

The Concept of Mental Health Deterioration in Light of Decisions by Higher Judicial Bodies



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SUMMARY

Important arrangements were made to protect an individuals' sexual safety in the Turkish Penal Code. During judgments of sexual crimes, the witnesses of medical experts are usually used for evidence collection and for researching whether the crimes were aggravated. Due to this, reports are frequently requested from all physicians in all fields of medicine in their daily clinical practices by judicial authorities.

Following implementation of the new Turkish Penal Code, the concept of mental health deterioration was frequently discussed and is still a discussed topic in the fields of both law and medicine in terms of crimes against sexual immunity. It is believed that subjects discussed in this article will provide important information for both adult, child and adolescent mental health professionals in terms of drawing attention to the importance of the medicolegal evaluations which are frequently requested from psychiatrists in their daily clinical practice and in terms of providing an evaluation of the concept of mental health deterioration in light of judicial decisions.

Regarding the process from the beginning of application to the present, prejudications reduce questions about how the concept must be evaluated and what the meaning of the concept is. In this study, the decisions of Higher Judicial Bodies were researched and situations relating to how concepts must be evaluated and the meaning of the concept of mental health deterioration today in accordance with the prejudications were presented.

Keywords: Sexual assault, sexual abuse of child, mental health, medicolegal aspects.

INTRODUCTION

The aim of the law

Laws are issued by the state in order to survive in a society harmoniously and seamlessly and they represent a set of rules supported by sanctions. The functions of laws are to provide peace, security, equality and liberty.

Contradictions to the rules of law result in sanctions (penalty, compulsory execution, compensation and invalidity etc.) which are regulated by the state when the rules are established.

The concepts of crime and penalty

"*Nulla poena sine lege*" means there is no crime and penalty without law. In The Constitution of The Republic of Turkey,

Article 38, it is stated that "No one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed; no one shall be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed.". This article highlights that if defining an action as a crime it must occur precisely in the law. Because of this, people in practice must know the purpose of legal regulation and how legal regulations will be put into practice. Otherwise, justice is not achieved in society. Hence, the law has its own language and the question "How do I know what the laws mean?" comes to mind.

Resources can be used to understand what the laws mean and can be grouped under two main headings: principal and

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ancillary sources. The text of the law, the law's preambles and the Supreme Court's decisions and practices are the principal sources, while scholars' doctrines and articles are ancillary sources.

Definition of sexual crime and penalty in the context of sexual freedom and preference

Sexual freedom and preference are fundamental rights which are inalienable and no other person has a right to speak on them, as they were guaranteed by the Turkish Penal Code. Important regulations were done to the Turkish Penal Code for protecting the sexual security of individuals. The aim of these regulations is not to punish the perpetrators of the crime for revenge. On the contrary, the aim is to prevent the crime with the threat of punishment for those with criminal intent.

A penalty is a sanction which is imposed for the basic shape of the offence. Some situations related to results and commission styles of offence are judged as aggravating circumstances of penalty. In some cases of sexual offence, the punishments imposed are dependent on the way of commission of the offence (in cases of performance of sexual abuse by antecedents, second or third degree blood relations or by undue influence based on public office, etc.), not to defend his/herself against those crimes (children, mental patients and disabled people) and the results of the crime (mental health deterioration, disability, illness and death) are increased.

During these trials, the opinions of medical experts are often referenced and relate to the validation of evidence about the occurrence of the crime and researching as to whether or not aggravating circumstances are present. Because of this, physicians in all areas of medicine are frequently requested to prepare reports which are demanded by legal authorities in their daily clinical practices.

The concept of "mental health deterioration" in sexual assault and abuse crimes

After the Turkish Penal Code (TPC) has inured, one of the topics that is most frequently discussed both in the field of law and medical science and in which there is no consensus is the concept of "mental health deterioration". This topic is encountered particularly by specialists of mental health and diseases of adults and children-adolescents and requires massive responsibility when medicolegal interpretation is done correctly but a valid report is not written; serious sanctions may occur for doctors who do not have shortcomings in terms of medical information but do not know the aims of the report written by them from a legal point of view. Attracting attention is important in medicolegal evaluations claimed from psychiatrists at the time of their clinical studies and being able to provide analysis of the concepts of mental health deterioration in light of judicial decisions is important. Therefore,

it is believed that this study contains important information for all specialists of mental health and diseases of adults and child-adolescents. Precedent decisions taken in the beginning of the application process to the present lessened the mystical nature of the concept. In this study, decisions of the Supreme Court about the concept of "mental health deterioration" are presented and in accordance with the precedent decisions, it is revealed how this concept is understood in the present day and the cases about how the concept should be considered are clarified.

