

CŞMD's submission to the United Nations Special Rapporteur on Violence Against Women-UN SRVAW thematic report on "Rape as a grave and systematic human rights violation and gender-based violence against women"

Questionnaire on criminalization and prosecution of rape

Definition and scope of criminal law provisions

1. Please provide information on criminal law provision/s on rape (or analogous forms of serious sexual violence for those jurisdictions that do not have a rape classification) by providing full translated transcripts of the relevant articles of the Criminal code and the Criminal procedure code.

Although there is no clear regulation against the offences of rape in our national laws, violations of the prohibition of all forms of sexual violence against adults/adolescents/ persons not attained the lawful age/minors/children are condemned by the law. Lawmakers estimated that in order to evaluate an offense as an offence against sexual integrity, it should be committed not because of existing power imbalance and using force, but because of satisfying the sexual pleasure. In practice, the acts that are not sexually motivated but fall under this classification, are not covered by this relevant section of the law. For example, the act of the nonconsensual violation of one's body through penetration as a method of torture is not considered as a sexually motivated penetration. In the official regulations, the crime of rape is not assessed within the context of gender-based discrimination and hate against women and hate crimes. This regulation is based on the legal definition of who a child/minor is. Any person who has not reached the age of 18 is a child/minor according to the regulations, however, the types of the commission of the criminal offenses and the committed offenses by offenders of different ages against the individuals 18 years of age or younger or older lead the different classification of punishments. In the Section Six of Turkish Penal Code regarding the offenses against sexual integrity, Article 102 is about the crime of sexual assault; Article 103 is about the crime of child molestation; Article 104 is about the sexual intercourse between/with persons not attained the lawful age; Article 105 is about the crime of sexual harassment. The relevant provisions of Turkish Penal Code punishing all sexual offences involving adults are provided below.

"SECTION SIX

Offenses against Sexual Integrity

Sexual Assault: Article 102 – (Amended on 18/6/2014 by Law no. 6545/art.58) (1) Any person who violates the physical integrity of another person by means of sexual conducts, shall be sentenced to the imprisonment for a term of 2 - 10 years, upon the complaint of the survivor. If this sexual act falls into the category of sexual importunity, the term of imprisonment shall be from 2 - 5 years.

(2) Where the act is committed by means of inserting an organ or other object into the body, the perpetrator shall be punished with a term of imprisonment no less than twelve years. If the act is committed against the perpetrator's spouse, conducting an investigation and prosecution shall be subject to a complaint by the survivor/spouse.

As stated in article 102 of the Turkish Penal Code, the survivor of the offence can be any adult person reached the age of 18. In this article, the crime of sexual assault is broken down into minor and major forms. Article 102/1 of the Turkish Penal Code explained the minor form of the crimes of sexual assault, where the focus is on the intercourse, rather than penetration.

Noncontinuous and nonrecurring acts are regarded under the category of sexual importunity rather than being regarded as a minor form of the crime. According to the lawmakers, the continuity of the intercourse should be sought in the minor form of sexual assault crime. The commencement of investigation or prosecution about the minor form of this crime is bound to complaint of the survivor. TCK 102/2, on the other hand, describes the major forms of this crime, and states that commission of this offense by inserting an organ or any object into a body should be punished. Therefore, this crime has been prosecuted by the judicial officials without needing any complaints filed by the survivor. However, according to the law, in case of commission of major form of this offense against the spouse, commencement of investigation or prosecution is bound to complaint of the survivor/spouse.

"The physical bodily examination on, and taking samples from third parties

Turkish Criminal Procedure Code- Article 76 – (Amended on 25/5/2005 by Law no. 5353, art.3) (1) The judge or the court upon the motion of the public prosecutor or on their own motion or, in cases of peril in delay, the public prosecutor, may decide to conduct external or internal physical bodily examination on the survivor or taking blood or similar biological samples from the body of the survivor, as well as hair, saliva, nail in order to obtain evidence of a crime, so long as this shall not create a danger to the survivor's health and there is no surgical intervention: the decision of the public prosecutor shall be forwarded to the judge or the court for approval within 24 hours. The judge or the court shall give their decision within 24 hours. Unapproved decisions shall be invalid, and evidence obtained shall not be used.

