CONSENT ISSUE IN MEDICAL INTERVENTIONS APPLIED TO PATIENTS WHO DO NOT HAVE THE CAPACITY TO ACT*

Fiil Ehliyetine Sahip Olmayan Hastalara Uygulanacak Tıbbi Müdahalelerde Rıza Sorunu

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Abstract

Life, physical integrity and health are values protected within the scope of personality right. For this reason, medical interventions applied on these values constitute a tort and/or crime unless there is a reason preventing illegality. In medical interventions, this reason often appears as the patient's consent. However, it is not possible to give consent for patients who permanently or temporarily lack the capacity of judgement. In this case, can medical intervention be applied with the consent of the patient's relative or legal representative? If so, what should the representative take into account when giving consent or what should be done if the legal representative refuses to give consent even though medical intervention is necessary and urgent? On the other hand, since consenting to medical intervention is a strictly personal right, it is argued that this right cannot be used through a representative. Despite this, in Turkish Law, there are provisions that still require the consent of the legal representative in medical interventions applied to underage or under guardianship patients, even though they have the capacity of judgement. These provisions cause problems in practice. And in German law, a paragraph (§1358) added to the German Civil Code allowed spouses to represent each other in medical interventions, under certain conditions, for a certain

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period of time. The paragraph, which was accepted after long discussions and entered into force at the beginning of 2023, seems to have brought about greater debates. On the other hand, in Turkish law adults who are under guardianship lose their capacity to act, even if they have the capacity of judgement. As a result, the guardian's consent must be sought for patients in this situation according to the legislation. However, this guardianship system for adults has long been abandoned in German and Swiss law. In our study, current approaches to the consent issue in medical interventions applied to patients who do not have the capacity to act are discussed within the framework of Turkish, German, Swiss laws and international regulations.

Keywords: Medical Interventions, Consent, Capacity of Judgement, Personality Right, Underage Patients, Under Guardianship Patients, Legal Representative

Özet

Hayat, vücut bütünlüğü ve sağlık, kişilik hakkı kapsamında korunan değerlerdir. Bu nedenle söz konusu değerlere yönelik tıbbi müdahaleler, hukuka aykırılığı engelleyen bir neden bulunmadığı sürece haksız fiil ve/veya suç teşkil eder. Tıbbi müdahalelerde bu neden çoğu zaman hastanın rızası olarak karşımıza çıkar. Ancak ayırtım gücünden sürekli veya geçici olarak yoksun hastaların tıbbi müdahaleye rıza vermeleri mümkün olmaz. Bu durumda tıbbi müdahale hastanın yakını veya yasal temsilcisinin rızasıyla uygulanabilir mi? Uygulanabilir ise bu kişiler rıza verirken neleri dikkate almalıdır? Öte yandan tıbbi müdahaleye rıza göstermek kişiye sıkı sıkıya bağlı bir hak olduğundan bu hakkın temsilci aracılığıyla kullanılamayacağı savunulabilir. Buna karşın Türk Hukukunda hasta temyiz gücüne sahip olsa dahi ergin değil veya kısıtlı ise ona uygulanacak tıbbi müdahalelerde yasal temsilcisinin rızasını arayan hükümler bulunmaktadır. Bu hükümler uygulamada sorunlara yol açmaktadır. Alman hukukunda ise Medeni Kanun'a eklenen bir paragraf (§1358) ile eşlerin belirli koşullar altında belirli bir süre için tıbbi müdahalelerde birbirlerini temsil etmelerine yasal olarak izin verilmiştir. Uzun tartışmalardan sonra kabul edilen ve 2023 yılının başında yürürlüğe giren paragraf, daha büyük tartışmaları da beraberinde getirecek gibi görünmektedir. Türk hukukunda ise vesayet altına alınan yetişkinler, ayırtım gücüne sahip olsalar dahi fiil ehliyetini kaybetmektedirler. Sonuç olarak bu durumdaki hastalar için mevzuat gereği vasilerinin rızası aranmaktadır. Halbuki yetişkinlere yönelik bu vesayet sistemi Alman ve İsviçre hukuklarında uzun süre önce terk edilmiştir. Çalışmamızda fiil ehliyeti bulunmayan hastalara uygulanacak tıbbi müdahalelerde rıza konusuna ilişkin güncel gelişmeler Türk, Alman ve İsviçre hukukları ile uluslararası düzenlemeler çerçevesinde ele alınmaktadır.

Anahtar Kelimeler: Tıbbi Müdahaleler, Rıza, Ayırtım Gücü, Kişilik Hakkı, Ergin Olmayan Hastalar, Vesayet Altındaki Hastalar, Yasal Temsilci

Introduction

Today, one of the basic conditions for medical intervention to be lawful is the patient's consent. In order for the patient's consent to prevent unlawfulness, the patient must have the capacity to consent and therefore the capacity of judgement. It is not possible for patients who do not have the capacity of judgement to give consent. In this case, another reason is needed to ensure lawfulness in medical interventions.

