

EVALUATION OF PSYCHIATRIC DISORDERS CAUSED BY CORONAVIRUS DISEASE IN TERMS OF CRIMINAL LIABILITY FROM THE PERSPECTIVES OF TURKISH AND GERMAN CRIMINAL LAW*

Türk ve Alman Ceza Hukuku Perspektifinden Koronavirüs Hastalığının Sebep Olduğu Psikiyatrik Bozuklukların Ceza Sorumluluğu Açısından Değerlendirilmesi

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ABSTRACT

It is important to reveal the scope of criminal responsibility from the perspective of the psychiatric impact of COVID-19 pandemic on individuals. Moreover, drugs used in the treatment of coronavirus may have psychiatric side effects, and these drugs also have the capacity to interact with psychiatric drugs and cause negative outcomes. Although this is no longer a specific consequence of the coronavirus (it could also be the result of another serious illness), it is generally caused by it. In this study, whether the psychiatric cases in question can be evaluated within the scope of mental illness regulated in article 32 of the Turkish Penal Code (TPC) and transitory reasons regulated in article 34 of the TPC will be discussed. The effect of negligence of the person in catching the coronavirus on the applicability

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of article 34 will also be examined regarding transitory reasons. It will be discussed that psychiatric conditions caused by coronavirus may be a reason that removes or reduces culpability regarding criminal responsibility. Finally, a short comparative legal look at German criminal law is thrown, which in § 20 StGB also regulates the state of incapacity due to illness and in § 21 StGB the reduced criminal responsibility.

Keywords: COVID-19, psychiatry, criminal liability, situations removing or reducing culpability, Turkish Criminal Law, German Criminal Law, coronaphobia.

ÖZET

COVID-19 pandemisinin kişiler üzerindeki psikiyatrik etkisi açısından cezai sorumluluğun kapsamının ortaya konulması önem arz etmektedir. Bunun yanında koronavirüs tedavisinde kullanılan ilaçların psikiyatrik yan etkileri söz konusu olabileceği gibi bu ilaçlar psikiyatrik ilaçlarla etkileşime geçip olumsuz sonuçlar doğurabilme kapasitesine de sahiptir. Bu koronavirüsün spesifik bir sonucu olmasa da (başka bir ciddi hastalığın sonucu da olabilir), genellikle buna neden olabilmektedir. Bu çalışmada söz konusu psikiyatrik vakaların Türk Ceza Kanunu'nun 32. maddesinde düzenlenen akıl hastalığı ile aynı kanunun 34. maddesinde düzenlenen geçici nedenler kapsamında değerlendirilebilirliği tartışılacaktır. İlaveten geçici nedenler bakımından kişinin koronavirüs hastalığına yakalanmasındaki taksirinin 34. maddenin uygulanabilirliğine etkisi araştırılacaktır. Nihayetinde koronavirüs hastalığının sebep olduğu psikiyatrik durumların ceza sorumluluğu bakımından kusurluluğu kaldıran veya azaltan bir neden olup olamayacağı hususu tartışılacaktır. Son olarak, StGB § 20'de akıl hastalığı nedeniyle kişinin kusursuzluğunu ve § 21 StGB'de azaltılmış cezai sorumluluğu düzenleyen Alman ceza hukukuna karşılaştırmalı olarak kısaca değinilecektir.

Anahtar Kelimeler: COVID-19, psikiyatri, ceza sorumluluğu, kusurluluğu kaldıran veya azaltan haller, Türk Ceza Hukuku, Alman Ceza Hukuku, koronafobi.

INTRODUCTION

A pandemic is not just a medical phenomenon; It deeply affects individuals and society and causes anxiety and stress.¹ Throughout the history of mankind, respiratory pandemics has given rise to increase in the numbers of psychiatric and neuropsychiatric cases.² For example, Spanish Flu seems to cause psychiatric symptoms such as mania, depression, paranoia, obsessive compulsive disorder

¹ Bilal Javed and others, 'The Coronavirus (COVID-19) Pandemic's Impact on Mental Health' [2020] 35(5) International Journal of Health Planning and Management 993. Gözde Erkin, 'Akıl Hastalıkları Kavramına Genel Bakış ve Covid-19', [2020] 5 (8), İstanbul Medeniyet Üniversitesi Hukuk Fakültesi Dergisi 11.

