



RAPE CRIME IN TURKISH CRIMINAL LAW

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Rape is one of the most underreported crimes. The crime is one of degradation as well as violence, and fear of reprisal and embarrassment contributes to the victim's hesitation to report it. Those who do report it must confront the trauma of the encounter with the police, the investigation of the crime and the ordeal of trial. Sexual offenses may range from violent sexual attacks to prohibited sexual encounters between adults and minors. Rape is unlawful carnal knowledge of a woman without her consent. It is a type of sexual assault usually involving sexual intercourse. The rape act may be carried out by physical force, coercion abuse of authority or with a person who is incapable of valid consent. Rape may be committed by fraud, such as under the guise of a medical examination or when the victim lacks capacity to consent. According to Turkish Criminal Law a man can rape his lawful wife and he can be guilty of the crime of rape committed upon her.

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Introduction

Generally rape is defined as sex without consent. Still the law of assault is more complicated than that definition. Because rape is not always clear whether there has been consent. There was traditionally a fear that men would be falsely accused of crime. "Rape, at common law, is unlawful carnal knowledge of a woman without her consent. Any sexual penetration, however slight, is sufficient to complete the crime if the other elements are present". The law of rape has conventionally involved four factors. These factors:

-Force Traditional definitions of sexual assault require force (or a substitute for it, such as threat or fraud). With evidence of force, courts could ensure that the defendant clearly realized the victim was not consenting to the sexual activity.

-Resistance Historically most jurisdictions required resistance to ensure that it was clear the sex was non-consensual. Of course, such a requirement not only makes it more difficult to prove rape, but may not reflect how rape victims actually act. Rather than resist, some victims may simply freeze in the situation. Is this still rape? Also, does requiring resistance put victims at greater physical risk? It should come as no surprise that most jurisdictions have eliminated the resistance requirement for rape.

-Nonconsent Perhaps the most confusing element of rape is that the victim does not consent. What does that mean? First, it is clear that the victim must not subjectively want to engage in the sexual conduct. Second, there must be some objective manifestation of nonconsent which puts the defendant on notice that the sex is without consent. Third, there is the question of whether the defendant must actually realize the victim did not consent or whether it is enough that the defendant should have realized the sex was not consensual. This latter aspect is also addressed in the mens rea requirement for the crime.

-Mens Rea Must the defendant actually realize the sex was without consent? Jurisdictions vary widely in the degree of mental fault necessary for rape. Some require that the defendant actually know that his victim has not consented. Others only require that the defendant act with 'recklessness.' Yet others require only 'negligence', so that a person is guilty of rape, even if he honestly believes the victim is consenting, but turns out to be wrong and reasonable person would have realized the victim did not consent".

"With respect to the definition of rape, the International Criminal Tribunal for the former Yugoslavia considered in its judgement in the *Furundžija case* in 1998 that rape required "coercion or force or threat of force against the victim or a third person". In its later case-law in the *Kunarac case* in 2001, however, the Tribunal considered that there might be other factors "which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim" and that this consideration defined the accurate scope of the definition of rape under international law. The International Criminal Tribunal for Rwanda in the *Akayesu case* in 1998 held that "rape is a form of aggression" and that "the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts". It defined rape as 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive'.

Rape and sexual violence can also be constituent elements of other crimes under international law. The International Criminal Tribunal for the former Yugoslavia in the *Delalić case* held that rape could constitute torture when the specific conditions of torture were fulfilled. The International Criminal Tribunal for Rwanda in the *Akayesu case* and *Musema case* held that rape and sexual violence could constitute genocide when the specific conditions of genocide were fulfilled.

It has been specified in practice that the prohibition of sexual violence is non-discriminatory, i.e., that men and women, as well as adults and children, are equally protected by this prohibition. Except for forced pregnancy, the crimes of sexual violence in the Statute of the International Criminal Court are prohibited when committed against "any person", not only women. In addition, in the Elements of Crimes for the International Criminal Court, the concept of "invasion" used to define rape is 'intended to be broad enough to be gender-neutral'".

