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SEXUAL HARASSMENT TOWARDS WOMEN IN CRIMINAL LAW AND WORKING LIFE

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Abstract

Sexual harassment is a substantive offense in criminal law. It was regulated within the name of “sexual harassment” for the first time in Turkish Penal Code No. 5237 (art. 105), on June 1st, 2005. According to Turkish Penal Code, for constitution of the “sexual harassment”, someone must be harassed in a sexual manner and it should happen without any physical contact. Sexual acts which are committed as a violation of physical integrity do not constitute the offense of sexual harassment but sexual assault. According to our Penal Code, committing sexual harassment by taking advantage of working in the same place is a reason for increase in punishment. If the victim is forced to quit the job because of this act, it constitutes aggravated version of offense by virtue of result. Regarding the acts of sexual harassment in working life, there are some provisions in labor law, as well, in order to prevent harassment acts and protect against harassment. Sexual harassment is considered as termination cause for justifiable reasons in terms of labor law. Moreover, for the application of that provision, harassment does not have to occur in daily working hours or working place. In the study, sexual harassment will be examined in terms of Turkish Penal Code and provisions of The Council of Europe Convention on Violence will be evaluated from the point of qualified versions. Furthermore, definition of sexual harassment in labor law and the protections against it will be explained.

Keywords: Sexual harassment, working life, woman, termination for justifiable reasons, physical integrity.

INTRODUCTION

Sexual harassment is a phenomenon that we confront everywhere, in workplaces, in the street, in social media, in family, at schools, in social institutions, in hospitals and in many other places. While both men and women are exposed to these actions which we can encounter all over the world, the victims are especially women. Sexual harassment is classified within the scope of sexual violence among types of violence and those who are exposed to types of violence against women come under the scope of protection in the domestic law and international law. Also, acts within the scope of sexual violence, sexual harassment in this sense, is regulated as a crime in the Penal Code. “The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)” also demand parties to regulate sexual violence and sexual harassment as offenses in their Penal Codes.

Sexual harassment is regulated as substantive offense in article 105 of Turkish Penal Code. It is regulated under the section of “Offences Against Sexual Integrity” and it is accepted that sexuality and in this regard, “sexual harassment” is a matter of freedom.

Acts of sexual harassment are offenses that people face often in working life. And in the acts of sexual harassment, women in particular are victims. Our Penal Code has made certain determinations in connection with acts of sexual harassment performed in working life and regulated them as qualified version of the crime; considered the cases which harassment force the victim to quit the job as aggravated version of crime by virtue of the result.

In labor law, act of sexual harassment is perceived different from Penal Code and physical behaviours and mobbing are also described within the scope of sexual harassment. In the field of labor law, sexual harassment is considered as violation of ethics and bona fide rules as well as personal rights. While the victim of the sexual harassment has certain rights, the employer has certain obligations.

I. SEXUAL HARASSMENT IN CRIMINAL LAW

A. General Remarks

Offense of sexual harassment has been regulated in Turkish Penal Code under the sixth chapters named Offenses Against Sexual Integrity. As our new Penal Code was enacted on June 1st, 2005; it brought along significant differences of approach. Penal Code No. 765, which remained in force for 79 years, did not regulate this offense with the name of “sexual harassment”. Acts which were expressed as sexual harassment were considered under the scope of offence of molesting regulated in article 421 (Artuk, Sexual Harassment, 30).

Main difference on approach is that; during the period when Code No. 765 was in force, these acts were regulated under the title of “Crimes Against Public Decency and Family Order” but the new Code No. 5237 which was enacted in 2005, regulates them in the chapter of “Offences Against Sexual Integrity”. In other words, while the previous Code was considering sexual acts as a moral issue, the Code No. 5237 adopts them as a matter of freedom. By arranging the crimes against sexual integrity part of sexual harassment, sexual freedom was intended to be protected in a broader context (Tezcan/Erdem/Önok, 322, 376).