² İhsan Okur and Ömer Faruk Demirel, 'COVID-19 ve Psikiyatrik Bozukluklar', [2020] 3(1), Medical Research Reports Review, 87.

and hyperactivity as a result of some neurological complications.³ Further, there are some research on links between post-Spanish Flu influenza and schizophrenia, and these disease outbreaks also increase the risk of neuropsychiatric dysfunctions and adult psychosis.⁴

Moreover, there are also side effects of psychiatric drugs and their interactions with antiviral agents used for COVID-19, as well as their pharmacokinetic and pharmacodynamic properties and side effects.⁵ Therefore, these interactions may result in mental diseases (or illnesses) or transitory reasons that cannot be characterised as mental diseases.

I. MENTAL DISEASES IN TURKISH CRIMINAL LAW

Mental disease is regulated under the title of “Reasons Removing or Reducing Criminal Liability” in Article 32 of the TPC. In this context, mental disease has the capacity to eliminate punishability as a cause that affects people’s culpability. As a matter of fact, “*in terms of a criminal law that adopts the principle of moral responsibility and needs moralization*”, TPC Art. 32 is an accurate regulation.⁶

TPC did not define the concept of mental disease in the mentioned article, leaving this determination to the science of psychiatry.⁷ In this context, the effects of the ability to perceive and direct behaviours are accepted by the science of psychiatry, and the conditions that cause a pathological condition in mental activity and ability can be considered as mental disease.⁸ It is also not possible to predetermine mental disease in terms of criminal law.⁹

In the TPC, there is no presumption regarding the situation that removes the culpability in terms of mental illness.¹⁰ For this reason, it is necessary to reveal the connection of the act of crime with the mentally ill perpetrator in each concrete case. It should be investigated whether mental illness affects the

³ Sarah Chyette and Jeffrey L. Cummings, ‘Encephalitis Lethargica: Lessons for Contemporary Neuropsychiatry’. [1995] 7(2) The Journal of Neuropsychiatry and Clinical Neurosciences 125 (Cited by Okur/Demirel, p. 87).

⁴ Okur and Demirel (n 2) 87.

⁵ Mehran Zarghami, ‘Psychiatric Aspects of Coronavirus (2019-nCoV) Infection’ [2020] 14(1), Iranian Journal of Psychiatry and Behavioral Sciences 2; For detailed information on the extent of these side effects and psychiatric effects, see. Okur/Demirel (n 2) 92 ff.

⁶ Nevzat Toroslu and Haluk Toroslu, *Ceza Hukuku Genel Kısım*, (Savaş Yayınları, 2019) 414.

⁷ Ibid.

⁸ Sulhi Dönmezer and Sahir Erman, *Nazari ve Tatbiki Ceza Hukuku* (Vol 2, 14th edn, Der Yayınları, 2019) 417.

⁹ Veli Özer Özbeke and Others, *Türk Ceza Hukuku Genel Hükümler* (14th edn, Seçkin Yayınları, 2023) 380.

¹⁰ Toroslu and Toroslu (n 6) 414.

perpetrator's ability to understand and his/her will.¹¹ However, for the acceptance of mental illness, it is not required that both the abilities of understanding and willingness are affected.¹² As a matter of fact, in the provision 32/1 of TPC, it regulates the point by "*A penalty shall not be imposed on a person who, due to mental disorder, cannot comprehend the legal meaning and consequences of the act he has committed, or if, in respect of such act, his ability to control his own behaviour was significantly diminished. However, security measures shall be imposed for such persons.*" A reduced penalty will be given to a person who has "*decreased ability to direct his/her behaviour*" in relation to the act he/she has committed, although not to the extent specified in the provision (TPC art.32/2). Here, the legislator regulates the reduced ability to direct person's behaviour; however, it does not take into account the reduced ability to perceive the legal meaning and consequences of the act. For this reason, within the scope of mental illness, the perpetrator, who has reduced perceptive ability to the degree stipulated in TPC art. 32/2, will have to be punished with a full penalty.¹³

The distinction between complete and partial mental illness stipulated in the TPC numbered 765 has been abandoned in the TPC numbered 5237, and only having a mental illness does not necessitate the evaluation of the person as complete or partial mentally ill.¹⁴ Rather than making this distinction, it is important how the mental illness affects the concrete act, regardless of the nature and degree of the mental illness, while the person commits the criminal act, and the relationship of the mental illness to the ability to perceive and direct the behaviour at the time of the act should be examined.¹⁵ In this context, the responsibility for this effect will be the subject of evaluation between TPC art. 32/1 and 32/2.

