bütünlüğüne veya bireylerin manevi bütünlüğüne saldırı teşkil

eden tıbbi müdahalelerin kişilik haklarına saldırı niteliği taşımamasının ön koşuludur. Bu sonuç, Türk Medeni Kanunu'nun 24. Maddesinde yer alan ilke kapsamında kişiliğin korunmasını amaçlar.

Rıza gösterilmesi şartına ek olarak, yetkili kişinin iyileştirici nitelikte olan ve tedavi amacı güden tıbbi müdahaleyi, tıp biliminin kurallarına uygun olarak gerçekleştirmesi gerekmektedir.

1219 sayılı Tababet ve Şuabatı Sanatlarının Tarz-ı İcrasına Dair Kanun'un 3. Maddesi kapsamında, hekimlere tıbbi müdahale uygulama yetkisi tanınmıştır. Bu yetkiler muayene, teşhis ve tıbbi müdahalelerde bulunma yetkisidir. Şüphesiz ki aşı hekimlerce uygulanabilecek tıbbi müdahaleler kapsamında değerlendirilir. Bir tıbbi müdahale örneği olarak aşının kimler tarafından uygulanabileceği ise, tezin ikinci bölümünde ele alınmıştır.

Yukarıda Hukukumuzda aşının, rızaya dayalı tıbbi müdahalelerden biri olarak değerlendirildiğini ifade etmiştik. Bu kapsamda zorunlu aşı kavramı, mevzuatımızda 1593 sayılı Umumi Hıfzısıhha Kanunu'nun 88. maddesinde düzenlenmiştir. Bu madde kapsamında, Türkiye'deki her bireye çiçek aşısının uygulanması zorunluğu hüküm altına alınmıştır. Hemen ifade etmek gerekir ki, 1930 tarihli Umumi Hıfzısıhha Kanunu'nda yer alan bu hükümdeki söz konusu hastalık, günümüzde elimine edilerek tamamen ortadan kaldırılmıştır.

Aşının tıbbi müdahale olarak hukuki niteliği, çeşitli Anayasa Mahkemesi ve Yargıtay kararlarına da konu olup incelenmiştir. Bu kapsamda Halime Sare Aysal Kararı, Salih Gökalp Sezer Kararı, Muhammet Ali Bayram kararı, Esma Fatıma Kızılsu & Rukiyye Erva Kızılsu Kararı ve çeşitli Yargıtay Kararları da ele alınmıştır. Yargıtay nezdinde verilen kararlar, Anayasa Mahkemesi nezdinden verilen kararlarda benimsenen yaklaşıma paralel olarak hukuki olarak temellendirilmektedirler. Mahkemelerin hukuki temellendirmeleri küçüklerin, akıl hastalarının, ayırt etme gücü bulunmayan

bireylerin ya da herhangi bir başka neden ile rıza verme ehliyeti bulunmayan kişiler üzerinde tıbbi müdahalede bulunulabilmesi için, bu kişilerin doğrudan yararı bulunması gerekçesi üzerine inşa edilmektedir. Bu hususlara ek olarak, tıbbi müdahaleye rıza gösterme yeteneği bulunmayan küçüğe, akıl hastasına ve benzeri nedenlerle bu yetenekten mahrum bir ergine sadece yasal temsilcisinin veya kanun tarafından belirlenen bir kişi veya makam ve kuruluşun izni ile müdahalede bulunulabileceği genel ilkeler olarak mahkeme kararlarında hüküm altına alınmıştır. Öte yandan bu halde dahi, rıza verecek kişi, makam veya kuruluşlara, müdahalenin amacı, niteliği ile sonuçları ve tehlikeleri hakkında uygun bilgi verilmesinin zorunlu olduğu da vurgulanmıştır.

Aşılar zorunlu aşılar ve tavsiye edilen aşılar olmak üzere iki gruba ayrılmaktadırlar. Bu çalışmada aşıların uygulanmasının zorunlu olup olamayacağı sorgulanmıştır. Aşıların bir tıbbi müdahale örneği olarak kişilik haklarına saldırı niteliği taşımamaları ve hukuka uygun olabilmeleri için Türk Hukuku'nda kanun tarafından izin verilen şekilde aşılama faaliyetlerinin gerçekleştirilmesi gerekir. Bu aşılama faaliyetinin hukuka uygun olabilmesi için öncelikle kanuna uygun rızanın verilmiş olması aranır. Nitekim yukarıda belirtildiği üzere, Türk Hukuku'ndaki tek zorunlu aşı, 1593 sayılı Umumi Hıfzısıhha Kanunu'nda düzenlenen çiçek aşısıdır. Diğer aşılar ise Sağlık Bakanlığı'nın Genişletilmiş Bağışıklama Programı Genelgesi kapsamında uygulanmaktadır. Bu genelgede özellikle on üç adet çocukluk dönemi aşısı planlanmıştır. Türkiye'de çocukluk dönemi aşıları, Sağlık Bakanlığı tarafından "difteri, boğmaca, tetanoz, çocuk felci, hepatit B, hepatit A, H. influenza tip b, tüberküloz, kızamık, kabakulak, kızamıkçık, suçiçeği ve zatürre" olarak ilan edilmişlerdir.

Aşıların zorunlu olarak uygulanmalarına ilişkin Avrupa İnsan Hakları Mahkemesi Büyük Dairesi'nin "Vavřička ve Diğerleri v. Çek Cumhuriyeti" Kararı başta olmak üzere karşılaştırmalı hukukta, zorunlu aşı kavramının hukuki niteliği çeşitli uluslararası yargı kararları da dikkate alınarak

incelenmiştir. Zorunlu aşı, belirli bir aşının kişi tarafından kendi rızasıyla yaptırılmamasının hukuki yaptırım ile karşılaşmasıdır. Yaptırım aşının zorla uygulanması, para cezası verilmesi veya aşılanmayan kişinin belirli sosyal ve hukuki imkanlardan istifadesinin engellenmesi şeklinde ortaya çıkabilmektedir.

Kişiler Hukuku kapsamında aşı uygulamaları da çalışmanın ikinci bölümünde incelenmiş olup, Türkiye'de çocukluk dönemi aşılarının ve bu aşıların kanuni zeminine ilişkin tartışmalar ile Covid-19 aşılarının yanı sıra HPV aşılarına ilişkin kanuni düzenlemeler, çıkarılan genelgeler incelenmiştir. Bu kapsamda özellikle HPV aşı uygulamaları üzerinde ilk derece mahkemelerinin kararları ile aşıların aşı takvimine alınması, aşı bedelinin Devlet tarafından karşılanmasına ilişkin açıklamalarda bulunulmuştur.

Çocukluk dönemi aşılarının zorunluluğu tartışmaları kapsamında, çocuğun yüksek yararı, velayet hakkı ve çocuğun katılımı kavramları bu çalışmada ulusal ve uluslararası mevzuat göz önünde bulundurularak incelenmiştir.

Kişiler Hukuku kapsamında aşı ve aşılama uygulamaları, Türk Hukuku'nda aşıların kim ya da kimler tarafından uygulanacağı ilgili mevzuat değerlendirilerek kaleme alınmıştır. Bu değerlendirme, Umumi Hıfzısıhha Kanunu'nun yanı sıra, 5258 sayılı Aile Hekimliği Kanunu, 6283 sayılı Hemşirelik Kanunu ile bunlara dayanılarak çıkartılan bazı yönetmelikler ile diğer ilgili yönetmelikler kapsamında gerçekleştirilmiştir.

Aşı uygulamaları kapsamında bireylerin geçerli rıza beyanlarında bulunmaları, gerçek kişilerin hak ehliyetleri ve fiil ehliyetlerinin mevcudiyetine göre farklı ihtimaller göz önüne alınarak değerlendirilmelidir. Bu çalışmada, tam ehliyetliler, tam ehliyetsizler ve sınırlı ehliyetlilerin geçerli rıza beyanında bulunmalarına ilişkin koşullar ayrı ayrı ele alınmıştır. Geçerli rıza beyanında bulunulmasına ilişkin koşulların incelenmesinin ardından, aydınlatma yükümlülüğü ve de aydınlatılmış rıza kavramları incelenmiştir.

Bu çalışmada belirtildiği üzere, çocukluk dönemi aşıları kapsamında incelenmesi gereken husus, bu kişilerin ergin olmaması halidir. Mevzuatımızda bu durum, 1219 sayılı Tababet ve Şuabatı Sanatlarının Tarz-ı İcrasına Dair Kanun'un 70. maddesinde, hastaların küçük ya da kısıtlı olmaları halinde, hastanın kanuni temsilcisinden ya da veli veya vasisinden izin alınması gerektiği düzenlenmiştir.

Türk Medeni Kanunu'nun 16. Maddesinde düzenlenen "ayırt etme gücüne sahip küçük veya kısıtlılar"ın tıbbi müdahalede bulunulması ihtimalinde rıza beyanında bulunmaya ehil olup olmadıkları, tıbbi müdahalelerin hukuka uygunluk şartları bağlamında ileri sürülen farklı görüşler değerlendirilerek incelenmiştir. Birinci görüş sahipleri, çocuğun üstün yararı ilkesini göz önünde bulundurarak varsayımsal rıza kavramını doktrine kazandırmıştır. Bu görüşü savunanlara göre, tıbbi müdahalenin hukuka uygunluğunu sağlayacak olan rıza, hastanın veli ya da vasileri veya yasal temsilcilerine danışılması ve de üstün özel yararının göz önünde bulundurulması ile ulaşılacak sonuca dair bir varsayımsal rızanın mevcudiyeti halinde tıbbi müdahalede bulunulmasıdır. İkinci görüş sahipleri veli, vasi ya da yasal temsilci tarafından tıbbi müdahaleye izin verilmesi ile rıza aranması koşulunun tamamlandığını savunmaktadır. Üçüncü savulan görüş ise, küçük tarafından verilen rıza beyanı ile veli, vasi ya da yasal temsilci tarafından verilen izni birlikte değerlendirerek sonuca ulaşmaktadır.

Çalışmanın dördüncü bölümünde, aşı uygulamaları sonucu ortaya çıkan zararlardan sorumluluk konusu incelenmiştir. Avrupa İnsan Hakları Mahkemesi'nin "Seyit Baytüre ve Diğerleri v. Türkiye" kararında, devletlerin tavsiye edilen aşıların yan etkilerinden sorumlu tutulamayacağına ilişkin karar verilmiştir. Somut olayda, çocuk felci aşısı çocuğa uygulanmış ve çok nadir görülen bir komplikasyonun ortaya çıkması üzerine aile tazminat talebinde bulunmuştur. Ailenin tazminat talebi, idare tarafından reddedilmiştir. İdarenin bu zararda kusuru olmaması nedeni ile sorumluluğunun olamayacağına dair hüküm kurulmuştur.

Bu çalışma kapsamına hangi aşıların zorunlu, hangi aşıların tavsiye edilen aşı olduğuna hangi otorite tarafından karar verileceği ve de aşı bedellerinin devlet tarafından karşılanıp karşılanması hususları incelenmiştir. Aşı zorunluluğu söz konusu olduğunda ise, aşı uygulaması nedeni ile ortaya çıkan zararların devlet tarafından kusursuz sorumluluk esasına dayanılarak karşılanması gerektiği düşünülmektedir.

Anayasalarda devletlerin pozitif yükümlülükleri arasında, yaşam hakkını korumak da sayılmaktadır. Bu kapsamda, aşı bedellerinin geri ödenmesi nezdinde, güncel olarak medyada kendine yer edinen HPV aşısına ilişkin tartışmalar ve aşı bedelinin geri ödenmesine ilişkin hukuki süreç de çalışmada incelenmiştir.

Tavsiye edilen aşıların seçilmesi konusunda ise, Sağlık Bakanlığı bünyesinde oluşturulan Bağışıklama Danışma Kurulunun tavsiyesi üzerine bu aşılara karar verildiği anlaşılmaktadır.

Anahtar Kelimeler: Kişilik Hakları, Aşılama, Tıbbi Müdahale, Tıbbi Müdahalede Rıza, Vücut Bütünlüğü

ABSTRACT

Vaccination as a Medical Intervention Example in Turkish Civil Law

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Vaccination is a medical intervention. This intervention is carried out either by injection or in the form of oral drops. Each vaccine administered through different application methods is a medical intervention, and the principle in this medical intervention is that it is performed with the consent of individuals. Many vaccines have been developed against numerous diseases worldwide.

The term medical intervention changes and evolves through time. When examined from the perspective of the Law of Persons, it is emphasized that in order to prevent a legal violation of the personality rights, consent must be given for medical treatment with the aim of restoring the individual's health. In addition to the requirement of obtaining consent, it is necessary for the authorized person to perform the medically beneficial and treatment-oriented medical intervention in accordance with the principles of medical science.

Since, the absolute wellbeing of individuals is a prior goal in health care, battling with contagious diseases is naturally gained importance, especially when pandemics or epidemics occurred throughout history. There is no doubt that infectious diseases raise mortality rates. In accordance with this historical fact and the consequences of contagious diseases affecting in public's memory, public authorities aimed to take precautions, and vaccination is the most important invention and precaution in this regard.

Vaccinations are one of the greatest public health tools which decrease burdens which can be the result of the dissemination of contagious virus or bacteria related diseases. However, vaccine hesitancy and antivaccination movements in society keep spreading. Vaccine hesitancy may have several reasons. These reasons can be the fear regarding the possible side effects of vaccines, uncertainty regarding the vaccine's ingredients and substances, religious reasons, or economic reasons due to vaccine prices if that recommended vaccination is not covered by the State.

Keywords: Personality Rights, Vaccination, Medical Intervention, Consent in Medical Intervention, Bodily Integrity

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ABBREVIATIONS

ACC	: Austrian Civil Code
CTFEU	: The Consolidated Treaty on the Functioning of the European Union
D.	: Date
ECtHR	: European Court of Human Rights
FCC	: French Civil Code
GCC	: German Civil Code (GCC)
No.	: Number
O.J.	: Official Journal
Oviedo Convention	: The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Bioethics Convention (European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5)
PACE	: The Parliamentary Assembly of the Council of Europe
SCC	: Swiss Civil Code
STIKO	: Standing Committee on Immunization
TCC	: Turkish Civil Code
TCO	: Turkish Code of Obligations
TMA	: Turkish Medical Association
UNICEF	: United Nations International Children's Emergency Fund
UNCRC	: The United Nations Convention on the Rights of the Child
WHO	: World Health Organization

PREFACE

Vaccinations are known as the greatest public health protection tool. Carrying the image of being the most effective way to prevent contagious diseases, every country's health care authorities have their own vaccination schedules and policies. However, after recently occurred pandemic, the legitimacy of vaccination mandates having been questioned. Yet, even before the Covid-19 pandemic, mandatory vaccinations had been called into question by parents or legal guardians who refuse to application of vaccinations their children.

Objectively, medical intervention can be described as, a physical and psychological initiative that is applied by the individuals who are authorized to practice the medical profession for protecting health, diagnosing, and treating diseases within the boundaries of medicine in accordance with professional obligations and liabilities.

It is obvious that, even though the term mandatory is not applied to the legislation, the State's authority differentiates regarding the applicability of vaccinations. The legal ground for vaccinations, in accordance with commonly acknowledged vaccination prescriptive that is observed in various countries requires an examination in accordance with Civil Law.

INTRODUCTION

1. The Significance and Objective of the Subject

Vaccinations are one of the medical interventions that can have both preventive and curative effects. When it comes to medical interventions without several conditions, that intervention will be considered unlawful. In this regard, primarily, the medical intervention should be necessary, a just cause should exist (justa causa), the patient's consent to treatment should be valid, an enlightenment needs to be carried out, and the intervention should be applied by the individuals who are authorized. These legitimacy conditions of medical interventions can be questionable in everyday life for instance, the necessity for a health care professional to apply the medical intervention, can be overlooked because of the crowded health care facilities and the application could be made by someone who is not a health care professional yet.

At first glance, vaccines can be conceivable as a preventive intervention. Especially, childhood vaccinations that are considered mandatory in the public eye. For some individuals, any intervention that is performed on a healthy body includes risks. As a result of this public belief, the anti- vaccination movements have been accelerated. This occasion arises this question on the legal ground: Have the lawmakers are not able to provide convincible legislation for medical interventions? What if the doctrine that prevails public health above the personal choices of individuals is not valid anymore because of the extinction of some diseases or acceptance that diseases or virus-related illnesses are a result of the course of nature? The constitutionality of childhood vaccinations and Covid-19 vaccinations became a controversial issue and individuals decided to take judicial proceedings. Many countries' supreme courts and the ECtHR's decisions on the constitutionality of mandatory vaccinations have been considered in the perspective of how human rights relate to vaccinations.

Another example can be the questionability about enlightenment and valid consent, during the COVID-19 pandemic, it can be questioned that the consent forms are covered the conditions of enlightenment to provide a valid consent. There can be several occasions that the conditions of enlightenment or valid consent are not fulfilled.

Authorities aim to prevent diseases beforehand, for that reason there are several other measures taken for preventing infections to spread. In other words, to “break the chain of infection” several legislations need to be adopted for creating a legal ground within the scope of personality rights.

2. The Plan of the Research

The thesis conducted within the scope of the discussion on the limits of medical intervention, based on the criteria to be determined, the analysis of data related to vaccinations, the evaluation of medical intervention and vaccine requirements within the scope of Civil Law (personality rights), the listing of legislative regulations on mandatory vaccinations in Comparative Law, the comparison of Articles in the Constitutions and relevant Laws of countries regarding medical intervention, and the evaluation of medical intervention and vaccination requirements within the scope of Civil Law (liability) is carried out within the framework of this study.

3. Sources of the Research

The Turkish Ministry of Health announced a vaccination schedule for children and there are thirteen vaccinations in this schedule. The Constitutional Court of the Republic of Türkiye adjudicated this issue, within the scope of the Constitutional Rights, Public Health Code (dated 24.04.1930, numbered 1593), and Law for the Protection of the Minors (dated 03.07.2005, numbered 5395). Yet, there are other Code’s that needs to be examined the lawfulness of vaccinations. There are also both international and national court decisions regarding COVID-19 and childhood vaccinations. These decisions have several peculiarities in common: being known as mandatory, the questioned constitutionality, the arising hesitancy towards vaccinations, the violation of personality rights through mandatory vaccines, and protecting public health by battling contagious diseases. Hence, mandatory vaccinations can be considered a medical intervention. Medical interventions' compliance with laws carries several criteria to prevent violation of personal rights. According to Private Law, medical intervention is against personality rights. In order not to invade personality rights, medical intervention should carry several criteria to be considered legal. Some of these criteria are mentioned in the mentioned in the significance and objective of subject heading.

Bearing all of these explanations in mind, it is necessary to establish criteria for mandatory vaccinations on a scientific scale within the scope of Civil Law.

In accordance with the above-mentioned issues, there are various legislations that directly effects the regulations regarding vaccinations. First and foremost, Turkish Civil Code numbered 4721 (O.J.:24607 D.: 08.12.2001) and Constitution of the Republic of Türkiye numbered 2709 (O.J.: 2709 D.: 09.11.1982) needs to be mentioned. Yet, there are other legislations that cover explanations regarding mandatory nature of vaccinations. Such as, Public Health Code numbered 1593 (O.J.:1483 D.: 06.05.1930), Code of Family Physicians numbered 5258 (O.J.: 25665 D.: 09.12.2004), Regulation on the Principles of Surveillance and Control of Communicable Diseases (O.J.:26537 D.: 30.05.2023), Code of Execution of Medicine and Medical Sciences numbered 1219 (O.J.: 863 D.: 14.04.1928), Medical Deontology Statue (O.J.: 10436 D.:19.02.1960), Medical Specialization Directive numbered 2002/4198 (O.J.:24790 D.:19.06.2022), Medical Specialization Directive numbered 7/6229 (O.J.:14511 D.: 18.04.1973), Presidential Decree No. 1 on the Organization of the Presidency (O.J.:30474 D.:10.07.2018), Law for the Protection of the Minors numbered 5395 (O.J.:25876 D.: 15.07.2005), Council of State Law numbered 2575 (O.J.:2575 D.:06.01.1982), Patients' Rights Statue (O.J.:23420 D.:01.08.1998), Patients' Rights Amendment Regulations (O.J.:28994 D: 08.05.2014), Code of Nursing numbered 6283 (O.J.:8647 D.: 02.03.1954), Administrative Procedure Law numbered 2577 (O.J.: 17580 D.:20.01.1982), Law on Organ and Tissue Procurement, Preservation, Transplantation, and Vaccination numbered 2238 (O.J.:16655 D.:03.06.1979), Population Planning Code numbered 2827 (O.J.:18059 D.: 24.05.1983), The Ordinance on Job and Duty Definitions of Healthcare Professionals and Other Professionals Working in Health Services (O.J.: 29007 D.: 22.05.2023), The Draft Law on Liability for Malpractice of Medical Services, The Ordinance on Social Security Institution Medicine Reimbursement (O.J.:31934 Repeating D.:25.08.2022), Turkish Criminal Code numbered 5237 (O.J.:25611 D.:12.10.2004), Ordinance of Inpatient Treatment Institutions Operating (O.J.: 17927 Repeating D.:13.01.1983)

SECTION I

MEDICAL INTERVENTION AND LAW OF PERSONS

1. In General

The Law of Persons mainly focuses on the person. The subject of the Law of Persons is, abstractly a person[1]. *"Person"* denotes to *"human"* in old Turkish languages as well[2]. Yet, when the term "*person*" is discussed, it is not only mean "*humans*" but also a collection of individuals' assets and values[3]. The values that constitute personality rights are life, health, bodily integrity, private life, honor and dignity and other personal values[4].

In other words, persons can be divided into "*natural persons*" or "*real persons*" and "*legal entities*"[5]. Naturally, medical intervention discussion will be related with the real persons only.

The collection of humans and assets is considered as a person with the condition of carrying designated features. Because of these reasons, the terms *"person"* and *"personality"* need to be discussed.

In legal parlance, besides the term "person", another term is used to refer to entities possessing the power over rights and obligations that term is *"personality"*[6]. In legal terminology, the term *"personality"* carries two meanings: a narrow sense and a broad sense. In the narrow sense, personality corresponds to the concept of a person, that is, the capacity for rights and obligations, and signifies the subject of rights. In the broad sense, personality has a much wider significance. In this sense, personality does

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[1] Dural and Öğüz, *Türk Özel Hukuku Cilt II Kişiler Hukuku*, 23rd. ed. (İstanbul: Filiz Kitapevi, 2022),5.
[2] Serap Helvacı, *Gerçek Kişiler*, 9th ed. (İstanbul: Legal Yayıncılık, 2021), 23.
[3] Helvacı, 26.
[4] Helvacı, 110-140.
[5] Ümit Gezder et al., "Turkish Civil Law," in *Turkish Private Law*, ed. Refik Korkusuz and Ferna İpekel Kayalı, 2nd ed. (Ankara: Seçkin, 2020), 38–39.; Jale G. Akipek, Turgut Akıntürk and Derya Ateş, *Türk Medeni Hukuku, Başlangıç Hükümleri, Kişiler Hukuku Cilt I*, 18th ed., (İstanbul: Beta Yayıncılık, 2022), 233.
[6] Akipek, Akıntürk and Ateş, 233

not merely denote the subject of rights, that is, the capacity for rights in other words *"the ability to be subject to the rights and obligations"*, as in the case of an individual.

This is why a distinction should be made between personality and a person. In this distinction, a fundamental aspect can also be evaluated as the concept of legal capacity. The fact that the concepts of person and personality are different can also be understood from Articles 47 and 48 of the Turkish Civil Code *(TCC)*. Article 47 of the TCC deals with legal entities, while Article 48 of the TCC concerns legal capacity.It would be appropriate to avoid using the term *"personality"* to denote legal capacity, which signifies the subject of rights and obligations. It is more accurate to express this concept using the term *"person"*.[7]

In Medical Law, when the discussions regarding to a *"person"* arise, a medical treatment's and medical intervention's conditions must be examined to reach a fair result. In the field of Health and Medical Law, it is of great importance to delineate the conceptual frameworks of certain fundamental terms closely related to medical liability law, which is considered a specialized area within general liability law.[8] These frameworks also constitute the conditions for the legality of medical intervention.

In terms of Private Law, medical intervention is a violation of personality values, and within this regard, medical intervention is a violation of Article 23 of the TCC.[9] Therefore, as above mentioned, several conditions must be fulfilled to provide a legitimate background for providing a lawful ground for medical interventions.[10]

Personality rights regarding medical interventions within the scope of ability to be subject to the rights and obligations are also questionable through examination of vaccines. Because the discussion within this regard contains violation of bodily integrity and the State's responsibility of providing the right to health. It could be said that there are obvious values that are crashing. The right to health and State's legislations that regulated vaccinations as mandatory are those values that carries conflictions.

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[7] Akipek, Akıntürk and Ateş, 234.
[8] Mehmet Demir, Hekim ve Hastane Yönünden Tıbbi Sorumluluk Hukuku, 1st ed. (Ankara: Yetkin, 2018), 73
[9] Türk Medeni Kanunu (Turkish Civil Code) O.J.: 24607 D.: 08.12.2001," 4721 § (22.11.2001).
[10] Helvacı, 115; Hakan Hakeri, *Tıp Hukuku*, 16th ed. (Ankara: Seçkin, 2019), 235.

1.1. The Concept of Persons

A person is an entity that owns right[11]. In law, a being who possesses *"the ability to be subject to the rights and obligations"* is called a "*person*".[12] In other words, a person is an owner and the subject of the right[13]. Undoubtedly, "*human*" is the first term that comes to mind when the capacity to acquire rights is questioned[14]. In other words, "*human*" is the first term when "*person*" is mentioned.[15]

In Turkish Law, according to Article 28/I of the TCC, the condition for gaining personality as a real person is to be born alive and precise. According to Article 26/II, a unborn child (fetus or embryo) will be capable of acquiring rights on the condition of being born alive afterwards. The related article provides legal protection to an unborn child, with the condition of being born alive and precise[16]. As a result of Article 28, it could be said that an infant is a person that has personality rights which requires a legal protection. Yet, when it comes to medical interventions, the essential requirements for their lawfulness of a medical intervention include an explanation of the intervention through enlightenment and receiving valid consent. When it comes to the childhood vaccinations, there is a medical requirement to receive the vaccinations even after being born and throughout the adulthood age for reach an immunization level to prevent spreading. Bearing these explanations in mind, it could be said that there is no possible way to receive valid consent when it comes to the inoculation of childhood vaccinations. As a result of this, the parent or legal guardian needs to give the permission. The parents or legal guardians must receive the enlightenment that includes explanation in order to provide valid permission.

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[11] Akipek, Akıntürk and Ateş, 272-273; Helvacı, *Gerçek Kişiler*, 25; Oğuzman, Seliçi, and Oktay Özdemir, *Kişiler Hukuku: Gerçek ve Tüzel Kişiler*, (İstanbul: Filiz Kitabevi,2022) 2.
[12] Gezder et al., "Turkish Civil Law," 39; Dural and Öğüz, *Türk Özel Hukuku Cilt II Kişiler Hukuku*, 5.; Oğuzman, Seliçi, and Oktay Özdemir, 43; Akipek, Akıntürk and Ateş, 231.
[13] Akipek, Akıntürk and Ateş, 231
[14] Dural and Öğüz, *Türk Özel Hukuku Cilt II Kişiler Hukuku*, 5.
[15] Dural and Öğüz, 5.
[16] Akipek, Akıntürk and Ateş, 229-230; Dural and Öğüz, 17 ; Helvacı, 29-31; Oğuzman, Seliçi, and Oktay Özdemir, 7-8; Rona Serozan, *Medeni Hukuk Genel Bölüm/ Kişiler Hukuku*, 9th ed. (İstanbul: On İki Levha, 2022), 424 ;Ayşe Arat, "Gerçek Kişilerde Kişiliğin Sona Ermesi," *Selçuk Üniversitesi Sosyal Bilimler Meslek Yüksekokulu Dergisi* 9, no. 1–2 (2006): 258.

1.2. The Concept of Personality

Article 23 of the TCC openly conveys the nature of personality rights[17]. The article reads as follows: *"No person may partially or completely waive their capacity to have rights and capacity to act.*

No person can waive their freedoms or restrict them contrary to law or morality.

The collection, vaccination, and transplantation of human-origin biological materials are possible upon written consent. However, those who have undertaken an obligation to provide biological materials cannot be compelled to fulfill their performance; neither material nor moral compensation can be demanded."

A person possesses *"the ability to be subject to the rights and obligations"*, however, accepting a human or any kind of entity that consists of *"the ability to be subject to the rights and obligations"* as a person will not be enough to be considered as a person. Because first of all, a person's capability to benefit from *"the ability to be subject of the rights and obligations",* a person (or the person's representative) must conduct several legal transactions. Therefore, that person must entitle the capacity to act. In addition, a person is not all alone in the universe. A person lives among a society and takes a place in society. With the aim of awakening respect and prosperity among other parts of society, a person must possess several values which are protected by the law. These values are a person's life, bodily integrity, honor, reputation, and name.[18] As it can be seen, a person is surrounded by the values that provide to reflect their own existence and determine his/her place in society.[19]

In doctrine, there are various definitions of personality rights.[20] According to one definition, personality rights contain all personal assets and provide individuals with the right to exist, to prosper, to be free, and to be respected.[21] Yet another definition describes personality rights as, pecuniary, and intangible moral values that

[17] Osman Gökhan Antalya and Murat Topuz, Medeni Hukuk Cilt: I, 4th ed. (Seçkin Yayıncılık, 2021), 159.
[18] Dural and Öğüz, *Türk Özel Hukuku Cilt II Kişiler Hukuku*, 8.
[19] Dural and Öğüz, 9.
[20] Osman Gökhan Antalya and Murat Topuz, *Medeni Hukuk Cilt: I*, 4th ed. 157; Osman Gökhan Antalya, *Manevi Zararın Belirlenmesi ve Manevi Tazminatın Hesaplanması*, 2017, 49; Fulya Erlüle, *6098 Sayılı Türk Borçlar Kanunu'na Göre Bedensel Bütünlüğün İhlalinde Manevi Tazminat* (İstanbul, 2011), 95.
[21] Antalya and Topuz, *Medeni Hukuk Cilt: I*, 95.

make that person perceived as human and form an individual's personality.[22] According to *Serozan*, personality right is a right that pertains to a person's all of the pecuniary and intangible moral values, her/his life, bodily integrity, health, honor, reputation, right of privacy, statements, pictures, name, work, freedom, and economical freedom that make that person human and form a person's personality.[23] According to *Kılıçoğlu*, personality right in general as a strictly personal and absolute right that encompasses personal assets, the right to live, health, freedoms, reputation and honor, private life, name, picture, and emotional state.[24]

It could be said that the description of personality rights is disputed. According to one view, personality right is a monopoly right that contains every personal value and provides authority in case of interference against everyone.[25] Another interpretation is that personality right contains every aspect of a person's reputation and all the assets that provide that person prosper in his/hers own personality freely.[26]

Since these rights are accepted as personality rights, these rights are referred to as *"absolute rights"*.[27] In addition to being referred to as an absolute right, according to *Zevkliler*, personality right is a prohibitive right. The term "prohibitive right" is used as a translation of *"Ausschlussrecht"*.[28] But nowadays, the translation of this term can be referred to as *"right of exclusion"*.[29]

Because of being an absolute right, personality rights provide the rightful owner with authority in case of interference against every person who interferes.[30]

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[22] Antalya and Topuz, 157–158 as cited in; Bernhard Schnyder et al., *Das Schweizerische Zivilgesetzbuch*, 13th ed. (Zürich: Schulthess Polygraphischer Verlag, 2009), 99.
[23] Rona Serozan, "Kişilik Hakkının Korunmasıyla İlgili Bazı Düşünceler," *İstanbul Üniversitesi Mukayeseli Hukuk Araştırmaları Dergisi* 11, no. 14 (November 21, 2011): 93, https://dergipark.org.tr/tr/download/article-file/14235.
[24] Ahmet M. Kılıçoğlu, *Şeref, Haysiyet ve Özel Yaşama Basın Yoluyla Saldırılardan Hukuksal Sorumluluk* (Ankara: Turhan Kitabevi, 1993), 4.
[25] Zevkliler, "Tedavi Amaçlı Müdahalelerle Kişilik Hakkına Saldırının Sonuçları (1982 - 1983 Öğretim Yılı Açılış Dersi Metni)," 2.
[26] Mustafa Dural and Turgut Öz, *Türk Özel Hukuku C. IV, Miras Hukuku*, 5th ed. (İstanbul, 2011), 94.
[27] Kahraman, "Medeni Hukuk Bakımından Tıbbi Müdahaleye Hastanın Rızası," 482.
[28] Zevkliler, "Tedavi Amaçlı Müdahalelerle Kişilik Hakkına Saldırının Sonuçları (1982 - 1983 Öğretim Yılı Açılış Dersi Metni)," 2; Aydın Zevkliler, *Kişiler Hukuku : Gerçek Kişiler* (Ankara, 1981), 263–64.
[29] "§120 SGG [Akteneinsicht,Kopien]," 2022, https://09bc5613c6b7a74878d71c9cc389a06acf41ca25.vetisonline.com/r3/search.(accessed 10.05.2023)
[30] Osman Gökhan Antalya and Murat Topuz, *Medeni Hukuk Cilt: I*, 4th ed. (Seçkin Yayıncılık, 2021), 159 as cited in: Heinz Hausheer and Aebi-Müller, *Das Personenrech Des Schweizerischen Zivilgesetzbuches* (Bern, 2008), 121–22.

Personality rights can only be exercised by the owner of that right[31]. Personality rights are inextricably connected to the individuals. That is another reason why it is untransferable and cannot be renounced.[32]

Within that context, a person will involve in the law area with all of the values that possessed. In conclusion, according to explanations above, personality means, *"all of the entities that carries legal and moral characteristic that worth protected under the roof of law."*. In other words, *"personality means rights that covers a person's ability to be subject to the rights and obligations and capacity to act, life, bodily integrity, reputation and honor, private life, name, etc."*[33]. The capacity to subject oneself to the rights and obligations is taken into account as a synonym of the personality.[34]

The Article 23 is one of the fundamental principles established by the Articles 13 and 17 of Constitution, which is tasked with safeguarding individuals not only against the State but also against each other and society; it also applies to private law matters.[35]

Vaccination is strictly related to the right to health; any individual who lives in a civil society has the right to receive proper health care. Treatment is part of the right to health. Vaccination can also be part of a treatment. Hence, vaccinations can be divided into two groups, preventive and curative vaccinations. When an individual wishes to receive a curative vaccination, this expectation from those individuals is directly related to the Health Care Authorities' approach. For example, HPV vaccinations are both preventive and curative.

Individuals who are diagnosed to carry several types of HPV virus are recommended to receive the HPV vaccination as part of their treatment[36]. Another example is tetanus disease, which doctors diagnose by examining the patient and

[31] Antalya and Topuz, *Medeni Hukuk Cilt: I*, 159; Mustafa Dural and Tufan Öğüz, *Türk Özel Hukuku Cilt:2, Kişiler Hukuku*,23th ed. (İstanbul, 2022), 108.
[32] Antalya and Topuz, *Medeni Hukuk Cilt: I*, 159; Dural and Öğüz, 97.
[33] Dural and Öğüz, *Türk Özel Hukuku Cilt II Kişiler Hukuku*, 9.
[34] Dural and Öğüz, 39.
[35] Saibe Oktay-Özdemir, "Türk Hukukunda Başkası Lehine Tıbbi Müdahaleler", Prof. Dr. Türkân Rado'nun Anısına Armağan, (İstanbul: On İki Levha Yayıncılık, 2020), 325
[36]Yicheng Mo et al., "Prophylactic and Therapeutic HPV Vaccines: Current Scenario and Perspectives," *Frontiers in Cellular and Infection Microbiology* 12 (2022): 2, https://doi.org/10.3389/fcimb.2022.909223.

looking at some signs and symptoms. There are no laboratory tests to confirm tetanus. According to the Turkish Ministry of Health, tetanus is a disease that requires immediate medical attention as soon as it is diagnosed. The patient is immediately hospitalized, and human tetanus immunoglobulin or horse-derived antitoxin is inoculated immediately. Treatment is continued with drugs that will control the contractions, aggressive care of the wounds to prevent infection, and antibiotics. The infected individual does not become immune. The only way to be immunized is to get vaccinated[37]. Another preventive vaccination is applied when an individual is infected with rabies or there is a possible infection because of a bite or a scratch of an animal, such as cats or dogs, even if the animal in question is a domestic animal, a vaccination to prevent rabies is recommended by medical authorities. The Turkish Ministry of Health published a Directive regarding to "Rabies Prevention and Control Directive"[38], because of mentioned reasons. The mentioned HPV, tetanus and rabies can be described as curative vaccinations. Which is directly related to the right of health. Every county's health authorities aim to set a threshold for immunization for transferable diseases, even if those diseases are not transmitted from one human to another, such as tetanus. Within this scope, making provisions for direct measures is important. Yet, when it comes to immediate and vital medical interventions, invading the person's consent can become an issue.

On the other hand, discussions regarding preventive vaccinations can carry possible dangers regarding to personality rights. For example, parents of an infant after the enlightenment regarding one of the childhood vaccinations can reject the inoculation the vaccination in question. Or after receiving a bite or scratch from an animal, an individual might reject the inoculation with a rabies vaccination, claiming to know the animal. Thus, personality needs to be taken into account when settling regulations for immunization.

Vaccination is an intervention that occurs through the injection of a liquid that has been developed in accordance with scientific and medical research. A person's free will to allow the inoculation of a vaccination is strictly related to how a legal

[37]T.C. Sağlık Bakanlığı, "Tetanos Hastalığı," https://asi.saglik.gov.tr/liste/48-tetanoz-hastal%C4%B1%C4%9F%C4%B1.html. (accessed 12.06.2023)
[38]T.C. Sağlık Bakanlığı Temel Sağlık Hizmetleri Genel Müdürlüğü, "Kuduz Korunma ve Kontrol Yönergesi," Pub. L. No. 7755, No: B100TSH0110002 (2001), http://www.istanbulsaglik.gov.tr/w/mev/mev_yonr/y_kuduz_kont_kor_y.pdf. (accessed 12.06.2023)

system regulates and defines the terms "*person*" and "*personality*". Within this scope, there are several subjects that needs to be examined. For example, what if there is a vaccination inoculation that has been applied by an individual who is not authorized?