Act of sexual harassment is classified in the scope of violence and violence constitutes a public problem. Although violence is a phenomenon encountered in all areas of life, regardless of gender and age groups, especially women are exposed to these kinds of acts. Acts of sexual harassment is also a problem that everyone can confront but it affects women more. Therefore violence and in this context violence against women is considered as violation of a woman’s right (In World Conference on Human Rights held in Vienna in 1993 the term “Human Rights of Women” entered into UN Human Rights documents) and combat against these actions is accepted as a state policy (see: Akbulut, Violence, 143). There are also studies in the international field. In this field, a legally binding convention even has been signed and came into force. As violence was defined in article 3 of the convention named “The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence”, acts which cause or pose risk of sexual harm and pain were also considered in the scope of violence and act of sexual harassment was regulated in article 40.

Acts of sexual harassment against women in working life are performed by colleagues, managers, chiefs and customers. However, these acts are rather carried out by people working at superior positions. And the ones who are exposed to sexual harassment more are the ones who are inexperienced, has no chance of finding a new job or who work hierarchically dependent on a

man (Şahin/Erdem/Sarı, 68). Article 105 of our Penal Code has a characteristic of a regulation that can significantly compensate the problems encountered in working life. This article is not only a regulation for preventing acts of sexual harassment towards women but it also gives place to decreatives which predict higher punishments for these acts in order to prevent these problems in working life. Application of sexual harassment by colleagues or superiors is regulated as qualified version of the crime.

B. Turkish Penal Code Regulation on Sexual Harassment

Article 105, where offense of sexual harassment is regulated, came into force on June 1st, 2005, has been changed first in June 2005 by the Code No. 5377, then the article was re-established by making amendments by the Code No. 6545, on June 18th, 2015 and it took its present form. In the article, the basic form of the crime was first described and then qualified version of the crime and aggravated version by virtue of the result were expressed.

According to article 105, for constitution of the crime, someone must be harassed for sexual purposes. Sexual harassment is not defined in the text of the article (for criticism on not being defined see: Pamuk, 1473). However, in the justification of the article, it is expressed that sexual harassment can be performed by sexual acts which are not violation of physical integrity (for the term of sexual harassment see: Artuk, Criminal Law, 34). Furthermore, in the justification of the article, it is stated that sexual harassment is disturbing the victim in defiance of moral pureness in terms of sexuality (for the criticism of the term see: Yokuş Sevük, 272, 273). Hence, sexual acts made by physical contact would not constitute offense of sexual harassment but offense of sexual assault which was regulated in article 102 or sexual abuse in article 103. The Supreme Court also acknowledges that the sexual behaviors without physical contact will be defined as sexual harassment. However, in the doctrine, before the amendments of Code No. 6545, discussions were made on whether the acts violating the physical integrity like pinching and brushing up against the victim, tweaking on the cheek or instant touch on breasts would constitute sexual harassment or sexual assault (see: Tezcan/Erdem/Önok, 378; Özbek/Kanbur/Bacaksız/Doğan/Tepe, 5.th Ed., 358). With the amendments mentioned above, acts with the characteristic of molesting will be included in to scope of sexual assault and sexual abuse, so it has been clarified that sexual harassment can be committed by sexual acts which do not violate physical integrity.

Sexual harassment can be committed orally (passing a word with sexual content), written (offering a sexual intercourse) or deictic gesture provided that it does not violate the physical integrity (Artuk/Gökçen/Yenidünya, 323). Which means it is an offense with independent action. However, committing the offense by making use of ease of mail or electronic communication devices creates a qualified version of the crime which requires higher penalty (penalty is increased by half). It is possible to commit the crime by display. For instance, sexual harassment can occur by displaying sexual organs. But committing the crime by display also creates a qualified version of the crime and it also requires increase in penalty (penalty is increased by half). Display, in terms of sexual harassment must be done toward a specific person, if display happens overt; it constitutes offense of indecent act in article 225 of Turkish Penal Code.

Acts of harassing must be disturbing or reach disturbing dimensions for constitution of the offense. Acts without disturbing characteristic, sexual purpose or sexual content do not constitute offense of sexual harassment. For example, friendship proposal, date proposal, asking questions about the marital status, are not in the scope of the sexual harassment. (Tezcan/Erdem/Önok, 378; Koca/Üzülmez, 59; Özbek/Kanbur/Bacaksız/Doğan/Tepe, 9.th Ed., 383).

