

RESEARCH	Health facility responsibility for “th” mandatory vaccination	
ARTICLE		
Djelloul Haidour	Doctor	
	Faculty of Law and Political Science, University of Mascara	
	Algeria	
	Email: djelloul.haidour@univ-mascara.dz	
Cylia Hamache	Doctor	
	Faculty of Law and Political Science, University of Mascara	
	Algeria	
	Email: cylia.hamache@univ-mscara.dz	
Noureddine Hairech	Doctor	
	Faculty of Law and Political Science, University of Mascara	
	Algeria	
	Email: hairechnou@univ-mascara.dz	
Doi Serial	https://doi.org/10.56334/sei/8.7.62	
Keywords	Damage; liability; facility; compensation.	
Abstract		
Legal liability for medical damage is one of the most important topics that attracts the attention of jurists and researchers in the legal field, especially since medical facilities have begun to use medical machines and devices from specialists, the use of which is often characterized by risks that threaten the health and life of the patient despite its great benefits, and the use of modern and complex technologies in the medical field, which may result directly or indirectly, immediately or later, in damages to the clients, in addition to the risks that accompany the work of prevention, diagnosis or treatment, including damages resulting from a medical accident or a clinic infection, or damages resulting from the approved health protocol, and the determination of objective liability entails repairing the damage suffered by the injured party, and the state may resort to mandatory vaccination, which results in damages.		
Citation		
Djelloul H., Cylia H., Noureddine H . (2025). Health facility responsibility for “th” mandatory vaccination. <i>Science, Education and Innovations in the Context of Modern Problems</i>, 8(7), 596-604; doi:10.56352/sei/8.7.62. https://imcra-az.org/archive/365-science-education-and-innovations-in-the-context-of-modern-problems-issue-7-volviii-2025.html		
596 - www.imcra.az.org . Issue 7, Vol. 8, 2025 Health facility responsibility for th mandatory vaccination Djelloul Haidour, Cylia Hamache, Noureddine Hairech		

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Received: 19.01.2025

Accepted: 28.04.2025

Published: 06.06.2025 (available online)

Introduction:

Civil liability in general and medical liability in particular have witnessed significant development due to technological and scientific development and the use of modern and complex techniques in the medical field, which may result in damages to beneficiaries without the doctor or his staff committing any error. As much as these machines, techniques and medicines are necessary to treat some diseases, they may pose a risk to the patient's health and may cause permanent disability or loss of life, or cause deformities to the fetus if the vaccinated woman is pregnant. The state, through its health facilities, may force its citizens to get vaccinated to avoid contracting some serious diseases.

This may result in damages that are difficult to remedy, especially since there are some people whose bodies cannot tolerate these vaccines, or the studies conducted on the vaccine that has been put into circulation are insufficient, in light of the spread of epidemics that threaten the entity of the state, so the state finds itself between the necessity of imposing the vaccine on public health, while committing to bearing the consequences of the damages that it may cause, despite its use as required.

The objective responsibility that is imposed on health facilities in the event that a patient, therapist or beneficiary suffers harm if the health facility uses a new medical treatment with unknown results, without any error on the part of the doctor or medical staff, as soon as there is a causal relationship between the harm and the act carried out by the doctor or his staff, the injured party can obtain compensation, noting that the causal link in the medical field is difficult, in light of the difficulty of proving the complexity of the patient's health condition.

The subject of objective medical responsibility of health facilities is of great importance, especially in light of the tremendous development in the field of medical sciences, treatments and medicines used to combat new, unknown diseases, as is the case with the Corona pandemic "Covid 19", in addition to the vaccines that have been produced to prevent infection with this pandemic, but there are those who fear the effects that may occur in the long term, while many are moving towards making vaccination mandatory.

Therefore, the problem raised is to what extent are health facilities responsible for damages that are not actually due to the doctor's behavior as much as their original and real cause is due to the vaccination itself?

To answer this problem, we must address the nature of the objective responsibility of health facilities for treatment, and the effects resulting from its approval, relying on the descriptive analytical approach..

THE FIRST TOPIC: The concept of civil liability without fault for damages resulting from compulsory vaccination

To determine objective liability for damages resulting from compulsory vaccination, it is necessary to define the concept of compulsory vaccination and the provisions of this liability, which differ from liability based on fault, while clarifying the position of the Algerian legislator on liability without fault for damages resulting from compulsory vaccination.