2. THE LAWFULNESS CONDITIONS OF MEDICAL INTERVENTION

There are several basic rules for a legitimate medical intervention, these are: the necessity of medical intervention with the aim of cure the patient[39], a just cause, a valid consent from the patient that gained through enlightenment, the necessity to be applied by the individuals who are authorized[40] and complying with scientific and medical methods of medicine as a branch of science. As it can be seen, due to the attributed importance of any interventions' legitimacy, interventions as legal action needs to be carried on within the framework of the law. The primary criteria above mentioned have been accepted by not only scholars but also find their own place in the majority of law systems.

2.1. Medical Intervention and Personality Rights

Every medical intervention will involve an intervention directed towards bodily integrity or the moral integrity of the individual, it is necessary for this intervention to be based on consent in order to avoid infringing upon personal rights.[41]

Undoubtedly, personality rights are one of the most important values that needs to be protected application of any medical intervention. Individual's personality rights required to be considered through medical interventions. Individuals obtains personality rights only for being a human. Because of this reason, personality has to be taken account into alongside acquiring a valid consent through informing a patient[42].

Individuals consent regarding to medical intervention is strictly connected with the bodily integrity and right to live.[43] A person's bodily integrity and life is guaranteed

[39] Helvacı, 115.
[40] Hakeri, 235–36. ; Helvacı, 115.
[41] Saibe Oktay-Özdemir, "Tıbbi Müdahaleye ve Tıbbi Müdahalenin Durdurulmasına Rızanın Kimler Tarafından Verileceği", Prof. Dr. Rona Serozan'a Armağan, (İstanbul: On İki Levha Yayıncılık, 2010), 1315
[42] Taneri, *Hasta ve Hekim Hakları ile Uygulamadan Örnek Hükümlerle Hekim Ceza Sorumluluğu*, 49.
[43] Özge Yücel, *Ayırt Etme Gücünden Yoksun Kişiler Adına Alınan Tibbi Kararlarda Özerklik Hakkinin Korunması Ve Hasta Talimatları,* 1st ed., (Ankara: Seçkin, 2018), 37 as cited in; Rainer Beckmann, "Patientenverfügungen: Entscheidungswege nach der gesetzlichen Regelung," *Medizinrecht* 27, no. 10

under the Constitution, and one of the greatest values that are incorporated into personality.[44] Within this scope, consent to any medical intervention is subject to protection of personality in private law.[45] With the same reason, consent to medical intervention should be differentiated from capacity to act in medicine contract.[46] Consent for the medical interventions is considered under the roof of personality rights.[47]

Hence, bodily integrity and the right to life are fundamental rights and freedoms, restriction of these rights are protected under the roof of the Constitution. According to first sentence of the Article 13 of the Turkish Constitution, "*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.".* When it comes to medical interventions, even though there are conditions that are required for the conformity of the law, lacking the conformity conditions may occur. Mandatory medical interventions can set an example. The mandatory vaccinations must be evaluated within the scope of the medical interventions.

(October 2009): 582, https://doi.org/10.1007/s00350-009-2497-4; Martino Mona, "Wille oder Indiz für mutmaßlichen Willen?: Die Konzeptualisierung und strafrechtliche Bedeutung der Patientenverfügung im Kontext einer kulturübergreifenden Bioethik," *Ethik in der Medizin* 20, no. 3 (September 2008): 3, https://doi.org/10.1007/s00481-008-0570-6; Julia Hornung, *Die psychiatrische Patientenverfügung im Betreuungsrecht: Ihre zulässigen Regelungsgegenstände – unter besonderer Beachtung der antizipierten Selbstbestimmung gegen sich selbst*, 1. Auflage, Schriften zum Bio-, Gesundheits- und Medizinrecht, Band 27 (Baden-Baden: Nomos, 2017), 79; Regina E. Aebi-Müller et al., *Arztrecht*, Stämpflis juristische Lehrbücher (Bern: Stämpfli Verlag, 2016), 159.

[44] Yücel, *Tibbi Kararlarda Özerklik Hakkinin Korunması ve Hasta Talimatları*, 37 as cited in; Mona, "Wille oder Indiz für mutmaßlichen Willen?," 249; Friedhelm Hufen, *Geltung und Reichweite von Patientenverfügungen: der Rahmen des Verfassungsrechts*, 1. Aufl (Baden-Baden: Nomos-Verl.-Ges, 2009), 333–34; Heinz Hausheer and Aebi-Müller, *Das Personenrech Des Schweizerischen Zivilgesetzbuches* (Bern, 2008), 122; Jochen Taupitz, *Empfehlen sich zivilrechtliche Regelungen zu Absicherung der Patientenautonomie am Ende des Lebens? Gutachten A für den 63. Deutschen Juristentag*, Verhandlungen des dreiundsechzigsten Deutschen Juristentages / hrsg. von der Ständigen Deputation des Deutschen Juristentages Gutachten, Bd. 1, Gutachten, Teil A (München: Beck, 2000), 12; Torsten Verrel, Alfred Simon, and Christina Rose, *Patientenverfügungen: rechtliche und ethische Aspekte*, Orig.-Ausg, Ethik in den Biowissenschaften 11 (Freiburg München: Alber, 2010), 23; Jochen Taupitz and Amina Salkić, "Advance Directives and Legality of Euthanasia under German Law," in *Self-Determination, Dignity and End-of-Life Care: Regulating Advance Directives in International and Comparative Perspective*, ed. Stefania Negri, Queen Mary Studies in International Law 7 (Leiden ; Boston: Martinus Nijhoff Publishers, 2011), 333–34.

[45]Sert and Yücel, *Sağlık ve Tip Hukukunda Sorumluluk Ve İnsan Hakları*, 37 as cited in; Taupitz, *Empfehlen sich zivilrechtliche Regelungen zu Absicherung der Patientenautonomie am Ende des Lebens?*, 15; Mark-Oliver Baumgarten, *The right to die? rechtliche Probleme um Sterben und Tod ; Suizid - Sterbehilfe - Patientenverfügung - "health care proxy" - Hospiz im internationalen Vergleich*, 2., überarb. Aufl (Bern: Lang, 2000), 163,165.

[46] Sert and Yücel, *Sağlık Ve Tip Hukukunda Sorumluluk ve İnsan Hakları*, 37.

[47] Yücel, *Tıbbi Kararlarda Özerklik Hakkinin Korunması ve Hasta Talimatları*, 38.

A medical intervention requires several conditions to be considered legal. First of all, the individual must be a health care professional[48]. Individuals who are qualified and licensed to provide medical care to patients are known as health care professionals. The indication condition must be fulfilled[49] and there must be a medical necessity[50] for that medical intervention in question. Except for medical necessities covered by Article 13 and 17/2 of the Turkish Constitution[51], Article 13/3 of the Medical Deontology Statute[52], and Article 12 of the Patients' Rights Statute[53], bodily integrity cannot be violated. The informed consent[54] must be received from the patient and an enlightenment must be given before the consent.

Lastly, the medical intervention must be compatible with the ethics and regulations of medicine. The intervention must be necessary and conform with the data of the medicine.[55]

2.1.1. Who Can Be Authorized to Practice Medical Interventions?

In Turkish Law, the Code of Execution of Medicine and Medical Sciences[56] establishes the definition of a doctor or physician in terms of medical intervention. According to Article 3 of the Code of Execution of Medicine and Medical Sciences numbered 1219, every physician can examine the patients, diagnose, and perform minor surgical intervention.[57] With the Article 3 of the Code, a specialization diploma is required in order to perform important surgical interventions. Performing such interventions by general practitioners, except in cases of necessity, does not remove the medical nature of the intervention, but it constitutes a violation of the physician's duty of care. The same principle applies to specialist physicians who perform surgical interventions outside of their fields of specialization.[58] In other words, the concept of physician/doctor in terms of medical intervention is determined with the Code of Execution of Medicine and Medical Sciences. The authority to perform surgical

[48] Hakeri, *Özel Hükümler*, 2:294.
[49] Hakeri, 2:294.
[50] Taneri, *Hasta ve Hekim Hakları ile Uygulamadan Örnek Hükümlerle Hekim Ceza Sorumluluğu*, 41.
[51] Türkiye Cumhuriyeti Anayasası (Constitution of the Republic of Türkiye) O.J.: 2709 D.: 09.11.1982.
[52] Tıbbi Deontoloji Nizamnamesi (Medical Deontology Statue) O.J.: 10436 D.:19.02.1960.
[53] Hasta Hakları Yönetmeliği (Patients' Rights Statue) O.J.:23420 D.:01.08.1998.
[54] Hakeri, *Özel Hükümler*, 2:294.
[55] Hakeri, 2:294.
[56] Tababet ve Şuabatı Sanatlarının Tarz-ı İcrasına Dair Kanun (the Code of Execution of Medicine and Medical Sciences) O.J.: 863 D.: 14.04.1928.
[57] Sert and Yücel, *Sağlık ve Tip Hukukunda Sorumluluk Ve İnsan Hakları*, 43
[58] Ayan, *Tıbbî Müdahalelerden Doğan Hukukî Sorumluluk*, 6.

interventions is primarily entrusted to physicians but, in the Article 3 of the Code, there are some exceptions regulated. For instance, emergency medical technicians can apply medical intervention to the patient and perform the necessary medical interventions and operations in this regard, emergency medical aid and care must be limited in accordance with the regulation to be issued by the Ministry of Health. In addition, individuals who received the education that organized by the Ministry of Health can perform circumcision under a watch of physician.[59]

Broadly, people working in the systems that provides health care are all considered healthcare personnel. However, when health care personnel are mentioned within the scope of this thesis, evaluating the concept needs a narrower approach. Therefore, personnel who are directly involved to the medical activities must be understood as health care professional. For this reason, health care personnel can be defined as, "*Persons who work directly to protect and improve people's health, to diagnose and treat diseases, with the purpose to establish and maintain a state of complete mental, physical and social well-being through providing medical assistance."* Within this context, health care personnel can be described as, healthcare professionals with medical intervention authority.[60]

The human body is the most essential element of personality rights.[61] Personality rights are examined under the roof of Law of Persons. As a result, the subject of the Law of Persons is abstractly a person.[62] Every individual acquires personality rights just because of being human.[63] Personality rights are one of the inalienable rights. Because of being inalienable, these rights cannot be transferred, renounced, or restricted through violations of law and morality.[64] The right that related to the right to live and bodily integrity which includes the wellbeing of the body and psychology, has the greatest importance.[65]

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[59] Fatih Birtek, "Tıbbi Müdahaleler Açısından Komplikasyon - Malpraktis Ayrımı," *İstanbul Barosu Dergisi* 81, no. 5 (2007): 1999; Sert and Yücel, *Sağlık ve Tip Hukukunda Sorumluluk ve İnsan Hakları*, 44-45

[60] Hakeri, 142-143.

[61] Onur Koru, "Tıbbi Müdahalenin Hukuka Uygunluğu: Endikasyon Şartı," *İnönü Üniversitesi Hukuk Fakültesi Dergisi* 12, no. 2 (December 31, 2021): 493, https://doi.org/10.21492/inuhfd.899101.

[62] Mustafa Dural and Tufan Öğüz, *Türk Özel Hukuku Cilt II Kişiler Hukuku* (Filiz Kitapevi, 2022), 5.

[63] Zafer Kahraman, "Medeni Hukuk Bakımından Tıbbi Müdahaleye Hastanın Rızası," *İnönü Üniversitesi Hukuk Fakültesi Dergisi* 7, no. 1 (July 2016): 482.

[64] Kahraman, 482.

[65] Cüneyt Çilingiroğlu, *Tıbbi Müdahaleye Rıza*, 1st ed. (İstanbul: Filiz Kitabevi, 1993), 33.

The rights of individuals over their own body are the right to health, the right to live and bodily integrity. According to Article 12 of the Turkish Constitution[66], these rights are *"personal, inviolable, inalienable and indispensable"*.[67]

The Law of Persons is the First Book of the TCC; in addition, the Law of Persons is considered the core of the Civil Law.[68] Every type of right exists for individuals in Private Law, especially material rights. In other words, there is no person without the possession of any rights, or there is no right that exists that does not belong to a person.

In this regard, the codifications of law of persons in comparative law can be examined. The main idea behind the codification of the Swiss Civil Code *(SCC)*[69] is mentioned above as *"there is no person without the possession of any rights, or there is no right that exists that does not belong to a person"*. This mindset makes a person the focus of Private Law, and as a result, the "*person*" term is regulated individually at the beginning of the TCC[70]. Article 8-117 of the TCC alienates the relationship between other persons and goods, and centers upon the beginning, ending, and protection of personality; a person's capacity to have rights and capacity to act; a person's connection with the places (settlement and place of residence); relationship by affinity; and record of personal status. Legal entities are also regulated in the same sections[71].

On this subject, the difference between the TCC, Roman Law, and Pandect Law is worth to be mentioning to understand the position of the term *"person"* in comparative law. The prevailing opinion in Roman Law and Pandect Law states that Private Law should regulate the order of assets firstly. Also, the TCC differentiates from the German Civil Code *(GCC)*[72] example and does not regulate a "general section" that involves and regulates the Law of Persons. In addition, the French Civil

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[66] "Türkiye Cumhuriyeti Anayasası (Constitution of the Republic of Türkiye) O.J.: 2709 D.: 09.11.1982," 2709 § (1982).
[67] Koru, "Tıbbi Müdahalenin Hukuka Uygunluğu: Endikasyon Şartı," 493.
[68] Oğuzman, Seliçi, and Oktay Özdemir,, *Kişiler Hukuku: Gerçek ve Tüzel Kişiler*, 1.
[69]Swiss Civil Code of 10.12.1907 [Switzerland], status as of 23.01.2023, available at: https://fedlex.data.admin.ch/filestore/fedlex.data.admin.ch/eli/cc/24/233_245_233/20230123/en/pdf-a/fedlex-data-admin-ch-eli-cc-24-233_245_233-20230123-en-pdf-a-2.pdf (accessed 12.06.2023)
[70] Oğuzman, Seliçi, and Oktay Özdemir, 1.
[71] Dural and Öğüz, *Türk Özel Hukuku Cilt II Kişiler Hukuku*, 5.
[72]German Civil Code of 01.01.1900 [Germany], status as of 02.01.2002 available at: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf (accessed 12.06.2023)

Code *(FCC)*[73] and the Austrian Civil Code *(ACC)*[74] regulate the law of persons under the scope of family law; this approach is considered inadmissible throughout the codifications of the TCC[75]. As can be seen, Turkish legislators attribute the terms "*person*" and "*personality*" an immense value and aim to protect the rights and values attached to these terms.

As mentioned, health care professionals are individuals who are trained and licensed to provide medical care to patients. They work in various settings, such as hospitals, clinics, private practices, and nursing homes. Some common health care professionals are doctors/physicians, nurses, dentists, midwives[76], physical therapists, occupational therapists[77], community health workers and other health care providers[78]. Yet, essentially, the obligation to examine the patient, diagnose any existing illness, and subsequently treat the illness, if present, relies on the physician.[79] This conclusion is legislated in the Article 16/I of the Medical Deontology Statue dated 1960[80] and explained in the Article 23 of the Ethics of the Physician's Profession[81].

In Turkish doctrine, the doctor/physician term has been described multifariously. According to Ayan, "*The term of doctor/physician refers to the persons who are authorized to practice the medical profession and to perform medical interventions by the modern social order legal system."*[82]. That description detailed as follows, *"In order for such an authority to be recognized, it is obligatory to*

[73]French Civil Code of 21.031804 [France], available at: https://www.trans-lex.org/601101/_/french-civil-code-2016/ (accessed 12.06.2023)
[74]Austrian Civil Code of 01.01.1812 [Austria], available at: https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=42818&p_classification=01 [accessed 12.06.2023]
[75] Oğuzman, Seliçi, and Oktay Özdemir, *Kişiler Hukuku*, 1 footnote:1.
[76] "Definitions of Healthcare Settings and Other Related Terms," in *WHO Guidelines on Hand Hygiene in Health Care: First Global Patient Safety Challenge Clean Care Is Safer Care* (World Health Organization, 2009), https://www.ncbi.nlm.nih.gov/books/NBK144006/. (accessed 12.06.2023)
[77]R Barnitt, "Ethical Dilemmas in Occupational Therapy and Physical Therapy: A Survey of Practitioners in the UK National Health Service.," *Journal of Medical Ethics* 24, no. 3 (June 1, 1998): 193, https://doi.org/10.1136/jme.24.3.193.
[78] "Definitions of Healthcare Settings and Other Related Terms," in WHO Guidelines on Hand Hygiene in Health Care: First Global Patient Safety Challenge Clean Care Is Safer Care (World Health Organization, 2009), https://www.ncbi.nlm.nih.gov/books/NBK144006/. (accessed 12.06.2023)
[79] Ümit Gezder, "Hekimin Yükümlülükleri", Tıp Hukuku Dergisi, 3/6 (2014), 138
[80] Tıbbi Deontoloji Nizamnamesi (Medical Deontology Statue) O.J.: 10436 D.:19.02.1960
[81] Türk Tabipleri Birliği, "Hekimlik Meslek Etiği Kuralları," Türk Tabipleri Birliği, February 1, 1999, https://www.ttb.org.tr/haber_goster.php?Guid=5755966a-a285-11e7-9205-300896da83fe. (accessed 12.06.2023)
[82] Mehmet Ayan, *Tıbbî Müdahalelerden Doğan Hukukî Sorumluluk*, Kazancı Hukuk Yayınları, no. 102 (Ankara: Kazancı, 1991), 5.

successfully complete a certain period of vocational education/training in almost all societies and also to obtain a working license from the authorized bodies of the state. Physicians are divided into two groups according to their level of expertise: general practitioners and specialist physicians. General practitioners are people who practice the medical profession based on undergraduate education only. Specialist physicians, on the other hand, consist of people who have received specialization training in a particular branch after the completion of their undergraduate education."[83] In terms of Turkish law, specialization training was carried out within the framework of the provisions of the Medical Specialization Directive dated 05.04.1973 and numbered 7/6229 (old Specialization Directive)[84]. In 14.05.2002 with a Decision of the Council of Ministers, Medical Specialization Directive has been repealed, which was put into effect with the decision of the Council of Ministers dated 5/4/1973 and numbered 7/6229. The repeal came into force with the Official Gazette which was dated 19.06.2002 and numbered 24790. After the abolition of the Directive numbered 7/6229, the new directive came into force. The new Medical Specialization Directive numbered 2002/4198 (new Specialization Directive) was agreed on 14.05.2002[85]. According to Article 4 of the new Directive, *"Those who do not obtain a certificate of expertise in accordance with the provisions of this Regulation shall not be entitled to a specialty title and they cannot use their authority and cannot engage in medical activities related to their expertise."* As a matter of fact, specialist physicians take names according to their fields of specialization and can perform surgical interventions related to this branch. This approach of the legislator remained the same throughout the amendments. As can be seen, when we examine the definition of the concept of the person authorized to practice the medical profession both the concept of a physician and a doctor appear. When we examine this binary distinction, according to Taneri, *"physician"* is the correct term of a person practicing the medical profession. And the term of doctor, which refers to the specialization of the branch of science, is preferred because it is generally accepted in the society.[86]

[83] Ayan, 5.
[84] "Tababet Uzmanlık Tüzüğü (Medical Specialization Directive) O.J.:14511 D.: 18.04.1973," 7/6229 § (1973), https://www.resmigazete.gov.tr/arsiv/14511.pdf. (accessed 12.06.2023)
[85] "Tıpta Uzmanlık Tüzüğü (Medical Specialization Directive) O.J.:24790 D.:19.06.2022," 2002/4198 § (2002). (accessed 12.06.2023)
[86]Gökhan Taneri, *Hasta ve Hekim Hakları ile Uygulamadan Örnek Hükümlerle Hekim Ceza Sorumluluğu*, 2nd ed. (Ankara: Bilge Yayınevi, 2015), 41.

In order for a medical intervention to be based on a legal ground, and therefore, for the legitimacy of medical liability to be accepted, several basic conditions must be met.[87] The validity conditions are the existence of an indication for medical intervention, a valid consent statement based on the informed will of the patient, and the intervention has been performed in accordance with the medical expertise rules recognized in the field of medical profession and art.[88] A doctor's intervention for protecting an individual's life and health is concerns both ethics and the law . Because the very own of medical intervention is strictly related with most of the fundamental rights and freedoms. Such as, the right to live, protection of bodily integrity and determination of a person's own future or patient autonomy.

In conclusion, due to possible negative effects that medical intervention can cause on individuals' body, only the authorized health care professional (essentially physician) can be capable to perform medical intervention, the main purpose of this restriction is protection of individuals and the society[89]. It will be invalid for an individual to authorize any other person then a physician or health care professional.[90]

2.1.2. Necessity For Medical Intervention to be Based on Informed Consent

As mentioned above, all of the medical interventions will involve a type of intervention aimed at the person's physical or moral integrity; in order to protect individual rights, it is essential that this intervention be based on consent. This outcome arising from Article 24 of the TCC is explicitly present in the legislation specifically governing medical interventions, and special provisions regarding obtaining consent are introduced. Article 70 of the Code of Execution of Medicine and Medical Sciences numbered 1219 which is amended with the Code numbered 5728 dated 23.02.2008 and Article 24 of the Patients' Rights Statue are strictly related with the consent and the permission when there is an application of medical intervention on minors.[91]

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[87] Mehmet Demir, Hekim ve Hastane Yönünden Tıbbi Sorumluluk Hukuku, 1st ed. (Ankara: Yetkin, 2018), 82-83

[88] Demir, 82-83; Taneri, 41.; Hakan Hakeri, *Tıp Hukuku Özel Hükümler*, 25th ed., vol. 2 (Ankara: Seçkin, 2022), 294.

[89] Hakeri, *Tıp Hukuku*, 236.

[90] Köksal Bayraktar, "Hekimin Tedavi Nedeniyle Cezai Sorumluluğu" (İstanbul, İstanbul Üniversitesi Hukuk Fakültesi, 1972), 112.

[91] Saibe Oktay-Özdemir, "Tıbbi Müdahaleye ve Tıbbi Müdahalenin Durdurulmasına Rızanın Kimler Tarafından Verileceği", Prof. Dr. Rona Serozan'a Armağan, (İstanbul: On İki Levha Yayıncılık, 2010), 1315-1316

The most important element of performing a lawful medical intervention is receiving a valid consent given from the person to whom the medical intervention will be performed. In the second paragraph of Article 17 of the Constitution[92]; *"Except for medical obligations and the cases written in the law, the body integrity of the person cannot be violated; a person cannot be subjected to scientific and medical experiments without his consent."* provision is included. The Article 70 of the Law No. 1219[93], is legislated parallelly with the Constitution. The relevant article states that *"Physicians, dental physicians and dentists should obtain the consent of the patient before any operation they will perform, and if the patient is minor or in a state of emergency, the parent or guardian of the patient will give the consent."*.

According to the Article 5 of the Patients' Rights Statue[94], under the heading of *"Principles"*, subparagraph d, *"Except for medical necessities and situations specified in the law, a person's bodily integrity and other personal rights cannot be infringed upon without their consent.";* in the subparagraph f, *"Except for cases prescribed by the law and medical necessities, the privacy of the patient's personal and family life cannot be infringed upon."*. In addition, in the Article 24 of the Patients' Rights Statue under the heading of *"Patient's Consent and Permission"*, *"the consent of the patient is required for medical interventions...."* is also included.

The presence of the patient's consent alone will not make the medical intervention lawful, moreover, the patient must be informed, and a valid consent must be obtained. The validity of the consent obtained from the patient is important in terms of determining the legal relationship between the patient and the physician, the legality of the intervention and the responsibility of the physician.[95]

In order for the elimination of unlawfulness through consent, in addition to being granted under the person's control, three essential conditions are required to be met. At first, with regards to the intervention that will affect the right to personality,

[92] Türkiye Cumhuriyeti Anayasası (Constitution of the Republic of Türkiye) O.J.: 2709 D.: 09.11.1982.
[93] Tababet ve Şuabatı Sanatlarının Tarz-ı İcrasına Dair Kanun (the Code of Execution of Medicine and Medical Sciences) O.J.: 863 D.: 14.04.1928.
[94] "Hasta Hakları Yönetmeliği (Patients' Rights Statue) O.J.:23420 D.:01.08.1998" (1998).
[95] Berna Özpınar, "Tıbbi Müdahalede Kötü Uygulamanın Hukuki Sonuçları" (Ankara, Gazi Üniversitesi, 2007), 32.

the will to waive this intervention must be explicitly stated.[96] Secondly, the consent must be given with consciousness and willpower that enables foreseeing the consequences of relinquishment.[97] The third condition required for the elimination of the unlawfulness of consent is that this given consent should not be contrary to morality. Likewise, Article 23/II of the TCC explicitly stipulates this condition.[98]

The patient's right to determine their own future refers to the informed patient's ability to manage the process of potential intervention or other healthcare services and be in a decision-making position during the process, involves matters of personal values[99]. As an extension for the patient's fundamental rights of life, health, and bodily integrity, the patient will play an active role in the decision-making process regarding medical interventions that affect their personal rights.[100]

2.2. Compulsory And Evidence-Based Medical Intervention According To Scientific Medical Data

Every medical intervention must be carried out in accordance with specific medical rules and standards in the given circumstances. However, deviating from these principles, rules, or standards would indicate a careless execution of the medical intervention, implying a breach of the physician's medical contract. Nevertheless, the failure to adhere to universally accepted principles of medical science in a particular situation will not affect the classification of whether the intervention is medical or not. This condition relates to the determination of the physician's duty of care obligation. Which is strictly related to the physician’s liability.

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[96] Oğuzman, Seliçi, and Oktay Özdemir, *Kişiler Hukuku*, 108; Dural and Öğüz, *Türk Özel Hukuku Cilt II Kişiler Hukuku*, 230; Nihan Koyuncu Aktaş, *Hekimin Özen Borcuna Aykırılıktan Doğan Sözleşmesel Sorumluluğu* 1st ed. (İstanbul: On İki Levha Yayıncılık, 2020), 28

[97] Oğuzman, Seliçi, and Oktay Özdemir, *Kişiler Hukuku*, 108; Dural and Öğüz, 230; Koyuncu Aktaş, 28

[98] Koyuncu Aktaş, 28

[99] Hamide Tacir, “Tıbbi Müdahaleler Karşısında Hastanın Kendi Geleceğini Belirleme Hakkı”, II. Ulusal Sağlık hukuku “Tıbbi Müdahalenin Hukuki Yansımaları” Sempozyumu, Ankara, Seçkin, 2015, s. 13-51, 14; Koyuncu Aktaş, “Hekimin Özen Borcuna Aykırılıktan Doğan Sözleşmesel Sorumluluğu” 28

[99] Koyuncu Aktaş, 28

[100] Koyuncu Aktaş, 28-29

The physician should have the freedom to choose the method of treatment, but they should also rely on medically accepted methods recognized by the medical science.[101]

2.2.1. Indication

Indication is a term that demonstrates the necessity of medical intervention by a physician for a patient. It can be defined as *"the medical necessity"* or *"medical requirement*".[102]

In the Article 5, subparagraphs (d) and (f) of the Patients' Rights Statue[103], foresees indication as a condition that makes the violation of bodily integrity, infringement of other personal rights, and infringement of privacy lawful. Similarly, in Article 12 under the heading of *"Prohibition of Intervention Outside Medical Necessity"* of the Statue, the condition of indication is regulated as follows *"Nothing can be done or requested that may lead to death or vital danger, violate bodily integrity, or reduce mental or physical resistance without the purpose of diagnosis, treatment, or protection."*.

Apart from the Constitution and the Patients' Rights Statue, the concept of indication is present in our positive law in Article 5 of the Population Planning Code.[104] In both this specific law and the related Statue, a medical indication model, limited to the termination of pregnancy or prevention of pregnancy due to medical risks, specifically within the context of gynecology and obstetrics, has been extensively regulated. According to the regulations, indications are divided in two as ordinary, while others are considered extraordinary in nature. Within the legal framework, an ordinary indication allows for optional termination of pregnancy or pregnancy cessation within a specific period; whereas an extraordinary indication applies in cases of medical threats endangering the life of the pregnant woman or her vital organs.[105]

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[101] Ş. Berfin Işık Yılmaz, "Tıbbi Müdahalelerde Hekimin Aydınlatma Yükümlülüğü," *Türkiye Barolar Birliği Dergisi*, no. 98 (2012): 391.
[102] Koru, "Tıbbi Müdahalenin Hukuka Uygunluğu: Endikasyon Şartı," 495.
[103] Hasta Hakları Yönetmeliği (Patients' Rights Statue) O.J.:23420 D.:01.08.1998.
[104] Nüfus Planlaması Hakkında Kanun (Population Planning Code) O.J.:18059 D.: 24.05.1983," 2827 § (1983).
[105] Mehmet Demir, Hekim ve Hastane Yönünden Tıbbi Sorumluluk Hukuku, 1st ed. (Ankara: Yetkin, 2018), 82

Yet, according to *Demir*, in the doctrine of medical liability law, a comprehensive definition of the concept of *"indication"* that fully explains its content and encompasses all elements specific to this phenomenon has not yet been established. Essentially, this concept cannot be viewed as a notion that, on its own, ensures the legality of a medical action or intervention. However, within the scope of liability law and particularly in the context of the obligation to provide compensation, the term *"indication"* should be understood and evaluated as a legal situation or a medical-legal phenomenon that denotes usefulness or necessity in its general sense.[106]

As mentioned above, a medical intervention can only be considered legal if there is an indication. Bodily integrity cannot be violated except for the medical necessities that finds its source from Article 17/2 of Turkish Constitution[107], Article 13/3 of Medical Deontology Statue[108], Article 12 of the Patients' Rights Statue[109]. In fact, Article 17/2 of the Constitution states, *"Except for medical necessities and situations prescribed by law, the integrity of the person's body cannot be violated"* emphasizing directly the indication.[110]

According to Turkish Constitution Article 17, *"The corporeal integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law; and shall not be subjected to scientific or medical experiments without his/her consent."*[111]. It is clear from Article 17, bodily integrity can be violated if only there is an *"medical necessity"* and "*cases prescribed by law*"[112]. According to Turkish Constitution Article 17, *"The corporeal integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law; and shall not be subjected to scientific or medical experiments without his/her consent."*. It is clear from Article 17, bodily integrity can be violated if only there is an *"medical necessity"* and *"cases prescribed by law"*.

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[106] Demir, 79-80
[107] "Türkiye Cumhuriyeti Anayasası (Constitution of the Republic of Türkiye) O.J.: 2709 D.: 09.11.1982," 2709 § (1982).
[108] "Tıbbi Deontoloji Nizamnamesi (Medical Deontology Statue) O.J.: 10436 D.:19.02.1960".
[109] Taneri, *Hasta ve Hekim Hakları ile Uygulamadan Örnek Hükümlerle Hekim Ceza Sorumluluğu*, 41.
[110] Demir, 79
[111] Türkiye Cumhuriyeti Anayasası (Constitution of the Republic of Türkiye) O.J.: 2709 D.: 09.11.1982 Article 17.
[112] Akkoyunlu, "Genel Sağlığın Korunmasına İlişkin İdari Bir Faaliyet Olarak Aşı Uygulamasının Kanuniliği," 46.

Indication is a requirement that should be sought not only in terms of treatment but also throughout the entire process related to healthcare services.[113] The criteria for determining the presence or absence of indication are the difference between performing a medical intervention and not performing it.[114] The physician should predict this difference in advance and do whatever is required for the patient's benefit. If the presence of indication is not clear, the physician should conduct further research and, if necessary, perform tests and examinations to clarify the presence of indication before resorting to medical intervention.[115] Otherwise, the intervention performed would be illegal.[116]

The indication condition can be disputable as a lawfulness condition of a medical intervention. When we examine cosmetic surgeries and circumcision, medical necessity conditions can be questionable. In the example of circumcision as a medical intervention, the direct or indirect therapeutic purpose is not clear. When it comes to cosmetic surgeries, in cases solely aimed at enhancement of physical appearance, due to the potential impact on the individual's psychological integrity, and considering the possible positive effect on absolute well-being, the intervention can be considered to be oriented towards therapeutic purposes. On the other hand, in cases where there is no clear medical indication, an intervention carried out on the patient within the scope of their consent by authorized individuals is involved.[117] To sum up, examples can be set forth when there are discussions regarding medical interventions that lack medical necessity. Besides the cosmetic surgeries that aim to improve the physical appearance of individuals, check-ups, sterilization, and castration could be included as examples.[118]

Medical interventions can be operated even though there is not a medical necessity. For example, the motivation behind the circumcision operations are mostly religious and social reasons. Even though the legislator sets forth the legality conditions of circumcision, indication in this regard can be questionable.[119] In this

[113] Hakeri, *Tıp Hukuku*, 231.
[114] Hakeri, 232.
[115] Nejdet Şatır, "Sağlık Hukukuna İlişkin Uyuşmazlıkların Çözümünde Yargıtay 13. Hukuk Dairesinin Yargısal Yaklaşımı," *Sağlık Hukuku Digestası, Ankara Barosu Yayınları* 1, no. 1 (2009): 386–87.
[116] Koru, "Tıbbi Müdahalenin Hukuka Uygunluğu: Endikasyon Şartı," 496.
[117] Koyuncu Aktaş, "Hekimin Özen Borcuna Aykırılıktan Doğan Sözleşmesel Sorumluluğu", 34-36
[118] Koyuncu-Aktaş, 23
[119] According to additional clause of the Article 3 of the Law numbered 1219, every physician is authorized to perform circumcision, and no specialized diploma will be required for this activity.

context, the aim of this medical intervention is not explicitly related to direct or indirect medical treatment purpose.[120]

When it comes to vaccination applications, the conditions of medical necessity and requirement can be evaluated, whether the vaccination is a preventive one or a curative one. Mandatory vaccinations, which are regulated as necessary, can be considered to meet the medical requirement conditions.[121] Therefore, indication conditions in mandatory vaccination applications can be considered to subsist. As mentioned in the thesis, some vaccinations are regulated in the legislation of countries, and these vaccinations are applied to every individual of the related country because of the enforcement of the law. On the other hand, regarding recommended vaccinations, the indication conditions are questionable at first glance. The preventive nature of the recommended vaccinations can be considered an indication condition. In this regard, it could be said that recommended vaccinations can be considered one of the medical interventions that can be operated on even though there is no specific medical necessity.

2.2.2. Duty of Care

The subject of the physician's duty of care is, the physician's behavior in order to treat his/ her patient, using the right methods and supervising of the patient's interests. In other words, the physician's duty of care is directed towards the diagnosis and treatment of the disease in question. In this respect, the physician's obligation to diagnose the disease and apply the necessary treatment is the physician's primary obligation.[122] It is certain that the physician must fulfill this duty with care. In this respect, the duty of care imposed on the physician is not only a primary obligation, but also an obligation that expresses the way how this primary should be fulfilled to ensure the *"correct execution"*.[123] In other words, the duty of care is directly related to the deed that constitutes the main deed.[124] For this reason, the duty of care is neither a

[120] Koyuncu-Aktaş, 34
[121] For example, in Türkiye the smallpox vaccination according to the Article 88 of the Public Health Code dated 1930, numbered 1593 is regulated as mandatory.
[122] Fikret Eren, *Borçlar Hukuku Genel Hükümler* , 27th ed. (Ankara: Yetkin, 2022), 31.
[123] Yasemin Akbaş, "Hekimin Özen Yükümlülüğü," *Fatih Üniversitesi Hukuk Fakültesi Dergisi* 2, no. 2 (2014): 113.
[124] Mustafa Alper Gümüş, *Türk-İsviçre Borçlar Hukukunda Vekilin Özen Borcu*, 1st ed. (İstanbul, 2001), 142.

primary obligation nor a secondary obligation.[125] The main source of the duty of care which is expected from the physician is based on the rule of good faith, and the reflection of this rule in the law of obligations is the concept of diligent performance. In this respect, the physician is not only expected to perform the treatment, but also to perform this treatment diligently.[126]

The physician is obliged to make the correct diagnosis before choosing the treatment method. In order to make the diagnosis correctly, the physician should act with care. For this, the data must be obtained by thoroughly researching the patient's history, interviewing the patient, and finally making a careful examination. The evaluation must be proceeded carefully, and the most appropriate treatment method should be selected. Another important part of the diagnosis is that all of the diagnostic tests must be competed and analyzed. Although it has become easier to diagnose with the developments in medical science today, the physician can only make the correct diagnosis as a result of the necessary examinations. The physician must perform with utmost care to diagnose.[127]

3. GENERAL EXPLANATIONS REGARDING MANDATORY MEDICAL INTERVENTIONS

The right to bodily integrity, which constitutes the most important personal values forming the right to personality, includes life, health, and bodily integrity itself. It is the natural and organic integrity that an individual possesses by virtue of being human, and the preservation of bodily integrity is an inherent right.[128]

2.1. General Provisions Regarding Mandatory Medical Interventions in International Law

The right to health has been recognized in relation to the relationship between health and human rights, starting from the Second World War when human rights began to be institutionalized, and it has been reflected in human rights legislations and

[125] Veysel Başpınar, *Vekilin Özen Borcundan Doğan Sorumluluğu*, 2nd ed. (Ankara, 2004), 158.
[126] Akbaş, "Hekimin Özen Yükümlülüğü," 113.
[127] Akbaş, 113–14.
[128] Aydın Zevkliler, "Tedavi Amaçlı Müdahalelerle Kişilik Hakkına Saldırının Sonuçları (1982 - 1983 Öğretim Yılı Açılış Dersi Metni)," *Dicle Üniversitesi Hukuk Fakültesi Dergisi* 1, no. 1 (1983): 9.

Constitutional regulations concerning the right to health during the transition to the social state. The right to health is stated as follows in the first paragraph of Article 25 of the Universal Declaration of Human Rights, dated 1948[129], after the establishment of the WHO. According to the related article, *"every individual has the right to an adequate and best possible standard of living, which includes access to food, clothing, accommodation, medical care, and reqired social services, as well as security in the occurance of unemployment, illness, disability, widowhood, old age, or other loss of livelihood due to factors beyond his or her control".*[130]

The term medical intervention took place in several International Conventions. As a transnational convention, The European Convention on Human Rights and The Oviedo Convention of 1997 are described as the greatest present-day example.[131]

The Oviedo Convention includes several rules regarding medical intervention; consent, compensations due to damages, and exercise of the rights. The articles are Article 5, 6, 24 and 26. Article 5 with the heading of *"General Rule"* explains the basic rules for a lawful medical intervention. Only with the subject's free and informed permission may prepare a legal ground for a valid intervention in the area of health. The patient must be adequately informed in advance on the reason for and nature of the intervention, in addition potential risks and effects of the intervention in question. The affected party is free to withdraw consent at any moment[132]. As it can be seen, Article 5 of the Convention emphasizes the importance of the consent, therefore protecting the personality rights through informing the individuals regarding their bodily integrity can be considered as validity condition.

