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A Forensic Psychiatric Perspective on the Draft Mental Health Act of Turkey in Light of Similar Laws and Practice in a Foreign Jurisdiction

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SUMMARY

Objective: Designated Acts for issues related to mental health are in force in many countries throughout the world. A mental health act is also expected to be approved in Turkey soon. Under the leadership of the Psychiatric Association of Turkey, non-governmental organizations operating in the field of mental health has contributed to the emergence of a comprehensive draft. The current draft, after extensive discussion and reiterations for almost a decade, was brought to a state close to its final form and accepted as a draft bill, ready to be legislated in the Turkish Grand National Assembly. This review will discuss the potential impact of the law in matters involving Forensic Psychiatry, and present our recommendations.

Method: Current draft, which has not yet been finalized, was compared to similar statutes in Massachusetts, USA, and potential benefits and pitfalls were discussed in light of experience with these laws in this jurisdiction.

Results: The draft introduces several new concepts and practices which have never existed in Turkey before. It also attempts to organize some of the existing de facto clinical practices in a uniform manner. As a whole, it appears to be in compliance with human rights and related international treaties. However, it is likely that some of the sections might have compliance issues in daily practice.

Conclusion: In this review, we aimed to draw attention to a number of issues, based on our experience in Massachusetts, USA, where similar laws have been in force for a very long time. Rather than literally comparing the statutes in both jurisdictions, we attempted to emphasize positive aspects as well as likely problems that we might encounter should Turkish draft be legislated in the present form.

Keywords: Mental health act, forensic psychiatry, Turkey

INTRODUCTION

Codes governing mental health services were needed due to lack of clear guidance in the law for specific issues related to persons with mental health issues in Turkey. Although our lawyers, physicians, other mental health professionals and citizens concerned with this issue have expressed the lack of such a law in our country from time to time, no serious attempts have been made by legislators except for some of the changing articles of the civil law. But over time, with the expansion of mental health services, the need for legal regulation of mental health services became a necessity by the society. The Psychiatric Association of Turkey, with contribution of the civil society organizations operating in the same field, initiated and prepared the text that provided the basis to the current draft law. It is expected that the draft (TBMM 2/58), which has been processed by the Turkish Grand National Assembly (TGNA), will be accepted without any major changes.

This review will be based on the draft, which has not been finalized yet. In this article, we will present the importance of the proposed law for Forensic Psychiatry, our suggestions regarding possible positive and negative consequences in the light of similar laws, practices and experiences in a state of the United States (USA).

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DISCUSSION

The history of mental health services is older than that of many medical branches. The oldest hospitals in the U.S. are usually psychiatric hospitals; Similarly, in our country, it is possible to come across mental treatment centers in many regions that date back to a thousand years. These centers, which initially aimed at isolation of mental patients rather than their rehabilitation or treatment, later turned towards treatment and rehabilitation. In modern societies, mental health service has reached a level aimed at protecting mental health, prioritizing the rights of individuals, and aiming to offer the most appropriate treatment method with the highest level of respect for personal rights and freedoms. Thus, special Mental Health Laws have been introduced in many societies (Nesipoğlu 2017).

The relationship between mental health and laws goes back to very old times. It is known that Babylonian manuscripts, Roman laws and Islamic law contain provisions on criminal liability of mentally ill patients (Oncu and Sercan 2007). In modern Western law, this issue began to be addressed in the early 19th century. When the concept that a person cannot be punished for the crimes due to a mental illness emerged due to a lawsuit; In order to determine this situation, it was deemed appropriate to present an expert opinion to the court (Edward Oxford case 1840, Gold 2010). But who would this expert be? It was suggested that this specialist be a physician; but from which specialty? Psychiatry was not yet established as a specialty, but mental health hospitals are available. As a result, it was decided that physicians who worked in mental health hospitals for a certain period of time to provide expert opinion, and these people were called "Psychiatrists" for the first time. Briefly, even if it is not for psychiatry, "Psychiatrist" is a medical specialty that emerged from the forensic need (Freemon 2001). Undoubtedly, every psychiatrist faces judicial matters in management of their patients, but the legal dimension of the profession is mostly confronted by forensic psychiatrists. For this reason, in this review, we wanted to examine the forensic psychiatric aspects of this law proposal by comparing the practices in the two countries.

