



2528-9705

Örgütsel Davranış Araştırmaları Dergisi
Journal Of Organizational Behavior Research
Cilt / Vol.: 3, Sayı / Is.: S2, Yıl/Year: 2018, Kod/ID: 81S2389



LEGAL EFFECTS OF SEXUAL RELATIONSHIP WITH WIFE WITHOUT CONSENT IN IRAN AND FRANCE PENAL CODES

Mahmood ROOHOLAMINI

Faculty member (professor) at the Faculty of Law and Theology, Shahid Bahonar University of Kerman, Kerman, Iran.

ABSTRACT

According to the Civil Codes, having a sexual relationship for a woman is an obligation. However, the deprivation of the woman from the right to indemnity is the punishment inflicted for refusal and it seems that the law does not in any way allow the husband to resort to force, violence, threats and beatings in order to have a sexual relationship with wife. Iranian lawmakers have not been so motivated study the wife's rights in case the husband, in order to have a sexual relationship with his wife, resorted to violence, threats and beatings. Given that one of the main conditions of rape in Iran's criminal law is the lack of a marital relationship, therefore, in the current situation, the prosecuted husband is not charged with rape with his wife. Nevertheless, it seems that the wife, on the one hand, can claim damages on the basis of civil or criminal law, on the one hand, and on the other hand, on the basis of certain provisions of the Islamic Penal Code, in particular under the crime title of "threat ", to pursue the prosecution of her husband. In French criminal law, for a long time the judicial process believed that the having of a sexual relationship, even with the use of force and without consent of the woman, was not in conflict with the legitimate goals of marriage. Therefore, the act could not be included in the definition of the crime of rape. Nonetheless, the act if caused physical harm would have the ability to prosecute (violence) or offense. However, the judiciary proceeds accept the occurrence of rape between the couples in two stages, in the first stage, the judicial process accepts the occurrence of sexual assault only between couples who are in the physical separation, and at a later stage, this practice also involves the occurrence of rape between couples who are not physically separated. Finally, the French legislator, in 2006, anticipates the possibility of rape between couples in the French Penal Code. As a result, at present, in French criminal law, the commission of any sexual relationship with a spouse by force, threat, and violence takes the title of sexual assault.

Key words: sexual satisfaction, matrimony, rape, sexual relations, sexual violence

INTRODUCTION

One of the most important issues regarding the rights and duties of couples is the legal nature of the subject of sexual relations. This relationship effects are different based on the fact that it is a right or duty. If sexual relationship for the wife is merely a right, the husband will in no way have the right to force the wife to have a sexual relationship. But if the sexual relationship is considered as a duty of the wife, the question arises as to which rights the husband will have if the wife refuses to meet this duty. In answering this question, it should be noted that the laws and regulations concerning family rights in Iranian law are inspired by Shi'a jurisprudence. Based on Shi'a jurisprudence, a woman must obey her husband. The Shi'a scholars categorize obedience as a specific obedience (marital relationship) and general obedience. Some jurisprudents consider the sexual relationship with a spouse to be a right for the husband, and believes that a woman can not avoid her husband's presence without a religious excuse (Amiri, 2010). One of the most important issues that arises here is that if a woman does not accept to

have sex with her husband, what is the right of her husband? Some jurists believe, according to verse 34 of Nisaa, the husband has three rights that can be implemented gradually: first, advice, and then refuse to share their beds, and in the end beat (Mousavi and Dehghan, 2008) There are very few discussions on the first two rights, namely, advice and abandonment, but about the beating all comments in the jurisprudence books and the interpretation of the word "beat" were the same almost since a 100 years ago. They consider beating as physical punishment and there is no fundamental difference in their views. But today, around this issue, there are some questions¹. One of the important points in the verse 34 of Nisa seems to be a criminological point. In fact, the explicit and immediate prohibition of the non-punishment of a woman could have been less effective. For this reason, the Holy Quran proposes a gradual prohibition. Therefore, if a man gradually withdraws from his wife and at first does not beat and take off from the assault, this act will gradually lead to the loss of recourse to beatings. In fact, not the Holy Qur'an gives permission to beat, but has logically attacked beatings. From a historical and sociological point of view, in the era of the advent of Islam in Saudi Arabia, a woman had no value and place, and a man could have beaten his wife. Islam wields a lot of rationality in its fight against beatings. In fact, Islam considered the "principle of decent conduct" as one of the most fundamental and most important ethical principles in the family (Nemati and et al, 2011). Recourse to the assault and beating is perfectly in conflict with the principle of decent conduct companionship; and, unquestionably, the advice is opposing the assault. Advice is based on wisdom and reason, while the assault is on the basis of the anger and superiority of ignorance over wisdom and reason. As a result, the whole endeavor of the Qur'an is that to replace ignorance and anger in the form of beatings with intellect and wisdom in the family environment, in the form of advice. It is worth reminding that the Qur'an, in verse 19 of the Nisa, orders men to deal with women with merit, even if they do not like them and want to divorce them treat in a non-violent behavior (Amani, 2011). Now, how could God, on the one hand, order men to do such, and, on the other hand, order to beat? Therefore, with the slightest doubt, the purpose of the Qur'an in verse 19, is not to resort to assault, but to anticipate ways to exclude recourse to assault. In such a situation, some of the jurists consider the only reaction to the wife refusal for sex is to quit the alimony by the husband (Jokar, 2011) and that is why civil law stipulates the following in Article 1108: "Whenever a woman without a legal religious barrier, she refuses to have sex with husband duties, she deserves no alimony." (Nemati and et al, 2011).

