Permanent disability in the criminal law: a forensic point of view

Deficiência permanente no direito penal: um ponto de vista forense

ABSTRACT
Permanent disability is a medico-judicial concept that aggravates the qualification of a criminal offence. The function of the forensic doctor is not always easy. The
Algerian legislator has not defined this notion, nor determined a percentage to qualify it. From this point of view, ask yourself if such a notion is clearly defined by the legislation. On the other hand, to wonder if the determination of permanent disability constitutes a difficulty to the forensic doctor during the criminal expertise.

Materials and methods: we proceeded to an analytical reading of the articles of the Algerian criminal law bearing the concept of permanent disability, In particular, article 264 and a comparison with other articles of the criminal law of different countries and the literature. A comparison with the notion of permanent disability in the civil law. A discussion of cases of victims of assault and battery observed in the forensic medicine department of the University Hospital of Sidi Bel Abbés received in the context of a criminal expertise, to determine a permanent disability.

Results: the reading of the articles of the Algerian criminal law bearing the notion of permanent disability and the discussion of the cases of criminal expertises received at the forensic medicine department of the University Hospital of Sidi Bel Abbés, in order to determine a permanent disability revealed: the abstract and ambiguous character of this notion. Some of its aspects have been described, but less broadly than other countries, where this concept has not been as clearly defined.

Keywords: criminal law, assault and battery, criminal expertise, permanent disability, forensic doctor.

RESUMO
A deficiência permanente é um conceito médico-judicial que agrava a qualificação de um delito penal. A função do médico forense nem sempre é fácil. O legislador argelino não definiu essa noção, nem determinou uma porcentagem para qualificá-la. Deste ponto de vista, pergunte-se se tal noção é claramente definida pela legislação. Por outro lado, perguntar se a determinação de incapacidade permanente constitui uma dificuldade para o médico forense durante a perícia criminal.

Materiais e métodos: procedemos a uma leitura analítica dos artigos do direito penal argelino com o conceito de deficiência permanente, em particular, o artigo 264 e uma comparação com outros artigos do direito penal de diferentes países e da literatura. Uma comparação com a noção de deficiência permanente no direito civil. Uma discussão de casos de vítimas de agressão e bateria observada no departamento de medicina forense do Hospital Universitário de Sidi Bel Abbés recebeu no contexto de uma perícia criminal, para determinar uma deficiência permanente.

Resultados: a leitura dos artigos da lei penal argelina que ostentam a noção de deficiência permanente e a discussão dos casos de perícia criminal recebidos no departamento de medicina forense do Hospital Universitário de Sidi Bel Abbés, para determinar uma deficiência permanente revelaram: o caráter abstrato e ambíguo dessa noção. Alguns dos seus aspectos foram descritos, mas de forma menos abrangente do que outros países, onde este conceito não foi tão claramente definido.

Palavras-chave: direito penal, agressão e bateria, perícia criminal, incapacidade permanente, médico forense.
1 INTRODUCTION

No country, no community, is immune to violence. It is a universal scourge that destroys society and especially the health and prosperity of the individual. The violence is punished by the Algerian criminal law in its chapter I entitled: offence against the persons, in particular in the paragraph 1 of article 264 which provides that: Any individual who voluntarily causes bodily harm or injury, or as is the case with any other violent act or means that result in illness or total incapacity to work for more than 15 days, shall be liable to serve a prison sentence of between one and five years and pay a fine of between, 100000 and 500000 Algerian Dinars.

If the victim files a complaint, the police initiate legal proceedings, a requisition established for a forensic examination of the victim and the issuance of an initial medical certificate of intentional assault and battery allowing for the determination of total incapacity for work and judicial follow-up in this sense. It is important to know that if the total incapacity to work exceeds fifteen days, it is an offence punishable by imprisonment. These assaults and intentional injuries can result in permanent disability for the victim. This notion of permanent disability is a medico-judicial notion that aggravates the qualification of the offence. The forensic doctor is called upon, by means of a court order, to answer questions relating to the consequences of this violence: Is it a mutilation or a permanent disability?

