

Brief Note

REVISIONS TO TURKISH LEGISLATION ON SEXUAL ABUSE OF CHILDREN

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Sexual abuse of children has increased at an ominous rate in the recent years and Turkey has one of the highest rates of child marriage in Europe

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Recent revisions to the Turkish legislation on sexual abuse of children is contrary to Turkey's international obligations



ACCOUNTABILITY
UNIT

Brief Note

REVISIONS TO TURKISH LEGISLATION ON SEXUAL ABUSE OF CHILDREN

EXECUTIVE SUMMARY

1. This legal note concerns Turkish legislation on sexual abuse of children which was amended in November 2016 after controversial government proposals which attempted to significantly dilute protections for children
2. The current legislation, even after the amendments, is limited to increasing punishment for the crime, and is likely to result in unwelcome court decisions not acting in the best interest of children
3. Accountability Unit assesses the shortcomings to the legislation and proposes that Turkey urgently adopts a national plan of action and further legal protections to actively prevent different manifestations of sexual abuse of children

BACKGROUND

4. Article 103 of the Turkish Criminal Code¹ ("Criminal Code") regulates the crime of sexual abuse of children. Under Article 103, "sexual abuse of children" comprises any sexual activity with a child under the age of 15 and sexual activity with a child between the ages of 15 and 18 through threat, coercion, force or any other factor affecting their decision-making capacity.² On 22 October 2016, the Ministry of Justice proposed a series of amendments³ to Article 103 before the Turkish Parliament which were partly enacted, purportedly to implement decisions of the Turkish Constitutional Court. Article 103, as amended, provides that sexual abuse of a minor under the age of 12 is an aggravating factor but does not address many other shortcomings to the law and other concerns to protect children against different forms of sexual abuse. Whilst Article 103, as amended, remains largely unchanged (and retains some inherent problems) the key concern emanates from the content of the Ministry of Justice proposals which belie intent to substantially dilute protections for children if adopted as envisaged.

Sexual Abuse of Children in Turkey

5. Sexual abuse of children has increased at an ominous rate in the recent years.⁴ In the past five years, according to official records, there has been 50% increase in the number of child abuse cases.⁵ In 2015, there were 16,957 child abuse cases in Turkey.⁶ According to the Turkish Statistical Institute's

data, from 2015, child victims of crime (in general) numbered 122,000 and 10% of these were victims of sexual crimes. Almost 9% of women in Turkey have been exposed to sexual abuse before the age of 15 and one in three children in Turkey are victims of sexual abuse which is the third highest rate in the world.⁷

6. According to a Girls Not Brides study, Turkey has one of the highest rates of child marriage in Europe, with an estimated 15% of girls married before the age of 18.⁸ According to a more recent study by Turkish Psychiatry Association, this rate is 26%.⁹ Although the minimum age of marriage is 17 for both men and women, marriage at the age of 16 with the consent of the court is allowed in “exceptional circumstances”. Approximately 19% of women who were married before the age of 18 and 10% of women who were married after 18 have been exposed to sexual violence.¹⁰ Around 50% of women who were married before the age of 18 have been exposed to some form of physical or sexual abuse.¹¹

7. NGOs and lawyers across Turkey have been calling out for an effective national policy to address child abuse and legislative reform to fight against sexual abuse of children, including the forced marriages of girls. Scientific research on child abuse is limited in Turkey, and is lacking, in particular, on the subject of child exploitation in the form of prostitution, pornography, and commercial sexual exploitation.

LEGISLATION PROHIBITING SEXUAL ABUSE OF CHILDREN

8. The Criminal Code regulates sexual abuse of children and sexual intercourse with a minor in separate clauses, Articles 103¹² and 104¹³ respectively.

9. Article 103¹⁴ defines “sexual abuse” of children as any sexual “behavior” towards: (a) a child under the age of 15 or a child who is above 15 but unable to perceive the meaning and legal consequences of this act; and (b) a child above 15 using force, threat or any other factor affecting the decision making capacity of the child. The article also proscribes “indecent assault” against children although as a less severe offence.¹⁵ Child rape, which is defined as inserting an object or an organ into the body of a child is defined as a major form of sexual abuse under Article 103 (2).¹⁶ Further aggravating circumstances under Article 103 are if the crime is committed: (a) by more than one person; (b) in the context of a suspect abusing a circumstance of living together as a facilitator for his/her actions; (c) by a family member or a relative; (d) by someone who is a teacher, guardian, caregiver, health-care staff who is responsible from taking care of or supervising the child; (e) where there is abuse of power imbalance due to public duty or superior-subordinate relationship between the abuser and the child;¹⁷ (f) where the sexual abuse of a child results in a similar outcome with the crime of willful injury;¹⁸ (g) if the abuse results in victim’s lapse into vegetative state or results in death.¹⁹