The Iranian civil code does not allow a husband to resort to beatings to have a sexual relationship. In such a situation, "the husband can go to court, asking the woman to obey. It seems like a court order is not practical and is against the dignity of women to make her obey by the material and physical obligation and by the execution of a court ruling, both in terms of the personality of the woman and the rights of her (safae and et al, 2016). Similarly, in Iran's law, it seems that the only punishment for the woman's refusal to have a sexual relationship is to deprive her of the right to alimony², and the legislator will never allow her husband to resort to beatings. Unfortunately, in Iran's law, there has not been much discussion about whether a husband can resort to assault or violence and threats in the context of specific obedience or even refusal for sex by the woman. In fact, this is one of the neglected debates in

¹ Ibid, 183

² Ibid, 141



Iranian law. Despite the fact that in Article 1103 of the Civil Code, couples are obligated to have good relations with each other, no breach of civil law has been foreseen for breach of this duty. As a result, in the absence of a guarantee of execution, it seems that the task envisaged in this article finds more of a moral advocacy (Asadi, 2011). However, it seems that in cases where the husband, by using force, threats and violence, has made sexual relations with his wife, this practice has not been specifically denounced. Nevertheless, the courts can prosecute the husband, based on the material of the Islamic Penal Code, under the title "Threat or Threat to beat". In the French legal system, for a long time, the courts have argued that the having of a sexual relationship with a spouse, even by force and violence, is not in conflict with the objectives of marriage. Therefore, the commission of such an act did not have any performance warranties. In such a situation, the husband could have sexual relationship with his wife, even using force. Nevertheless, since around the 1990s, courts have tended to punish husbands who, by force and violence, began to have sexual relations. This procedure continued until 2006, and this year, the legislator, by adding a note to Articles 22-222 of the Penal Code, sees having sexual relations by force, violence and threats with a wife legally as rape. Therefore, there is a significant difference between the criminal law of Iran and French taking into account the nature of the sexual relationship without the consent of the woman and its legal effects. Thus, the current paper first explores the status of the woman's satisfaction in having a sexual relationship in Iran's law and then examines the status of the woman's satisfaction in having a sexual relationship in French law.

A) The position of the wife's satisfaction in having a sexual relationship in Iran's criminal law
The most important thing about the role of consenting a woman in having a sexual relation is to explain the legal nature of the right or obligation of this relationship.

Legal nature of the right or obligation of this relationship

In Iran's law, Article 1102 of the Civil Code stipulates: "Once the marriage was haveed, the marriage relationship between the parties and the rights and duties of the couples will be haveed." The Iranian legislator, in articles 1103 to 1119, deals with the identification of the rights and duties of couples, and none of these materials refers explicitly or explicitly to the implication that the having of a sexual relationship is one of the duties of a wife. However, Article 1127 of the Civil Code stipulates: Whenever a husband has a sexually transmitted disease after the marriage, the woman will have the right to refuse to have sex with him, and the refusal will not lead to deprivation of alimony. Based on the opposite concept, it can be said that if the husband does not have sexually transmitted disease, the woman has no right to refuse, but if she refuses to do so, she will be deprived of her right to alimony. In other words, the woman does not have the right to refuse to have a sexual relationship, but if she does, the only guarantee is that she is deprived of her right to alimony. Also, under Article 1085 of the Civil Code: "A woman can not be surrendered until her seal, refuses to perform duties performed against her husband, provided that she is present, and this refusal is not a right of alimony". Also, under Article 1086 of the Civil Code, if a wife has sex with her husband before she received the dowry, she no longer has the right to refuse to have a sexual relationship. Article 1108 of the Civil Code explicitly states: "Whenever a woman without a legitimate obstacle refuses to perform marital duties, she will not be entitled to alimony." In this article, the Iranian legislator also uses the term "duties of paired", without defining it. According to the provisions of the Civil Code, the law seems to impose an obligation on the woman to have a



sexual relationship implicitly, and only the guarantee of not fulfilling this duty would be the denial of the right to alimony.