Article 6/2 with the heading of *"Protection of persons not able to consent"* explains the limitations of the consent when the patient in question is a minor. According to the article, if a minor is considered legally incapable of providing a valid consent when there is a possibility to apply a medical intervention, the intervention may only be carried out with the

[129]UN General Assembly, "Universal Declaration of Human Rights" (1948), https://www.un.org/en/about-us/universal-declaration-of-human-rights. (accessed 12.06.2023)
[130]UN General Assembly, "Universal Declaration of Human Rights" (1948), https://www.un.org/en/about-us/universal-declaration-of-human-rights. (accessed 12.06.2023)
[131] Roberto Andorno, "The Oviedo Convention: A European Legal Framework at the Intersection of Human Rights and Health Law," *Journal of International Biotechnology Law* 2, no. 4 (January 26, 2005): 133, https://doi.org/10.1515/jibl.2005.2.4.133.
[132] European Court of Human Rights (Grand Chamber), "Vavřička and Others v. The Czech Republic. App. Nos. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15, 43883/15.," April 8, 2021, paragraph 141, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-209039%22]}; Brigit Toebes, "Vavřička v. Czech (Eur. Ct. H.R.)," *International Legal Materials* 61, no. 6 (December 2022): 881, https://doi.org/10.1017/ilm.2022.25.

consent of the minor's guardian, an authority, or another person or organization designated by law. In proportion to the minor's age and level of maturity, the view of the minor will be considered as a more important deciding factor.[133] Under this scope, conditions of a minor's consent to the treatment can be differentiated considering the maturity age can legislated differently in the International Law. Yet, eighteen is commonly regulated as the age of maturity.[134] A minor's treatment can be considered as a treatment contract[135] therefore the general rule of the receiving a valid consent can be discussed under this scope because of minor's questionable capability to be a party to a treatment contract. This related article of the Convention does not turn the minor's consent condition into a controversial issue and clearly authorizes some other individual or entity.

Article 24 with the heading of *"Compensation for undue damage"* explains the occurrence of damages as a result of any type of medical intervention. In accordance with the requirements and conditions established and provided by law, the individual who experienced damage or harm as a result of a medical intervention is eligible to fair compensation. Of course, every medical intervention carries the possible dangers regarding to the intervention. The possible dangers can be death, or bodily injuries such as loss of organs and limbs. And due to these unwanted consequences, individuals can be come up against pecuniary loss and intangible damages. The material damages can be treatment costs, workforce loss, destabilization of the economical future and expectations. Yet, since there is a death of an individual, that individual's relatives can be deprived from his or her economical support and there are other possible economical damages can be arisen because of the death. Since, there are various damages possibly be arisen, the liability of a failed medical intervention should be regulated in every nation's legislation.

Article 26/I with the heading of *"Restrictions on the exercise of the rights"* set forth exceptional conditions. According to article, the exercise of the rights and protective provisions set forth in this Convention shall not be subject to limitations other than those imposed by law and required in a democratic society in the name of safety of the public, crime prevention, public health protection, or the protection of others' rights and freedoms.[136]

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[133] "Vavřička and Others v. The Czech Republic.", Paragraph 141 ; Toebes, 881.
[134] "Legal Age," LII / Legal Information Institute, https://www.law.cornell.edu/wex/legal_age. (accessed 12.06.2023)
[135] Zarife Şenocak, "Küçüğün Tıbbi Müdahaleye Rızası," *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 50, no. 4 (2001): 80, https://doi.org/10.1501/Hukfak_0000000580.
[136] "Vavřička and Others v. The Czech Republic.", Paragraph 141; Toebes, 881.

According to this article, the cases prescribed by the law and necessary measures are regulated as an exception.

Within this scope, the regulation regarding medical necessity needs to be examined in the Oviedo Convention. Chapter II, Article 8 of the Convention regulates the consent when someone faces an unpredicted medical emergency. In other words, this article regulates emergency situations. Any medically urgent intervention may be performed out immediately for the protection of the patient's health when an urgent situation prevents obtaining the appropriate consent.[137]

In case of urgencies, if there is an immediate requirement for continuing a person's life or bodily integrity and a valid consent from that person cannot be received, a doctor's intervention within the scope of medical rules should not considered against law.[138] This case can be referred as "cases prescribed by law". The main logic of the legislator in this particular situation is that a person's private interest is subserved through medical intervention.

Hence, medical intervention is directly related to the human rights, there are other international treaties that regulated several principles. Such as the International Covenant on Civil and Political Rights of 1966[139] and the European Convention on Human Rights of 1950[140]. Both of these conventions include regulations regarding the *"right to life"* [141] which is the prior aim for operating any kind of medical intervention. Whether preventive or curative. By way of addition, the Oviedo Convention carries some characteristic aspect regarding being *"the first comprehensive multilateral treaty addressing biomedical human rights issues"*.[142] When both first article which

[137] Council of Europe, "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," 164 § (1997), https://rm.coe.int/168007cf98 Article 8. (accessed 12.06.2023)
[138] M. Kemal Oğuzman, Özer Seliçi, and Saibe Oktay Özdemir, *Kişiler Hukuku (Gerçek ve Tüzel Kişiler)*, 20th ed. (İstanbul, 2021), 161.
[139] UN General Assembly, "International Covenant on Civil and Political Rights, United Nations, Treaty Series" (1966), https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights. (accessed 12.06.2023)
[140] Council of Europe, "European Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocols Nos. 11 and 14, Supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16" (1950), https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c. (accessed 12.06.2023)
[141] UN General Assembly, International Covenant on Civil and Political Rights, United Nations, Treaty Series Article 6; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16 Article 2. (accessed 12.06.2023)
[142] Andorno, "The Oviedo Convention," 133.

announces the aim of the Oviedo Convention and other articles examined as a whole, it could be understood that a medical intervention is application of biology and medicine.[143]

Vaccination policies in Europe are also discussed in the Parliamentary Assembly of the Council of Europe *(PACE),* on 19 March 1997, Recommendation 1317[144] was adapted.[145] The recommendation shows the Assembly's approach, according to Article 5, efforts to raise the immunization rate shouldn't be focused solely on the struggles of the transitioning nations. Western European populations' immunization rates have been steadily dropping in recent years. Fears of major epidemics in Western Europe are increased by the region's low vaccination rate and the presence of infectious disease outbreaks nearby.[146] As it can be seen, the threshold of immunization is not only a national issue which is related to every nation's own legislation but also an international issue that effects wider regions.

This issue can also bring mind the questionable migrant and immigrant population that trespassing among countries. Since, the trespassing cannot be inspected in regard to the medical conditions of immigrants, the contagious diseases can be prevented by vaccination are increasing. According to a study, immigrants might directly contribute to the spread of infectious diseases from one region to another.[147] This worry is particularly related with the large populations, like refugees, are relocated to different regions of the globe.

Article 6 of the Recommendation states that, in order to prevent infectious diseases, the Assembly advises the Committee of Ministers to invite member states to develop or public vaccination programs that either reactivate and comprehensive, and

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[143] Gürkan Sert and Özge Yücel, eds., *Sağlık ve Tip Hukukunda Sorumluluk ve İnsan Hakları: Sağlık Hizmeti, Sağlık Hakkı ve Hasta Hakları, Medeni Hukuk, Ceza Ve İdare Hukuku Yönünden Sorumluluk*, Birinci baskı, Seçkin. Hukuk, no: 1899 (Ankara: Seçkin, 2021), 36.

[144] Parliamentary Assembly, report of the Social, Health and Family Affairs Committee, rapporteur: Mr Christodoulides. Text adopted by the Standing Committee, acting on behalf of the Assembly, on 19 March 1997., Vaccination in Europe. (accessed 12.06.2023) http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15351&.

[145] European Court of Human Rights (Grand Chamber), ""Vavřička and Others v. The Czech Republic.", Paragraph 142; Toebes, 882.

[146] "Vavřička and Others v. The Czech Republic.", Paragraph 143; Toebes, 882.

[147] Elizabeth D. Barnett and Patricia F. Walker, "Role of Immigrants and Migrants in Emerging Infectious Diseases," *Medical Clinics of North America* 92, no. 6 (November 2008): 1448, https://doi.org/10.1016/j.mcna.2008.07.001.

to set up effective epidemiological surveillance[148]. In accordance with this recommendation, countries very own immunization program's importance is highlighted.

In addition, with Article 7, the Assembly invited the Committee of Ministers to define a policy, and call upon the member states. In accordance with this policy, defining a coordinated pan-European policy on population immunization in collaboration with all relevant parties, such as the WHO, UNICEF, and the European Union *(E.U.)* , in order to establish and maintain common quality standards for vaccines and ensure a sufficient supply of vaccines at a fair price; urging member states to ratify the Council of Europe's European Social Charter, in particular Article 11, which guarantees *"the right to protection of health"*.[149]

When we examine general provisions regarding to International Law, the Law of the E.U. should be included. Public health is covered under Title XIV of Part Three of the Consolidated Treaty on the Functioning of the European Union *(CTFEU)*[150]. According to Article 168/I of the treaty, protection of human health must be prioritized during the formulation and execution of all Union policies and initiatives. Article 168/I describes the Union policies, according to the article, all Union policies and initiatives must be defined and carried out with a high level of protection for human health. And aims improve public health, prevent physical and mental illnesses and diseases, and eliminate sources of danger to physical and mental health. Also, it is stated that, the Union must take actions that complements national policies. This will include promoting research into the major health scourges' causes, transmission, and prevention, as well as health information and education, monitoring, early warning of, and combating serious transnational health threats. Improvements in public health, the prevention of physical and mental illnesses and diseases, and the elimination of sources of danger to physical and mental health are considered goals of the Union. Which should be used in conjunction with national policies. In order to decrease the negative effects of drugs and medicines on health, the Union shall work in conjunction

[148] "Vavřička and Others v. The Czech Republic.", Paragraph 143; Toebes, 882.
[149] "Vavřička and Others v. The Czech Republic.", Paragraph 142-143; Toebes, 882.
[150] European Union, "Consolidated Version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ L. 326/47-326/390" (2012), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A12008E168. (accessed 12.06.2023)

with the Member States.[151] Article 168/II states that the Union shall promote Member State cooperation in the areas covered by this Article and, as necessary, support Member State action. It would especially promote interstate collaboration to strengthen the complementarity of health services provided across borders. According to Article 168/II, the Union shall promote Member State cooperation in the areas covered by this Article and, as necessary, support Member State action. It will especially promote interstate collaboration to strengthen the complementarity of health services provided across borders. Article obliges Member States to coordinate their policies and programs in the areas mentioned above in conjunction with the European Commission. The Commission may, in close consultation with the Member States, take any helpful initiative to encourage such coordination, particularly initiatives aimed at the establishment of guidelines and indicators, the organization of best practice exchange, and the preparation of essential components for ongoing monitoring and evaluation. The European Parliament will be kept up to date in every way.[152]

In the public health field, the Union and the Member States will promote collaboration and alliance with other nations and the relevant international organizations according to Article 168/III of the CTFEU.[153]

The European Parliament and the Council may additionally implement incentive measures to combat the main cross-border health scourges, takes measures pertaining to combating substantial cross-border hazards to health, in accordance with the Article 5. In accordance with the regular legislative procedure and after interacting with the Economic and Social Committee as well as the Committee of the Regions, the European Parliament along with the Council may also adopt measures to motivate people to take action to safeguard and enhance human health, especially in the face of major cross-border health threats, as well as measures to monitor, detect, and respond to those threats, as well as those that have as their primary goal the protection of public

[151] "Vavřička and Others v. The Czech Republic." Paragraph 144; Toebes, 883.
[152] "Vavřička and Others v. The Czech Republic.", Paragraph 144; Toebes, 883.
[153] European Union, "Consolidated Version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ L. 326/47-326/390" (n.d.), Article 168/III, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A12008E168. (accessed 12.06.2023)

health from unhealthy habits, such as extreme usage of alcohol and tobacco, with no attempt to harmonize the laws, legislations, and regulations of the Member States.[154]

2.2. General Provisions Regarding Mandatory Medical Interventions in Turkish Law

In medical interventions, as a general rule, in order for the physician's intervention not to constitute an unlawful infringement on the right to personality, it is necessary for the individual to consent to the treatment for the purpose of restoring their health.[155]

If a person does not obtain a capacity to provide a valid consent, a legal representer's permission is required. In conclusion, the main rule acquiring a consent for a medical intervention is based on a competence.

According to the Article 13 of the Constitution, only by law and in accordance with the reasons outlined in the relevant articles and without impinging upon their essence may fundamental rights and freedoms be limited and according to the Article 17, if there is a medical necessity and a case prescribed by the law, applying a medical intervention is considered possible. This article regulates the limitations of medical interventions. An individual's right regarding to their own body is protected within the scope of this regulation on a Constitutional level. With this article, the general rule of obtaining a valid and informed consent before applying any kind of medical intervention became a prior rule.

A clear and proportional regulation is a necessity regarding to discussions about mandatory application of any kind of a medical intervention in Turkish law. In article 17 of the Constitution there is not any specific legal restrictions regulated. For that reason, secondary regulations carry great importance about limitations of mandatory medical interventions.

Therefore, term *"medical necessity"* mentioned in Article 17 of the Constitution is not sufficient. Both Article 13 and Article 17 of the Constitution require the legislator to regulate cases that could involve interference with bodily integrity in the law. Article 17 of the Constitution establishes the basis for being able to intervene

[154] "Vavřička and Others v. The Czech Republic.", Paragraph 144; Toebes, 883.
[155] Helvacı, 114.

an individual's bodily integrity and for the law to be enacted for medical interventions. The phrase "in cases specified in the law" in Article 17/2 of the Constitution can be criticized for not fulfilling the provision stipulated in Article 13 of the Constitution, which essentially states only based on the reasons specified in the relevant articles of the Constitution, as it is abstract and does not contain specific restriction reasons. This is because there is a provision in Article 13 of the Constitution that limitations on fundamental rights and freedoms will only be made by law. Therefore, the phrase *"cases specified in the law"* should not be detached from the concept of *"medical necessity"* that precedes it and should not be evaluated separately. *"Medical necessities"* and *"cases specified in the law"* should be considered together.

Medical intervention term in the Turkish Law system is described in Article 4, and subparagraph (g) of the Patients' Rights Statue. According to this regulation, medical intervention is: "*A physical and psychological initiative which is applied by the individuals who are authorized to practice medical profession for protecting health, diagnosing and treating diseases within the boundaries of medicine in accordance with professional obligations and liabilities*."[156]. This definition was included Turkish Medical Law legislations with Article 2 of the Patients' Rights Amendment Regulations which was published in the Official Gazette on 08.05.2014. [157]

There are several definitions of medical intervention in Turkish doctrine. According to *Ayan*[158]; *"Medical interventions are activities which aims to cure. This includes all kinds of interventions that aims to prevent, annihilate, or reduce negative outcomes of a disease, an abnormality, or deficiency. Both direct and indirect activities that carried out by authorized individuals which aims to cure, and treat are considered as medical interventions.".* According to *Taneri*[159], medical intervention is; *"All kinds of initiatives which are proceed by doctors for diagnosing and treating any kind of diseases which effects individuals mental and bodily integrity, alleviating the disease incase recovery from illness is not possible, preventing (the diseases which have not occurred yet, but the possibility for occurring is foreseeable) or any kind of*

[156] Hasta Hakları Yönetmeliği (Patients' Rights Statue) O.J.:23420 D.:01.08.1998.
[157]"Hasta Hakları Yönetmeliğinde Değişiklik Yapılmasına Dair Yönetmelik (Patients' Rights Amendment Regulations) O.J.:28994 D: 08.05.2014".
[158] Ayan, *Tıbbî Müdahalelerden Doğan Hukukî Sorumluluk*, 5.
[159] Taneri, *Hasta ve Hekim Hakları ile Uygulamadan Örnek Hükümlerle Hekim Ceza Sorumluluğu*, 43.

intervention for aiming to prevent a contagious disease to prevent spread which are applied in pursuance of medical standards.". According to *Çilingiroğlu*[160]; *"An initiative which implemented by officially authorized persons and aims to diagnose, treat, prevent or aspire to plan the population in spite of physical and mental anomalies that threatens a person's life, health and physical integrity."*. According to *Savaş*[161]; *"Lexical meaning of the medical intervention not only covers the treating purpose but also contains prevention and alleviation purposes; and the requirement for being applicable by qualified people who are required to follow the technique and science. Medical intervention absolutely does not treating orientated. Vaccinations which aim to prevent diseases or birth control methods (such as intrauterine device, IUD) are also medical interventions. From blood transfusions to the most dangerous surgical operations, and also population planning activities and suggesting a diet plan are all medical interventions is spite of complying with scientific and medical methods and being an intervention to bodily integrity."*. According to *Tavlı*[162]; *"medical interventions are interventions which are aim to diagnose, treat and protect and must be performed for absolute goodness of individuals' physical, phycological and social aspect."*. According to *Oktay-Özdemir*, medical intervention refers to interventions carried out on the human body for the purpose of diagnosis and treatment. In this context, the concept of medical intervention for the benefit of others has also been defined. Medical intervention for the benefit of others involves interventions that are performed on a person who does not directly benefit from or only indirectly benefits from the medical intervention, but another individual gains diagnostic or therapeutic benefits from these interventions.[163] According to *Koyuncu-Aktaş*, *"medical intervention can be appropriately defined as any activity directed towards an individual's physical and mental well-being using the methods of medical science by authorized individuals. This definition encompasses a range of activities, from addressing existing physical or mental ailments, reducing the effects of these ailments, or preventing potential illnesses, to addressing requests for aesthetic purposes, tissue and organ transplants, interventions related to gender, or activities related to*

[160] Cüneyt Çilingiroğlu, "Özel Hukuk Yönünden Hastanın Tıbbi Müdahaleye Rızası" (Yüksek Lisans Tezi, İstanbul, İstanbul Üniversitesi, 1991), 3, http://nek.istanbul.edu.tr:4444/ekos/TEZ/19860.pdf.
[161] Halide Savaş, "Ülkemizde Sağlık Çalışanlarının Ve Sağlık Kurumlarının Tıbbi Müdahaleden Doğan Cezai Sorumluluğu" (İstanbul, Marmara Üniversitesi, 2006), 121.
[162] Tavlı, *Tıbbi Müdahalede Karar Vericiler ve Rıza*, 4.
[163] Saibe Oktay-Özdemir, "Türk Hukukunda Başkası Lehine Tıbbi Müdahaleler", 322-323.

population planning. It includes both invasive and non-invasive procedures carried out for the benefit of the patient.".[164]

As it can be seen, there are several medical intervention definitions in Turkish doctrine. The basic element form medical intervention is aiming the absolute wellbeing of individuals, whether that intervention carries extreme risks or negligible risks for that individual.

As above mentioned, there are several criteria set forth for qualifying a medical intervention as mandatory. Since, medical interventions are required to be carried out by individuals who are authorized, one of the conditions to be considered as a legitimate intervention is to *"operating by a health care professional, especially a doctor"*[165]. The main reason behind this rule is protection of the society, hence protection of individuals. In addition, if someone delegates authority for some other person who is not a health care professional, that authority will be considered invalid[166].

2.2.1. Mandatory Medical Interventions within the scope of the Constitutional Rights

Vaccination can be considered as a medical intervention that violates an individual's bodily integrity, and therefore, it can be considered and argued to be unlawful in this context. However, it can be asserted that vaccination is not unlawful when there are justifications for compliance with the law, such as the consent of the affected party or when the intervention serves the public interest. The issue of the application of justifications for compliance with the law is particularly important in the case of mandatory vaccines classified as compulsory and for the Covid-19 vaccine. If consent is given for vaccination, there will be a justification for compliance with the law, and no legal debate will arise. The main issue to be discussed is whether vaccination is lawful or mandatory when an individual does not give consent. This raises questions regarding the legality and compulsory nature of vaccination.

[164] Koyuncu Aktaş, 38.
[165] Hakeri, *Tıp Hukuku*, 236.
[166] Hakeri, 237.

As mentioned, the right to life, the right to health, and bodily integrity are protected by the Constitution[167], particularly under Article 17, which safeguards the individual's inviolability and physical and spiritual existence. In this regard, we can state that this right is protected not only against attacks by others but also against attacks by the State. Additionally, it is the duty of the state to protect life, health, and bodily integrity. The personal values that constitute the right to personality, especially the importance of life, health, and bodily integrity in our context, encompass the overall development of the individual in all aspects. It is within the responsibilities of the state to eliminate and completely eradicate potential harm posed by epidemic diseases, infectious diseases, natural disasters, or any other factors that may impede or threaten such development.

Regarding to mandatory medical interventions, there are several applications to Constitutional Courts in both national and international law which will be examined in the thesis.

If the state makes certain vaccines mandatory in order to protect the health and right to life of its citizens and if individuals refuse to give their consent, a debate arises as to whether this intervention would be unlawful. Therefore, the question of whether it is possible to infringe upon bodily integrity in the presence of the acceptance of public interest. If so, under what criteria this intervention would be considered lawful becomes significant in terms of conflicting constitutional values. Moreover, in the event of the potential acceptance of certain vaccines as mandatory, the effects and consequences of an individual's refusal of vaccination, as well as the course of action the administration would take in response, should also be discussed.

In particular, the decisions of the Court of Cassation regarding medical interventions, including compulsory vaccination, will be evaluated under this heading. Within this context, in-depth analysis will be conducted on topics such as vaccines during infancy and childhood, compulsory vaccination, the principle of legality, the right to personality, the conflict between individual rights and the public interest, the best interests of the child, and the concept of consent by legal representatives throughout in the thesis.

[167] Türkiye Cumhuriyeti Anayasası (Constitution of the Republic of Türkiye) O.J.: 2709 D.: 09.11.1982.

First and foremost, it should be mentioned that the course of decisions made by the Court of Cassation has changed in parallel with the decisions of the Constitutional Court. In order to shed light on this course and evolving legal perspective, and to understand the direction of these decisions step by step along with their reasoning, the decisions of the Court of Cassation will be chronologically evaluated under this heading.

In the decision of the 2nd Civil Chamber of the Court of Cassation with the case number 2014/26980 and the decision number 2015/6339, dated 1st April 2015, it was stated that when the legal representative of a minor refuses to consent to the administration of vaccines that are mandatory within the scope of the "expanded immunization program", and as a result, the vaccines are not administered to the minor, the Provincial Directorate of Family and Social Policies requested a decision for health measures in accordance with Article 5(1)(d) of the Law for the Protection of the Minors, numbered 5395[168]. After the acceptance of this request by the court of first instance, the case was brought before the court due to the legal representative's appeal. When we examine the 2nd Civil Chamber of the Court of Cassation's decision the "expanded immunization program" should also be examined, the "expanded immunization program" includes vaccination services aimed at reaching and immunizing vulnerable age groups before they become infected, with the purpose of reducing and even eliminating diseases such as pertussis, diphtheria, tetanus, measles, mumps, rubella, tuberculosis, polio, varicella, hepatitis A, hepatitis B, Streptococcus pneumoniae, and Haemophilus influenzae type b-related invasive diseases and associated mortality rates. This program is defined in the Memorandum of the Ministry of Health of the Republic of Türkiye, dated 25th February 2008, with the reference number 6111, with the objective of controlling and potentially eradicating these diseases by ensuring immunization before individuals in vulnerable age groups contract the infections.

According to the examination conducted within the scope of the case, the legal basis relied upon includes the Law numbered 5395 on the Law for the Protection of

[168] "Çocuk Koruma Kanunu (Law for the Protection of the Minors) O.J.:25876 D.: 15.07.2005," 5395 § (2005).

the Minors[169]; Oviedo Convention; the Convention on the Rights of the Child *(UNCRC)*[170], and the TCC.

In the court decision, the grounds for lawful medical intervention that would eliminate the unlawfulness of the medical intervention are set out within the framework of the Bioethics Convention, including the nature of the consent to be given and general information on consent for medical interventions on minors.

In this regard, it is emphasized that medical intervention can only be carried out when the relevant person freely and adequately gives informed consent. In the case of minors, mentally incapable individuals, those lacking capacity to give consent, or those deprived of the ability to give consent for any reason, medical intervention can only be performed if it directly benefits this group of individuals. Furthermore, it is stated in the court decision that medical intervention on a minor, a mentally ill person, or an individual deprived of the capacity to give consent may only be carried out with the permission of their legal representative or a person or institution designated by law. Even in such cases, it is emphasized that the person, authority, or institution giving consent must be provided with appropriate information regarding the purpose, nature, consequences, and risks of the intervention.

Subsequently, in the specific case, it is stated that the consent of the legal representative must be sought for the intervention on a minor. However, the court also examines the situation where the legal representative is informed about the purpose, nature, consequences, and potential dangers of the medical intervention but still does not give consent. In this context, it is emphasized that, according to the Convention on the Rights of the Child and provisions of the TCC, the best interests of the child must be considered in all decisions made by legal representatives regarding the child, taking into account the scope and use of parental rights.

As a result, according to the decision of the Court of Cassation, in the debate on obtaining consent for medical intervention on a minor, it is stated that the decision should be based on the best interests of the child and whether the intervention is necessary. It is mentioned that the vaccination of the minor is necessary to protect the

[169] Çocuk Koruma Kanunu (Law for the Protection of the Minors) O.J.:25876 D.: 15.07.2005.
[170] UN General Assembly, "Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, Vol. 1577," (accessed 12.06.2023).

minor as an individual in terms of future diseases and also for public health, and no valid reason has been put forward by the legal representatives for refusing consent. Additionally, the court decision states, "*Considering the reports in the file, it is understood that the vaccination is necessary not only for the future individual health of the child but also for public health.*" However, there is no information available regarding the specifics of these reports or who prepared them. It is stated that if it is necessary for the best interests of the child, the consent of the legal representative will not be required.

Although the court decision does not provide a concrete basis for determining in which cases the best interests of the child are present and does not specify which vaccines were refused, it is considered sufficient that the vaccine for the child falls under the "extended immunization program" and the legal representative did not provide a valid reason.

In the decision of the 2nd Civil Chamber of the Court of Cassation with the case number 2014/22611 and the decision number 2015/9162, dated 4th May 2015, it was stated that if the legal representatives of the child, having been informed about the administered vaccine, withhold consent without any justifiable reason, this stance that is contrary to the child's best interests cannot lead to legal consequences. In other words, if the lack of permission by the parents is clearly against the child's best interests, permission is not required. In conclusion, the court stated that even in the absence of permission from legal guardians, vaccines can be administered to children both in the interest of the child's best welfare and for the preservation of public health. The same conclusion also takes place in various Court of Cassation decisions.[171]

In Turkish Constitutional Court's Halime Sare Aysal decision mandatory vaccination applications on infancies is questioned[172]; in Muhammed Ali Bayram decision, mandatory heel prick procedure on newborns and vaccinations is

[171]Yargıtay 2. H.D., 2015/1170 E., 2015/9552 K., 07.05.2015; Yargıtay 2. H.D., 2015/637 E., 2015/10057 K., 13.05.2015; Yargıtay 2. H.D., 2014/28082 E., 2015/10717 K., 26.05.2015; Yargıtay 2. H.D., 2015/9985 E., 2015/11141 K., 01.06.2015; Yargıtay 2. H.D., 2015/11141 E., 2015/12106 K., 09.06.2015

[172] Halime Sare Aysal Application (Application Number: 2013/1789) (O.J.:29572 D.:24.12.2015), R.G. Tarih ve Sayı: 24/12/2015-29572 (Constitution Court of the Turkish Republic 2015).

questioned[173]; in Salih Gökalp Sezer decision, the parent rejected a mandatory (Hepatitis B) vaccination for the infant and the court decided for protective measures for the infant[174]; in Esma Fatıma Kızılsu & Rukiyye Erva Kızılsu decision, even though the parents were not allowed the infancy vaccinations, the court ruled out a medical intervention decision and the Constitutional Court have decided the Article 17 of Turkish Constitution is violated, which legislates the *"Personal inviolability, corporeal and spiritual existence of the individual"*[175]. The court cases above mentioned will be discussed under the heading of "Vaccination as a Medical Intervention that Violates Bodily Integrity".

4. VACCINE DEVELOPMENT PROCESS AND VACCINE APPLICATIONS

The vaccine development process is quite complex and can vary in duration depending on the targeted disease type, the vaccine production technology to be used, the number of volunteers participating in clinical trials, and the approval procedures. The vaccine development process can be summarized into variously different stages: discovery, preclinical, clinical research (phase I, phase II, phase III)[176], and licensure and post-marketing (phase IV).[177]

The first step in vaccine development is to identify the antigen that will induce immunity against the targeted disease. Since the disease agents and pathogens that cause diseases vary, different antigen and vaccine types can be developed, such as live attenuated vaccines, inactivated vaccines, recombinant vaccines, etc. In the preclinical stage following the discovery phase, the effectiveness and safety of the potential vaccine are carefully investigated under laboratory conditions. In preclinical studies, the level of immune response elicited, the potential for disease prevention, any side or toxic effects, the impact of the vaccine production technology, and the use of adjuvants on the immune system are also tested. The effectiveness and safety of a potential

[173] Muhammed Ali Bayra Application (Application Number: 2014/4077), . (O.J.:29869 D.:26.10.2016), R.G. Tarih ve Sayı: 26/10/2016-29869 (Constitution Court of the Turkish Republic (2016).
[174] Salih Gökalp Sezer Application (Application Number: 2014/5629) (Constitution Court of the Turkish Republic (2017).
[175]Türkiye Cumhuriyeti Anayasası (Constitution of the Republic of Türkiye) O.J.: 2709 D.: 09.11.1982.; Esma Fatıma Kızılsu ve Rukiyye Erva Kızılsu Application (Appliation Number: 2013/7246) (Constitution Court of the Turkish Republic (2016).
[176]CDC, "How Vaccines Are Developed and Approved for Use," https://www.cdc.gov/vaccines/basics/test-approve.html (accessed 12.06.2023).
[177] Çetin Çelik and Mehmet Ateş, "Aşı Paradoksu," *Celal Bayar Üniversitesi Sağlık Bilimleri Enstitüsü Dergisi* 9, no. 1 (March 31, 2022): 179, https://doi.org/10.34087/cbusbed.1012885.

vaccine, which has successfully completed preclinical studies, are evaluated in the next stage through clinical trials conducted in humans.

The main purpose of Phase I clinical trials can be listed as evaluating the safety profile, dosage, and immune responses induced by the vaccine. In this phase, the vaccine is administered to a small number of volunteers at different doses, and in addition to assessing the immune responses elicited, the short-term safety of the vaccine is also tested (e.g., injection site pain, fever, muscle aches). Compliance with "Good Clinical Practice" is mandatory in all clinical trials. All physicians and other healthcare professionals participating in clinical research must adhere to the rules of the Helsinki Declaration. This declaration encompasses five fundamental principles: 1) Respect for the individual and their autonomy, 2) Beneficence and non-maleficence, 3) Justice, 4) Protection of the privacy of the individual's personal life, and 5) Protection of the confidentiality of data obtained from the patient and the research participant. Phase I trials are conducted in healthy adult volunteers between the ages of 20 and 80. In vaccine studies, Phase I trials are conducted in an open-label manner to evaluate the safety of the candidate vaccine and determine the type and scope of the immune response it triggers. Researchers may use an "immunity model" (challenge model) by infecting the participants with the pathogen after vaccinating the experimental group. In some cases, a weakened or modified version of the pathogen is used for this purpose. In addition to safety data, dose range determination, tolerance, and pharmacokinetic properties are examined in drug research. These studies are typically completed within an average of 1-1.5 years under normal conditions. If the results are successful, the next stage, Phase II trials, is initiated.[178]

In Phase II trials, the safety and efficacy of the vaccine are evaluated by administering it to hundreds of volunteers. Both humoral and cellular immune responses are measured in Phase II, but Phase II trials alone are not sufficient to evaluate the effectiveness of a vaccine.[179]

Phase III studies are of critical importance in testing the safety and efficacy of developed vaccines. In this stage, the vaccine candidate is administered to large populations involving thousands of volunteers. The goal of Phase III clinical trials is

[178] Çelik and Ateş, 178.
[179] Zeliha Yazıcı, "COVID-19 Sürecinde İlaç Tedavisinin ve Aşı Uygulamalarının Etik Boyutu," no. 9 (June 24, 2022): 11.

to demonstrate the effectiveness of the developed vaccine against the target disease and monitor short-term and long-term side effects. Since the vaccine is administered to large groups of people in this stage, some rare side effects that may not have emerged in earlier stages may be observed. To compare the effectiveness of the vaccine candidate, a group of volunteers participating in the research is given a solution known as a placebo, which is not the actual vaccine. The participants receiving the vaccine or placebo are randomly selected. Throughout the study, both the volunteers and most of the researchers are unaware of who received the candidate vaccine and who received the placebo. This method, known as "blinding," is necessary to minimize factors that could affect research results. Phase III trials are usually multicenter and multinational. After evaluating the data obtained from Phase III, the process proceeds to the licensure stage. The safety and efficacy of a licensed and in-use vaccine continue to be monitored in Phase IV. Based on the data collected in Phase IV, vaccines that have been licensed, especially those with safety concerns, can be withdrawn, although this is very rare.[180]

In Türkiye, vaccines are licensed by the Turkish Medicines and Medical Devices Agency *(TİTCK)*, which is under the authority of the Ministry of Health. The licensing of all pharmaceutical products used for the prevention, treatment, or diagnosis of diseases is carried out in accordance with the "Human Medicinal Products Licensing Regulation". After the scientific and technological evaluation of the medical product, which has been prepared in compliance with national and/or international guidelines and a license application has been submitted, a license certificate is granted to the product that demonstrates suitable qualities in terms of quality, safety, and efficacy. The license is a document issued by the Ministry of Health, indicating that the product can be marketed for use in the specified condition and manner as stated in the short product information, including its specific content, dosage, and form. License certificates are valid for 5 years, and for products whose license period has expired, a license renewal application is made. In the European Union, vaccines that have obtained their licenses through the centralized licensing procedure by the European Medicines Agency *(EMA)* are valid in all European Union countries. In the United

[180]Sevtap Metin, "Covid-19 Bağlamında Zorunlu Aşı Tartışmalarının Hukuki Boyutu" . Sağlık Bilimlerinde İleri Araştırmalar Dergisi" no. 4 (2021): 43; WHO, "Clinical Trials," https://www.who.int/health-topics/clinical-trials. (accessed 12.06.2023)

States, the Food and Drug Administration *(FDA)* is responsible for the licensing of vaccines.

SECTION II

VACCINATIONS AS A MEDICAL INTERVENTION EXAMPLE

1. The description of Vaccination

Vaccination is a commonly heard medical intervention method that applied most of the individuals in every society. The meaning of a vaccination is simply, a method to prevent diseases beforehand. There are various definitions regarding vaccinations. For example, one of the definitions of vaccination reads as follows "*the process or an act of giving someone a vaccine (a substance put into a person's body to prevent them getting a disease)*".[181] Another definition is, *"the act of vaccinating and the scar left following inoculation with a vaccine"*[182], and last but not least another definition reads as follows, *"a way of protecting someone from getting a particular illness by putting a substance called a vaccine into their body, usually by injection and an injection with a substance that prevents someone from getting a particular illness"*.[183] These definitions makes an brief summary regarding to common perception of vaccinations. Such as, being a medical intervention, and being a protective measure in spite of infectious diseases.

Hence, national dictionaries place the nuances of the terms, the Turkish Language Association described the vaccination term with several historical nuances. The translation of the term of vaccine defined as follows, "*a solution that prepared with a disease's microbe and injected for acquiring immunity against several disease and application of that solution"*.[184]

The main purpose of vaccination is reaching out to the individuals before becoming infected and developing immunity. Vaccination stimulates the immunization system and creates an immune response, through antibodies that

[181]Cambridge Dictionary, "Vaccination Cambridge Dictionary," https://dictionary.cambridge.org/dictionary/english/vaccination. (accessed 12.06.2023)
[182] Collins Dictionary, "Vaccination Definition and Meaning | Collins English Dictionary," https://www.collinsdictionary.com/dictionary/english/vaccination. (accessed 12.06.2023)
[183]Macmillan Dictionary,"Vaccination Definition and Synonyms https://www.macmillandictionary.com/dictionary/british/vaccination. (accessed 12.06.2023)
[184] TDK, "Aşı Ne Demek?" https://sozluk.gov.tr/?kelime=aşı. (accessed 12.06.2023)

acknowledges the agents of diseases which seizes and destroys the agents.[185] When an individual inoculates the vaccination, their body will develop a lifelong resistance against diseases. The perpetual immunization is aimed by the vaccination that targets diseases.[186] Vaccination and quarantine measures ensure the protection of the vaccinated individuals or those subjected to isolation for therapeutic purposes, with the primary benefit arising for the community due to the prevention of disease transmission.[187] Hence, vaccination aims to benefit public health.

Since vaccination is a medical intervention, there are several definitions in the medical science that needs to be explained[188]. For example, a definition that examines the adult's approach regarding adulthood immunization explains vaccination as follows, "*a immunobiological preparation that prepared with the aim of original protection against a particular disease"*[189]. Another definition explains vaccine as a *"biological mixture that used to acquire immunity against diseases that caused by microorganisms such as viruses, and microbes, as a consequence of particular procedures microorganisms with decreased pathogenic affects that still acquires qualifications that stimulates body's defense mechanism and includes the diseases that caused by microbe the bits of microbes or antigens"*[190]and vaccination as *"body's preparation of immune system though injecting vaccines to the body against diseases caused by specific viruse and bacteria."*[191].

[185] Fatmagül Kale Özçelik, "Hakların Çatışması ve Dengelenmesi Bağlamında Çocuklara Yönelik Zorunlu Aşı Uygulaması (Avrupa İnsan Hakları Sözleşmesi Ekseninde Bir İnceleme)," *Süleyman Demirel Üniversitesi Hukuk Fakültesi Dergisi* 10, no. 2 (2020): 53.
[186]Kale Özçelik, "Hakların Çatışması ve Dengelenmesi Bağlamında Çocuklara Yönelik Zorunlu Aşı Uygulaması (Avrupa İnsan Hakları Sözleşmesi Ekseninde Bir İnceleme)," 52–53; Sağlık Bakanlığı, "Aşı Nedir, Nasıl Etki Eder?,", https://asi.saglik.gov.tr/genel-bilgiler/49-a%C5%9F%C4%B1-nedir,-nas%C4%B1l-etki-eder.html (accessed 12.06.2023).
[187] Saibe Oktay-Özdemir, "Türk Hukukunda Başkası Lehine Tıbbi Müdahaleler", 323.

