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Evolution of health law in Turkey

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Abstract
Turkey has always been one of the leading countries in the field of health and fundamental rights. Though Turkey is a member of many international organizations and a candidate state for the European Union, had some regulations on fundamental rights, patients rights and right to health, even before the international papers, such as the Universal Declaration of Human Rights, did not come into force. Turkey always follows closely to the new developments in health care technologies, that is why Turkey continues to be one of the most chosen countries in international health tourism. These improvements in health care drive Turkey to adjust its regulations related to patients' fundamental rights and right to access to health. In the 2000s, health law postgraduate programs were founded in some universities in Turkey. With these programs, research in health law has been accelerated. Turkey will be one of the leading countries in health law too in the next few years. In this study, we started with the fundamental sources of the right to health in Turkey; then we continued with current objects at issue in Turkish health law; then we gave place to the current problems of Turkish health law such as reproductive rights, problems related to organ and tissue transplantations, increasing numbers of legal cases against health care professionals, their possible solutions and the future expectations.

Keywords: health law, medical law fundamental rights, right to health, right to access to health, improvements in healthcare technologies, Turkish medical law, Turkish health law, reproductive rights, malpractice cases

Introduction

Turkey, as one of the G-20 nations, is an important nation in providing health services at full throttle [1]. Turkey provides health services not only nation wide but international [2] in many different areas of health as of the current situation. In Turkey, health technologies are being used intensively that is why many high-tech surgeries can be performed [3]. That is why Turkey is one of the important countries in health tourism [4].

Health services in Turkey are regulated mainly in the Article 56 of Constitution of the Republic of Turkey as "Everyone has the right to live in a healthy and balanced environment. It is the duty of the State and citizens to improve the natural environment, to protect environmental health and to prevent environmental pollution. 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. In order to establish widespread health services, general health insurance may be introduced by law." Providing the health services is the main duty of the Turkish Ministry of Health and while the Ministry provides health services via public hospitals and via field services, private health service providers contribute to health service delivery. In 2006 with the Turkish Social Insurance and Universal Health Insurance Law (Law no.5510), universal health insurance became mandatory for all citizens. But the regulations are messy.

Turkey put the term sustainable development on its agenda in 1996, after the United Nations Conference on Environment and Development held in Rio in 1992. Used this term in development plans and in policy papers, such as thematic national policy papers and strategy papers which contribute significantly to the development of the term sustainable development in the ensuing years. Especially with the health reform of Turkey, made after the year 2000, many important improvements have been made in health service delivery and in health law. In 1995, "Health Reform" took its part in the 7th Development Plan as one of the structural reform projects with its legal aspects, its purpose, its strategy and its place in the calendar. In 2002, the reform had been published in the Immediate Action Plan under the title of "Health to Everyone". In this plan,fundamental principles and the calendar of this reform had been included and this reform had been launched by the Turkish Ministry of Health in 2003 under the name of "Health Transformation" [5]. In the 11th Development Plan (2019-2023) the main objective about health services is specified as *"The main objective is to ensure high-quality, reliable, efficient and financially sustainable health services provision supported by evidence-based policies, in order to improve the quality of living of individuals, to allow their active and healthy participation in economic and social life and thus improve the regional distribution of services as well as the quality of physical infrastructure and human resources."*[6] Turkey aims to increase the quality and quantity of the health services correlatively with this objective until 2023 [7]. In the UN Sustainable Development Summit which was held in September 2015, 2030 Agenda for Sustainable Development was accepted by the signature of the 193 states. Many goals of this agenda are about health directly or indirectly [8]. Any sustainable development goals are about public or individual health indirectly in short or long terms. In this study, the current situation of Turkey in medical law and health law will be examined and then the possible improvements will be argued in the futuristic scope.

Fundamental sources of the right to health in Turkey

The constitution of The Republic of Turkey In Turkish law, the sources of the right to health are based on the Constitution of the Republic of Turkey and many international and supranational conventions signed by Turkey. Regulations on the right to health are all over the lot [9]. The main purpose of this disorder is the sophisticated structure of the health services, it means even if the health service is a public service, it is provided by the private sector too. Besides, the health services are the subject of the administration law which is a younger [10] and uncodified area of Turkish law.

All of the rights related to health, such as right to health, right to live healthy, right to access to health and patients' rights constitute the subset of human rights and these rights mean weighty responsibilities for the nations [11]. This approach took its place in Article 1 of Turkish Patient Rights Regulation under the title of "Objective": *"This Regulation; basis, a reflection on the human health care rights field, and especially in Turkey Constitution, other legislation and accepted in international legal texts in which "patient rights" had been concretely demonstrated and health services are provided for all institutions and organizations and health institutions and organizations outside the health care given to cases. In order to regulate the principles and procedures for ensuring that everyone can benefit from the patient rights, to be protected from violations of rights and, when necessary, to use legal safeguards as necessary"* That is why in every legal arrangements, that regulate the rights of every service recipient within the Turkish Health System and the mandate/authority of the service providers, every legal texts about human rights are signed by Turkey, must accepted as the fundamental sources.