II. THE EFFECT OF MENTAL DISEASES CAUSED BY CORONAVIRUS ON CRIMINAL LIABILITY

The existence of mental diseases caused directly or indirectly by coronavirus and whether these will completely eliminate the ability to culpability is a subject

¹¹ Ibid, Özbek and others (n 9) 380-381.

¹² Toroslu and Toroslu (n 6) 414.

¹³ For an opinion that such a distinction will not lead to a fair result, see. Toroslu and Toroslu (n 6) 415-416.

¹⁴ Dönmezer and Erman (n 8) 422; On the distinction between complete mental illness and partial mental illness, see., Ayhan Önder, *Ceza Hukuku Dersleri*, (Filiz Yayınları 1992) 285. Mehmet Emre Yıldız, *Ceza Hukukunda Akıl Hastalığının Kusur Yeteneğine Etkisi ve Akıl Hastalarına Özgü Güvenlik Tedbirleri*, (Adalet Yayınevi, 2020), 120-125. For a view that due to the fact that the distinction was not adopted with the TPC numbered 5237, TPC art.32 would be considered complete mental illness, see. Hamide Zafer, *Ceza Hukuku Genel Hükümler (TCK m.1-75)*, (8th edn,Beta Yayıncılık 2021) 452.

¹⁵ Dönmezer and Erman (n 8) 426.

within the field of forensic medicine.¹⁶ It has been reported that there are some cases related to the relationship between coronavirus and schizophrenia in studies conducted in this field.¹⁷ Anxiety, fear, panic and obsessive compulsive disorders have also increased due to social isolation and quarantine measures^{18, 19} In this context, cases in which the diagnosis of coronavirus could be associated with mental illnesses were encountered in patients without a previous psychiatric history.²⁰ An increase has been observed in diseases such as post-traumatic stress disorders, based on the stress that health workers has been exposed to.²¹ Various potential pandemic stressors for healthcare workers have been identified in the current pandemic as follows: contact with COVID-19 patients, working in high-risk areas, social isolation, watching news about COVID-19, worrying about personal health.²² Depending on these factors, it has been observed that there is an increase in diseases such as anxiety, depression, and burnout syndrome in healthcare workers.²³

Dementia has even been associated with the coronavirus.²⁴ For example, the behaviour of the perpetrator infected under the influence of coronavirus-based mental illness within the scope of transmitting the virus to others may be evaluated within the scope of TPC art. 32.

After determining the mental illness triggered by coronavirus or caused directly or indirectly, the most important issue is that it is necessary to reveal whether the mentally ill person acts due to this disease while committing a

¹⁶ Dönmezer and Erman (n 8) 422.

¹⁷ For details see. Okur and Demirel (n 2) 91 ff.

¹⁸ World Health Organisation, 'Mental Health and Covid-19' <<https://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/publications-and-technical-guidance/mental-health-and-covid-19>> accessed 04 July 2023.

¹⁹ Okur and Demirel (n 2) 91, Erkin (n 1) 9 ff.

²⁰ Maxim Taquet and others, 'Bidirectional associations between COVID-19 and psychiatric disorder: retrospective cohort studies of 62 354 COVID-19 cases in the USA' [2020] *The Lancet Psychiatry* 131 <[http://dx.doi.org/10.1016/s2215-0366\(20\)30462-4](http://dx.doi.org/10.1016/s2215-0366(20)30462-4)> accessed 28 September 2024.

²¹ Julian Hannemann and others, 'The impact of the COVID-19 pandemic on the mental health of medical staff considering the interplay of pandemic burden and psychosocial resources—A rapid systematic review' (2022) 17(2) *PLOS One* 2-3 <<http://dx.doi.org/10.1371/journal.pone.0264290>> accessed 28 September 2024.

²² Ibid. For details see. Osea Giuntella and others, 'Lifestyle and mental health disruptions during COVID-19' (2021) 118(9) *Proceedings of the National Academy of Sciences* 4-5 <<http://dx.doi.org/10.1073/pnas.2016632118>> accessed 28 September 2024.

²³ Hannemann and others (n 21) 24.