[188] Sencer Abdullah Akkoyunlu, "Genel Sağlığın Korunmasına İlişkin İdari Bir Faaliyet Olarak Aşı Uygulamasının Kanuniliği," *Erzincan Binali Yıldırım Üniversitesi Hukuk Fakültesi Dergisi*, no. XXI (2017): 44.
[189] Bekir Urağan İneli, "18 Yaş Üstü Erişkinlerin, Erişkin Aşıları Konusundaki Bilgi, Tutum Ve Görüşleri İle Aşı Yaptırma Oranlarının Değerlendirilmesi" (Yayımlanmamış Uzmanlık Tezi, Antalya, 2016), 5.
[190] Sebahat Dilek Torun, "Ümraniye Eğitim ve Araştırma Sağlık Grup Başkanlığı Bölgesinde Aşılama Hizmetleri Ve Soğuk Zincir Yönetimi Üzerine Eğitimin Etkisi" (Yayımlanmamış Doktora Tezi, İstanbul, 2006), 16.
[191] Torun, 16.

1.1. Vaccination as a Medical Intervention that Violates Bodily Integrity

Thirteen vaccinations are included in the schedule and recommended for children issued by the Turkish Ministry of Health. Within this scope, it is important to mention that the one and only mandatory vaccination that regulated as a mandatory in Türkiye is smallpox vaccination according to the Article 88 of the Public Health Code dated 1930, numbered 1593. The first sentence of the Article 88 of the Code reads as follows, *"Within Türkiye, every individual is obligated to be vaccinated with the smallpox vaccine."*. To simply put, it is obvious that smallpox is one of the childhood vaccinations in Türkiye which is regulated in an article as a mandatory. Therefore, as a result of Article 88, the legality condition can be considered fulfilled. Yet, the other conditions are also needed to be sorted out.

When examining the regulations related to vaccinations in Turkish Law, it can be argued that some of them involve medical interventions requiring consent. From this perspective, according to *Oktay-Özdemir*, they do not possess a distinctive feature[192]. However, vaccine implementations which does not seem to not require consent have been considered as medical interventions which are not requiring consent, considered important for discussion according to *Oktay-Özdemir.*[193]

Application of vaccination is a violation against bodily integrity. Constitutions which are prior legal documents that legislates the boundaries between people and the State, clearly has limitations regarding medical interventions. In additions, Civil Law regulations and secondary regulations have several limitations. Bodily integrity is protected within the scope of these regulations.

According to Turkish Constitution, violations regarding bodily integrity is prohibited. An intervention against bodily integrity only be accepted in exceptional cases, which are regulated in the Constitution.

Qualification of childhood vaccination applications in Türkiye is disputed whether mandatory or recommended.[194] With Muhammed Ali Bayram Application, it was decided by the Constitutional Court in that the mandatory practice applied to

[192] Saibe Oktay-Özdemir, "Türk Hukukunda Başkası Lehine Tıbbi Müdahaleler", 343.
[193] Oktay-Özdemir, "Türk Hukukunda Başkası Lehine Tıbbi Müdahaleler", 343-344.
[194] Kale Özçelik, "Hakların Çatışması ve Dengelenmesi Bağlamında Çocuklara Yönelik Zorunlu Aşı Uygulaması (Avrupa İnsan Hakları Sözleşmesi Ekseninde Bir İnceleme)," 53.

babies that taking heel blood through mandatory heel prick procedure did not violate the right to bodily integrity, despite the family's consent, since it met the legality requirements.[195] Yet, even before the Muhammed Ali Bayram decision, the Halime Sare Aysal decision sets clear boundaries regarding Turkish Constitutional Court's approach regarding mandatory vaccinations. In Constitutional Court's series of decisions regarding mandatory vaccinations, including the application of childhood vaccines without obtaining parent's permission, the Constitutional Court conducted evaluations in the application of Halime Sare Aysal, which dates back to 2015 and was brought forward through individual complaint.[196] After this decision of the Constitutional Court, in which it was decided that physical integrity was violated because of the mandatory vaccinations applied to children due to the lack of legal basis. In other words, aftermath of Halime Sare Aysal decision, the understanding of compulsory vaccination changed. The families consent became essential within the scope of applicability of vaccinations on minors. If the family does not provide a valid consent to application of the vaccinations, there is no longer any legal ground for taking criminal action against the family. Therefore, since 2015, the vaccination policy in Türkiye considered to become voluntary.[197]

In the case of Halime Sare Aysal, upon an application by the Ministry of Family and Social Policies, the Court of First Instance, despite the family being informed about the importance of vaccines included in the "Expanded Immunization Program", decided to administer the vaccines due to the family's refusal based on their status as *"children in need of protection"*. Ultimately, having exhausted domestic remedies, the family made an individual application to the Constitutional Court. The Constitutional Court addressed the application under four main headings in the context of the principles of *"infringement of privacy", "bodily integrity cannot be violated except for medical necessity and cases prescribed by the law", "right to refuse medical intervention"*, and *"requirement of legality in restricting fundamental rights and freedoms"*. In this decision, the Constitutional Court interprets the concept of private

[195]Muhammed Ali Bayram Application (Application Number: 2014/4077), (O.J.:29869 D.:26.10.2016), R.G. Tarih ve Sayı: 26/10/2016-29869 (Constitution Court of the Turkish Republic (2016)

[196]Sevtap Metin, "Covid-19 Bağlamında Zorunlu Aşı Tartışmalarının Hukuki Boyutu" . Sağlık Bilimlerinde İleri Araştırmalar Dergisi" no. 4 (2021): 40

[197]Kale Özçelik, "Hakların Çatışması ve Dengelenmesi Bağlamında Çocuklara Yönelik Zorunlu Aşı Uygulaması (Avrupa İnsan Hakları Sözleşmesi Ekseninde Bir İnceleme)," 53–54.

life broadly, in parallel with the ECtHR, emphasizing that this right cannot be solely reduced to the right to privacy. It highlights that the legal interest related to a person's bodily integrity is also protected within the scope of the right to respect for private life. The Court centers around Article 17 of the Constitution. As emphasized in the decision of the Constitutional Court, the right to private life (or privacy) protects individuals against physical and psychological intrusions from both public authorities and private entities, encompassing their physical and mental integrity. This legal interest also includes the right to refuse medical intervention. According to Article 17 of the Constitution, one of the conditions that ensures the legality of medical interventions without the patient's consent is medical necessity, and the other is being based on the law.[198]

The State has the obligation to protect life and for that reason, mandatory vaccination became an effective public health protection tool. The right to life, is a fundamental right that enables individuals to benefit from other essential rights. ECtHR discussed this issue in the Öneryıldız v Türkiye Application. In related decision, it is stated that, according to the first paragraph of Article 2 of the Human Rights Act, everyone's right to life is protected by law. No one life can be intentionally put to an end, except for the execution of death penalties that prescribed by the law, which is decided by the court. Pursuant to the relevant article, the State not only have a negative obligation to intentionally and unlawfully end the lives of individuals but also obliged to protect the life of every individual within its jurisdiction, including harm from third parties.[199]

1.2. Who Is Authorized to Administer Vaccinations?

Just like any other medical intervention, physicians are authorized to administer vaccinations. In Turkish Law, there are several legislations that describes the responsibilities of health care professionals. It is evident that vaccination is a medical intervention, and medical intervention is a medical activity. According to Turkish Law, this activity is primarily performed by physicians. However, the only authorized individuals for medical intervention are not limited to physicians. Law

[198] Sevtap Metin, "Covid-19 Bağlamında Zorunlu Aşı Tartışmalarının Hukuki Boyutu", 40
[199] Kale Özçelik, 57; Öneryıldız v Türkiye Application no.48939/99 (ECtHR, 30 November 2004).

numbered 1219 regulates the conditions under which midwives, dentists, health officers, and other authorized individuals specified in the Law can perform medical interventions.[200]

According to Article 1 of the Code of Family Physicians[201], the purpose of the code is to regulate the status and financial rights of the health personnel who will be appointed or employed in order to develop primary health care services, to focus on preventive health services in line with individual needs, to keep personal health records and to provide equal access to these services, in the provinces to be determined by the Ministry of Health, in order to provide family medicine services. As it can be seen, the first article aims to regulate the status of "health personals".

Article 2 of the Code defines the "Family Physician" and "Family Health Worker". Family medicine specialist, who is responsible for providing personal preventive health services and primary health care diagnosis, treatment and rehabilitative health services comprehensively and continuously in a certain place to every person without discrimination of age, gender and disease, providing mobile health services to the extent necessary and working on a full-time basis or a specialist physician or physician who has received the training stipulated by the Ministry of Health. Family health worker described as health personnel such as nurses, midwives, and health officers who serve together with the family physician.

The Ordinance on Job and Duty Definitions of Healthcare Professionals and Other Professionals Working in Health Services[202], "the healthcare professional" was used and defined[203]. Article 4/1-b lists the healthcare professionals as follows: physicians, dentists, pharmacists, nurses, midwives, opticians, and other profession defined in the additional Article 13 of the Law numbered 1219[204].

The Turkish Criminal Code[205] also made a definition in terms of applicability regarding Article 280. According to the article, "Healthcare professional term can be

[200] Saibe Oktay-Özdemir, "Türk Hukukunda Başkası Lehine Tıbbi Müdahaleler",323
[201] Aile Hekimliği Kanunu (Code of Family Physicians) O.J.: 25665 D.: 09.12.2004.
[202] Sağlık Meslek Mensupları ile Sağlık Hizmetlerinde Çalışan Diğer Meslek Mensuplarının İş ve Görev Tanımlarına Dair Yönetmelik (The Ordinance on Job and Duty Definitions of Healthcare Professionals and Other Professionals Working in Health Services) O.J.: 29007 D.: 22.05.2023.
[203] Hakeri, *Tıp Hukuku*, 141.
[204] Hakeri, 143.
[205] Türk Ceza Kanunu (Turkish Criminal Code) O.J.:25611 D.:12.10.2004.

understood as physician, dentist, pharmacist, midwife, nurses and other health care providers.[206]

In this context, there is no doubt that the first thing that comes to mind when health personnel is mentioned is physicians and nurses. I elaborated on the subject of the physician above. The nurse, who has the authority to intervene in her field, is defined as follows in Article 132 of the Ordinance of Inpatient Treatment Institutions Operating.

According to the Article 1 of the Nursing Law No. 6283 dated 25/2/1954[207], *"Those who have graduated from faculties and colleges providing undergraduate education in nursing in Türkiye and whose diplomas have been registered by the Ministry of Health, can be given the title of nurse. The title of nurse is also given to those whose continued their education abroad related to nursing, when equivalence is approved by completing them in a school recognized by the Ministry of Health and whose diplomas are registered by the Ministry of Health.".* According to Article 4/1-b of the Nursing Regulation, a nurse is a health personnel authorized to practice the profession of nursing. In conclusion, above mentioned health care professionals are capable to inoculate vaccinations, essentially the ones listed in the Code numbered 1219.[208]

Routine vaccinations for children can be said to be administered in the through routine controls of the infant, on the other hand, adults can willingly wish to receive several preventive vaccinations. During their regular visits to hospitals, family physicians or other health care facilities, adults can receive vaccinations such as Flu vaccination or HPV vaccination.

When it comes to the application of preventive vaccinations, the HPV vaccination can set an example. Because, when an individual is diagnosed to be infected with a HPV virus, the treatment includes receiving the vaccination. On the other hand, the medical requirement condition is widely disputed in childhood vaccination applications. Because, as it will be seen in the ECtHR's Vavřička and Others v. The Czech Republic decision, parents may consider some vaccinations not

[206] Hakeri, *Tıp Hukuku*, 143.
[207] Hemşirelik Kanunu (Code of Nursing) O.J.:8647 D.: 02.03.1954.
[208] Tababet ve Şuabatı Sanatlarının Tarz-ı İcrasına Dair Kanun (the Code of Execution of Medicine and Medical Sciences) O.J.: 863 D.: 14.04.1928.

necessarily applicable because of the extinction of the disease or not being transferable among humans.

2. MANDATORY VACCINATIONS

Vaccinations are divided as mandatory vaccinations and recommended vaccinations[209]. Mandatory vaccinations are required to be applied the target group. With mandatory vaccinations, the State limits the individuals free will and freedom to preferences[210].

According to *Haverkate,* the mandatory vaccination term can be restrained to cover only children. In consonance with this limitation, mandatory vaccinations described as, legally obligatory vaccinations that must inoculate to children without the necessity to receive parent's consent whether there are a legal and economic consequences.[211]

The States undertake the mission of providing vaccination for everyone with aiming immunization. In case rejection of application of the mandatory vaccinations, the States foresees several implications and consequences.[212] These consequences can be either penal sanctions or administrative sanctions. In addition, children who applied for primary school education and did not receive vaccination may be rejected.[213] For example, in Australia, Italy, France and Czech Republic children who did not receive mandatory vaccinations are not accepted to education institutions.[214] In Australia, administrative authority received pecuniary penalty because of the registration of

[209] Mine Kasapoğlu Turhan, "İdari Kolluk Yetkisi Bağlamında Zorunlu Aşı Uygulaması," *Hacettepe Hukuk Fakültesi Dergisi* 9, no. 1 (June 30, 2019): 3–4, https://doi.org/10.32957/hacettepehdf.491871; Ercan Avcı, "Çocukluk Dönemi Aşılarına İlişkin Karşılaştırmalı Bir Analiz: Amerika Birleşik Devletleri ve Türkiye," *Liberal Perspektif: Analiz,* no. 9 (2017): 7, https://oad.org.tr/wp-content/uploads/2021/06/Analyses_2104_2019925145411997OAD_km6cahy.pdf; Kale Özçelik, "Hakların Çatışması ve Dengelenmesi Bağlamında Çocuklara Yönelik Zorunlu Aşı Uygulaması (Avrupa İnsan Hakları Sözleşmesi Ekseninde Bir İnceleme)," 53.
[210] Kale Özçelik, "Hakların Çatışması ve Dengelenmesi Bağlamında Çocuklara Yönelik Zorunlu Aşı Uygulaması (Avrupa İnsan Hakları Sözleşmesi Ekseninde Bir İnceleme)," 53.
[211] M Haverkate et al., "Mandatory and Recommended Vaccination in the EU, Iceland and Norway: Results of the VENICE 2010 Survey on the Ways of Implementing National Vaccination Programmes," *Eurosurveillance* 17, no. 22 (May 31, 2012): 2, https://doi.org/10.2807/ese.17.22.20183-en; Kale Özçelik, "Hakların Çatışması ve Dengelenmesi Bağlamında Çocuklara Yönelik Zorunlu Aşı Uygulaması (Avrupa İnsan Hakları Sözleşmesi Ekseninde Bir İnceleme)," 53.
[212] Kasapoğlu Turhan, "İdari Kolluk Yetkisi Bağlamında Zorunlu Aşı Uygulaması," 3.
[213] Kale Özçelik, "Hakların Çatışması ve Dengelenmesi Bağlamında Çocuklara Yönelik Zorunlu Aşı Uygulaması (Avrupa İnsan Hakları Sözleşmesi Ekseninde Bir İnceleme)," 53.
[214] Kale Özçelik, 53.

unvaccinated children.[215] In Italy, families that rejected inoculation of mandatory vaccinations received pecuniary penalty.[216]

2.1. Can Vaccinations be Mandatory?

Infectious diseases are one of the greatest problems that humankind faced since the beginning of the history. Infectious diseases caused epidemic and pandemic and caused death of millions of people. There are various studies conducted to prevent infectious diseases. The precautions that prevent these diseases has more importance compared to the curing infectious diseases.[217]

In Türkiye, regarding mandatory vaccination practices, the Constitutional Court has concluded that the fundamental requirement sought by the ECtHR, namely the legal basis, is not present in the Turkish legal system. The Turkish Constitutional Court's decision has ruled that mandatory vaccination constitutes an infringement of individual rights due to the fundamental reason of lacking a legal basis. When evaluating the decisions of the Turkish Constitutional Court regarding mandatory childhood vaccinations, it becomes evident that alongside the determination of the absence of medical necessity for these vaccines, a central point of discussion is the legality aspect. As a medical intervention, the administration of vaccines must adhere to the general requirements of medical intervention, including the requirement for consent. For vaccinations to be administered without consent, there must be a legal basis.[218]

2.2. Childhood Vaccinations and Covid-19 Pandemic in Comparative Law

When considering that vaccines help prevent deaths from many diseases during infancy, it is understood that States aims to achieve community immunity through

[215] Kale Özçelik, 53.
[216] A. Di Pietro et al., "Today's Vaccination Policies in Italy: The National Plan for Vaccine Prevention 2017-2019 and the Law 119/2017 on the Mandatory Vaccinations," *Annali Di Igiene: Medicina Preventiva E Di Comunita* 31, no. 2 Supple 1 (2019): 56, https://doi.org/10.7416/ai.2019.2277; Kale Özçelik, "Hakların Çatışması ve Dengelenmesi Bağlamında Çocuklara Yönelik Zorunlu Aşı Uygulaması (Avrupa İnsan Hakları Sözleşmesi Ekseninde Bir İnceleme)," 53.
[217] Seltap Gülcü and Sevda Arslan, "Çocuklarda Aşı Uygulamaları: Güncel Bir Gözden Geçirme," *Düzce Üniversitesi Sağlık Bilimleri Enstitüsü Dergisi* 8, no. 14 (n.d.): 34.
[218] Sevtap Metin, "Covid-19 Bağlamında Zorunlu Aşı Tartışmalarının Hukuki Boyutu",40

mandatory vaccination as a solution.[219] Yet, application of childhood vaccinations are ongoing and accustomed procedures. There are disputes regarding to several counties that will be discussed below.

Covid-19 Vaccinations were produced as a result of important battle against the contagious virus. After the production of the vaccinations, all countries had placed great hopes on these vaccinations to protect their populations, especially to protect the risk group, and the vaccinations was largely successful. But on the other hand, there were signs of vaccination complaints. It is currently the subject of discussion in many countries, with both expected and unexpected side effects.

2.2.1. The Czech Republic

In the Czech Republic, the Public Health Protection Act *(PHP Act),* which pertains to mandatory vaccination, stipulates that citizens permanently residing in the country and foreigners who have been granted long-term residence permits are required to undergo certain routine vaccination procedures, which are detailed in secondary legislation. According to Section 50 of the PHP Act, early childhood centers like those in the current case may only take children who have received the necessary vaccinations, who have been certified as having acquired immunity through other means, or who have been determined to be unable to undergo vaccination due to health reasons[220]. Children under the age of fifteen are obliged to have these vaccinations administered by their legal representatives. Similarly, the same law states that preschool educational institutions will only admit children who have received the required vaccinations, can provide evidence of immunity, or cannot be vaccinated for health reasons. A similar provision can also be found in Article 5 of Section 34 of the Education Act.[221]

The Czech Republic's Minor Offenses Act *(the MO Act),* Chapter 2 and Article 29(1)(f), stipulate that a person who violates or fails to fulfill their obligation regarding the prevention of infectious diseases may be fined up to ten thousand Czech Korunas

[219]Seda İrem Çakırca, "Bebeklik Dönemi Aşı Uygulamalarının Velayet Hakkı Kapsamında Değerlendirilmesi," *İstanbul Hukuk Mecmuası / Istanbul Law Review*, no. 80(4) (December 27, 2022): 1111, https://doi.org/10.26650/mecmua.2022.80.4.0002.
[220] "Vavřička and Others v. The Czech Republic." Paragraph 11-13; Toebes, 862.
[221] "Vavřička and Others v. The Czech Republic." Paragraph 12-13; Toebes, 862.; Czech Republic The Education Act And The Act On Offences, https://www.global-regulation.com/translation/czech-republic/6092751/change-the-education-act-and-the-act-on-offences.html (accessed 31.08.2023)

(CZK). In the Case of Vavřička and Others V. The Czech Republic, this monetary amount calculated equal to four hundred Euros.[222]

In the occurrence of medical malpractice during mandatory vaccination in the Czech Republic, resulting in the impairment of the vaccinated person's health, the responsible party would be liable for compensation under the law of torts, as stated in the relevant decision.[223]

Under the laws and procedures in force in the Czech Republic, until December 31, 2013, it was possible to hold the responsible healthcare professional liable for compensation in cases where individuals' health was harmed due to mandatory vaccination, based on provisions related to strict liability in the Civil Code of the Czech Republic, Article 421/a. However, this provision was repealed as of January 1, 2014, through codification efforts in the field of civil law. Nevertheless, as of April 8, 2020, the state's liability for such damages was established. In addition to the explanations regarding liability for compensation in relation to vaccination, any damages suffered by individuals due to adverse effects of these vaccines will be covered by public health insurance.[224]

Another legal regulation related to mandatory vaccination in the Czech Republic is found in Article 4 and the first paragraph of Article 7 § 1 of the Charter of Fundamental Rights, which came into effect on January 1, 1999.

The first paragraph of Article 4 of the Charter stipulates that obligations can only be imposed on individuals based on the limits set by law and referring to their fundamental rights and freedoms. The article can be explained as follows: *"Particularly on the basis and within the confines of the law, and under the condition that each person's fundamental freedoms and rights are respected, duties may be imposed."*[225]. Furthermore, the second paragraph of the same article states that fundamental rights and freedoms can only be restricted by law and in accordance with the conditions specified in the Charter. According to Article 7 § 1 of the Charter, "*The*

[222] "Vavřička and Others v. The Czech Republic." Paragraph 17, 82-83; Toebes, 862.; Czech Republic Minor Offenses Act, https://www.global-regulation.com/translation/czech-republic/514453/amendment-to-act-no.-200-1990-coll.-on-offences.html (accessed 31.08.2023)
[223] "Vavřička and Others v. The Czech Republic." Paragraph 18; Toebes, 862.
[224] "Vavřička and Others v. The Czech Republic." Paragraph 19-20; Toebes, 862.
[225] "Vavřička and Others v. The Czech Republic." Paragraph 65.

inviolability of the person and of his or her private life shall be guaranteed. It may only be restricted in the cases provided for by law." [226].

Article 15/1 of the Charter guarantees the freedom of thought, conscience, and religion for individuals. The regulation reads as follows *"Freedom of thought, conscience and religious conviction shall be guaranteed. ...*[227]*".* Article 16/1 provides that everyone has the right to freedom of religion and to manifest their religion or beliefs, individually or in community with others, in public or in private, through worship, teaching, practice, and observance. According to the article, "*Everyone has the freedom to practice their religion or faith openly, individually or in community, in private or in public, through religious service, instruction, practice, or rituals.*" This provision is addressed in the Vavřička and Others v. The Czech Republic judgment of the European Court of Human Rights.[228]

The Charter includes provisions related to the right to health in Article 31. According to this article, everyone has the right to the protection of their health. Citizens are entitled to free healthcare and medical care within the limits set by law. The article's wording is takes places in the Vavřička decision, shortly, as follows, "*Every person has the right to have their health protected. Citizens have the right to free medical care and medical aids under the conditions set forth by law, based on public insurance.".*[229] The scope of the second sentence of this article was limited to the amount of insurance premiums collected within the scope of public insurance by a decision of the Constitutional Court of the Czech Republic on July 10, 1996. According to the European Court of Human Rights, all relevant provisions of the Charter are subject to the country's economic and social situation and living standards[230].

Article 33 § 1 of the Charter addresses the right to education. It states that everyone has the right to education. The relevant paragraphs of Article 33 of the Charter stipulate that "*Everybody shall have the right to education. School attendance shall be mandatory for the period specified by law.".*[231] According to this article, the

[226] "Vavřička and Others v. The Czech Republic.", Paragraph 66.
[227] "Vavřička and Others v. The Czech Republic.", Paragraph 67; Toebes, 868.
[228] "Vavřička and Others v. The Czech Republic.", Paragraph 68; Toebes, 868.
[229] "Vavřička and Others v. The Czech Republic.", Paragraph 67-73; Toebes, 868.
[230] "Vavřička and Others v. The Czech Republic.", Paragraph 70; Toebes, 868.
[231] "Vavřička and Others v. The Czech Republic.", Paragraph 71; Toebes, 868.

common ethical rule of the education is openly stated as “everyone has the right to education”. Attendance at school is compulsory in the period determined by law. In addition, by its nature, the law shall specify the age limits for compulsory education. In the Czech Republic, citizens have the right to pursue primary and secondary education free of charge.

2.2.2. Germany

In Germany, discussions regarding to side effects of Covid-19 vaccinations has been a current topic. We may encounter people who experience long-term side effects with the cause of COVID-19. The search for compensation and support is reflected in the German press more and more every day.[232]

In Germany, as of March 1, 2020, measles vaccination has been made mandatory through the Law for the Protection against Measles and to Strengthen Vaccination Prevention *(Measles Protection Act).* By July 31, 2022, all children who were already receiving care in the affected institutions at the time had to provide documentation. The rationale for this requirement is the inability to reach the desired vaccination levels for measles, which is one of the most contagious infectious diseases in Germany[233]. The Measles Protection Act stipulates that all children, after completing their first year, must show proof of measles vaccinations recommended by the Permanent Vaccination Commission when enrolling in school or daycare. Childcare providers are also required to provide documentation of measles vaccination.

The same applies to individuals working in collective facilities such as teachers, caregivers, and healthcare personnel born after 1970, as well as those working in healthcare institutions. Refugees and asylum seekers must also demonstrate

[232] Financial Times, “BioNTech Faces Hundreds of German Compensation Claims for Covid-19,”, https://www.ft.com/content/9b4e8497-65ad-4cbc-81d7-3ef7c9d322cb. (accessed 12.06.2023)
[233] “Masernschutzgesetz | Ministerium Für Soziales, Gesundheit, Integration Und Verbraucherschutz,” (accessed 25.05.2023) https://msgiv.brandenburg.de/msgiv/de/themen/gesundheit/oeffentlicher-gesundheitsdienst/masernschutzgesetz/#; Bundesministerium für Gesundheit, the Robert Koch-Institut, and the Paul-Ehrlich-Institut, “Frequently Asked Questions about the Measles Protection Law,” August 1, 2022, 1.

vaccination protection after being admitted to a collective housing facility for four weeks[234].

Since only measles vaccine is not available in Germany, this requirement is fulfilled through the administration of the measles-mumps-rubella *(MMR)* vaccine. Measles vaccines are now exclusively offered in Germany as a component of the MMR (Measles, Mumps, Rubella) or MMRV (Measles, Mumps, Rubella and Varicella) combination vaccines. To reduce the amount of shots given to children, the Standing Committee on Immunization *(STIKO)* generally advises the use of combination vaccinations. Children with an effective immune system are completely capable of adhering to the immunization. A combination vaccine is generally just as acceptable as a single vaccine.[235]

Although the mandatory COVID-19 vaccination has been discussed in the German Parliament, a general compulsory vaccination has not been accepted. However, as of December 12, 2021, the Infection Protection Act *(Infektionsschutzgesetz - IfSG)* introduced the requirement for presenting a COVID-19 vaccination certificate, proof of recovery from COVID-19, or evidence of a medical contraindication against vaccination for specific professions and workplaces under sections 20/a and 73/1a. This requirement applies to healthcare and care sectors such as hospitals, doctor and dentist practices, ambulance services, nursing homes, disability facilities, and home care.[236]

2.2.3. Italy

In Italy, the number of individuals who received incomplete vaccinations or not vaccinated at all, creates a possible threat to achieving herd immunity, this threat has been significantly increasing since 2013[237]. Following a major measles outbreak in January 2017, efforts towards the enactment of a new law, Law Decree No. 73/2017,

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[234] Bundesministerium für Gesundheit, the Robert Koch-Institut, and the Paul-Ehrlich-Institut, "Frequently Asked Questions about the Measles Protection Law," 1.
[235] Bundesministerium für Gesundheit, the Robert Koch-Institut, and the Paul-Ehrlich-Institut, "Frequently Asked Questions about the Measles Protection Law," 1.
[236] Federal Constitutional Court of Deutchland, BVerfG, Beschluss vom 27. April 2022 – 1 BvR 2649/21, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2022/04/rs20220427_1bvr264921.html, (accessed 12.06.2023)
[237] Alessio Facciolà et al., "Vaccine Hesitancy: An Overview on Parents' Opinions about Vaccination and Possible Reasons of Vaccine Refusal," *Journal of Public Health Research* 8, no. 1 (March 11, 2019): 1436, https://doi.org/10.4081/jphr.2019.1436.

were accelerated, and it came into force[238]. These legislative actions were deemed necessary due to the failure to achieve the intended results of Italy's 15-year vaccination policy, as vaccine hesitancy continued to spread[239]. To mitigate this public health risk, *"the National Plan for Vaccine Prevention 2017-2019"* was implemented[240]. Following the implementation of this plan, mandatory vaccinations planned to implementation from underaged infants to children who sixteen years old was increased from four to ten, and fines were introduced for hesitant or vaccine-refusing parents.[241] Prior to the enactment of Law No. 119/2017 in Italy, the vaccines considered mandatory (excluding the Veneto Region) were diphtheria, tetanus, hepatitis B, and polio.[242] These vaccines were categorized as mandatory, but there were no sanctions against individuals refusing vaccination until the adoption of Law No. 119/2017. Particularly since 1999, no sanctions had been imposed on individuals refusing vaccination for themselves or their children, and unvaccinated children were admitted to schools.[243] Before the implementation of Law No. 119/2017, the legislator's intention was to ensure individuals' protection against diseases through reliable vaccinations that obtained informed consent and voluntary consent.[244] With the adoption of Law No. 119/2017, pertussis, measles, mumps, rubella *(MMR)*, varicella, and Haemophilus influenzae type b *(Hib)* were added as mandatory vaccinations to the immunization schedule[245]. Prior to the adoption of this law, pertussis, measles, mumps, rubella *(MMR)*, Hib, HPV, meningococcal disease, and pneumococcal disease vaccines were strongly recommended. This situation resulted

[238] Fortunato D'Ancona et al., "The Law on Compulsory Vaccination in Italy: An Update 2 Years after the Introduction," *Eurosurveillance* 24, no. 26 (June 27, 2019), https://doi.org/10.2807/1560-7917.ES.2019.24.26.1900371.
[239] A. Di Pietro et al., "Today's Vaccination Policies in Italy: The National Plan for Vaccine Prevention 2017-2019 and the Law 119/2017 on the Mandatory Vaccinations," *Annali Di Igiene: Medicina Preventiva E Di Comunita* 31, no. 2 Supple 1 (2019): 54–64, https://doi.org/10.7416/ai.2019.2277.
[240] Di Pietro et al., "Today's Vaccination Policies in Italy," 2019, 55.
[241] Ministero della Salute [Ministry of Health]. Decreto legge 7 giugno 2017, n. 73, Disposizioni urgenti in materia di prevenzione vaccinale, come modificato dalla Legge di conversione 31 luglio 2017, n. 119. [Decree Law 7 June 2017, n. 73, Urgent provisions on vaccination prevention, as amended by the conversion law July 31, 2017] Rome: Ministry of Health; [accessed 11 Jun 2019]. Available from: http://www.trovanorme.salute.gov.it/norme/dettaglioAtto?id=60201.
[242] Di Pietro et al., "Today's Vaccination Policies in Italy," 2019, 56.; Stefano Crenna, Antonio Osculati, and Silvia D. Visonà. "Vaccination policy in Italy: An update. Journal of public health research", Vol.7, p. 128 https://doi.org/10.4081/jphr.2018.1523
[243] Di Pietro et al., "Today's Vaccination Policies in Italy," 2019, 56.
[244] Fortunato D'Ancona et al., "Introduction of New and Reinforcement of Existing Compulsory Vaccinations in Italy: First Evaluation of the Impact on Vaccination Coverage in 2017," *Eurosurveillance* 23, no. 22 (May 31, 2018): 2, https://doi.org/10.2807/1560-7917.ES.2018.23.22.1800238.
[245] D'Ancona et al., 1.

in a significant decrease in both mandatory and recommended vaccination rates, leading to a severe measles outbreak in 2017, as mentioned above. With the conversion of the Legislative Decree into Law No. 119/2017 on July 31, 2017, the obligations related to vaccination were increased, and sanctions were introduced. According to the law, children up to the age of six who have not been vaccinated cannot attend preschool education, and their parents are liable to fines ranging from one hundred to five hundred euros. In its initial implementation, the campaign was carried out to administer the mandatory and recommended vaccines from the previous dated National Vaccine Plans to children up to the age of 16 who had not been vaccinated, ensuring the free administration of vaccines listed in the National Vaccine Plan to unvaccinated children. The law also provided for the creation of a National Vaccine Registry for individual vaccine tracking, but this implementation was not put into effect.[246]

In the Constitutional judgment no. 5/2018, the Italian Constitutional Court examined the constitutionality of a decree-law that speedily turn into a law to raise the required immunization numbers from four to ten in this ruling, which was issued on November 22, 2017. It is also worth the mention that, these four vaccinations that aimed by the Italian government are considered minimum. In other words, parents can implement the vaccinations added afterwards even before the judgment no. 5/2018, if they have the will to inoculate. The decree-law considered all ten vaccination's inoculation indispensable for immunization before participating to early childhood educational services. The penalty for noncompliance was an administrative fine. Several arguments were raised against this, including unjustifiably interfered with the personal autonomy, which is fundamental principle.[247] In other words, a direct contravention against personality rights. There is a need of a justification to reject this argument, the following justification is used for that reason.[248]

The court pointed out the vaccination's prophylactic purpose and named it as "*the preventive nature of vaccination"* the gravely inadequate level of immunization

[246] Di Pietro et al., "Today's Vaccination Policies in Italy," 2019.
[247] European Court of Human Rights (Grand Chamber), "Vavřička and Others v. The Czech Republic. App. Nos. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15, 43883/15.," Paragraph 106-107; Toebes, "Vavřička v. Czech (Eur. Ct. H.R.)," 875.
[248] Italian Constitution Court (Corte constituzionale), No.5/2018, https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_5_2018_EN.pdf (access date: 09.08.2023)

in Italy at the specified time period, and the current pattern pointing to a decline in immunization rates. It was determined that the legislation fell under the political and discretionary purview of the authorities, who were expected to determine whether there was an urgent need to act before emergency situations that can be considered as *"crisis scenarios"* materialized and to do so in light of new information and *"epidemiological phenomena"*. Additionally, there was a necessity and requirement to behave in accordance with the precautionary principle. This principle is fundamental to the approach to preventive medicine and is crucial when it comes to public health. The court pointed out that *"recommendation and obligation"* were intertwined concepts in medical practice and that changing six vaccinations from being simply recommended to being mandatory did not significantly alter their status, pointing out that there was no scientific basis for the current trends in popular opinion that believed vaccination to be ineffective or dangerous. Additionally, it was determined that creating a requirement to provide a certificate for enrollment in school, and if this necessity gets rejected, imposing fines were considered both reasonable actions for the legislature to regulate, particularly in cases where it had stipulated that prior to the imposition of such sanctions, individual gatherings with parents and guardians to discuss the benefits and positive effects of vaccinations were to be held.[249] The court referred to established case law and investigated, the vaccination policies, according to the court, *"there was a requirement for balance between the individual right to health (including freedom regarding treatment), the coexisting and reciprocal rights of others, and the interests of the community,(…)."* As it can be seen, the conflict between the personality rights and public health when it comes to the vaccinations was questioned. In addition, the best interest for children and parent's or legal guardians approach also questioned.

When it came to minor children's interests, their parents had a common responsibility to act in a way that would best protect their children's health. This was the first step in pursuing such interests. However, such independence did not include the ability to make decisions that would be harmful to the minor's health.

A law requiring medical treatment was not unconstitutional if it met the following criteria: it was intended to improve or maintain the recipient's health as well

[249] "Vavřička and Others v. The Czech Republic." Paragraph 106-108; Toebes, "Vavřička v. Czech (Eur. Ct. H.R.)," 875.

as the public health; the recipient should not effected from the treatment negatively, with the sole exception of those consequences that ordinarily arose and, consequently, were acceptable; and, in case of further and exacerbated harm, a reasonable compensation payment would be made. The court additionally pointed out that there were numerous constitutional values at stake in the vaccination debate, and that their coexistence gave legislators latitude in deciding how best to guarantee the efficient protection of contagious diseases. This discretion should use in light of the numerous epidemiological and health conditions identified by the relevant authorities, as well as the continually developing findings in medical research, which the legislature had to look to for direction when making decisions in that area. The Constitutional judgments numbered 307/1990 and 118/1996 should also be examined.[250] The Constitutional Court previously ruled in its earlier judgment no. 307/1990, issued on June 14, 1990, that a law requiring mandatory anti-poliomyelitis vaccination was unconstitutional due to its failure to provide compensation for those suffering health problems brought on by the vaccine in the absence of negligence liability. The Constitutional Court reviewed the legislation that was subsequently passed (Law no. 210 of 25 February 1992) in its judgement no. 118/1996 of 18 April 1996. The court made note of the two components of health in constitutional law: the subjective and individual aspects regarding an individual's fundamental right and the sociological and objective features regarding a person's health as a matter of public interest. It was not possible to entirely exclude the possibility of someone's health suffering harm. In order to strike a balance, the legislation gave importance to the collective component of health. However, no one should be required to sacrifice their health in order to protect the health of others without also receiving fair compensation for any harm caused by medical care. The statute, according to the court, violates the Constitution since it doesn't provide for compensating persons whose health was harmed by mandatory vaccination before the law went into effect. It noted that without taking into account any guilt for negligence, such harm gave rise to a claim for compensation under the Constitution itself. In the Constitutional judgment no. 268/2018, This ruling, which was handed down on November 22 as Judgment No. 5/2018, dealt with a legal situation in which there was no remedy for health harm brought on by a vaccination that was optional rather than required. The court stated that there was no qualitative difference between mandatory

[250] Stefano Crenna, Antonio Osculati, and Silvia D. Visonà. “Vaccination policy in Italy: An update. Journal of public health research”, Vol.7, p. 130

and recommended vaccines, with the primary concern being the shared goal of preventing infectious diseases. In light of this, the Constitution was broken by the omission of compensation.[251]

2.2.4. France

In France, vaccination practices reflect a more systematic approach compared to other European countries, showcasing its historical development. The French Ministry of Health and the High Authority of Health publishes the vaccines to be administered to individuals residing in France each year.[252] The aim is to ensure immunity against diseases such as diphtheria, tetanus, polio, pertussis, Hib b, measles, mumps, rubella (MMR), meningococcal disease, and pneumococcal diseases for all children born after January 1, 2018.[253]

The vaccination schedule for childhood immunizations in France is organized in detail from birth. Children receive the tuberculosis vaccine from birth onwards. At two months of age, they receive the first dose of diphtheria, tetanus, pertussis, polio, Hib, and Hepatitis B vaccines. At four months, they receive the second dose of the same vaccines. At eleven months, they receive a booster dose of these vaccines. At twelve months, they receive the meningococcal disease, measles, mumps, and rubella vaccine. Between sixteen and eighteen months, they receive the second dose of the measles, mumps, and rubella vaccines. At six years old, they receive the second dose of diphtheria, tetanus, pertussis, and polio vaccines. Between eleven and thirteen years, the third dose of diphtheria, tetanus, pertussis, and polio vaccines is administered. The cost of vaccines varies depending on the vaccine, the status of the healthcare professional administering it, and the institution providing the vaccination.[254]

The French Public Health Law makes it mandatory for young children to be vaccinated against diphtheria, tetanus, and polio, holding parents responsible for ensuring these vaccinations are administered. The obligations related to mandatory

[251] "Vavřička and Others v. The Czech Republic." Paragraph 111-115; Toebes, "Vavřička v. Czech (Eur. Ct. H.R.)," 876.
[252] "Vaccinations in France," Expatica France, https://www.expatica.com/fr/healthcare/healthcare-basics/vaccinations-in-france-162178/. (accessed 12.06.2023)
[253] "Vaccinations in France," Expatica France.
[254] "Vaccinations in France," Expatica France.

vaccination were subject to debate with Decision No. 2015-458 of the Constitutional Council.