Relationship between penalty and the concept of mental health deterioration in sexual crimes

One subject with whom doctors especially hesitate in a sexual assault or a sexual abuse is when there is a report that no deterioration exists in the mental health of the victim; this would mean that a sexual crime did not occur.

With the decision of the Constitutional Court No. 34, dated 26 February 2009, it is clearly highlighted that "*deterioration of the physical and mental health is not an independent and second crime, it is a reason for increasing in penalty*" and "*it is mandatory that in all concrete cases, it should be stated by the reports of relevant specialists whether a deterioration exists or not by paying attention to age, physical evolution, relative elements like psychological and socio-cultural structures*".

In the decision of the Supreme Court of Criminal General Council, dated 20 November 2007, Docket No. 2007/5-142, it is stated "*In the case of the deterioration of the victim's mental health, there is no criminal state to determine independent and detached penalty, compared to the basic form of the crime, more severe punishment is the case.*" it is noted that the concept of "mental health deterioration" is an aggravating circumstance. Based on this concept, mental health deterioration does not change or remove the basic form of the crime, namely the crime of sexual assault. However, in the case of deterioration a significantly increased sentence is given. In fact, by TPC article no. 103/6, the penalty cannot be less than 15 years if there is a deterioration in mental health of a child in the case of sexual abuse and by TPC article no. 102/5, the penalty cannot be less than 10 years if there is mental health deterioration of an adult in the case of sexual assault.

Permanency problem of mental health deterioration and criteria in permanency evaluation

It is an undeniable fact that each sexual abuse and assault affects mental health seriously. It is stated that the punishment given for the basic type of the crime should include natural and unavoidable effects emerged by that trauma and allocation of the increase in mental health deterioration to severe and continuous health loss circumstances is a more accurate idea (Erol 2009). For this reason the subject under investigation

must be, if the case is severe, whether or not continuous and functionally disrupting deterioration has occurred.

In the case of negative mental influences, interpretations made regardless of its permanence and functional properties lead to severe punishment for perpetrators and serious legal mistakes.

In sexual abuse and assault phenomena, conceptual confusion among physicians related to concepts base on the effects on mental health and mental health deterioration was revealed in a study made by Karbeyaz et al (Karbeyaz et al 2012). In this study, 168 sexual assault phenomena judged in Eskişehir Criminal Court between June 1st, 2005 and December 31st, 2008 and assessed in Eskişehir by local institutions were analyzed. They found 167 of 168 phenomena resulted in mental health deterioration with various diagnoses (post traumatic stress disorder (PTSD), major depression (MD), adjustment disorder, acute stress disorder). The assessment of all phenomena in the Council of Forensic Medicine after at least 6 months revealed that only 9 (7 PTSD, 1 PTSD+MD, 1 MD) of 168 sexual assault phenomena resulted in mental health deterioration. We think the difference between reports from the Council of Forensic Medicine and local institutions about mental health deterioration is due to two basic reasons. First, psychiatric symptoms not receiving any diagnosis of psychiatric disease were defined as mental health deterioration by local institutions and were thought to be severe and permanent consequences of the event. The second reason is that the permanency factor is ignored by local institutions and mental assessments are made just after the event occurs. In this study made in Eskişehir, the determination that 45 (32.9%) of 137 phenomena were diagnosed as 'posttraumatic stress disorder' by local institutions were diagnosed in 1-3 months, 70 (51.1%) of them in 3-6 months, and 22 (16%) in more than 6 months supports the idea that the permanency factor was ignored.

The concept of the permanency factor of mental health deterioration is underlined by Higher Judicial Bodies. The Supreme Court Criminal General Council states in its decision dated 20 November 2007, docket no 2007/5-142 that: *"In case that mental health deterioration of the victim is detected to be permanent by physicians' report, escalation clause may be applied."* In the decision of Supreme Court 5th Criminal Chamber dated 14 February 2011, docket no 2008/5532 it is stated that: *"for the mental or body health of the victim to be the cause of escalation clause, a permanent damage should occur. The existence of the permanent damage shall be determined by physicians' report"* and it is emphasized that permanency is one of the major elements for the "mental health deterioration" assessment and physicians should make that assessment.