The Regulation method and its place in national law of the conventions on human rights are regulated arguably [12] in Article 90/5 of Turkish Constitution: "*International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."* In this way, if a national law and an international convention on human rights are in conflict, then the law will be ignored and the convention will be applied to the situation. That means, Article 90 of the Turkish Constitution hierarchized the international conventions on human rights and these conventions have higher status then national law in the hierarchy of norms of Turkish law. Thus in the Turkish hierarchy of norms, there is a new grade, namely the grade of international conventions on fundamental rights, had been set in the midst of Turkish Constitution and national law. So, all of the international conventions concerning right to health and signed by Turkish Government, must be accepted as the supranational texts based on its position among fundamental rights.

Constitutional basis of the right to health are regulated in Article 17 and Article 56 of the Turkish Constitution. First paragraph of Article 17, is as below: *"Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence."*, widens the right's scope to include everyone and the spiritual being of the people. Second paragraph of the Article is framing the right in the scope of medical intervention which embodies the provision of the health service with this statement: *"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."* As it may seem, when it comes to medical interventions and their applications, they have a great importance in the Turkish Constitution.

Duties and responsibilities on provision of health service, which is a right for everyone, are given to the State by the Article 56 of Turkish Constitution: *"Everyone has the right to live in a healthy and balanced environment. It is the duty of the State and citizens to improve the natural environment, to protect the environmental health and to prevent environmental pollution. 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. In order to establish widespread health services, general health insurance may be introduced by law."*

Ovideo convention Until the second half of the 20th century, nations

were interested in legal responsibilities arising from medical interventions but they were not interested in patients' rights and personal rights of the patients, as much as they were interested in responsibilities [13][14]. Derived sub-terms of human rights such as; workers' rights, minority rights, women rights, children's rights, are caused by the formation of the term Patients' Rights since the 1970s. While the research on patients' rights and on personal rights of the patients was proceeding, fast-growing developments in the medical area and in medical technologies had caused transformation in the term patient. Such that the terms organs, tissues, cells and genes are included to the scope of the legally protected organism (healthy or ill). Inadequacy of the national and supranational regulations for these new terms had caused the new threats to human dignity and to personal rights. First international convention which paid regard to these threats is the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Biomedicine Convention).

The Biomedicine Convention is the result of a multidisciplinary study which started in 1982 [15]. In the Conference of Ministers of Justice, which was held in 1990, studies for an international convention on protection of human rights in the area of medicine and biology were recommended to The Committee of Ministers of the Council of Europe. The Parliamentary Assembly of the Council of Europe supported this recommendation. In Semptember 1991, The Committee of Ministers of the Council of Europe gave authorization to Ad Hoc Committee of Experts on Bioethics (CAHBI-Comité Ad Hoc Pour La Bioéthique) for these studies. Name of the Committee of Experts on Bioethics had been changed into the Steering Committee on Bioethics (CDBI-Comité Directeur Pour La Bioéthique). This committee consists of experts in medicine, biology, legal and theology. In this committee there are many opportunities for the discussions of experts in many different areas. This committee has more than 40 members from Council of Europe member states. Besides, it is allowed for the attendance of the delegates such as EU delegates, European Evangelical Alliance delegates, WHO's delegates, UNESCO's delegates, delegates of different science foundations of Europe and the delegates of the states, as the observers [16].

The Biomedicine Convention was opened for signature on 4th April 1997 for legal protection of human rights and dignity in present and future applications of biology and medicine. Article 1 of the Convention, entitled as Purpose and Object, declares to make necessary regulations in national laws to be able to apply the Convention in the most effective way possible. In Turkey, first the Ministry of Foreign Affairs prepared a draft act of ratification of this Convention which is the first bounding convention on violation of rights on the applications of biology and medicine, and the Council of Ministers proposed the draft on 3th September 2001. The Convention had been ratified on 3th December 2003 and the law of approval published in Legal Gazette no. 25311 on 9th December 2003 as the law no.5013. The original convention text and its Turkish translation was published in Legal Gazette no. 25439 on 20th April 2004 as the annex of the Decree of the Council of Ministers' (no.2004/7024). Convention had been deposited with the Secretary General of the Council of Europe on 2nd July 2004 and the Convention was put into effect on 1st November 2004 in Turkey [17]. In current Turkish Constitution (1982) and in the previous Turkish Constitution (1961), the position of the ratified Conventions in the national law was controversial [18- 20], but with the alteration made in 2004 has been framed the hierarchy of norms [21].