10. According to Article 104, someone who has sexual intercourse with a child older than 15 years without using threat or force can be punished only upon complaint.²⁰ Sexual intercourse with a child older than 15 years by a family member, a relative or someone who is responsible for taking care of or protecting the child is an aggravating factor for this offense.²¹

11. On 24 November 2016, a proposal from the Ministry of Justice to amend Article 103 before the Turkish Parliament passed²² and was enacted on 2 December 2016.²³ The proposal, as originally promulgated, did not provide a definition of “child abuse”, thereby proscribing an undefined crime and giving the courts the full discretion to consider whether sexual activity with a child was indeed child abuse. The proposal was not enacted in its original form and when the legislation was published in the official gazette it included, whether intended or not, the definition of the crime. The amendments to Article 103, ultimately, introduced a heavier minimum sentencing for sexual abuse, indecent assault and rape of children under 12.²⁴ No amendment was proposed or enacted regarding Article 104.

12. On 17 November 2016, 7 MPs also motioned for “deferment of the announcement of the verdict” or “suspension of punishment” where: (a) a perpetrator of a sexual abuse crime had not used force, threat or did anything to affect the decision making capacity of the child; (b) the crime occurred before 16 November 2016; and (c) the perpetrator married the victim. The reason for the motion,

according to its supporters, was the high number of underage married couples in Turkey whose “sexual behavior” was considered sexual abuse and who were “victimised” by their separation from their families during long prison terms. In truth, the motion sought “amnesty” for perpetrators of sexual abuse of children under 15, since sexual behavior would not be considered “sexual abuse” if it was committed against a child older than 15 years old without the use of force, threat or any other factor affecting the decision making capacity. The proposal in the motion also did not limit the age difference between the victim and the perpetrator, nor specify whether or not a marriage should have taken place before 16 November 2016 or whether perpetrators currently detained would have “amnesty” if they married the victims. This motion was withdrawn following protests, objections and outrage from civil society.

Shortcomings of the Legislation on Sexual Abuse

13. Article 103 (1), defines crime of sexual abuse of children but it does not set out what amounts to “sexual behavior”. According to the jurisprudence of the Court of Cassation,²⁵ the simple criteria for sexual behaviour when assessing a case under Article 103 was the existence of “physical contact”²⁶ with a child without a more qualitative approach taking into consideration the specific circumstances and duration of the “behavior” in question. According to the criteria used by the Court of Cassation, for example, the act of forcing a child to undress for sexual pleasure would not qualify as “sexual abuse of children” as there would be no physical contact. Article 103 also lacks a definition for “indecent assault” which

is often compared to “sexual harassment”, a less serious crime, interpreted by the Court of Cassation as sexual behavior that does not require physical contact;²⁷ but the distinction between these two crimes has always remained unclear.

14. Another shortcoming of Article 103 is regarding the element of “consent” in qualifying certain behavior as “sexual abuse”. It is not clear, to what extent mental deficiency, psychological problems or physical disabilities render a child “unable to perceive” a sexual act and its consequences. This provision results in revictimisation and further traumatising of children with physical or mental impairments or diseases when this “inability” has to be proven during investigations or court proceedings. A child’s consent cannot be sought also when there are “other factors affecting the decision-making capacity” of the child but there is lack of certainty whether, for example, insistence, emotional manipulation, offering money or abusing vulnerabilities in order to “convince” the child is considered “consent” or a “factor affecting the decision-making capacity”.

15. Article 104 is titled “sexual intercourse with a minor”, rather than a “child”, which implies that the criteria used for this crime is whether a child has reached the status of “adulthood”. According to the Turkish Civil Code anyone under the age of 18 is considered a minor but marriage renders a child an “adult”.²⁸ The minimum age of marriage is 17 years for both men and women and the Civil Code allows

for marriage at the age of 16 with the consent of the court in ‘exceptional circumstances’, such as pregnancy.²⁹ Sexual assault against a partner within a marriage is prohibited according to the Criminal Code but prosecution depends on a complaint by the victim and it is categorised as a less serious crime.³⁰ Article 104, therefore, does not protect children under 18 who are married but were forced to have sexual intercourse as they do not hold “minor” status

Turkish Constitutional Court Decisions

16. Two Constitutional Court decisions in 2015³¹ and 2016³² required the annulment and replacement of Article 103 of the Turkish Criminal Code. Those decisions were arguably made with a view to give a margin of appreciation to courts so that they can take into consideration a range of factors when looking at the severity of a sexual act including consent, mental state of the perpetrator, the age of the child victim, or whether the victim was later to be married to the abuser.