²⁴ Yu-Hui Liu and others, 'One-Year Trajectory of Cognitive Changes in Older Survivors of COVID-19 in Wuhan, China' [2022] 79(5) *JAMA Neurology* 516 <<http://dx.doi.org/10.1001/jamaneurol.2022.0461>> accessed 28 September 2024.

crime.²⁵ What needs to be done here is to keep the defendant under stationary mental examination.²⁶ If strong indications of suspicion are present, which tend to show that the suspect or the defendant committed the criminal conduct; then in order to clarify whether the suspect or the defendant is mentally ill, and if so, the duration of the illness, and whether this affected his actions, the Judge of the Peace in Criminal Matters during the investigation phase, and the trial court during the prosecution phase may order the suspect or the defendant to be stationed in a public medical centre upon the proposal of the expert, after hearing both the public prosecutor and the defence counsel (Turkish Penal Procedure Code, TPPC art. 74/1).²⁷ Measures of security are imposed on persons who commit

²⁵ For a similar decision, see “According to the report of ... Training and Research Hospital dated 27/10/2015 included in the file; According to the medical board report of the ... Hospital, in which it was stated that there was no circumstance that reduced the defendant’s criminal capacity, but the defendant’s defence counsel submitted an appeal to the court after the decision date, stating that the defendant was mentally ill and was related to this in the annex of the petition; regarding the theft allegedly committed by the defendant on 06/05/2015 in the face of the statement that the criminal responsibility has decreased in accordance with the article 32/2 of the TPC; in accordance with Article 32 of the TPC No. 5237, by examining all the reports in the file on whether the defendant had mental illness and criminal capacity in a way that would completely remove or significantly reduce his ability to perceive the legal meaning and consequences of the act and to direct his behaviour due to a mental illness or weakness at the time of committing the crime, and after obtaining a report from the related Specialization Department of the Forensic Medicine Institute by eliminating the contradiction between the reports, it was necessary to make a judgment after the result of the report the by evaluating the legal situation of the defendant. By not doing this, it is necessitated to make decision of reversal.” (Ct. of Cass. (the Court of Cassation), 6th CC. (Criminal Chamber), F. (File no) 2020/10775, D. (Decision no) 2021/12118, 23.06.2021.

²⁶ For a similar decision, see “In the defence that the defendant killed his/her mother as a result of falling into depression and losing himself/herself; In order to dispel the doubt about the mental health of the defendant, the defendant should be referred to the Istanbul Forensic Medicine Institute with the case file, and s/he should be taken under observation in the Specialization Department of Observation...” (Ct. of Cass., 1st CC., F. 2011/4148, D. 2011/5979, 17.10.2011). İsmail Malkoç, *Açıklamalı Türk Ceza Kanunu* (1st edn, Yazarın Kendi Yayını/Author’s Own Publishing, 2013) 518.

²⁷ “According to the report of ... University Hospital dated 27/01/2011 attached to the defendant’s appeal petition; In the face of the reporting of “depression, anxiety dissociative disorder, it is recommended to follow the patient once a month by the psychiatry clinic for (6) months”; It is a necessity to evaluate of the legal situation of the defendant, after taking a report by following the procedure in accordance with Article 74 of the TPPC, in order to determine whether the defendant was mentally ill at a level that would affect the crime committed, whether his/her illness had the ability to perceive the legal meaning and consequences of the acts committed, or whether s/he had the ability to direct her/his behaviour in relation to these acts...” (Ct. of Cass., 3rd CC., F. 2013/7332, D. 2014/5563, 17.02.2014; For similar judgements, see. Ct. of Cass., 1st CC., F. 2011/4707, D. 2012/3793, 10.05.2012; Ct. of Cass., 4th CC., F. 2013/9811, D. 2014/32842, 13.11.2014.

crimes under mental illness for the purpose of protection and treatment(TPC art. 32/1, 57).²⁸

The last point to be evaluated in this context is the need to reveal whether the coronavirus-related mental illness affects culpability in terms of each type of crimes. If these diseases are not functionally related to the act committed, then it cannot be said that they affect the person's culpability. For example, while a panic attack or seizure caused by the COVID-19 cannot be considered as culpable in actions such as injuring the person around him or damaging the property, the same conclusion cannot be reached in terms of the acts of fraud or theft.²⁹

III. TRANSITORY REASONS IN TURKISH CRIMINAL LAW

According to art.34 of TPC, any person who is, because of a transitory reason, unable to comprehend the legal meaning and consequences of an act he has committed, or whose ability to control his behaviour regarding such act was significantly diminished, shall not be subject to a penalty. As a matter of fact, in the case of committing a crime under a transitory reason, it is not possible to mention about dangerousness.³⁰

The lawmaker regulates the existence of transitory reasons as a condition affecting the culpability but does not reveal its scope. The scope of transitory reasons can be determined by investigating the reasons that prevent the emergence of the psychic link between the perpetrator and his behaviour and the reasons that prevents the volitionality³¹ of the behaviour in this way.

