

MARITAL RAPE BETWEEN CRIMINALIZATION AND LEGALIZATION A COMPARATIVE STUDY BETWEEN ISLAMIC LAW AND LEGISLATION

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Abstract:

The issue of marital rape continues to be a subject of great legal debate. The established principle in criminal law is that the husband is not punished if he forces his wife against her will, as marriage grants him the right to have sexual relations with her even without her consent. However, the topic of marital rape has recently gained international attention, with many countries, especially Scandinavian ones, believing that marriage does not justify sexual intercourse without the consent of both parties. This is because the matter is primarily linked to the freedom to engage in sexual relations. The importance of this issue is further highlighted when referring to Algerian criminal law, which exhibits a lot of terminological confusion and lacks precision in defining the crime of rape, as it does not explicitly exclude the wife. This has led us to address this issue, hoping to find a solution based on what is stated in Islamic law.

Key words : Marriage, rape, exoneration, coercion, consent.

INTRODUCTION:

The panelist in the Algerian Penal Code finds that the family bond is generally influential in crimes and penalties, and the marital bond in particular is considered a formative element in some crimes, such as the crime of adultery or neglect of a pregnant woman, or it is a mitigating excuse for the punishment, as is the case with the excuse of provocation resulting from flagrante delicto in the act of adultery stipulated in Article 279 of the penal code. This bond may also be a cause of impunity, as is the case in the marriage of the kidnapper to the kidnapped woman stipulated in Article 326 of the Algerian Penal Code. What concerns us in this context is the interference of the marital bond as a reason for exoneration in the crime of Rape, which the Algerian legislator included in the text of Article 336, is a general punishment that does not exclude the wife from it, which raises the question about the extent to which the husband who has intercourse with his wife can be punished, or that he benefits from one of the reasons for permissibility that can be inferred in this case from the rules of Islamic law.

It is stated in the text of Article 336 of the Algerian Penal Code that: “Whoever commits the crime of indecent assault shall be punished with temporary imprisonment for a period of five to ten years.” What is understood from the explanations of the Algerian Penal Code is that what is meant by the crime of indecent assault in this article is the crime of rape, so the correct translation is for the term “viol” is mentioned in the French text is rape.

By using the term “indecent assault,” the Algerian legislator has fallen into the pitfalls of error, because there is a vast difference between rape and indecent assault, as rape only occurs against a female, while indecent assault includes any indecent acts that do not involve penetration, This includes engaging with a female in a place not intended for that purpose (anal intercourse), engaging in sexual acts with males, forcefully hugging and kissing a woman, and generally violating someone's sexual integrity(1). Accordingly, the Algerian legislator used the term “indecent assault” instead of “rape” and used the term “indecent act” instead of “indecent assault.”(2). It is more accurate to use the word “rape” because it has a broader meaning, as it implies the act occurring without the consent of the victim.(3).

In addition to this confusion, the legislator did not define any concept of indecent assault, nor did it clarify any of its elements. By referring to the jurisprudential definitions, we find that the meaning of indecent assault stipulated in Article 336 of the Penal Code is the act of a man engaging in sexual penetration against a woman without her consent.⁽⁴⁾ This definition, in the view of some jurists, is a limited definition in that it is stated in absolute terms. Its apparent meaning includes even the husband having sexual intercourse with his wife against her will. Therefore, we find that rape according to them is the unlawful intercourse with a female with the knowledge of the absence of her consent.⁽⁵⁾ We find that there are legislations that take this point into account by explicitly stipulating the exception of the wife from the crime of rape, such as Syrian legislation in the text of Article 489/01 of the Penal Code, which states: “Whoever forces someone other than his wife to have sexual intercourse with violence or threats...” and Article 503 of the Lebanese Penal Code that stipulate: “Whoever forces someone other than his wife to have sexual intercourse with violence and threats...”, as well as the Palestinian penal legislation in Article 152, which states: “Whoever has unlawful sexual intercourse with a female without her consent...”, These laws clearly state that forcing a woman who is not his spouse to engage in sexual activity is a serious offense. This indicates that if a husband forces his wife to have sex with him, he will not face consequences for the infraction.⁽⁶⁾

Regarding the Arab nations that omitted this information, the reason is primarily attributed to their religious practices, namely Islam. As we will address in more detail in the second section of this study, Islamic law does not view a husband having sex with his wife without her consent as illegal. We think that if there had never been a crime known as “marital rape,” this problem would not have been as significant. With the growing calls for women’s independence, rights, and equality with men, some laws have started to penalize lawful sexual relations with women through coercion. Thus, we have two distinct jurisprudential developments. These are in this issue: the tendency that forbids a husband from having forced sex with his spouse and the trend that allows it, both of which are covered in more detail below:

1/ Criminalizing marital rape:

This section will first cover the laws that make it illegal for a husband to have sexual relations with his wife without his consent. It will also address the arguments put up to support the criminalization of marital rape and the objections raised against them.