For the mental health deterioration to be considered permanent, the one must consider the time frame after the sexual

act the assessment is made. There is not an exact consensus related to this. The diagnostic criteria about mental health deterioration and stated periods to diagnose some mental diseases are available in manuals. For example, by stating that some symptoms for PTSD should last for more than 1 month, PTSD is stated to be diagnosed no earlier than 1 month prior to symptom initiation. However, a criterion is not in question for permanency. Relevant physicians stated that the decision about mental health deterioration of the victim should be made after a minimum of six-month follow-up at intervals of 2 to 3 months (Sirin et al 2006, Karbeyaz et al 2009). In the Supreme Court 5th Criminal Chamber decision dated 07 April 2010, numbered 2010/657 it is stated that: *"In the context of report of 08.02.2009 arranged at 31.12.2008 'before 6 months' beginning from 04.08.2008 by Council of Forensic Medicine 6th Specialized Board upon consultation of the victim; by also taking care that there is no assessment whether the mental health deterioration is permanent as explained in Supreme Court Criminal General Council decision dated 20 November 2007, docket no: 2007/5-142, numbered 2007/240 for the victim stated to be treated before for depression and to be exposed to mental health deterioration; victim shall be consigned to the same institution with the file and after determining whether he is exposed to mental health deterioration and it is permanent; written judgement while the designation and estimate of the legal position of the accused are required, have necessitated cancellation."* With this decision, the application of mental health inspections after at least 6 months is accepted for permanency by higher judicial bodies. In present day the Council of Forensic Medicine states that mental health inspections are to be performed at least 6 months after the event for children (under 18), at least 12 months after the event for adults and dates for assessment of victims' mental health are given by taking these periods into consideration. For the assessment of permanency, not only should some pass after the event but the victim should also have necessary mental treatment during this period. One of the major problems relating to this subject is the lack of necessary medical and psychological support. However, negative mental effect findings are detected in phenomena sent for inspection after sexual assault. Lack of necessary support and treatment for the victim shall also bring into question the claim of negligence of the physicians in permanent problems that could benefit from medical support in anyway.

In stating the permanency of mental health deterioration, some questions may come to mind. For example, is it possible that mental deterioration of a person that seems to recover in 6-12 months by treatment can reoccur after several years, or that a child exposed to sexual assault will exhibit sexual maladaptiveness when he becomes an adult?

In order to make a medical decision, two important points should be taken into account:

- No recovery of mental response occurs after the attack despite appropriate mental support and treatment and their continuation after at least six months follow-up.

- Severity of these findings so as to disrupt social functionality.

Due to other trauma that appears in the period after an event, the effects of the trauma can be recovered by appropriate medical support and treatment; in reoccurrence or reappearance of findings, it is impossible to ignore the effects of the second trauma. For this reason, findings should be accepted to reappear because of the trauma after the initial event. In this case, a cause effect relationship about the second or ingravescient situation should be made with the secondary trauma.

It is impossible to know mental problems in the future with modern methods and criteria. However, it is not possible for judiciaries to decide with abstract data or estimations or to extend the trial period by taking possible problems in the future into account. For this reason, as a physician, it shall be appropriate to make assessments with concrete data in hand. Otherwise, another problem regarding this subject is about relating mental deterioration detection in the future to sexual abuse and assault in the past, thereby establishing a cause-effect relationship.

Permanency problem of mental health deterioration in repetitive sexual acts

In the decision of the Supreme Court of the 5th Criminal Chamber (dated 14 February 2011, docket no: 2008/5532) it was stated that “...*Permanent damage of the victim will come into existence only once. For example, permanent damage of the victim's mental health occurs once, deterioration of mental health in every act was not be discussed again*”. Due to the decision declaring that mental health does not deteriorate over and over again in all events, the Supreme Court of 14th Criminal Chamber has taken the decision that it should be determined because of the perpetrator's action, and mental health deterioration occurred in the event of sexual abuse that has more than one perpetrator (The Supreme Court of 14th Criminal Chamber, Docket No: 2011/13955, Decree no: 2011/4996, Date: 14 December 2011). This point of view, which sets a prejudication from a legal perspective, is not seen as a medically convenient approach. From a legal perspective, it has been observed that it is required to assess psychological trauma as physical trauma. For example, judicial bodies could ask which injury was life-threatening in the event of incisive and penetrating injury performed by two people (one perpetrator had injured the lung of the victim and the other perpetrator had only caused a skin cut). Answering this question is medically possible. In regards to mental trauma, while the problems facing on the determination of causal relation between the event and the current mental findings, in cases of sexual assault or abuse with more than one perpetrator, it is quite controversial to determine whose action caused the deterioration in mental

health. Also, as a comment like the condition formatted once medically is not very accurate. Therefore, we formed an opinion to assess the psychological trauma event as a whole.