The relevant Decision addresses the legislation concerning mandatory vaccination, including the Constitution, the Public Health Law, the Criminal Code, Ordinance No. 58-1067 of November 7, 1958, regarding the basic law on the Constitutional Council as amended, Ordinance No. 2000-548 of June 15, 2000 regarding the Public Health Code's legislative part, Law No. 2002-303 of March 4, 2002, on Patient Rights and the Quality of the Healthcare System, Law No. 2004-806 of August 9, 2004, on Public Health Policy, Ordinance No. 2005-759 of June 4, 2005, on rules governing filiation, Law No. 2007-293 of March 5, 2007, on Reforming Child Protection, Law no. 2009-61 of 16 January 2009 ratifying Ordinance no. 2005-759 of July 4, 2005 reforming the rules governing filiation and amending or repealing miscellaneous provisions on filiation, Regulation of the Constitutional Council governing the process for applications for priority preliminary rulings on constitutionality, dated February 4, 2010.[255]

The provisions discussed in the relevant Decision include Article L. 3111-1 of the Public Health Law, which states that *"The vaccination policy is adopted by the Ministry of Health. The Minister establishes the necessary conditions for immunization, provides recommendations, and publishes the vaccination schedule after hearing the opinions of the High Council of Public Health." It also states that "By decree, the obligations provided for under Articles L. 3111-2 to L. 3111-4 and L. 3112-1 may be suspended for the entire population or part of it, taking into account the epidemiological situation and the development of medical and scientific knowledge.".*[256]

Furthermore, Article L. 3111-2, introduced after the law's enactment on March 5, 2007, states that *"Diphtheria and tetanus toxoid vaccinations are mandatory unless there is a medically recognized contraindication. These vaccinations must be applied at the same time.*" This article imposes responsibility to parents and legal guardians by saying, *"Those responsible for parental authority or the protection of children shall be personally liable for ensuring compliance with this measure and if there is a need*

[255] "Decision No. 2015-458 QPC of March 20, 2015 | Conseil Constitutionnel," https://www.conseil-constitutionnel.fr/en/decision/2015/2015458QPC.htm. (accessed 12.06.2023)
[256]"Decision No. 2015-458 QPC of March 20, 2015 | Conseil Constitutionnel," Paragraph 1.

for exemption, it must be stated at the time of enrollment in any children's institution, whether a school, nursery, summer camp, or other. The conditions under which diphtheria and tetanus vaccinations must be given will be established in a decree.".[257]

According to Article L. 3111-3 of the Code *"the vaccination against poliomyelitis is required*[258]*"* This is in accordance with Article L. 3111-3 of the Code as in effect following the implementation of the Law of August 9, 2004. Individuals who have authority over or are in the role of guarding children are personally obligated to uphold this obligation.[259]

Under the terms of the Article 227-17 of the Criminal Code of the Ordinance of July 4, 2005, a two-year prison sentence and a fine of EUR 30,000 are regulated as penalties for a father or mother who fails to uphold their legal obligations without a good reason and puts their child's health, safety, morals, or education. In line with Section 373(3) of the Civil Code, the offense outlined in this article shall be regarded as equivalent to abandonment of family.[260]

Given that the applicants claim that the contested provisions violate the right to health guaranteed by the eleventh recital of the Preamble to the Constitution of October 27, 1946, by imposing a requirement to vaccinate against certain illnesses even though the vaccines thereby made mandatory may pose a risk to health; that this risk is claimed to be especially high for young children; and that the illnesses for which these vaccines are mandatory.[261]

Taking into account that Article 227-17 of the Criminal Code does not specifically punish failing to follow a vaccination obligation; that the applicants' objections are directed against the vaccination requirement and not against the criminal punishment of this requirement; and that the request for a priority preliminary ruling on the constitutionality of the issue relates to Articles L. 3111-1 to L. 3111-3 of the Public Health Code.[262]

[257] "Decision No. 2015-458 QPC of March 20, 2015 | Conseil Constitutionnel," Paragraph 2.
[258] "Decision No. 2015-458 QPC of March 20, 2015 | Conseil Constitutionnel," Paragraph 3.
[259] "Decision No. 2015-458 QPC of March 20, 2015 | Conseil Constitutionnel," Paragraph 3.
[260] "Decision No. 2015-458 QPC of March 20, 2015 | Conseil Constitutionnel," Paragraph 5.
[261] "Decision No. 2015-458 QPC of March 20, 2015 | Conseil Constitutionnel," Paragraph 6.
[262] "Decision No. 2015-458 QPC of March 20, 2015 | Conseil Constitutionnel," Paragraph 7.

Considering that the nation "*shall guarantee to all, particularly to children, mothers (...) protection of their health*" according to the eleventh recital of the 1946 Constitution.[263]

Given that, the legislator required that parents of minors must vaccinate them against diphtheria, tetanus, and poliomyelitis; this was done to combat three diseases that are extremely serious, contagious, or unlikely to be eradicated; After hearing the opinions of the High Council of Public Health, it gave the role of developing and implementing the vaccination strategy to the minister responsible for health.[264]

In the Case Of Vavřička And Others v. The Czech Republic, the case no. 2015-458 QPC is examined. It is stated that, the Court of Cassation asked the Constitutional Council to make a preliminary determination about the validity of specific Public Health Code articles. Those rules required minor children under the care of their parents to apply a diphtheria, tetanus, and poliomyelitis vaccination. In the initial proceedings, the petitioners argued that the mandatory vaccines would pose a health danger, violating the constitutional mandate for health protection. The rule of the Constitutional Council disputed articles' constitutionality in a judgement dated March 20, 2015. It was noted that the legislature was attempting to eradicate three very deadly, infectious, or incurable diseases by making the recommended immunizations mandatory. Thus, it had only made each of these immunizations mandatory if there were no recognized medical reasons not to. According to the Constitutional Council, the government is free to create vaccination policies to safeguard both individual and societal health. The Constitutional Council did not have the same general assessment and decision-making authority as Parliament, so it was not its responsibility to question the legislative provisions in light of the current scientific state of knowledge or to determine whether the goal of health protection set by the legislature could have been achieved in another way. The provisions of the law were not blatantly inappropriate to the goal.[265]

[263] "Decision No. 2015-458 QPC of March 20, 2015 | Conseil Constitutionnel," Paragraph 8.
[264] "Decision No. 2015-458 QPC of March 20, 2015 | Conseil Constitutionnel," Paragraph 9.
[265] Vavřička and Others v. The Czech Republic." Paragraph 95-97; Toebes, "Vavřička v. Czech (Eur. Ct. H.R.)," 874.

2.2.5. Hungary

In Hungary, twelve mandatory childhood vaccines are inoculated, and the cost of these vaccines is covered by the National Insurance. The childhood vaccinations applied in Hungary are tuberculosis, diphtheria, tetanus, pertussis (whooping cough), measles, mumps, rubella, polio, Haemophilus influenzae type b infection, pneumococcal disease, hepatitis B, and varicella (chickenpox) vaccines.[266] The government is considered to be responsible to regulate mandatory vaccinations in Hungary. Under normal circumstances, it is considered possible for the Ministry responsible for the Health System to regulate vaccinations mandatory.[267] In Hungary, the debate on mandatory vaccinations intensified with the COVID-19 pandemic when regulations were introduced on November 21, 2021, through Decree-Law No. 598/2021, published in the Official Gazette of Hungary. These regulations enabled employers to make vaccination mandatory for their employees. In addition, employers are allowed to request several documents that includes personal information about employees.[268]

In addition to Decree-Law No. 598/2021, the provisions regarding mandatory vaccinations in Hungary are primarily regulated by the Health Act of 1997. It is acknowledged that if the administration of the vaccines specified in the administrative decision is not complied with, the vaccination decision can be implemented directly, regardless of any application.[269]

The regulations regarding mandatory vaccination provisions in the Health Act of 1997 were brought to the court by a married couple who did not want their children to be vaccinated, and the constitutionality of these provisions was addressed by the Constitutional Court in its decision dated June 20, 2007, with the reference number 39/2007. The Court argued that the mandatory vaccination of children in specific age

[266]Zsófia Gács and Júlia Koltai, "Understanding Parental Attitudes toward Vaccination: Comparative Assessment of a New Tool and Its Trial on a Representative Sample in Hungary," *Vaccines* 10, no. 12 (November 25, 2022): 7, https://doi.org/10.3390/vaccines10122006.
[267]Dániel Gera and Dorottya Gindl, "Hungary: Mandatory Vaccination as a Term and Condition of Employment,", https://www.schoenherr.eu/content/hungary-mandatory-vaccination-as-a-term-and-condition-of-employment/. (accessed 12.06.2012)
[268]Anna Horváth, "Hungary Introduces Mandatory Vaccinations in the Workplace" https://cms-lawnow.com/en/ealerts/2021/11/hungary-introduces-mandatory-vaccinations-in-the-workplace. (accessed 12.06.2012)
[269] Vavřička and Others v. The Czech Republic." Paragraph 98-99; Toebes, "Vavřička v. Czech (Eur. Ct. H.R.)," 874.

groups is based on scientific knowledge and that the protection of children's health should take precedence over potential side effects. Therefore, it was stated that the mandatory vaccination system does not violate the bodily integrity of children. On the other hand, when we examine legal remedies against refusing the mandatory vaccination applications in Hungary, *"the unconstitutional omission"* should be mentioned. In the decision of Vavřička and Others V. The Czech Republic, it is stated that, the legislations that allows *"immediate enforcement of vaccination"* considered unconstitutional, and therefore repealed.[270]

2.1.1.6. The United Kingdom (the UK)

With the immunization programme in the UK there are fourteen vaccinations for different age groups.[271] Infants up to two months receive *"diphtheria, tetanus, pertussis, polio, haemophilus influenzae type b (Hib) and hepatitis B, rotavirus, MenB*[272]*"*. Infants up to three months receive *"diphtheria, tetanus, pertussis, polio, haemophilus influenzae type b (Hib) and hepatitis B, rotavirus, pneumococcal disease"*[273]. Infants up to four months receive *"diphtheria, tetanus, pertussis, polio, haemophilus influenzae type b (Hib) and hepatitis B, rotavirus, MenB"*.[274] Infants who are twelve to thirteen months receive *"haemophilus influenza type b (Hib), MenC, MenB, measles, mumps and rubella (MMR), and pneumococcal disease"*.[275] From two years old, infants will receive flu vaccination annually and infants from three years of age to four months old *"diphtheria, tetanus, pertussis, polio, measles, mumps and rubella (MMR)*[276]*"*. Female children from twelve to thirteen years old receive HPV vaccination. Hence, there is a questionable inequality regarding to gender, since September 2019, both male and female children offered to receive HPV vaccination.[277] Lastly, children from fourteen to eighteen years old receive *"diphtheria, tetanus, polio,*

[270] Vavřička and Others v. The Czech Republic." Paragraph 100; Toebes, "Vavřička v. Czech (Eur. Ct. H.R.)," 874.
[271] UK Gov., "Immunisation," August 3, 2022, https://www.gov.uk/government/collections/immunisation; Cristiana Vagnoni, Elizabeth Rough, and Sarah Bunn, "UK Vaccination Policy," https://commonslibrary.parliament.uk/research-briefings/cbp-9076/.(accessed 12.06.2012)
[272] Nidirect, "Childhood Immunisation Programme" October 9, 2017, https://www.nidirect.gov.uk/articles/childhood-immunisation-programme. (accessed 12.06.2012)
[273] Nidirect, "Childhood Immunisation Programme"
[274] Nidirect, "Childhood Immunisation Programme"
[275] Nidirect, "Childhood Immunisation Programme"
[276] Nidirect, "Childhood Immunisation Programme"
[277] Nidirect, "Childhood Immunisation Programme"

meningitis (meningococcal groups A, C, W and Y)".[278] All of these above mentioned vaccinations are not mandatory.[279]

In January 2020, the UK left the EU, however, the decision to leave the EU did significantly affect how vaccine distribution policies were developed. The UK did not demolish obligations which are derived from International Law. For instance, the obligations arisen from the ECtHR implemented the domestic law: the Human Rights Act, dated 1998.[280]

During Covid-19 pandemic, there are two legislations in force in the UK: *"the Public Health (Control of Diseases) Act 1984 and the Coronavirus Act 2020".*[281]

2.2.7. The USA

In the United States, there are regulations enforced by different states that mandate vaccinations for school-age children. These regulations apply not only to children attending public schools but also to those attending private schools and daily care facilities such as daycare centers and certain private courses.

The Centers for Disease Control and Prevention *(CDC),* the agency responsible for protecting the nation's health in the USA, aims to strengthen and sustain immunity against diseases through collaboration with public health institutions and private organizations. It is acknowledged by the CDC that vaccination laws serve as a tool to keep vaccine-preventable diseases at low rates. In this context, there are vaccination requirements for university students, healthcare workers, and patients, in addition to the vaccination of school-age children attending public or private schools[282].

The CDC has compiled state laws, regulations, and health department rules under a program called the Public Health Protection Program. The program's 2019 update includes regulations for the vaccination of children between kindergarten and

[278]Nidirect, "Childhood Immunisation Programme".
[279]Cristiana Vagnoni, Elizabeth Rough, and Sarah Bunn, "UK Vaccination Policy," https://commonslibrary.parliament.uk/research-briefings/cbp-9076/.(accessed 12.06.2012)
[280]Jeff King and Natalie Byrom, "United Kingdom: Legal Response to Covid-19," in *The Oxford Compendium of National Legal Responses to Covid-19*, by King Jeff and Byrom Natalie (Oxford University Press, 2020), https://doi.org/10.1093/law-occ19/e17.013.17.
[281] Jeff King and Natalie Byrom. "United Kingdom: Legal Response to Covid-19".
[282] "CDC - Vaccination Laws - Publications by Topic - Public Health Law," https://www.cdc.gov/phlp/publications/topic/vaccinationlaws.html.(accessed 12.06.2023)

high school graduation (K-12). In all states, childhood vaccinations that protect against communicable diseases are required for children to participate in education.

For example, in the state of Florida, under Section 1003.22(4)(a) of the "Public K-12 Education" in the “Early Learning - 20 Education Code”, every child must present immunization records and a certificate of immunization deemed necessary by the Florida Department of Health before being admitted and attending a public or private school or daily care facility.[283]

Similarly, in Nevada, Section 194.192 of the law titled “Special Education Institutes and Institutions (Chapter 394)” establishes vaccination requirements for childhood. The first clause of this section states that, except for cases permitted due to religious beliefs or health conditions, a certificate confirming the child's immunity against diseases such as diphtheria, tetanus, tetanus (unless the child is under 6 years old), polio, measles, mumps, and other diseases determined by the Local or State Health Boards, with appropriate reminder doses administered or vaccination in accordance with the mandated schedule, must be provided by the child's parents or guardians.[284]

Virginia also includes regulations regarding communicable diseases in its laws. The relevant section of the 2022 Laws, under the “Health” section[285], states that parents, guardians, or individuals parenting a child are responsible for ensuring the child's immunity in accordance with the Immunization Schedule developed and published by the Centers for Disease Control and Prevention. The conditions for ensuring the immunity of school-age children in state or private elementary, middle, and high schools, childcare centers, nursing schools, and daily family care homes are outlined, specifying the required number of doses and appropriate intervals for vaccines against various diseases.

[283] “The 2022 Florida Statues, Title XLVIII, Chapter 1003, Part II School Attendance, 1003.22 Fla. Stat. § 1003.22”, http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=1000-1099%2F1003%2FSections%2F1003.22.html. (accessed 12.06.2023)

[284] “2013 Nevada Statutes, Chapter 394 - Educational Institutions and Establishments, NV Rev Stat § 394.192 (2013) NRS: Chapter 394 - Private Educational Institutions and Establishment”, https://www.leg.state.nv.us/nrs/nrs-394.html. (accessed 12.06.2023)

[285] “Title 32.1. Health. § 32.1-46. Immunization of Patients against Certain Diseases” https://law.lis.virginia.gov/vacode/title32.1/chapter2/section32.1-46/.(accessed 12.06.2023)

These regulations aim to protect public health by ensuring the immunity of school-age children, healthcare workers, and patients. They also provide provisions for sharing immunization and patient location information in a confidential manner without requiring authorization from the guardian, as stated in subsection E of the relevant clause.

To sum up, in North America, specifically in the United States, although there have been various practices in different states since the early 1800s, today, a document proving that childhood vaccinations have been administered is required to enroll in school. However, all fifty states allow exemptions for medical reasons, while forty-five states also allow exemptions for religious and philosophical reasons.[286] In Canada, there are different practices at the provincial level. For example, in Ontario and New Brunswick, certain vaccines are mandatory for children starting school.[287]

Under this heading, the position of South America can be compared with the North America, in South America, mandatory vaccination is widely implemented. In countries such as Paraguay, Guyana, and many Caribbean countries, it is mandatory to have vaccinations in order to start school, with a coverage rate of around 80%.[288]

Yet, hesitancy against vaccinations is an emerging phenomenon in the U.S.A. Because of this, the health care institutions have been answering all of the questions to prevent vaccine hesitancy. For example, in CDS's website it is clearly stated that: "Today's vaccines use only the ingredients they need to be as safe and effective as possible.".[289]

Since 1924, according to a study, childhood immunization campaigns have reportedly prevented 103.1 million cases of diphtheria, hepatitis A, measles, mumps, pertussis, polio, and rubella in the U.S.A.[290].

[286] Saad B. Omer, Cornelia Betsch, and Julie Leask, "Mandate Vaccination with Care," *Nature*, no. 771 (2019): 469–70.
[287] "Immunization of School Pupils Act, R.S.O. 1990, c. I.1" (2014), https://www.ontario.ca/laws/view.
[288] Samantha Vanderslott and Tatjana Marks, "Charting Mandatory Childhood Vaccination Policies Worldwide," *Vaccine* 39, no. 30 (July 2021): 4057, https://doi.org/10.1016/j.vaccine.2021.04.065.
[289]CDC, "What's in Vaccines? Ingredients and Vaccine Safety " https://www.cdc.gov/vaccines/vac-gen/additives.htm. What's in Vaccines? Ingredients and Vaccine Safety
[290]AAP, "Childhood Immunizations," https://www.aap.org/en/advocacy/state-advocacy/childhood-immunizations/.(accessed 12.06.2023)

The decision of implication of recommended vaccinations are mostly up to individuals to decide in the U.S.A., when the vaccination is offered to children, this decision seems to belong to the parents or legal guardians. According to a survey which was published when COVID-19 was on the whole world's agenda regarding adolescents HPV vaccination, adolescents' intent to receive the human papillomavirus (HPV) vaccination in the USA largely depends on their parents' approach.[291]

3. RECOMMENDED VACCINATIONS

Vaccinations that are not regulated as mandatory by the governments, not enforced through penalties, yet provide benefits when individuals inoculated them, are referred to as recommended vaccinations.[292] Recommended vaccinations are the ones that takes place in immunization programme depending on target groups or for everyone, whether reimbursed by the State's organizations or not.

Typically, the national healthcare system covers the cost of the vaccinations included in the routine vaccination program, but in some nations, the recipient must pay the full cost of other vaccinations.[293]

Under this heading, informed consent for recommended vaccination should be discussed. The European Court of Human Rights, in its decision in Association X v. United Kingdom in 1978, ruled that it is not necessary for the state to provide detailed information about contraindications and risks to families before administering vaccines recommended under the vaccination program. However, it is not possible to adopt this decision of the ECtHR in Turkish law.

In medical interventions, obtaining informed consent is mandatory. Within the framework of informed consent, risks should also be explained. The fact that a vaccine is a recommended vaccine does not change the fact that the procedure performed is a medical intervention. Moreover, asking questions and conducting necessary tests for the determination of contraindications should be evaluated within the physician's duty

[291] Kalyani Sonawane et al., "Parental Intent to Initiate and Complete the Human Papillomavirus Vaccine Series in the USA: A Nationwide, Cross-Sectional Survey," *The Lancet Public Health* 5, no. 9 (September 2020): 484, https://doi.org/10.1016/S2468-2667(20)30139-0.
[292] Sevtap Metin, "Covid-19 Bağlamında Zorunlu Aşı Tartışmalarının Hukuki Boyutu" . Sağlık Bilimlerinde İleri Araştırmalar Dergisi" no. 4 (2021): 38
[293] Haverkate et al., "Mandatory and Recommended Vaccination in the EU, Iceland and Norway," 1.

of care. COVID-19 vaccine has been administered as a recommended vaccine in many countries, including Türkiye. Like other medical treatments, specific information about preventive medical treatment such as the COVID-19 vaccine should be shared with patients.

In Turkish Law, Article 31/I of the Patient's Rights Statue reads as follows, "*It is essential to inform and enlighten the patient or their legal representative about the nature and consequences of the medical intervention when obtaining consent*.". Implementation of recommended vaccinations are up to the target individual's freewill and choice. Recommended vaccinations are taking place in the vaccination schedule, but the decision of inoculation is up to the person. Individuals can choose to receive or refuse the vaccination.[294] There are several countries that does not apply mandatory vaccinations. These counties are, Austria, Denmark, Estonia, Finland, Germany, Ireland, Lithuania, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden and the UK.[295]

3.1. Childhood Vaccinations

Vaccination in children is a highly effective preventive public health service in developed and developing countries, considering the cost-benefit balance. There are several main purposes of childhood vaccination. These are: protecting the child against severe side effects and the risk of death from infectious diseases, preventing outbreaks of contagious diseases that spread from person to person, achieving immunity at the community level, and ensuring the protection of unvaccinated children who are unable to receive vaccines due to medical reasons or lack of access to vaccination services in the community.[296]

Vaccination holds a prominent place among child health interventions. In 1974, WHO developed and recommended the Expanded Programme on Immunization.[297] It

[294] Kale Özçelik, "Hakların Çatışması ve Dengelenmesi Bağlamında Çocuklara Yönelik Zorunlu Aşı Uygulaması (Avrupa İnsan Hakları Sözleşmesi Ekseninde Bir İnceleme)," 53.
[295] Haverkate et al., "Mandatory and Recommended Vaccination in the EU, Iceland and Norway," 3; Kale Özçelik, 53.
[296]Emine Dede, Tıp Hukukunda Çocuk Hastaların Hakları, (Ankara: Seçkin Yayınları, 2017), 133
[297]Dede,133; Essential Programme on Immunization. (2023, July 26). Retrieved from https://www.who.int/teams/immunization-vaccines-and-biologicals/essential-programme-on-immunization (accessed 12.07.2023)

is clear that contagious diseases increase mortality rates.[298] WHO announced the diseases that can be preventable by vaccination as follows: *"cervical cancer, cholera, COVID-19, diphtheria, hepatitis B, influenza, Japanese encephalitis, malaria, measles, meningitis, mumps, pertussis, pneumonia, polio, rabies, rotavirus, rubella, tetanus, typhoid, varicella, yellow fever"*[299]. Depending on every countries' needs to provide immunization threshold, there are various childhood vaccination schedule in each country.

3.1.1. Legal Framework of Childhood Vaccinations in Türkiye

One of the greatest accomplishments in public health over the past century is the routine immunization of children. According to Turkish Ministry of Health, routine vaccination is administered for thirteen diseases in the childhood vaccination schedule. These include diphtheria, pertussis (whooping cough), tetanus, polio, hepatitis B, hepatitis A, Haemophilus influenzae type b, tuberculosis, measles, mumps, rubella, varicella (chickenpox), and pneumococcus (pneumonia).[300]

As part of the current expanded immunization programme in Türkiye, that includes vaccination services aimed at sensitive age groups to reach them before they are exposed to infection, with the goal of controlling and even eliminating these diseases and aiming to ensure that the infants and children develop immunity.[301] In parallel, starting from 2008, the DTP-Hib-IPV pentavalent vaccine has been introduced for use in Türkiye. With the directive dated 13.03.2009 and numbered 7941 from the General Directorate of Basic Health Services of the Ministry of Health, the aim of the programme conducted by the Ministry of Health was to prevent the diseases mentioned above and the resulting infant and child deaths and disabilities.[302]

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[298] Harmanjot Kaur et al., "A Review: Epidemics and Pandemics in Human History," *International Journal of Pharma Research and Health Sciences* 8, no. 2 (April 2020): 3139, https://doi.org/10.21276/ijprhs.2020.02.01.

[299]WHO, "Vaccines and Immunization, https://www.who.int/health-topics/vaccines-and-immunization#tab=tab_2. (accessed 12.06.2023)

[300] T.C. Sağlık Bakanlığı, "Sağlık Bakanlığı Tarafından Ülkemizde Uygulanan Çocukluk Dönemi Aşı Takviminde Hangi Aşılar Yer Alıyor?," https://asi.saglik.gov.tr/genel-bilgiler/52-sa%C4%9Fl%C4%B1k-bakanl%C4%B1%C4%9F%C4%B1-taraf%C4%B1ndan-%C3%BClkemizde-uygulanan-%C3%A7ocukluk-d%C3%B6nemi-a%C5%9F%C4%B1-takviminde-hangi-a%C5%9F%C4%B1lar-yer-al%C4%B1yor.html. (accessed 12.06.2023)

[301] Dede, 134

[302]T.C. Sağlık Bakanlığı Temel Sağlık Hizmetleri Genel Müdürlüğü, Genişletilmiş Bağışıklama Programı Genelgesi, no: B100TSH0110005, (25.02.2008) https://dosyasb.saglik.gov.tr/Eklenti/1117,gbpgenelge2008pdf.pdf?0 (accessed 12.06.2023)

In order to understand how childhood vaccination practices are legally regulated in Türkiye, it would be meaningful to evaluate the hierarchy of norms and analyze the regulations that can provide guidance on childhood vaccination practices in the legislation.[303]

As mentioned above, according to Article 88 of the Public Health Code dated 1930, numbered 1593, the only mandatory vaccination that is regulated as mandatory in Türkiye is smallpox vaccinations.

When considering the central axis of the question of whether vaccination practices can be mandatory, which is based on the conflict of rights (public health vs. respect for private life), it is crucial to examine how these fundamental rights are regulated in the constitution. Article 17 of the 1982 Constitution clearly states that, "*except for medical necessities and situations specified by law, no one can be subjected to interference with their bodily integrity or medical procedures without their consent*.". Article 17 forms the main basis for objections to mandatory vaccination practices. However, in the context of childhood vaccinations, other provisions of the Constitution should also be taken into consideration. The third paragraph of Article 41 of the Constitution defines the limits of the rights of children to benefit from care and protection, establish and maintain relationships with their parents, based on the best interests of the child. Thus, the principle of the best interests of the child has found its place as a constitutional principle. Article 56, paragraph 3 of the Constitution imposes a positive obligation on the State. The relevant article states that *"the state has an undeniable responsibility to enable each individual to continue their life in physical and mental health"*. Just as the protection of private life is guaranteed in the Constitution, it should not be overlooked that the state also has a positive obligation to ensure public health.

The United Nations Convention on the Rights of the Child *(UNCRC)* and the Oviedo Convention are significant international treaties that encompass regulations regarding consent to medical intervention and children's rights in the context of mandatory vaccination practices. It should be noted that Türkiye is a party to these international agreements. UNCRC was signed by Türkiye in 1990 and ratified by the Grand National Assembly of Türkiye in 1995 (Official Gazette: 27.01.1995/22184).

[303] Çakırca, 1117.

Türkiye signed the Oviedo Convention on 4th April 1997 and ratified it through Law No. 5013 on 3rd December 2003. The official gazette publication of the ratification law was made on 20th April 2004 in Official Gazette No. 25439.

Article 3 of the UNCRC establishes the best interests of the child as a primary principle. Article 3/I of the Convention states the position of the best interest of children as an essential term. The best interests of the child must come first above all decisions involving children, whether they are made by public or private social welfare organizations, courts of law, administrative authorities, or legislative bodies.[304] Within this framework, states parties commit to respecting the responsibilities, rights, and duties of parents or legal guardians in providing care for the child, in accordance with the rights recognized in the Article 5 of the Convention.[305] Moreover, in Article 6 of the Convention, is emphasized that *"every child has the inherent right to life"*[306], and states parties undertake to ensure the child's survival and development to the maximum extent possible.

The Oviedo Convention addresses the issue of vaccines and their administration[307]. According to Article 1 of the Convention, States parties to the Convention commit to ensuring respect for everyone's fundamental rights in biological and medical practices, with a focus on protecting dignity and personality rights in regard to the use of biology and medicine, parties must protect the dignity and identity of all people and ensure that everyone is treated fairly and with respect for their integrity and other fundamental rights. In addition, each party carries the responsibility to adopt the internal legislative reforms if necessary to create applicable legal ground for provisions of this Convention effect.[308]

The Oviedo Convention stipulates that a medical intervention can only take place with the informed consent of individuals in accordance with the Article 5. Relevant article states that, only with the individual's free will and informed consent may allow to be carrying out a medical intervention in the field of health. The

[304] UNICEF, "Convention on the Rights of the Child Text" Artcile 3/I,https://www.unicef.org/child-rights-convention/convention-text.(accessed 12.06.2023)
[305] UNICEF, "Convention on the Rights of the Child Text" Article 5.
[306] UNICEF,"Convention on the Rights of the Child Text " Article 6.
[307] Çakırca, 1118.
[308] "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 (ETS No. 164)" (04.04.1997), Article 1.

individual in question must be adequately informed in advance on the reason for and nature of the intervention, as well as its potential risks and effects. The individual is free to revoke permission at any moment[309].

For minor individuals who does not obtain the legal capacity to give a valid consent, medical procedures can only be carried out with the permission of their representative, and the views of the minor individuals should be taken into account within an appropriate extent and in accordance with the specific circumstances regarding to Article 6 of the Convention. The heading of Article 6 is *"Protection of persons not able to consent".* Article 6/II of the Convention explains the limits of a minor individual's consent capacity. According to related article, if a minor is considered legally incapable of providing consent to an intervention, the intervention may only be carried out with the permission of the minor's representative, an authority, or an individual or body designated by law. According to the minor's age and level of maturity, the opinion of the minor is going to be taken into account as a more significant assessing factor.

In other words, in Türkiye, Oviedo Convention is included to the domestic law. Because of being one of the parties of the Convention, Article 6/II also applies in the Turkish domestic law. According to Article 6/II of the Convention, the consent of the parent is required in cases where minors lacking the capacity to give consent are concerned. According to the article, a minor is not legally able to consent to an intervention; as a result, the intervention may only be carried out with the consent of his or her agent, an authority, or another person or organization designated by law.[310]

Thus, the Oviedo Convention highlights the principles of the best interests of the child and the right to participation, which are also foundational elements of the UNCRC.

[309] 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 (ETS No. 164), Artcile 5.
[310] "Vavřička and Others v. The Czech Republic." Paragraph 141; Toebes, "Vavřička v. Czech (Eur. Ct. H.R.)," 881.

3.1.2. The Disputes Regarding Childhood Vaccinations' Obligatory

If there is a legal dispute arising, there must be various contradicted interests and benefits existed. Every value has the superiority and validity claim against other values. The policies regarding mandatory childhood vaccinations are one of the greatest examples of this dispute of values. This dispute contains not only children's and their parent's rights but also the State's responsibility to protect the public health. In cases of the disputes, the legal system and the Courts are expected to abolish the dispute.

For example, Turkish Constitution Court decided that, because of the principle of legality is not fulfilled, gave a priority to the parent's right and applications against the parent's consent will cause violation of rights. In accordance with this decision, it could be said that, parents who is vaccine hesitant or believes antivaccination will have validation for their requests until adoption of new regulations. Yet in recent years it is observed that, with the increase of the antivaccination movements that caused prevalence of diseases that could be prevented by infancy vaccinations. In addition, the States has been evaluating the vaccination schedules.[311]

WHO's report states that, because of the vaccine hesitant parents that delay the application of vaccinations and parents who refuses vaccinations for following anti vaccination movements "*1 in 5 children still do not receive routine life-saving immunizations*".[312] WHO states that, approximately "*1.5 million children die from diseases that could be prevented by already existing vaccinations*"[313]. The term of *"routine life-saving"* vaccinations can be counted as, measles, rubella, varicella, dengue, diphtheria, influenza, hepatitis A, hepatitis B, Hib, HPV, pneumococcal, polio, rotavirus, shingles, tetanus, pertussis. These eighteen diseases are considered *"dangerous or deadly"* according to CDC.[314] The CDC also stated that, these fatal diseases are prevented several occasions through vaccination. In addition, requirement to receive different vaccinations for different age groups such as being an infant,

[311] Kale Özçelik, "Hakların Çatışması ve Dengelenmesi Bağlamında Çocuklara Yönelik Zorunlu Aşı Uygulaması (Avrupa İnsan Hakları Sözleşmesi Ekseninde Bir İnceleme)," 53.
[312] WHO, "Vaccine Hesitancy: A Growing Challenge for Immunization Programmes," August 18, 2015, https://www.who.int/news/item/18-08-2015-vaccine-hesitancy-a-growing-challenge-for-immunization-programmes. (accessed 12.06.2023)
[313] WHO, "Vaccine Hesitancy: A Growing Challenge for Immunization Programmes,"
[314]CDC, "Recommended Vaccines by Disease," https://www.cdc.gov/vaccines/vpd/vaccines-diseases.html. (accessed 12.06.2023)

adolescent or adult and other factors for every individual is highlighted by CDC[315]. Receiving vaccinations of above-mentioned diseases since infancy is extremely important either the wellbeing of individuals and the immunization threshold that effects the whole society.

Regarding to debates and discussions over the mandatory applications of vaccinations during infancy, the concepts of *"parental custody" and "the best interests of the child"* are also brought into the discussion, considering the issue of the legal representative expressing consent for medical intervention. Since an infant cannot express their will regarding this matter, the custodial parents, who decide on the future of the child, become the subjects of the right based on the expression of will and as a result expression of a valid consent. Therefore, the scope, limits, and reasons for restricting/revoking custodial rights caries vital importance in this context. It is an undisputed legal fact that the custodial parents, who will express the will on behalf of the baby, do not have unlimited freedom in making such expressions. Especially in the context of children's rights, the principle of *"the best interests of the child"* emerges as one of the most significant reasons that necessitate the limitation of custodial rights[316].

3.2. COVID-19 Vaccinations

COVID-19 vaccinations are announced as not mandatory by the Ministry of Health in Türkiye.[317] The announcement also includes that the COVID-19 vaccinations are free of charge and can be inoculated in the Health Care Facilities that apply vaccinations. But, aiming to reach the heard immunity, every individual is recommended to inoculate for the COVID-19 vaccination. Therefore, COVID-19 vaccination can be considered a recommended vaccination in Türkiye. On the other hand, when we disregard the Ministry of Health's announcement (which is probably known by a small number of individuals) in public, COVID-19 vaccinations are credited as mandatory because of the restrictions and measures that will be explained below.

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[315]CDC, "Recommended Vaccines by Disease".
[316] Çakırca, 1108.
[317] T.C. Sağlık Bakanlığı Covid-19 Aşısı Bilgilendirme Platformu, "COVID-19 aşısı yaptırmak zorunlu mudur?" https://covid19asi.saglik.gov.tr/TR-81350/covid-19-asisi-yaptirmak-zorunlu-mudur.html (accessed 31.08.2023)

According to *Metin*, an authorization for a general mandatory vaccination in the Public Health Code is not regulated. But, if there is a spread of a highly contagious disease, vaccination requirements could be imposed.[318] As it is well known, COVID-19 is a pandemic, therefore Articles 57, 64 and 72 of the Public Health Code is applicable. According to Article 72, certain actions shall be taken in the event that one of the diseases indicated in Article 57 presents itself or is suspected to have occurred. Administering serum or vaccinations to patients or individuals who have been exposed to the disease is considered among these measures.

Under the heading of Vaccine Development Process and Vaccine Applications in the thesis, it is mentioned that there are different phases to comply with before the inoculation of vaccinations. Yet, research and development efforts for COVID-19 vaccines have occurred on an unprecedented scale and at an unprecedented speed worldwide. The duration of immunity provided by COVID-19 vaccines and the long-term side effects are currently not definitively known. Whether the vaccines can confer long-lasting immunity, and the need for annual re-production of new mutant strains similar to influenza vaccines due to frequent virus mutations, as well as the requirement for annual vaccination of the population, remain unclear. This uncertainty could complicate the applicability of vaccines to the entire population and lead to a significant increase in costs. Considering that under normal circumstances, it takes several years for Phase IV evaluation, which focuses on "long-term safety", to be reached, the presence of an advanced and effective, transparent surveillance system is essential for the detection and monitoring of adverse effects that may develop during the Phase IV process for COVID-19 vaccines that have passed or will pass the Phase III stage.[319]

Within this context, the scientific debates could be set aside when there is a debate regarding to type COVID-19 vaccinations whether mandatory or recommended. In order to accepted as a mandatory vaccination, the legality principle of the COVID-19 vaccination must be fulfilled. Compliance with the legality principle is only possible when there is a regulation in a Code. Therefore, classifying COVID-

[318] Sevtap Metin, "Covid-19 Bağlamında Zorunlu Aşı Tartışmalarının Hukuki Boyutu", 43
[319] Metin, 43

19 vaccination as mandatory through directives regarding to application of COVID-19 vaccinations is not in compliance with the principle of legality.