(2) In cases where there is the consent of the survivor, obtaining a decision according to the rules as mentioned in the subparagraph one is not required in order to conduct these interactions.

(3) Where there is a need to determine the parentage of a child, a decision according to the rules in subparagraph one is required, in order to conduct this research.

(4) The witness may refrain from bodily examination or giving body samples under the grounds of refraining from testimony. If the individual is a child or mentally ill, the decision to refrain shall be made by the legal representative. In cases where the child or the mentally ill person is capable of understanding the legal meaning and consequences of taking the witness-stand, their opinion on the subject shall also be asked. In cases where also the legal representative is the suspect or accused, then the judge must make the decision about this matter. However, evidence of the crime obtained in this way shall not be used as evidence in the further stages of the lawsuit unless the legal representative who is not under criminal charges as a suspect or an accused gives his consent.

(5) Judge or court decisions rendered under this provision may be subject to opposition.

The physical bodily examination of a woman

Article 77 – (1) Upon her request and if it is possible, the physical bodily examination of a woman shall be conducted by a female medical doctor."

The articles applied in the criminal proceedings of the crimes of sexual assault in the Turkish Criminal Procedure Code are Article 76 and Article 77. The former article regulates the taking samples from the bodies of the survivors, if deemed necessary during the proceedings. In the latter article, the law has modified the general practice by bringing the provision of the specific physical bodily examination of a woman. However, in practice, it is not possible to enjoy this legal right due to the condition that "if it is possible". This provision is one of the gender-based exceptions brought by our laws.

2. Based on the wording of those provisions, is the provided definition of rape:
 - a. Gender specific, covering women only: **NO.**
 - b. Gender neutral, covering all persons: **YES.**

- c. Based on the lack of consent of victim: **YES**. Since consent is not clearly stated in the provisions of the law, in practice, the existence of consent in each case is evaluated by the panel of the court. There is the uncertainty in this regard in the law.
- d. Based on the use of force or threat: **YES**.
- e. Some combination of the above: **YES**.
- f. Does it cover only vaginal rape?: **NO**.
- g. Does it cover all forms of penetration?: **YES**. If yes, please specify.

Commission of offense by inserting an organ or an object into a body constitutes the major form of the crime of sexual assault under the Article 102/2 of the Turkish Penal Code. The law evaluates the act of the vaginal, oral, or anal insertion of organs or the objects under the category of sexual assault. According to the lawmakers, the insertion of the objects constitutes identifiable objects, which are penetrated into the cavities with sexual motivation. In practice, these acts are committed usually by fingers, etc.

However, since the law is focusing on the penetration in such cases, although there is no gender discrimination clearly in the law, in practice and in the interpretations of the law in the doctrine, it is regarded that the perpetrators of the major form of this offence (by inserting an organ or an object) specified in Article 102/2 of the Turkish Penal Code cannot be the women. Although lawmakers do not explicitly state this, it may be possible to say that those who regulate the law focus on the concept of honor and the existence of penis in such offences. There are no regulations in order to consider the fact that the perpetrators of such offences can be anyone and such offences constitute the crime of rape when there is no clear and explicit consent.

- h. Is marital rape in this provision explicitly included?: **YES**.
 - i. Is the law silent on marital rape?: **NO**.
 - j. Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included?
 - k. Is marital rape excluded in the provisions, or is marital rape not considered as a crime?: **NO**.
3. Are there any provisions excluding criminalization of the perpetrator if the victim and alleged perpetrator live together in a sexual relationship/have a sexual relationship/had a sexual relationship? If so, please submit it.
4. What is the legal age for sexual consent?