There are provisions in Turkish law and other national and international laws stating that medical intervention can be applied to patients who do not have the capacity of judgement, with the consent of the legal representative. However, based on these provisions, it is not easy to say that the consent of the legal representative alone can ensure lawfulness in medical intervention. As a matter of fact, the right to life, physical integrity and health is a strictly personal right. Therefore, it is not possible, as a rule, to exercise this right through a legal or voluntary representative. Some regulations go even further and require the consent of the legal representative for medical interventions to be applied to patients who have the capacity of judgement but underage or under guardianship. Within the framework of the patient's right to self-determination, it is necessary to question how close these provisions are to the ideal.

In the first part of this study, the concept of consent will be discussed in terms of the lawfulness of medical interventions within the framework of personality right and the right to self-determination. In the second part, the issue of consent in medical interventions applied to patients who do not have the capacity of judgement will be discussed. Under this heading, the legal nature of legal representative's consent and the new regulation in German law that came into force at the beginning of 2023 and allows spouses to give consent in medical interventions and to represent each other health-related legal transactions is handled. In the third part, the consent issue in medical interventions to be applied to underage or under guardianship patients, who have the capacity of judgement, will be discussed. Under this heading, the legal regulations requiring the consent of the legal representative in Turkish law for medical interventions to be applied to these patients will be discussed in comparison with the regulations in the German and Swiss Civil Codes.

Finally, our conclusions regarding the consent issue in medical interventions and our recommendations in terms of Turkish law within the framework of protecting personality and realizing the person's right to self-determination are presented.

I. Interventions in personality right and the conditions of lawfulness

A. Concept of Personality Right

'*Personality right*' is defined in the doctrine as '*the right that a person has on all the values that enable him or her to freely develop his or her personality and reputation in society*'. A person's life, health, physical integrity, freedom, honor,

dignity, name, picture, image, private life, secrets, scientific and professional identity are some of these values.[1]

In the Turkish Civil Code (TMK)[2] and the Swiss Civil Code (ZGB)[3], although there are provisions specifically regulating a few of these values (for example, TMK art. 26 and ZGB art. 29, which protect the right to the name), personality right is regulated in general (TMK art. 24 and ZGB art. 28), and the values within the scope of personality right are not listed one by one. Therefore, the judge decides which values will benefit from legal protection within the scope of personality right. While making this evaluation, the judge takes into consideration all legal rules in the field of public and private law, especially the Constitution.[4] For example, according to art. 12 I of the Constitution of the Republic of Turkey (CRT), '*Everyone has fundamental rights and freedoms that are bound to personality, inviolable, inalienable and indispensable.*' According to art. 17 of CRT, *[E]veryone has the right to live and to protect and develop their material and spiritual existence (I). The physical integrity of the person cannot be violated, except for medical necessities and cases written in the law; no one shall be subjected to scientific or medical experiments without his consent (II).*

In the German Civil Code (BGB)[5], the values protected within the scope of personality right are included in different paragraphs. For example, according to §823 I of BGB *[A] person who, intentionally or negligently, unlawfully injures the life, limb, health, freedom, property or some other right of another person is liable to provide compensation to the other party for the damage arising therefrom*. In the same direction in Turkish law, according to art. 24 I of TMK, '*A person whose personality right has been unlawfully attacked may request protection from the judge against those who attack*'. A similar provision is included in art. 28 I of ZGB. As a result, the right that a person has on his or her life, physical integrity and health is also protected within the scope of personality right.

Personality right is an absolute right, because of that it can be claimed against anyone and everyone can be asked not to violate this right. For this reason, any attack that harms this right constitutes a tort unless there is a reason that prevents unlawfulness.[6] In tort law, the reasons preventing unlawfulness can be listed

1 Mustafa Dural and Tufan Öğüz, *Türk özel hukuku Cilt II: Kişiler Hukuku (2*3rd edn, Filiz Kitabevi 2022) 100.

2 Türk Medeni Kanunu, Law No.: 4721, dated 22.11.2001, RG 8.12.2001/24607.

3 Schweizerisches Zivilgesetzbuch, dated 10.12.1907, AS 24 233.

4 Dural and Öğüz (n 1) 101.

5 Bürgerliches Gesetzbuch, Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by Article 1 of the Act of 10 August 2021 (Federal Law Gazette I p. 3515).