1/1/ Legislation criminalizing marital rape:

Relatively few laws specifically make it illegal for a husband to force his wife to engage in sexual activity. The text of Article 216 of the Danish Penal Code states that having sex with one’s spouse is a class 1 felony equivalent to rape. The Swedish law states as much in Article 1 of Chapter 4. In addition to South Australia, Canada, Russia, Poland, and the former Czechoslovakia, marital rape is illegal in Hungary. Article 375/02 of Belgian law also establishes penalties for rape between spouses in the event that the victimized spouse files a complaint.⁽⁷⁾

Additionally, we see that in twenty-two American states’ laws⁽⁸⁾ if the marriage is still unbroken and the couple is not living apart, it is illegal for a husband to have sexual relations without the consent of his spouse. It should be mentioned that each state has a different legislative framework for penalizing marital rape under US law. A case in point is the California Criminal Code that was released. If the husband had forced sexual relations with his wife in September 1979, he would have been penalized. But if the wife didn’t consent because her husband drugged her or rendered her unconscious, that doesn’t count and the crime doesn’t happen.⁽⁹⁾

Regarding French law, there is still debate on the subject. The overarching concept guiding all sexual relationships, whether they take place inside or outside of marriage, is consent. This principle is only applicable from a civil perspective, though, as coercion of the wife is one of the acceptable justifications. According to French civil law, a husband’s employment of coercive tactics, such as beating, injuring, or the like, is acceptable grounds for divorce because it is required for marital relations to occur with consent.⁽¹⁰⁾

However, there is still a lot of jurisprudential debate around the topic of marital rape from the perspective of criminal law. The work has settled on the established principle in the French Penal

Code, which states that a husband who has forced his wife to consent to sexual relations will not face consequences. This is because marriage grants him the right to have sexual relations with her. While there isn't a specific definition of rape in general or reference to marital rape in French jurisprudence.

Article 332 was amended to state that "Rape is any sexual penetration, regardless of its nature, committed against another by violence, coercion, threat, or surprise," after the law was passed on December 23, 1980. The France legislator had equated between anal and vaginal penetration. Any sexual penetration that takes place without consent is covered under this article. The fact that this article made no mention of couples having sexual relations is crucial to us. Regarding whether a husband has forced sex with his wife through an anal penetration, there is consensus in French jurisprudence.

Regarding forced sex through vaginal penetration, legal precedent has been split into two camps: the dominant camp maintains that a husband who rapes his wife is not subject to punishment, while the other camp believes that punishment is not necessary. Given that the sexual relationship between spouses is at the core of marital duties and that it is no longer acceptable to use violence and harm to the wife, supporters of the first trend (supporters of sexual freedom) see a shift in French society's morals and the tolerance that was offered to the rapist of his wife.

Supporters of the second trend, however, emphasize that since having sex is a component of having marital rights, the husband is not punished for exercising one of those rights. There are now two schools of thought on forced sexual relations when a person is physically separated from their partner. Even while physical separation ends a marriage, the responsibilities arising from the marriage contract itself continue. Therefore, from the perspective of those who hold the first opinion, the wife's forced sexual relations in this case amount to chargeable rape, while those who hold the second opinion contended that physical separation did not erase the two parties' divorce. spouses, and its impact is restricted to married life separation and does not extend to the obligations imposed by the marriage contract, the most notable of which is the wife's consent to having sex. Consequently, the act is not criminal in nature if it was carried out by force.⁽¹¹⁾

Although it protects the ideal of sexual freedom and seeks punishment for marital rape, the French judiciary's verdicts were rather cautious in light of the law's silence and variations in jurisprudence⁽¹²⁾.

1/2/ Justifications for criminalizing marital rape:

Jurisprudence offers numerous arguments in favor of penalizing a husband who coerces his wife into having sex. We'll make an effort to restrict them to the following:

1-The world's constitutions have made the decision to uphold people's fundamental rights, such as the freedom to live as one pleases and the right to equality. The severity of the infringement on women's freedom, particularly their right to sexual freedom, is what defines forced sexual relations. Ensuring equal protection for men and women before the criminal law is a necessary component of the right to equality. It must encompass both married and single women as well as the union of couples.