For constitution of the crime there is no consequence required, act of harassment with sexual manner is sufficient for the crime. Therefore offense of sexual harassment is regulated as

an “merely acting offense”. Although one movement is enough for constitution of the crime, there is no specification in article 105 about committing offense repetitively. On the contrary, in the Penal Code, with the decision to commit a crime, committing the same crime more than once against the same person constitutes a “successive offense” and offender is not punished for each offense but punishment is determined by increase over the same offense. Yet, the Council of Europe Convention, to which Turkey is a party, demands parties to regulate committing the same crime more than once (repeatedly) as qualified version of the crime (art. 46).

According to article 105, anyone can be offender of the act of sexual harassment. There is no specific determination about the offender. But just like the other violation types, sexual harassment also affects mostly women and so offenders are mostly men. Specific regulations concerning violence against women also point out this situation. On the Convention of European Council (Introduction Part), it is expressed that gender-based violence against women, compared to men, is a social mechanism which force women into a secondary position and acts of sexual harassment are one of the most common violence types that women often face. In the Penal Code, sexual harassment, when committed by some specific people, is regulated as qualified version of the crime. It is a situation that requires more penalty if the offender is guardian, trainer, caretaker or custodial parent of the victim or someone in charge of protection, caretaking or custody. For the execution of the qualified version, concrete case and relevant legislation will be decisive in determining whether the offender has these characteristics. And in the Council of Europe Convention, it is demanded that if the offenses mentioned in the convention are committed against those individuals who get undefended because of special cases, it should be regulated as a cause that requires increased penalty. Eventhough article 105 does not have any definition about the offense committed jointly, European Council Convention also demands this situation to be regulated as qualified version (art. 46).

Offense of sexual harassment also has no specific characteristic about the victim. The victim can be male or female based on article 105. People with different sexual preferences can also be victims. However, victims of sexual harassment crimes are mostly women (see: Yeşiltaş, 148). In the Introduction part of Council of Europe Convention, it is accepted that women and little girls are more likely to be exposed to gender-based violence compared to men. According to a research in Turkey, 14 % of working women are harassed sexually in their working places. In the health sector, this percentage gets higher. Even, it is reported that nurses have been sexually harassed by 41% (<http://www.styleturkish.com/documents/content/file/Isyerinde%20Siddet.pdf>). Children are also exposed to sexual harassment (for child in Criminal Legislation see: Akbulut, Child, 546 and more). Our Code regulated the cases, where victims are children, as qualified version of the crime. There were not any specific regulations in article 105 about sexual harassment against children before the amendments of Code No. 6545. This case caused a controversy in doctrine. Some authors defended that acts of sexual harassment against children would be punished according to article 103 which regulates offense of sexual abuse against children, instead of article 105. Therefore they claimed that children can not be victims of sexual harassment offense (Özbek/Kanbur/Bacaksız/Doğan/Tepe, 9.th Ed., 381; Tezcan/Erdem/Önok, 377). Turkish Legislator regulates the offense of sexual harassment against children as a qualified version of the crime with the amendment of Code No. 6545. While basic version of the crime is punished with three months to two years of imprisonment or judicial fine, if the victim is a child becomes six months to three years of imprisonment with no judicial fine option. If offender of sexual harassment against children holds one of the characteristics as previously mentioned, penalty is increased by half. Accordingly, punishment for sexual harassment against female children in working life committed by the specific people mentioned above will increase by half

of the punishment specified in paragraph 1. This amendment about children in article 105 serves as a required by Council of Europe Convention (art. 46). That's because according to the convention, all offenses mentioned in the convention, where victims are children, should be regulated as qualified version of the offense requiring a higher penalty. However, there is no determination about the commitment of the crime in front of the eyes of children, which is another case that the convention requires to be a qualified version.