6 Dural and Öğüz (n 1) 152; Christian Grüneberg and others, *Bürgerliches Gesetzbuch*, vol 7 (82., neubearbeitete Auflage, CH Beck 2023) para §823 BGB, 4.

as '*consent of the injured party*', '*exercise of an authority based on public or private law*', '*overriding private or public interest*', '*self- defense (Notwehr)*' and '*necessity (Notstand)*'.[7]

B. Lawfulness Reasons in Medical Law and the Patient's Rright to Self-determination

Medical interventions pose serious risks to the patient's life, health and bodily integrity. Therefore, medical interventions related to these values protected within the scope of personality right constitute a tort and/or crime unless there is a reason preventing unlawfulness. There are different views in the doctrine explaining why medical interventions should be considered lawful. While one view considers medical interventions to be lawful because they are '*permitted activities by law*', some other views accept that medical interventions are lawful because the doctors '*exercise a right or fulfill a duty given by law*' as part of their profession. On the other hand, there are also views based on the '*overriding interest of the patient*'. '*The permissible risk theory*' argues that medical activity cannot be considered unlawful because it inherently involves risk. However, these views explaining lawfulness based on the medical profession, have been criticized on the grounds that they ignore the patient's right to determine his or her own future (right to self-determination). These views base the lawfulness of medical intervention on the will of the patient within the framework of the patient's right to self-determination.[8]

In medical law, the patient's right to self-determination is defined as '*a right that enables patients who are able to make their own decisions to make their own life choices with their free will, free from any kind of interference*'.[9] Today, in the field of medical law, as an absolute right[10], the right to self-determination is considered as sacred as the right to life, even for this reason, it is stated that euthanasia, which is illegal in Turkish law, should be regulated legally.[11]

In Turkish law '*the right to self-determination*' is protected in many provisions of the Constitution within the scope of personality right (see art. 15, 20 and

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7 Bilgehan Çetiner, Andreas Furrer and Markus Müller-Chen, *Borçlar Hukuku Genel Hükümler* (1st edn, On İki Levha 2021) 357 et seq.

8 For views and criticism see Hasan Tahsin Gökcan, *Tıbbi Müdahaleden Doğan Hukuki ve Cezai Sorumluluk* (4th edn, Seçkin 2022) 296 et seq.

9 Hamide Tacir, 'Hastanın Kendi Geleceğini Belirleme Hakkı' in Hamide Tacir and Aysun Altunkaş (eds), *III. Sağlık Hukuku Kendi Geleceğini Belirleme Hakkı ve Ötanazi Sempozyumu* (1st edn, Seçkin 2016) 45.

10 Hakan Hakeri, 'Patient Autonomy and Criminal Law: A Turkish Perspective' in Paweł Daniluk (ed), *Patient Autonomy and Criminal Law: European Perspectives* (Routledge 2023) 354.

11 See Erika Biton Serdaroğlu, 'Ötanazi - Ölme Hakkı' (2016) 22 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 463, 488.

especially art. 17 of CRT). This right is reflected in medical law as '*patient autonomy*'.[12] Art. 17 II of CRT is the legal basis of patient autonomy.[13] Within the framework of this right, the patient does not have to choose what is best for his or her, but can also make choices that are not in his or her own interest, such as refusing treatment.[14] Forcing a patient who refuses treatment to receive it against his or her consent or providing medical intervention to him or her is incompatible with patient autonomy.[15] For this reason, the paternalist doctor model, which has been prominent in medical law since the past, has been criticized on the grounds that it harms patient autonomy.[16] The paternalistic model argues that the patient will not know what will be better for him or her because his level of medical knowledge is not sufficient, therefore it will be wrong for the patient to make a decision; instead, the doctor who knows the patient's well-being better than him or her should make the decision. For this reason, this model is gradually being abandoned, and instead, the patient-doctor relationship called the '*interviewer model*', in the form of client-counselor in communication with the patient, is proposed as the most ideal model.[17]

Within the framework of the '*right to self-determination*', patients must decide with their own free will the treatment process and how they will spend the rest of their life. In Turkish law, the patient's right to refuse treatment is regulated in articles 22 and 25 of the *Patient Rights Regulation* (HHY)[18]. The provision in the regulation that requires withdrawal of consent after treatment has started on the condition that there is no medical risk was removed from the regulation in 2014[19].

In German law, the right to develop one's personality freely is constitutionally guaranteed. According to art. 2 of the German Constitution *[E]veryone has the right to the free development of their personality, provided that they do not violate the rights of others and do not violate the constitutional order or the moral*

12 Gökcan (n 8) 97.

13 Hakeri (n 10) 343.

14 The doctor cannot be held responsible for not providing medical intervention to a patient who refuses to give consent. See ibid.

15 ibid 354.