Although the legal age for sexual consent is the age of 15 according to the interpretation of the law in practice, the lawmakers envisage less punishment for the persons who married to the children who were forced into early marriages. According to the provisions of the law, the limit is below 12 years of age for considering the aggravated form of offense. The provisions the law implicitly try to explain that when children/minors are older than twelve, but younger than fifteen, as either incapable of appreciating the legal meaning and consequences of the act or as having underdeveloped capability to control their behaviors, cannot give any sexual consent. However, in our country, there is no definition of a crime of early and forced marriages and there is no clear criminal law provisions for the sanctions. Early and forced marriages are a form of abuse that is frequently seen within the borders of our country. In addition, the religious marriages taken place regardless of age, are accepted within the society with an implicit approval. These religious marriages are undocumented and there is no explicit definition of crime or criminal sanction in the law for this practice.

However, it is worth noting that the issues we have mentioned here are based on the interpretation of the legal documents.

5. Are there provisions that differentiate for sexual activity between peers? If so, please provide them.

No, there are not. However, in practice, especially the boys are evaluated under the judicial system on account of sexual activity between peers, and most of them are punished as a result of the court sessions. These children are forced into marriages by their families or are forced to declare that they consented or not in order to avoid and get rid of the criminal sanctions.

6. Provide information on criminal sanctions prescribed and length/duration of such criminal sanctions for criminalized forms of rape.

The Turkish Penal Code has imposed a penalty of imprisonment as a criminal sanction in cases of sexual assault. By referring to the Article 102 of Turkish Penal Code above;

- Any person, who violates the physical integrity of another person as minor form of sexual assault stated in Article 102/1 of Turkish Penal Code, shall be sentenced to a penalty of imprisonment for a term of two to ten years;

- Noncontinuous and nonrecurring acts stated in Article 102/1 of Turkish Penal Code, is regarded under the category of sexual importunity rather than being regarded as a minor form of this offence, the term of imprisonment shall be from two years to five years.

- When the act is committed as a major form of the offence stated in Article 102/1 of Turkish Penal Code, the perpetrator shall be punished with a term of imprisonment no less than twelve years.

Where the offence is committed against persons who are physically or mentally incapable of defending themselves; by misusing the power obtained by the position had in a public office or by the power provided by relation of service and tutelage; against a person with whom there is a third degree blood relation or kinship, or by the stepfather, stepmother, step-sibling, adoptive person or adopted child; by using weapons or together with the cooperation of more than one person; by using the advantage of environment where people have to live together, the punishments imposed on the perpetrator(s) according to above paragraphs are increased by one half.

- Where more force than is necessary is used to suppress the resistance of the survivor during the commission of the offence, the perpetrator shall also be sentenced to a penalty for intentional injury in addition.

- Where the survivor enters a vegetative state or dies as a result of the offence, the penalty of aggravated life imprisonment shall be imposed.

7. What does the legislation in your country provide in terms of reparation to the victim of rape and/or sexual violence after conviction of the perpetrator?

Although the provisions for the reparation are not specific to survivors of sexual crimes, the survivors are able to motion for compensation of their material and emotional losses in line with the provisions of the law. However, this cannot be made a subject of litigation by lawyers and rights holders in practice.

Aggravating and mitigating circumstances

8. Does the law foresee aggravating circumstances when sentencing rape cases? If so, what are they?

- a. Is rape by more than one perpetrator an aggravating circumstance?: **YES.**
 - b. Is rape of a particularly vulnerable individual an aggravating circumstance, or the imbalance of power between alleged perpetrator and victims? (for example, doctor/patient; teacher/student; age difference): **YES.** (However, in practice, there are some news published on the media regarding some decisions ruled against the vulnerable survivors who are children or persons with disabilities in sexual assault cases as if they consented. There is cycle of impunity of the perpetrators of the crimes of rape against refugees when they stated that they do not know the laws of Turkey.)
 - c. Is rape by spouse or intimate partner an aggravating circumstance?: **NO.**
9. Does the law foresee mitigating circumstances for the purposes of punishment?: **NO.** If yes, please specify.
(Although this is not only specific to this crime, punishments of the perpetrators of the crime of rape are reduced under "unjust provocation mitigation", "good conduct abatement" by courts)
10. Is reconciliation between the victim and the perpetrator allowed as part of a legal response?: **NO.** If so, at what stage and what are the consequences?
- a. Regardless of the law, is reconciliation permitted in practice?: **NO.** And what is the practice in this regard?
11. Is there any provision in the criminal code that allows for the non-prosecution of perpetrator?: **YES.** If yes, please specify.