Analysis of the rights related to the health in Turkey In this section it is aimed to discuss the rights related to health in Turkey. The rights will be discussed are right to access to health, right to receive the highest attainable standard of service, patient rights, reproductive rights, workers' occupational health and safety rights, right to dignified death. Contemporary topics of Turkish health and medical law, such as organ and tissue transplantation, public health, violence in health, medical malpractice and defensive medicine topics will be discussed under this title too.

Right to access to health Turkey is a party of the Universal Declaration of Human Rights. Article 25 of this Declaration includes right to access to health too which is as below: *"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."* Article 56 of Turkish Constitution is in line with Article 25 of the Declaration and it regulates the general health insurance for everyone in Turkey. This health insurance is an obligation for not only all Turkish citizens (children or elders) and also for everyone in Turkey, citizens or not. But this health insurance is problematic. In early years insurance gave limited access to health. So this situation created a financial burden for poor citizens. So insurance did not solve the inequality in access to health services [22]. But now, with the Turkish Law on The Law on the Restructuring of Certain Receivables and Amendments to Certain Laws (No. 7256), the citizens who have unpaid health insurance premium debts have full access to health services just like the other citizens until the 30th April of 2021. This deadline had been extended by presidential decision until the 31st December of 2021.

In Turkey, people who are under temporary protection have the right to access to health too. For example, since 2011 Syrian citizens have taken refuge in Turkey. They receive health service within the scope of Turkish Temporary Protection Regulation. In Turkish law, health services provided to Syrian citizens who are under temporary protection, are completely free of charge but there are some regulations on the service procurement methods. Right to access to the health of the refugees in Turkey was regulated under the Article 20 and 27 of this regulation. In Article 27, it is specified that health centers might be set inside or outside of the temporary accommodation centers; that they cannot directly consult the private hospitals and that the cost of the health services will be covered by the Turkish Ministry of Health. In 2020, Turkish Ministry of Internal Affairs Directorate General of Migration Management sent an official letter to the Ministry of Health which declares to not to provide health services for the refugees who consult hospitals outside of the residence province. According to this letter, the Turkish Ministry of Health announced this letter to the hospitals' administrations and now they cannot get health services outside of their residence province and also it is forbidden for them to get health services in private hospitals and in universities. It seems this situation will be continued in the near future.

Right to receive the highest attainable standard of service Turkey is a party of the International Covenant on Economic, Social and Cultural Rights. According to the additional article 12 of this Covenant ("The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."), Turkish Ministry of Health established new departments on patients' security and offering quality health services [23].

Patients' rights In Turkey the patients' rights are regulated in Patient Rights Regulation, published in 1998. Even if it was published in 1998, the regulations are updated in time according to the improvements.

Besides, Turkey has signed the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine so this Convention is also being applied in Turkey when it comes to patients' rights. Turkey attaches a great importance to patients' rights. In Turkey, every hospital and every health care facility are obliged to have a patients' rights section.

Patients' rights in Turkey are as follows; right to access to fair health care services, right to be informed, right to choose the healthcare facility, right to choose the healthcare professional, right to ask for

order of priority, right to access to proper diagnosis, treatment and care, prohibition of unnecessary medical intervention, prohibition of euthanasia, right to access to careful medical intervention, right to ask for information, right to access to the medical records, right to privacy, right to protection of the personal data, right to give consent, right to respect to performing religious duties, right to receiving respectful services, right to have companion, right to respect for patients' time, right to apply, complain and sue [24].

Reproductive rights Turkey is one of the processor states in reproductive rights and elective abortion rights. In 1983, Charter on Uterine Evacuation and Sterilization Services and Their Inspection was published in the Legal Gazette (No.18255). On the other hand, treatments with assisted reproductive techniques are quite successful. The most important discussion topics of health and law are surrogate motherhood and the donation of germ cells and embryos. In 2010, these applications were banned legally via Regulation Concerning Assisted Reproduction Treatment Practices and Centres' (Legal Gazette no. 27513) [25]. But the current situation of these applications in neighbouring countries is causing some troubles. Turkey's current approach to these matters can be changed in years because of the approach of the neighbouring countries and possible economic return of these applications via health tourism. For this change, new legislation must be made on protection of the rights of children and the surrogate mother [26]. Prohibitions In this globalized world are making it difficult to achieve the objectives. Currently there is no consensus on this subject in health law doctrine but the majority support these possible legislations.

The Turkish Council of State has delivered a hopeful judgement about embryo transplantation recently [27]. According to this judgement, a woman can get pregnant via embryo transplantation even if her husband is dead. In the case, the couple was trying some IVF treatments for years and finally in 2020 they had a successful embryo. But before their frozen embryo was transplanted the husband died because of cancer. So the Ministry of Health did not give permission to this transplantation after the husband died and decided to annihilate this embryo. Woman sued the Ministry after this decision and the Council of State found this action of the Ministry as a breach of reproductive rights. This hopeful decision is important for the acceptance and application of these new kinds of technologies within reproductive rights.