Overview of the Law

Before expressing an opinion about the general law, it is necessary to state that; there are fundamental differences between the US legal system and Turkey's legal system, because of the resemblance of Turkish laws to European legal systems. In addition, since states have jurisdiction on the treatment and management of their mentally ill residents, every state has its set of laws which can be somewhat different from each other. It should also be borne in mind that the Mental Health Act is essentially part of the "Civil Law". The courts in our country, even the Constitutional Court, are the TGNA and the President, who has the final say in whatever decision they take. General courts can only apply to the Constitutional Court by pointing out the incompatibilities of the law. The Constitutional Court can only formally cancel the decision and gives the TGNA six months to amend the law in question. The suitability, correctness and inaccuracy of the law is evaluated only within the framework of the general constitutional provisions and its main content is not included. Briefly, the Constitutional Court does not establish "properness" for the law. For example, if there is an application to the Constitutional Court when the Mental Health Act is issued, the Constitutional Court will not make the following decisions: "this law is not necessary in this period" or "why is the criminal responsibility for criminal psychiatric practices not included in the content?" etc.

In the USA, when the decisions taken by local courts are appealed and discussed in the higher courts, the decision of the appeals courts may be regarded as precedent for similar legal situations in the future. Such cases are called "Landmark Cases" (case law) and are accepted as mandatory norms throughout the country. Especially in the USA, forensic psychiatry practice heavily utilizes these higher court decisions which can be replaced by newer and more relevant ones over time.

We see that the short and clear expressions used in our basic laws (Turkish Penal Code, Turkish Civil Code, etc.) are not preferred in this draft. This might be due to the detailed nature of mental health related issues that need to be addressed in a detailed manner as opposed to a basic law which has to be more general and must be applicable over a wide range of topics in society. Only the forensic psychiatric aspects of the draft will be addressed in this review.

Aspects of the Law That May Concern Forensic Psychiatry

Legal Representative

It is understood that the concept of "Legal representative" defined in clause c of the first paragraph of article 3 of the draft text is a reference to Turkish Civil Code (TCC). In this sentence, containing the statements covering the legal representation defined in Article 405 of TCC; A clear statement referencing to Article 406 of the same law was not found. As has been known, with the provision of Article 406, it is possible to appoint legal representatives for almost all persons with alcohol, substance and even behavioral addictions (Gambling, internet, games etc.). In addition, the concept of "legal representative" is thought to cover both items. When we look at the laws of the US State of Massachusetts in this respect, we see that guardianship is handled in detail, and specific areas of guardianship (e.g., sale of real estate, consent to treatment, hospitalization, salary, investment, etc.) are determined individually in court orders

(MGL5-416). This gives the courts ability to limit the powers of guardianship based on a person's specific deficits. Given the language in TCC, which is one of the basic laws in our country, guardianship powers cannot be regulated in this way with an additional law. Should such a provision considered in the future, a comprehensive change in TCC might be needed rather than a change in the current draft.

Advance Directives

Again, a new concept for the legislation of our country is included in the paragraph x of the first paragraph of Article 3. The concept called "giving instructions in advance" has been utilized in many states in the USA under the name of "advance directives". This application proposal, which was entered into our legislation with the patient rights regulation published in 2014, appears at the law level for the first time (Patient Rights Regulation 1998). In the text of the legislation, it is mentioned that the person can give instructions in advance about which medical procedures he/she approves if he/she loses the mental capacity to make treatment decisions. Important procedural details such as whether this instruction can be given verbally or should be in writing, how it should be documented, whether a signature is required, validity period are not mentioned in the text. There is no reference to the procedures that are not approved by the person either. What would be the course of action if a procedure or treatment that is not mentioned in the document is required? It would be useful for the person to state procedures or treatments they do not approve, as well as the treatments that the person has previously approved. For example, a patient with bipolar mood disorder who has the power of discrimination will not be able to give an instruction that says, "When I go on a psychotic manic attack, I should not get haloperidol ampoules, I have pain for months due to my existing cervical disk hernia, my neck contraction that occurs almost every time as a drug side effect.". Considering from another point of view, if this text becomes the law, the relevant regulation (Patient Rights Regulation) will not be providing arbitration to issues between lawyers and medical doctors after its new version has been published. In this discussion, past experiences of "do not intervene when my consciousness is over" come to mind (for example; hunger strikes). Although the intervention is partially defined in cases where the consciousness is lost and against the patient, a law article should address this in a clear manner or refer to another arrangement with clear status. For example, a statement such as "Procedures for the implementation of the instructions to be given while having the power of discrimination are regulated by the relevant regulation" and details can be discussed in the regulations that should supplement this law (the "compliance of the decision with the laws and medical deontological rules" mentioned in Article 15 of this draft is too general and vague). In its current form, in practice this situation can go up to a passive euthanasia, which is not legal in Turkey. However, this regulation might create a "de facto" situation as such, and this exceeds the scope of this law.