FIRST REQUIREMENT: The concept of mandatory vaccination

Vaccination is a preventive procedure that depends on introducing a foreign body into the human body in order to protect against diseases, by introducing bacteria or viruses or part of either of them that has been subjected to several physical or chemical factors. Vaccines generally contain preservatives and immune-stimulating substances for the purpose of strengthening the immune system's response to the vaccine while prolonging the duration of immune stimulation and antibiotics for the purpose of preventing the growth of bacteria in the vaccine fluid or substance, and various saline

substances depending on the type of vaccine, and water or any other liquid¹, and in this regard, the World Health Organization defined the vaccine as a preparation provided to induce the body to become immune to a disease by stimulating the production of antibodies, in vaccines that contain a suspension of inactivated microorganisms, and is done through injection, orally, or through nasal sprays².

A vaccine is also defined as a substance given to a person with the aim of stimulating the immune system to confront and eliminate the disease-causing agent or its toxins when it enters the human body³, and therefore vaccination is the process of deliberately giving a person disease-causing germs, live or dead, or their stored toxins for the purpose of inducing the body to form a state of immunity against those germs or against their toxins without those germs having the ability to cause disease.

First section: Definition of mandatory vaccination

Vaccination is defined as the process of creating direct contact between the immune system of the vaccinated person and the weakened or killed germ or its harmless toxins in a way that does not cause any disease or complications, and is sufficient to stimulate the immune memory to protect the vaccinated person when the germ actually enters his body and to effectively confront its damage and toxins, and thus prevent this from developing into a disease or other complications that follow follow it⁴. Most vaccinations are given by injection, while others are given orally or by nasal sprays. Therefore, the basis of the idea of vaccination is to form immunity against diseases. Immunity is the body's ability to confront pathogens such as bacteria, viruses, fungi, cancer cells and their toxins, eliminate them and prevent them from harming its organs and cells. Immunity may be natural and present in the body by nature. Acquired immunity is divided into two types: immunity that the body acquires directly after contracting a disease, and immunity that the body acquires indirectly through the process of various vaccinations against diseases⁵.

As for mandatory vaccination, it is defined as a means that aims to provide immunity and prior protection from the risks of contracting diseases and the resulting symptoms and complications that may lead to disability or death⁶. It is an activity among the medical activities of public health institutions, aiming to maintain public health and protect citizens from various infectious diseases by obligating members of society to receive it⁷.

First section: Algerian legislator's definition of vaccines

The Algerian legislator has included the vaccine within the immunological medicine that is given to a person in order to create active or passive immunity, or in order to diagnose the state of immunity. Algerian laws have stipulated compulsory vaccination since the 1969 law, whether that which children are subject to since birth, or that which travelers are subject to, as well as people who practice activities that expose them to serious diseases, but without referring to determining the state's responsibility for the damage that may be caused to individuals.

SECOND REQUIREMENT: Provisions of the objective liability of the state for damages resulting from vaccination

If the Algerian legislator did not clarify the extent of the state's responsibility for the damages that befall individuals as a result of their being subjected to compulsory vaccination, the French legislator adopted the state's responsibility without fault for the damages that may befall individuals as a result of their being subjected to compulsory vaccination, after amending Article 10 of the Health Law of 1964 pursuant to Article 03 of Law No. 75-401, and it approved the state's responsibility for vaccinations that are performed outside approved centers.

First section: Basis of liability without fault for damages resulting from compulsory vaccination

¹ Hiwa Ibrahim Qader, Dilawar Aziz Khalil, Civil Liability of the State without Fault for Compulsory Vaccination Damages, Journal of the College of Law for Legal and Political Sciences, Volume 12, Issue 47, Iraq, 2023, p. 425.

² Ibid. p. 425.

³ Ibid. p. 425.

⁴ Ibid. p. 426.

⁵ Nadia Belamouri, Vaccination as a Preventive Mechanism and its Impact on Child Health, Child Rights Notebooks Journal, Volume 09, Issue 01, Algeria 2018, p. 6.

⁶ Onid Sabah Othman, Civil Liability for Compulsory Vaccination Damages, Al-Baheth Journal for Academic Studies, Volume 6, Issue 01, Algeria, 2018, p. 56.

⁷ Abdel Rahman Fatnasi, Administrative Responsibility of Public Institution Workers for Their Medical Activity in Algeria, Master's Thesis, University of Batna 1, Algeria, 2015, p. 286.