The problem of determination of cause-and-effect relationship between the concept of sexual crime and the concept of mental health deterioration

Another problem is to find whether mental health deterioration depends on the event of sexual assault / abuse; in other words to determine the relationship between cause and effect. It was reported that conditions such as mental health deterioration symptoms that begin after the event was learned by the family, environment and judicial authorities that make appropriate causal relationships discussed, have been ignored in some prepared reports (Erol 2009). Also, trauma that was experienced, personal characteristics of the victim (his/her psychopathology independent of trauma) and event-related attitudes of his/her family or entourage affect his/her perception and reaction to the event. Therefore, it is important to identify the cause of mental health deterioration. It is necessary to distinguish the effect of trauma and the other effects of living after the trauma. This is one of the subjects which shows the importance of an appropriate and detailed psychiatric examination performed by experienced psychiatrists.

Assessment of the concept of mental health deterioration in sexual assault and abuse against people who have severe or profound mental retardation

In the decision of the Supreme Court of Criminal General Council (Dated 5 April 2011, Docket no: 2011/5-28), it was stated that “*In the event that the perpetrator is convicted because of the sexual assault, according to the report given by ... Mental Health and Disease Hospital, the female victim has severe mental reterdation and it is identified that she cannot defend herself mentally and there cannot be mental health deterioration after the actions because of the female victim's already existing mental health condition*”. This precedent points out that while assessing the notion of mental health deterioration, it should be noted whether the victim perceives the event or not. In the Turkish Penal Code Article 102/3a, it is stated that in sexual crimes against adults, “*If the offense is committed against a person who cannot protect himself because of corporal or spiritual disability, the punishments imposed according to above subsections are increased by one half*”. Thereby, even mental health deterioration in sexual assault against people having severe mental retardation or diseases that ruin perception or bedridden people, is not assessed, due to TPC Article 102/3a these conditions are seen as an aggravating cause. Hence, there is a deterrent policy about the adults who are in the at risk group for sexual assaults. However, in the case of sexual abuse crimes against children, we note that there is no such regulation in the scope of TPC. It is seen that for the basic form of the crime, the penalty given in the crime of sexual abuse against

children is heavier than the penalty given in the case of adults but there is no regulation similar to TPC Article 102/3a; for instance, in the case of the children having severe mental retardation or baby victims. Hence, the law article is deficient related to these children, who are already in a high risk group in terms of sexual abuse.

Examination of the sexual crime victims and problem of repetitive examination

The repetitive examination of the victim is also a situation which damages the relation of causality between the event of sexual abuse and assault and mental health deterioration. It is beyond doubt that the examination performed numerously and sometimes inappropriately can cause the individual to experience the event over and over, and traumatize the victim, which may result in mental health deterioration.

In certain studies, it is noted that repetitive examinations have inevitable effects in experiencing the event again and more severely (Karbeyaz et al. 2009, Ozdemir and Celbis 2012).

To solve this problem; the examinations should be performed in an appropriate way by professional groups, people in charge should behave carefully and prudently, and the reports should be prepared without any hesitation and any need for re-examination.

The authority for the regulation of the reports about mental health deterioration

The individual authorized to give reports on mental health deterioration constitutes one of the topics for discussion. The topic concerns the areas of expertise for forensic medicine, psychiatry and child psychiatry, and, in the process, reports were prepared by the relevant departments of the universities. However, it is said that *"the report about whether victim's mental health damaged or not, is taken from specialized Committee of Forensic Medicine Institute, according to the results of the report the legal status of the perpetrator must be determined and assessed"* by both the Supreme Court of Criminal General Council and Fifth Criminal Chamber of the Supreme Court. With these decisions, the reports that were given by different universities' Psychiatry Departments were invalidated (Turkish Supreme Court of 5th Criminal Chamber, Docket no: 2011/3837, Decree no: 2011/5030, Date: 29 June 2011; Turkish Supreme Court of Criminal General Council, Docket no: 2011/ 5-201, Decree no: 2011/193, Date: 27 September 2011). In the same decision of the Supreme Court of the Criminal General Council, if the victim is a child, the Council says *"the report must be taken from at least a five-person delegation of experts which one is mandatorily a child psychiatrist"*. This has been made a decision about how many people at least must be in the committee and it is mandatory that a child psychiatrist should be in the committee. In this regard, the reports, which are prepared by only a child psychiatrist