Due to the fact that conducting an investigation and prosecution shall be subject to a complaint by the survivors/spouse in case the act is committed as a major form of offence specified in Article 102/2 of Turkish Penal Code against the spouse, there can be decision of non-prosecution if the survivor / spouse retract the complaint.

- a. If the perpetrator marries the victim of rape?: **NO.** (However in order to provide a note to the study, the draft bill, which aims to make the marriage between the perpetrator and the survivor as a standard procedure in order to get away from the criminal sanctions in the crimes of sexual assaults against children, was submitted to the parliament and rejected by public pressure. Government officials declared that the bill will be introduced to parliament when the parliament is opened in June.)
- b. If the perpetrator loses his "socially dangerous" character or reconciles with the victim?: **NO.**

Prosecution

12. Is rape reported to the police prosecuted ex officio (public prosecution)?: **YES.**
13. Is rape reported to the police prosecuted ex parte (private prosecution)?: **YES.**
(Sexual assault crimes are not based on complaints, but they can also be prosecuted upon the survivors' complaint.)
14. Are plea bargain or "friendly settlement" of a case allowed in cases of rape of women: **NO.**
15. Are plea bargain or "friendly settlement" of a case allowed in cases of rape of children: **NO.**
16. Please provide information on the statute of limitations for prosecuting rape.

In our law, statute of limitations for prosecuting are not specific to crime, but are calculated within the prescribed sentence of the imprisonment if the crime is committed. In the minor form of the sexual assault crime, the duration of statute of limitations prescribed in the law is 15 years; the duration of it is 8 years if the crime is falls into the category of sexual importunity; the duration of it is 15 years if the crime is committed as a major form of crime; the duration of it is 6 months if the crime is committed against the spouse. However, the law examines the cases according to the way the crime was committed and the evidence in the file. As a result of this examination, the prescribed duration of statute of limitations may increase. For example, if the action is committed as

major form of the offence specified in Article 102/2 of the Turkish Penal Code and there are reasons that aggravate the crime, the duration of statute of limitations will increase. Judicial bodies decide on each crime and on the date of the commission of crime according to the provisions of the law in force in our country. Unfortunately, the duration of statute of limitations is subject to various conditions. The statute of limitations for rape crimes in Turkey is not completely removed, although it has been removed in many developed countries.

17. Are there provisions allowing a child who was the victim of rape and to report it after reaching adulthood?: **YES**. (Although it is not clearly and explicitly stated in the law, it can be inferred from the interpretations and from the limitation periods pertaining to criminal proceedings that this is possible.)
18. Are there mandatory requirements for proof of rape, such a medical evidence or the need for witnesses?: **NO**. If yes, please specify.
Although there is no mandatory requirements for proof of rape, there is no survivor friendly approach where they do not bear the burden of proof in their testimonies. In practice, the penal of the courts lay the burden on the survivors to prove and document the crime of rape they are exposed to, rather than on the law enforcement officials and prosecutors).
19. Are there rape shield provisions aimed at preventing judges and defense lawyers from exposing a woman's sexual history during trial?: **NO**.
20. Are there procedural criminal law provisions aimed to avoid re-victimizations during the prosecution and court hearings?: **NO**. If yes, please specify.

War and/or conflict

21. Is rape criminalized as a war crime or crime against humanity?: **YES**.
22. Is there a statute of limitations for prosecuting rape in war or in conflict contexts?: **NO**
23. Is there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict?: **YES**.
24. Has the Rome Statute of the International Criminal Court (ICC) been ratified?: **NO**.