Now, given that civil law implicitly implies having a sexual relationship for a wife as a duty, it is questioned whether the couple can have a sexual relationship with or without her consent? It should be noted that the majority of the jurisprudents, in discussing the non-compliance of the woman (whether specific or general) take the only guarantee implementation of law as to deprive the woman of the right to alimony (Ahangar, 2014), and in no way pointed out that the couple has the right to resort to force and threats and coercion to force women to tolerate. It can also be clearly stated that none of the material of Iranian civil law allows the husband to resort to violence and assault on women to indulge in sex relation, even if the having of a sexual relation to a woman is a duty. In the event of a woman refusing to perform this duty, the only right that is created for her husband is that she is exempt from alimony on the basis of Article 1108 of the Civil Code. In this way, the husband can not, under any circumstances, have a sexual relationship with his spouse contrary to her will. It is worth reminding that, under Article 1108 of the Iranian Civil Code, if a woman without a legitimate obstacle, that is, without legal reason, refuses to perform marital duties, she will not merely be entitled to alimony, and other husband's duties will remain in force. According to the provisions of the Civil Code, one can say that one of the effects of marriage is the permissibility of having a sexual relationship. In other words, married couples can make sexual relationship. In this sense, the having of a sexual relation is not an obligation but an optional and permissible practice. Most jurists say the word Tamkin is compliance to the term "duty", and they believe that compliance is either general or specific, and in their view, the meaning of specific compliance is the woman's responsibility to have a sexual relation (Amir Mohammadi, 2009). Although these jurists have recognized this legal delicacy, they have to study the "sexual relationship" in a particular way, but they have committed this confusion, which has made it a duty for a wife, while the sexual relationship is not a duty but one of the effects of the marriage contract, the actual adoption of which requires the consent of the woman.

Sometimes, in spite of the wife's dissatisfaction, the couple may resort to sex by force, threat and violence. The question arises, in such cases, what is the guarantee of execution against the husband's behavior in Iran's law.

Enforcement of the implementation of the sexual relationship by the husband without the consent of the wife

It appears that if a husband has sex with his wife without consent, she can, on the one hand, demand for damages and, on the other hand, request the prosecution of the husband.

- ***Legal enforcement***

Civil law does not expressly state any sentence in the case of a legal guarantee of husband sexual relations with wife without the consent of a woman. Given that civil law does not allow a husband, explicitly or implicitly, in any form whatsoever to permit sexual relationship through the use of force, violence and threats, it can be said that in the case of using these tools in the first stage, a woman can claim under Article 1 of the Civil Liability Act. According to this article, "anyone without legal permission, intentionally or as a result of inaccuracy, inflicts harms in life or health or property or liberty or dignity or commercial reputation, or to any other right created by law to individuals, if there is any harm to the material or the other, it is the responsibility of the compensation for the damage caused by the action itself. " As you can



see, the top priority of the matter is to commit the crime "everyone." Therefore, the husband can be considered one of the perpetrators of this article. Also, there is no doubt that the having of a sexual relationship without the consent of the spouse and the use of force, threats and beatings, on the one hand, is intentional, and on the other hand harms the wife's life and health (especially the Psychological damage). In fact, it should be said that the effects of having a relationship with the wife have the same negative effects as rape. "Rape has always been regarded as one of the worst and most deplorable crimes throughout history, in which, in addition to the many damages that it inflicts on human dignity, there is also a huge insult. Man, he always owns his body and soul, and his physical integrity must remain immune from any abuses. One of the acts that constitute an attack on the physical integrity of individuals is to perform sexual acts without consent and in contradiction to their will and with the use of hatred and reluctance (Matankolae, 2010). Thus, by accepting the assumption that the sexual relationship with the wife without her consent leads to physical and psychological harm, it appears that the wife can claim compensation from her husband on this basis. In addition, the wife, based on Article 1115 of the Civil Code, can apply for housing, since in such cases there is a likelihood of repeat offending, which causes fear of a physical loss for a woman³. Similarly, in the event of a sexual relationship with a wife through the use of force, threats and violence, the wife may request the prosecution of her husband on the basis of the general provisions of the Islamic Penal Code.