or a board of child psychiatrists, were voided properly by the Supreme Court (Turkish Supreme Court of Criminal General Council, Docket no: 2011/ 5-56, Decree no: 2011/76, Date: 3 May 2011). In this subject, not only reports of departments of universities but also reports of the 6th Specialized Board of Forensic Medicine were invalidated with the justification of "the child psychiatrist, who is the expert of the examination subject, not attending to the interview" (Turkish Supreme Court of Criminal General Council, Docket no: 2011/ 5-412, Decree no: 2012/2, Date: 31 January 2011; Turkish Supreme Court of 5th Criminal Chamber, Docket no: 2008/5532, Decree no: 2011/712, Date: 14 February 2011).

One of the important steps for evaluating whether or not mental health is impaired is the decision of the Turkish Supreme Court of Criminal General Council (Docket no: 2011/56, Decree no: 2011/76, Date: 05 April 2011). In this decision, it was stated that *"The reports on mental health deterioration can be prepared in universities when the similar committees like 6th Specialized Board of Forensic Medicine established in them."* In this manner, assessments have been started on the universities' boards which have appropriate structures. As a result of the Supreme Court's negotiations and discussions, it has been decided that boards may form two forensic experts, one of which is the chairman of the board and three pediatric psychiatrists. Following this decision, judicial committees and boards began to be established within the universities. After the decision of the Turkish Supreme Court of Criminal General Council, the application for reversing the report, which was given by a forensic medicine department at one university, was rejected by the 11th Criminal Chamber of the Supreme Court. The preamble of this decision is *"If a mental health report was taken from the committee, which was duly constituted within the university, there is no need to take another report from the Institute of Forensic Medicine"* (The Supreme Court of 11th Criminal Chamber, Docket no: 2011/32, Date: 20 July 2011). Thus, universities' judicial boards that were established in accordance with the criteria remarked by the Supreme Court were authorized to prepare the reports about whether "the mental health of victim is impaired or not".

CONCLUSION and RECOMMENDATIONS

- The victim's mental health impairment as a result of sexual assault is not a factor for changing the basic shape of the offence and is not a fact for the perpetrator not taking a punishment.
- Mental health deterioration is a factor that exacerbates the punishment in a crime, which may require a severe punishment.
- In accordance with the decisions of the Supreme Court for saying "the victim's mental health was impaired", the severe and permanent psychiatric damage should be seen beyond

temporary psychiatric symptoms, which do not provide diagnostic criteria for a psychiatric disease.

- Deterioration in mental health must be persistent (continuous). The evaluation for persistence should be done at a minimum 6 months after the date of the event and after a treatment process.

- Emotional and non-objective decisions can not answer the facts which the judicial authorities are looking for and lead to serious legal misconceptions.

- While preparing the report on whether mental health is impaired or not, expert interviews and tests should be done within the framework of national and international accepted criteria, scientific criteria based on the diagnosis, and objective and auditable evidence (tests, interviews, etc.) should be reflected in these reports.

- Elements seen and assessed by a physician must be reported and clearly understood by judicial authority. For this reason, confusion should be avoided in prepared reports and special attention should be paid by knowing definitions and issues contained in the legal regulations and the purpose of these regulations.

- It is essential that physicians prepare their reports according to the medical signs and symptoms. However, when it comes to forensic reports, physicians should also know what judicial authorities want from them and act in accordance with legal regulations because of their role as experts. Reports should contain clear medical information and signs in addition to this information being compatible with legal rules. Prepared reports being medically insufficient as well as void of legal base, inadequate or biased can lead to serious legal mistakes. In such cases, according to TPC Article 276 imprisonment for experts may be considered. Also, the various complaints and lawsuits of victims may be considered.

- Regulation of the reports that take judicial decisions into account, determining how mental health is influenced by sexual assault and providing the decision of mental health deterioration are very important for protecting the rights of the offender, victim and the organizers of the report, for avoiding an increase in victimhood and re-traumatism of the sexual abuse and assault victims during their judicial reporting process and for fair and speedy trials.

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