The permanent character is not a problem for mutilation. It is defined as: "the accidental loss or removal of a limb, an external part of the body, which causes an irreversible damage to the physical integrity" ROBERT.

The qualification of a permanent disability is up to the forensic doctor, who must specify the permanent character of the disability, which is "irreversible" or "definitive". On the basis of his decision, the accused is sentenced and the judge qualifies the offence and takes the correctional, criminal or misdemeanor character.

The function of the forensic doctor is not always easy. The Algerian legislator has not defined this notion. He made references such as mutilation or deprivation of the use of a limb, blindness, loss of an eye or other types of disability as provided for in Article 264 paragraph 3 of the Algerian Criminal Law. The legislative texts have not determined a precise percentage of permanent partial disability, from which the forensic doctor will evoke the existence or not of
permanent disability. From this point of view, it is necessary to ask whether such a notion is clearly defined by the criminal legislation. The questions are: what is the definition of permanent disability? Is a loss of an organ that does not affect the functioning of the body considered a permanent disability? such as splenectomy and section of the auricle. Is a loss of an organ whose function is compensated considered a permanent disability? such as thyroidectomy. Should we consider functional disorders only or the person’s activity or their participation in society?

On the other hand, to wonder if the determination of permanent disability constitutes a difficulty to the forensic doctor during the criminal expertise.

We have tried to show that the notion of permanent disability remains vague and ambiguous, often constituting a difficulty for the forensic doctor during the criminal expertise of the cases received for the determination of a permanent disability for the victims of voluntary assault and battery.

2 MATERIALS AND METHODS

We proceeded to an analytical reading of the articles of the Algerian criminal law concerning the notion of permanent disability and in particular article 264, and a comparison with other articles of the criminal law of different countries containing this concept, and the literature data. A comparison with the notion of permanent disability in the civil law.

A discussion of cases of victims of assault and battery received at the service of forensic medicine of the university hospital of Sidi Bel Abbés for a criminal expertise, in order to determine a permanent disability for these victims of intentional assault and battery.

3 RESULTS

The reading of the articles of the Algerian criminal law and of the various countries containing the concept of permanent infirmity made it possible to reveal that, the concept of disability was cited and not defined. It is a medico-judicial notion that aggravates the qualification of the offence.

Some of its aspects have been described, but less broadly than the articles of the criminal law of other countries containing this concept, for which this notion has not been so defined.
The discussion of cases of victims of assault and battery received for criminal expertise in the forensic medicine department of the university hospital of Sidi Bel Abbés, to determine if the injuries sustained to these persons resulted in permanent disability.

4 ANALYSIS AND DISCUSSION

Criminal jurisprudence has classified injuries into three types: minor injuries that heal without causing disability in less than twenty days, serious injuries, those that consolidate with a disability in more than twenty days, and fatal injuries which leading directly or indirectly to death.

According to the literature, disability is defined as: “the state of an individual not enjoying his functions or enjoying them only imperfectly” ROBERT. It is a medico-legal concept defined as the permanent loss of a function or organ. It is the occurrence of an organ damage that cannot be cured. It can be physical, but it can also affect the mental or intellectual faculties of the victim.

This concept has been described in Article 264 (amended) of the Algerian Criminal Law, which provides that: Any individual who voluntarily causes bodily harm or injury, or as is the case with any other violent act or means that result in illness or total incapacity to work for more than 15 days, shall be liable to serve a prison sentence of between one and five years and pay a fine of between, 100000 and 500000 Algerian Dinars.

When the violence was followed by mutilation or deprivation of the use of a limb, blindness, loss of an eye or other permanent disability, the guilty party is punished by imprisonment for a period of five (5) to ten (10) years. After reading the above article, it appears that permanent disability is a juridical concept that aggravates the qualification of the offence. It is not juridically defined, but some of its aspects have been described, such as: loss or deprivation of the use of a limb, blindness, and loss of an eye.