Data

25. Please provide data on the number of cases of rape that were reported, prosecuted and sanctioned, for the past two to five years.

Since public institutions do not disclose data, we do not have data on these crimes.

Other

26. Please explain any particular and additional barriers to the reporting and prosecution of rape and to the accountability of perpetrators in your legal and social context not covered by the above.

In the social and legal context we are in;

- Legislation in Turkey is not sufficiently explained in a detailed way. Turkish laws are ambiguous, full of gaps and open to interpretation. The crime of rape, persistent stalking and other crimes of sexual violence and abuse are not sufficiently taken into consideration in Turkish Penal Code; there are no definitions of consent, consent building and similar concepts. This is disadvantageous for the survivor women and girls; therefore they prefer not to report the crime.
- In the crimes of rape, every individual who suspects and finds that the crime was committed has an obligation to report the crime. This situation conflicts with doctor-patient confidentiality, and women and girls who were subjected to rape do not

consult doctors because of the concern that the doctors will report them; therefore they cannot get the adequate support and cannot protect the evidences for proving the existence of crime.

- Although Turkey ratified in its constitution and in its legislation that in case of a conflict between international conventions and treaties and Turkish laws, the provisions of international conventions shall prevail; the penalties of courts and judicial officials do not taken into consideration the relevant provisions of the international provisions. There is almost no case laws exist in this regard. For example, the forensic reports obtained from university hospitals by the survivors of rape are not accepted by the courts, despite the international provisions. The penalties of courts in Turkey only take into consideration the reports of the Institution of Forensic Medicine of Ministry of Justice and this causes the doubt concerning impartiality of courts regarding this matter.
- The judicial officials in practice do not consult many provisions existing in legislation in Turkey unfortunately. Indeed, it can be said that there is instability between the laws and practices in Turkey, especially regarding the crime of gender-based violence against women and girls, LGBTI+s.
- As being the first signatory country to Istanbul Convention, Turkey does not fulfill its obligations to transform the legislation and practices in order to prevent the violence and to transform the cultural norms, which cause gender based discrimination. Turkey fails to comply with the binding clauses regarding providing special services for the survivors of sexual violence and regarding the prevention of early and forced marriages; rather, Turkey has submitted various legislations to the parliament contradicting the international standards.¹ The Istanbul Convention was brought up for discussion on the grounds that it causes the mainstreaming of homosexuality; the high-level public authorities have provided statements encouraging the annulment of the Convention.²
- In Turkey, legal regulations that can be seen as positive in the prevention of gender-based sexual violence and rape, are not implemented in practice and are not known by judicial officials, so they do not become case law. Legal regulations are not publicly promoted by the government, authorities and law enforcement officials, there is no awareness raised in that regard, rather there are various contradicting statements and practices. The concept of Gender and the trainings regarding gender in universities were cancelled on the grounds that these are against the social values.
- There is no steps taken for the prevention of early and forced marriages, rather a parliamentary commission was established to prevent divorces, bills were submitted to the parliament on marrying off the children who are the survivors of rape with the perpetrators, the muftis were authorized for performing civil marriages, the education system was changed by limiting it to 4+4+4 years, which may limit the schooling rate of girls.
- Public institutions regarding supporting services do not provide information and support to civil society and they refrain from providing their opinion and making collaboration with civil society.
- It is observed that public institutions do not share information with the media or with each other, and there is no decent coordination other than some specific services. It is not known who is behind the mechanism controlling the services, and the state seems to monitor and audit its own services.
- There is no research shared publicly by the state on sexual violence.
- There is no special support units specialized in supporting survivors of sexual violence in Turkey. There are no units such as National Emergency Response Hotline, Rape

¹ For more information, see. Istanbul Convention Monitoring Platform, (2017). *Shadow NGO Report on Turkey's First Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*: <https://rm.coe.int/turkey-shadow-report-2/16807441a1>