Transitory reasons are the reasons which do not reach the level of mental illness, do not create a permanent and lasting effect on the person; however, they partially or completely eliminate the ability of people to culpability in terms of concrete events.³² Although these causes are temporary, they cannot

²⁸ Zafer (n 14) 451; For an example of a decision on the determination of criminal liability in the event of an offense of defamation under mental illness, see. Ct. of Cass., 4th CC., F. 2013/32707, D. 2014/36761, 22.12.2014.

²⁹ For similar thoughts, see. Mahmut Koca and İlhan Üzülmöz, *Türk Ceza Hukuku Genel Hükümler*, (16th edn, Seçkin Yayınları, 2023) 328-329.

³⁰ Serdar Talas, *Ceza Hukukunda Kusur İlkesi Bağlamında Nedeninde Serbest Hareket (actio libera in causa) Kavramı ve Geçici Nedenlerin Ceza Sorumluluğuna Etkisi*, (Yayımlanmamış Doktora Tezi, İstanbul Üniversitesi Sosyal Bilimler Enstitüsü Kamu Hukuku Anabilim Dalı, 2011) 171; Ayşe Özge Atalay, *Ceza Hukukunda Actiones Liberae in Causa Kuramı*, (On İki Levha Yayıncılık, 2019) 73 ff.

³¹ Justification of the Article, <www.cezabb.gov.tr> accessed 04 August 2021; Toroslu and Toroslu (n 6) 418.

³² Mehmet Emin Artuk and Others, *Ceza Hukuku Genel Hükümler*, (14th edn, Adalet Yayınları, 2020) 627; Malkoç (n 26) 516; Dönmezer and Erman (n 8) 431; Önder (n 14) 287; Zafer (n 14) 455-456.

be determined or predicted regarding of where, when, how and to what extent they will occur.³³

In order for transitory reasons to be mentioned in themselves of the perpetrator, these reasons must not have arisen from the will of the perpetrator.³⁴ As a matter of fact, TPC art. 34/1 regulates the involuntary effect of alcohol or drugs, which is a kind of transitory reasons. Due to this reason, full punishment will be given to anyone who commits a crime under the influence of a transitory reason voluntarily caused by the perpetrator.

Systemic diseases that affect the perception ability of the person are also evaluated within the scope of transitory reasons.³⁵ Diabetes and post-pregnancy psychosis are shown as examples within the justification of the article. The damage caused by coronavirus on people can also cause psychiatric neurosis or psychosis. As a matter of fact, this situation is similar to the examples given in the justification of the article. After all, the fact that people affected by the coronavirus disease are under psychosis is not continuous, but it has the capacity to directly affect the person's perception ability.

The regulation in art.34/1 of TPC, “...unable to comprehend the legal meaning and consequences of an act he has committed, or whose ability to control his behaviour regarding such act was significantly diminished...”, looks alike with the provision for mental diseases.³⁶ A person is not punished for transitory reasons, however, in case of mental illness which is not as serious as it is mentioned by art. 32/1 of TPC, it can be punished reduced and security measures can be applied. For transitory reasons, no security measures are regulated. As a matter of fact, regulating these measures is pointless, since the person who commits a crime under transitory reasons cannot be considered as dangerous.³⁷ However, within the scope of this similarity, if psychosis and similar psychiatric disorders caused by coronavirus disease, which can be considered as a transitory reason, reach the level of mental illness, TPC art. 32 should be applied.

IV. THE EFFECT OF TRANSITORY REASONS CAUSED BY CORONAVIRUS ON CRIMINAL LIABILITY

In order to determine what situations will constitute a transitory reason within the scope of coronavirus, it is necessary to examine the judgements first. In a judgement by the Turkish Court of Cassation (Yargıtay)³⁸, it is stated “*the*

³³ Koca and Üzülmöz (n 29) 331; Malkoç (n 26) 516.

³⁴ Toroslu and Toroslu (n 6) 418.