The basis of liability means the consideration on the basis of which the state, represented by the health sector, bears responsibility for the damages it caused to others as a result of the compulsory vaccination it provided to them. There are several bases for explaining the basis of liability without error, which we will address in turn, as follows:

Firstly: Risks as a basis for liability without fault

The risk theory means that whoever creates risks that he benefits from or from must bear the consequences of the damages. Applying this to the management's activity, the benefit that the management benefits from its activity requires it to bear the consequences of this activity. The consequences of bearing risks are represented in compensating for the damages that befall individuals as a result of these risks, based on justice and fairness⁸.

The majority of French jurisprudence supports the theory of risk as a basis for the objective liability of public health facilities, since the practice of the medical profession requires taking risks. Patients may be exposed to physical danger from the use of modern treatment techniques that involve exceptional risks, i.e. the activity of this facility involves exceptional risks, and the use of modern treatment techniques may have harmful and unexpected effects on the human body that must be guaranteed, and the public health facility must guarantee these risks.

The French legislator also intervened with explicit legal texts to implement the risk theory in many areas, especially in the field of mandatory vaccination, to achieve liability without fault based on the idea of risks for the activity of the public health facility. The following conditions must be met⁹:

- The harmful act must be a necessary medical act.
- This medical act must be such that it creates a risk, but its occurrence is exceptional.
- The medical act must be the direct cause.

Secondly: The principle of equality before public burdens as a basis for liability without fault

The principle of equality before public burdens means equality among members of society in bearing public costs. It is one of the highest principles of justice that requires the citizen to contribute to the burdens resulting from the management of public facilities within the limits of his capabilities. Article 37 of the 2020¹⁰ constitutional amendment states the following: "All citizens are equal before the law...", including equality in bearing the costs of managing public facilities and others, requires that when the administration places a burden on some citizens that exceeds that borne by the rest of the citizens, these citizens must bear these additional burdens in exchange for the benefits they benefit from, and this applies to all citizens in general and abstract.

Accordingly, this principle imposes two aspects. The first aspect is equality among citizens in rights and benefits, which in turn is represented and embodied in equality before the law and before public utility services. The second aspect is equality among citizens in burdens, costs and public duties (equality in sacrifice), which is the basis for the state's responsibility without fault¹¹.

Scientific and technological development has led to the expansion of the scope of administrative liability without fault, by adopting the principle of equality before public burdens as a basis for it, in the absence of a danger on which it is based, and compensation in this principle is based on the idea that the damage resulting from the activity of the administration should not be borne by a specific individual as long as the benefit accrues to the public. The majority of French jurisprudence has called for considering this principle as the basis for the state's liability without fault for the damages of mandatory vaccination for the public interest, and the social necessity that requires the legislator to regulate the mandatory vaccination process, so that if it results in unusual harm to the person receiving the vaccine, the state bears compensation on the basis of the principle of equality before public burdens, because the source of the harm is the law issued by the legislator, which imposes legal obligations on citizens for the benefit and protection of society. In the event that one of the individuals addressed by this legal act bears an unusual burden, justice in distributing the burdens among citizens requires

⁸ Masoud Shahoub, *Liability for Risks and Its Applications in Administrative Law, A Comparative Study*, Office of University Publications, Algeria, 2000, p. 3.

⁹ Abdul Rahman Fatnasi, *Ibid.* p. 59.

¹⁰ Constitutional Amendment of 2020, issued by Presidential Decree No. 20-442, dated December 30, 2020, approved in the referendum of November 1, 2020, Official Gazette of the Algerian Republic, No. 82, issued on December 30, 2020.

¹¹ Boukarch Belkacem, *State Responsibility for Special Texts*, Journal of Legal and Social Sciences, University of Djelfa, Volume 5, Issue 3, Algeria, 2020, p. 722.

compensating this individual, in respect of the principle of equality among citizens, the application of which depends on the fulfillment of two conditions, which are:

- That the resulting damage has the character of a public burden.
- That there is a breach of the principle of equality before public burdens.

Second section: Conditions for achieving liability without fault for damages resulting from compulsory vaccination

Compulsory vaccination is imposed by the state on individuals, for the sake of a public interest that benefits society more than it benefits the person who underwent vaccination. This vaccination has a compulsory nature for citizens in order to prevent epidemic diseases in society. In contrast, and in order to determine objective liability for damages resulting from compulsory vaccination, several conditions must be met in addition to the general conditions in the system of liability without fault. These conditions can be divided into two groups: the first is specific to the compulsory vaccination process itself, while the second group relates to the damage resulting from the compulsory vaccination process.

