

**GENDER DISCRIMINATION IN
THE TURKISH PENAL CODE
DRAFT LAW**

**An Analysis of the Draft Law from a Gender
Perspective
and
Proposed Amendments
by the Women's Platform on the Penal Code**

SUMMARY REPORT

by

**Women for Women's Human Rights (WWHR)
NEW WAYS**

**Gender Discrimination in the Turkish Penal Code Draft Law
Women for Women's Human Rights (WWHR) – New Ways**

Translated and compiled by: Liz E. Amado
Printed by: Net Copy

This publication was made possible through the contributions of the
Heinrich Böll Foundation, Turkey and the Swiss Agency for
Development and Cooperation (SDC).

© 2003 NEW WAYS
Istanbul, Turkey

Women for Women's Human Rights – New Ways
Inonu Cad. Saadet Apt. 37/6 34439
Gumussuyu – Istanbul
Turkey

Tel: +90 212 251 00 29
Fax: +90 212 252 00 65

E-mail: wwhrist@superonline.com
www.wwhr.org

INTRODUCTION

The Reform of the Turkish Penal Code

The reform of the penal code remains one of the most pressing and important issues on the agenda for the Turkish parliament for the 2003-2004 legislative term. The reform under question will be indicative of not only Turkey's commitment to conformity with global human rights norms of the 21st century, but will also mark Turkey's position in the European Union candidacy process and progress towards democratization. However, more significantly than either, the penal code reform will contribute to restructuring the Turkish legal system, thus affecting lives of all Turkish citizens; men and women, children and adults, in private, public, social and political spheres.

A positive step toward establishing gender equality in the legal sphere in Turkey was taken in 2001, when the Turkish Civil Code was reformed to grant full equality to women and men in the family, largely as a result of the persistent efforts and strong campaign of the women's movement in Turkey. Following the civil code reform, in 2002, Women for Women's Human Rights – New Ways initiated and coordinated a working group on the penal code reform. The Women's Working Group on the Reform of the Penal Code from a Gender Perspective included activists, lawyers, and academicians from women's NGOs and bar associations. After analyzing both the Turkish Penal Code in effect and the Penal Code Draft Law, the group prepared a detailed recommendation report voicing the demands of women and outlining specifically the necessary changes to ensure gender equality in the penal code. After the publication of this report, a public campaign was launched in 2003 for the establishment of gender equality in the Turkish Penal Code reform process. As the initiator and coordinator of these campaign efforts, Women for Women's Human Rights – NEW WAYS continues to work intensively to integrate a gender perspective into this legal reform process.

The Penal Code Draft Law submitted to the Turkish parliament in May 2003 directly contradicts the premise and objective of the so called reform and takes no measures to overcome the discrimination against women in the penal code in effect. The draft law fails to offer the basic necessary amendments to recognize and protect women's human rights to the full extent and bring the criminal justice system a par with modern criminal law. On the contrary, the draft law further sanctions violations against women's bodies and sexuality and falls short of safeguarding sexual and bodily rights of women as foreseen in international human rights documents such as the Universal Declaration of Human Rights, CEDAW and the Turkish Constitution.

As the draft law is already under review in the Justice Commission and may come before the Turkish Grand National Assembly shortly, it is most urgent to increase pressure on the government, parliament and other pertinent institutions and advocate and lobby effectively to ensure the necessary changes. Swift and decisive action is pivotal, as there will be little or no room for intervention and amendments once the draft comes up for vote in the general assembly.

Perpetuation of Gender Discrimination in the Draft Law Prepared by the Conservative Justice and Development Party

The underlying philosophy that women's bodies are commodities of men, family and society, and women's sexuality has to be suppressed and controlled is reflected in the provisions on sexual offenses both in the penal code in effect and in the draft law. Rather than taking the necessary measures to overcome discrimination against women and eradicate harmful traditional practices and ancient patriarchal social constructs, the Penal Code Draft Law legitimizes discrimination, denies women ownership of their own bodies and sexuality and sanctions human rights violations such as honor crimes, forced marriages and marital rape. In its current state, the penal code draft law fails to fulfill its legal mission and in no way promises progress towards achieving a more equal, free and democratic society.