³⁵ Justification of TPC Art. 34 (n 31); Malkoç (n 26) 516.

³⁶ Artuk and others (n 32) 628.

³⁷ Koca and Üzülmöz (n 29) 332.

³⁸ Ct. of Cass. GACC. (General Assembly of Criminal Chambers of Court of Cassation),

angry character and the aggressive nature, which increases their tendency to crime, seen in people with epilepsy... whether or not it is a “transitory reason” should be clarified first by asking the Council of Forensic Medicine, which is the effective authority in this matter and after this issue has been clarified by the Council, decision should be made according to the result.” Based on this decision, one may argue that the coronavirus disease may cause angry character and aggressive attitudes. Although coronavirus cannot be considered as a central nervous system disease like epilepsy, it has also been observed that this virus causes neuropsychiatric cases.³⁹

Major psychological problems such as generalized anxiety disorder and panic attacks, aggressive or obsessive behaviours that cause the patient’s maladjustment, depression and sleep disorder are common psychological reactions within the scope of coronavirus.⁴⁰ Coronaphobia, a new term in the psychiatric literature, refers to the extreme fear of being infected by the coronavirus.⁴¹ Being infected with influenza, having a close environment with this deadly virus, and intense fear of being infected, uncertainty about being infected, and media misdirections are important predictors of post-traumatic stress.⁴² For example, the existence of a transitory reason can be mentioned if a person with coronaphobia pushes the people around themselves with the effect of their psychic state and causes injury to people, or, if a person insults people who sneeze unprotected under the influence of this phobia, a transitory reason may be thought.

With the information pollution and the media’s misdirection about the coronavirus, a new term has come to the fore: *infodemic*. An infodemic can be defined as a lot of information that contains false or misleading information in digital and physical media during a disease outbreak.⁴³ It causes confusion,

F. 1983/1-416, D. 1984/79, 27.02.1984. <<https://www.turkhukuksitesi.com/showthread.php?t=18229>> accessed 28 September 2024

³⁹ Likewise, transitory reasons may come to the fore in physiological disorders. For example, a disease with a high fever can be considered as a transitory cause. Zafer (n 14) 455-456.; Önder (n 14) 288). As the coronavirus is a disease with high fever, TPC art. 34 may be thought to be applied for.

⁴⁰ Zarghami (n 5) 1; For detailed information on the effects of the pandemic on the behaviour of children, adults, people with disabilities and healthcare professionals, see. Javed and others (n 1) 993-995. For detailed information on forensic psychiatric analyses of cases evaluated as a transitory reasons within the scope of Article 34/1 of TPC, see; Muhammed Emin Boylu and Others, ‘Türk Ceza Kanunu “Madde 34/1” Kapsamında “Geçici Bir Neden” Olarak Değerlendirilen Vakaların Adli Psikiyatrik Açından İncelenmesi’[2023] 37(2) J For Med, 67 ff.

⁴¹ Ibid.

⁴² Ibid.

⁴³ World Health Organisation, ‘Infodemic’ <https://www.who.int/health-topics/infodemic#tab=tab_1> accessed 28 September 2024.

which can harm health, and creates distrust of health authorities and undermines the public health struggle. With the widespread use of social media and the internet, information can spread faster. This can help to fill information gaps faster, but it can also increase harmful messages.⁴⁴ There is no doubt that this chaotic situation may cause transitory reasons that cause the person's perception ability to deteriorate.

The most important issue that should be evaluated within the scope of transitory reasons is the will of the person in the emergence of the transitory reason. Whether the emergence of the reasons is willingly by a person in the context of transitory reasons other than alcohol or drugs is not stated in the Code.⁴⁵ According to the general acceptance in the doctrine, in order to talk about the transitory reasons, the person must not have any culpability even to the degree of negligence in the emergence of this situation even though the Code does not state that the perpetrator should have culpability in the emergence of the reasons.⁴⁶ As a matter of fact, this is a requirement of the theory of *actio liberae in causa*.⁴⁷ This theory prevents the perpetrator who causes the transitory reason knowingly and willingly or in violation of the objective duty of care, from benefiting from the penalty reduction within the scope of this transitory reason.⁴⁸ Moreover, the principle of *nemo auditur propriam turpitudinem allegans*, which has not lost its validity since Roman law, also requires this.⁴⁹