Rape Crimes In Turkish Criminal Code

The Turkish Penal Code's second title is Crimes Against Persons and this second title's second part's title is Crimes Against Sexual Inviolability. These crimes are Sexual Abuse(art.102), Sexual Exploitation of Children-Child Molestation(art.103), Sexual intercourse between/with persons not attained the lawful age(15 to 18) (art.104), Sexual Harassment(art.105). In this article we examine the rape crime in article 102 and 103. But rape crime is not clearly defined in our law system. In our system we examine the rape inside the sexual assault crime. Regulations in our law system for this topic as follows:

Sexual abuse ARTICLE 102

- (1). Any person who attempts to violate sexual immunity of a person, is sentenced to imprisonment from two years to seven years upon complaint of the victim.
- (2). In case of commission of offense by inserting an organ or instrument into a body, the offender is punished with imprisonment from seven years to twelve years. In case of commission of this offense against a spouse, commencement of investigation or prosecution is bound to complain of the victim.
- (3). If the offense is committed;
 - a) Against a person who cannot protect himself because of corporal or spiritual disability,
 - b) By undue influence based on public office,
 - c) Against a person with whom he has third degree blood relation or kinship,
 - d) By using arms or participation of more than one person in the offense, the punishments imposed according to above subsections are increased by one half.

- (4) In case of use of force during the commission of offense in such a way to break down victim's resistance, the offender is additionally punished for felonious injury.
- (5) In case of deterioration of corporal and spiritual health of the victim as a result of the offense, the offender is sentenced to imprisonment not less than ten years.
- (6) In case of death of vegetal existence of a person as result of the offense, the offender is sentenced to heavy life imprisonment.

Child molestation ARTICLE 103

- (1) Any person who abuses a child sexually is sentenced to imprisonment from three years to eight years. Sexual molestation covers the following acts;
 - a. All kinds of sexual attempt against children who are under the age of fifteen or against those attained the age of fifteen but lack of ability to understand the legal consequences of such act,
 - b. Abuse of other children sexually by force, threat or fraud.
- (2) In case of performance of sexual abuse by inserting an organ or instrument into a body, the offender is sentenced to imprisonment from eight years to fifteen years. (RAPE)
- (3) In case of performance of sexual abuse by antecedents, second or third degree blood relations, step father, guardian, educator, trainer, nurse and other persons rendering health services and responsible from protection and observation of the child, or by undue influence based on public office, the punishment to be imposed according to the above subsections is increased by one half.
- (4) In case of execution of sexual abuse against the children listed in paragraph (a) of first subsection by use of force or threat, the punishment to be imposed is increased by one half.
- (5) The provisions relating to felonious injury are additionally applied in case the acts of force and violence cause severe injury to the person subject to sexual abuse.
- (6) In case of deterioration of corporal and spiritual health of the victim as a result of offense, the offender is sentenced to imprisonment not less than fifteen years.
- (7) In case the offense results with death or vegetal existence of the victim, the offender is punished with heavy life.

Article 102 paragraph 2 is regulates rape against adults article 103 paragraph 2 is regulates rape against children. There should be no consent of victim to be able to punish the perpetrator because of rape.

Rape and sexual assault are regulated different at the same article. But rape has not been clearly defined in Turkish Criminal Code. Our old criminal code (code number 765) has separated sexual assault and rape. In our new criminal code the scope of sexual offenses has been extended beyond forceful vaginal intercourse. For this reason we can not differentiate this crimes clearly from each other. Our criminal law system requires not only inserting an organ but it is also punishable inserting of any instrument in body of a person. This insert action shall not be directed into vagina. It can be directed to anus or mouth. We have to focus the perpetrators aim. If he/she has sexual aim, he/she should be punished according to article 102. So man or woman can be perpetrator; but during the our old criminal code term only man could be a perpetrator for the rape crime. In Wisconsin Criminal Code we can identify similar arrangement. In article 940.225 (5-c) as follows: "'Sexual intercourse" includes the meaning assigned under s. 939.22 (36) as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required".

For us to be able to say that there has been a sexual assault crime, the perpetrator should use sexual behaviours to violate the victim's sexual inviolability. The perpetrator must be contact the victims body for the formation of this crime. This contact shall not be a naked or using organ. For the article 102/2 and

103/2 the perpetrator shall use an organ or another instrument against the victims body cavity. If there is no physical contact with the victims body, it can not be a sexual assault or rape crime. It is a sexual abuse.

If this offense has been committed against spouse our criminal law system can be punish the perpetrator, but in this case the victim should complain for this action. Contrary to new Turkish Criminal Law System “under the old common law, a husband could not rape his wife. This concept was probably adopted by all states. A husband could be charged with assault or battery if he used considerable force to compel his wife to have sexual intercourse with him against her will”. According the USA courts it is not a crime¹. “Sexual intercourse by a man with his lawful wife was not unlawful and hence is not rape even if she did not consent”. The new sexual assault laws in USA that almost half the states adopted in the 1970s changed this concept. State statutes in many states now permit husbands to be charged with the rape of their wives under the conditions established by the statutes of the state in which the rape is committed.