- *Criminal enforcement*

In the Islamic Penal Code of Iran, having a sexual relationship leading to intercourse is described as "adultery." In this regard, Article 221 of the Islamic Penal Code states that: "Adultery is a relationship between a man and a woman who are not the cause of the conjugal relationship between them and that there are no suspicions of the circumstances." Also, if the sexual relationship leading to intercourse is without the consent of the woman, the law referred to describes this act as "indulgence and reluctance," and it is considered to be a factor in the intensification of punishment. According to Article 221 of the Islamic Penal Code of Iran, the practice of a husband who, without the consent of his wife and through the use of force, threats and violence, is engaged in sexual relationship, can not be investigated under this article because, according to this article, in order to have a sexual relationship, the act must take place between a man and a woman not a married couple. In the Islamic Penal Code of Iran, no other material can be found based on which it is possible to describe and punish the sexual relationship of the husband by force, threat, and violence. In other words, having such a relationship today in Iran's laws lacks a specific criminal offense. It seems that the Iranian legislator has not paid attention to the negative effects that sexual relationship involves in the use of force and violence. Many writers believe that the having sexual relationship with the woman means, without the consent of the woman, a lot of physical, psychological and social harm. That is why, according to some writers, the offense of sexual assault in the following categories of adultery is a legitimate mistake because adultery is significantly different from rape. The authors believe that adultery is the guilty plea in which the parties are satisfied, and



³ If the married woman suffer a physical, financial or honorable loss inflicted by husband, the woman can demand a separate housing and if the probability of the loss is confirmed, the court will not order her husband to return to her home and as long as the aforementioned is alright the woman may refuse returning home, and alimony will be on the part of the husband.

there is no criminal offense in this crime, while in rape a woman is not satisfied and she is a victim. Additionally, the crime of adultery does not have side effects on the body, while the crime of sexual assault has a lot of physical and psychological harm to women. It seems that some writers are not careful that having a sexual relationship with a spouse without wife consent also causes physical harm and, in particular, severe psychological harm to women. The significance of psychological harm, if not more important, is definitely not less. It seems that the criminalization of such behavior in jurisprudence is also possible (Haji Deh Abadi and et al, 2013). According to some writers, the basis of the criminalization of certain behaviors in Islamic law is the application of the rule of law to the detriment. Based on this view, if the current offense is to a disadvantage, the government can proceed with the criminalization of that behavior on the basis of the rule of law. Therefore, given the fact that the having a sexual relationship with the use of force and violence by a spouse causes physical and psychological harm to a woman, the legislator can punish such a behavior in the form of a crime of injustice⁴. As stated, based on the opinion of some lawyers, having a sexual relationship for a woman is an obligation. If we consider such a relationship to be a duty, it's unthinkable that having a sexual relationship with a woman becomes a "right" for the man. In such a situation, on the one hand, the husband may, based on the principle of diligence, intend to exercise his right and, on the other hand, the exercise of this right would cause another loss (Jafari, 2014). In such a situation, there is a conflict between the rule of law and the rule of law and, in cases of conflict, the rule of law is a disadvantage for the state. The nature of the punishment should be determined on the basis of the nature of the damage suffered by the spouse and the husband's situation. Unfortunately, one of the main causes of the use of violence for sexual relationship is the husband's lack of awareness of the negative effects and harm that such a relationship has. In such a situation, the husband has no knowledge at all of the fact that having a relationship with a spouse by resorting to force has such destructive effects. Perhaps if the husband knew such a thing, he would never do that. The crime of having a coercive sexual relationship with the spouse, at least, can have a declarative effect, and this sensitization of public opinion is important in this matter. However, it seems that the male-dominated culture of dealing women with violence and force and taking them as second gender is still as such in Iran, as in many other countries of the world. This causes violence against women, especially in the context of sexual relations. In fact, one of the signs of patriarchal culture is the prevalence of forced marriages with women. Unfortunately, despite the high frequency of compulsory marriages in Iran, there are no accurate data on these types of marriages, and the reason for this is, on the one hand, a reluctance to report forced marriages due to economic, social and cultural conditions (Moghadasi and Ameri, 2016). On the other hand, the reason for this is the non-criminalization of forced marriage⁵. In fact, marriage is a relationship based on the freedom of the will of the parties. In Iranian law, in most cases, a mandatory legal guarantee has been set aside for mandatory marriage and no effective criminal enforcement has been set. It is worth mentioning that resorting to a criminal sanction is in the sole interest of the man, because, in the event of the marriage annulment, the woman will be deprived of all legal rights reserved for the wife. Therefore, the negative effects of applying for legal guarantees for women are far greater than the positive effects for women. It seems that it is