2-If it is accepted as standard that the marriage contract permits the partners to enjoy one another, and then this boundary shouldn't be crossed. Legally speaking, the husband's coercion of his wife and her suffering on a bodily and mental level to have sex with her are not acceptable. Given that the law gives either spouse the right to file for divorce if the other refuses to allow the other to enjoy him sexually, the current legal system does not permit the husband to use illegal means (coercion) to enforce his right to have sex with his wife.

3- The wife would suffer significant physical and psychological harm if she were forced to engage in sexual activity because she would lose her sense of self and wouldn't feel safe.

4-Allowing forced sex with a wife gives a non-wife greater rights than a wife because it is illegal for a man to compel a friend, girlfriend, fiancée, or even a prostitute into sexual activity. Thus, given the absence of punishment for the wife's rape, we come to an invalid conclusion. Punishing the rape a fiancée, mistress, or prostitute is not the same as not punishing a man who forcibly has sex with his wife. This devalues the status of the lawful wife relative to that of the mistress or prostitute.⁽¹³⁾

1/3/ Criticism of the justifications for criminalizing marital rape:

The response to the justifications presented for criminalizing the rape of a wife lies in the difference between Eastern and Western societies, as Eastern and Arab societies, more precisely, are primarily Islamic societies, relying in the philosophy of their laws on the moral view of dealing with social conditions, while Western societies we find rely on a purely utilitarian philosophy.

With regard to equality between men and women, inequality is in fact equality, because the nature of men differs from the nature of women. Otherwise, how do we justify the offering of dowry from the man to the woman, and how do we justify the man's responsibility to provide for the wife and children, and other responsibilities placed on the husband's shoulders without the wife.

As for the violation of a woman's body without her consent and causing psychological harm to her, we come to a very important point. If some Western laws punish a husband for raping his wife, it is because he has other women to fulfill his desires.⁽¹⁴⁾ Especially since the crime of adultery is not punished in the majority of Western legislations, the husband does not suffer from his wife's rejection, nor does the wife suffer from her husband's rejection. As for our society, there is no alternative for a spouse other than polygamy, which is not easily accessible to the general public.

As for the statement that the wife is of lower status than the fiancée, the Regarding the claim that a wife is less valuable than a fiancée, concubine, or prostitute, we argue that these positions would not exist if adultery had not been criminalized. As a result, all sexual activity—whether by a fiancée, concubine, or prostitute—is prohibited and punishable by the law, protecting the wife's social standing and dignity because no one else—not even other adulteresses or rapists—is allowed to engage in sexual activity.

To say that the legal systems permit sexual intercourse within the framework of a marriage contract without permitting coercion, we respond to this by saying that this is acceptable in the face of Western laws and systems. Otherwise, how can we explain the words of the Almighty : “ **Men are the protectors and maintainers of women because Allah has made one of them excel over the other, and because they spend out of their possessions (to support them). Thus righteous women are obedient and guard the rights of men in their absence under Allah's protection**”. (verse 34 of Surah An-Nisa) and this is what we will discuss in detail in the next point.

2/ Legalizing marital rape:

Starting with the laws that allowed for forced sex with a wife, we hunt for a pattern of allowing this behavior. We next offer arguments in favor of and against this practice.

2/1/ Legislation legalizing marital rape:

As we have mentioned earlier, there are specific laws in the Arab world that make it legal for forced sexual relations to occur with the wife. We further emphasized that, since the Islamic reference serves as the foundation to which we refer in the event of other Arab nations that did not expressly state permissibility, there is no punishment for this act either. The lack of clarity or silence in the law, as well as the fact that some Western positive laws—like those in England and Germany—consider marital ties to be a legitimate justification for forcing someone into sexual relations before delving deeply into the position of Islamic law.⁽¹⁵⁾

The position of Islamic law is summarized in that marriage necessitates sexual intercourse between spouses, and all sexual acts that one spouse performs on the other are considered permissible acts. One of the most important effects of marriage is the legalization of sexual relations between spouses, and this legalization is a requirement of marriage as the legitimate means to satisfy sexual desire and achieve the goals intended by Islamic law for the benefit of both the individual and the society equally. The established principle is the legalization of sexual relations between spouses, as stated in the Quran: **Your wives are like farmland for you, so approach them `consensually` as you please. And send forth something good for yourselves. Be mindful of Allah, and know that you will meet Him. And give good news to the believers.** From verse 223 of Surat Al-Baqarah.

