

Attitudes of the Turkish medical profession and jurists towards new Turkish legislation concerning body examination without consent in Criminal Procedure

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Abstract: In Turkey, new legislation relating to criminal investigation is the subject of an ongoing debate, and is being discussed from various aspects. This legislation concerns body examination of suspects or crime victims. In this study, the approach of physicians and jurists regarding both internal and external physical examination of suspects and victims without their consent, and possible acceptable conditions for such action are addressed. Then, the new legislation is evaluated and discussed comparatively and internationally from the viewpoints of law and ethics. A questionnaire was given to a total of 600 jurists, physicians, and students of both professions in Turkey. Data was collected and evaluated. More than 90% of the physicians expressed the opinion that the new legislation should be modified or amended, while more than 70% of the jurists agreed with the current legislation which says that body examination of suspects and victims should be carried out without his/her consent for the public good. Both law students and medical students agreed with the approach of the current law. It should also be noted that the legislation was prepared by a commission of jurists only, without the cooperation of physicians. In conclusion, body examination of suspects or victims without consent should be carried out only in certain circumstances and the law should be amended. Certain regulations may still need to be prepared in collaboration with the professionals who are involved in the practice.

Key words: Criminal law, ethics, crime victims, suspects, physical examination

Body examination can provide independent, scientific, corroborative evidence that may be of value to the court in arriving at a judgment. New legislation concerning body examination without consent that has been introduced in Turkey is the subject of debate. Sometimes it might be required by the court and must be done without consent.

There are certain cases involving culture-based aspects that should be separately evaluated. Dealing with rape victims or those suspected of homicide for sexual motives goes beyond proving the case in a court of law. There should be adequate provisions such as rehabilitation programs, psychiatric consultation, consent of the patient [1] and the concept of trust in the doctor-patient relationship [2, 3].

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International ethical codes concur in the view that medical practitioners cannot be forced to act outside the scope of medical ethics.

However, for a crime to be resolved, it is imperative that forensic facts are complete from a legal perspective. To expose the perpetrator of a murder or rape, it is necessary to perform a body examination and to collect samples from the suspect and/or the victim [2, 4]. This ethical dilemma needs to be discussed.

Old and New Turkish Code of Criminal Investigation

According to earlier legislation body examinations used to be performed under the ambiguous Article 66/5 of the Code of Criminal Procedure; CMUK, dated 1929, number: 1412 [5, 6, 7].

In December 2004, new legislation was introduced, since earlier legislation was regarded as insufficient. In connection with this legislation, a new set of regulations concerning **Body Examinations, Genetic Inspections and the Determination of Physical Identity within the Criminal Code** was drawn up. **In accordance with articles 75 and 76 of the new code dated 2004 [CMK]; a victim or suspect** may be examined with the aim of collecting evidence in relation to a crime.

In accordance with articles 75 and 76 of the newly revised code, any examination and collection of samples may be carried out without the consent of the victim or suspect if a court order is issued by a judge or court. Additionally, it is stressed that even if the suspect or the victim has not consented, **the physician is obliged to conduct this examination or may otherwise face criminal charges** [8, 9, 10].

Objective

Our goal was to analyze the attitudes of physicians and jurists about body examinations of victims and suspects from the perspective of the new Turkish Criminal Code. Their attitudes towards body examination were investigated by means of a small study. The findings have been compared with examples relating to this practice in other countries. Our final goal was to outline some suggestions for a less problematic implementation of body examination, and carry out an ethical evaluation with respect to the roles of health care professionals, suspects or crime victims, when both sides have different expectations of each other's needs.

Methodology

This study was designed to examine the attitude of physicians, forensic medicine specialists and jurists towards articles 75 and 76 of the code of the recently promulgated Turkish Criminal Code. This was a descriptive small study. We prepared 2 questions. The questionnaire was distributed to the participants.

The first question consisted of two items, namely a and b, with clear YES/NO answers. The first item "a" concerned external body examination, while the second item "b" concerned internal body examination.