17. In 2015, a first instance Court applied to the Constitutional Court requesting the annulment of Article 103 (2),³³ on the grounds that heavy sentences/punishment were not in compliance with the principle of proportionality, necessity and equality. The Constitutional Court, in its decision, emphasised a number of societal and contextual factors in Turkey which they were obliged to consider: marriages at young ages are common in rural areas, under aged suspects are often not aware of the criminal liability of their sexual acts, there are no campaigns seeking to raise awareness to youth in these areas, high imprisonment for

young children disturbs the public conscience, and that the current law does not distinguish situations in which the age gap between the victim and the suspect is narrow or where there is a marriage between the victim and the suspect. The Court stated that fundamental principles of criminal law are rooted both in Constitutional principles and in social, cultural and moral values and economic needs of the society in which they apply. The Court agreed that Article 103 (2) was not proportionate and lacked any “reparative mechanisms”. The Constitutional Court, therefore, held that it should be within the margin of appreciation of the courts to decide when Article 103 (2) has been violated, taking all these factors into consideration. For these reasons, the Court ruled that Article 103 is contrary to Articles 2³⁴ and 10³⁵ of the Turkish Constitution (“Constitution”) and gave the government one year to amend the law from the date the decision became definitive.

18. In 2016, in another decision, the Constitutional Court annulled the first and second sentences of Article 103 (1), proscribing prison sentences for sexual abuse and indecent assault of children, on the grounds that the article does not allow for margin of appreciation to the courts to take into consideration circumstances when the age gap between the victim and the abuser is narrow and when the “situation” is “repaired” through a marriage between the victim who reaches the legal age. For these purposes the Constitutional Court considered the punishment under Article 103 (1) was disproportionate and contrary to Article 41(4)³⁶ of the Constitution which seeks to protect children. The Court

provided the government 6 months to amend the law from the date the decision became definitive.

OBSERVATIONS AND RECOMMENDATIONS

19. The recent law amending Article 103, which does not correspond to the Constitutional Court’s concerns and emphasis on the principles of proportionality and necessity, is limited to increasing punishment for the crime and is contrary to principles advocating for the best interests of a child and Turkey’s international obligations.

20. Increasing the punishment for sexual abuse of children under 12, without anything more, implies that sexual abuse of children between the ages of 12 and 15 is a less severe crime. The law blurs the absolute prohibition of sexual behavior against a child under 15 and falls far short of providing full protection for children between 12 and 15 from various forms of sexual abuse. This overwhelming focus on the sentencing provisions for the crime, in Article 103 as amended, could potentially lessen accountability when a crime is committed against children between 12 and 15. Such an interpretation will further open the way for families, in particular families from disadvantaged groups including members of the refugee and asylum communities, to resort to marrying their daughters between these ages with less criminal sanction than before.

21. Taking into consideration the troubling statistics on child abuse in Turkey, the basic principle that everyone under the age of 18 is a child should be adopted. Since the “exceptional” legal age for marriage is 16, at minimum, all sexual acts between an adult and a child under the age of 16 should be prohibited and considered sexual abuse. Any sexual act with children older than 16 without open and unequivocal consent or with threat, coercion or any other factor affecting their decision making-capacity should also be considered sexual abuse.

22. The scope of the definition of “sexual behavior” with regards to the protection of children should be clearly defined, and the simplistic criteria of “physical contact” should be made much broader to cover any act that could result in a sexual interaction with a child, whether physical, verbal, psychological or virtual. The definition should, in particular, include displaying children’s bodies using mass media/social media/communication or technological devices.

23. A distinguishing criteria should also be introduced when assessing liability of children as opposed to adult perpetrators.³⁷ Provisions to rehabilitate child perpetrators pushed to committing sexual crimes or a regime to assess punitive measures appropriate for children should be introduced.³⁸ Article 103 should also provide that a significant age gap between the victim and the perpetrator is as an aggravating factor.

24. The modes of liability for the sexual abuse of children should be extended to include: third parties who record, share or display sexual activity with children, who facilitate sexual activity between children with adults or another child, or who cover-up sexual abuse of children at public or private institutions.

