

“Crimes Against Sexual Inviolability” Report of the 14th Turkish Criminal Law Days, Istanbul University, Faculty of Law, 14-16 June 2019

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Introduction

The Turkish Criminal Law Reform of 1 June 2005 has been commemorated with an academic program held in June of every year, consisting of discussions on developments and issues in Turkish criminal law. “*Turkish Criminal Law Days*”, held for the fourteenth time this year, was dedicated to Prof. Dr. İbrahim DÜLGER who passed away at a young age while the preparations for the academic program were still underway. The theme of this year’s academic program was “*Crimes Committed against Sexual Inviolability*”, the main research area of Prof. Dr. İbrahim DÜLGER. This year’s program was held on 14-16 June 2019 and hosted academics, chief prosecutors, judges, prosecutors and lawyers, as well as other individuals working on criminal law from all over Turkey. Lawyers and experts in various areas such as criminology, psychology, sociology and medicine attended this interdisciplinary conference.

1) Crimes against Sexual Inviolability in Practice

The academic program began at Istanbul University Faculty of Law on June 14, 2019 with the opening speeches of Prof. Dr. Adem SÖZÜER and Hakkı KÖYLÜ

(President of the Justice Commission of the Turkish Grand National Assembly). The first panel, “*Evaluation of the 14th Anniversary of the Reform*”, was moderated by Prof. Dr. Adem SÖZÜER and hosted Prof. Dr. Bahri ÖZTÜRK, Prof. Dr. Cumhur ŞAHİN, Prof. Dr. Ahmet GÖKCEN and Prof. Dr. İzzet ÖZGENÇ. Afterwards, the panel on the Court of Cassation was moderated by Bekir ŞAHİN (Head of the Criminal Department no. 14 of the Court of Cassation), and Mustafa Can KORKARER and Serdar COŞKUN (Members of the Criminal Department no. 14 of the Court of Cassation) took the floor. Dr. Veli KAFES, the Public Prosecutor of the Court of Cassation, stressed in his presentation titled “*The right to Intervene of the Underage Victim in Public Case*”, that the will of children regarding them to intervene in the case would be put forward by their legal representatives, and explained how a possible conflict between the will of the underage victim and that of the state-appointed lawyer of the sexually abused child could be resolved. Judge Rapporteur of the Court of Cassation, Tahir Hami TOPAÇ, discussed the scope and general framework of the new concept of “*indecent assault*” which was added to the Criminal Code in his presentation on “*Indecent Assault*”.

2) The Relationship between Psychiatry and Crimes against Sexual Inviolability

The first session of the program started with the moderation of Prof. Dr. Bengi SEMERCİ, who began with explaining that: the frequency of abuse cannot be realistically known, the problem is not limited to girls and sexual abuse can turn into other types of abuse. The first speaker, Prof. Dr. Ayşen COŞKUN, presented on the “*Examination of Problem Areas for Victim and Offender Children who Enter the Judicial System because of Sexual Abuse, in terms of Forensic Psychiatric*”, and stated that the only way to detect sexual assault and to prove the crime is to carry out a thorough forensic psychiatric evaluation in cases where physical findings are lost or cannot be detected, and that results of forensic psychiatric evaluation are accepted as evidence in many countries. She also noted the importance of distinguishing and identifying protective and risk reduction factors for children who enter the judicial system and their families. In his presentation titled “*Victim Oriented Practice in Judicial System: Judiciary Interview Rooms*”, Prof. Dr. Tolga DAĞLI explained the concepts of waiting room, interview room and observation room. He stated that “*judiciary interview rooms*” are designated for child-friendly judicial procedures, conducting interviews under proper conditions and methods convenient for the

mental and physical conditions of the interviewee, and prevention of secondary victimization, all which must be carried out in line with the child's best interest. Prof. Dr. Fatih ÖNCÜ, in his presentation on "*Psychiatrists' Approaches to Sexual Offenders and Victims*", explained that sexual assault paves the way for many mental illnesses and psychiatric disorders in victims of sexual assault, and stressed the importance of experts in dealing with these issues.