There are various disputes can be examined in regard to Covid-19 restrictions and measures in Türkiye. These restrictions are mandatory vaccination policies and curfew decisions which are came into force through directives. These decisions could be considered as legal outcomes of the issue. Yet, when we examine mandatory vaccinations, it is stated that, rejection of inoculation of mandatory vaccinations causes ta paying a penalty or limitation regarding administrative sanctions.

In Türkiye, curfew decisions were made for individuals over the age of sixty-five and under the age of twenty without any time limit has created debates on proportionality. However, the curfew decisions made by the Directives of the Ministry of Interior has become the focus of discussions in terms of compliance with the principle of legal administration within the framework of the Constitution and other legislations.[320] On March 21, 2020, the first curfew restriction in Türkiye was imposed for individuals who are 65 and older and individuals who diagnosed chronic illnesses[321]. On April 3, 2020, people under the age of twenty-one were also become subject to this restriction.[322] On April 05, 2020, some of the individuals between the ages of eighteen and twenty were excluded from the curfew restriction[323]. With the circular of the General Directorate of Provincial Administration of the Ministry of Interior on April 10, 2020, a two-day curfew was declared for the first time in 30 provinces and this curfew restriction was followed by other prohibitions.[324]

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[320] Betül Güler, "İdarenin Covid-19 Pandemisine İlişkin Sokağa Çıkma Yasağı Kararlarının Kanuni İdare İlkesi Kapsamında Değerlendirilmesi," *İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi Covid-19 Hukuk Özel Sayısı*, no. 38 (2022): 182.

[321] T.C. İç İşleri Bakanlığı, "65 Yaş ve Üstü Ile Kronik Rahatsızlığı Olanlara Sokağa Çıkma Yasağı Genelgesi," https://www.icisleri.gov.tr/65-yas-ve-ustu-ile-kronik-rahatsizligi-olanlara-sokaga-cikma-yasagi-genelgesi (accessed 12.06.2023); Güler, "İdarenin Covid-19 Pandemisine İlişkin Sokağa Çıkma Yasağı Kararlarının Kanuni İdare İlkesi Kapsamında Değerlendirilmesi," 181.

[322]T.C. İç İşleri Bakanlığı, "Şehir Giriş/Çıkış Tebirleri ve Yaş Sınırlaması, https://www.icisleri.gov.tr/sehir-giriscikis-tebirleri-ve-yas-sinirlamasi (accessed 12.06.2023); Güler, "İdarenin Covid-19 Pandemisine İlişkin Sokağa Çıkma Yasağı Kararlarının Kanuni İdare İlkesi Kapsamında Değerlendirilmesi," 181.

[323] T.C. İç İşleri Bakanlığı, "Şehir Giriş/Çıkış Tebirleri ve Yaş Sınırlaması"; Güler, "İdarenin Covid-19 Pandemisine İlişkin Sokağa Çıkma Yasağı Kararlarının Kanuni İdare İlkesi Kapsamında Değerlendirilmesi," 181.

[324]T.C. İç İşleri Bakanlığı, "15 İlde 29.05.2020 Saat 24.00 Ile 31.05.2020 Saat 24.00 Arasında Uygulanacak Olan Sokağa Çıkma Kısıtlaması," https://www.icisleri.gov.tr/15-ilde-29052020-saat-2400-ile-31052020-saat-2400-arasinda-uygulanacak-olan-sokaga-cikma-kisitlamasi (accessed 12.06.2023); Güler, "İdarenin Covid-19 Pandemisine İlişkin Sokağa Çıkma Yasağı Kararlarının Kanuni İdare İlkesi Kapsamında Değerlendirilmesi," 182.

Curfew decisions are one of the general administrative actions. These decisions considered administrative law enforcements for the restoration of public order[325].

Even tough curfew decisions take places in every political regime in the world and the ECtHR provisions, there is not a common definition has been stated regarding to curfew decisions. However, curfew decisions carry different and distinctive features in different legal systems pertaining to effects[326].

Curfew decisions are considered as exceptional measures since curfew decisions enforced limitedly. Within that context, the consent forms can be examined, which are the commonly used method to provided enlightenment and receiving consent during the Covid-19 Pandemic in Türkiye. The commonly used forms are titled as "COVID-19 (SARS-CoV-2) Vaccine Consent Form"[327] yet, besides receiving the consent, this form also needs to provide sufficient information regarding to enlightenment. The commonly used forms are not included some essential information to provide enlightenment. Lack of written and verbal information regarding the ways of transmission of the infection, the required preventive measures to be taken, diagnose methods, treatment options, and the duration of infectivity can be mentioned in these consent forms. Yet, in practice not only most of these forms do not contain this information but also individuals do not even bother to read these forms.

The issues regarding to written enlightenment forms for vaccinations will be discussed under the Enlightenment heading of the thesis.

[325] Artuk Ardıçoğlu, "Hukuka Uygun Olmayan Sokağa Çıkma Yasağı Hukuka Aykırı Mıdır?," , https://birikimdergisi.com/guncel/7331/hukuka-uygun-olmayan-sokaga-cikma-yasagi-hukuka-aykiri-midir (accessed 12.06.2023).; Güler, "İdarenin Covid-19 Pandemisine İlişkin Sokağa Çıkma Yasağı Kararlarının Kanuni İdare İlkesi Kapsamında Değerlendirilmesi," 185.
[326] Güler, "İdarenin Covid-19 Pandemisine İlişkin Sokağa Çıkma Yasağı Kararlarının Kanuni İdare İlkesi Kapsamında Değerlendirilmesi," 185.
[327] İstanbul Aile Hekimliği Derneği, "Covid-19 (SARS-CoV-2) Aşı Onam Formu,", https://www.istahed.org.tr/wp-content/uploads/2021/01/covid-asi-onam-1.pdf. (accessed 12.06.2023).

3.3. HPV Vaccinations

Recently, discussions concerning HPV vaccinations are remains popular both global media and in Turkish media[328]. The discussion differentiates regarding to societies social norms.

In terms of prevalence and mortality among females, cervical cancer ranks in fourth place compared to other cancer types[329]. Bearing this information in mind, WHO's recommendation regarding HPV vaccinations will not be seen consequently. Currently the recommendation for age intervals are " *A one or two-dose schedule for girls aged 9-14 years; one or two-dose schedule for girls and women aged 15-20 years; two doses with a 6-month interval for women older than 21 years*[330]".

The individuals who wish to get HPV vaccinations are required to pay great amount of money in Türkiye. The institution which is responsible for pricing and reimbursement policies of pharmaceutical products and medicines is called Social Security Institution (SGK) in Türkiye [331]. In Turkish media, the recent discussions mostly cover the Social Security Institution's approach[332]. In Ankara 62nd Labor Court's decision with reasons (2021/30 File Number, 2022/35 Judgement Number, date of hearing is 08.09.2021, date of judgement is 10.03.2022, date of insertion of decision with reasons is 08.04.2022), plaintiff is a 21 year old female who is already paid the first dose of HPV vaccinations which has a three dose schedule. In Ankara 62nd Labor Courts judgement[333], it is clearly stated under the explanations of the counsel of the plaintiff that "HPV vaccination is the only treatment modality that prevents cervical cancer. In addition, to get an absolute protection for vaccination

[328] Haberturk, "Türkiye'deki HPV Aşısında Uygulama Ne Olacak? Bugün Ücretli Ama...,", https://www.haberturk.com/turkiye-deki-hpv-asisinda-uygulama-ne-olacak-3546845. (accessed 12.06.2023).
[329] Freddie Bray et al., "Global Cancer Statistics 2018: GLOBOCAN Estimates of Incidence and Mortality Worldwide for 36 Cancers in 185 Countries," *CA: A Cancer Journal for Clinicians* 68, no. 6 (November 2018): 402, https://doi.org/10.3322/caac.21492.
[330]WHO, "WHO Updates Recommendations on HPV Vaccination Schedule", https://www.who.int/news/item/20-12-2022-WHO-updates-recommendations-on-HPV-vaccination-schedule.
[331] "Sosyal Güvenlik Kurumu İlaç Geri Ödeme Yönetmeliği (The Ordinance on Social Security Institution Medicine Reimbursement) O.J.:31934 Repeating D.:25.08.2022" (2022), https://www.resmigazete.gov.tr/eskiler/2022/08/20220825M1-1.htm Article 1.
[332] Alican Uludağ, "Yargıdan emsal HPV aşısı kararı – DW," *dw.com*, March 11, 2022, https://www.dw.com/tr/mahkeme-hpv-a%C5%9F%C4%B1s%C4%B1n%C4%B1n-bedelinin-geri-%C3%B6denmesine-karar-verdi/a-61093961; "Türkiye'deki HPV Aşısında Uygulama Ne Olacak?"
[333] Ankara 62. İş Mahkemesi 2021/30 E. 2022/35 K. (March 10, 2022). (Not published)

application there are two other doses are needed to be applied.". After the first dose's application, plaintiff appeals to the Social Security Institution for reimbursement of the first dose's cost. The Social Security Institution rejects that application. In the statement of claims, the other required two doses are claimed with preliminary injunction decision and the amount of two doses are reimbursement since the beginning of the invoice date including advance interest.

The defendant Social Security Institution's counsel claimed that the case was not filed in due time; the second and third doses of vaccinations are not considered among the lists of the Social Security Institution, because of this, the Social Security Institution is not obliged to reimburse the cost of vaccines and the procedure that applied by the institution is appropriate.

In the decision, it is stated that the case is about the collecting of the vaccination fee from Social Security Institution.

The evidence presented by the plaintiff was collected and an expert investigation was conducted. According to expert's report, "the cervical cancer is caused by contagion of the human papilloma virus (HPV) that seen in our country. Even though cervical cancer is fatal and according to scientific facts, cervical cancer is preventable and can be prevented and annihilated by vaccination and other methods, including cervical cancer vaccination." The experts report pointed out the right to life by writing as follows: "Since the cervical cancer is deadly and the vaccination carries vital importance, medically a vaccination to prevent cervical cancer is a necessity" even though this fundamental right did not mention obviously in expert report as it can be seen from the reasoned decision. Yet, it is pointed out that in the Health Implementation Communiqué there is not any regulation regarding to reimbursement of HPV vaccinations.

The judgement states that, the vaccination in question is a prevention method of cervical cancer which is lethal. Because of this fact, the vaccination carries vital importance and application of it and its medical necessity is clearly can be understood from the expert investigation. According to the judgment, the right to life and the right to health are ensured by the Constitution. For that reason, Social Security Institution must cover the vaccination expenses.

Another first instance court decision is from İstanbul 22nd Labor Court's decision[334] (2022/7 File Number, 2022/702 Judgement Number, date of hearing is 05.01.2022, date of judgement is 11.11.2022, date of insertion of decision with reasons is 11.11.2022). In this case, the plaintiff sets forth that during her examinations with gynecologist for two years, the doctor recommends an HPV vaccine to be applied. Afterwards, plaintiff purchases three doses of the HPV vaccination and inoculates. After vaccination, the plaintiff gathers the information above mentioned with the invoices and has recourse the vaccinations expenses with commercial advance interest from the Social Security Institution by applying the court.

In İstanbul 22nd Labor Court's decision, the legal reasoning explained as follows; "*Article 56 of Turkish Constitution says that: The State shall regulate central planning and functioning of the health services to ensure that everyone leads a healthy life physically and mentally and provide cooperation by saving and increasing productivity in human and material resources. The State shall fulfil this task by utilizing and supervising the health and social assistance institutions, in both the public and private sectors."*[335]. In conjunction with this article, in court's decision, the State's administration of healthcare services is considered as a Constitutional obligation. In addition, according to the expert investigation regarding this case, it is stated that the HPV Virus effects more than 500.000 people every year and one of the most important causes of contracting cervical cancer that scientifically proved. Also, this expert report includes the fact that, the cervical cancer is one of the 5th most common cancer type among women.

The expert report that predicated on this decision denotes the positive effects of vaccination. Such as, the risk that above mentioned that caused by HPV Virus can be minimized through vaccination application; the HPV vaccination is and safe and effective way to prevent cervical cancer beforehand; when the HPV vaccination applied to female infants it will decrease the wart and cancer types up to %86, and as for adolescents it will decrease the risk up to %71 percent. In addition, the frequency of the cervical cancer will decrease up to %40. In conclusion, application of the HPV vaccine when it's recommended by a doctor. Similar to the Ankara 62nd Labor Court's

[334] İstanbul 22. İş Mahkemesi 2022/7 E. 2022/702 K. (November 11, 2022). (Not published)
[335] Türkiye Cumhuriyeti Anayasası (Constitution of the Republic of Türkiye) O.J.: 2709 D.: 09.11.1982 Article 56.

decision, the fact that there is not any regulation regarding to the reimbursement of HPV vaccinations, according to the Health Implementation Communiqué is also pointed out in İstanbul 22th Labor Court's decision.

Eventually, according to the decision, the HPV vaccination does not takes place in the in the Health Implementation Communiqué, because of this, the Social Security Institution rejected the reimbursement demand. But, because of the issues stated in the expert report, and the right to life and the right to health which are ensured by the Constitution requires the Social Security Institution to reimburse the vaccination fee.

As it can be seen from both cases the plaintiffs are insurance holders, and an individual who wishes to protect themselves from a fatal cervical cancer obliged to purchase all of the vaccination's doses by themselves. After this purchase, individuals are applying to the Social Security Institution with the invoices. The Social Security Institution will give a verdict. Most of the cases, this verdict is against the applier's demand and after The Social Security Institution's rejection verdict, the remaining course will be the process of law to make a complaint to Labor Court.

Another first instance court decision is from İstanbul 20nd Labor Court's decision[336], (2021/783 File Number, 2023/125 Judgement Number, date of hearing is 24.12.2021, date of judgement is 01.02.2023, date of insertion of decision with reasons is 10.02.2023). In this case, the plaintiff sets forth that the only treatment method that prevents cervical cancer was administered in 30.09.2020, and the vaccination in question must administered in three doses to ensure full protection. Afterward, the plaintiff makes an application to Social Security Institution for reimbursement the cost of vaccination. This demand was rejected on 15.12.2021. The plaintiff stated that, the rejection decision from institution is unfair because cervical cancer is a deadly disease. In the statement of claims, 2,087.95 TL, together with the legal interest are claimed.

The defendant Social Security Institution's counsel claimed that the institution's decision was in accordance with the procedure and the law, and demanded that the case to be dismissed. The legal reasoning explained as follows, the dispute revolves around whether it is possible for the plaintiff to reimburse the cost of the HPV vaccination, along with its interest, from the defendant. After the necessary

[336] İstanbul 20. İş Mahkemesi 2021/783 E. 2023/125 K. February 01, 2023 (Not published)

information and documents were obtained from the relevant Hospital and the Social Security Center by the court, the expert reports prepared by the expert committee in the İstanbul 20nd Labor Court's 2021/533 File Number, and 2021/379 Judgement Number, which have precedential value, were included in the file and notified to the parties. The attorneys of the parties have submitted their statements and objections to the relevant reports. After these explanations about gathering the evidence, and scientifical reports.

The legal reasoning explained in three categories. Firstly, the court directly shares the information that is given in the expert report.

The explanation in the decision of the HPV Virus in relation with the expert reports. The court explained the HPV virus as a DNA virus that infects only humans and is primarily transmitted through sexual contact. It is one of the most common sexually transmitted infections (STIs), and the transmission usually occurs within a few years after the first sexual intercourse. Most HPV infections do not cause clinical symptoms, which is why many individuals are unaware that they are infected with HPV. Consequently, HPV is considered one of the major threats to public health worldwide. HPV genotypes are classified as high-risk (cancer-causing) and low risk (non-cancerous). Persistent infections with high-risk HPV genotypes typically lead to cervical, anal, vaginal, penile, vulvar, and oropharyngeal cancers within several decades. On the other hand, low-risk HPV genotypes cause recurrent respiratory papillomatosis and lesions known as genital warts in the genital area and mucous membranes. Protecting against HPV is important in reducing the morbidity and mortality rates associated with HPV-related diseases and alleviating the economic and social burden in society. Primary prevention includes HPV vaccination, while secondary prevention involves screening and early detection measures such as HPV DNA testing and Pap smear (cervical screening) tests. Almost all cases of cervical cancer (%99) are associated with HPV infection. According to the data from 2020, cervical cancer has ranked fourth among the most common cancer types in women and first among gynecological cancer types, with an incidence rate of 13.3 per 100,000 women worldwide. It is reported that in 2020, 604,127 women were diagnosed with cervical cancer globally, and 341,831 women lost their lives due to this disease. In Türkiye, according to the Health Statistics Yearbook 2020, the incidence rate of cervical cancer is 4.3 per 100,000 women, ranking ninth among the most common

cancer types in women and third among gynecological cancer types after endometrial and ovarian cancers. In addition to cervical cancer, HPV is responsible for approximately 9% of anal cancers, 69% of vulvar cancers, 75% of vaginal cancers, 63% of penile cancers, and 70% of oropharyngeal (mouth and throat) cancers.

Secondly, the courts add the information regarding the vaccination types by stating the fact that, The Food and Drug Administration (FDA) has approved three effective and safe HPV vaccines that prevent infections caused by the most common high-risk HPV genotypes, namely quadrivalent, bivalent, and nine-valent vaccines. These vaccines were approved in 2006, 2009, and 2014, respectively.

In addition, in the decision, data regarding other counties' HPV vaccination policies and WHO's approach was shared. In the decision, it is stated that, as of 2021, HPV vaccinations have been included in the National Immunization Programs of 100 countries worldwide, including the United States, United Kingdom, Germany, Australia, Belgium, Sweden, and New Zealand. In addition to this relevant information regarding in international HPV vaccination policies. WHO's statement about the HPV vaccination explains that with the existing screening methods reaching a significant number of individuals, cervical cancer will become an issue of the past in the next century, except in Africa where HPV is highly prevalent. WHO estimates that, it is calculated that the incidence of cervical cancer worldwide will decrease by 42% in 2045 and by 97% in 2120, preventing 74 million new cases. Furthermore, it is estimated that by 2030, 300,000 cervical cancer-related deaths will be averted, reaching 14 million by 2070 and 62 million by 2120.

Thirdly, the decisions explain the vaccination types and vitality rates that is caused by HPV viruses in Türkiye. The available HPV vaccination styes are explained. According to the decision, in Türkiye, the licenses for Gardasil and Cervarix vaccinations were obtained in 2007 and 2008, respectively, and these HPV vaccinations were made available for purchase. Additionally, the license for Gardasil 9 vaccine was obtained in 2019, but it has not been introduced to the market. Therefore, since December 2007, Gardasil and Cervarix vaccines have been available in pharmacies in Türkiye. However, due to the withdrawal of the manufacturing company, currently only Gardasil vaccinations can be obtained from pharmacies. This

relevant information is out of date since January 2023, Gardasil 9 has been introduced to the market in Türkiye, after gaining the license.[337]

The court decision included detailed information regarding protection of vaccinations. In this regard, stimulation of two-valent and four-valent HPV vaccinations effect on the immune system in young women (under 25 years old) who do not carry HPV (negative) and young women who have received the full course of the vaccines have been shown to prevented from cancer and precancerous lesions by 93%. Additionally, in young women (under 25 years old), regardless of their HPV status, HPV vaccines have been shown to prevent cancer and precancerous lesions by 54%. In other words, the effectiveness is nearly complete in young women who are shown not to carry HPV, while it is reduced in women who receive the vaccine without considering their HPV status. Vaccine effectiveness decreases with age. In women aged 24 and older, regardless of their HPV status, no protective effect against precancerous lesions has been observed with the administration of vaccines. After these explanations, the court states that, it is recommended to administer the HPV vaccination to girls and boys under 18 years of age, as well as to sexually inexperienced individuals between the ages of 18 and 24. Although early publications suggested the potential benefits of the vaccine for women over 25 years old, based on which the FDA approved vaccination up to the age of 45 in 2018, a comprehensive analysis conducted after widespread use of the vaccination indicated that its effectiveness decreases with age, and it is not protective in women over the age of 24. Therefore, the challenged decision is in accordance with the law, public interest, and service requirements, and it is necessary to dismiss the lawsuit, which was filed with unjustified and baseless allegations.

As it can be seen, in the very beginning of legal evaluation the court seemed to have a positive approach regarding to reinforcement of payment of vaccination. Yet, all of these above-mentioned explanations are faced with this statement: the subject of the discussion is not whether the vaccination should be included in the national immunization program, but rather who should receive the vaccination. After this statement, the court evaluates the plaintiff's age group. In the specific case, it is stated

[337] Abdülselam Durdak, "Türkiye'ye Gelen 9'lu Aşıyla Rahim Ağzı Kanserinden Korunmak Mümkün," https://www.aa.com.tr/tr/sirkethaberleri/saglik/uzmanindan-turkiyeye-yeni-gelen-9lu-asiyla-rahim-agzi-kanserinden-korunmak-mumkun-aciklamasi/678135. (accessed 12.06.2023)

that the plaintiff was born on 20/03/1992 and is 30 years old. The court considered that the effectiveness of the vaccination in preventing cancer in the plaintiff's age group is controversial, it has been expressed that it is not appropriate to use public funds until scientific studies on this matter are clarified. Because of this evaluation, the plaintiff's case was dismissed. Yet, appealing to Regional Court of Justice is decided to be possible. The other two decisions (Ankara 62nd Labor Court's decision, İstanbul 22th Labor Court's decision) were final verdicts and appeal was not possible.

The significance of this decision is, the decision puts the plaintiff's age to the center to evaluate the reinforcement a protective health measure, the vaccination by stating this case is not about who should receive the vaccination in question, not whether it should be included in the national immunization program. The scientific data used to reach this conclusion is a FDA's analyze. But, there are various scientific researches that indicates this vaccination can prevent females to effect from a vital cancer types.[338]

In addition, in the case in the Ankara 15th Administrative Court, File No. 800, in the Social Security Institution's defense statement it is mentioned that, the Immunization Advisory Board discussed including the Human Papillomavirus (HPV) Vaccination into the National Childhood Immunization Schedule on November 11,2010. It is declared in the defense statement that, this discussed was the first item on the agenda that scheduled to be discussed on December 9, 2010, was rescheduled and took place on November 26, 2010, based on the letter dated November 22, 2010, with the reference number 45332. As a result of the discussions, no decision was made to include the HPV vaccination in the National Immunization Program.

When considering the opinions of the Immunization Advisory Board members and relevant associations, it was emphasized that adding the HPV vaccination to the schedule is not a priority and that it may be more beneficial to establish control programs for varicella and Hepatitis A. Furthermore, it was highlighted that the

[338] Levent Dikbaş, "Human Papilloma Virüs Aşıları: Güncel Tartışmalar," *Düzce Tıp Fakültesi Dergisi / Duzce Medical Journal* 19, no. 3 (2017): 84; Mo et al., "Prophylactic and Therapeutic HPV Vaccines"; Ken Lin et al., "Perspectives for Preventive and Therapeutic HPV Vaccines," *Journal of the Formosan Medical Association* 109, no. 1 (January 2010): 4–24, https://doi.org/10.1016/S0929-6646(10)60017-4; "WHO Updates Recommendations on HPV Vaccination Schedule" (accessed 12.06.2023).; The North American Menopause Society, NAMS, "HPV and Menopause," https://www.menopause.org/for-women/menopauseflashes/sexual-health/hpv-and-menopause-what-women-of-the-sexual-revolution-need-to-know (accessed 12.06.2023).

widespread implementation of cervical cancer screening activities in Türkiye and the need for studies on disease incidence, prevalence, and economic evaluations specific to our country should reach a sufficient level in the literature. Based on the scientific data, medical requirements, current situation in our country, and parameters such as the effective and efficient use of public resources, it can be seen that the Immunization Advisory Board did not make a recommendation to include the HPV vaccination in the schedule. It is evident that the protection of public health, the formulation of health policies, and the implementation of services are based on these studies, opinions, needs, and recommendations. The regular and free cervical cancer screenings conducted nationwide, the need to expand them, and the existing treatment options do not currently necessitate the inclusion of the HPV vaccination in the schedule.

Again, it is worth to mention the fatality of the cancers that caused by the HPV viruses. The fourth most frequently diagnosed cancer and the fourth most common cause of cancer death in women is cervical cancer. Early and advanced stages of cervical cancer have a fairly clear treatment plan, but there are questions about how to handle locally advanced cases. Chemoradiotherapy is being considered as a novel therapeutic option, the traditional treatment methods are radiotherapy and surgical therapy in the management of locally advanced cervical cancer.[339]

The State's approach regarding to HPV vaccinations is undoubtedly conflicts with essential rights. Based on the guaranteed right to health and the right to life enshrined in the Constitution, it is believed that the subject vaccination cost should be covered by the defendant Social Security Institution.

Under this scope, Social Security Institution's approach to cover expensive treatment that is both physically and mentally exhausting for the individuals rather than preventing the fatal cancer types with three doses of vaccination neither benefits the Institution nor the society.

[339] Pınar Solmaz Hasdemir and Tevfik Güvenal, "Lokal İleri Evre Serviks Kanseri Yönetimi: Güncel Derleme," *Türk Jinekolojik Onkıloji Dergisi* 22, no. 1 (2021): 9–14.

SECTION III

VACCINATION WITHIN THE SCOPE OF THE LAW OF PERSONS

1. LAWFULNESS CONDITIONS OF VACCINATION

1.1. Vaccination Application

When the authority to apply medical intervention is recognized by law, it will be considered lawful because of the legal background provided by the legislations.

Just like any other medical intervention, physicians are authorized to administer vaccinations. In Turkish Law, there are several legislations that describes the responsibilities of health care professionals.[340] Both the patient and the physician have a number of obligations and rights as a result of the legal relationship between them. In order to establish the legal relationship between a physician and a patient, it is necessary to first look at the places where a legal relationship can be established. A person in need of healthcare services, that is, a patient, can generally only benefit from healthcare services in places specified by the law. In other words, a patient can usually establish a legal relationship with a physician only in these places. According to Article 12/II of Code numbered 1219, physicians, dental practitioners, and specialists in accordance with the regulations of medical specialization can practice their professions primarily in the following healthcare institutions and organizations. These are: Public institutions and organizations, private healthcare institutions and organizations under contract with the Social Security Institution, foundation universities under contract with the Social Security Institution and public institutions, private healthcare institutions and organizations without contracts with the Social Security Institution and public institutions, foundation universities without contracts with the Social Security Institution and public institutions, all constitute independent professional practice.[341]

Medical facilities in Türkiye can be divided into three groups. First degree medical facilities that consists of Family Physicians, Institutional Physicians, 112 Emergency Service; second degree medical facilities that consists Public Hospitals,

[340] Gezder, "Hekimin Yükümlülükleri", 123
[341] Gezder, "Hekimin Yükümlülükleri", 124-125

Municipality Hospitals and Military Hospitals; third degree medical facilities that consists of Training and Research Hospitals and University Hospitals[342].

1.2. Valid Consent

Contemporary legal system seeks the existence of the patient's consent in medical interventions as an essential element of the legality of the medical intervention that applied by the physician. It is possible to reach this conclusion from the right to life in Article 17 of the Constitution[343] and Articles 24 and 25 of TCC, which regulate the protection of the personality against the violation of personal integrity without obtaining the person's consent.

In German and Swiss Law systems, the person is given the right to self-determination and it is accepted that the limitation of "patient consent to medical intervention" arises from this right. According to Article 2/II of the Bonn Constitution, every person is entitled to life and bodily integrity. The right to personal freedom is indisputable. The only legal basis for causing interference with these rights is a law.[344]

Currently, Turkish and Swiss Law systems does not contain a general rule specifically regulating the obligation of disclosure *(Aufklärungspflicht).*[345] Accordingly, there is no general obligation for a physician to inform the patient about everything that could affect the formation of the will that can be considered contractual because of the relationship between patient and the physician.[346]

1.2.1. Capacity to Consent

Retrieving a valid consent is strictly related with capacity to act. To understand conditions of a valid consent, personality rights regarding medical interventions within the scope of capacity to act must be examined.

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[342] Hakkı Demirci, *Farklı Siyasal Rejimler ve Refah Sistemleri Bağlamında Tüm Yönleriyle ABD Küba Türkiye Sağlık Sistemi ve Uygulaması*, 1st ed. (Ankara: Gazi Kitapevi, 2019), 110.
[343] Türkiye Cumhuriyeti Anayasası (Constitution of the Republic of Türkiye) O.J.: 2709 D.: 09.11.1982.
[344] Işık Yılmaz, "Tıbbi Müdahalelerde Hekimin Aydınlatma Yükümlülüğü," 33; Federal Ministry of Justice of Germany, "Basic Law for the Federal Republic of Germany in the Revised Version Published in the Federal Law Gazette Part III, Classification Number 100-1, as Last Amended by the Act of 28 June 2022 (Federal Law Gazette I p. 968)" (n.d.), https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html (accessed 12.06.2023).
[345] Gezder, "Hekimin Yükümlülükleri", 128
[346] Gezder, 128

The capacity to act described as, a person's ability to be subject of the rights and obligations[347]. The capacity to act regulated in Article 9 of the Turkish Civil Code (numbered 4721, dated 22.11.2001). The abolished Turkish Civil Code regulated the heading of the Article 9 as *"exercise of the civil rights"*, which was the exact translation of the French Translation of SCC Article 12. On the other hand, the German translation was used commonly in the doctrine and used in the Turkish Civil Code numbered 472, the term is above mentioned *"capacity to act".* In other words, when we examine the TCC's legislation process, it is possible to say the term "capacity to act" changed over time due to different translations of Swiss Civil Code *(SCC).*[348]

When we examine the Turkish legislator's approach, the term of "personal interests" is observed to be used according to *Zevkliler*.[349] *Zevkliler'*s statement is that the *"personal interest"* term is used both in the Turkish Civil Code Article 24 and Turkish Code of Obligations *(TCO)* Article 49. In addition, the same term is used in the French translation of the SCC. On the other hand, in the German translation of the SCC, this term is used as *"personal relations".* According to *Zevkliler, "personal interests"* term is not used appropriately, because the main subject of the personality rights are personal values, not the interest regarding to those values.[350]

1.2.1.1. Full Capacity

Real (natural) persons who acquired all the conditions of the capacity to act are considered to have acquired full capacity[351]. In other words, the individuals who are accessed to the adulthood and without any guardianship decision and obtains mental competence are categorized under to have full capacity. These individuals can obtain rights and incur a debt without assistance of a representer [352]. As a rule, individuals who has full capacity are responsible from the damages caused by their actions[353].

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[347] Dural and Öğüz, *Türk Özel Hukuku Cilt II Kişiler Hukuku,* 47; Serap Helvacı, *Gerçek Kişiler,* 9th ed. (İstanbul: Legal Yayıncılık, 2021), 51; Oğuzman, Seliçi, and Oktay Özdemir, *Kişiler Hukuku: Gerçek ve Tüzel Kişiler,* 51

[348] Dural and Öğüz, 47.

[349] Zevkliler, "Tedavi Amaçlı Müdahalelerle Kişilik Hakkına Saldırının Sonuçları (1982 - 1983 Öğretim Yılı Açılış Dersi Metni)," 3.

[350] Zevkliler, 3.

[351] Serap Helvacı, *Gerçek Kişiler*, 9th ed. (İstanbul: Legal Yayıncılık, 2021), 67; Şaban Kayıhan, *Kişiler Hukuku*, 1st ed. (Seçkin Yayıncılık,2022), 42.

[352] T.C. Sağlık Bakanlığı, "Yetişkin Aşılama,", https://asi.saglik.gov.tr/asi-kimlere-yapilir/liste/30-yetiskin-a%26.

[353] Kayıhan, *Kişiler Hukuku*, 42.

Adults who acquire full capacity can decide to receive recommended vaccinations. With the gradual increase in the elderly population in Türkiye, there is a corresponding increase in chronic diseases and cancers, and this situation has led to the increasing prominence of adult vaccination.

1.2.1.2. Full Incapacity

The foundation of the ability is the power of discernment. If a person does not obtain *"ability to make a sound judgement",* that person is considered to incapable to act. That person is prohibited to "enter into transactions, use rights, or incur obligations"[354].

The necessity for a lawful medical intervention, a valid consent must be received. Yet, application of medical intervention to individuals who does not obtain capacity to act can be questionable because that individual in question may not understand the explanations of enlightenment. When the issue comes to vaccination policies, the individuals that do not obtain the power of discernment are required to be protected and evaluation within the scope of law when it comes to application of vaccinations is necessary.

In cases where an individual lacks capacity, three situations can arise. The first possibility is not explicitly regulated in Turkish law but discussed and addressed in positive laws of foreign jurisdictions, where the person expresses desires regarding treatments and interventions to be performed on them or withheld during periods when they had the capacity to discernment but lack it at the time of decision-making. This possibility is referred to as a *"patient's directive".* Another possibility is to appoint a legal representative to make decisions on these matters, authorizing this individual to decide on behalf of the person concerned. The final possibility is when the individual lacked capacity during periods of discernment and had no prior arrangements, and these possibilities need to be considered within this context.[355] It would be appropriate to regulate this issue comprehensively within our legal system.[356]

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[354] Gezder et al., "Turkish Civil Law," 41., Helvacı, 69

[355] Saibe Oktay-Özdemir, "Tıbbi Müdahaleye ve Tıbbi Müdahalenin Durdurulmasına Rızanın Kimler Tarafından Verileceği", Prof. Dr. Rona Serozan'a Armağan, (İstanbul: On İki Levha Yayıncılık, 2020), 1336

[356]Oktay-Özdemir, "Tıbbi Müdahaleye ve Tıbbi Müdahalenin Durdurulmasına Rızanın Kimler Tarafından Verileceği", 1342

1.2.1.3. Limited Capacity

Article 16 of the TCC regulates the limitations regarding to "*Infants and disabled persons with distinguishing power*". According to the Article 16/I, the above-mentioned group of people are not permitted to enter into any legal obligations without the approval of their legal representatives. In addition, for uncovered earnings and the use of strictly personal rights, such authorization is not required.

As can be seen, TCC regulates persons with limited capacity as divided to two categories. One of them is "*minors who are mature*", the second group of people is "*adult persons who have been incapacitated.".* As a rule, "*minors who are mature"* and "*adult persons who have been incapacitated"* are considered legally incapable, but this incapability is limited according to various conditions. In other words, being legally incapable is the rule; obtaining capacity is the exception for the individuals with limited capacity[357]. Limited capacity individuals are those whose legal capacity to act has been restricted for their protection, although there is not sufficient reason for their limitations, and legal representatives have been appointed to assist them.[358]

If a patient is a capable minor or a person with limited decision capacity, the physician will fulfill the duty of enlightenment by providing information to the minor or person with limited capacity and their legal representatives, who can make decisions regarding the medical intervention[359].

For any kind of intervention, if the patient is a minor or incapacitated, the permission of the parent or legal guardian will be obtained. According to this regulation, if there is no parent or legal guardian, or if they are absent, or if the person on whom the procedure will be performed is unable to express their permission, then permission is not required.[360] Article 70 of the Code of Execution of Medicine and Medical Sciences and Article 24 of the Patients' Rights Statue, in medical

[357] Kayıhan, *Kişiler Hukuku*, 45.
[358] Helvacı, *Gerçek Kişiler*, 67
[359] Çilingiroğlu, "Özel Hukuk Yönünden Hastanın Tıbbi Müdahaleye Rızası," 73.
[360] Oktay-Özdemir, "Tıbbi Müdahaleye ve Tıbbi Müdahalenin Durdurulmasına Rızanın Kimler Tarafından Verileceği", 1325.

interventions, regardless of whether the minor or incapacitated person has the capacity for discernment, the permission of the legal representative will be required.[361]

It is worth to mention that the Patients' Rights Statue was issued during the time of the old TCC. Therefore, the relevant provisions should be understood as 272, 346; 431, 487. When these two provisions are examined, it is observed that within the framework of protective measures introduced for both minors and incapacitated individuals, the decision will be made by the court.[362]

If the patient is a minor, in the context of the minor's right to determine their own future, concepts such as the *"Principle of the Best Interests of the Child", "Principle of the Superior Interest of the Child",* and *"Right to Participation"* should be examined. The principle of the best interests of the child emerges as a principle that is observed in every matter concerning the child.[363] According to *Serozan,* the best interests of the child should not be equated with the interests of adults and should not be simplified.[364]

1.3. Enlightenment

The term "enlightenment" or means having or being informed, and it can be defined as the medical intervention being based on informed consent, briefly informing the patient about the intervention to be made, and the patient must be fully aware of the consent that is given.[365]

The most important element of the physician's medical intervention to the patient and compliance with the law is the patient's consent. As a rule, receiving the consent is mandatory, except in emergency situations and unconsciousness of the patient. Receiving the consent of the patient is important not only for the patient but also for the physician. In terms of determining the legality of the intervention and determining the responsibility of the physician it is important to evaluate the

[361]Oktay-Özdemir, "Tıbbi Müdahaleye ve Tıbbi Müdahalenin Durdurulmasına Rızanın Kimler Tarafından Verileceği", 1326.
[362]Oktay-Özdemir, 1340.
[363] Emine Dede, Tıp Hukukunda Çocuk Hastaların Hakları, (Ankara: Seçkin Yayınları, 2017), 79-80.
[364] Rona Serozan, Çocuk Hukuku, (İstanbul: Vedat Kitapçılık, 2017), 67.
[365] Işık Yılmaz, "Tıbbi Müdahalelerde Hekimin Aydınlatma Yükümlülüğü," 393.

characteristics of the consent at the stage of determining the legal relationship between the patient and the physician.

In order for the patient's consent to be legally valid, he/she must have the ability to comprehend the importance of the medical intervention for which he/she gives his/her consent[366]. In other words, the consent must be obtained from an individual who acquires the capacity of discernment. In this sense, according to the TCC, the consciously given consent of a fully capable person is legally valid.

Since persons who does not obtain capacity (full incapacity) will not be able to comprehend the consequences and understand importance of medical intervention, consent to medical intervention is their legal representatives must declare their consent[367]. The individuals with limited incapacities must be able to declare their consent without the consent of the parent or guardian, as it is a legal capacity and the right to medical intervention is a strictly personal right.

Physician's responsibility will not occur if there is an enlightenment given prior to the intervention to the patient. Enlightenment's form requirement should be explained within this regard. Because proving the existence of the enlightenment could be a disputable issue.