⁵ Ibid, 191

only resort to criminal sanctions which, to a certain extent, can have a positive effect on women. In fact, forced marriage should be legally recognized; marriage parties should be recognized as married, but a criminal sanction must be set for all those who provide the grounds for forced marriage. In fact, most cases of violence and the use of force to have sexual relations are related to forced marriage cases. In such a situation, a woman has little desire for sexual relationship. As a result, one of the main means of combating sexual relationship with violence and coercion with a wife seems to be the criminalization of forced marriage. It should be noted that today in many countries forced marriage has been criminalized. It seems that the crime of forced marriage in the Iranian legal community has not become a matter of concern. Therefore, the necessity of the criminalization of forced marriage not only requires the community of law makers more effort in this regard, but it is imperative that psychologists, doctors, social workers, and even political organizations, the social and cultural agencies of women also making greater efforts in this regard to help provide grounds for criminalization of forced marriage in the future.

However, the practice of using threats and violence by a husband to have a relationship with a spouse appears to be punishable on the basis of the general provisions of the Islamic Penal Code. One of the predicted crimes in the Islamic Penal Code is the crime of threats. Therefore, if a husband threatens his wife for sexual relationship, the husband's action seems to be punishable by under "the crime of threat". For example, if a husband uses knife to threaten or have sexual relationship, it can be in accordance with Article 617 of the Islamic Penal Code (Ta'zirat / 1996), which states: "Everyone uses knife, or any other weapon, to pretend or exercise power or use it to be intimidating or extorting someone or threatening it, or, if it is not a mockery, will be entitled to a period of six months to two years imprisonment; and 74 lashes". Evidently, the perpetrator of the criminal act envisaged in Article 617 is "everyone." Therefore, it necessarily does not give a particular attribute to the perpetrator. Consequently, the husband may also be the perpetrators of the criminal conduct contemplated in this article. Accordingly, the use of a knife or any other weapon to threaten is a crime. Consequently, the prosecution provided for in Article 617 of the Islamic Penal Code (Ta'zirat / 1996) could be fulfilled when the husband, using a knife or any other weapon, threatens his wife to have a sexual relationship. It is worth reminding that, according to the article, the threat could, if only, lead to the pursuit of a knife or other weapon used to carry out the threat. Also, it could be assumed that the husband, using the threat, forced his wife to have a sexual relationship without using another knife or weapon. Now, the question arises whether in such cases it is possible to prosecute a couple in a criminal matter. In answering this question, Article 669 of the Islamic Penal Code deals more with the threat of crime in a more general way. According to this article, "whenever someone threatens another in any way with the death or personal injury or financial loss or disclosure of a series of actions against him or his relatives, including whether he or she is claiming money, the request for action or the current withdrawal has been or will not be considered, punishment for flogging up to 74 beats of lash or from two months to two years imprisonment." Clearly, this article restricts the scope of the threat to particular cases, that is, only the threat of killing or personal injury or financial loss, or a threat of disclosure, can be one of the examples of Article 669. It is worth noting that, in accordance with the provisions of the article, the threat is a crime, whether due to the demand for money or the property, or the demand for the work or the quitting an act. Consequently, if



the husband's threat, in order to have a sexual relationship, can constitute one of the examples of the threats posed by Article 669, there is no doubt that the act committed under this article is arbitrary. It should be recalled that, according to the article, even if the threat is intended to carry out an act that is legal and legitimate, this can not prevent the commission of the offense. In other words, no one can even threaten another with a legitimate act. Consequently, although it is legitimate and legal for the husband to have a sexual relationship with the wife, the husband does not have the right to use the threat in the meaning of Article 669 in order to force his wife for sex. Similarly, in cases where the husband threatens his wife to have sexual relationship with him, or if he uses the threat, the force and the assault, this is in nature is a loss for the wife, because such a threat entails mental harm to a woman. Similarly, if the practice of using force and violence leads to physical injuries, namely, the beatings and deficiencies of a member, or the loss of the wife, a husband shall be entitled to pay the blood money based on the Islamic Penal Code (2013) and sentenced to imprisonment Article 614 of the Islamic Penal Code (Ta'zirat / 1996).

The place of consent of the wife in having a sexual relationship in French criminal law

For a long time in the French legal system, a husband who had forced his wife, even through violence, threats and forced sexual relations, could not be prosecuted for committing sexual assault, because the judiciary believed that "the husband has committed no action contrary to the legitimate aims of the marriage." (LEVASSEUR, 1991). On the basis of this judicial process, even some French lawyers believed that the husband could force his wife to have a sexual relationship, even if by physical superiority. Thus, it could be said that during this period, the judicial process and part of the French legal doctrine considered the having of a sexual relationship as a duty for a wife. However, if the act of committing acts of violence and assault had caused severe physical harm, then the act was prosecuted as of intentional deliberate mischief but not committing an act of rape⁶. But over time, the French judiciary has been marginally cautious of this view and tends to accept the occurrence of rape between couples.