3) The Crime of Sexual Harassment, Consent and Victim Rights

The second session, moderated by Prof. Dr. Fatih Selami MAHMUTOĞLU, began with the presentation titled "The Crime of Sexual Harassment", presented by Assist. Prof. Dr. Serdar TALAS and Res. Assist. Dr. Sertaç IŞİKA, who presented on the Court of Cassation's findings with respect to the act and subjective components of the crime of sexual harassment. Afterwards, the topic of "*Characteristics of Consent to Crimes against Sexual Inviolability*" was presented by Prof. Dr. Berrin AKBULUT. She emphasized that the nature of consent varies in crimes against sexual inviolability and reported on discussions on consent for each crime. Finally, Assist. Prof. Dr. Zafer İÇER presented his paper on the topic of "*Evaluation of the Importance of the Age of the Victims for Crimes against Sexual Inviolability*". He explained that sex crimes committed against children have varying adverse physical and psychological effects.

4) Forensic Medical Practices in the Crimes against Sexual Inviolability

The last session of the first day took place under the moderation of Prof. Dr. Bahri ÖZTÜRK. The first presentation of this session was the report "*Medical Evaluation of Sexual Age Claims: Three Case Reports*" by Res. Assist. Dr. Arda AKAY/Yazgülü TAŞTEMİR/Dr. Naz YORULMAZ/Dr. N. Gülben ALBAYRAK/Assist. Prof. Dr. Tunç DEMİRCAN/Prof. Dr. Coşkun YORULMAZ. The speakers stressed the importance of discussing genital examination findings in light of recent literature and medical guidelines and noted that it is mandatory to consider effects of voluntary relationships, accidents and medical operations in differential diagnosis of sexual assault findings. In the following presentation, "*Alternative Approaches in The Prevention of Sexual Assaults in Terms of Forensic Medicine*", Prof. Dr. Nevzat ALKAN presented on risks of exposure of sex crime offenders, approaches to the death penalty and chemical sterilization for the prevention of sexual assault. Finally,

Yazgülu TAŞTEMİR/Dr. Zehra KOYUNCU/Büşra ARSLAN/Res. Assist. Dr. Arda AKAY/Res. Assist. Dr. Rahime ERBAŞ/Işılal BALCI/Adv. Meltem AKSOY/Dr. N. Gülben ALBAYRAK/Prof. Dr. Burak DOĞANGÜN/Prof. Dr. A. Coşkun YORULMAZ presented on the topic of “*Retrospective Evaluation of Criminal Responsibility of Juveniles Pushed to Crime in Sexual Abuse Claims*” and explained how to retrospectively evaluate sexual crimes.

5) Women and Peers in Crimes against Sexual Inviolability

The second day of this academic program was held on 15 June 2019 at the Istanbul University Congress Center. This day started with the fourth session of the program and ended with the Round-Table Meeting. In the fourth session, three speakers took the floor with their presentations under the chairmanship of Prof. Dr. Ali Kemal YILDIZ. Assoc. Prof. Dr. Güneş OKUYUCU ERGÜN presented her paper titled “*Some Problems Regarding Crimes Against Sexual Inviolability and the Problematic of the Female Offender*”, and stated that a woman who forces an adult man to have ordinary sexual intercourse would not be punished by the aggravated form of the crime of sexual assault, but she would be held responsible of the basic form of sexual assault. She further pointed out that in this case, issues relating to the principle of equality and the nature of sex crimes arises. The second speaker, Assoc. Prof. Dr. Hakan KARAKEHYA, presented on the “*Turkish Criminal Code and Consent-based Peer Sexuality in the Crimes Against Sexual Inviolability*”, and discussed in detail how consent-based sexual intercourse would be punished when both the offender and the victim are children. Finally, Assist. Prof. Dr. Ozan Ercan TAŞKIN presented his paper on the “*The Woman as a Victim of Sexual Crime from the Perspective of Victimology*”. He stated that victimization caused by the crime should be examined in a different way and emphasized that it is necessary to classify victims and consider their personal, physical and mental characteristics. Accordingly, the victim could be protected from being victimized for the second time.