Even if it is within the context of reproductive rights or not, women's right to nonproliferation has always been a tool of the population policies in Turkey. Turkey is one of the processor states in legislation on uterine evacuation. This legislation had been made in 1983. Currently, the abortion of less than 10 week pregnancy is legal. In some criminal cases, abortion of less than 20 week pregnancy can be legal. If woman is married, the husband's consent will be seek for abortion. This will be a problem for the autonomy rights of women in the future. Even today there are some feminist groups who react to this legislation [28].

In Turkey it is forbidden to have a caesarian section if there is no necessity. The main reason for this prohibition is the highest rate (%53) [29] of the caesarian section. Actually it is one of the fundamental rights of the woman to have a caesarian section so this prohibition became a huge problematic in the medical ethics.

Occupational health rights Worker's health is a subject strictly controlled in Turkey. In Turkey, there is an occupational and safety law (No:6331) and in this law, there are strict rules on occupational accidents and illnesses. However Turkey is in the third place (15,3 per 100.000) in the world in occupational accidents resulting in death according to the data of ILO [30].

During Covid-19 pandemic, Covid-19 disease was newly regarded as an occupational illness for physicians and for the other sector workers who had caught Covid-19 virus during work.

Turkey has some strict rules on worker's health. For example, in Turkish law, every accident happened during work and every illness that happened while working are counted as occupational accidents/illnesses and these all are under the responsibility of the employer. The employer has to take every measure possible to eliminate the risks. Every workplace, having more than 50 workers or doing hazardous work, must employ an occupational health and safety specialist. And also every workplace, having more than 50 workers, must employ an on-site doctor. Besides, every worker in Turkey has a work accident and occupational disease insurance. These rules are inspected strictly and periodically. There are heavy penalties for the violation of these rules in Turkey.

Right to die with dignity Right to die with dignity contains the right to choose the timing of the death and the right to choose the way of the death [31]. The origin of the right to die with dignity is the Death With Dignity Act of the State of Oregon dated in 1994 [32]. According to this act *a patient must be: (1) 18 years of age or older, (2) a resident of Oregon, (3) capable of making and communicating health care decisions for him/herself, and (4) diagnosed with a terminal illness that will lead to death within six months. It is up to the attending physician to determine whether these criteria have been met* [33]. Currently, not only Oregon has the Death With Dignity Act, but also 9 other States (Washington, California, Colorado, Columbia, Hawaii, Maine, New Jersey, New Mexico, Vermont) [34] of The USA have the Death With Dignity Act.

In Turkey, there is a prohibition for euthanasia so the right to die with dignity is not an acknowledged right. Right to die with dignity cannot be tought without the euthanasia issue. So when the euthanasia will be at the agenda, then we can discuss the right to die with dignity again in Turkey.

Even if we are defending that right to die with dignity cannot be completely discuss where the euthanasia is prohibited this does not mean that right to die with dignity means euthanasia. Steinberg describes the right to die with dignity as *"Preserve his humanity, even if to preserve his humanity means to allow the natural processes of a disease or affliction to bring about a death with dignity. The patient will be choosing death sooner rather than later, to avoid a life filled with pain, frustration, helplessness, and hopelessness, dependent on machines or other people. This is a fundamental element of the right to self-determination, the exercise of which depends on how an individual patient values a life of suffering, under permanently disabling conditions, relative to a quick death."* [35] Euthanasia is one of the methods to use the right to die with dignity. There are some other methods for using the right to die with dignity such as assisted suicide and physician-assisted suicide and these terms are not the same according to the studies. [36] The main purpose of medicine is to ameliorate the pains of the patients as Gostin stated. So according to Turkish Medical Association's declaration about end of life [37], painful treatments that became a torture for a patient cannot be defended and the intensive care and the palliative care services must be delivered professionally and in the light of current affairs. The declaration indicates that the right to die with dignity is not only about right to die (euthanasia and assisted suicide methods), it is also about to get highest quality of end of life care. After these definitions we can remark that the right to die with dignity is an umbrella term which contains the right to palliative care and the end of life methods such as euthanasia and assisted suicide. Right to palliative care and euthanasia will be explained in the next sections.

The right to palliative care Palliative care has been defined as one of the fundamental rights in CESCR General Comment No. 14 of the article 12 of the International Covenant on Economic, Social and Cultural Rights. In International Guidelines on HIV/AIDS and Human Rights, the right to palliative care is specified as one of the fundamental rights. Also, the right to palliative care is located in the Universal Declaration of Human Rights as a fundamental right too. Besides, the Council of the European Union has declared the right to palliative care as one of the strictly bonded personal rights. And finally, 14 of the fundamental medicines determined by the World Health Organization (WHO) are the medicines of palliative care.