Firstly: Conditions for mandatory vaccination

- The vaccination process must be necessary. The state is always looking for appropriate health solutions and measures to reduce diseases that threaten public health. Vaccination is considered one of the most important means implemented by the state to protect society from serious and infectious diseases. It even goes so far as to impose these health measures, so that individuals cannot refuse them in order to preserve public health¹². The state is responsible for mandatory vaccination operations without fault, due to the mandatory nature of vaccination, which aims to protect public health and protect society from epidemics.

- That the compulsory vaccination process constitutes an exceptional risk: that is, compulsory vaccination may cause known risks, but their occurrence is exceptional. - That compulsory vaccination has been carried out in accordance with the conditions specified by law: In order to achieve the state's liability without fault for the damages resulting from compulsory vaccination, the vaccination process must be carried out in accordance with the conditions specified by the legal texts. Although this condition does not raise many problems given that the texts have determined the organization of the compulsory vaccination process, the problem raised in this regard is to know the party responsible for the damages resulting from compulsory vaccination in the event that such vaccination is carried out outside the public health facility such as private clinics or at home by the family doctor.

This issue has raised a great deal of controversy in France, knowing that the French legislator in the 1964 law on the state's liability without fault for damages resulting from compulsory vaccination stipulated that the state's liability must be carried out in centres approved by the state. The problem was in defining the concept of approved centres, although most French jurists considered that the term approved centre allows for the state's liability without fault to be established whether the vaccination was carried out in a public medical facility or in a private clinic.

Although the majority of jurisprudence demands that the scope of the state's liability extends without fault to damages resulting from compulsory vaccination performed in private clinics, the French administrative judiciary has not ruled on the state's liability without fault unless compulsory vaccination is performed in an approved center, and the administrative judiciary has continued its position of refusing to grant compensation for damages resulting from vaccination performed outside approved centers, in compliance with the text of the law. However, on May 27, 1975, the French legislator issued Law No. 75-401 amending the 1964 law, in particular the first paragraph of Article 10, and by virtue of it the condition that vaccination must be performed in an approved center was cancelled, after the phrase "in an approved center" was deleted in the new text, and thus the state became responsible for all damages resulting from compulsory vaccination regardless of the place where it was performed without any fault on the part of the vaccinator. This would achieve justice, because mandatory vaccination was imposed by the state by law, not the entity that carried out the vaccination for the public interest, so it must bear the harmful consequences resulting from it. In addition, carrying out mandatory vaccination in private clinics cannot cancel the obligation to vaccinate imposed by the state on individuals.

Secondly: Conditions for damage resulting from compulsory vaccination

Damage is the basic element of liability and must be proven in order to rule on compensation. However, not all damage is compensable in liability without fault. Rather, several conditions must be met, in addition to the general conditions that

¹² Adel Bin Abdullah, Administrative Responsibility of Hospital Facilities, PhD Thesis, University of Biskra, Algeria, 2011, p. 212.

must be met whether or not the fault is the basis for it. These special conditions for damage are an innovation of the French administrative judiciary in the field of liability without fault, and are as follows:

1- The specific nature of the damage: In order for liability to be established without fault for compulsory vaccination damages, the damage for which compensation is sought must be specific. Specific damage means that it is directed at one person or a specific number of people¹³, such that the injured party finds himself in an exceptional situation that is not shared by other individuals. However, if the damage affects an unlimited number, it becomes general damage in terms of its extent and loses its specific nature as a condition for the establishment of objective liability.

2- The extraordinary gravity of the damage: The compulsory vaccination that entails the damage must be of an extraordinary gravity of the damage, meaning the damage that exceeds the extent that makes it a normal risk for members of society as members of this group, and it is one of the justifications for adopting the principle of state liability without fault, as the French administrative judiciary stipulates that the damage that gives rise to this liability must be extraordinary, and the extraordinary damage is not determined based on the number of people who were victims of the accident or the risk of vaccination, but rather by looking at the extraordinary gravity of this accident.

3- That the damage is directly attributable to compulsory vaccination: This means that there is a causal link between the damage that befell the injured party and the compulsory vaccination process. The causal relationship is a pillar for the establishment of liability, regardless of its nature. However, the causal relationship in liability without fault differs from its meaning in liability based on fault. While in the latter it means that the damage is the result of the fault, in liability without fault it means that the damage is the result of the dangerous activity or thing. If the injured party is in the area of liability without fault, he can be exempted from proving the fault, but he is obligated to prove the existence of a causal relationship. The law does not allow the judge to rule on the state's liability without fault for compulsory vaccination damages unless the damage is a direct result of compulsory vaccination.