6) The Digital World and Judgments of the Constitutional Court on the Crimes against Sexual Inviolability

The fifth session of the program was chaired by Prof. Dr. Hamide ZAFER, and started with the presentation titled “*Sexual Offences Committed through Internet*” by Assoc. Prof. Dr. Murat Volkan DÜLGER, who explained the concept of pornography for revenge, blackmailing victims and child pornography on the Internet. Following

this presentation, Res. Assist. Eylem BAŞ presented on "*The Crime of Child Molestation in Light of Annulment Decisions of the Constitutional Court*", and Res. Assist. Zeynep KARAER GÜÇLÜ presented "*An Evaluation of TCC Article 104/1 in Terms of Certainty*". The presentations discussed judgments of the Constitutional Court on crime of sexual abuse, and who could complain about the crime of sexual relation with minors.

7) Special Forms of Crimes against Sexual Inviolability and the Case of Pregnancy

The third session of the day, and the sixth session of the conference, was moderated by Prof. Dr. İzzet ÖZGENÇ. The first presentation of this session was "*Abandonment of Attempt in the Crime of Sexual Assault – A Critical Assessment in Light of the Case-Law of the Court of Cassation*" by Assist. Prof. Dr. Murat ÖNOK. Afterwards, Assoc. Prof. Dr. Mehmet Emin ALŞAHİN took floor with his presentation titled "*The Problem of Concurrence on Crimes against Sexual Inviolability*", followed by Att. Merve ÇETİNER and Prof. Dr. Faruk TURHAN's presentation on the topic of "*Issues Pertaining to Termination of Pregnancies Caused by Sexual Assault or Sexual Abuse and an Assessment of Problems of Practice*". In this session, speakers discussed some important and controversial decisions of the Court of Cassation on the subject of attempted sexual assault, as well as the conditions under which successive offences and joinder of these offenses with other sex crimes shall be applied.

8) The Execution Regime of Crimes against Sexual Inviolability

The seventh session of the program started under the moderation of Burhan KARALOĞLU, the Head of the Criminal Department no. 9 of the Court of Cassation. In this session, Prof. Dr. Mustafa Ruhan ERDEM compared some countries in his presentation titled "*New Trends in Sanctions for Sexual Offenders: The Case of Germany, Switzerland and Austria*". After this presentation, Assist. Prof. Dr. Asuman AYTEKİN İNCEOĞLU presented her paper on "*Castration in Crimes against Sexual Inviolability within the Framework of Decisions of the European Court of Human Rights*". The last speaker of this session was Res. Assist. Yaprak ÖNTAN, who presented her paper titled "*Institutes and Postponement of Execution of Imprisonment Sentences of the Convicts of Crimes against Sexual Inviolability*". In this session, speakers discussed cases of the surgical and chemical castration decided by the

European Court of Human Rights, and issues relating to the prohibition of torture and ill-treatment, the right to respect for private and family life, and the right to marry and have a family. The speakers pointed out that the regime of execution for the prison sentences of offenders convicted of crimes against sexual inviolability was different from that of other convicted offenders. The speakers also talked about the length of time to be spent at the prison for conditional release on probation, the right to request the postponement of the execution and the aggravation of the conditions of separation in open penitentiary institutions.