Due to the large number of acts of sexual harassment experienced in working life, the legislator has regulated benefiting from the ease of working relations as a cause requiring higher penalty. Because such relationships ease the realization of these acts and raise the possibility of repetition. So, that leads to high numbers of the offense in working life. Paragraph 2 of article 105 also adopted committing sexual harassment by benefiting from the ease of public services, contractual affiliation/ employment relations or familial relationship as a qualified version of the crime (penalty in the first paragraph will rise by half). Thus it also adjudicates that acts of sexual harassment committed by senior people in both public areas or private sector will be punished aggravatedly. The legislator punishes sexual harassment performed not only through misuse of superior positions but also by taking advantage of working at the same place and resolves that the punishment would rise by half.

Acts of sexual harassment are committed easily in working life and this brings along some negativities to the victims (see: Yeşiltaş, 150; Eyüpoğlu, 61 and more). Decrease in productivity, being late to work, aggressive and unhappy moods and being obliged to leave the job are some these negativities. Our Penal Code regulates the case where the victim is obliged to leave the job as “aggravated form of offense by virtue of result” in the last sentence of the article which offense of sexual harassment placed and it is expressed in the same sentence that the punishment can not be less than a year. In the same manner, cases where the victim is obliged to leave his/her family or school are also regulated as “aggravated form of offense by virtue of result”. Although it is expressed in the Council of Europe Convention, no determination is given in the article regarding serious psychological harm on the victim caused by offense (art. 46).

For constitution of the crime, the act not only should be committed “with intent”, but also “with sexual purposes”. Acts done with humiliation, frightening or disturbing but not with a sexual purpose constitute not sexual harassment but other offenses (offenses of insult, threatening or disturbing the peace and tranquility) occur (Yenidünya, http://www.marmaraceza.org/dosyalar/icerikresimleri/8_Ders_Notu_Cinsel_taciz_Suu_1.pdf). Sexual purpose is defined as having opinions or setting targets about someone only considering her/his sexual identity. Idea of sexual satisfaction is not required for sexual purpose (Ünver, 124; Koca/Üzülmez, 60; for opposing view, see: Artuk/Gökçen/Yenidünya, 326).

As a conclusion, the regulations of article 105 of Turkish Penal Code on sexual harassment, includes some important provisions but it contains a number of insufficiencies in the structure resulting from the Council of Europe Convention.

II. SEXUAL HARASSMENT IN WORKING LIFE

A. Phenomenon of Sexual Harassment in the Workplace

Any unwanted, insulting, humiliating behaviour against a worker's personality, mental and bodily integrity in order to provide sexual benefit without sexual contact is called sexual harassment (Çelik/Caniklioğlu/Canbolat, 245 and more; Mollamahmutoğlu/Astarlı, 645; Centel, 15; Bakırcı, 1 and more; Onaran, 19; Zippel, 1 and more; Ekin 98 and more). Since sexual harassment usually has the characteristics of attack on women's right and freedom to work and

personal rights, it causes sense sex discrimination (Kaya, 5 and more; Yuvalı, 33; Tuncay, 5). In international law, there are regulations that accept sexual harassment as sex discrimination (Rubenstein, 1; Segrave, 23; Sthorm 48 and more). And in Directive 2006/54 of the European Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation, sexual harassment is where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

B. Protection Against Sexual Harassment In terms of Labour Law

Sexual harassment is considered as a violation of personality rights and moral and bona fide rules. Therefore, if the elements of sexual harassment have occurred in the workplace, it is described as offense in terms of the Turkish Penal Code; as for the Turkish Code of Obligations, it constitutes tort (art. 49 and more). In Labour Law the employer, within the scope of employer's liability of guarding the employee arising from employment contracts, has an obligation of protecting against all kinds of harassment directed to workers and sexual harassment in particular (Süzek, 428 and more; Mollamahmutoğlu/Astarlı, 645). In this context, primarily the employer is obliged to refrain from sexually harassing behaviours.