The medical expertise is a measure of instruction, ordered by the criminal courts: investigating judge, indictment chamber, juvenile judge, juvenile court and president of the criminal court. The modalities of the criminal expertise are fixed by the articles 95 of the code of medical deontology and the article 144 of the code of criminal procedure.
Criminal courts are required to select forensic doctors from lists drawn up by the courts and approved by the Ministry of Justice. Exceptionally, and by reasoned decision, the courts may choose forensic doctors who are not on any of these lists. The forensic doctor chosen from outside the list takes an oath before the judge, before carrying out his mission. The forensic doctor is an auxiliary of justice, because the magistrate needs his technical opinion. Its mission is to take back all the prejudices, to define all that has changed in relation to the previous state of the person in relation to the trauma. He receives the order containing the mission he has been assigned, through the judicial police or by the person to be examined.

He is empowered to interview an accused person and ask him the questions necessary for the accomplishment of his mission, without the presence of the judge and counsel.

He cannot get an opinion from another specialist on his own. He must first ask the judge for authorization.

The forensic doctor cannot answer anything other than the questions he is asked, within the framework of his mission: he cannot mention elements that are not related to his mission.

The criminal expertise carried out within the framework to determine a permanent infirmity, for a victim of voluntary assault and battery is proceeded in conformity, with the article 143 of the Algerian criminal procedure law which stipulates that: Any investigating or judgment court, in cases where a technical question arises, may, either at the request of the public Prosecutor or office or at the request of the parties, order an expertise. Where the investigating judge considers that an order for an expert opinion should not be granted, he or she must issue a reasoned order. The experts proceed with their mission under the control of the investigating judge or the magistrate, who must designate the jurisdiction ordering the expertise.

The mission of the forensic doctor, which can only be to examine technical questions, must always be specified in the decision ordering the expertise.

The investigating judge may designate one or more other experts sapitor.

When carrying out a criminal expertise in the context of determining a permanent disability, for a victim of assault and battery, several questions may be
Is it a loss of an organ? Is it a loss of organ function? Is the loss of an organ that does not affect the functioning of the body considered a permanent disability? such as splenectomy following a stab wound or partial or total section of the auricle with preservation of function.

This notion of disability is not determined in percentage, only a finding of a loss or deprivation of function of an organ is sufficient to qualify it, contrary to permanent disability in the civil law where article 38 paragraph 3 of the law n°94-28 of 21-2-1994 provides that the rate of permanent disability in the civil law is evaluated according to an indicative scale of disability. The objective of this scale is to provide elements for estimating the damage resulting from the after-effects of work accidents. It is only indicative. The proposed disability rates are average rates, and the doctor in charge of the assessment is free to deviate from the rates of the scale when confronted with a case with particularities ; He is then obliged to provide the arguments that led him there. The doctor must consider five elements: the nature of the disability, the general condition, the age, the physical and mental faculties of the victim, as well as his aptitudes and professional qualifications.

The nature of the disability is the physical or mental damage to the victim, the reduction in validity that results from the loss or alteration of organs or functions of the Human body. The nature of the disability is the basic information from which it is not taken into account the estimation of the general state of previous infirmities, whether they are consecutive to an accident at work or an occupational disease. The physician will start.. This will be taken into account when calculating the disability rate. The rate may be increased if the physical or mental condition of the victim appears to be more severely affected by the after-effects than that of a normal person. The professional skills and qualifications are medico-social. When the doctor in charge of the evaluation considers that the after-effects of the accident or occupational disease are susceptible to a change in the victim's professional life or a change in employment, this point likely to influence the estimate must be clearly emphasized.

The assessment of disability in the criminal law is left to the judge based on the report of medical experts, whose role is to specify the permanent nature of this disability, which must therefore be "irreversible" or" definitive ". It is up to the
prosecution to prove it by any means (medical certificates or medical expertise).

In the criminal law, authors indicate that permanent disability is the partial loss of function of a member of the body, whether by amputation or permanent disruption of function. They cited: impairment of vision, amputation of an arm, permanent loss of part or function of the arm, dislocation of the shoulder with permanent impairment of its function, loss of finger bones and inability to bend the fingers, shortening of the thigh, inability to close the mouth and chew, difficulty in neck movements and loss of part of the head bones.