Enlightenment could be provided in both written and verbal form. However, providing the enlightenment condition in written form is preferred because of the terms of proof.[368] Proving the existence of the enlightenment carries some problems because, in the Turkish legal system, written consent is not regulated as a condition of validity. Written enlightenment is considered a convenience to prove. There is not a provision that regulates the enlightenment issue within the scope of burden of proof in Turkish Law. Article 6 of the TCC states that, if there is no other regulation, the claimant must prove the claim. In accordance with this regulation, if the patient claims that the consent was retrieved without enlightenment, that patient must prove their

[366]Özpınar, "Tıbbi Müdahalede Kötü Uygulamanın Hukuki Sonuçları," 38.
[367]Özpınar, 38.
[368]Berna Özpınar, "Tıbbi Müdahalede Kötü Uygulamanın Hukuki Sonuçları" (Ankara, Gazi Üniversitesi, 2007), 38, https://tez.yok.gov.tr/UlusalTezMerkezi/tezDetay.jsp?id=x245qhoilL39zRLFKwMfag&no=H0yF9bLy18O5Bbfe4UUYaw. (accessed 12.06.2023); Pelin Çavdar, "Hekimin Aydınlatma Yükümlülüğü" MÜHF - HAD Prof. Dr. Cevdet Yavuz'a Armağan, (İstanbul, 2016), 755

claim.[369] As it can be seen, there are discussions regarding enlightenment. In doctrine, the burden of proof relies on the physician because in the relationship between physician and patient, patient is the weak and vulnerable side.[370] Likewise, because of the forms that are provided for the enlightenment are in the possession of the physician, the burden of proof considered to lie with the physician.[371] The same principle applies in the German Law.[372]

1.4. The Informed Consent

Informed consent, which is defined in universal medical ethics documents, has been put into practice with legal regulations in Türkiye. The first legislation regarding to informed consent in Turkish Law was regulated in 1928. That law was named as "The Law on the Style of Execution of the Medical and Medical Arts".[373] The other regulations are, Patients' Rights Statue[374] Article 15, 18, and 24; Human Rights and Biomedicine Convention Article 5, and Medical Deontology Statue Article 14/2. These regulations are the legal grounds for informing and consent.[375]

The content and qualification of the informed consent had been explained in the Article 26 of the Ethics of the Physician's Profession. Article 26 reads as follows, *"the physician enlightens the patient accordingly to the patient's health condition, health status, the diagnosis, recommended treatment, treatment's possibility to be succeed and duration, the method of the treatment, the prospects of the treatment, type of treatment, risks that the treatment method carries for the patient's health, the use of prescribed medicines and illumination of the possible side effects, the consequences of the disease, possible treatment options and risks if the patient does not accept the treatment."*[376].

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[369] Pelin Çavdar,759.; Erdem, Büyüksağiş, "Yaşama Şansının Yitirilmesi Sonucu Uğranılan Kayıplar Açısından Hekimin Tazminat Sorumluluğunun Kapsamı- Uygun İlliyet Bağı Teorisine Değişik Bir Yaklaşım" *AÜHFD,* no.4 (2005), 125.
[370] Ayan, 243.
[371] Hakeri, 327.
[372] Çavdar, 759 as cited in:, Markus Parzeller, Moren Wenk, Barbara Zedler and, Markus Rothschild "Patient Information and Informed Consent Before and After Medicial Intervention", *Dtsch Arztebl,* vol. 104 no.9 , (2007), 9
[373] Tababet ve Şuabatı Sanatlarının Tarz-ı İcrasına Dair Kanun (the Code of Execution of Medicine and Medical Sciences) O.J.: 863 D.: 14.04.1928.
[374] Hasta Hakları Yönetmeliği (Patients' Rights Statue) O.J.:23420 D.:01.08.1998.
[375] Okyay, Akbaba, and Kirkit, "Aydınlatılmış Onam ve Aşılama," 156.
[376] Türk Tabipleri Birliği, "Hekimlik Meslek Etiği Kuralları," Türk Tabipleri Birliği, February 1, 1999.

In general, the informed consent can be described as *"a patients' willingly acceptance without any hesitation and being completely understood after the proper explanation from the heath care professional of a medical intervention that includes explanation of the risks, benefits, alternatives and medical applications that contains the risk and benefits."*[377].

It can be easily understood from the nature of consent that it is a personal right. Personal rights require the involvement of the respective individual who holds that right. Therefore, the person on whom a medical intervention will be performed needs to give consent. In this context, the individual will ensure the legality of the intervention by giving consent before the procedure with full awareness of the intervention. However, the consent for treatment must be given after being fully informed about all aspects of that treatment. Within the framework of the obligation to inform the patient, informed consent is sought.[378]

There is no complete terminological unity regarding to informed consent in Turkish Law[379]. In this sense, different terminologies are used, such as *"consent"*, *"informed consent"*, and *"obtaining consent by informing*". The concept of *"obtaining consent by informing"* is included in the terminology of the Draft Law on Liability for Malpractice of Medical Services[380].

However, *"obtaining consent by informing"* can be understood as receiving permission. Receiving the consent as a similar term to obtaining permission mostly in question for the consent to be used by the parent or guardian of the fully incapacitated individuals, or individuals with limited capacity. There is a difference between consent and permission in this sense.

[377] Okyay, Akbaba, and Kirkit, "Aydınlatılmış Onam ve Aşılama," 156.
[378] Saibe Oktay-Özdemir, "Tıbbi Müdahaleye ve Tıbbi Müdahalenin Durdurulmasına Rızanın Kimler Tarafından Verileceği", 1323
[379] Işık Yılmaz, "Tıbbi Müdahalelerde Hekimin Aydınlatma Yükümlülüğü," 32.
[380] "Tıbbi Hizmetlerin Kötü Uygulanmasından Doğan Sorumluluk Kanun Tasarısı (the Draft Law on Liability for Malpractice of Medical Services)"; Türk Tabipleri Birliği, "Yeniden Isıtılan Teklif: Malpraktis Kanunu," Türk Tabipleri Birliği, https://www.ttb.org.tr/haber_goster.php?Guid=dd5336a0-d0b8-11ea-be10-6c152474dcf3. (accessed 12.06.2023)

1.4.1. The Consent from Underaged

The requirement for consent when the medical intervention is applied to on underaged individuals should be examined. If the underaged individual does not have the capacity to understand the relevant medical intervention, it is undisputed that the parent's consent will be given for the medical intervention. However, certain medical interventions cannot be performed on minors even with parental permission.

Law on Organ and Tissue Procurement, Preservation, Transplantation, and Vaccination numbered 2238[381] regulates the procurement, preservation, transplantation, and vaccination of organs and tissues for the purposes of treatment, diagnosis, and scientific research. Article 5 of the Law on Organ and Tissue Procurement, Preservation, Transplantation, and Vaccination, strictly prohibits to obtain organs and tissues from individuals who have not reached the age of eighteen and are not legally appellor.

1.4.1.1. The Consent from Underaged in Turkish Law

The consent of *"minors who are mature"* when there is an application for any kind of medical intervention is not considered sufficient. The consent will be provided through the legal representatives of minors. In Article 70/1 of the the Law on the Style of Execution of the Medical and Medical Arts[382] reads as follows: "*Physicians, dental practitioners, and dentists obtain prior permission from the patient's legal guardian or custodian before performing any type of surgery, regardless of whether the patient is a minor or under guardianship*.". This article used the term of *"surgery"*, but the term of *"medical intervention"* can be used in this article as well. The legislator's approach for using the surgery term can be discussed. The Law on the Style of Execution of the Medical and Medical Arts is dated 1928, because of that reason, it could be said that the term of medical intervention is not used widely in that time period. On the other hand, Article 24/I of the Patient's Rights Statue reads as follows, "*In medical interventions, the patient's consent is required. If the patient is a minor or incapacitated, permission is obtained from their parent or legal guardian.*". To simply

[381] "Organ ve Doku Alınması, Saklanması, Aşılanması Hakkında Kanun (Law on Organ and Tissue Procurement, Preservation, Transplantation, and Vaccination) O.J.:16655 D.:03.06.1979," 2238 § (1979).
[382] Tababet ve Şuabatı Sanatlarının Tarz-ı İcrasına Dair Kanun (the Code of Execution of Medicine and Medical Sciences) O.J.: 863 D.: 14.04.1928.

put, Turkish legislator aimed to receive a valid permission from patient's legal guardian or custodian and receiving the consent of a minor is not considered sufficient.

Article 16 of the TCC, establishes that minors with the capacity for discernment can personally exercise their strictly personal rights. In order to understand the legal nature of medical interventions to be performed on minors, the discretion of the parent and the refusal of the parent to authorize the necessary medical intervention should be examined. Within that context, when the discretion of the parent and the regulations regarding to consent for medical intervention should be analyzed.

As above mentioned, the consent to medical intervention is considered a strictly personal right, and according to Article 16/I of the TCC, the permission of the legal representative is not required as a general rule for the exercise of strictly personal rights[383]. In the doctrine, views regarding the consent for medical interventions on minors are generally categorized under several main headings.[384]

According to one viewpoint, it is sufficient to seek the consent of the minor who has the capacity for discernment.[385] This viewpoint can be detailed in accordance with the term of *"hypothetical consent".* The consent obtained from neither family members nor legal representatives does not substitute for the patient's consent. Therefore, medical intervention does not become legally valid and lawful only based on the consent of the legal representative. Conforming to this view, the factor that ensures the legality of medical intervention is hypothetical consent.[386] Accordingly, it is necessary to consult with the patient's family members or legal representatives to determine the patient's hypothetical will regarding the implementation of medical intervention and to consider the patient's best interests.[387]

The second viewpoint, based on the purpose of protecting the minor as stated in Article 16 of the TCC, considers the presence of the legal representative's consent for medical intervention to be both necessary and sufficient. This viewpoint is based

[383] Şenocak, "Küçüğün Tıbbi Müdahaleye Rızası," 75; Kahraman, "Medeni Hukuk Bakımından Tıbbi Müdahaleye Hastanın Rızası," 489.
[384] Kahraman, "Medeni Hukuk Bakımından Tıbbi Müdahaleye Hastanın Rızası," 488.
[385] Şenocak, "Küçüğün Tıbbi Müdahaleye Rızası," 76; Kahraman, "Medeni Hukuk Bakımından Tıbbi Müdahaleye Hastanın Rızası," 489.
[386] Sibel Adıgüzel, "Hekimin Aydınlatma Yükümlülüğü," *Türkiye Adalet Akademisi Dergisi* 5, no. 19, 2014: 959.
[387] Kahraman, "Medeni Hukuk Bakımından Tıbbi Müdahaleye Hastanın Rızası," 488.

on the assumption that the decision of the legal representative regarding medical intervention will be in the best interest of the minor, regardless of whether the minor has the capacity for discernment[388]. In Article 70 of the Law on the Practice of Medicine and its Branches No. 1219[389], dated 11.04.1928 and Article 24 of the Patients' Rights Statue it is stipulated that the consent of the legal representative is required for medical interventions on minors who have the capacity for discernment. Furthermore, in Article 24/II of the Patients' Rights Statue[390], it is stated that even in cases where the consent of the legal representative is sufficient, the minor's participation in the decision-making process regarding their treatment will be ensured by listening to their views to the extent they can understand and providing them with information. This indicates an inclination towards the third viewpoint. However, when the wording of this provision examined, it can be understood that a valid consent from an underaged individual is not necessary for a medical intervention that includes the valid consent condition that is required to be considered lawful, in other words, legal. In accordance with this provision, the minor's participation in decision-making will be ensured by providing information about the medical intervention. This viewpoint is criticized particularly in relation to the capacity for discernment of minors in exercising legal acts on their own and the associated responsibility for decisions concerning personal matters. It is argued that minors should have the right to make decisions regarding matters that affect their personality and bear the responsibility for such decisions. Furthermore, it is emphasized that minors should not be deprived of the opportunity to exercise control over their bodily integrity and health, which are fundamental aspects of their personality, and should not be reduced to mere subjects of medical intervention[391]. Similarly, according to *Arpacı*, the interpretation of Article 16/I of the TCC, individuals with limited capacity, do not require a legal representative for giving consent to medical interventions would not be inconsistent. Yet, special provisions regarding to medical interventions regulates different principle, amendments dated 23.01.2008 – 5728/38 of the Article 70 of the Law on the Practice of Medicine and its Branches No. 1219, dated 11.04.1928 regulates that in case the patient is underaged or with restricted (minor or under guardianship), it is necessary to

[388] Adıgüzel, "Hekimin Aydınlatma Yükümlülüğü," 961–62.
[389] Tababet ve Şuabatı Sanatlarının Tarz-ı İcrasına Dair Kanun (the Code of Execution of Medicine and Medical Sciences) O.J.: 863 D.: 14.04.1928.
[390] Hasta Hakları Yönetmeliği (Patients' Rights Statue) O.J.:23420 D.:01.08.1998.
[391] Şenocak, "Küçüğün Tıbbi Müdahaleye Rızası," 74–75.

seek the consent of the parent or guardian for all kinds of medical interventions. According to the regulation, if there is a medical intervention that involves grave danger, a written declaration of consent is necessary.[392] Article 24/II of the Patient's Rights Statue is considered a regulation without any sanctions in case of non-compliance.[393]

Similarly, according to the Article 6/II of the Oviedo Convention, it is regulated that the opinion of the minor will be taken into account as a determining factor in proportion to their age and degree of maturity. According to the article *"When a minor lacks the legal capacity to give consent to a medical intervention, that medical intervention may only be carried out with the representative's or authority's consent or the consent of a person or body designated by law*.[394]*".* It would be appropriate to state that this provision is more influential in terms of the decision to be made regarding the minor compared to the provision in the Patient's Rights Statue.

Lastly, according to the third viewpoint, both legal representative's consent and minor's consent should be received together.[395] The justification of this viewpoint is achieved by considering the above-mentioned viewpoints together. Firstly, minors with discernment and individuals with limited capacity, who possess the power of discernment, will have the ability to express their consent to medical intervention independently, as the act of expressing this consent is tightly linked to the exercise of a fundamental right. This is because the disclosure of this consent is the exercise of a right closely tied to the individual. In the case of the patient being a minor or having limited capacity, the rule (Article 16/II of the TCC) that seeks the consent of the parent or guardian without mentioning the capacity for appeal is erroneous from this perspective. In other words, in the case of the patient being a minor or having limited capacity, it is inaccurate to seek the consent of the parent or guardian without mentioning discernment as stated in the Article 70/I the Law on the Practice of Medicine and its Branches No. 1219.[396] However, in order to protect individuals with

[392] Abdülkadir Arpacı, "Özel Hukuk Açısından Tıbbi Müdahaleye Rıza Beyanı, Buna Ilişkin Sorunlar ve Çözüm Yolları," *Yeditepe Üniversitesi Hukuk Fakültesi Dergisi* 6, no. 2 (2009): 9–10.
[393] Arpacı, 10.
[394] European Court of Human Rights (Grand Chamber), "Vavřička and Others v. The Czech Republic. App. Nos. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15, 43883/15.," Paragraph 141; Toebes, "Vavřička v. Czech (Eur. Ct. H.R.)," 881.
[395] Çilingiroğlu, "Özel Hukuk Yönünden Hastanın Tıbbi Müdahaleye Rızası," 55.
[396] Çilingiroğlu, 55.

limited capacity, it is beneficial for the legal representative to also be involved in granting consent, particularly in the case of hazardous and significant medical interventions that could be considered fatal. While individuals with limited capacity can express their consent independently, the involvement of the legal representative serves the purpose of their protection of the minors. According to this view, cases where the legal representative refrains from participating in the consent given by the person with limited capacity, the legality of medical interventions can only be prevented by the consent expressed solely by the person with limited capacity.[397]

In the case of minors who are not under guardianship, consent must be given by their appointed legal representatives, known as guardians. Contrasted with, in the case of a minor under legal guardianship, the consent of both the person with limited capacity and the guardian, as well as the permission of the judge of the Court of Peace, are required. Considering a medical intervention that is closely related to the right to personal integrity, it is a crucial issue that should be discussed not only from a legal and sociological perspective but also from a psychological standpoint.[398]

Article 24/III of the Patient's Rights Statue states that, medical intervention on the patient is not dependent on consent in situations where obtaining the patient's consent is not possible and there is an imminent danger to life while the patient is unconscious, as well as circumstances that might result to the loss of an organ or the inability for it to perform its function. In accordance with this provision, if it is not possible to obtain consent from the patient's legal representative in the presence of emergency situations, the requirement for information and consent will not be necessary.

On the other hand, in some cases, there is also the possibility that the parent or legal representative may not give consent for medical intervention on the minor with discernment. Article 24/V of the Patient's Rights Statue regulates this scenario. The relevant legislation, can be reference is made to Article 346 of the Turkish Civil Code for situations where the parent does not give consent. According to this article, it is regulated that *"if the child's interests and development are endangered and if the*

[397] Çilingiroğlu, 55–56.
[398] Çilingiroğlu, 56.

parents cannot find a solution or are unable to do so, the judge may take the necessary measures for the protection of the child."

1.4.1.2. The Consent from Underaged in Comparative Law

The authority of legal representation is addressed through specific regulations where those utilizing legal representation are authorized. This is because giving consent for medical intervention involves the exercise of an individual's personality rights. It should be noted that the legal representative is not expressing consent on behalf of the represented person. The legal representative gives consent on their own behalf based on the authority granted by the law. In both Turkish and foreign legal systems, it is explicitly stipulated that the consent of minors for medical intervention can only be given through their legal representatives.[399]

The determination of who will provide consent for medical interventions on underaged individuals who obtains the power of discernment and have the maturity to perceive and evaluate the relevant medical intervention, or in other words, have the capacity to understand the nature and consequences of the medical intervention, varies from country to country. The issues regarding to consent from underaged in comparative law, will be discussed under the heading of "Childhood Vaccinations and Covid-19 Pandemic in Comparative Law".

2. MANDATORY VACCINATION PROVISIONS IN TURKISH LAW

In the Public Health Code, Article 88 stipulates that smallpox vaccination is mandatory for the purpose of combating smallpox disease. Article 89 emphasizes that the child will be vaccinated within the four-month period following birth, and the responsibility for this vaccination is the child's parents or legal guardians' responsibility. However, since 1977, smallpox disease has not been observed worldwide; also, it should be noted that smallpox vaccination has not been administered in Türkiye since 1980.[400]

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[399] Saibe Oktay-Özdemir, "Tıbbi Müdahaleye ve Tıbbi Müdahalenin Durdurulmasına Rızanın Kimler Tarafından Verileceği", 1348

[400] Oktay-Özdemir, Saibe, "Türk Hukukunda Başkası Lehine Tıbbi Müdahaleler", 343-344; Mine Kasapoğlu Turhan, "İdari Kolluk Yetkisi Bağlamında Zorunlu Aşı Uygulaması," *Hacettepe Hukuk Fakültesi Dergisi* 9, no. 1 (June 30, 2019): 8-9

In the Article 3 of the Public Health Code numbered 1593[401], regulates among the duties of the Ministry of Health the supervision of all kinds of vaccines and serums. In Article 57 of the Public Health Code numbered 1593, several contagious diseases are enumerated. These diseases are cholera, plague (Bubbon or pneumonia form), spotted fever, ruam, black fever, variola, diphtheria, brain fever, dysentery, puerperal fever, glanders, scarlet fever, rubeola, leprosy, brucellosis. In addition, if there is a occasion of spread of these diseases it is expected to inform the medical authorities. Article 64 of the Public Health Code numbered 1593, if there is a spread of other contagious diseases besides the above-mentioned diseases in Article 57, Ministry of Health is legally authorized to take precautions regarding to informing requirement[402]. If this obligation is prevented by individuals, there is a punishment that regulated in the Turkish Criminal Code Article 195, titled as "*Acting Contrary to Measures to Contain Contagious Disease*". This article reads as follows, "*When an individual disobeys quarantine orders issued by the authorities because someone has a contagious disease or has died from one, they will be punished with a sentence of imprisonment for a period of two months to one year*."

In Turkish Law, quarantine measurement is legislated to prevent spread of contagious diseases. Article 72 of the Public Health Code regulates the quarantine conditions. If there is a event of an epidemic, quarantine, detention or application of serum and vaccination to those who have been exposed to patients and people who are suspected to be infected can be applied. In essence, Article 72 of Public Health Code regulates the measures to be taken in cases where one of the diseases listed in Article 57 occurs or is suspected to occur have been mentioned. In Article 87, it is stated that measures to be taken for each of the diseases listed in Article 57 will be announced through a regulation to be issued by the Ministry of Health. In addition, Article 47 of the Code regulates that when one of these diseases is observed within the borders of Türkiye, vaccines or serums may be administered to patients. According to Article 64 of the Code, these measures can be taken for every infectious disease.[403]

[401] Umumi Hıfzısıhha Kanunu (Public Health Code) O.J.:1483 D.: 06.05.1930, 1593 § (24.04.1930)
[402] Okyay, Akbaba, and Kirkit, "Aydınlatılmış Onam ve Aşılama," 157.; Oktay-Özdemir, Saibe, "Türk Hukukunda Başkası Lehine Tıbbi Müdahaleler", 343

[403] Oktay-Özdemir, Saibe, "Türk Hukukunda Başkası Lehine Tıbbi Müdahaleler", 343

All of these above-mentioned regulations of the Public Health Code can be observed in the regulations issued by the Ministry of Health. For instance, the Regulation on the Principles of Surveillance and Control of Communicable Diseases includes an updated list of diseases that require notification, clearly indicating that the regulation is prepared based on Articles 3, 57, and 64 of the Public Health Code. In Annex I of the same regulation, the diseases that are subject to notification and preventable by vaccination are listed as follows: pertussis, diphtheria, mumps, measles, rubella, congenital rubella, neonatal tetanus, poliomyelitis, smallpox, Haemophilus influenzae type b (Hib) meningitis, and influenza[404]. Additionally, in addition to the mentioned provisions the Directive on the Expanded Immunization Program of the Ministry of Health also regulates which vaccines should be administered routinely and how these vaccines should be administered.[405]

The other regulation that includes components of the medical intervention's components is Article 13 of the Medical Deontology Statue. The article describes medical intervention's components as follows, "the medical intervention aims to diagnose, treat or protect, the doctor or the dentist will not held responsible in case of these interventions did not cause any kind of improvement and the intervention should not be conflict with medical principles and ethics".[406] This Statue contains the rules that both doctors and dentist are obliged to follow, according to a statement which published by Turkish Medical Association *(TMA*).[407]

Currently, a circular issued by the Ministry of Health dated 25.02.2008 and numbered 2008/4 determines the vaccines to be administered to children.[408]

When the legality principle in Turkish legislations examined, according to *Oktay-Özdemir*, since medical interventions to human beings constitute a violation of personal rights, they can only be performed in a way allowed by the law and can be

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[404] "Bulaşıcı Hastalıklar Sürveyans ve Kontrol Esasları Yönetmeliği (Regulation on the Principles of Surveillance and Control of Communicable Diseases) O.J.:26537 D.: 30.05.2023.
[405] Okyay, Akbaba, and Kirkit, "Aydınlatılmış Onam ve Aşılama," 157.
[406] Tıbbi Deontoloji Nizamnamesi (Medical Deontology Statue) O.J.: 10436 D.:19.02.1960.
[407]Türk Tabipleri Birliği, "Tıbbi Deontoloji Nizamnamesi," https://www.ttb.org.tr//makale_goster.php?Guid=f7933e30-923f-11e7-b66d-1540034f819c. (accessed 12.06.2023)
[408] T.C. Sağlık Bakanlığı Temel Sağlık Hizmetleri Genel Müdürlüğü, Genişletilmiş Bağışıklama Programı Genelgesi, no: B100TSH0110005, (25.02.2008) https://dosyasb.saglik.gov.tr/Eklenti/1117,gbpgenelge2008pdf.pdf?0 (accessed 12.06.2023)

done on the basis of receiving consent as a rule, and the element that removes the illegality is the consent given in accordance with the law. It is natural that within the framework of the basic regulations in our laws, interventions for the benefit of third parties are possible only in cases specified by the law. Mandatory vaccinations can be discussed within this scope. In other words, the principle of legality is valid in interventions for the benefit of third parties. This means that a general regulation stating that medical interventions to be made in favor of others is not sufficient; is to be sought. For example, organ transplantation is an intervention performed with the permission of the law and only in compliance with the legal conditions. Besides vaccination, donating blood, participating in medical research are also medical interventions that are regulated in the laws and sub-norms with the authority given by the law and are therefore permitted.[409]

3. MANDATORY VACCINATIONS WITHIN THE SCOPE OF THE CONSTITUTIONAL RIGHTS

Vaccination is a medical intervention that violates an individual's bodily integrity, and therefore, it can be considered and argued to be unlawful in this context. However, it can be asserted that vaccination is not unlawful when there are justifications for compliance with the law, such as the consent of the affected party or when the intervention serves the public interest. The issue of the application of justifications for compliance with the law is particularly important in the case of mandatory vaccines classified as compulsory and for the Covid-19 vaccination.

Given that vaccination is a medical intervention that derogates a person's bodily integrity, it can be claimed that due to lack of several conditions, can be considered against the law. However, it might be argued that vaccination is legal when there are good reasons to follow the law, such as when the intervention is willingly be applied by the individuals with believing that vaccination increases the immunization rates.

If consent for a vaccination is given, there will be legal justification for compliance and there won't be any legal controversy. The main topic for discussion is whether vaccination is permitted or required when a person refuses to consent. This raises concerns about the legitimacy of vaccinations.

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409 Saibe Oktay-Özdemir, “Türk Hukukunda Başkası Lehine Tıbbi Müdahaleler”, 329-330.

The Constitution upholds the individual's inviolability and physical and spiritual existence, which includes the rights to life, health, and bodily integrity, particularly under Articles 13 and 17. In this sense, we can say that this right is safeguarded not only from infringements by third parties but also from infringements by the state. The state also has an obligation to safeguard people's lives, health, and physical integrity. The overall development of the individual in all facets is covered by the personal values that make up the right to personality, particularly the significance of life, health, and bodily integrity in our context. The state has a duty to prevent and end all harm that could be caused by infectious diseases, epidemic diseases, natural disasters, or any other. Although specific limitations are not provided in the Article 17, the provision is included in the law to regulate interventions within this scope. In assessing the legitimacy of such interventions, the criteria for guaranteeing set forth in Article 13 of the Constitution must be taken into consideration. This approach takes place in the Halime Sare Aysal decision as well.[410]

If the state makes certain vaccines mandatory in order to protect the health and right to life of its citizens and if individuals refuse to give their consent, a debate arises as to whether this intervention would be unlawful. Therefore, the question of whether it is possible to infringe upon bodily integrity in the presence of the acceptance of public interest and, if so, under what criteria this intervention would be considered lawful becomes significant in terms of conflicting constitutional values. Moreover, in the event of the potential acceptance of certain vaccines as mandatory, the effects and consequences of an individual's refusal of vaccination, as well as the course of action the administration would take in response, should also be discussed.

In particular, the decisions of the Court of Cassation mandatory vaccination, evaluated under the relevant heading. Within this context, in-depth analysis will be conducted on topics such as vaccines during infancy and childhood, compulsory vaccination, the principle of legality, the right to personality, the conflict between individual rights and the public interest, the best interests of the child, and the concept of consent by legal representatives.

[410] Halime Sare Aysal Application (Application Number: 2013/1789) (O.J.:29572 D.:24.12.2015), R.G. Tarih ve Sayı: 24/12/2015-29572 (Constitution Court of the Turkish Republic 2015), Paragraph 57.

As mentioned, the vaccines that should be inoculated to children are specified in the Ministry of Health's circular with the number 2008/4, dated February 25, 2008. In a decision regarding this circular, the Constitutional Court ruled that the vaccines specified in this circular shall not be administered contrary to the permission of the parents. The Court emphasized that the circular does not pertain to the diseases listed in Article 57 of the Constitution, and therefore, mandatory vaccine administration cannot extend beyond the diseases enumerated in this article.[411]

As mentioned above, Turkish Constitution Court's decisions examined the Public Health Code's related regulations to determine the legal aspect of mandatory vaccinations. The Court stated that, the regulation regarding smallpox vaccine is specified as a mandatory vaccine, while other vaccine administrations are carried out within the scope of the Ministry of Health's relevant directives and established programs such as curriculars. However, the Court evaluated that there is no legal provision that forms the basis for general and mandatory vaccination practices. Consequently, the Constitutional Court ruled that although mandatory vaccination constitutes intervention on the body, its implementation without medical necessity and legal basis, as provided in Article 17 of the Constitution, violates the right to "the protection and enhancement of the material and spiritual existence". Furthermore, the Court has indicated that vaccines administered within the framework of directives and established programs lack legal basis. As a result, if an inoculation of a vaccination is rejected by the parents, the child cannot be considered as a child in need of protection according to Law No. 5395. The Court has established that the health measure applied by a court order, involving intervention in the child's bodily integrity, also lacks the legality requirement of predictability.[412]

[411] Saibe Oktay-Özdemir, "Türk Hukukunda Başkası Lehine Tıbbi Müdahaleler", Prof. Dr. Türkân Rado'nun Anısına Armağan, (İstanbul: On İki Levha Yayıncılık, 2020), 344
[412] Sevtap Metin, "Covid-19 Bağlamında Zorunlu Aşı Tartışmalarının Hukuki Boyutu", 41

SECTION IV

LIABILITIES ARISING FROM VACCINATIONS

1. LIABILITIES ARISING FROM MANDATORY VACCINATIONS

As mentioned above, when an individual faces with consequences either monetary or limitations regarding to their actions, in order to reject application of a vaccination that vaccination can be described as mandatory.

Every state has authorities that determines the vaccinations as mandatory or recommended. In Turkish Law, the term *"administration"* can mean an organization, an administrative unit, an official office in an organic sense. In accordance with this explanation, administration is used to express the department, institution, organization, or place where any administrative work is carried out.[413] According to the regulation in Article 125 of Turkish Constitution, the administration is obliged to pay the damage arising from its own actions and transactions. With this regulation, the administration is generally held responsible for the damages that caused by the administration. This opportunity provides a capability to the administrative jurisdictions regarding the responsibility of the administration and provides the freedom and opportunity to make decisions in parallel with the general rules of law, justice, equity, international law documents and practices in comparative law.[414]

In Turkish Law, liability in general arises from tort, violation of a contract or the law, for instance liability without fault. In terms of administration, liability arises either from service fault (defect liability) or from liability without fault. Liabilities arising from service defect refers to the disability, disorder or malfunction in the organization, establishment or functioning of the services carried out by the administration. The cases that are considered as service defect in the doctrine and judicial jurisprudence are generally stated as poor or not functioning of the service, late or slow functioning of the service, and non-operation of the service at all. The state

[413] Bahdiyar Akyılmaz, Murat Sezginer, and Cemil Kaya, *Türk İdare Hukuku*, 10th ed. (Ankara: Seçkin Yayıncılık, 2019), 32.
[414] Ender Ethem Atay and Hasan Odabaşı, *Teori ve Yargı Kararları Işığında, İdarenin Sorumluluğu ve Tazminat Davaları* (Ankara, 2010), 55.

of strict liability is based on two principles in administrative law: the principle of danger and the principle of equalization of sacrifice.[415]

If a damage has arisen due to an administrative action, based on fault or a situation requiring strict liability, the administration is legally obliged to compensate this damage.

As mentioned, vaccination inoculation generally occurs in the hospitals. In this regard, legal status of the hospital and physician in the face of employer's liability should be examined. The legal liability of the hospital as the employer and the legal status and responsibility of the employee, namely the physician should be examined. In the Turkish Code of Obligations *(TCO)* the liability of the employer for the harm caused to others by a subordinate during the performance of work is regulated differently in Articles 66 and 116 of the TCO. Indeed, while Article 66 of the TCO pertains to non-contractual liability, Article 116 of the TCC pertains to contractual liability. However, in cases where the conditions of both liabilities are met, and if the breach of a contractual obligation also constitutes a violation of a general behavioral norm, claims arising from both Article 66 and Article 116 of the TCO can potentially compete with each other. In addition, the decisions of the Court of Cassation when discussing the liability of the hospital, the concept of fault liability is raised, and the investigation of fault is requested.[416] The liability of the employer, as stipulated in Article 66 of the TCO is a form of liability based on objective liability, and therefore, fault will not be a requirement for the occurrence of this liability. Accordingly, it should not be construed that the decisions of the Court of Cassation, asserting that fault is necessary for the hospital to compensate for the material and immaterial damages of the patient, imply that neither the hospital as the employer nor the physician as the employee will be required to exhibit fault regarding the liability defined in Article 66 of the TCO. However, the absence of the requirement for fault in the liability of the employer does not mean that Article 66 of the Turkish Civil Code will not apply when fault exists.[417]

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[415] Serkan Demirkaya, "Tıbbi Uygulama Hatası, İdarenin Tazminat Sorumluluğu ve Kusurlu Personele Rücü," *Terazi Hukuk Dergisi* 11, no. 119: 80.
[416] Gezder, Ümit. "Adam Çalıştıranın Sorumluluğu Karşısında Hastane ve Hekimin Hukukî Durumu (TBK M.66)". Tıp Hukuku Dergisi, vol.5, no.9, 58
[417] Gezder, Ümit. "Adam Çalıştıranın Sorumluluğu Karşısında Hastane ve Hekimin Hukukî Durumu (TBK M.66)", 73

When it comes to mandatory vaccination, it is believed that the damages arising from vaccination should be covered by the state based on the principle of strict liability.[418]

2. LIABILITIES ARISING FROM RECOMMENDED VACCINATIONS

In the Baytüre v. Türkiye case, the European Court of Human Rights ruled that the state cannot be held responsible for the side effects resulting from recommended vaccines. In the specific case, a child who received diphtheria, tetanus, pertussis and polio vaccine in 2003 experienced a complication that occurs in one in two and a half million cases due to the weakness of the child's immune system, resulting in a permanent deformity of the right foot. In other words, following this vaccination, the child has experienced a deformity in the right foot arch and this issue was diagnosed and confirmed by the Ministry of Health Virology Laboratory on October 2, 2003.

The applicants have filed a claim with the Ministry of Health on December 25, 2003, seeking compensation for their damages, holding the mandatory vaccination method entirely responsible based on the diagnosis. Upon the Ministry's failure to respond to their requests, the applicants, through their lawyers, filed a lawsuit with the Administrative Court of Adana on March 25, 2004, seeking compensation for the damages they claimed. The applicants made a compensation claim yet, this claim was rejected.

The Ministry submitted the medical expert report of Bahtiyar Enes Baytüre, who suffered paralysis after receiving the polio vaccine, to the court on May 12, 2004. According to the report, a medically unpreventable and highly complex condition was identified. All analyses conducted revealed that no errors were identified in the administration of the vaccination. None of the other vaccinated children experienced any harmful effects. To express the issue in another way, the family's claim for compensation was rejected by the authorities on the grounds that the damage occurred as a result of a complication. The court, in a decision dated June 9, 2005, rejected their request, considering the medical expert reports, ruling that there was no proof of Ministry of Health services' negligence. The decision was based on a medical report

[418] Jeff King "Legal, Constitutional, and Ethical Principles for Mandatory Vaccination Requirements for Covid-19." Lex-Atlas: Covid-19, February 2, 2022. https://lexatlas-c19.org/vaccination-principles/. (access date: 12.07.2023)

that stated that difficulties like the applicants were highly uncommon and physically impossible to avoid.

The applicants raised an appeal based on legal issues and filed an appeal with the Court of Cassation on August 18, 2005. The applicants specifically took issue with the fact that the court rejected the idea of the government's no-fault liability, which they claimed would have allowed the court to provide them compensation. Also it is stated in the decision, the applicants expressed their disappointment that the first-instance court did not consider the principle of strict liability of the administration as a means to enable them to obtain compensation. The disputed decision was upheld by the Supreme Administrative Court. In addition, the Council of State prosecutor is of the opinion that the strict liability of the administration can be evaluated in this case.

To sum up, the applicants brought a case against the national courts and state authorities for their refusal to compensate them for the harm they had suffered before the European Court. In judicial decisions, it was also ruled that the authorities cannot be held liable because there was no fault on their part.

The applicants took their claims to the ECtHR. The applicants invoke Articles 2 and 8 of the European Convention on Human Rights, alleging that their son suffered paralysis following a mandatory vaccination method. They express particular concern over the failure of competent authorities and national courts to compensate for their damages. In addition, the applicants also argue that the duration of proceedings before administrative courts is not reasonable within the meaning of Article 6, paragraph 1 of the Convention.

The reasoning explained under two headings. Firstly, regarding to the alleged violations of Articles 2 and 8 of the Convention. Secondly, regarding to the alleged violations of Articles 6 of the Convention.

The first heading can be explained as follows: The applicants argue that their son Bahtiyar Enes Baytüre's paralysis occurred as a result of the mandatory vaccination method and claim that the State should be held responsible under Articles 2 and 8 of the Convention.

The Government objects to this claim. The Government reminds that polio is caused by a virus that highly contagious, and primarily affects children under the age

of 5. It also asserts that there is no cure for this disease and that the polio vaccine is the only means of prevention. The Government further states that this vaccine has been recommended by the WHO. The vaccine was accepted at the 41st Global Health Assembly held in 1988 with the aim of eradicating polio worldwide. Türkiye, as part of the global initiative to eradicate polio, became a member of the program in 1989 and strongly advised its citizens to be vaccinated with the scientifically proven vaccination as the best method of protection.

The Government also argues that although the vaccine is not mandatory, it is strongly recommended, and its sole purpose is to protect the health and lives of all individuals. It emphasizes that all vaccination campaigns are thoroughly examined by health authorities both before promotion and during implementation, and that a system is in place to monitor and control the vaccination program.

The Government acknowledges that the polio vaccine can pose rare risks of serious "side effects" in extremely rare cases (1 in 2,500,000,000). However, considering the risk-benefit balance, the vaccination against the disease, as recommended by the WHO, is largely in the best interest of the patient.

The Government argues that in the specific case, there has been no interference with the rights protected under Article 8 of the Convention, and specifically states that the State does not compel families to vaccinate their children but only advises and recommends vaccination, providing services only to those who voluntarily seek vaccination. The Government also asserts that the issue of compensation in cases of vaccine-related harm goes beyond the discretion of the State and that, except for 13 European states, other European states do not have a compensation system concerning this matter. It concludes that such a system, which undermines the requirements of Article 8 of the Convention, does not exist. In other words, The ECtHR stated in this decision that only 13 member countries provide compensation for damages caused by recommended vaccines.

The applicants reiterate their claims and believe that their children should be compensated for the harm suffered as a result of vaccination.

However, it is stated that, the ECtHR, as the legal qualifier of the conditions of the case, is not bound by the characterizations put forward by the applicants or the

Governments. Therefore, ECtHR considers appropriate to examine the complaints raised by the applicants within the scope of Article 8 of the Convention (Guerra and Others v. Italy, 19 February 1998, § 44, Reports of Judgments and Decisions 1998-I).