The second question was open-ended and related to health care expectations and ethical issues arising from the answers to the first question. The questions were prepared in order to meet two objectives. The first of these was to identify professionals' and students' attitudes toward both internal and external body examination without consent. The second objective was to confirm the answer to the first question, justify the exact answer of YES/NO, and ask if the respondents had any alternative suggestions.

The participants were chosen randomly, except for the students, who were chosen from the largest university that included both medical and law schools, so that the education of both groups could be considered to be comparable. The group of participants who were professionals were chosen either from the same university with departments of medicine, forensic medicine, and law, or randomly chosen from among professionals in private practice. The only criteria for the professionals who were not members of an institution were that they were active in their specific areas and for the physicians, that they had experience of body examination.

The university in the city of Istanbul where we conducted our study consists of professionals and students from all geographical regions of Turkey and could be considered representative of different opinions in different geographical regions. The questionnaire was distributed to 200 attorneys and law enforcements agencies, 200 forensic medicine specialists and physicians from different specialties. Also, 200 students at the schools of law and medicine who had taken the ethics course were given the same questionnaire.

Questionnaire

- 1) If the suspect or victim does not give consent,
 - a. Should an external body examination be carried out by the physician?
Yes *No*
 - b. Should an internal body examination be carried out by the physician?
Yes *No*
- 2) If consent is withheld and if you oppose body examination without consent, what means do you suggest for obtaining the necessary evidence for the crime investigation?

Analysis

The appropriate descriptive statistics were the frequency of the answers YES and NO to parts **a** and **b** of question 1. We had a return rate of 100%. The statistical method used was a simple description of nominal data as percentages. Additional comments or proposals of participants in answer to the open-ended question 2 were summarized in the "Results" section.

Results

95% and 83% respectively of the total of 200 law and medical students stated that external examination by a physician of suspects or victims for the public good should always have priority over the individual's rights, and added that only guilty parties would object to an examination.

With respect to internal body examination, 85% and 77% respectively of law and medical students claimed that to protect society, internal body examination would be acceptable even when consent was withheld [Table I].

They added that the examination should be carried out without threatening the health of the victim. Some asserted that, depending on the seriousness of the crime, an internal body examination might even be performed by force. Others who were opposed to internal body examination without consent, perceive this as a violation of basic human rights. When the students were asked to suggest alternatives, they proposed that suspects should be convinced and/or other evidence and testimonies of witnesses should be evaluated. They also said that if there were no valid reason for refusing consent to the examination, this should not remove grounds for possible guilt.

Contrary to the results obtained from the student group, more than 96% of the physicians claimed that body examination and especially internal body examination should not be performed without consent [Table I]. They added that there would be many drawbacks and risk of damage in such a practice, as well as psychological trauma, even in experienced hands. Similarly, the number of forensic medicine specialists who declared that internal and external body examination should not be done without consent was approximately the same [Table I].

Table I Participants who declared that body examination should be carried out without consent

Jurists n=200		Physicians n=200		Students n=200	
Attorney	Prosecutor, Judges	Forensic Medicine Specialists	Other	Medical	Law
external body examination					
%76	%100	%3	% 4	% 83	% 95
internal body examination					
%70	%100	%3	% 2	% 77	% 85

On the other hand, more than 70% of the attorneys claimed that body examination should be carried out for evidence and that physicians should cooperate in this. Finally, all law enforcement agencies declared that internal and external body examination should be carried out without consent [Table I].

The participants belonging to the legal profession who claimed that body examination without consent should not be performed made almost the same suggestions. They proposed that the physician could write his/her own opinion as a medical report about the subjects whom it is impossible to examine.

Discussion

For descriptive purposes, we start our discussion section with one finding that stood out as particularly significant. A major problem was reflected in the answers of forensic medicine specialists and other physicians who claimed that there were enormous difficulties in carrying out a body examination without consent.