Again, in the state of Massachusetts and some other states, a "health care proxy", that is, a document for individuals to be able to assign a health care representative, who will make decisions regarding their treatment in case they lose the ability to make such decisions, is used in order to overcome this problem. This form is filled in and signed in front of a witness to report the name and contact information of one or two people to have the power to make treatment decisions for the signing individual in case he/she loses the ability to make treatment decisions. It is useful to discuss this practice, which is accepted in another culture, may or may not be as useful, or may even cause potential problems in our country.

Since the title of this law proposal is "Mental Health", expressions concerning almost all general medical practices should be avoided. This problem can be overcome by adding a sentence that will limit the scope of giving instructions to the text only to procedures that concern mental health.

Competence to Consent for Treatment

With the Patient Rights Regulation published in 2014, it was appropriate to define the competence to consent for treatment entered in our legislation in this law and to give this task to adult or child-adolescent mental health professionals. The history of this concept, which is called Competency to Consent for Treatment in the psychiatry literature, is based on the past (Sullivan 1974, Appelbaum and Bateman 1979). "McArthur Competency to Consent for Treatment Tool", which has been translated into many languages and developed for clinicians to use, is a commonly used measurement tool in this field; The validity and reliability study that has been translated into our language has also been completed (Karakaşlı et al. 2018; Appelbaum and Grisso 1995). Even though they may be under full guardianship, it should be kept in mind that, as stated in many articles of this draft, individuals may have the right to speak about their treatment, and it should be clearly determined whether or not they have a competence to consent for treatment, and the abovementioned tool would be helpful.

In Article 11 b, c and e of the draft, the sharing of health information of individuals (consent to release information) is regulated. In these subheadings, in addition to their own consent in children and adolescents, their parents' consent was also considered, while legal representatives of children who were not adults or parents were not mentioned. Someone who is not qualified to give consent for treatment may not be able to share information about the treatment. This situation must be addressed in the law. Also, "authorized persons and institutions" mentioned in the text should be defined more clearly.

Reporting a Crime

As it is known, the use of illegal substance is a crime that is punishable by imprisonment according to our laws. On the other hand, substance use is also a medical diagnosis. The expression in item 11 of the draft and referring to article 280 of the Turkish Penal Code (TPK) brings to mind an existing problem. Considering the reasoning of the article 280 and the parliamentary debates, this article was originally issued for healthcare personnel who intervened in terrorist offenders, otherwise the substance abuse, as a medical issue was not meant. However, there have been many cases where this article was abused in our country. For example, by referring to this article, prosecutors have requested the list of all substance use disorder patients from psychiatry specialists in the past. The solution of this problem seems possible with the change of the basic law, TPK. In the USA, mandatory notifications specified in law are limited to issues such as child, elderly or disabled abuse and situations that endanger the lives of others (mandated reporter statute) (e.g., MGL 51A). Even if the request is made by a court order, if the patient does not give permission, the physician is expected to reject this request due to the privacy of the patient-physician relationship, otherwise the physician may be under legal responsibility.

Involuntary Treatment and Hospitalization

The fifth section of the law is devoted to involuntary treatment and hospitalization practices. A number of additions have been made to the articles of guardianship and involuntary treatment of TCC in the Turkish Grand National Assembly recently (06.12.2019). The main purpose of the amendment is to establish the legal infrastructure of forced treatment of those with alcohol-substance use disorders. As researchers working in an institution where alcohol-substance abuse diagnoses are forcibly treated, we think that the legal infrastructure of forced treatment cannot be established with a few sentences to be added to a general law. The part that regulates the involuntary treatment of alcohol-substance abuse (MGL Section 35), which is under the head of involuntary treatments in the state of Massachusetts, USA, consists of multiple pages of text; to describe how treatment should address specific issues while patients' civil rights are protected. Given the issues with such treatment despite a detailed legislation in Massachusetts, similar problems might be encountered by practitioners as well when this draft becomes law and goes into effect.