CONCLUSION

25. During the drafting of the proposals to amend Article 103 the Ministry of Justice of Turkey or the Justice Commission of the Turkish Parliament did not ask for consultation from specialist NGOs or lawyers in this field and the law introduced by the Turkish Parliament does not reflect many concerns expressed in various reports and multi-disciplinary studies.

26. Article 103, as amended, arguably does not reflect the requirements set down by the Constitutional Court to provide a greater margin of appreciation in both categorising what constitutes a crime of sexual abuse of children and what ought to be appropriate sentences for perpetrators. Whilst some of the Constitutional Court requirements are in themselves problematic, the fact that Article 103 as amended does not clearly accord with the requirements of the Constitutional Court opens up the possibility that this law will again be before the Turkish Parliament soon and would no doubt be subject to the same pressures to remove critical

protection for children. For this reason, developments in this area ought to be monitored carefully.

27. The Turkish Parliament should urgently consider further revisions to Article 103 as Accountability Unit and others civil society actors have suggested and, critically, to adopt a national plan of action to prevent different manifestations of sexual abuse of children, including within socially accepted institutions, and to ensure that when crimes do occur there is full accountability and redress.

REFERENCES

- 1.The current Turkish Criminal Code, No. 5237, was adopted in 2004, came into force in 2005 and Articles 103 and 104 were amended in 2014 and 2016.
- 2.Turkish Criminal Code No. 5237, Art. 103. Article 104 of the Turkish Criminal Code No. 5237 further provides that any sexual activity with children older than 15 which is consensual can be punished upon complaint.
- 3.Article 13 of the Proposal on Amending the Code on Criminal Procedure and Other Codes No. 31853594-101-1339-4059, 22 October 2016.
- 4.Hurriyet Daily News, "Ominous rise in number of child victims of sexual abuse", available at (last visited on 8 November 2016) <http://www.hurriyetdailynews.com/study-ominous-rise-in-number-of-child-victims-of-sexual-abuse-.aspx?pageID=517&nID=99807&NewsCatID=339>.
- 5.Turkish Ministry of Justice, Official Legal Statistics, available at (last accessed on 21 December 2016) http://www.adlisicil.adalet.gov.tr/istatistik_2015/CEZA/48.pdf.
6. Turkish Ministry of Justice, Official Legal Statistics, available at (last accessed on 21 December 2016) http://www.adlisicil.adalet.gov.tr/istatistik_2015/CEZA/48.pdf.
- 7.Turkish Psychiatry Association, "Çocuk İstismarı Bilgilendirme Dosyası", 21 September 2009, available at (last accessed on 19 December 2016) <http://www.psikiyatri.org.tr/news.aspx?notice=1526>.

8.Girls Not Brides, "Child Marriages Around the World", available at (last accessed on 12 January 2017) <http://www.girlsnotbrides.org/child-marriage/turkey/>.

9.Turkish Psychiatry Association, "Çocuk İstismarı Bilgilendirme Dosyası", 21 September 2009, available at (last accessed on 19 December 2016) <http://www.psikiyatri.org.tr/news.aspx?notice=1526>.

10.Turkish Psychiatry Association, "Çocuk İstismarı Bilgilendirme Dosyası", 21 September 2009, available at (last accessed on 19 December 2016) <http://www.psikiyatri.org.tr/news.aspx?notice=1526>.

11.Turkish Psychiatry Association, "Çocuk İstismarı Bilgilendirme Dosyası", 21 September 2009, available at (last accessed on 19 December 2016) <http://www.psikiyatri.org.tr/news.aspx?notice=1526>.

12.Article 103 of the Turkish Criminal Code No. 5237.

13.Article 103 of the Turkish Criminal Code No. 5237.

14.Pursuant to Article 103 (1) of the Turkish Criminal Code No. 5237, the punishment for the crime of sexual abuse of children is from eight to fifteen years of imprisonment.

15.This distinction was introduced in a previous amendment in 2014. Pursuant to Article 103 (1) of the Turkish Criminal Code No. 5237, the punishment is from three to eight years imprisonment.

16.Pursuant to Article 103 (2) of the Turkish Criminal Code No. 5237, the punishment of this offence cannot be less than sixteen years of imprisonment.