9) Criminal Procedure in Crimes against Sexual Inviolability

The eighth session of the academic program was moderated by Vuslat DİRİM, Head of the Criminal Department no. 13 of the Court of Cassation. The first speaker, Assist. Prof. Dr. Kerim ÇAKIR presented his paper titled *“The Evidence Value of the Declaration of the Complainant in Crimes”*. Çakır argued that that the inability of law to adequately interact with benefits from other disciplines such as psychology, can lead to erroneous practices. He emphasized that benefiting from different disciplines such as psychology or psychiatry may enable accurate results in evaluating the evidence obtained from statements on sex crimes. Afterwards, Assist. Prof. Dr. Zahit YILMAZ presented his paper on *“The Right to Complaint for the Crime of Having Consensual Sexual Relations with a Minor”*, and stated that *“the fact that the victim of the crime is a child and the crime is committed based on the child’s consent, raises the issue of whom the right to complain belongs to”*. He further noted that the legal representative who has the custody of the child is obligated to protect the child and should be considered as authorized to exercise the right to complain on the child’s behalf. Finally, Res. Assist. Dr. Rahime ERBAŞ/Prosecutor Candidate Hazel Büşra ATEŞ/Prof. Dr. Coşkun YORULMAZ presented their report titled *“Mandatory Reporting Duty by Healthcare Professionals in Pregnancies Among 15–18 Years Old”*. These speakers discussed crimes relating to the failure of the mandatory reporting duty of healthcare professionals, codified in the Turkish Criminal Code, and analyzed the crime of sexual abuse in this context.

10) Current Problems and Solutions in the Crimes Against Sexual Inviolability

The last panel of the day was moderated by Prof. Dr. Adem SÖZÜER and was accompanied by a Round-Table Meeting. In this panel, Prof. Dr. Mahmut KOCA,

Prof. Dr. Ali Rıza ÇINAR, Assoc. Prof. Dr. Yusuf YAŞAR, Assist Prof. Dr. İnanç İŞTEN and Retired Judge Murat AYDIN discussed recent issues of theory and practice relating to crimes against sexual inviolability through Q&A.

11) The Concepts of “Sexual Behavior” and “Physical Contact” in Crimes against Sexual Inviolability

The third day of conference was held on 16 June 2019 at the Istanbul University Faculty of Law, Doctorate Hall. In the ninth session, three speakers presented their papers under the moderation of Mustafa ARTUÇ (Member of the Criminal Department no. 14 of the Court of Cassation). Assoc. Prof. Dr. Olgun DEĞİRMENCİ presented on *“Sexual Violence against Women as a Genocide Instrument in the Light of Decisions of International Criminal Tribunals”*, and emphasized the relationship between the two events by giving the example of sexual violence against women as part of the genocide committed in Rwanda and the former Yugoslavia. Assoc. Prof. Dr. Fahri Gökçen TANER presented on *“The Concept of Sexual Behavior in the Light of Behavior Conductive to Violate Sexual Freedom”*, and stated that the concept of sexual behavior is not a legal concept but must be determined by research in the areas of medicine, anthropology, psychology and sociology. The speaker also emphasized that it was necessary to make an assessment based on the principles of criminal law. The last speaker of the session, Assist. Prof. Dr. Reşit KARAASLAN, presented his paper *“A Critical View on the Condition of Bodily Contact in the Crime of Cyber-Grooming and Sexual Abuse”*, and stated that the crime of sexual abuse may be committed without physical contact, and the Criminal Code should be amended accordingly.

12) Incest Relationships and Status of the Spouse in Crimes against Sexual Inviolability

The tenth session of the academic program was chaired by Prof. Dr. Ahmet GÖKCEN. First, Res. Assist. Kazım Furkan AĞKUŞ presented on the topic of *“The Reason of Non-Punishment of Consensual Adult Sexual Intercourse between Close Relatives”*, followed by Res. Assist. Alparslan DERELİ’s presentation on *“Incest from Criminological and Victimological Perspective”* and Assist. Prof. Dr. Ezgi CANKURT’s paper titled *“Evaluation of Sexual Violence of the Intimate Partner”*. The discussions of this session focused on the concept of incest and the relevant legal issues. Speakers discussed whether incest could be criminalized in light of the

purpose of punishment, as well the nature of sexual behavior towards the spouse and intimate partner, which is another important issue of sex crimes.