In Turkey, the right of the palliative care is regulated in a directive entitled "Directive for Palliative Care Services Implementation

Procedures and Principles" which was published in 2015 [38]. This is the only official regulation about palliative care in Turkey and there is no legislation about it. But this was a big step on the right of palliative care in Turkey.

According to this directive, there is no right to be in palliative care units of the hospitals till the end of life. If a patient wants to use its right to palliative care, this care can be maintained in the patient's house or in the private facilities. If a hospital is not able to accept a palliative care patient, then there can be no responsibility of the hospital on not being able to accept the patient [24].

Also, this directive has no regulation on the speciality of the physician which will maintain the palliative care but according to this directive, anesthetists are preferred in palliative care practice. The other important issue of this directive is the consent issue. A palliative care patient must give its consent to the palliative care and if the patient is unable to give its consent then the relatives of the patient must give their consent to the palliative care. But if the nonacquiescence to the care has harmful consequences for the patient itself then the senior physician will evaluate the situation. This is an important regulation on consent issue and this is one of the exceptional situations in consent matter in Turkish health law.

Palliative care is a young matter in Turkish health services. In the next few years it is expected that palliative care will become widespread all over Turkey. Nowadays many private hospitals invest in home care services, especially for the palliative care services in home. So we expect new regulations on palliative care in the next years in Turkey.

Euthanasia There is no consensus on euthanasia in global arena. European Court of Human Rights (ECHR) has decided that the article 2 of Convention (Right to life) does not include the end-of-life decision (active euthanasia) [39]. Besides, in the same case, Court has decided that help to suicide or faciliate death cannot be in the scope of the Article 3 (Prohibition of torture). But in another case (Widmer vs. Switzerland, 1993), ECHR has decided that the Article 2 cannot be interpreted as prohibition of passive euthanasia [40, 41].

The term euthanasia is quite different then the term assisted suicide. Euthanasia is described as *act undertaken by one person with the intention of ending the life of another person to relieve its suffering* [42]. Nevertheless assisted-suicide is described as *killing oneself with the assistance of another person* [42]. Even if these terms are interwoven by being the methods of to use the right to die with dignity, they are actually quite different.

In USA and UK, passive euthanasia is evaluated in the scope of the right to refuse treatment [24]. In Turkey, every types of euthanasia are prohibited in the Article 13 of the Patient Rights Regulation and also euthanasia is in the scope of intentional killing crime in Turkish Penal Code. But Turkey is a developing country, so when the euthanasia becomes a global discussion issue, it might be able to be discussed in Turkey too in the near future.

Contemporary issues about health law and medical law in Turkey

Organ and tissue transplantation Organ transplantation is a controversial issue [43] in social, legal and ethical [43] areas. In the one side of the discussions there are right to health and best interest [44] issues and in the other side there are some fundamental rights, such as right to health and the personal right of the donor [45-47]. Organ transplantation issue contains the personal rights of the donors and the recipients, objectives of the treatment and evidence-based medical results. Besides, this issue reunites the ethical, medical and legal areas. Apart from the donor's situation (born dead or alive), there are three main models for authorization of the organ or tissue transplantations. These are; consent, objection and necessity models [48].

In Turkish Law, the consent model is being applied. Legal basis of this model in Turkish law is the first paragraph of Article 14 of Turkish Law (No.2238) on the Harvesting, Storage, Grafting, and Transplantation of Organs and Tissues: *"If a person did not indicate that he or she donated its body, organs or tissues for treatments, diagnosis or medical researches by an official will or an holograpghic will or by a nuncupatory will affirmed before 2 witnesses; its organs can be harvested with the consent of its spouse or its adult children or its parents or its siblings present at the time of death; if there are none of them, this process might be performed with the consent of one of the relatives of the decedent."*

The second paragraph of the Article 14 is controversial: *"Unless a testament with a contrary intention is presented, tissues such as cornea that do not cause any alteration to the appearance of the body when removed can be harvested." Clearly, the second paragraph of Article 14 refers to a distinct tissue but also indicates an expansion through the usage of a preposition that expresses similarity. If this expansion is not kept limited to tissues, it becomes possible to use all biological structures that can be harvested through natural body openings for transplantation based on the presumed consent model. If corneal harvesting does not alter the appearance of the body, even if the wording of the article has a preposition of similarity namely 'such as', the highlighted tissue is only the cornea. Presently, there is no published study that we know of regarding the definition of the phrase "not altering the appearance of the body."* [49] These kinds of uncertainties in the wording of this regulation cause huge confusions and many questions of the debates in the different areas. But the regulation came into force in 1979; so this aged regulation needs some improvements and some clarifications in the controversial Articles. Transplant tourism is a developing area of health tourism and as above mentioned Turkey is one of the important health tourism countries in the World [50]. So our regulations must be coherent with these innovations.