A comparative review has been published about this issue previously (Arikan et al. 2007). This law, one of many possible positive contributions to make to the mental health field, perhaps most importantly, is that it can clarify the procedure in involuntary treatment and hospitalization in Turkey.

In the proposal, it was mentioned that the involuntarily admitted patient or his/her relatives' request for discharge from hospital should be notified to the court without delay. This issue can be understood as a reference to the relevant article in TCC, but practical problems may arise regarding this requirement. If it is left in the text in its current form, the relevant regulation should address and clearly explain the procedure. Otherwise, when taken literally, if a patient demands discharge every day, his or her doctors will have to send the request to the court on a daily basis. The other way of suggesting that the legal representative or the deputy of the patient conduct this process through the court should be highlighted. In Massachusetts laws and practices, such objections can only be made to the relevant courts by the relative or legal representative of the involuntarily admitted patient.

Article 16 of the proposal regulates the legal procedure for involuntary hospitalization. Especially in cases where the patient does not have an attorney, assigning a court appointed counsel will ensure that due process is followed and patient's rights are protected. In addition, legal counsel representing the hospital should be required to be present at the hearing. In the USA, the people who are unable to hire a lawyer and are facing involuntary hospitalization, are appointed public defenders, who are attorneys to represent persons in certain legal proceedings. Public defenders are paid by the state. In addition, the contracted lawyer of the hospital where the patient is hospitalized is also present at the hearing and represents the side of the physicians and therefore the healthcare institution. In our country, this can be done through lawyers at the Provincial Health Directorate, since there are no lawyers in state hospitals. Private hospitals will need to find their own lawyers. Details of this issue can be clarified by the regulation to be issued again (e.g., only in case of dispute the representation of a lawyer in the hospital, etc.).

In the same article, it was decided that the involuntary hospitalization and the duration of treatment should be limited to three weeks at the first time. In the USA, this situation is generally limited to 20 days for the first stay for forensic psychiatric observation, but can be extended for another 20 days if necessary. However, when it comes to treatment, 3 weeks may not be enough to decide whether the first stay should be prolonged or not. This period must be at least 6-8 weeks with the permission of the Civil Court. As it is known, these periods are the time to decide the effectiveness of many psychiatric, especially antipsychotic treatments. Patients with alcohol-substance use disorder who were accidentally hospitalized for treatment in Massachusetts have the expression "up to 90 days" as determined by law in court decisions (MGL Chapter 123, Section 35). For other psychiatric diagnoses, the first involuntary hospitalization decision is up to six months, and subsequent extensions are up

to one year at a time. During these periods, the patient is kept in the hospital within the scope of the forced hospitalization decision. The duration of 20 days or three weeks for forensic psychiatric observation is almost equal with each other; This 20-day period is widely applied in other states of the USA. The point to be discussed here is to pave the way for diagnosis based decision making for forced hospitalization/ treatment rather than forensic psychiatric observation. The aim should be to demonstrate the accuracy of an application rather than its rationality. Decisions limiting the maximum treatment period with a language such as "up to…" can relieve clinicians and reduce unnecessary bureaucratic procedures. This dilemma between observation and treatment has been discussed both in publications in Turkey (Sert et al. 2019) and in the regulations of the World Health Organization (WHO Resource Book on Mental Health, Human Rights and Legislation 8.3.1). Our suggestions on this issue, which has many different applications, are as mentioned above.

The last point to be emphasized is the statement "Mental Health services cannot be excluded from any health insurance coverage" in Article 21e of the draft. We think that it is correct to guarantee such a proposition with the provision of law. Furthermore, by modifying the language in this text or clarifying in the upcoming regulation, the increase in the existing risk premiums of health insurances should be limited. The reason coverage for mental health services have been excluded from health insurance in many countries of the world, is a prejudice that people who will receive mental health services will use this service more than necessary since their "mental health" is not in place. Therefore, insurance companies may disproportionately increase premiums against the law. This may need to be prevented by legislation.

CONCLUSION

At the time of this review, the draft was already waiting to be enacted as a law proposal in the Turkish Grand National Assembly. This draft will introduce many new concepts and features to mental health care, including due process, structure and clarification of evaluation and treatment processes while emphasizing and enhancing compliance with human rights and related international conventions. We think that this law will lead to positive changes in the care and treatment of the mentally ill in Turkey.

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