² In a news published by Yeni Akit Newspaper on 7 June 2019, it is stated that "In an iftar event he attended at the Haliç Congress Center in İstanbul on June 1, Recep Tayyip Erdoğan, the president said "the Istanbul Convention is not a Nas and not a criteria for us" as an answer to a question on Istanbul Convention which is the basis of the Law No. 6284 disrupting the family order, a basis of the Gender Equality Initiative and of the propaganda of homosexual deviance" : <https://m.yeniakit.com.tr/haber/erdogan-istanbul-sozlesmesi-nas-degildir-787761>

Crisis Center, "Sex Crimes Unit", Sexual Violence Counseling Center or similar units in the Prosecutor's Office or in the Police Department. The existence and functions of such units are not known publicly. State institutions do not assume the obligations of preventing and protecting the survivors; the concept of "sexual violence" is almost never used publicly.

- Legal support and consultancy units specializing in supporting the survivors of sexual violence were not established and there is no quality consultancy services are not provided for answering the problems and the questions frequently asked by the survivors such as burden of proof, reporting the crime, statute of limitations for prosecution in sexual abuse cases and the rights in case of the crimes in public spaces.
- No measures were taken to protect the privacy of survivors of sexual violence and to facilitate the reporting of the crime for them. Many women in our country still do not report the sexual assaults because they do not want their families and their acquaintances to learn what they were subjected to (and due to the fear of exclusion, stigmatization and fear of exposing to further violence). Public institutions are not effective in promoting reporting of sexual violence. Women are not able to, anonymously or by protecting their privacy, provide the documents related to the sexual assault they were exposed to, without being forced to make an official complaint and they cannot make the related evidences to be taken officially without filing an official complaint.
- It can be observed that there is an impression that judicial officials support the judicial decisions that legitimize sexual violence and abuse against women. There are examples in our history of law showing that the defense of consent is raised in the cases where the survivors are 13-year-old children by some courts. Regular trainings and supervision, including examples of best practices of legislation and evaluation of the crimes of sexual violence, are not provided to the judicial officials in line with the universal rights.
- In Turkey, women who were subjected to rape refrain from applying to public institutions, even they apply, they still ask for help and support solidarity via social media. This also indicates the distrust of public institutions. In many cases, it is observed that public institutions do intervene the process or support the survivors or ensure just decisions to be made, only after the violence cases become visible on social media. It is common for women raise up their voices via social media in order to get rid of male violence, and this leads the question of why the state cannot react effectively and rapidly to the violence against women and to the male threats against women and to mainly the rape culture. State institutions do not investigate what instruments women use, why they use or not (e.g. KADES button) and these do not develop emergency measures in that regard. In this regard, the experience of non-governmental organizations working in this field, of rights-based women and LGBTI+ organizations are not benefited from and no collaborations are made with them. On the contrary, these organizations are targeted.
- Definitions of sex crimes, such as sexual assault, rape are not revised in line with the universal rights, the revisions contradicting the international standards, which make the definitions vague in a way to lead the impunity, are submitted by the government to the parliament. The definition of the crime of rape was revised in line with the women's rights in many countries following the global "me too" movement. The crime of rape in Turkey is not defined on the basis of consent by being limited with "physical coercion". The least visible forms of sexual violence are not defined in the law, the definitions of rape and other forms of sexual violence are not expanded, and there are judicial decisions, which lead to public indignation and unrest, that are justified without taking into account the discrimination against women and building consent.
- In sexual violence cases, even though the private lives and sexual history of the survivors are irrelevant, those are put under the scope and the ethic values of them are investigated. This cause that in such cases they are considered as if they consented, secondary traumas are triggered and this cause public resentment. The law globally known as "rape shield law" prohibiting an individual charged with a sexual crime from questioning the survivors about the prior sexual relationships unless such evidence is somehow relevant to the charged crime; with the aim of preventing victim

blaming and of ensuring the fair trial process; is not regulated in legislation on the crime of rape, sexual assault and homicide against women in Turkey.

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