Literature references also qualify a permanent disability as an entire ear section, surgical removal of the spleen following trauma, and when a permanent partial disability is estimated at 30% for a victim of assault and battery. The Algerian legislator has suggested that the administration of a harmful substance causing permanent impairment of the body functions is considered as permanent disability, as stipulated in Article 275 (Amended) of the Algerian criminal Law: « When the substances administered have caused either an incurable disease, or the loss of the use of an organ, or a permanent infirmity, the penalty is imprisonment for five (5) to ten (10) years ».

The permanent character does not pose a problem for the mutilation of a limb; partial or total section or amputation of a finger, hand, etc. The mutilation is defined as: « the accidental loss or the ablation of a limb, of an external part of the body, which causes an irreversible attack to the physical integrity » ROBERT. The deprivation of the use of a limb does not also pose a problem, such as the after-effects of a tendon and nerve injury

A permanent disability qualifies, even if the abuser did not intend to cause the disability.

The concept of disability has also been described in the following articles:

Article 267 (Amended) of the Algerian Criminal Law stipulates that anyone who voluntarily injures or beats his legitimate fathers or mothers, or other legitimate ascendants, shall be punished by imprisonment for ten to twenty years, if the injuries or blows were followed by mutilation, amputation, or deprivation of the use of a limb, blindness, loss of an eye or other permanent disability.

Article 271 of the Algerian Criminal Law provides that, when a minor under sixteen years of age is mutilated, amputated, deprived of the use of a limb, blinded,
deprived of an eye or permanently disabled as a result of assault, battery, violence, assault or voluntary deprivation of food or care, the penalty is ten to twenty years imprisonment. When the act is committed by an ascendant or descendant, spouse or other person having authority over the child as stipulated in Article 276 of the Algerian Criminal Law: imprisonment for ten to twenty years.

The crime of castration also represents a permanent disability, is an operation with the intention or result of depriving the male or female individual of his reproductive faculties. The guilty party is punished with life imprisonment. Article 274 of the Algerian criminal law stipulates that "Anyone who is guilty of the crime of castration is punished by life imprisonment. If death is the result, the guilty party is punished by death".

Article 148 (Amended) of the Algerian Criminal Law provides imprisonment from two to five years, anyone who commits violence or assault against a magistrate, a civil servant, a public officer, an agent of the public force in the exercise of his duties or in the course of such exercise. When the violence results in mutilation, amputation, deprivation of the use of a limb, blindness, loss of an eye or other permanent disability, the penalty is imprisonment for ten to twenty years.

From the reading of these articles, we have noticed that the permanent disability has been mentioned on several articles of the Algerian criminal law, but it has not been defined.

In the Egyptian law, article 412 of the criminal law paragraph 1, examples of permanent disability have been included in the article that qualifies this concept such as: a decrease in vision, section of the entire auricle of the ear, splenectomy... etc. Partial section of the pinna of the ear is not considered a permanent disability, as the function of the ear is preserved. A loss of teeth is not considered a permanent disability because the function of the teeth can be replaced by prostheses.

Other countries have qualified an alteration of the mental state resulting from violence as a permanent disability. The Court of Cassation of Iraq has ruled a permanent disability any depression occurring in a person who has suffered blows to the head, caused by an iron stick. The Iraqi law in its article 240 of the criminal law has indicated that a total or partial disturbance of one of the sensory functions, occurring as a result of violence has been qualified as a permanent
disability.

In the Jordanian criminal law, this concept has been qualified when a total or partial disruption of one of the sensory functions has occurred as a result of violence. Article (335) of the Jordanian Criminal Law stipulates that if the act of violence leads to the amputation or the removal of an organ, or the amputation or deprivation of the use of a limb, or the deprivation of the use of one of the senses or causing a serious mutilation (which can not be healed, such as the severance of the pinna of the ear and the scar of burn). However, mutilations reconstructed by cosmetic surgery are not considered a permanent disability if the victim is able to make it financially.