16 See for criticism Erhan Kılınç, 'Sağlık Kurumlarında Paternalist Liderlik Modelinin İncelenmesi' (2018) 1 Journal of Healthcare Management and Leadership 1, 9.

17 See Elif Atıcı, 'Hasta - Hekim İlişkisi Kavramı' (2007) 33 Uludağ Üniversitesi Tıp Fakültesi Dergisi 45, 49; Nora Scheidegger, 'Patient Autonomy and Criminal Law: A Swiss Perspective' in Paweł Daniluk (ed), *Patient Autonomy and Criminal Law: European Perspectives* (Routledge 2023) 332.

18 Hasta Hakları Yönetmeliği, RG 1.8.1998/23420.

19 RG 1.5.2014/28994.

law (I). Everyone has the right to life and physical integrity. The freedom of a person is inviolable. These rights may only be interfered with on the basis of a law (II). Patient autonomy is also defined in German law as the individual's self-determination over his or her body and mind, in the form of freedom to decide on medical procedures and measures.[20] The right to self-determination is also guaranteed in the Swiss Constitution in the fundamental right to life and personal freedom (art. 10 II of the Federal Constitution of the Swiss Confederation). It is accepted that the right to self-determination is to take precedence over the medical necessity of treatment and the patient may refuse medical intervention that would save his or her life.[21] The same approach exists in comparative law in many countries.[22]

Patient autonomy is also expressed in international agreements. According to art. 5 of the Convention on Human Rights and Biomedicine (CHRB) a medical intervention may only be applied after the person has given free and informed consent to it; and before intervention, the person must be given appropriate information about the purpose and nature as well as consequences and risks of it. The person may withdraw consent at any time freely.

Today, as a result of these approaches and legal regulations explained above, '*informed consent*' within the framework of the patient's right to self-determination, as an extension of patient autonomy, is accepted as the basic condition for medical intervention to be lawful.[23] '*Informed consent*' is defined as *[T]he voluntary acceptance of the treatment by the patient after the doctor has adequately and appropriately explained the risks and benefits of the treatment, together with all its alternatives, and the patient has understood it without any hesitation*.[24] The doctor's obligation to inform the patient is clearly regulated in articles 15-20 of HHY in Turkish law.

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20 Dorothea Magnus, 'Patient Autonomy and Criminal Law: A German Perspective' in Paweł Daniluk (ed), *Patient Autonomy and Criminal Law: European Perspectives* (Routledge 2023) 117.

21 Scheidegger (n 17) 333.

22 For legal regulations in comparative law see Gökcan (n 8) 111, 112. For a comparative evaluation of national laws in Europe regarding the concept of patient autonomy, see Krzysztof Wala, 'Conclusion: A Comparative Look at the Criminal Law Protection of Patient Autonomy in Europe' in Paweł Daniluk (ed), *Patient Autonomy and Criminal Law: European Perspectives* (Routledge 2023) 354 ed seq.

23 Hakan Hakeri, *Tıp hukuku Cilt I Genel Hükümler* (23rd edn, Seçkin 2021) 260; see also Tacir (n 9) 56; Scheidegger (n 17) 333. For the legal nature of consent to medical intervention in contract law Zekeriya Kurşat, 'Analysis of the Concept of "Consent" in Medical Interventions from a Contract Law Perspective' (2017) 14 Law and Justice Review 53, 53 ed seq.

24 Hakeri (n 23) 289.

C. Legal Nature of Consent in Medical Interventions

Consenting to medical treatment is a strictly personal right.[25] For this reason, it cannot be used through a legal or voluntary representative. However, in order for the patient's consent to prevent unlawfulness, the patient must have the capacity to consent. What is important in terms of consent to medical intervention is the patient's ability to understand, comprehend and decide. The patient must be able to understand and compare, at least in general terms, the basis, risks, effects and results of the treatment to be applied; and the doctor, not the judge, must determine whether the patient has the capacity to consent [26].

Patients who have the capacity of judgement, are full age, and are not under the guardianship, in other words, patients who are fully competent in terms of capacity to act can consent to medical intervention on their own. However, a person may permanently lack the capacity of judgement due to young age, mental illness and similar reasons, or may temporarily lose the capacity of judgement due to shock, fainting and similar reasons. These people, who do not have the capacity of judgement, do not have the capacity to consent. On the other hand, can patients who are underage or under guardianship, but have the capacity of judgement, give consent to medical treatment on their own? These issues will be discussed under separate headings below.