The victim of sexual assault can be everybody. Because our law system doesn't distinguish man or woman for this crime. For example a woman can insert an organ or instrument into a man's body with sexual intent. Another extreme example a man can be a perpetrator of rape against a man or a woman against a woman. In USA law a woman cannot be charged because of raping another woman. But she can be charged as a party to the crime of the rape of another woman if she hired, encouraged, assisted, or procured a man to rape another woman.

In case of child molestation, victim must be younger than 18 years old. In our legal system child is a person who is younger than 18 years. If the victim is younger than 18 but older than 15 and the perpetrator doesn't use the force, threat and fraud and the victim doesn't complain, the perpetrator can't be punished because of rape. Incorporating this issue in article 104 as follows: “Any person who is in sexual intercourse with a child who completed the age of fifteen without using force, threat and fraud, is sentenced to imprisonment from six months to two years upon filing of a complain”. For this crime victim can use the right to complain by himself/herself.

This crime can be handled wilfully. Negligence is impossible for this crime. If the victim consent the sexual action, we can't talk about the offense occurred. If the victim is younger than 15 he/she can't consent the sexual action.

The protected legal benefit with this crime in article 102 is guaranteeing of sexual self determination right of a person. In article 103 our legal system wants to protect young persons body and psychology. Our criminal code's aim is to protect sexual freedom.

Attempt of rape is punishable. If the perpetrator try to insert organ or another instrument but he/she fail this action, he/she is to be punished because of attempting of rape. Attempt is regulated in Turkish Criminal Code article 35². If the perpetrator voluntarily abandons performance of the acts necessary to commit the crime, or avoids accomplishment of the crime with his own efforts, then he may not be punished for this crime; however, where the accomplished part constitutes an offense, punishment is given only for this specific offense. For example the perpetrator starts the actions but after than grieves and abandons the other actions than he can not be responsible of article 102/2 or 103/2. But he can be responsible for 102/1 or 103/1.

If more than one person participate in this crime we should check their positions in that crime. If the participation of a perpetrator is sine qua non (participation is necessary) for the crime so all perpetrators become the same punishment. If participation is not necessary in this case other than the perpetrator,

¹ “Rape is an act of sexual intercourse committed by a man with a woman not his wife without her consent and when the woman's resistance has been overcome by force or fear”. State v. Clark, 218 Kan. 726-728, 544, P.2d 1372, 1375 (1976)

² Article 35 is as a follow:

“(1) A person who acts with the intention of committing crime but fails to perform the acts necessary to commit the crime due to a cause beyond his control, is considered to have attempted to commit crime.

(2) In case of attempt to commit crime, the offender is sentenced to imprisonment from thirteen years to twenty years instead of heavy life imprisonment according to the seriousness of the damage or danger; and imprisonment from nine years to fifteen years instead of life imprisonment. In other cases, the punishment is abated from one-fourth up to three-fourth”.

people who participate to the crime, are to be punished with less punishment¹. For example one guy holds the victim, another one wants to rape. In this case both of them are to be punished same. But if one guy is looks around, another one rapes, than in this case perpetrator is responsible for rape observer is responsible to help. The observers are to be punished less than the perpetrator. “In the Missouri case of State v. Drope, the defendant and four other man tied the defendant’s wife to a bed, and while the defendant held a gun to her head, each of the men had sexual intercourse with the woman”. In this case according the Turkish Criminal Law all perpetrators are responsible for the rape.

Coercion and threats are parts of rape crime. For this reason we can’t punish the perpetrators extra because of coercion and/or threatening. Coercion must be enough to break the resistance of victim. If coercion more than the breaking the resistance of victim the perpetrator is also responsible for the injury.

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¹ Participation is regulated in Turkish Criminal Code article 37-41. Help the crime is regulated in Turkish Criminal Code article 39. This article as a follow:

“1) A person encouraging another person to commit offense is sentenced to life imprisonment from fifteen years to twenty years if subject to heavy life imprisonment; and from ten years to fifteen years imprisonment if the offense requires life imprisonment.

2) A person is kept responsible under the following conditions from commission of offense as the party encouraging the offender;

a) To solicit a person for commission of an offense or to support his decision to commit offense or to guarantee help after commission of offense.

b) To give idea about how the offense shall be committed or to supply the necessary tools to be used during commission of offense.

c) To render support before and during the commission of offense in order to simplify the intended act”.