

Genetics Related Regulations in Turkish Criminal Law and Criminal Procedure

Prof. Dr. Feridun Yenisey

Bahçeşehir University, Istanbul Turkey

I - Legal Framework

Genetic research resulted many changes in many different fields of the law. However, legal institutions react slowly to the scientific developments and change in the law takes place later. New discoveries and implementations of earlier discoveries related to the use of the genetic code, affected Turkish criminal law and criminal procedure as well, but in a limited extend.

There are some sets of issues, arising from developments in genetics, such as experiments on human beings for medical purposes, or the utilization of DNA evidence or DNA identification in criminal procedure and storing genetic samples which is related to the right on personal data and raises privacy concerns. These points will be the focus of our short talk.

Article 17 of the Constitution states that everyone has the right to life and the right to protect and develop his or her material and spiritual entity. The physical integrity of the individual shall not be violated except in the case of medical necessity and in cases prescribed by laws and shall not be subjected to scientific or medical experiments without his or her consent.

Turkey has signed the "*Convention for the Protection of the Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (1997)*" and ratified it by Law dated 3.12.2003 - No. 5013. "Additional Protocol to the Convention for the Protection of the Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings (1998)" has also been ratified.

According Article 90 of the Constitution, international treaties have the legal status of statutes and those concerning basic rights and freedoms, have priority in relation national law. Therefore, "The Convention for Human Rights and Biomedicine" is now an integral part of the Turkish legal system.

Other ratified international instruments related to our topic are; "European Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific Purposes (1986)" and the "Protocol of Amendment to the European Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific Purposes (2004)".

II - Genetics Related Regulations in Turkish Criminal Code

In the Turkish legal system, unauthorized *experimentation* and *test* on human beings is forbidden under the threat of punishment (Art. 90 Turkish Penal Code: TCK), but is permitted under two conditions. These conditions include the authorization of the Ministry of Health and informed consent from the relevant individual. Furthermore, the Regulation on Medical Research necessitates approval from ethics committees.

1) Scientific experiment on human being

The sanction of illegal scientific experiment on human being is imprisonment one to three years (Art. 90/1 TCK). The provisions pertaining to intentional injury or intentional killing are additionally applicable if the the victim is injured or dies due to the scientific experiment (Art 90/5 TCK).

The Code defines the conditions of a permitted experiment on human beings in detail (Art. 90/2 TCK). The first requirement is consent. Additional to consent, the following conditions must be satisfied to avoid criminal responsibility:

- a) authorization from the relevant council or body shall be received,
- b) the experiment shall first be conducted in an experimental environment other than the human body or on a sufficient number of animals,
- c) the scientific data obtained through an experiment conducted in an experimental environment other than human body, or on animals, should necessitate the experiment then being performed on human beings in order to attain its objectives,
- d) the experiment should not foreseeably damage, or have a permanent effect upon, human health,
- e) no method should be employed that might result in the test subject suffering to a degree unacceptable to human dignity,
- f) the objective of the experiment should outweigh any danger to the person's health or burden placed upon him,
- g) the consent of the test subject should be in writing and based on sufficient information about the content and consequences of the experiment, and should not be dependent upon securing any gain.

2) *Experimentation on children*

Experimentation on children had been strictly forbidden by Turkish Criminal Code when it had been enacted in 2004 (Art. 90/3 TCK). But before the Code entered in force, it has been amended and experimentation on children is an exception now, which may only be conducted under the following conditions in addition to the conditions specified above:

- a) the scientific data obtained through an experiment that has been conducted in an experimental environment should necessitate the experiment then being performed on a child, in order to attain its objectives,
- b) written consent of the mother or father, or legal guardian, and the consent of the child, where he has the capacity to give consent; and,
- c) the presence of a child an illness expert from an authorized body which has the capacity to give permission for the experiment.

Medical research involving minors can be conducted for the direct interest of the minor. However, for research to be conducted on minors, the condition of the benefit of the minor is not sufficient. Furthermore, permission of the parents is a prerequisite for conducting medical research. In cases where the legal representative does not consent, the urgency of the medical intervention shall be considered. If medical research on minors arises from a medical emergency the intervention can be performed with the decision of the court.

3) *Conducting a test on a patient for purposes of medical treatment.*

Turkish Criminal Code makes a distinction between *experimentation on human beings* and *tests conducted upon a patient for purposes of treatment* (Art. 90/4).

Treatment oriented *non-consensual test* on a patient is always punishable by imprisonment up

to one year (Art. 90/4, sentence 1).

However, where it is understood that existing methods of known treatment shall not yield any positive result, conducting an experiment, while using known scientific methods, upon a person who has consented to such, with the aim of treating such person, shall not incur criminal responsibility.

The consent should be in writing and be based on sufficient information about the content and consequences of the experiment, and the medical treatment should be conducted by an expert physician in a hospital.

III - Research involving human biological material

Removing and using biological material from living persons, is regulated in Turkish under certain conditions. *The Law on Procurement, Preservation, Grafting and Transplantation of Organs and Tissues* governs the conditions of consent for the removal of organs and tissue.

According to the *Civil Code* human biological material shall be removed, inoculated and transplanted based on written consent. Therefore, the initial provision for the removal of biological material from living persons is written consent. Accordingly, the consent has to be obtained in the presence of two witnesses and without any outside pressure. Secondly, the consent has to be informed consent. The donor must be informed in detail on the potential threats that might arise, and the medical, psychological, familial and social consequences and benefits for the recipient.

Scientific research can be conducted on bodies of the deceased that have previously expressed consent for donating their body to be used for research purposes and the bodies of individuals with no surviving family members.