13) The Crime of Sexual Assault and Prevention of Sexual Crimes

The eleventh session, the last session of the conference, was chaired by Prof. Dr. Cumhuriyet ŞAHİN. Constitutional Court Rapporteur Hüseyin TURAN presented his paper titled “*A Comparison of Simple Sexual Assault Crime in Terms of the Turkish Criminal Code No. 765 and No. 5237*”, followed by Res. Assist. Neslihan CAN’s presentation on “*The Crime of Genital Examination*”. CAN emphasized that genital examination constitutes a medical intervention and is closely related to crimes against sexual inviolability. This presentation was followed by the Psychologist İrem ÜNAL’s report on “*The Attitudes and Behaviors of the Police about the Victims of Sexual Crimes Applying to the Police Stations*”. In this speech, she emphasized that the underlying reason of not reporting the crime is the sexual assault victim’s fear that the police would blame her/him for her/his external appearance at the time of the statement. The speaker also noted the lengthiness of the process which frustrated the victim. Finally, Res. Assist. Yağmur ALTAY presented her paper on “*An Alternative Approach to Prevent Sexual Offences: Situational Crime Prevention*”. In this presentation, she discussed “routine activities theory”, one of the victimization theories, and possible ways of preventing sex crimes.

14) Closing Speech by the President of the Conference

Following the final session, Prof. Dr. Adem SÖZÜER, President of the Conference, gave a closing speech. The program was completed after giving the floor to academics, practitioners and participating students. Prof. Dr. Adem SÖZÜER’s main remarks can be summarized as follows:

“First, it should be noted that sex crimes in the repealed Turkish Criminal Code (no. 765) were organized under the title of “crimes against general morality”, not under “crimes against sexual inviolability”, as codified in the new Turkish Criminal Code (no. 5237). From this point of view, it is understood that the legal value protected in terms of sex crimes prior to the Turkish Criminal Law Reform is not the sexual inviolability of the individual, but the morality of society. This is also perceived from the basic concepts used in the codification of sex crimes. The former code was of discriminatory nature, as the crimes in question were codified as “rape” and “carnal abuse”.

With the Turkish Criminal Law Reform of 2005, the new Code (no. 5237) took an individualistic approach. One proof of this is that in the former Code (no. 765), it was codified that if marriage took place after the sexual crime, the trial or the sentence would be postponed until the end of the statute of limitation. If divorce took place before statute of limitation, the postponement would be abolished. It is a significant development that such provisions are not included in the current Code (no. 5237).

If the victim and the offender are wed after the crime of sexual abuse, this legitimizes the crime and violates human dignity and all principles of law. Enacting "panic legislation" in response to horrendous events suffered by society is not compatible with the principles of modern criminal law and would not solve existing problems. The erroneous Court of Cassation judgments affirming the marriage of the victim with the rapist would not only victimize the victim once again but would also not solve the issue. In this case, the most reasonable and permanent solution would be to explicitly codify that the law would not punish sexual behaviors among peer children not carried out by force, threat, deceit or any other matters affecting the will of the other party."

Conclusion

An academic and thematic conference has been annually held on the anniversary of the Turkish Criminal Law Reform of June of 2005. Each year, academics, judges, prosecutors and lawyers from Turkey and all over the world participate in this academic program. Besides lawyers, experts from different disciplines such as criminology, psychology, sociology and medicine also take part in this interdisciplinary program.

This year, while the preparations for the academic program were still ongoing, Prof. Dr. İbrahim DÜLGER passed away at a young age. The academic program was dedicated to him, and the main theme of the academic program was chosen as "*Crimes against Sexual Inviolability*", the main research area of the departed Prof. Dr. İbrahim DÜLGER. This academic program, which brought together practitioners and academics from all over Turkey, was held in the historic halls of the Istanbul University Faculty of Law. Members of the Constitutional Court and the Court of Cassation, as well as experts from areas other than law presented in the sessions. This enabled an interdisciplinary event where presenters could share their knowledge and experience relating to theory and practice. Furthermore, participants discussed

various issues arising from both the law and its implementation through Q&A. Finally, it must be noted that, a very significant issue of the criminal law was extensively discussed, and the conference will continue to be held in relation to other criminal law issues in the coming years.