THE SECOND TOPIC: How to compensate for objective liability resulting from compulsory vaccination

Compensation is the penalty for liability, i.e. the effect resulting from it, such that the responsible administrative authority is the one that bears the consequences of the damages it causes to others by compensating for the resulting damages according to specific rules and in appropriate ways.

FIRST REQUIREMENT: Damage assessment rules

The damage assessment rules relate to the nature of the compensable damage, as well as the date of the damage assessment.

First section: The nature of compensable damage

As a general rule, compensation is monetary. The judge may also order the restoration of the situation to what it was or rule to perform a specific matter related to the unlawful act as compensation.

An exception to the monetary compensation rule is the case of compensating for damage resulting from physical assault, which is the administration's carrying out of a physical executive act that affects the right to property or freedom, such as assaulting people in non-exceptional circumstances and arresting them without judicial permission, and assaulting private property without legal basis, such as demolishing or seizing a property¹⁴.

Compensation for these damages shall be on the day the damage occurs, and in the event that the damage occurs within a specific period of time.

Second section: Date of damage assessment

Determining the date of damage assessment is of great importance, and a long time may pass between the date of occurrence of the damage and the date of issuance of the judge's decision to award compensation. The general rule in judicial reasoning is that the date of damage assessment is the date of the ruling in the case.

¹³ Badran Murad, The Basis of Liability for Damages Resulting from Forced Vaccination Operations, Critical Journal of Law and Political Science, University of Tizi Ouzou, Volume 3, Issue 2, Algeria 2008, p. 89.

¹⁴ Hussein Taheri, Administrative Law and Administrative Institutions, Dar Al-Khaldouniya for Publishing and Distribution, 1st edition, Algeria, 2009, p. 270.

French courts have settled, and jurisprudence has supported it, that damage must be assessed on the day of pronouncing the judgment, whether in its constituent elements or its monetary value, because in the period between the occurrence of the harmful act and the issuance of the judgment to award compensation, the monetary price at which the compensation is estimated changes.

Three Section: The judge's powers in assessing damages

The principle is that the judge has broad freedom in assessing the value of compensation that he grants to the injured party within the framework of administrative liability, but this freedom is not absolute and has legal and objective limits.

First: The judge's freedom to assess the damage

The judge's freedom appears in his broad authority, in assessing the amount of compensation according to what he deems appropriate to redress the damage, after reviewing the documents submitted by the injured party. Granting compensation for moral damage falls within the discretionary authority of the judges of the subject matter. However, if the damage is material, it is necessary to distinguish between the damages that affect the person's body and the damages that affect his money. If the damages are physical, the judge must examine the injured party's medical file, taking into account the lost gain and the loss he has suffered.

Second: The limits of the judge's freedom to assess the damage

One of the most important things that can be mentioned in the limits of the judge's freedom to assess the amount of compensation is the request submitted by the injured party, which sets a maximum limit for it, and the judge cannot exceed it so that he does not rule more than what was requested of him¹⁵.

As a general rule, the judge is bound by the requests of the parties and therefore may not rule more than what they have requested. Although it is accepted that administrative compensation is for material and moral damage, including the two elements of damage of existing loss and lost profit, the judge does not rule on this except within the limits of the requests of the parties, such that he should not exceed them, and the judge must specify the amount of compensation from the one requesting it in the submitted petition, otherwise the request is rejected, and the compensation must cover the damage incurred¹⁶.

SECOND REQUIREMENT: Methods of compensation

Article 132 of the Algerian Civil Code stipulates that:

"The judge shall determine the method of compensation according to the circumstances. Compensation may be paid in installments, or it may be a regular income. In both cases, the debtor may be obligated to estimate insurance.

Compensation shall be estimated in cash, but the judge may, according to the circumstances and upon the request of the injured party, order the restoration of the situation to what it was, or rule, as compensation, to pay some assistance related to the unlawful act"¹⁷.

It is clear from the text that the judge determines the compensation, and the compensation may be either in-kind compensation or compensation for a consideration. The principle in administrative liability when penalties are imposed is that compensation is for a consideration, whether it is monetary or non-monetary, and the compensation is usually monetary. Accordingly, the penalty for administrative liability here is monetary compensation, such that in-kind compensation is excluded even if it is possible from a practical standpoint¹⁸.