II. Consent issue for patients who do not have the capacity of judgement

A. The Legal Nature and Function of the Consent of the Patient's Legal Representative

We have previously expressed that consenting to medical intervention is a strictly personality right, and therefore must be used personally by the right holder, and cannot be used through a representative. However, in doctrine, strictly personal rights are divided into two group as absolute and relative, and it is accepted that relative ones can also be used by the legal representative. For example, while it is not possible to exercise rights such as engagement and marriage through the legal representative, it is accepted that the legal representative files a divorce case on behalf of the under guardianship person whose spouse commits adultery.[27] In Swiss law, the distinction between these rights is clearly stated in art. 19c of ZGB, which was added to the Code in 2013.[28] Consenting to

[25] Dural and Öğüz (n 1) 106.

[26] Hakeri (n 23) 393, 394.

[27] Mustafa Dural and Suat Sarı, *Türk Özel Hukuku Cilt I: Temel Kavramlar ve Medenî Kanunun Başlangıç Hükümleri* (15th edn, Filiz Kitabevi 2020) 176.

[28] Schweizerisches Zivilgesetzbuch (Erwachsenenschutz, Personenrecht und Kindesrecht) änderung vom 19. Dezember 2008, AS 2011 725; Botschaft zur Änderung des Schweizerischen Zivilgesetzbuches (Erwachsenenschutz, Personen- und Kindesrecht), BBl 2006 7001.

medical intervention is also considered a relative personality right and accepted that it can be exercised through a legal representative in doctrine.[29]

In legal systems, medical intervention is also allowed for patients who do not have the capacity of judgement, with the consent of their legal representative (for Turkish law see art. 70 of the Law No. 1219[30]; for German law see §630d I of BGB; for Swiss law art. 378 of ZGB, for international law see art. 6 II and III of CHRB). In fact, in Swiss law, the persons authorized to represent the patient in medical interventions are specifically listed in order as a very crowded group (see art. 378 I of ZGB). However, the legal nature of the consent of the legal representative is controversial in the doctrine.

According to one view, although giving consent to medical intervention is a strictly personal right, it is legally valid for the legal representative to consent to medical intervention in order to protect the interests of the patient who does not have the capacity of judgement. According to another view, there is no real representation here, and the consent of the legal representative only prevents unlawfulness[31], provided that it is for the overriding private interest of the patient. One view even argues that if the patient's overriding private interest can be determined, there is no need for the consent of the legal representative. According to another view, the consent of the legal representative does not replace the consent of the patient; here, the reason that ensures lawfulness is the presumed consent of the patient.[32]

As can be seen, in terms of the lawfulness of medical interventions to be applied to patients who do not have the capacity of judgement, some of the opinions are based on the authority given by the law, while the others are based on the patient's overriding private interest or presumed consent. In our opinion, the consent of the legal representative alone is not sufficient to ensure the lawfulness in medical interventions to be applied to patients who do not have the capacity of judgement. As a matter of fact, there are cases in law where medical intervention is allowed without the consent of the legal representative (for Turkish law see art. 70 of the Law No. 1219 and art. 24 I of HHY; for German law see §630d I BGB; for international law see art. 8 of CHRB). In these cases, another reason should be sought to prevent unlawfulness in medical interventions. In our opinion, for underage patients who have not yet gained the capacity of judgement, this

29 Dural and Öğüz (n 1) 107; Yahya Deryal, *Sağlık hukuku problemleri* (1st edn, Seçkin 2012) 32.

30 Law on the Practice of Medicine and Its Branches (Tababet ve Şuabatı San'atlarının Tarzı İcrasına Dair Kanun), dated 11.4.1928, RG 14.4.1928/863.

31 Saibe Oktay Özdemir, 'Ayırt Etme Gücü Bulunmayan Yetişkinlere Yapılacak Tıbbi Müdahalelere Onay Konusunda İsviçre Hukukunda Yapılan Değişiklikler' (2016) 11 Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi 223, 230.

32 For views see Ayça Çakal, *Türk Özel Hukukunda Tıbbi Müdahaleye Rıza* (1st edn, Seçkin 2018) 156, 157.

reason is the '*private interest of them*'. For full age patients who do not have the capacity of judgement, this reason is essentially the '*patient's presumed consent*' within the framework of the patient's right to self-determination. First of all, the patient's presumed consent should be investigated, and if this cannot be determined, medical intervention should be applied, taking into account the patient's private interest.