The ECtHR recalls that within the scope of Article 8 of the Convention, issues related to problems affecting individuals' physical and mental integrity, access to information regarding health risks, and their participation in medical intervention choices, including the consent they provide, are considered. (see, in particular, Marie Thérèse Trocellier v. France (decision on admissibility), no. 75725/01, 5 October 2006).

The ECtHR acknowledges that within the framework of a vaccination campaign whose sole purpose is to eradicate infectious diseases and protect public health by preventing serious accidents, the State cannot be accused of failing to take appropriate measures to protect individuals' physical integrity.

Upon examining the elements of the case, The ECtHR concluded that the vaccination method applied to Bahtiyar Enes Baytüre was inappropriate for him or that sufficient measures were not taken to prevent the occurrence of risks associated with this vaccination.

The ECtHR does not disregard the fact that an individual may be a victim of the unwanted effects of a recommended vaccine. It acknowledges the difficulty of such a situation. However, in a system where vaccination is not mandatory, even in the absence of medical error, the establishment of a compensation system for individuals who suffer harm caused by a vaccine is a fundamentally social security measure that falls outside the scope of the Convention.

Consequently, the applicants' complaints must be rejected as they do not comply with the provisions of Article 35(3)(a) of the Convention. In addition, the duration of the proceedings does not comply with the requirement of a "reasonable time" as foreseen in Article 6(1) of the Convention.

In conclusion, the Court ruled that a case against Türkiye involving the failure to provide compensation to those harmed by a voluntary vaccine was inadmissible.

It is important to mention that, within the scope of this case, the side effect from the vaccination is extremely rare.

When we examine the liabilities from the recommended vaccinations, the enlightenment is worth to be discussed. Despite the fact that there are forms and brochures that are intended to cover the enlightenment when applying a vaccination, these measures are not met when an inspection is done taking into account fundamental Civil Law principles. As mentioned under the heading Medical Intervention and Personality Rights, there are no limitations in the regulations regarding the execution of the enlightenment. Therefore, enlightenment can be verbal, written, illustrated, or an informative movie screening. It could be said that a printed form or a brochure will not cover the liability of the enlightenment. In this sense, the proper method to receive enlightenment is to receive verbal consent after informing verbally and then recording it in writing according to *Çavdar*.[419]

In the decision of the 13th Civil Chamber of the Court of Cassation with the case number 2017/8515 and the decision number 2020/5427, dated 29th June 2020[420], it was stated that, simply providing a consent to the procedure to be performed is not enough, the possible complications that may occur should also be explained, but the informed consent to be obtained should be obtained through enlightenment. It is important to inform the patient considering the cultural, social and mental status of the patient; the chances of success and duration of the intervention; the risks of the treatment method for the patient's health; the use of the medicines given and possible side effects; the consequences of the disease if the patient does not accept the recommended treatment, and possible treatment options and risks. It has been clearly stated that the enlightenment should be given in a way that can be understood by the patient, that any health-related attempt can be made with the free and informed consent of the person, and that the consent obtained will be invalid if it is obtained through pressure, threat, insufficient enlightenment, or deception.

Bearing these explanations in mind, when we examine the consent and enlightenment conditions of vaccinations, receiving a signature from the patient on the standard written forms will not provide a fulfilled enlightenment on the part of the

[419] Çavdar, 755.
[420] Yargıtay 13. H.D., 2017/8515 E., 2020/5427 K., 29.06.2020.

physician. Therefore, the view that put forth the method of receiving verbal consent after informing the patient verbally and then documenting it in written form is the appropriate way to acquire enlightenment.

3. REIMBURSEMENT OF VACCINATIONS

Under the heading of "HPV Vaccinations" several First Degree Court decision was examined, under this scope, vaccination evaluated as a protective health measure such as medicine. Because of the State's responsibility to ensure the right to health, at first glance, providing vaccinations can be considered one of the State's responsibilities. Yet, there are controversial discussions regarding vaccination policies in Türkiye. Reimbursement of vaccinations is one of them. HPV and Flu vaccinations can be set an example within this regard.

When the reimbursement policies need to be examined, firstly the legal framework should be mentioned.

In the first paragraph of Article 17 of the Constitution, it is stipulated that everyone has the right to live, to protect their material and spiritual existence, to place and develop them, in the first paragraph of Article 56 stipulates that, everyone has the right to live in a healthy and balanced environment, the third paragraph of the article regulates that health institutions should provide services in order to physically and mentally healthy life for individuals, the State must regulate the central planning and operation of the health services. This will foster cooperation by reducing wastage and boosting productivity of both human and material resources. Thus, the provision of Article 17 was completed with Article 56. In conjunction, State is responsible to ensure that everyone continues their life in physical and mental health.

Article 65 of the Constitution stipulates that the state will fulfill its duties determined by the Constitution in social and economic fields, to the extent of the adequacy of its financial resources, by taking into account the protection of economic stability. Aa s result of these regulations, the State is charged with the arrangements to be made in order to ensure the 'people's right to continue their life in physical and mental health', which is granted to individuals in Article 56 of the Constitution. Article 65 also imposes some restrictions on this duty.

In other words, the right granted by Article 56 is related to the *"right to life and protection of material and spiritual existence"* regulated in Article 17 of the Constitution. However, while performing its economic and social duties the State might abolish the right to live in the arrangements. Clearly, the State cannot impose rules that endanger or restrict the right to live and as a component of this right, the right to health.

The right to health, which is regulated as a social right in the Constitution, means ensuring the safety of the society and individuals in terms of health. Due to its nature, the right to health is accepted as an element of the social state principle today. The social state is obliged to protect all its citizens against various risks, including diseases, and to make the necessary arrangements for this purpose. In the performance of the health service, the forefront consists of the quality of the service because of the nature of this service and the importance of human life.[421]

It is understood that the right to life of all citizens is under protection within the scope of the State guarantee and its positive obligation. The *"right to life"* regulated in Article 17 of the Constitution is not only in the sense of continuing one's life, but also the *"right to a healthy life"*. People's right to be healthy reveals that they are subject to a public protection. The right to benefit from health services is an economic and social right. In this respect, it envisages certain obligations to the public or to the state as stated in the Constitution. The state is obliged to fulfill these duties as a requirement of the "Convention on Economic, Social and Cultural Rights", to which it has signed, and to take the necessary measures for everyone to benefit from health services, and to ensure that people benefit from health services without delay.[422]

The Social Security Institution, which was established with the Social Security Institution Law No. 5502 adopted on 16.05.2006, is one of the public administrations authorized and in charge in the field of social security. Organizational structure of the Social Security Institution has been rearranged within the framework of the Presidential Government System.[423]

[421] Mert Narman, "Şahsi Tedavi İçin Yurt Dışından İlaç Getirilmesi," *Terazi Hukuk Dergisi* 12, no. 130 (2017): 55 as cited in; 10th Chamber Of Council Of State, 2007/7391, 2010/7354.
[422] Narman, "Şahsi Tedavi İçin Yurt Dışından İlaç Getirilmesi," 55.
[423] Kadir Arıcı, *Türk Sosyal Güvenlik Hukuku* (Gazi Kitapevi, 2022), 164–65.

The main purpose of the institution was determined as to carry out a social security system based on social insurance principles, effective, fair, easily accessible, actuarially, and financially sustainable, in contemporary standards (Article 3 of Law numbered 5502). The establishment purpose and qualifications of the institution is stated as follows: *"Social Security Institution has been established as a public legal entity, administratively and financially autonomous in order to implement the provisions of the legislation, subject to the provisions of private law in cases where there is no provision in the Law No. 5502 and this Section. The Institution is the relevant institution of the Ministry of Labor and Social Security. The Institution Its headquarters are in Ankara (Article 403/2 of Law numbered 5502)."*.

The institution is one of the most authorized public administrations in the field of social security. The purpose of the institution is to manage the social security system. The Social Security Institution is an administratively and financially autonomous institution with a legal entity.[424]

The Communiqué on Healthcare Practices are issued by the Social Security Institution. In the Communiqué, under the heading of *"Payable Medicines (Annex-4/A)"*, and under the section *"4.1.9"*, medicines to be paid by the Institution "List of Reimbursable Medications" published on the official website of the Institution (Annex-4/A).

The source of the problem in the litigation of new medications and medical devices, citing their absence in the Communiqué on Healthcare Practices is not the unlimited fulfillment of individuals' every individual request and demand, as stated in Article 63 of Law No. 5510's justification. Nor is it the desire of physicians and other healthcare personnel to develop new treatment methods, be recognized in their profession, or earn more money. The sole aim of a physician is to bring their patient's health to the best possible condition based on the scientific and technological conditions of the day. The problem lies in the way the Institution exercises its authority to determine the types, quantities, and duration of use of diagnostic and treatment methods, orthotics, prosthetics, and other corrective equipment, as well as financing

[424] Arıcı, 165.

health services under Article 63/2 of Law No. 5510, in conjunction with the Communiqué on Healthcare Practices.[425]

It is important to mention that the Immunization Advisory Board is a non-executive advisory body that makes recommendations.[426]

3.1. The Authority that Determines the Vaccinations as Mandatory or Recommended

The determination regarding vaccinations will be examined under two headings. These are the determination of mandatory vaccinations and recommended vaccinations.

3.1.1. Determination of Mandatory Vaccinations

The obligation to protect the life of the State's, which is referred to *as "positive obligation"*, arising from Article 2 of the Human Rights Act within the scope of the right to life, requires States to take effective measures and requires to make legal and administrative arrangements against possible threats against to the right to life. In addition, where a person knows or should know that a real and immediate threat to one's life has arisen due to the actions of a third party, the State must take appropriate measures within its jurisdiction to eliminate such threats.[427] For example, in cases where the COVID-19 or measles disease, has become an epidemic, the State is obliged to take mandatory measures for both those who have the disease and healthy people who are at risk of contracting the disease, since the imminent and real risk has arisen for people's lives and the State is aware of this situation. This emerges as a requirement of the right to life and States can adopt the mandatory vaccination policies.[428] Otherwise, if deaths occur due to the State's failure to take preventive measures to avoid spread of epidemic diseases, the right to life of individuals will be violated. The cases of emergencies can set an example within this regard, because, in emergency

[425] Mahmut Kabakçi, "Sağlık Uygulama Tebliğinde Sağlık Hakkı," *Çalışma ve Toplum* 3, no. 74 (July 11, 2022): 1772, https://doi.org/10.54752/ct.1141934.
[426] "Sağlık Bakanlığı Bilimsel Danışma Kurulu Hakkında Açıklama – Koronavirus," December 12, 2020, https://www.klimik.org.tr/koronavirus/saglik-bakanligi-bilimsel-danisma-kurulu-hakkinda-aciklama/. (accessed 12.06.2023)
[427] Osman v the United Kingdom Application no. 87/1997/871/1083 (ECtHR, 10 October 1998) .
[428] Kale Özçelik, "Hakların Çatışması ve Dengelenmesi Bağlamında Çocuklara Yönelik Zorunlu Aşı Uygulaması (Avrupa İnsan Hakları Sözleşmesi Ekseninde Bir İnceleme)," 57.

situations, individuals may receive intervention without seeking a valid consent, considering the best interest of that individual.

As it is seen under the HPV Vaccinations heading, the defense statements from Social Security Institution, includes explanations without giving priority to the right to life and the right to health. One of these explanations can set an example in this regard. In the case in the Ankara 15th Administrative Court, File No. 800, Social Security Institution's defense statement[429] must be mentioned.

The case is about claimant's application dated 25.01.2022, requesting the inclusion of HPV vaccination in the National Vaccination Program and their provision free of charge, and after the rejection of this request, that this lawsuit has been filed with the stated allegations and demands.

Social Security Institution's defense statement includes legal grounds that needs to be explained to understand the Institution's approach.

Firstly, the Institution claimed that this case should be brought before the Council of State, and the lawsuit should be dismissed based on jurisdiction.

The legal grounds under this sense are Article 14 and 15 of the Administrative Procedure Law No. 2577.[430] According to the third paragraph of Article 14 of the Administrative Procedure Law No. 2577, the petition shall be examined in terms of *"jurisdiction and authority"* and it is stated that in cases where a lawsuit is filed before a court that is not competent or authorized in terms of jurisdiction or authority regarding matters within the jurisdiction of administrative courts, the lawsuit shall be rejected in terms of jurisdiction or authority and the case file shall be referred to the competent or authorized court, as per the first paragraph of Article 15 of Law No. 2577.

Furthermore, in the defense statement it is claimed that, Article 24 of the Council of State Law No. 2575[431] lists the cases that will be heard by the Council of State as the court of first instance; and in the first paragraph of this article, it is

[429] T.C. Sağlık Bakanlığı Hukuk Hizmetleri Genel Müdürlüğü, "Sayı:E-11045126-641.04.99.00 S2022/800-58.101 Konu: Savunma Lahiyası," April 27, 2022. (Not published)
[430] "İdari Yargılama Usulü Kanunu (Administrative Procedure Law) O.J.: 17580 D.:20.01.1982," 2577 § (1982).
[431] "Danıştay Kanunu (Council of State Law) O.J.:2575 D.:06.01.1982," 2575 § (1982).

stipulated that the Council of State shall render decisions as the court of first instance for annulment and full compensation lawsuits filed against regulatory actions issued by ministries, public institutions, or professional organizations with public entity status, which will be applied nationwide.

According to statement, this lawsuit filed by the plaintiff requesting the annulment of the implicit rejection of the request for the inclusion of vaccines necessary for protection against Human Papillomavirus (HPV) in the national vaccination schedule for free administration, the challenged action is an action that will be implemented nationwide by Ministry of Health. Therefore, according to the Institution, these issues should be brought before the Council of State, in conclusion, the Institution states that the lawsuit should be dismissed based on jurisdiction, and the case file should be referred to the Council of State for further proceedings.

In the terms of interest, Institution states that, according to Article 2/1-a of the Administrative Procedure Law No. 2577[432], annulment lawsuits are defined as lawsuits filed by those whose interests have been violated for the annulment of administrative actions due to their unlawfulness in terms of authority, form, reason, subject, or purpose.

In the defense statement, the Institution defines the general principles of Administrative Law as follows: the general principles require the existence of an interest relationship between the real or legal persons and the subject matter of the case, and the mentioned interest must be current, personal, legitimate, and substantial in Administrative Law.

It is stated in the statement that, if the grounds for the requested claim in question are stated as "public interest" by the plaintiff, it should be noted that not every individual claim based on public interest can be subject to a lawsuit. Furthermore, according to statement, it is evident that there is no interest relationship between the plaintiff and the administrative action in this case, and the criteria for an infringement of interests are not fulfilled. Therefore, as above mentioned, the Institution demanded in accordance with the aforementioned provision of Law No. 2577, the lawsuit should be dismissed due to the lack of interest.

[432] İdari Yargılama Usulü Kanunu (Administrative Procedure Law) O.J.: 17580 D.:20.01.1982.

In the statement Ministry's General Directorate of Public Health is also mentioned. The Institution offers to individuals to use channels such as "*SABİM*" and "*CİMER*" which are questionable ways to appeal regarding the right to health and live.

In the terms of legal grounds, the right to life, is explained as the most important right of an individual and encompasses the protection and improvement of their physical and spiritual existence, as a result, requires the proper provision of healthcare services. In accordance with the decision of the Constitutional Court dated 16.07.2010[433] the nature of human health, which is the fundamental goal of healthcare services, has an inherent characteristic that cannot be postponed, delayed, or substituted. Therefore, it is stated that, the execution of "health services" by the State, as granted by Article 56 of the Constitution, is carried out by the Ministry of Health in accordance with the provisions of the Presidential Decree No. 1 on the Organization of the Presidency[434] (Articles 352 to 384).

Based on the work and research conducted within the scope of these duties and authorities, cervical cancer is defined by the WHO as a "preventable cause of death", and it is recommended that screening be conducted worldwide, with each country developing its own control policy. The link between Human Papillomavirus (HPV) and DNA cervical cancer has been proven, with its presence shown in 99.9% of cervical cancer patients. While HPV-related changes that may occur in the cervix regress in 60% of cases within 2-3 years, approximately 1-3 out of every 100 women infected with oncogenic types of HPV develop cervical cancer within 10-15 years. With the application of improved screening tests such as HPV-DNA Test and Pap Smear Test, it is possible to detect cases at the stage of precancerous cellular changes and achieve 100% cure.

It is in the best interest of the Institution and the society to prioritize covering the costs of these vaccinations rather than providing high levels of healthcare assistance that is way more expensive for individuals who develop cancer later on. By covering the expenses at the vaccination and preventing the disease, the institution and the community will benefit instead of incurring expensive treatment costs for individuals who are later diagnosed with cancer. Yet, the Institution stated that, the

[433] AYM GK, E. 2010/29 K. 2010/90 (July 16, 2010).
[434] "Cumhurbaşkanlığı Teşkilatı Hakkında Cumhurbaşkanlığı Kararnamesi Sayı:1 (Presidential Decree No. 1 on the Organization of the Presidency) O.J.:30474 D.:10.07.2018".

cancer treatments are covered by the institution. It is obvious that this conclusion is against the Article 17, 56, 60, 65 of the Constitution and Article 23 of the TCC.

3.1.2. Determination of Recommended Vaccinations

As mentioned throughout the thesis, the State has to authority to form institutions that decided whether a vaccination is mandatory or recommended.

In Türkiye, licenses of vaccinations will be received from Turkish Medicines and Medical Devices Agency. This agency serves under the roof of Turkish Ministry of Health. Duties of this agency is announced as *"to serve the society with regulatory, supervisory and directive actions for pharmaceuticals, medical devices, traditional herbal, supportive and advanced treatment medicinal products and cosmetic products."*[435] In addition, the agency aims to *"To be a human-oriented, scientifically-based value producing, internationally leading institution that can be shown as reference."*[436] After receiving the approval, vaccinations can be introduced to the medicine market.

In Türkiye, Immunization Advisory Board determines the vaccination schedules[437]. According to the definition from the Ministry of Health, Immunization Advisory Board is a committee consisting of experts in the field that develops scientific recommendations for the use of vaccinations.[438]

When there is a change regarding to vaccination schedules the Ministry of Health send a notification to all Provincial Health Departments in Türkiye, based on the advice of the Immunization Advisory Board.[439]

There are changes has been made in Türkiye in 2020. The application of these changes in the childhood vaccination schedule follows the path that mentioned above.

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[435]Türkiye İlaç ve Tıbbi Cihaz Kurumu (TİTCK), "Görevimiz/ Hedefimiz" https://www.titck.gov.tr/kurumsal#0. (accessed 12.06.2023)

[436] Türkiye İlaç ve Tıbbi Cihaz Kurumu (TİTCK), "Görevimiz/ Hedefimiz"

[437]"Bağışıklama Için Hekimlere Yönelik Bilgi Notu,"Aşı, http://www.ttb.org.tr/kollar/_asi/makale_goster.php?Guid=6b550056-8ae0-11ea-911b-f85bdc3fa683. (accessed 12.06.2023)

[438] T.C. Sağlık Bakanlığı. "Bağışıklama Danışma Kurulu,", https://covid19asi.saglik.gov.tr/TR-77835/bagisiklama-danisma-kurulu.html. (accessed 12.06.2023)

[439]T.C. Sağlık Bakanlığı. "Çocukluk Dönemi Aşı Takvimi Değişti!" 2020. https://asi.saglik.gov.tr/images/yayinlar/Aslama_-_Brosur.pdf (accessed 12.06.2023); Muzaffer Eskiocak and Bahar Marangoz, *Türkiye'de Bağışıklama Hizmetlerinin Durumu* (Ankara: Türk Tabipleri Birliği Merkez Konsey, 2021), 44.

First, The school-age vaccinations for primary education, 1st and 8th grades, were changed in accordance with the recommendation of the Immunization Advisory Board on June 3, 2020, and the implementation was decided by Family Health Centers. Before this change, in the 1st grade of primary education, the 2nd dose of MMR (Measles, Mumps, Rubella) vaccination and the booster dose of dTaP/IPV (or 4 in 1: Diphtheria, Tetanus, Pertussis, Polio) vaccination were administered. In the 8th grade, a booster dose of Td (Tetanus, Diphtheria) vaccination was also inoculated.

Since July 1, 2020, with the implemented changes, all children (starting from those who born on July 1, 2016) who have reached the 48th month will receive the MMR and DTPa-IPV vaccinations in Family Health Centers instead of schools for the 1st grade of primary education.[440]

The Tetanus-Diphtheria vaccinations, which was previously administered in schools for the 8th grade of primary education, will now be given to all children who have reached the age of 13 (156th month) starting from those born on July 1, 2007, in Family Health Centers.[441]

All of the vaccinations thar are stated in the childhood vaccination schedule are free of charge.[442]

Bearing these explanations in mind, Immunization Advisory Board's approach regarding to vaccinations should be analyzed. Yet, there is not any legal basis that regulates the limitations of Immunization Advisory Board. It is worth to mention that Immunization Advisory Board is an advisory board that provides recommendations, not an executive board[443].

The duties of Ministry of Health are defined in Article 352 of the Presidential Decree No. 1 on the Organization of the Presidency[444], and the first paragraph of the same article, states that Ministry Health is entrusted with the task of "conducting

[440]T.C. Sağlık Bakanlığı, "Aşılama Takviminde Değişiklik Yapıldı," 2020, https://hsgm.saglik.gov.tr/tr/haberler/asilama-takviminde-degisiklik-yapildi.html. (accessed 12.06.2023)
[441] T.C. Sağlık Bakanlığı, "Aşılama Takviminde Değişiklik Yapıldı"
[442] T.C. Sağlık Bakanlığı, "Aşılama Takviminde Değişiklik Yapıldı"
[443] "Sağlık Bakanlığı Bilimsel Danışma Kurulu Hakkında Açıklama – Koronavirus," December 12, 2020, https://www.klimik.org.tr/koronavirus/saglik-bakanligi-bilimsel-danisma-kurulu-hakkinda-aciklama/. (accessed 12.06.2023)
[444] Cumhurbaşkanlığı Teşkilatı Hakkında Cumhurbaşkanlığı Kararnamesi Sayı:1 (Presidential Decree No. 1 on the Organization of the Presidency) O.J.:30474 D.:10.07.2018.

studies for the protection and improvement of public health, reducing and preventing disease risks.". Article 352/2 clearly states that, the procedures and principles for determining drug prices are determined by the President upon the proposal of the Ministry.

In addition, the first paragraph of Article 361, in point (c), states that Ministry's General Directorate of Public Health is responsible for conducting monitoring, surveillance, research, vaccination, and control activities related to infectious and non-infectious diseases, chronic diseases, cancer, as well as risk groups such as mothers, children, adolescents, the elderly, and people with disabilities. It is also responsible for preparing and implementing plans and programs in line with the specified objectives, ensuring their supervision, evaluation, and taking necessary measures. All of these above mentioned measures can be described as planning the immunization program, deciding whether a vaccinations should be included in the vaccination schedules or not, determining the recommended vaccinations and the issues regarding covering the expenses of recommended vaccinations.

In this regard, the ECtHR's Association X v the United Kingdom decision[445] can be mentioned. The ECtHR accepted that the applicant's infant, who was deprived of access to the necessary emergency treatment, was the victim of the poor functioning of the hospital services, since the organization and functioning of the health protection system could not be adequately ensured. The court is not the result of negligence or misjudgment during the infant's health care. The court emphasized that the infant died because of not receiving any kind of medical service. Thus, the Court ruled that a failure to provide treatment that puts the patient's life in danger violates the right to life.

[445] European Court of Human Rights "Association X v the United Kingdom App. No. 8416/78"

CONCLUSION

A vaccine is a medical intervention. This intervention is administered through injection or oral droplets. Different administration methods exist for vaccines, and the fundamental principle in this medical intervention is that it should be carried out with the consent of individuals. Numerous vaccines have been developed for various diseases worldwide.

Indeed, the recommended and even mandated vaccines are currently a subject of debate. When we consider the situation, if individuals are choosing or getting these vaccines of their own free will, there is no issue. For example, there is the flu vaccine. It is not mandatory in Türkiye, but many people want to get the flu vaccine. They may perceive themselves as being in a high-risk group or are cautious about their health during a specific period. The supply of these vaccines is limited, and people often inquire about them from pharmacists specifically.

If a person voluntarily chooses to receive a vaccination, then there is no legal ground to disputes to arise. However, just like any other type of medical intervention, it is necessary to fulfill the requirement of informed consent for legal compliance. Whether the vaccination is mandatory or recommended, the need for informed consent remains unchanged in both cases to fulfill the requirement of legal compliance. Furthermore, it is important for the medical intervention to be administered by healthcare professionals for it to be legally valid.

In addition, careful and cautious administration is required. The vaccination should be administered carefully, and for this, we also seek the presence of medical necessity within the indication conditions. Apart from exceptional procedures such as aesthetic surgeries, the validity criterion for medical interventions actually revolves around the therapeutic element in the careful and cautious application of medicine.

Every country has a vaccination schedule, and in Türkiye, the vaccination schedule is prepared by the National Immunization Advisory Board. In Türkiye, there are thirteen childhood vaccination available. This vaccination schedule is based on the recommendations provided by WHO.

WHO considers systematic vaccination, starting from newborns and following a specific schedule, as one of the most important and effective public health measures worldwide. In Türkiye, the National Immunization Advisory Board creates such a schedule and implements the vaccination accordingly.

In this context, vaccine hesitancy can be discussed. It is a phenomenon that is prevalent not only internationally but also in Türkiye, particularly in relation to childhood vaccinations. With the recent focus on COVID-19 vaccinations, the tendency of parents to refuse or hesitate in getting their children vaccinated is also seen in different ways in Türkiye. Various reasons can contribute to vaccine hesitancy, including doubts about the contents and safety of vaccinations, suspicion regarding their efficacy, or concerns about potential side effects.

For individuals who refuse vaccination, the Ministry of Health initiates monitoring and attempts to obtain court decisions for the compulsory vaccination of children. This process eventually reaches the Constitutional Court through individual applications. Parents argue that their children are being subjected to vaccination against their consent and that this violates their rights protected by the constitution. They claim that parents have the discretion in this matter, citing the rights to bodily integrity, spiritual integrity, and the right to develop their children's physical and spiritual well-being. The Halime Sare Aysal decision by the Constitutional Court examined the issue of compulsory vaccination and debated the necessity of the vaccine, specifically the MMR vaccine in that case.

In the Constitutional Court, a debate is underway regarding whether it is mandatory to administer the 13 vaccines under Turkish law. In terms of legal basis, it is mentioned that only the smallpox vaccine has a legal foundation in the General Public Health Law, while other vaccines are not explicitly mentioned in legal texts. Based on this, an argument is made that other vaccines should not be administered as a mandatory requirement.

The Constitutional Court shapes its rejection reasoning based on the claim that parents' fundamental rights and freedoms are being violated. In the specific debate, there is an interference with fundamental rights and freedoms, and Article 13 of the Constitution, which pertains to the limitation of fundamental rights and freedoms,

states that such limitations can only be made by law. In Türkiye, the Constitutional Court, through its examination, determines that there is a specific regulation only for the smallpox vaccine, allowing for its mandatory administration in Türkiye. However, since smallpox has been eradicated worldwide, this regulation becomes meaningless. As for the thirteen childhood vaccinations, Turkish laws contain general statements such as *"necessary health measures shall be taken".* It is determined that these general statements do not provide a legal basis for the mandatory administration of the thirteen childhood vaccines. The fundamental reasoning of the Constitutional Court revolves around the limitation of fundamental rights and freedoms, emphasizing that such limitations can only be imposed based on explicit provisions in the law. It is important to reiterate that there is no explicit legal provision regarding the thirteen childhood vaccines in our legislation.

With the decision given by the Constitutional Court in 2015, it was determined that childhood vaccines are not mandatory due to the lack of legislation.[446] This decision did not require any legislative amendments until 2023, and the legislator did not deem it necessary to make any changes. Therefore, currently, childhood vaccines are not mandatory under Turkish law. Parents can choose not to administer these vaccines, and the Ministry of Health cannot force or coerce parents into getting their children vaccinated. However, it should be noted that the Ministry of Health does track newborn vaccinations as part of routine procedures. Primary healthcare centers may contact parents when the scheduled dates for vaccinations approach and inquire about whether the vaccines have been administered. Many people hold the belief that these vaccinations are necessary, which motivates them to continue with the vaccination process.

According to data provided by the Ministry of Health, including during the pandemic, childhood vaccination rates reach around 95%.[447] This level of vaccination coverage is achieved both voluntarily and without mandatory requirements, so there is no legal issue. However, if the vaccination coverage were to drop below the desired level, usually around 95% for highly contagious diseases, it may become a concern.

[446] The only exception in this regard is the smallpox vaccination which is regulated in the Article 88 of Public Health Code. O.J.:1483 D.: 06.05.1930, 1593 § (24.04.1930) As a result of Article 88 of the Public Health Code, the principle of legality is fulfilled, and therefore, smallpox vaccination can be classified as a mandatory vaccination.
[447] Muzaffer Eskiocak and Bahar Marangoz, 18.

Herd immunity is achieved when a certain threshold of vaccination coverage is reached, reducing the transmission rate and making it easier to manage the disease. In fact, it becomes possible to prevent and eliminate the spread of the disease. Different diseases may have different thresholds for herd immunity. In Türkiye, at least according to the data released by the Ministry of Health, the current vaccination coverage is already at around 95%, which is a voluntary achievement and does not raise any legal concerns.

However, the legislator or the Constitutional Court did not address one crucial aspect. If there were a law stating that certain vaccines are mandatory as a means to protect public health and prevent outbreaks, and if the thirteen diseases listed in the vaccination schedule were explicitly mentioned as vaccines that must be administered, then the Constitutional Court could have reviewed the issue of mandatory vaccination. Just because it is stated in the law does not necessarily mean it is not unconstitutional. The law itself could be unconstitutional and subject to cancellation. In the Halime Sare Aysal decision, the Constitutional Court solved the problem in a simple way, stating that since there is no law, there is no need for further debate. But if there were a law and it was debated, would the same result have been reached? We cannot know that within the context of the Constitutional Court. This highlights a lack of clarity. If one day a vaccine were to be made mandatory in Türkiye, for example, if the Ministry of Health were to say, “Reaching a 95% vaccination rate for measles is not possible at the current state, so measles vaccinations will be applied mandatory because measles is highly contagious and deadly disease.” would this be in accordance with the constitution? We do not know if it would have been considered a provision that could be subject to cancellation due to being unconstitutional. The Constitutional Court's finding pertains to the conditions for the limitation of fundamental rights by law. It emphasizes that such limitations must be based on explicit provisions in the law.

Even though this discussion has not taken place in Türkiye, it has been addressed at the European Court of Human Rights (ECtHR). Vaccine hesitancy has emerged as a significant issue in many European countries, and there are differing legislative trends regarding the mandatory or non-mandatory nature of vaccines. Some countries are removing mandatory vaccination requirements, while others are considering legislation to make vaccines mandatory.

The Vavřička and Others V. The Czech Republic case is related to childhood vaccinations, not specifically to COVID-19 vaccinations. Many countries have referenced this case in developing their own legislation regarding mandatory vaccination policies. This case has been extensively utilized in this thesis.

Some parents in the Czech Republic refuse to have their children vaccinated against childhood diseases or some of them, which results in their children being unable to attend daycare facilities. This means that the parents have to take care of their children during working hours, which is a limitation for them. It also imposes a restriction on the child's socialization and development by not being able to attend daycare. Additionally, a fine is imposed as a sanction.

In the case, one of the statements made by the parents is that they do not want to have their children vaccinated against tetanus because, tetanus is not a microbe that spreads from person to person. Another statement is that they do not want their child to receive the polio vaccine because the last case of polio in the Czech Republic observed in the 1960s. They argue that it is not a prevalent disease anymore and not a risk for their child. They refuse to have these two vaccines administered but agree to have the other three vaccinations to apply.

The parents file a complaint with the European Court of Human Rights, claiming that their fundamental rights are being violated. There are five other parents and children involved in similar situations, where they either reject all vaccines or some of them.

In the case, we see a panorama of countries that establish their own regulations. Some countries have mandatory vaccination policies, while others do not. The Czech Republic argues that these diseases are highly dangerous, and these vaccines have been proven safe and with very low side effects for years. They emphasize the need to achieve herd immunity, and if the threshold of herd immunity is not maintained, we can observe the reemergence of eradicated diseases, which occasionally happens. For example, localized measles outbreaks and other outbreaks of diseases can be detected. Especially considering the perception of illegal migration as a health threat, the Czech Republic defends the need for mandatory vaccination. The main justification is to ensure the protection of both vaccinated children and public health by preventing

outbreaks. Additionally, there are individuals and children who cannot be vaccinated due to their immune systems reacting to vaccinations or having allergies. The argument is that other children need to be vaccinated to protect these unvaccinated children as well.

Other countries also present similar justifications in their arguments. The European Court of Human Rights (ECtHR) states in its decision that the safety of these childhood vaccines has been established by WHO, every counties Ministry of Health, and many scientists. The ECtHR does not conduct a separate review of the safety of vaccines but relies on the recognition of these authorities to deem them safe. The imposed sanction, which is the child's inability to attend daycare, implies that the parents should take care of the child themselves if the child cannot go to daycare.

Furthermore, the ECtHR mentions that the implemented sanction is not a significant burden, emphasizing that the ultimate goal is public health and the prevention of outbreaks. Considering the significant economic and health damage that outbreaks, including the COVID-19 pandemic, can cause, it has been determined that the desired outcome is the protection against such outbreaks.

The criticism directed towards the compulsory vaccination policy implemented by the Czech Republic is multifaceted. One of the main criticisms is the lack of a disease-based examination. In this case, nine vaccines are made mandatory, and some parents may only refuse three of them with specific reasons. However, all diseases and vaccines are being evaluated collectively as if they are of the same nature. In reality, some diseases, such as tetanus, are significantly different from others because they are not transmitted from person to person, and they do not pose a risk of causing an outbreak. Tetanus, for example, is commonly associated with injuries caused by rusty nails, but it can also contaminate open wounds through dirty soil or non-ventilated metals. If left untreated, tetanus can be a fatal disease, especially in underdeveloped and some developing countries where treatment may not be accessible or effective in intensive care units. However, if detected early and administered with antibodies, tetanus can be treated successfully, even if a person was not previously vaccinated. Therefore, tetanus is different from other diseases, particularly in terms of its potential to cause an outbreak.

The benefit of vaccination is primarily seen in the vaccinated individual, and it also helps reduce the overall healthcare costs for society. However, there are many diseases in society that require expensive treatments, such as cancer which can be preventable by HPV vaccination. Cancer treatment is a long and costly process, but preventive tests, such as Pap smears, mammography, and other cancer screenings, can significantly increase the chances of early detection and reduce the cost of treatment. Hence, while we compare tetanus disease which is not transferable among humans and HPV disease which is transferable, it would be inconsistent to impose mandatory vaccination for tetanus, which is expensive to treat, while not imposing similar requirements for other diseases.

In conclusion, one of the main criticisms directed at the decision is the lack of a thorough examination of each disease individually, taking into account factors such as the nature of the disease, its mode of transmission, the risk to children, and the effectiveness of the vaccine. Evaluating the specific risks and benefits of each vaccine would have led to a more convincing and scientifically grounded decision. Vaccine hesitancy often arises from skepticism, and it would be more effective to provide scientific arguments based on convincing legal and scientific grounds, rather than relying solely on the credibility of institutions such as the Ministry of Health, the WHO, or pharmaceutical companies.

The dissenting opinion regarding the decision is often considered more convincing, as it addresses the concerns raised by parents who oppose only three specific vaccines. The dissenting opinion highlights the need to consider these concerns and provide a disease-specific analysis. Critics argue that the decision should have considered scientific data on the risks and side effects of vaccines individually. The lack of such an approach may undermine the credibility of the decision, as people may distrust the statements made by institutions, politicians, or pharmaceutical companies.

The nature and risks of the disease and the risks associated with the vaccine should have been specifically addressed with scientific arguments in order to provide a more transparent and persuasive decision. The decision can be criticized for not conducting a disease-specific analysis, without taking into account the scientific characteristics of the nine diseases and their transmission rates.

Another criticism raised is regarding proportionality. If an alternative measure could have achieved the same result with less restrictive measures, then the adoption of such a restrictive measure would not be proportional. For instance, in Germany, only measles vaccination is mandatory. The German Health Ministry states that despite all their voluntary and persuasive efforts, they could not reach the required vaccination rate necessary for herd immunity against measles. They witnessed local outbreaks and were concerned about the potential for larger-scale outbreaks. Consequently, they made it mandatory. This kind of explanation, where alternative and less restrictive measures were tried and failed, differs from simply imposing mandatory vaccination without considering alternative measures.

Bearing in mind all of the above mentioned discussions, there is a need to set legal ground when it comes to application of vaccinations. Yet, the disputes that arises mainly focuses to the negative consequences that arise afterwards.

In Turkish Law, there are various legislations that is used to set a legal ground for vaccinations, hence, it could be said that, the legislator provided a legal ground for this regard. But up to the present time, it is obvious that Turkish legislator does not put vaccination policies an order of presence. The profound examples in this regards can be listed as follows. First of all, Public Health Code numbered 1593, (O.J.:1483 D.: 06.05.1930), dates back to 1930. Even though vaccination, vaccine hesitancy and increasing anti vaccination movements, Turkish legislator's approach does not choose to renew several articles, in this regard, annulment does not even have a place to be discussed. Some articles can set an example, Article 88 of the Code numbered 1593 states that, every individual within Türkiye is required to be vaccinated with the variola vaccination. Yet, in the 1980's the eradication of the disease announced[448]. In Addition, since the Public Health Code legislated in the 1930's, the language that is used for this code needs to be updated. In order to reach every target individual in the country, an update regarding this code is a necessity.

Secondly, the National Immunization Advisory Board that decides whether a childhood vaccination to be applied on the infants and minors, should provide medical necessities regarding to applicability of the vaccinations, during the Covid-19 pandemic, Turkish Ministry of Health announced ne necessity to receiving

[448] WHO, "WHO commemorates the 40th anniversary of smallpox eradication. (2019, December 13). WHO Commemorates the 40th Anniversary of Smallpox Eradication". https://www.who.int/news/item/13-12-2019-who-commemorates-the-40th-anniversary-of-smallpox-eradication. (accessed 12.06.2023)

vaccinations, hence, same approach should implemented when it comes to create a threshold of the diseases that can preventable by vaccination in childhood period.

Lastly, even though there are forms and procedures that aims to cover the enlightenment when it comes to applying a vaccination, these measures are not fulfilled when an examination is made considering basic principles of Civil Law. It could be said that the health care facilities are responsible to inform the individuals beforehand the application, but the extremely crowded health care facilities prevent health care workers to behave accordingly to enlightenment procedures.

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