17.Pursuant to Article 103 (3) of the Turkish Criminal Code No. 5237, these further aggravating circumstances (a-d) increases the punishment by half. Prior to 2004, under the previous Criminal Code "causing physical and mental damage" as a result of the abuse was considered an aggravating factor but it was excluded in the 2005 Criminal Code as it was accepted that firstly, any form of sexual abuse will cause some level of physical and mental damage to a child; secondly, measuring the damage has the risk of revictimising or further traumatising children; and thirdly, certain damages will reveal at a later stage in life, or a victim might recover from certain damages, which will put into question the adequacy or proportionality of the punishment.

18.Article 103 (5) states that an additional sentencing under Article 86 of the Turkish Criminal Code No. 5237, regulating "willful injury" may apply in this situation.

19.Pursuant to Article 103 (6), the punishment, in this case, is aggravated life imprisonment.

20. Pursuant to Article 104 of the Turkish Criminal Code No. 5237, perpetrators of this offence can be punished between two to five years upon complaint.

21. Pursuant to Article 104 of the Turkish Criminal Code No. 5237 the punishment, in this case, is 10-15 years imprisonment.

22. Law on Amending the Code on Criminal Procedure and Other Codes No. 6763, ratified on 24 November 2016.

23. It was published in the Official Gazette No. 29906, available at (last accessed on 21 December 2016) <http://www.resmigazete.gov.tr/eskiler/2016/12/20161202-1.htm>.

24. Pursuant to amended Article 103 (1) of the Turkish Criminal Code No. 5237, a prison sentence cannot be less than ten years for sexual abuse and less than five years for indecent assault if committed against a child under 12. Pursuant to amended Article 103 (2), a prison sentence cannot be less than eighteen years if rape is committed against a child under 12.

25. Turkish Court of Cassation, Docket No. 2006/714, Decree No. 2007/1887, 13 March 2007.

26. N. Centel, "Reviewing The Sexual Harassment Offense In Turkish Penal Code Number 5237 And Amendment Propositions For The Sexual Offenses", *Türkiye Barolar Birliği Dergisi*, Volume March-April 2012, No. 99, p. 269-290, at 273.

27. Pursuant to Article 105 of the Turkish Criminal Code No. 5237, punishment for this crime is upon complaint and between three months to two years of imprisonment and six months to three years if committed against a child; Turkish Court of Cassation, Docket No. 1996/1293; Decree No. 1996/1799, 23 May 1996; Turkish Court of Cassation, Docket No. 2002/5072; Decree No. 2003/2834, 13 May 2003.

28. Article 11 of the Turkish Civil Code No. 4721.

29. Article 124 (2) of the Turkish Civil Code No. 4721.

30. Article 102 (2) of the Turkish Criminal Code No. 5237.

31. Turkish Constitutional Court, Docket No. 2015/26, Decision No. 2015/100, 12 November 2015.

32. Turkish Constitutional Court, Docket No. 2015/108, Decision No. 2016/46, 26 May 2016.

33. Article 103 (2) of the Turkish Criminal Code No. 5237: "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".

34. Article 2 of the Turkish Constitution states: "The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the

nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble."

35. Article 10 of the Turkish Constitution: "Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds. (Paragraph added on May 7, 2004; Act No. 5170) Men and women have equal rights. The State has the obligation to ensure that this equality exists in practice. (Sentence added on September 12, 2010; Act No. 5982) Measures taken for this purpose shall not be interpreted as contrary to the principle of equality. (Paragraph added on September 12, 2010; Act No. 5982) Measures to be taken for children, the elderly, disabled people, widows and orphans of martyrs as well as for the invalid and veterans shall not be considered as violation of the principle of equality. [...]"

36. Article 41 (4) of the Turkish Constitution: "The State shall take measures for the protection of children against all kinds of abuse and violence."

37. According to Turkish Criminal Code, children under the age of 12 do not have criminal liability, but children between 12-15 and 15-18 have separate and gradually increasing criminal liability.

38. Article 31 of the Turkish Criminal Code No. 5237 provides that children having not attained the full age of twelve on the commission date of the offense, may not have criminal responsibility. In case a person who attained the age of twelve but not yet completed the age of fifteen on the commission date of the offense does not have the ability to perceive the legal meaning and consequences of the offense, or to control his actions, may not have criminal responsibility for such behavior. However, security precautions specific to children may be adopted for such individuals. If a person has the ability to apprehend the offense s/he has committed or to control his/her actions relating to this offense, then such person may be sentenced to imprisonment from nine years to twelve years if the offense requires heavy life imprisonment; from seven years to nine years if the offense requires life imprisonment. The Turkish Criminal Code or the Child Protection Act No. 5395 do not provide for alternative punishment and rehabilitation mechanisms for juveniles.

CONTACT INFORMATION

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