Judicial recognition of the possibility of rape between married couples

The French judiciary accepted occurrence of sexual assaults between married couples is progressively and in two stages. In the first stage, the judicial process involved the occurrence of sexual assaults between couples only in the hypothetical manner that couples were physically subjected to the possibility of having an underlying illness or having a sexual relationship with severe violence.

The first case in this regard relates to a case brought by a magistrate at the charge of the Gonbale court for alleged rape against his wife due to sexual relationship with the use of unbridled violence (using torture and brutal acts)⁷. Some lawyers believe that the court has prosecuted the husband for alleged rape, for a specific kind of violence. According to these jurists, if the accused had used more lenient violence, he could not be prosecuted for rape⁸. It is in such a context that some French lawyers write: "how the husband thought about the freedom of sexual relationship that he committed such a brutal behavior?"⁹ It seems that these jurists were still under the influence of this judicial process, according to which having sexual

⁶ Ibid, p. 345.

⁷ Ibid, p. 82.

⁸ Ibid, p. 82.



relationship, even without the consent of the woman, is not in conflict with the goals of marriage. In the view of these jurists, the marital relationship also permits sexual relationship without the consent of the spouse, but the husband should not abuse this right. In other words, the husband can have a relationship with his wife without her consent, but this relationship should not cause harm to his wife.

The second case relates to the case where the prosecutor prosecuted the accused (the husband) for alleged assault, while the prosecutor wanted to prosecute the accused, charged with rape and threatened with murder. In response to a public prosecutor's objection, the prosecutor's office of the French court affirms the opinion of the investigating judge and states that "given the fact that in this case the relationship of pairedness continues to be in place, it is better to punish actions. Consequently, instead of relying on the issue of female dissatisfaction, it will rely on the issue of physical violence against women."¹⁰ The allegations in this case seem to have paid particular attention to the existence of a marital relationship, which constitutes a barrier to the victim of rape between couples. Following the objection to this verdict, the French Supreme Court's criminal tribunal, while violating the above-mentioned judgment, considers that in the ruling, on the one hand, the provisions of Article 232 of the Penal Code (formerly) have been ignored and, on the other hand, the accused has committed sexual relationship by using violence against his wife, who is on the verge of divorce.¹¹ Some French lawyers interpret this voting technique as an indication of the skepticism of French Supreme Court judges in recognizing sexual assaults between married couples. Whatever the purpose and intentions of the Supreme Court's judges, however, this judgment recognizes the possibility of committing the crime of rape between married couples, but the scope of this judgment is limited, because, as it is seen in this case couples were on the verge of divorce and separation. Taking into account the issued verdicts, it may be said that the judicial process during this period may have led to the recognition of occurrence of sexual assaults between married couples, that the wife was on the verge of divorce and, in fact, for the judicial process.

In short, in all of the aforementioned cases, the most important element in which the legal process based on the sexual relationship of a husband to taking sexual assault was that on the one hand, the husband had sexual relations by violence against his wife, and on the other hand, the husband and wife were on the verge of divorce. As a result, the fundamental question remains whether there is a possibility of rape, between a wife and a husband who are not on the verge of divorce, and so on, the question was posed that if the husband did not use violence however, he has used other tools such as coercion and threat, whether the act of committing an offense could constitute a victim of sexual assault or not. It should be noted that the French Supreme Court's Criminal Division issued a verdict in 1992, giving a clear answer to this question. In fact, by issuing this verdict, the French judiciary will enter the new stage, the second phase, in order to recognize the possibility of occurrence of sexual assaults between married couples.

The second stage, the admission of the possibility of the occurrence of sexual assaults by the husband, is related to the case in which the woman claims that her husband, in two separate stages, on the 11th and 19th of February 1991, using forcibly, and contrary to her consent, had committed sexual relationship. In this case, the investigating magistrate does not accept

¹⁰ Cour d'appel d'Anger, chambre d'accusation, 15 février 1984.