It is not permissible for a wife to prevent her husband from having sexual relations with her without excuse, in order for them to enjoy each other. The presence of a valid marriage contract is necessary for sexual intercourse, and the wife must not be divorced three times or have completed her waiting period. If a man violates a woman in this case, he deserves the punishment of adultery⁽¹⁶⁾. We discover that if a husband forces his wife to have sexual relations with him, there is no reason to

conclude that adultery has occurred, as the foundation for the latter is the illegality of the relationship, or the absence of permissibility.⁽¹⁷⁾

Therefore, a wife who refuses to fulfill her husband's desire is committing a sin⁽¹⁸⁾, as indicated by the saying of the Prophet: "If a man calls his wife to his bed and she refuses, the angels curse her until morning." Allah has granted the husband the right to compel his wife to obey him, even by hitting her, as evidenced by His saying:

"Thus righteous women are obedient and guard the rights of men in their absence under Allah's protection. As for women of whom you fear rebellion, admonish them, and remain apart from them in beds, and beat them.59 Then if they obey you, do not seek ways to harm them. Allah is Exalted, Great. If you fear a breach between the two, appoint an arbitrator from his people and an arbitrator from her people. If they both want to set things right, Allah will bring about reconciliation between them. Allah knows all, is well aware of everything" [From verse 34,35 of Surah An-Nisa .

Nushuz has been defined as "the disobedience of a woman towards her husband and her refusal to obey him, such as refusing to join him in bed when he calls her, or leaving the house without his permission, or allowing someone (whether a woman or one of her relatives) to enter his house without his permission." In other words, a wife who does not submit to her husband is considered rebellious, and the husband has the right to compel her to obey him, even by force.."(20).

However, Islamic law restricts the permissibility of a husband having sexual relations with his wife against her will, imposing limits on the use of force by the husband on his wife, as well as legal prohibitions that prevent the husband from exercising his right to have sexual relations with his wife by force.

2/2/ Justifications for allowing a husband to have intercourse with his wife against her will:

We shall now give some justifications that are not based on Islamic law. Instead, these are defenses offered by positive law jurists. This is because most positive legislation takes into account whether or not a husband and wife may engage in forced sexual relations. The most significant defenses of the tendency that allows husbands to have forceful sex are reviewed below:

a-Since the marriage contract permits both partners to enjoy each other, it is not acceptable to bring up the subject of a body's sanctity being violated. This means that a husband's having sex with his wife against her will is regarded as an exercise of his right to have sex. Even if she does not consent, the woman must accept sexual contact from her husband. This obligation stems from a general marital duty that the wife accepted when she entered into the marriage contract. Here, consent refers to the willingness of both partners to have sex whenever they feel like it.⁽⁵⁰⁾

B-Punishing the husband for forced sexual intercourse carries many disadvantages that far exceed the current legal situation, which allows the husband to have this relationship, because criminalizing this relationship leads to endangering the marriage and the family, and punishing the husband leads to a rupture of the marital bond and the collapse of the family, which leads to harm. Social damage that exceeds what the wife suffers from her husband's contact with her without her consent.

C-The state's intervention through punishment constitutes a violation of the sanctity of the private life of the spouses. The intended interest in permissibility is to protect the sanctity of marital life, while criminalization means respecting the personal freedom of the wife only.

D-Criminalizing and punishing forced sexual intercourse opens the door to the risk of blackmail that could occur from the wife against the husband. For example, if she wants a divorce, she threatens him by reporting that he forced her to have sexual intercourse, which is a deadly means of punishing the husband at any time the wife wants.

e-From a practical standpoint, there is no justification for criminalizing a husband's forced intercourse with his wife, due to the rarity of its practical cases. This in turn is due to the reluctance of wives to report due to fear of the husband's retaliation, fear for the status of the children, or fear of a decline in the economic level, as well as society's view of the wife who reported it. Her husband. Moreover, regardless of these considerations, the issue of proving a coercive relationship is difficult, given the different circumstances of committing marital rape from ordinary rape.

And-There is an alternative to criminalization, which is the possibility of the woman resorting to the personal status courts for divorce. However, if the husband commits acts that are in themselves crimes, such as beating, physical assault, or violence, then the wife files a criminal lawsuit, and this is sufficient to deter the husband from having sexual relations using coercion accompanied by violence⁽⁵¹⁾.

2/3/ Criticism of the justifications for allowing a husband to have intercourse with his wife against her will:

Saying that the marriage contract allows the spouses the right to sexual enjoyment is a given, but it should not exceed the limits of enjoyment. The woman's acceptance and satisfaction with the marriage contract and its effects, even if it makes her accept sexual intercourse, does not mean that the wife has given up her right to maintain her body. Or she agrees to submit to sexual intercourse with her husband under duress.