In Swiss law, in 2013 it is clearly regulated that a person with capacity to act may instruct a natural person or legal entity to take responsibility for his or her personal care or the management of his or her assets or to act as his or her legal agent in the event that he or she is no longer capable of judgement (art. 360 of ZGB)[33]. And according to art. 377 I of ZGB, *if a person lacking capacity of judgement has not given instructions on treatment in a patient decree, the attending doctor shall plan the required treatment in consultation with the person entitled to act as representative in relation to medical procedures*. In this case, the representative shall decide according to the *presumed wishes (mutmaßliche Willen)* and interests of the patient lacking capacity of judgement (art. 378 III of ZGB). A similar regulation is also included in the German Civil Code (see §1827 of BGB). In Turkish law, according to art. 24 V of HHY*, the previously expressed wishes of the patient, who does not have the capacity to consent, regarding medical intervention are taken into account*. However, it is unclear what is meant by '*the previously expressed wishes'* in the regulation (whether it should be written or verbal, or whether it should be expressed to relatives or a doctor).[34]

'*Presumed consent*'[35] can be defined as '*the consent that the patient would give if he or she knew the effects, risks and consequences of medical intervention along with its alternatives*'.[36] In legislation, presumed consent is essentially accepted as a reason that ensures the lawfulness of medical intervention in exceptional cases where consent cannot be obtained (for Turkish law see art. 24 V of HHY; for German law see §630d I of BGB; for Swiss law see art. 379 of ZGB; for international law see art. 9 of CHRB; art. 3.3 and 3.7 of the European Consultation on The Rights Of Patients Amsterdam 28 - 30 March 1994). Apart from these cases, the fact that the legal representative has given consent should not prevent the investigation of the patient's presumed consent. A medical intervention that

[33] The article is amended by No I 1 of the FA of 19 Dec. 2008, in force since 1 Jan. 2013 (AS 2011 725; BBl 2006 7001).

[34] Oktay Özdemir (n 31) 241.

[35] '*Presumed consent*' is a different concept from '*hypothetic consent'*. '*Hypothetic consent*' is defined as the consent that the patient would have given if he or she had been informed enough for the medical interventions applied to him or her by the doctor without giving sufficient information. Gökcan (n 8) 370, 371; Hakeri (n 23) 521.

[36] Hakeri (n 23) 502.

is contrary to known wishes of a patient of age cannot be considered lawful simply on the grounds that the legal representative has consented.

B. Representation of Spouses in Medical Interventions in German Law

In German law, '*Law to Reform Guardianship and Custodianship* (Gesetz zur Reform des Vormundschafts- und Betreuungsrechts)'[37] came into force on January 1, 2023. With the Section §1358 added to BGB in the reform, spouses are allowed to represent each other in medical interventions. In previous reform efforts, targets were set for spouses to legally represent each other.[38] However, this offer was not supported due to the risk of abuse in the representation of adult persons, especially in matters related to assets.[39] With the §1358 of BGB added to the Code in this last reform, spouses are allowed to represent each other, at least limited to matters related to medical treatment.

In §1358 of BGB, the spouse is given the authority to consent to medical interventions and take relevant legal actions, even to decide on measures restricting freedom. According to §1358 I of BGB *[I]f one spouse is legally unable to take care of their health care matters due to unconsciousness or illness (represented spouse), the other spouse (representative spouse) is entitled to act on behalf of the represented spouse*

1. to consent to health examinations, medical treatments or medical interventions or to prohibit them and to receive medical information,

2. conclude and enforce treatment contracts, hospital contracts or contracts for urgent rehabilitation and care measures,

3. to decide on measures in accordance with §1831 IV, provided that the duration of the measure does not exceed six weeks in individual cases, and

4. To assert claims that the represented spouse is entitled to against third parties due to the illness and to assign them to the service providers under the contracts according to number 2 or to demand payment to them.

In order for spouses to consent to medical interventions instead of each other, one of the spouses must first be unable to perform health-related tasks due to loss of consciousness or illness. This regulation aims to ensure compliance with §1814 of BGB regarding the appointment of custodian.[40] In matters listed in §1358 I

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37 BGBl. I, 2021, Nr. 21 from 12.05.2021, p. 882; BT.Drucks. 19/24445.

38 See BT-Drucks. 15/2494, 1.

39 Schmidt-Recla/Beate Gsell and others (eds), *Beck-online Großkommentar zum Zivilrecht* (CH Beck 2023) para BGB §1814, 52.3.

40 Benedikt Jugl, 'Das Gesetz zur Reform des Vormundschafts- und Betreuungsrechts aus notarieller Sicht, Teil 1' (2022) 26 Zeitschrift für die NotarPraxis 401, 401.

of BGB treating doctors are released from their duty of confidentiality towards the representing spouse. This spouse may inspect the medical records relating to these matters and authorize their transfer to third parties (§1358 II of BGB).