Turkish Criminal Code sanctions the removal of organs and tissues from a living another person using illegal methods by imprisonment of five to nine years (Art. 91/1 TCK); unlawful removal of organs or tissue from a deceased person with imprisonment up to one year (Art. 91/2 TCK) and trading in organs and tissues by imprisonment of five to nine years (Art. 91/3 TCK).

If the removal of organs and tissues results in the death of the victim, the offender will also be punished according the provisions relating to intentional killing (Art. 91/8 TCK).

IV - Research involving human embryos

The Regulation on Centers for Medically Assisted Procreation published in 2001 includes provisions concerning research on human embryos. Moreover, as mentioned above, *The Convention on the Protection of the Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine*, which is part of Turkish law, covers statements directly related to the issue.

The definition of embryo is not clearly made in Turkish law. However, the *Regulation on Centers for Medically Assisted Procreation* defines an embryo as the “fecund state of an egg”. This Regulation is related to the medical therapeutic methods used for assisting procreation. The creation of embryos is allowed only for procreation purposes. The use of embryos for other purposes is prohibited.

The Turkish law does not involve legislative instruments regarding cloning. The relevant regulation can be found in the amendment to “the Convention for the Protection of the Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine on the Prohibition of Cloning Human Beings”, which has been signed, but not ratified by Turkey as by September 2013.

V - Genetics Related Regulations in Turkish Criminal Procedure: DNA Evidence

Obtaining DNA evidence is regulated in Turkish Criminal Procedure Code (CMK). Material obtained through physical bodily examination and taking samples of the suspect, accused or a third party, as described in Articles 75 and 76 CMK may be subject to molecular-genetic tests.

Molecular-genetic tests shall only be conducted if it is necessary to determine if those body samples are related to the suspect or to the victim, or to determine the family connections. Molecular-genetic tests that are outside of the scope of these aims are forbidden (Art. 78/1 CMK).

Permitted tests may also be conducted on other body parts, that had been found and seized at the crime scene, and their owner's identity is not known.

Molecular genetic-tests shall only be conducted upon a judge's order. The ruling shall also contain the name of the expert appointed to conduct the test (Art. 79/1 CMK).

Expert may be selected from the officially appointed experts or from the individuals who are required to act as an expert or from officials who are not attached to the investigating or prosecuting authorities, or from officials belonging to an objectively separate structural branch of the investigating or prosecuting authority. These individuals are obliged to take all suitable organizational and technical precautions in order to prevent illegal conduct of molecular-genetic tests and so that unauthorized third parties may not obtain knowledge about the outcomes. The items subject to test shall be delivered to the experts without labeling them with the name, family name, address and date of birth of the person from whom the items originate.

The outcome of the analysis on samples are considered as personal data and shall not be used for another purpose; the individuals, who have access to the files, shall not disclose the information to unauthorized persons (Art. 80 CMK). Violation of this regulation will be punished under Art. 135 TCK.

As soon as the time limit for opposing the decision to drop the prosecution is exhausted, the opposition has been overturned, the court gives a final judgment on acquittal or a judgment is rendered on not punishing the accused and those judgments are made final, the samples and information shall be destroyed immediately in the presence of the public prosecutor, and this fact shall be documented and its document shall be kept in the file. Violation of this regulation will be punished under Art. 138 TCK.

VI - Genetic information

Turkey has ratified *The Convention for the Protection of the Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine*. Articles 12, 13 and 14 of the Convention are concerned with genetics. This Convention is part of Turkish Law and its provisions cover tests of genetic diagnosis, intervention seeking to modify the human genome, and choosing a future child's sex.

The Regulation on the Centers for Diagnosis of Genetic Diseases was published in 1998 and governs the establishment of centers for diagnosis and medical treatment of genetic diseases before the child is born. Article 17 of the Regulation states that the sex of the child cannot be determined except where serious hereditary sex-related disease is to be avoided. In Article 19 it is stated that the centers for genetic diagnosis cannot execute a procedure unless informed consent of the applicant is obtained. Concerning the protection of genetic information, it is stated that the results cannot be declared to any third party without consent from the particular individual.

Genetic information is part of information covered in medical records and is a personal data. Any person who illegally records personal data shall be punished under Art. 135 TCK.

VII - Protection of Personal Data

Concerning the protection of personal data in Turkish law, Article 17 of the Constitution governs the personal inviolability, material and spiritual entity of the individual and Article 20 covers the privacy and protection of private life. The 2010 amendment to Article 20 by the law No. 5982 has created a new fundamental right related to protection of personal data.

Governing provisions concerning the protection of personal rights are included in the *Turkish Civil Code*. *The Regulation on the Medical Deontology* binds physicians and dentists to secrecy concerning occupational execution. *The Guideline for Good Clinical Practice* also states that the secrecy of private life shall be protected in research on human beings. Accordingly, personal data concerning the state of individuals and relevant medical information has to be kept confidential. *The Regulation on the Patients' Rights* also governs personal data. *The Law on the Right to Information* also includes provisions on the issue.

Personal data includes any information relating to an identified or identifiable natural person. The information may involve all of the properties of reference for identification such as genetic information, name, address and civil status of the individual. There are two types of personal data: personal data and sensitive personal data. Sensitive personal data consist of data revealing political opinions, ethnic or racial origin, religious or other beliefs, and data relating to state of health, private and sexual life.

Turkish Criminal Code introduced rules concerning the protection of personal data unlawfully. According to these rules, it is a crime to record, to disseminate or to transfer personal data (Art. 135 TCK). It is also considered a crime to record sensitive personal data such as the philosophical, political and religious opinions, sexual lives and health status of the persons. Moreover, it is also stated as a crime in the Code not to erase the personal data within the time limit envisaged by the law.