To say that state interference in the privacy of marital life may expose the family to danger is an exaggeration, as the state interferes in many matters of marital life, by criminalizing acts less serious than sexual assault that occur between spouses, such as assault by beating and wounding, without anyone saying that this is the case. It leads to the demise of the family.

As for the statement about the fear of blackmail from the wife, the inaccuracy of the reports submitted by the victims is expected in all crimes and not only in this case. In addition, the inaccuracy of the reports is not considered an excuse to make the facts that are the subject of the complaint or report permissible. Rather, the legislator is required to take measures from This would reduce the maliciousness of these complaints.

Likewise, saying that there are few complaints submitted by wives, or the difficulty of proving the incident, does not justify permissibility, because criminalization does not require a certain percentage of assaults or complaints, but rather there are higher rights that must be protected, and the difficulty of proving criminal incidents does not justify permissibility and non-criminalization. We have many facts that are difficult to prove, such as incest, homosexual acts, and bribery, but they are criminalized and punishable.

We find that women's associations and human rights organizations have played a prominent role in the field of educating women, informing them of their rights and defending them, which created a class of women who can report the rape they are exposed to by their husbands, and this is what we see especially in Western countries. Opinion poll studies and various researches have also shown that forced communication has become a strikingly frequent occurrence⁽⁵²⁾.

As for the last justification presented by the supporters of permitting forced sexual intercourse as an alternative to criminalization, the reality reveals an increase in divorce cases from wives who were subjected to forced intercourse with their husbands. This solution places the responsibility on the state to protect the rights of divorced women, and it also places a burden on the state to renew A justification for wives being subjected to abuse and rape⁽⁵³⁾.

CONCLUSION:

As an evaluation of the justifications presented by supporters of criminalizing marital sexual coercion and supporters of permitting coercion, we find that the justifications of the supporters of criminalization are stronger in terms of legal logic. On the other hand, the justifications of the supporters of permission are more socially acceptable, as they protect a greater interest. They prevent the dissolution of the family and society in the face of encroachment on women's rights.

However, the justifications put forth by proponents of criminalization, with all their strength and appeal, do not justify their adoption in Islamic societies. This is because the context that aligns with these justifications is Western society, which has created alternative opportunities for spouses outside of legitimate relationships. Adhering to what Islamic law prescribes is the safest and most effective approach in our belief, primarily because we are a Muslim society. Furthermore, the plan outlined by Islamic law to address this issue is extremely sound, as long as we adhere to certain conditions imposed by the law.

Islamic law permits a husband to have sexual relations with his wife, even if she dislikes it, but only within the framework that prohibits any other illicit relationships for both the husband and the wife. Therefore, the husband's actions can be justified because he is not engaging in the forbidden act of adultery. Additionally, the possibility of the wife refusing sexual intercourse decreases because she does not have an outlet for her desires outside of her husband, which is not the case for Western women who have similar opportunities for deviation and fulfilling their desires outside of legitimate boundaries.

Also, the permissibility brought by Islamic law was not absolute, but was restricted by many moral controls, so there is no intercourse except in the natural place, and at a time that allows for the relationship without harm or physical harm to the wife (menstruation and postpartum). Islamic law also took into account not to prejudice the spiritual connection. For a woman by her Creator, it is forbidden to coerce her while she is fasting or performing Hajj, just as coercion does not begin with beating, but rather the essence of abstinence must be investigated in the stages of admonition and abandonment.

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- [26] ⁽⁵¹⁾Mahmoud Ahmed Taha Mahmoud, *opcit*, pp. 299, 300, Ashraf Tawfiq Shams al-Din, *opcit*, pp. 165 et seq. René Garo, *Encyclopedia of Public and Private Penal Law*, translated by: Lynn Salah Matar, vol. 07, Beirut: Al-Halabi Legal Publications, 2003, p. 143.
- [27] ⁽⁵²⁾In a study in the United States of America, it was found that 14% Among the total victims of rape crimes are wives who were raped by their husbands, and in a study conducted by the German Ellensbach Institute published in Stern magazine Stern It was shown that about 18% of wives were subjected to forced intercourse from their husbands. Ashraf Tawfiq Shams al-Din, *opcit*, p. 169.
- [28] ⁽⁵³⁾Mahmoud Ahmed Taha Mahmoud, *opcit*, p. 300 et seq., Ashraf Tawfiq Shams al-Din, *opcit*, p. 168 et seq.