In the third paragraph of the §1358 BGB, exceptions to the spouses' authority to represent the other spouse and give consent on his or her behalf in medical interventions and other medical measures are stated. According to §1358 III of BGB; *[T]he authorizations according to paragraphs I and II do not exist if;*

1. *the spouses live separately,*
2. *the representing spouse or the treating doctor knows that the represented spouse*
   a) *refuses to be represented by him or her in the matters mentioned in subparagraph I, numbers 1 to 4 or*
   b) *has authorized someone to manage his or her affairs, insofar as this authorization covers the matters specified in paragraph I, numbers 1 to 4,*
3. *a custodian has been appointed for the represented spouse, provided that his or her area of responsibility includes the matters specified in paragraph I, numbers 1 to 4, or*
4. *the requirements of paragraph I are no longer met or more than six months have passed since the time determined by the doctor in accordance with paragraph IV, sentence 1 number 1.*

As can be seen, in order for spouses to legally represent each other in medical interventions and related legal proceedings, many positive and negative conditions (in §1358 I and III of BGB) must be met at the same time. Who will determine whether all these conditions are met and how can it be proven? Regarding this issue, it is stipulated in §1358 IV of BGB that the doctor who will perform the treatment and against whom the right of representation will be exercised must issue a written document confirming that these conditions have been met. According to first and second subparagraphs of §1358 IV of BGB, *the doctor over whom the right of representation is exercised has to confirm in writing that the requirements of paragraph I are met and the latest point in time at which these have occurred*, *and to present the representing spouse with the confirmation in accordance with number 1 with a written declaration that the requirements of paragraph I are met and that the reasons for exclusion in paragraph III are not met.* It is accepted that the document issued by the doctor will only serve to prove the spouse's authority to represent, and will not have a constitutive effect nor will it protect good faith [41].

The doctor will issue this document based on the written assurance received from the representative spouse. According to third subparagraph of §1358 IV of

[41] ibid 402.

BGB *the doctor must obtain written assurance from the representing spouse that a) the right of representation has not yet been exercised due to unconsciousness or illness, due to which the spouse cannot legally take care of his health care matters and b) there is no reason for exclusion in paragraph III.*

According to fifth subparagraph of §1358 of BGB if a custodian whose scope of duties includes the matters is appointed to represented spouse the right of representation may no longer be exercised by the other spouse. The last subparagraph of the provision refers to custodianship law. The referred sections of BGB are §1821 II- IV, §1827 I-III, §1828 I-II, §1829 I-IV, and §1831 IV in conjunction with paragraph II. However, §1831 I BGB is not mentioned among the references. For this reason, an accommodation that involves deprivation of liberty is not possible with the consent of the representative spouse.[42] Likewise, since there is no reference to §1832 BGB, it is accepted that the measures foreseen therein should not be applied, even though they are mentioned in §1358 I BGB. [43] These measures can only be implemented by appointing a custodian.

Section §1358 of BGB is seen as a compromise between the legislator's goals in ensuring that spouses represent each other and preventing abuses.[44] However, the provision has been criticized from many aspects. At first, it is stated that the provision is contrary to the UN Convention on the Rights of Persons with Disabilities, which stipulates that legal representation should be avoided.[45] On the other hand, since the provision stipulates too many conditions regarding the power of representation, and it can only be used in certain health problems, with certain measures and limited for a period of time, it will often be concluded that the spouse does not have the authority to represent, and the goal of preventing the appointment of a custodian will not be achieved. The provision also contains significant uncertainty for the treating doctors. It is especially difficult for the doctor to interpret exceptions to the representation. The doctor will not be able to control issues such as the separation of spouses or whether the spouse to be represented refuses representation, and he or she will have to rely entirely on the information provided by the representative spouse. If there is more than one doctor, the document prepared by the doctor may cause confusion rather

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42 Dagmar Brosey and Georg Dodegge, 'Rechtliche Betreuung und freiheitsentziehende Maßnahmen nach der Betreuungsrechtsreform : Impulse aus der Expertenkommission "Herausforderndes Verhalten und Gewaltschutz in Einrichtungen der Behindertenhilfe" NRW' (2023) 32 Betreuungsrechtliche Praxis 48, 49.

43 See ibid; see also Jugl (n 40) 402.

44 See Sebastian Zander, 'Auswirkungen der Vormundschafts- und Betreuungsrechtsreform auf die notarielle Praxis' (2022) 88 Zeitschrift für das Notariat in Baden-Württemberg 320, 325.