¹¹ Cour d'appel d'Anger, chambre d'accusation, 15 février 1984.



the charge of rape. Because, he believed, on the one hand, no action was taken to divorce and separation from couples; on the other hand, the husband did not use any kind of violence to commit sexual relationship and only used force. In the opinion of the investigator, the use of force was traditionally accepted in marriage in French law for the purpose of having a sexual relationship, and as a result, the act could not have been taken as sexual assault. Following the public prosecutor's complaint, the Branch of the Rhine Appeal Court, in a verdict issued on March 7, 1991, confirms the opinion of the investigating judge and states that one of the effects of marriage is to legitimize the marital relationship between couples. Therefore, a wife can not show her self-dissatisfaction or the use of force by her husband to have a normal and balanced sexual relationship as reason for being victimized. Evidently, the most important mistake made by the interrogator seems to be that the having of a sexual relationship contrary to woman's desire and satisfaction is regarded as a normal and balanced relationship, while the normal and balanced is the relationship that woman is satisfied with. Following the verdicts' appeal, the French Supreme Court's criminal tribunal, while upholding this ruling, states that "the prosecutor's office of the Rennes Appeal Court, with the approval of the prosecutor, overlooks the provisions of Article 332 of the French Sentence Act, because, the assumption of the consent of the wife to have a relationship with her husband is valid until there is no reason to reject." Similarly, the Supreme Court's Penal Code adds that "Article 332 of the Penal Code does not aim solely at securing and safeguarding the freedom of consensual sexual relationship. Therefore, in no way persons connected by marriage can not be excluded from the provisions of this article." (LEVASSEUR, 1991). In this verdict, the judicial process immediately recognizes the occurrence of sexual assaults between married couples, because, as we have explained, in the contemplated case, no action is taken to divorce, and also, the husband does not resort to violence, but merely uses the force. In fact, in this judgment, the Supreme Court will only increase the scope of Article 332 of the Penal Code, and in no way does not criminalize a new offense. The verdict is immediately converted to a judicial proceeding, and French courts, based on this verdict, make sentences for rape victimization between couples. Finally, the French legislator, following the judicial process, has shown his willingness to recognize the possibility of the occurrence of sexual assaults between married couples in April 4, 2006.

- *Crime of sexual assaults between married couples*

The French legislator first stepped up the recognition of sexual assaults between couples in the April 4, 2006, "Reinforcing the Prevention and Suppression of Family Violence, in Transparency of Criminal Laws", by ratifying New and added to Article 22-222 of the Penal Code. The aforementioned passage stipulates that rape occurs when sexual relationship is committed against a victim of violence, coercion (PILLET, 2010), threats or trafficking, although there is a family relationship between the perpetrator and the victim. Similarly, the note stipulated that the consent of a woman to have a relationship with her husband is valid to the point where there is no opposite reason. This note explicitly recognizes the possibility of rape between couples. It is worth reminding that in French law, it is possible to realize two-way rape, that is, a man can commit sexual assault on a woman and, conversely, a woman committing rape against a man. In the foregoing, the French legislature also does not rule out the possibility of committing rape by a wife against a husband in this note.



It is worth reminding that, since marriage permits having sexual relationship between couples, the aforementioned passage, in turn, stipulates the judicial process, which, in the event of an assault on rape, this suggests that the sexual relationship has taken place with the consent of the parties. It seems that the prediction of such an act is the only symbolic role, and the French legislator predicts it with knowledge and knowledge of the same role. Since criminal law is the principle of innocence, therefore, even on the assumption of rape, the court should charge the principle of innocence. The logical consequence of this is that the court assumes that the relationship has been made with the consent of the parties.

It should be noted that the addendum to Article 22-222 of the French Penal Code does not in any way impose a new criminal offense, but only defines the scope of this article. In fact, the French legislator, like the judicial process, is following social change. Undoubtedly, the recognition of the possibility of sexual assault among couples can play an effective role in preventing such an occurrence.

It is worth reminding that the French legislature over time has realized that this section of Article 22-222 of the Penal Code states that "the condition or assumption of the consent of a woman to have a sexual relationship with his husband is valid to some extent. There is no reason to oppose it ", it plays the role of symbolic and educational, and no longer needs to exist (LAZERGES, 1995). For this reason, according to the law of July 9, 2010, it is removed from the text. Today, not only does France's criminal law recognize the possibility of occurrence of sexual assault between married couples, but even sees the existence of a paired relationship as an aggravating factor in the victimization of rape. Under Article 23-222 of the French Penal Code, rape is punishable by 15 years' imprisonment and, if there is a relationship between the perpetrator and the victim, the punishment referred to in paragraph 11 of article 24-222 of the Penal Code France, will increase to twenty years of imprisonment.