The main issue here is to determine whether people who commit crimes within the scope of transitory reasons caused by coronavirus can benefit from impunity within the scope of transitory reasons. This is the issue of how to determine and evaluate whether the person is negligent in the emergence of transitory reasons caused by coronavirus. To determine this, the present writers believe that the culpability of the person getting the coronavirus disease should be revealed. If the person is negligent in catching the coronavirus and in the emergence of the transitory reasons caused by this disease, s/he will not be able to benefit from impunity within the scope of the transitory reasons, in accordance with the theory of *actio liberae in causa* and the principle of *nemo auditur propriam turpitudinem allegans*. If a person has acted against the obligation of duty of

⁴⁴ Ibid ; Sebastián García-Saisó and others, 'The COVID-19 Infodemic' (2021) 45 Revista Panamericana de Salud Pública 1, <<http://dx.doi.org/10.26633/rpsp.2021.56>> accessed 28 September 2024.

⁴⁵ Zafer (n 14) 455.

⁴⁶ Dönmezer and Erman (n 8) 431; Malkoç (n 26) 515; Artuk and others (n 32) 629; Koca and Üzülmöz (n 29) 332; Atalay (n 30) 75.

⁴⁷ Artuk and others (n 32) 629.

⁴⁸ Zafer (n 14) 456.

⁴⁹ For similar judgements, see. Ct. of Cass. GACC. (General Assembly of Criminal Chambers of Court of Cassation), F. 2014/830, D.2016/185, 12.4.2016.

care in the context of not being caught in the coronavirus, in this case, TPC art. 34/1 should not be applied. However, the determination of the negligence of the person within the scope of contracting the coronavirus disease, that s/he acts in violation of the obligation of objective care, appears as an important problem.

As for the present writers, the source of the obligation of the duty of care within the scope of the negligence of the person in this regard should be investigated. In fact, the duty of care forms the core of the theory of negligence.⁵⁰ In addition, once this point has been established, the value of predictability within the scope of the duty of care should also be revealed.

In the determination of negligent based upon the culpability; first, whether the perpetrator has the ability to be culpable should be investigated. After that, whether the obligation of duty of care, which is objectively in existence, can be expected from the perpetrator should be investigated by taking into account the perpetrator's personal abilities.⁵¹ Secondly, the source of the objective duty of care should be investigated. It is not possible to make a specific list of the rules that must be followed in order to be considered as fulfilling the obligation of the duty of care in a concrete case.⁵² Some of these may be written rules, some of them are specific violations of rules required by social life, the ordinary flow of life, and general life experiences.⁵³ These rules may be as follows; criminal codes or other codes, regulations, circulars, or rules related to risks or newly discovered, newly known substances.⁵⁴ In this context, circulars issued within the scope of coronavirus measures can be considered as the scope of the duty of care. The impact of the pandemic on the country's agenda and the prevalence of these measures throughout the country can be considered as a criterion for people to act in accordance with these obligations. However, detecting and proving the negligence or culpability of a person, which causes the person to be in a transitory reason by coronavirus, poses as an important problem. The present writers' recommendation is that people act against the measures that can be considered as the scope of the objective duty of care, and even not wearing masks despite having the opportunity to get masks, may be accepted as an evaluation criterion that they acted negligently in catching this virus. However, in terms of this obligation, it should be investigated whether infected by the coronavirus has a direct effect on the transitory reasons. Applying indirect reasons

⁵⁰ Bernd Heinrich, *Ceza Hukuku Genel Kısım II- (Taksir – İhmali Suçlar – İştirak – İctima – Hata – Alternatif Tipiklik)*, (Yener Ünver tr, Adalet Yayınları, 2015) 87.

⁵¹ Nil Melek Gültekin Diken, *Ceza Hukukunda Taksire Dayalı Sorumluluk*, (Yayımlanmamış Doktora Tezi, Marmara Üniversitesi Sosyal Bilimler Enstitüsü, 2018) 265.

⁵² Gültekin Diken (n 51) 91.

⁵³ Gültekin Diken (n 51) 91-92.

⁵⁴ Gültekin Diken (n 51) 92.

and making weakly related evaluations while determining the culpability of persons within the scope of transitory reasons will not be compatible with the structure of criminal responsibility.