45 Georg Dodegge, 'Die Entwicklung des Betreuungsrechts bis Juli 2022' (2022) 36 Neue juristische Wochenschrift 2590, 2597.

than explanation.[46] Due to these ambiguities, it is estimated that §1358 of BGB, which gives spouses the authority to represent each other in medical matters, will create more problems than benefits in medical practices.[47]

In order to eliminate the ambiguities explained above, it is suggested that if the person refuses to be represented by his or her spouse, this should be recorded in the central registry of the Federal Chamber of Notaries, and the refusal of representation by the spouse should be clearly stated in the divorce and separation agreements.[48] However, recording the will regarding rejection of representation in the central registry will require an economic expense, and it is possible that the need for treatment may arise before the spouse has the opportunity to make this registration. On the other hand, the doctor who issued the representation document will also need to be given the authority to examine the central registry. [49]

C. Representation of Spouses in Medical Interventions in Swiss Law

In Swiss law, according to art. 374 I of ZGB*, any person who as spouse or registered partner cohabits with a person who is no longer capacity of judgement or who regularly and personally provides that person with support has a statutory right to act as that person's representative if there is no advance care directive and no deputy has been appointed*. In the art. 378 of ZGB, the persons who have the right to represent the patient who does not have the capacity of judgement and to consent or refuse the treatments to be applied to him or her are specifically listed in order. Spouses and registered partners are in third place in this provision.[50] The spouse or registered partner, who is the legal representative of the patient, must comply with the instructions of the patient, if any according to art. 370 of ZGB, while exercising his or her authority of representation in medical treatments and giving consent to the medical interventions to be applied to the patient.[51]

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46 For criticism see Jugl (n 40) 402.

47 See Benedikt Jugl, 'Das Gesetz zur Reform des Vormundschafts- und Betreuungsrechts aus notarieller Sicht, Teil 2' (2023) 27 Zeitschrift für die NotarPraxis 3, 6.

48 Jugl (n 40) 403.

49 Herbert Grziwotz, 'Struktureller Wandel des Betreuungsrechts?' (2020) 53 Zeitschrift für Rechtspolitik 248, 251.

50 In Turkish law, based on art. 14 of the Law on Organ and Tissue Removal, Storage, Vaccination and Transplantation (Law No. 2238, dated 29.5.1979, RG 3.6.1979/16655), it is argued that the consent of the patient's spouse should be sought first for patients who do not have the capacity to consent. Hakeri (n 23) 395, 396.

51 Oktay Özdemir (n 31) 237.

III. Consent issue for underage or under guardianship patients who have the capacity of judgement

In Turkish law according to art. 16 of TMK, underage or under guardianship patients who have the capacity of judgement can use their strictly personal rights on their own, without needing the consent of the legal representative. Therefore, as long as they have the capacity to consent, they should be able to consent to medical intervention on their own. However, special legal regulations in the field of health law (art. 70 of the Law No. 1219, art. 24 I of HHY), which are older than TMK, require the consent of the legal representative for these patients. Due to these regulations, for example, a 16-year-old child who has the capacity of judgement cannot receive treatment from the hospital for dental treatment, on the grounds that she does not have her parents with his or her. These regulations, which contradict the art. 16 of TMK, have led to the emergence of different opinions in the doctrine.

For underage patients, while one view considers the underage's consent sufficient, another view requires the consent of both the underage and the legal representative. According to another view, although the opinion of the underage should also be taken, this is not binding and the consent of the legal representative is required. About under-guardianship patients, in Turkish doctrine, it is accepted that people who are put under guardianship for any reason other than minor age, mental illness or mental weakness can consent to medical intervention on their own.[52] In German and Swiss law, since full age people with the capacity of judgement have capacity to act, there is no need for the consent of the legal representative (for German law see §104 BGB, for Swiss law see art. 13 of ZGB).

Conclusions and recommendations

The right to self-determination is a strictly personal right. Every patient who has the capacity to consent should be able to decide or reject the medical intervention to be applied to his or her with their free will. On the other hand, the right to self-determination does not end with the loss of the capacity of judgement. For this reason, medical intervention on a patient who has previously declared that he or she refuses any treatment is unlawful, even if the legal representative consents. Therefore, for the patients who do not have the capacity of judgement, their presumed consent should first be investigated. The legal representative must also take into account the wishes of the person he represents when giving consent. Although spouses are allowed to represent each other in exceptional cases in medical interventions in BGB, time will tell the consequences in practice of the regulation, which has been criticized in many aspects.

[52] For views see Çakal (n 32) 79–85; Gökcan (n 8) 321, 322; Dural and Öğüz (n 1) 107.

In our opinion, regulations requiring the consent of the legal representative for underage or under guardianship patients who have the capacity of judgement are not compatible with the protection of personality. Within the framework of the right to self-determination, these patients must be able to give their consent to medical intervention on their own. In Turkish law, the people of age lose their capacity to act with the placement under guardianship, even if they have the capacity of judgement; and the consent of the legal representative is required for medical interventions to be applied to them. However, in German and Swiss law, the people of age have the capacity to act as long as they have the capacity of judgement. For this reason, within the framework of the individual's right to self-determination, the conditions for consenting to medical intervention as a legal representative and the conditions of capacity to act for people of age should be rearranged in Turkish law.

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