CONCLUSION

Undoubtedly, having a relationship with a spouse is one of the effects of marriage. No matter what the right and duty of married couples, it does not mean that the husband can use force and violence to have sex with his wife; in particular, if it is the detriment of the woman, and according to Islamic jurisprudence and based on the rule of "no harm", no one has the right to harm the other. Unfortunately, the Iranian legal community has taken the issue of having a coercive sexual relationship with a wife and its harmful effects indifferently with no particular sensitivity. In many legal works, which are directly related to the rights of the family, although the writers of these works regard the particular compliance as the marriage effects, the writers have in no way object the issue of having coercive sexual relationship with wife. Therefore, it seems that the Iranian legal community should focus on this issue and discuss it. Similarly, as we have seen, the French judiciary moves ahead of the legislature in accepting the possibility of sexual assault between couples. In other words, the French judiciary will adapt itself to social changes sooner than its legislature. In fact, accepting the possibility of sexual assaults between couples by the judicial process shows the importance and role of the judicial process in legal developments. It is clear that the judicial process does not have the right to criminalize because this is the exclusive jurisdiction of the legislator. Nevertheless, the judicial process can make a kind of pseudo-verbal abuse by interpreting the rules. In fact, crime, ie, the prediction of a behavior as a forbidden cause, and the imposition of punishment for non-observance of this

prohibited behavior. In fact, the judicial process determines the sexual relationship of the husband by means of threats, violence and force as prohibited conduct, but does not determine any criminal offense. In fact, on the one hand, the applicable penalties in this field have already been set by the legislator. Thus, it can not be said that the judicial process has been committing malpractice. On the other hand, we can not ignore the determination of the prohibited practice by the judiciary rather than the legislature. Therefore, we can speak of a kind of pseudo-crime.

Given the developments in French law, it seems that the judicial process in Iran can also play an effective role in criminalizing the sexual relationship of the husband by means of threats, violence and force. Although the Iranian judiciary can not in any way prosecute the sexual relationship with a spouse with a spouse, it is based on the general criminal offenses haveed in the Islamic Penal Code, especially in Iran. The offense of "threat" or "assault" can be punishable by perpetrators.

References

- Ahangar, Rasoul. (2014). "Exploring jurisprudence in explaining the relationship between the necessity of charity and submission", Journal of Islamic Studies of Women and Family, No. 1, pp. 135-149.
- Amani, hadith. (2011). "The Role of Women in Family Relaxation", Tahoura Magazine, vol. 9, pp. 61-84.
- Amir Mohammadi, Mohammad Reza. (2009). Civil Rights (Family Finance System), Publishing, Tehran, First Edition.
- Amiri, Hussein. 2010. "Sexual Rights of a Woman and a Couple in Islam", *Magazine of Knowledge*, No. 154, pp. 70-81.
- Asadi, Leila Sadat. (2011). Family Criminal Law, Carver Publishing, Tehran, First Edition..
- Haji Deh Abadi, Ahmad, Haji Dahabadi, Mohammad Ali and Yousefi, Mohammad. (2013) "Examining the basis of harm in the criminalization of rape with an approach to Imamie jurisprudence", Criminal Law Research Center, vol. 8, pp. 35-66.
- Jafari, Somayeh. (2014). "Investigating the Elements of Rape, Reviewing the Course of its Legitimate Developments", Journal of Law Enforcement, No. pp. 70-79.
- Jokar, Mahboubeh. (2011). "The Rights and Duties of the Couple ", Tahoura Magazine, vol. 8, pp. 79-116.
- LAZERGES, Christine. (1995). "À Propos des Fonctions du Nouveau Code Pénal Français", A.P.C., n° 17, p. 8.
- LEVASSEUR, Georges. (1991). "Chronique: Infractions Contre Les Personnes", R.S.C, n° 2.
- Matankolae, Mehri. (2010). "Investigation of the Victims of Rape from a Criminological Perspective", Karagah Journal, No. 12, pp. 106.137.



- Moghadasi, Mohammad Bagher and Ameri Zahra. (2016). "Mandatory marriage; from prohibition to crime", *Criminal Law Doctrine*, vol. 12, 2016, pp. 169-198.
- Mousavi Rokni, Ali Asghar and Dehghan, Monshahidi. (2008). "The punishment of a wife from the point of view of Imamieh jurisprudence and the rights of the subject of Iran", *Shiite Women's Journal*, No. 16, p. 165-206.
- Nemati Pirali, Delara, Kardani, Raheleh and Vakili, Mehdi. (2011). "Matrimonial Matters of Couples and Family Ethics in Islamic Resources", *Women's Strategic Studies Journal*, vol. 54, pp. 211-253.
- PILLET, François. (2010) "Rapport n° 564 (2009-2010)", Fait au Nom de La Commission Des Lois, déposé le 17 juin.
- Safaei, Seyyed Hossein and Emami, Esdullah. (2016). *Brief Family Law*, Mizan Publishing, Tehran, First Edition 46.