In addition, in the workplace, the employer is obliged to prevent the situations that may result in or ease exposure to sexual harassment; and if the worker has been exposed to sexual harassment in the workplace, he or she is also obliged to end the harassment and take the necessary measures to protect the honour and the dignity of the worker from the moment he or is informed. In relation to this, a clear regulation is included in the Turkish Code of Obligations art. 417. Accordingly, the employer, who is obliged to respect and protect the personality of workers and provide an arrangement in accordance with the principle of honesty in the employment relationship, is especially obliged to take the necessary measures in order to avoid sexual harassment or further damage of the ones who were already harassed.

Sexual harassment can be carried out directly by the employer in the workplace; this behaviour can also come from the employer's representative, another employee or third person. In this case, sexual harassment is therefore justifiable cause for immediate termination in terms of Labour Law. According to this, in accordance with the Labour Code art. 25/II,c, if a worker harasses another worker of the employer, the employer may terminate the employment contract immediately for a justifiable reason. Even if harassment is carried out outside the workplace or after working hours, it does not eliminate the employer's right to termination. In the event of sexual harassment towards a civil servant, an apprentice, a trainee, a contract staff, contract labour or worker of subcontractor working in the office, employer may also use his or her right of termination. Sexual harassment of an employee towards another employee is also a justifiable reason that the employer cannot be expected to continue the employment relationship in terms of Turkish Code of Obligations art. 435/2 (Mollamahmutoğlu/Astarlı, 645, Centel, 15). In subparagraph b of paragraph 2 with the title of situations that do not comply with rules of moral and bona fide rules and the like in article 24 of Labour Law, sexual harassment of an employee by the employer is regulated. If this is the case for an employee, he or she may terminate the employment contract for a justifiable cause. Harassment is not necessarily realized in the workplace or in daily working hours. And if an employee is harassed in the workplace by another employee or third party and necessary measures are not taken despite informing the employer about the situation, it constitutes a justifiable cause for termination for the worker (art. 24/II,d). In the provision, the reason of termination is not being harassed by another employee or third party but lack of necessary measures although the employer is informed about the harassment.

Realization of the sexual harassment in the workplace is another condition (Mollamahmutoğlu/Astarlı, 645; Çelik/Caniklioğlu/Canbolat, 245 and more). Inflicting a disciplinary punishment, changing workplace or termination of employment contracts are among measures that the employer will take.

In accordance with the debt of equal treatment regulated in article 5 of Employment Law, it is stipulated that victim of workplace harassment can get a maximum of 4 salaries and in addition, he or she may request material and moral compensation. (Yüksel, 37; Kaya, 5 and more; Yuvalı, 33; Tuncay, 5).

Responsibilities and obligations related to the employer are also applied to the employer representatives. In this respect, employer representatives are also obliged not to make discrimination and to fulfil the debt of equal treatment. The employer is legally responsible for the transactions of the employer representatives representing the employer. When sexual harassment is concerned, criminal and administrative sanctions are directed to employer representatives but legal responsibility rests with the employer.

Research shows clearly that in working life, comparatively higher rate of women compared to men are victims of psychological harassment in the workplace (Reinhart, 1 and more). Mobbing performed by sexual harassment cannot be proved because the victim hides the situation for various reasons. Sexual harassment has a special significance in Labour Law. Under normal circumstances, people at every stage of life can be exposed to sexual harassment. However, since workers' depending on employers and being the weak side brings a new dimension to sexual harassment committed against workers. Moreover the sexual harassment is made not only on the person's personality, but it also has an impact on his or her economic life (Bakırcı, 19; Onaran, 19).

CONCLUSION

Article 105 of Turkish Penal Code, where sexual harassment is regulated, contains some important regulations in order to prevent such acts. Within the amendments made in 2014 some deficiencies have been resolved, some regulations about harassments in working life has been made and by these amendments, some previous controversies have been settled. Nevertheless there are still some insufficiencies in terms of the determinations about qualified versions which European Council Convention. For instance, provisions about committing the crime repeatedly, having been convicted on same offense before or resulting in psychological damage are not included in the regulation. In labor law, the victim of sexual harassment has a right of termination with a valid cause, employer can terminate offender's contract for good cause and employer is in charge of protecting employee against all kinds of harassment, especially sexual harassment in context of employer's liability of guarding the employee.

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