In September 2002, while the independent temporary government was in effect before the early election of November 2003, the recommendations of the Working Group were discussed in a commission under the Ministry of Justice with Justice Minister Aysel Çelikel and several positive steps were taken towards revising 2000 draft law from a gender perspective.

However, following the November 2002 elections, the new government totally disregarded these efforts and submitted the 2000 Draft Law with minor alterations to the parliament. The draft law in question upholds the traditional philosophy of the penal code in effect and includes all the provisions openly discriminating against women. The government did not publicize the preparation of this draft law, nor did it consult any experts on the subject from non-governmental women's and human rights organizations.

Upon finally gaining access to the draft law, the Working Group revised the recommendations and demands according to the current draft and expanded the campaign further, forming a Women's Penal Code Platform. The platform visited members of the current Justice Commission, presented their recommendations and demanded to be included in the process of the penal code reform. The group's request for an appointment with the Justice Minister Cemil Cicek was denied. Since May 2003 a number of meetings and conferences were held in Istanbul and Ankara on sexual offenses and other violations of women's bodily rights in the penal code and the draft law, including a press conference to raise public awareness and intensify pressure on the government. Unfortunately, the government has not responded to the demands of women and has insisted on preserving the discriminatory draft law as is.

Unless Turkey is willing to accept being a State in which women can not exercise their basic human right to bodily integrity, the Penal Code Draft Law must be amended before it is approved. Otherwise, the Turkish judicial system will continue to be one which does not criminalize marital rape, legitimizes killings in the name of "honor", sanctions rape victims being forced to marry their rapists so the perpetrator escapes punishment, employs women's virginity or marital status as basis for discrimination, and classifies sexual assaults as crimes against society and public morality and assesses grievance of sexual crimes on constructs of "chastity" and "honor" rather than the individual's sexual and bodily integrity.

PROPOSED AMENDMENTS TO THE PENAL CODE DRAFT LAW

- **The Penal Code Draft Law regulates sexual offenses under “Crimes Against Society”, instead of under “Crimes Against Persons”**

Both the current Turkish Penal Code and the draft law classify sexual crimes under “Crimes Against Society.” In the draft law, articles pertaining to sexual offenses (Articles 315-329) are listed under the sub-section entitled “Crimes Against Sexual Integrity and Traditions of Morality.”

This classification reflects the overall discriminatory and obsolete approach of the penal code draft law. Placing crimes against sexual and bodily integrity under crimes against society implies that women’s bodies and sexuality do not belong to themselves, but rather to the constructs of the patriarchal society and family. It overtly dismisses a person’s right to control of a person over her/his own body and sexuality and contradicts the fact that any sexual offense is first and foremost an attack against an individual human being. The International Penal Law Congress in August 1964 has declared that the principal aggrieved party in sexual crimes is the person and since then many countries throughout the world have revised their penal codes to categorize sexual offenses under “Crimes Against Persons.”

The emphasis on traditions, morality and chastity in the section’s title further sanctions the notion that women’s bodies and sexuality are to be controlled, suppressed as commodities of the society, family or men. Presenting these subjective values as criteria for legislation not only serves to manipulate the law as a tool for violating women’s human rights, but also undermines the objective of legal authority in a social state.

In order to safeguard the personal rights and freedoms of its citizens equally and completely, the Penal Code Draft Law must be amended to place sexual offenses under “Crimes Against Persons” and revise the section title as “Crimes Against Sexual Integrity.”

- **The draft law legitimizes “honor killings” and does not take preventive measures to eradicate these violent crimes.**

The so-called “honor killings” are premeditated murders that continue to infect all segments of Turkish society and threaten and violate the most basic human right of women: the right to life. The state holds a constitutional duty to protect this right and take the necessary measures to prevent and eradicate honor crimes. As the medium in which criminal law is regulated, the penal code has to be designed to recognize this violent crime and penalize it accordingly.