The French criminal law does not define permanent disability in its article 222-9 which stipulates that: violence resulting in permanent mutilation or disability is punishable by ten years imprisonment and a fine of 150,000 euros. It is an aggravating circumstance retained when the punishable act has resulted in permanent mutilation or disability, its effects extend to all perpetrators, co-perpetrators and accomplices of the offense. The mutilation (total or partial loss of a limb) and the loss of function (deprivation of use: tendon or nerve damage) have been specified only for the limbs.

We are going to expose in the form of questionings, observations of cases received in the service of legal medicine of the University Hospital of Sidi Bel Abbés (Algeria) within the framework of a criminal expertise, in order to determine if the traumatism undergone to the victim having generated a permanent infirmity.

The first case, it is about a woman (M F), aged 68 years, victim of conjugal voluntary assault and battery caused by a sharp instrument. She sustained a facial trauma represented by a left supra-brow wound causing a section of the levator muscle of the upper eyelid resulting in a total ptosis without any visual impairment. She received surgical treatment, which resulted in an improvement after surgery, with persistent partial ptosis. There was no visual acuity impairment, but there was a functional loss of the upper visual field, requiring a permanent partial disability of 05 to 15%. Can this damage be qualified as a permanent disability?

The second case is an 18-year-old man (O A), victim of assault and battery. He sustained a trauma of the right hand caused by a sharp instrument and caused a section of the muscles of the hypothenar areas. This trauma caused a functional
deficit resulting in partial deprivation of the normal use of wrist movements, by limiting the prono-supination of the hand. Is it a permanent disability knowing that the trauma has caused a partial deprivation of the right hand which is the dominant hand for this person, and this limitation of movements justifying a permanent partial disability of 10 to 15%?

The third observation is about a 16-year-old male (S Y), victim of assault and battery. He sustained abdominal trauma caused by a sharp instrument causing a splenic wound. He benefited from surgical removal of the spleen (splenectomy). The clinical examination and the biological assessment prescribed did not reveal any clinical or hematological repercussions. Is it a permanent disability, knowing that it is a loss of an organ without functional repercussions, and this damage requiring a partial permanent disability of 05%?


The fourth observation is about a man (D A), 24 years old, he declared to have been a victim of assault and battery. He sustained a trauma of the right eye causing two corneal wounds healed with a visual acuity of 1/100th uncorrected. Is it a permanent disability, knowing that it is a functional deficit deprives almost total use of the right eye with a possible improvement following a corneal transplant?

5 CONCLUSION

The concept of permanent disability still remains abstract for the expert, due to the lack of a clear legal definition and scientific consensus defining this concept. The reading of the articles of the Algerian criminal law and of the various countries containing the concept of permanent infirmity made it possible to reveal that, the concept of disability was cited and not defined. It is a medico-judicial notion that aggravates the qualification of the offence. Some of its aspects have been described, but less broadly than the articles of the criminal law of other countries containing this concept, for which this notion has not been so defined.

According to article 264 of the Algerian criminal law, permanent disability is
a legal concept that aggravates the qualification of the offence. It is not defined, but some of its aspects have been described such as: loss or deprivation of the use of a limb, blindness and loss of an eye. Authors have defined this notion as the total or partial loss of function of a body member.

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This notion of disability is not determined in percentage, only a finding of a loss or deprivation of function of an organ is sufficient to qualify it. Literature references qualified a permanent disability when a permanent partial disability is estimated at 30% for a victim of assault and battery.

The Algerian legislator has suggested that the administration of a harmful substance resulting in permanent impairment of body functions is considered a permanent disability as stipulated in Article 275 (Amended) of the Algerian Criminal Law.

The role of the forensic doctor is to specify the permanent character of this disability, which must be "irreversible" or "definitive". This permanent character is not a problem for the mutilation. The appreciation is left to the judge based on the report of the forensic doctors.
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