There was a huge percentage difference between the attitudes of jurists and physicians. It is clear that practicing physicians experience the difficulties of body examination without consent. Also, there is a need to describe the criminal procedures that might involve specific cultural issues relating to Turkish society.

The authors also infer from the findings that while body examination is approved for the public good, the inevitable risks even in experienced hands suggest the need for some amendments to the law.

This is mostly reflected by practicing and experienced physicians in their answers to the second question. In a scan of literature on the subject we observed different approaches in different countries as outlined below in the comparative section [11, 12, 13].

Procedures Relating to Major Crimes in Turkey and Cultural Implications

Homicide, hunger striking, assisted suicide, torture, honors killing, rape and homicide with a sexual motive [paternity tests and incest], are examples of cases where the victims or

suspects may be required to undergo body examinations in the course of official investigations in Turkey. The body examination may be performed on the basis of a court order issued by a judge [14].

With respect to a **hymen examination**, if the victim does not consent, the physician's decision not to carry out this examination may easily be defended both from a legal and ethical perspective. At the very least, consent should be obtained by taking time to put the victim at ease, by clarifying the necessity for such a procedure, explaining the confidential nature of the procedure and getting psychological support, if necessary.

Especially in certain regions of Turkey, the hymen examination is concealed due to social attitudes and values, and goes under the description of a genital examination. In our society, even if not requested legally, the hymen examination may also be performed on under-aged girls at the demand of her family or close relatives.

Such examinations performed at the request of the court or families have severe social consequences ranging from the woman attempting to commit suicide to her being killed to protect the family honors. Carrying out an internal body examination is a risky and difficult task for the physician, and puts both psychological and social strain on the victim and their family.

According to a scientific study, 30% of girls who have undergone hymen examinations against their will have attempted suicide, and a fifth of these cases ended in death.^[7] In cases of loss of virginity, many of the crime victims were killed by their families for the sake of defending their honor; a crime referred to as "customary homicide" [honor killing]. 93% of those who survived were psychologically affected in a way which had a life altering impact. Withholding consent to hymen examination is extremely common.

Apart from crimes of a sexual nature, the necessity for internal body examination is clear in narcotics related crimes as well. If the person is not willing to give a blood sample, it should not be forgotten that results can also be obtained from urine and faeces samples. Other crimes of a violent nature [e.g. looting] may be included in this category [7].

Hunger striking and torture are cases where medical examination and sometimes intervention is absolutely necessary. Body examination is absolutely required by the judicial bodies, but there is still an issue that should be evaluated with respect to both the legislative process and ethical principles.

Assisted suicide, like overdose of medicine, is serious crimes for which evidence is required by the judiciary but body examination can be problematic.

Contagious diseases are subject to separate legislation (under the General Hygiene Act)

In the case of contagious diseases such as AIDS and syphilis, even if the person withholds consent, the examination may be considered as being for the public good. However, as this examination is also for the benefit of the individual, he/she may be persuaded to agree to examination and the taking of samples.

Body Examination without Consent from an Ethical Perspective

However, there is a chasm between law and ethics in the case of criminal investigations requiring body examination of the suspect or the victim, if the suspect or the victim do not consent and a court order is issued for a forcible body examination. It is asserted that an ethical approach is required in such cases to prevent harm or death.

Even if demanded by a court, if the conditions are not appropriate, a person sometimes cannot be examined without his/her autonomous consent from both the technical and humanistic points of view. The privacy of the patient should be considered as well [15]. Here

the good of the public and rights of the individual [human rights] clash from the viewpoint of ethics. Also the public good and non-maleficence regarding individuals come into conflict.

It is generally accepted that members of the medical profession cannot be forced to act in contradiction of medical ethics, their conscience, or national and international ethical and legal standards.

In the course of identifying a criminal and obtaining evidence of guilt, there is no legal objection to a lawyer requesting an obligatory body examination and the collection of samples without the consent of either the defendant or the victim [8].