However, the provisions in the draft law do not propose preventive measures against honor killings. On the contrary, Article 31 (Unjust Provocation) implicitly offers license to perpetrators of honor killings and legitimizes this violent tradition under the pretext of penal law. According to the current draft, with Article 31, honor killing perpetrators can benefit from “unjust provocation” and thereby receive up to three fourths reduction in their sentences. Article 462 of the penal code in effect, stating that witnessing or suspecting the spouse of an act of infidelity serves as provocation has been cancelled. Yet, the last paragraph of the justification of the draft law Article 31 employs the very same case of suspected or witnessed infidelity as an example of unjust provocation, thereby openly proving that the annulment of Article 462 as a merely feigned gesture lacking any actual intent to stop honor killings. The paragraph should be removed from the justification and be replaced with a clause acknowledging Turkey’s commitment to provisions in the Beijing +5 Outcome Document and recommendations of the European Council to eradicate the harmful traditional practice of honor crimes.

As a preventive measure against the traditional practice of vendetta killings, Article 136 (Aggravated Homicide) explicitly states that murders committed as blood feud constitute aggravated crimes and foresees more severe sentences. Honor killings are another similar violent traditional practice against which the state is bound to take precautions. Therefore, it is imperative to also classify honor killings as aggravated homicide in the penal cod. Otherwise the state will be accepting the supremacy of tradition over law and will fall short of adequately protecting the rights and freedoms of women.

- **Crimes of rape and sexual assault are erroneously named and defined in the draft law, implying these offenses are violations of one’s “honor” and “chastity” rather than sexual and bodily integrity.**

As an extension of the underlying notion that women’s bodies and sexuality are properties of the society and family, and women’s chastity is seminal to define the societies’ honor and morality, the Turkish Penal Code and the draft law formulate articles on sexual offenses based on concepts of “chastity”, “honor” and “morality” rather than sexual and bodily integrity and human rights. Instead of employing internationally and legally accepted terms such as “rape” or “sexual assault”, the draft law structures such offenses around the notion of “*ırz*” (chastity, honor.) Articles 315 and 317 of the draft law literally translate as “Forced Seizing of Chastity” and “Forced Assault on Chastity” respectively. Such terminology not only reiterates the perspective that primary target of a sexual assault is the person’s honor as foreseen by the society, rather than the person’s sexual and bodily integrity, but also implies that there may be consent in offenses of rape and sexual assaults. Unless the above mentioned articles are correctly titled “Rape” and “Sexual Assault”, penalizing these crimes adequately will not be possible.

The definition of rape also has to be revised and expanded. The deficiencies and flaws in the definition of rape in draft law Article 315 also hinder the law from effectively protecting women’s sexual bodily rights and freedoms. The draft law does not explicitly describe the modes through which rape may take place and does not acknowledge the fact that rape may occur through oral and anal penetration, as well as vaginal or through the forced insertion of an object into the anus. The use of psychological coercion, with or instead of physical coercion, is also not included in the definition, even though it is frequently employed by perpetrators.

- **The Penal Code Draft Law sanctions marital rape.**

The draft law states in the Justification of Article 315 (Forced Seizing of Chastity) that marital rape does not constitute a rape offense. Marital rape is clearly a serious violation of human rights. By not acknowledging marital rape as a crime, the penal code paves the way for the persistence of this crime, completely undermining the sexual and bodily integrity of married women. Such an omission clearly implies that married women do not have the right to choose to have sexual intercourse or not with their husbands and that their bodies and sexual rights are completely subject to their husbands’

control. Once again, it sanctions and legitimizes tradition and patriarchy over law and offers men license to force their wives into sexual relations.

The draft law stands in direct violation of global human rights norms, international documents and treaties and the Turkish constitution. Unless article 315 is revised to include marital rape, a major and prevalent sexual offense will continue to go unpunished in Turkey and jeopardize human rights of married women.

- **The draft law discriminates between married and unmarried women, virgin and non-virgin women.**

The Turkish Constitution states in Article 10 that all women and men are equal in the face of law. The Penal Code Draft Law stands in violation of the constitution by discriminating between married and unmarried women, virgin and non-virgin women. Such discriminatory provisions have to be removed from the draft law in order to abide by the principle of gender equality and fully recognize women's human rights.

Article 4 of the draft law (Definitions) includes a clause defining "woman" as "including girls" suggesting a distinction between virgin and non-virgin women, while there is no definition of "man" in the article as "including boys." In the article consisting of definitions of "nighttime", "weapons", "violence", "citizen", "civil servant" etc., the definition of "woman" is completely irrelevant and only highlights the discriminatory approach of the penal code per se.