Public health Seperation of the term medical law from the health law discipline was discussed in many academic studies.

While Nys describes the term medical law, he specified that the descriptions of the term cannot be objective and that all the cultural, historical, moral, scientific and legal differences can change the definition [51]. We think that medical law is a projection of the relationship between healthcare professionals and patients and it is a subject of a private and public law separately with the right, mission, authority and liability issues.

There are some researchers (Savatier et al.) who make an effort for a general definition. In 1956, this group specified that the medical law is examining the relationships that the physicians are the sides of [51]. This definition was criticized because of being narrow but we think that it is an accurate and contemporary definition. This definition of the French group has the characteristics of a law of profession. Memeteau's remark, which defends that the physicians cannot interiorize the existence of the medical law in medical ethics and professional ethics, brings a new perspective to this narrow definition [51]. Nys emphasises the interpenetration of the medical law and medical ethics with this statement: "What the rules of medical ethics demand of a physician will, at the same time and to a large extent, also be the legal obligation that has to be fulfilled." [51]

Many authors emphasized that the medical law is the subject of private and public law separately. When the works of these authors are examined, it can be seen that they all defined the medical law as the relationship between patient and healthcare professional. Besides, their definitions are criticized because of confining the term to the physicians. Nevertheless, we are trying to widen the term's scope with all of the healthcare professionals [52-54]. Kennedy and Grubb specified that the term medical law refers to the relationship between the physician and the patient in the 3rd edition of their book "Medical Law" and in this edition they emphasized that the main subject of the medical law is human rights. With this definition, medical law generally became a part of human rights law and peculiarly the subject of constitutional law [53]. However, according to Sheldon and Thompson, while the term medical law focuses on the relationship between the patients and the physicians, it neglects the nurses, therapists, physiotherapists and the other healthcare professionals [55]. Brazier and Glover indicate the same negligence and they defend that terminological change is inevitable [56]. We don't defend this kind of change because this change refers to the transformation of the

term into health law but the health law is a different area and a mixed discipline. In other words, a piece must take its place in total and this position finding must be done with integration, not with the terminological change.

Gokcen had defined the term health law by emphasizing its mixed-disciplinary feature as *"Health law is a department of law which contains the rights to reach to healthcare services of the citizens, regulations of the healthcare services, measures for protecting the public health, protection of public health, relationship between the patients and the healthcare professionals and the rights, liabilities and responsibilities depending on this relationship." [57] Canturk defined the medical law as "A department of law whose subjects are the rights and the liabilities of healthcare professionals in the course of the service delivery and the rights of patients and physicians."* [58] in its textbook. Kalabalik divided health law into four as medical law, healthcare law, public health law and law of management of healthcare services [59]. Sert defines the health law as an extensive discipline which contains social security, environment and food health apart from healthcare services and also describes medical law as a subheading which is composed of the rights and liabilities of the medical interventions [60]. Gokcen indicates medical law as an interdisciplinary area which carries the elements of constitutional law, administration law, penal law and private law [57]. Author also uses the terms medical penal law and medical liability law [57]. Hakeri, simply describes medical law as the law of medical interventions and characterizes this subheading as an interdisciplinary area. According to the author, medical law has some characteristics of constitutional law, penal law, administration law and civil law [61].

To sum up, the relationship between health law and public health law may be explained as a cluster approach. Health law is a macroaggregate and the public health law is one of the subsets of this macroaggregate. Public health law is one of the departments of health law featuring the law enforcement. In some papers this feature is described as "Police power" [62]. Some of the authors describe public health law as the relationship between the state and the community [63]. Gostin states that the main purpose of the art or science of medicine is to identify and ameliorate ill health in the patient, public health seeks to improve the health of the population. So this statement shows us the difference between the medical law and the public health law. Public health law is a department of health law in which the state has heavier responsibilities and enforcement power.

In Turkey, public health matters are regulated in the Law on Public Hygiene (no:1593) but it is a quite old regulation which was regulated in 1930. So this law cannot respond to the needs of today. For example during Covid-19 pandemic, this law cannot be used due to not including the general pandemic diseases. The pandemic diseases partaking in the law above mentioned are the diseases which cannot be seen today. During Covid-19 pandemic, there were no new regulations made. The process was managed via only circulars unconstitutionally.

Also, article 195 (Acting Contrary to Measures to Contain Contagious Disease) of the Turkish Penal Code regulates a crime about public health as "Any person who fails to comply with quarantine measures, imposed by the authorities on account of there being a person infected with a contagious disease or having died from such, shall be sentenced to a penalty of imprisonment for a term of two months to one year." This article became a current issue and applied frequently during Covid-19 pandemic in Turkey.