However, is this acceptable from a medical ethics perspective? Could such an examination cause even greater damage to the person's personality, body and psychology? Under the "right to dignity" article of the World Medical Association Declaration on the Rights of the Patient [Santiago, Chile, October 2005] and according to the Turkish Association of Physicians, "The patient's dignity and right to privacy shall be respected at all times in medical care and teaching, as shall his/her culture and values" [9].

According to many international declarations and a declaration of the Ethics Council of the Turkish Association of Physicians, examination of the hymen, which is a symbol of virginity in Turkey, removes the woman's rights over her body if performed without her consent, and because of its physical, sexual, social and psychological consequences is regarded as violence against the woman. According to the United Nations Universal Declaration of Human Rights, to which Turkey is a party, the hymen examination is discreditable and violates human rights [13].

Comparative Global Discussions

Debates regarding body examinations are ongoing all over the world. In England no sample may be collected unless the person concerned has consented. However, if consent is being withheld for an obvious reason, the prosecutor may convict the defendant. In Italy collecting samples is forbidden and the judge may not proceed without consent [16]. Under French law, it is obligatory to apply to a physician for any internal body examination on the condition that there is no risk of damage to the person's health.

In the Swiss Federal Criminal Code it is stated that physical and psychological examination of the suspect may be performed if required by a judge, so long as possible risks are eliminated. According to the Netherlands Criminal Code, the public prosecutor may order an internal body examination if there are serious grounds for suspicion. The examination must be performed by a physician of the same gender as the suspect [16].

According to the Convention on Human Rights and Biomedicine, Oviedo, 1997, to which Turkey is a signatory, any intervention may only be carried out after the person concerned has given their free and informed consent.

In the United States, although there are differences between states, body examinations can be ordered by the court for serious crimes, although the suspect is not exempt from charges if there is no consent. Canada and New Zealand comply with the European legal system and if body examination is required by the court but consent is withheld, the suspect is not regarded as exempt from guilt until evidence is collected. In India examination is possible if required by the court [17].

The Chairman of the Hamburg Chamber of Physicians has asserted that making a person vomit in order to determine any addictions as allowed under the German Criminal Code cannot be considered acceptable [18]. In the judgment dated 11 June 2005 concerning the case of *Jalloh v. Germany*, it was decided to give emetics to the suspect to obtain evidence regarding narcotics use, and despite the fact that the suspect withheld consent and actively

opposed the measure, the said emetic was administered to the suspect by means of a catheter to his stomach.

The European Court of Human Rights has clearly laid down the boundaries for the acceptability of body examinations from a human rights perspective. One of these is that the examination may be considered legally acceptable only on condition that all other means of collecting evidence have been exhausted. When performing such body examinations, the method should not unnecessarily injure his/her dignity. Following up on these principles, Germany was convicted. The reasoning behind this was that the same evidence could have been obtained by waiting for the person to provide this evidence through a faeces sample [19, 20].

Conclusion and Suggestions

Debates on the topic are continuing all over the world and different cultures take different approaches. In Turkey, the major problem seems to be cultural and ethical concerns during body examinations. Since actual and important dilemmas are not emphasized in the legislation, the most promising approach would be to suggest amendments that refer to these.

In a situation where the suspect does not consent, as in some examples from other countries, one approach to getting consent is to explain to the subject that he/she will not be acquitted because of lack of evidence in the event of their continuing to withhold consent. If the physician cannot perform an examination, there might be separate provisions in the law for reporting any observations and personal evaluation. This situation could be rectified by a statutory instrument. In situations where it is not physically possible to perform the examination, this might be explained in an official report emphasizing the risks.

During the internal body examination, providing the person with psychological support could be made compulsory. Passing a statutory instrument regarding this matter should be sufficient.

Progress of the debate concerning examination by force shows that expectations of revision in legislation have come to a climax. There is a need to consult international literature on the subject and take these into consideration in Turkey.

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