All women who are subject to sexual assault must be equally protected by law. However, Article 325 of the draft law (Abduction and Retention of Persons) foresees a higher sentence if the kidnapped woman is married, implying that the severity of an attack on a basic human right is dependent on the marital status of the woman. Along the same lines, the justification of Article 319 (General Aggravating Circumstances) states that the rape of a virgin woman constitutes a more severe offense than the rape of a non virgin woman, suggesting that the affliction caused by rape can be determined by whether the woman's hymen has previously been broken or not.

These above-mentioned provisions are extensions of discrimination against women by law, based on traditional patriarchal values and constructs. To ensure gender equality these articles have to be amended to exclude such discriminatory clauses.

- **The draft law sanctions forced marriages and legitimizes rape and abduction of women.**

Articles 326 (Active Penitence and Mitigating Circumstances) and 327(Active Penitence Necessitating the Suspension of Criminal Proceedings or the Sentence) of the draft law stand in clear violation of women's human rights and have to be removed. Rape and abduction are severe crimes against a person's sexual and bodily integrity and are penalized in the penal code. To offer a reduction or postponement in the sentence of such crimes if the perpetrator marries the victim contradicts the rationale and intent of the penal code and implies that the state condones the harmful traditional practice of forced marriage.

Both articles use the institution of marriage to violate a person's rights and freedoms and unjustly protect the perpetrator while further victimizing the aggrieved party. Marriage is presented as a compensation for the raped or kidnapped woman. The notion that women's bodies belong to the society and family, that constructs of honor and chastity hold greater import than a woman's sexual and bodily integrity materialize in such provisions. The articles openly suggest marriage as a way out for perpetrators, thereby forcing women to live with their rapists and abductors and be subject to further physical, sexual and psychological violence and abuse.

Passing the draft law with such provisions would indicate that the state consciously jeopardizes women's lives and chooses to ignore its duty to protect the human rights, freedoms and sexual and bodily integrity of women.

- **The draft law fails to adequately define the sexual abuse of children and assumes the possibility of consent on the child's part.**

The draft law under review falls short of adequately defining and penalizing sexual abuse of children. The draft law addresses sexual crimes against children together with sexual offense against adults scattered among four separate articles (No.315-318), assumes there may be consent of the child in such offenses and dismisses nature of the offense particular to the case of children. To protect the rights of the child in accordance with the Convention on the Rights of the Child, the draft law should be revised to address sexual offenses against children separately under one article entitled "Sexual

Abuse of Children” and remove concepts of “chastity” and “honor”, as well as supposition of consent.

Articles entitled “Assault on Chastity with the Consent of the Child” (No. 318) and “Seizing of Chastity with the Consent of the Child” (No. 316) are contradictions in terminology implying that children under 15 years of age possess the faculty of consent in sexual abuse. A child under 15 has not yet completed her/his psychological, sexual and intellectual development and does not have the aptitude to give consent. Furthermore, the power and dependence relationship most frequently present in the sexual abuse of children constitutes different characteristics than sexual assaults against adults, necessitating different provisions. Under these circumstances, the law should explicitly state that consent may not be considered relevant in the sexual abuse of children, define the offense under one article (the Sexual Abuse of Children) and recognize it as a different offense against sexual and bodily integrity.

The penal code in effect and the draft law also manipulate the provisions on sexual abuse to limit the sexual and bodily rights and freedom of young people. The draft law presents the space to penalize young people under 18 for consensual sexual relations. To overcome such discrimination, sexual offenses against minors between 15-18 years of age should also be revised to state that sexual abuse is not applicable if the age difference between the perpetrator and the aggrieved party is less than three years.

- **The draft law legitimizes the killing of the newborn child born out of wedlock by the mother.**

Draft law Article 139 (Homicide of the Newborn Child out of Wedlock) offers a reduced sentence for the murder of a newborn out of wedlock by the unmarried mother. The philosophy underlying this provision is that a child out of wedlock compromises a woman’s and family’s “honor” and thus the mother may be justified in murdering the child. Such an article is a clear violation of children’s rights. Furthermore, the Turkish civil code reform in 2001 has abolished the distinction between “legitimate” and “illegitimate” children and Article 139 of the Penal Code Draft Law stands in contradiction the civil code. Article 139 has to be removed from the draft law.