In the article 11 of European Social Charter which was put into effect in 1965, regulations were made under the title of "The right to protection of health" as mentioned above:

"With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed inter alia:
1 to remove as far as possible the causes of ill-health;
2 to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3 to prevent as far as possible epidemic, endemic and other diseases, as well as accidents."

In the 7th report covering the period between 1994-1998, the EU Social Charter's auditing body specified that Turkey did not fulfill its obligations according to Article 11 so that Turkey breached the Charter.

Article 35 of the EU Charter of Fundamental Rights is also about public health, entitled as "Health Care":

"Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities."

Currently, Turkey and the European Social Charter Conclusions with respect to these provisions were published in March 2021 [64]. According to Thematic Group 2 "Health, social security and social protection"

A number of measures to reduce infant and maternal mortality, including access to family doctors, the increase in the number of "Baby Friendly Hospitals" or the "Guest Mother Project", have led to very significant improvements in respect of infant and maternal mortality rates.

Amendments to Law No. 4207 on Preventing the Damage of Tobacco Products and their Control, new regulations have started to be implemented as of May 2008 on passive smoking. It is now prohibited to smoke in all open and closed public spaces.

Public Health is an important agenda topic in Turkey, as in the other countries especially during these times of Covid-19 pandemic. New regulations are expected in public health issue especially for the measurements of Covid-19, in the next few years.

Violence in healthcare Nowadays, cases on violence in healthcare are increasing in Turkey. Lately, we see a lot of news about violence in healthcare. After these violence cases, the law draft on violence in healthcare is on the carpet.

In the current situation, healthcare workers can seek their rights in the scope of criminal law for the violence actions of the citizens. Also, against the violence in healthcare there is a code system. When a healthcare personnel is alarmed white code it means the personnel is under a violence threat. But the efficiency of this code system is questionable. If measures are not taken to prevent this situation, we will encounter more violence actions in healthcare day by day.

Medical malpractice and legal cases Nowadays medical malpractice cases comprise a huge part of the legal cases in Turkey. According to the researches [65] many of the malpractice cases are about obstetrics and gynecology and the list continues with general surgery, paediatrics, internal diseases, brain surgery, anesthesiology, cardiovascular surgery, orthopedics, cardiology, infectious diseases and microbiology, otorhinolaryngology and plastic surgery.

In Turkey, legal cases about health and medical malpractices can be claimed in criminal courts, civil courts (for compensation claims) and in administrative courts. The physician can be directly sued in the cases of criminal jurisdiction and civil jurisdiction. Besides, the hospital can be sued along with the physician in the civil cases. In administrative courts, only the administration can be sued. That is why in administrative courts the physicians cannot be defendants. They can only be intervenors.

In the next few years an increase is expected in legal cases about medical malpractice, especially in the ones about Covid-19 treatments and the vaccines.

Penal liability Actually, the actions of the physicians on the human body have the characteristics of violation of physical integrity. These actions are fitted to the definitions of the intentional killing or injury crimes in Turkish Penal Code. But these actions have some compliance reasons with laws defined in Article 26 (Use of a Right and Consent) of the Turkish Penal Code: *"A person who exercises his right shall not be subject to a penalty. No penalty shall be imposed in respect of any act committed as a result of the declared consent of another person and provided that such person has the full authority to give consent."* So according to this Article, proper medical interventions cannot be the

subject of intentional crimes. But the incorrect medical interventions can be the subject of the recklessness which is regulated in the Article 22 of the Turkish Penal Code: *"Acts conducted with recklessness shall be subject to a penalty only where explicitly prescribed by law. Unconscious recklessness is defined as conducting an act without foreseeing the results as stated in the legal definition of the offence, due to a failure to discharge a duty of care and attention. An act is conducted with conscious recklessness when the result is foreseen but is not desired; in this case the penalty for the reckless offence shall be increased by one-third to one-half. The penalty to be imposed for an offence committed with recklessness shall be determined according to the offender's fault. In offences committed with recklessness, if there is more than one offender, each individual shall be culpable for his own fault. The penalty for each of the offenders shall be determined separately, according to their own fault. A penalty shall not be imposed if, as the result of a reckless act, the offender becomes a victim to such a degree (by reference to his personal and family circumstances only) that imposing a penalty becomes unnecessary. Where the offence is committed with conscious recklessness then the penalty to be imposed may be reduced by one-sixth to one-half."*

In Turkey, the physicians are put on trial for these crimes commonly; killing crimes (intentional or reckless), injury crimes (intentional or reckless), violation of privacy, illegally obtaining or giving data, counterfeiting documents (official or private), bribery, extortion and misuse of public duty [66]. The number of penal cases against physicians are increasing day by day.

Compensation Liability (civil law liability) In Turkish civil law, the relation between the physician and the patient is arguably based on the proxy contract. This is not a certain rule, some of the jurisprudents disagree with this motion but mostly this legal relation between the physician and the patient is based on the proxy contract. The court of cassation agrees with this motion. So when a medical malpractice occurs, the physician has a compensation liability for breaching the contract.