First section: Compensation in kind

It also means specific execution, which is the best method of compensation, as it leads to the complete repair of the damage by restoring the situation to what it was. This often occurs in contractual obligations, and the judge is obligated to provide compensation in kind if it is possible, whether the creditor requests it or the debtor submits it. One of the most important examples of compensation in kind is the creditor obtaining something of the same type that the debtor committed to at his expense after obtaining the judge's permission. This is according to the text of Article 166 of the Civil Code, which states that:

"If the obligation is to transfer a real right to something that is not specified except by its type, the right is not transferred except by separating this thing.

If the debtor does not fulfill his obligation, the creditor may obtain something of the same type at the debtor's expense after obtaining the judge's permission. He may also demand the value of the thing without prejudice to compensation."

¹⁵ Rachid Khaloufi, Administrative Liability Law, University Publications Office, 2nd edition, Algeria, 2006, p. 139.

¹⁶ Atallah Bouhamida, A Brief Introduction to Administrative Judiciary, Dar Houma for Printing, Publishing and Distribution, 2011, p. 319.

¹⁷ Law No. 05-10 of June 20, 2005, including the amended and supplemented Civil Code.

¹⁸ Sherif Ahmed El-Tabbakh, Administrative Compensation in Light of Jurisprudence, Judiciary, and Administrative Court Rulings, Dar Al-Fikr Al-Jami'i, 1st ed., Alexandria, 2006, p. 7.

Another example is when the contractor refuses to build, so the employer cannot carry out the construction at his expense, according to the text of Article 170 of the Civil Code, which states that:

"In an obligation to work, if the debtor does not fulfill his obligation, the creditor may request permission from the judge to implement the obligation at the debtor's expense if such implementation is possible."

In tort liability, in some cases, compensation in kind can be imagined. This includes a ruling to remove a wall that prevents light and air from reaching the neighbor, as stipulated in Article 132 of the Civil Code. However, in many cases, specific implementation is impossible in tort liability, and the judge is left with no choice but to rule on compensation in return. For example, with regard to damages to the neighborhood, the judge here cannot rule to close a factory that the administrative authority has authorized to be established, and its machines cause disturbance and anxiety to the neighbors, so he rules on compensation in cash.

Second section: Monetary compensation

The general principle is that compensation should be in cash, meaning that the judge has the power to rule obligating the administration that caused the damage to pay an amount of money to the person who suffered the damage. Once the administration pays the amount decided by the judge, the obligation to pay compensation ends. Here, the injured party may not, as long as the ruling is final, request a review of the compensation, with the exception of the case where the severity of the damage has increased from what it was at the time of issuing the ruling. Here, the injured party must resort to the judge once, and he may oblige the administration to pay the injured party an income, i.e. a sum of money, over time. The judge is the one who decides based on the nature of the damage and the position of the right holders. The judge may also oblige the debtor to provide insurance or order that a sufficient amount be deposited to ensure payment of the revenue awarded, as stipulated in Article 132, paragraph one, of the Civil Code.

Three Section: Moral compensation.

It is compensation that is not a financial amount, but rather a mere procedure carried out by the administration to satisfy the person who has been harmed psychologically and his sense of justice. An example of this is: publishing the judge's ruling convicting the administration in the newspapers. Rather, the mere issuance of a ruling in favor of the injured party himself by canceling the decision and obligating the administration to pay the expenses of the lawsuit is considered a restoration of honor and makes monetary compensation unnecessary¹⁹.

The compensation assessment must be a comprehensive assessment that includes all damages suffered by the person affected by the vaccination and lost profits, provided that the compensation does not exceed the value of the damage caused by the administration.

Conclusion:

In the context of the state fulfilling its constitutional and traditional obligations, represented in protecting public health, and deliberately values its function on the preventive side, represented in the preventive side, through compulsory vaccination, that this vaccination may cause harm to individuals, which requires the principle of justice to compensate those affected by the damages caused by compulsory vaccination, but the Algerian legislator did not explicitly state its position on charging the state with compensation for compulsory vaccinations if there is no error on the part of its provider, and on this basis we recommend that the legislator:

- Explicitly stipulate that the state bears responsibility for the damages caused to individuals as a result of compulsory vaccination.
- Adopting the date of discovery of the damage as the beginning of calculating the loss of the right to compensation for the damages caused by vaccines.

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¹⁹ Sherif Ahmed El-Tabbakh, Ibid. p. 8.

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