- **The articles criminalizing so-called “Indecent behaviors” should be removed from the draft law.**

Article 320 of the draft law (Indecent Behaviors) states that any person who acts indecently or “severs others’ feelings of chastity” in public will be sentenced to six to twelve months of prison. This article rests on no legal or objective ground, but rather on the relative traditional social constructs such as chastity and decency. The article is frequently employed to violate the human rights of transgendered people and prosecute them on unfounded grounds. The article which serves to restrict a person’s, especially women’s, sexual and bodily rights and freedoms and impose tradition to further control women’s sexuality through manipulating the law must be removed from the draft law.

- **The offense of sexual harassment is incompletely defined and does not recognize sexual harassment in the workplace.**

Sexual harassment is a serious sexual offense against a person’s sexual and bodily integrity like rape or other forms of sexual assault. Sexual harassment in the workplace is a prevalent form of sexual harassment in contemporary society, violating not only women’s sexual integrity, but also their right to work. In order to penalize the offense effectively, sexual harassment in the workplace should be explicitly defined and included in the sexual harassment article (No.321).

Furthermore, in cases where the victim is sexually harassed by someone who has authority over her/him, the prosecution of the offense should not be subject to complaint as the aggrieved party may be dependent on the perpetrator or may have to jeopardize her position or job by filing a complaint.

- **The General Aggravating Circumstances for sexual assaults in the draft law exclude sexual assaults by security forces and sexual assaults under custody.**

Sexual assaults including rape are often employed as a means of torture in custody in Turkey. This brutal human rights violation places the aggrieved under significant pressure and threat and magnifies the affliction of the aggrieved party.

In order to eliminate sexual assaults as a form or constituent of torture, Article 319 regulating the general aggravating circumstances of sexual offenses should be revised to include the use of weapons and similar objects and the offense occurring under custody or by security forces.

- **The draft law does not criminalize the practice of virginity testing.**

Virginity testing is a severe human rights violation against a woman's sexual and bodily integrity. Unfortunately the practice still exists in Turkey, performed in various public institutions including schools and penitentiaries and is even employed by force in families when women are suspected of having sexual relations before marriage or as proof of women's virginity upon marriage.

The right to choose if, when, how, where, with whom to have sexual relations is a basic human right. Infringing on this right, be it by school or security authorities or by families and husbands can have no legal pretext. The taboo and pressure on the construct of women's virginity restricts women's human rights and freedoms to the extent that it may cause them to get killed or to commit suicide. The state has a duty to ban and penalize harmful practice of virginity testing in the penal code in order to protect women's sexual and bodily integrity.

- **The article of "Discrimination" in the draft law does not fully support the equality principle of the Turkish Constitution.**

In accordance with the equality principle of Article 10 of the Turkish Constitution, the draft law of the penal code includes an article entitled "Discrimination" (No.186) penalizing discrimination by institutions and individuals. However, by limiting the offense to three clauses only safeguarding economic rights against discrimination, the article fails to penalize discrimination sufficiently.

The article should be revised to penalize "all those obstructing the exercise of one's social, political and economic rights" due to discrimination on the basis of language, race, color, gender, sexual orientation, political view, philosophic belief, religion or similar grounds as foreseen in the constitution.

WOMEN'S PLATFORM ON THE PENAL CODE

- Amnesty International Turkey Branch
- Ankara Women's Solidarity Foundation
- Association for the Support and Training of Women Candidates
- Association for the Support of Sincan Community Center
- Çanakkale Association to Promote Women's Labor
- CEDAW NGO Forum Preparation Committee
- Diyarbakır Bar Women's Commission
- Edirne Women's Human Rights and Handicrafts Group
- Filmmor: Women's Cinema Group
- IRIS Equality Watch
- Istanbul Bar-Women's Rights Enforcement Center
- Istanbul Governorate Human Rights Desk
- Istanbul Governorate Women's Status Unit
- Izmir Bar Women's Rights Enforcement Center
- Izmir Bar Women's Commission
- KATAGİ
- Kibele Women's Cooperative
- Okmeydanı Women's Atelier for Paper Art
- Purple Roof Women's Shelter Foundation
- Republican Women's Association
- Turkish Women's Union
- Women's Solidarity Foundation
- Women for Women's Human Rights – New Ways
- Van Women's Human Rights Initiative