Another issue that should be evaluated within the scope of negligence is how the responsibility will be determined if the result would have occurred even if the person had shown all the necessary care and attention but if it is unavoidable to get this disease despite all the care of the person and a transitory reason occurred because of it. As a rule, even if the person showed all the necessary care and attention, if it can be objectively demonstrated that the harmful result will occur, negligent liability cannot be mentioned.⁵⁵ Moreover, holding people liable for a result that cannot be prevented would be a practice that is incompatible with the basic principles of criminal law.⁵⁶

V. COMPARATIVE PERSPECTIVE ON GERMAN CRIMINAL LAW

German criminal law – like Turkish criminal law – contains a provision in § 20 of the German Criminal Code that abolishes the criminal’s criminal responsibility due to mental disorders that have an illness value: “*Whoever, at the time of the commission of the offence, is incapable of appreciating the unlawfulness of their actions or of acting in accordance with any such appreciation due to a pathological mental disorder, a profound disturbance of consciousness or intellectual disability or any other serious mental disorder is deemed to act without guilt*”. “Pathological mental disorders” or “other mental disorders” (e.g. borderline disorders, neuroses or post-traumatic stress disorders) as a result of an infection with the corona virus are quite conceivable. Coronaphobia can also reach such a severity in individual cases that a pathological mental disorder can be assumed.

In § 21 German Criminal Code, on the other hand, the “reduced criminal responsibility” can only have a mitigating effect: “*If the offender’s capacity to appreciate the unlawfulness of the act or to act in accordance with any such appreciation is substantially diminished at the time of the commission of the offence due to one of the reasons indicated in § 20, the penalty may be mitigated [...]*”. All reasons mentioned in § 20 German Criminal Code come into consideration here: “pathological mental disorder” or the “other mental disorder”, if they don’t reach the level of § 20 German Criminal Code.

In German criminal law, too, it must be determined on a case-by-case basis, i.e. related to the offence, whether the requirements of § 20 or § 21 of the German Criminal Code are met. In each individual case, the pathological disorder must lead to the perpetrator being either unable to see that the act was wrong or being

⁵⁵ Önder (n 14) 322.

⁵⁶ Ibid.

unable to act on the basis of this insight. In this respect, incapacity is legally not a permanent condition, it only causes the exclusion of guilt with regard to a very specific act.⁵⁷

In German criminal law, too, it is disputed whether the intentional or negligent induction of one's own incapacity may be taken into account in accordance with the legal concept of *actio libera in causa* and whether an appeal to one's own (reduced) incapacity is excluded. Especially in the case of self-inflicted drunkenness (also caused by negligence), the courts tend to deny the perpetrator an appeal to § 21 of the German Criminal Code. However, one should not be able to go that far for someone who negligently caused their own corona infection (with subsequent serious consequences), e.g. by refusing a vaccination or not wearing a mask. Although the subsequent infection with the virus may have been foreseeable, the subsequent (severe) mental disorder and certainly not the resulting illness could have been foreseen.

CONCLUSION

Revealing the scope of criminal responsibility from the perspective of the psychiatric impact of the COVID-19 pandemic on individuals is important. The coronavirus may negatively affect people's lives in a psychiatric sense. These effects can be listed as anxiety, minor or major depression, post-traumatic stress disorders, obsessive compulsive disorders, dementia and even schizophrenia.

Determining the scope of criminal responsibility of individuals in cases of criminal acts due to the effect of psychiatric cases appears as an important problem. At this point, it is an important issue that the mentioned psychiatric cases can be evaluated within the scope of mental illness regulated in article 32 of the TPC and transitory reasons regulated in article 34 of the same law. The same applies with regard to German law with regard to the provisions of §§ 20, 21 German Criminal Code. The Counsel of Forensic Medicine is the institute to examine to what extent coronavirus has affected the person.

When a crime is committed under the psychiatric effect caused by the coronavirus, the person should be under observation to reveal whether the crime was committed due to the effect. When it is determined that the crime has been committed due to mental illness, security measures will be imposed on the person for the purpose of protection and treatment. (TPC art. 32/1, 57).

Persons may commit crimes because of transitory reasons that do not reach the level of mental illness, do not show a pathological effect, and are caused by coronavirus disease. In terms of transitory reasons, the existence of negligence in catching the coronavirus disease affects the applicability of Article 34 of the

⁵⁷ Karl Lackner and Kristian Kühl and Martin Heger, *Strafgesetzbuch Kommentar*; (30th ed., C.H. Beck, 2023) § 20 marginal no 16.

TPC. If the person has acted negligently in catching the coronavirus disease, he will not be able to benefit from impunity in the context of transitory reasons.

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