Within the scope of Turkish civil law, the compensation liability of the physician is not limited to proxy contract. Physicians are responsible for medical malpractice based on tort liability and negotiorum gestio too. If there is no contract between patient and physician, these types of liabilities might come up. Tort liability simply means the liability for unlawful actions. Negotiorum gestio is defined simply as "*acting on behalf and for the benefit of a principal, but without his or her consent*" [67]. For example, when there is an emergency situation and when the patient is unconscious, the physician acts without the patient's consent. In Turkish medical law, the best example for the negotiorum gestio is the extended operation situation. When the necessity occurs and the patient is unconscious, the physician acts on behalf of the patient without its consent. In this situation the physician is responsible for its malpractice.

In Turkish law, compensation cases arising from medical malpractices are heard in Consumer Courts. Because the proxy contract is counted as a consumer transaction. In accordance with the Turkish Law on Consumer Protection, the mediation process is a cause of action. That is why for the compensation claims, the patient must apply to the mediator first. Thus it is aimed to solve these kinds of disputes in the fast lane.

Defensive medicine Defensive medicine arose in the 1970s in the USA for the need of self-defence of physicians [68]. There are 2 types of defensive medicine; these are positive defensive medicine and negative defensive medicine [69]. Positive defensive medicine includes doing unnecessary tests, prescribing unnecessary drugs, unnecessary consultation, unnecessary hospitalization, etc. Negative defensive medicine is the opposite of positive defensive medicine; it means negative defensive medicine is to avoid doing advanced medical intervention. Negative defensive medicine includes sending the patient to another physician or hospital, not doing necessary advanced medical interventions and advanced tests, etc. [68, 70] These applications lead to the liability of the physicians. Also, this leads to lack of physicians in risky specialties in the long term, because the physician candidates tend to not choose risky branches [71].

In Turkey, defensive medicine applications can cause to higher liability of a physician because in defensive medicine, the physician acts intentionally [24].

ECHR draws attention to the risks of the pressure on the physicians and decided to the States must ensure the diminishment of the pressure on the physicians. "Defendant medical practitioners in such cases were far better placed than claimants to scrutinise the validity of their conclusions. There were no rules effectively ensuring the objectivity of their conclusions, whereas they had a tendency to exculpate their colleagues out of professional ethics. The risk of incurring criminal liability for giving false conclusions was not a sufficient deterrent because, in view of the highly specialised subject matter, the risk that such an offence would be exposed was a very slim." [72]

Nowadays, defensive medicine applications are augmented in Turkey as in many countries. These applications are taught in many medical faculties in Turkey so more increase is expected on the defensive medicine applications in the next few years in Turkey.

Conclusion

Turkey is a member of many international organizations and a candidate state for the European Union. Turkey is a country which makes continuous updates in health law as a requirement of these international organizations and as being a state of law as stated in the Turkish Constitution. Regulations on public health and workers' health which came into force long before the Universal Declaration of Human Rights in Turkish law show us that Turkey is an experienced country in medicine and law both. Turkish Law (no.224) on Socialization of Health Care Services came into effect in the 1960s and it is still in force. Even if there are some criticisms [73] about this Law as it became obsolete after the Health Transformation Program, this Law is still legally binding.

Turkey has approved many international papers on Human Rights. So the articles of these papers relevant to the right to health are binding for Turkey too. Turkish Law on the Harvesting, Storage, Grafting, and Transplantation of Organs and Tissues and the Turkish Population Planning Law, which came into force shortly after the 1970s where the medical and public developments and changes had undergone, shows us that Turkey had followed closely the universal developments on right to health and had adapted them to the national law. Patients' Rights were regulated in 1998 in Turkish law and Turkey is one of the pioneering countries in the world.

Turkey has important developments on access to health, access to the high quality and reliable health care services and its equal distribution across the country. But in this transformation period, some unpredictable occasions had happened too as the destiny of every transformation period. There are some unsolved issues such as economic rights of health care professionals, violence in health, increasing legal cases (penal and civil) against health care professionals, ineffectiveness of primary health care services and these issues require some corrective actions in the fields of medicine and law.

Reflections of the developments in medicine on legal fields and the universal problem of avoiding the consequences of these developments which might damage human dignity is one of the problems of Turkey too. Ovideo Convention which is signed by Turkey too, has a force above the law. The Ministry of Health makes the required tracking and regulations. There are many important developments in theoretical as well as practical in Turkey after the 2000s as the development of health law, which is a transdisciplinary research area of medicine and law. The postgraduate programs on health law of many universities laid a foundation of the collaboration of medicine and law. We think that Turkey, who has a highly improved health care system, will be one of the countries having control over health law in the world in the next few years.

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