

A COMPARATIVE STUDY: DEVELOPMENT OF MARITAL RAPE AS A CRIME IN USA, UK AND TURKEY

Türkiye, İngiltere ve Amerika Birleşik Devletleri'nde Kocası Tarafından Eşinin İrzına Geçilmesi Suçunun Gelişimi Üzerine Karşılaştırmalı Bir Çalışma

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Özet

Bu makale, ceza adalet sistemlerinde cinsel suçların takibine ilişkin gelişen literatürde fazlaca yer bulmayan bir konuyu, özellikle, kocasını kendisinin ırzına geçdiği veya cinsel tacizde bulunduğu iddiasıyla yetkili otoriteye şikâyet etmesi halinde eşin görmesi muhtemel muameleyi Türkiye merkezli incelemektedir. Bu analiz Türk toplumundan (devlet otoritelerini de içine alacak şekilde) elde edilen gözlemler ile Amerika Birleşik Devletleri ve Batı ülkelerinde sahasında tanınmış uzmanlarca yapılmış araştırma ve yayınlanmış makaleleri kullanmayı hedeflemiştir. Türkiye'de kaynakların yetersiz olması bizi ikili söyleşi veya bireysel gözlem yoluyla bilgi edinmeye zorlamıştır. Ancak, batı kaynakları bize kocaları tarafından cinsel tacize uğrayan veya ırzına geçilen mağdur kadınların deneyimlerini bildirmektedir. Çalışmamızda Türk Polisinin performansının doyuruculuğu ve mağdurun bakımına yönelik sorunları ve diğer ceza muhakemesi hukuku unsurlarını incelemek istememize rağmen ilgili materyal ve istatistiklere ulaşmada zorluklarla karşılaşmıştır. Bu nedenle yabancı kaynaklı bir çalışma zorunlu hale gelmiştir. Seçilen konu tabiatıyla Amerikan ve İngiliz sistemlerinin gelişimi bağlamında incelenmiştir. Temennimiz bu incelemenin Türk sisteminin gelişmesi için bir örnek teşkil etmesidir.

Anahtar Kelimeler: Polis, Eşin İrzına Geçilmesi (Partnerin İrzına Geçilmesi), Cinsel Taciz, Rıza Dışı Evlilik İçi Cinsel İlişki.

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Abstract

This article examines an issue that has not found a great deal of interest in the growing literature on the treatment of sexual offences within the criminal justice systems, particularly, the possible treatment of marital rape and sexual assault complainants brought by the victim before the authorities in Turkey. This analysis draws on research from reputable journals and observations both from Turkish institutions and the public. The limited sources that are available in Turkey forced us to obtain personal interviews. However, western publications tell us about victims' experiences of their husbands' rape and sexual assault. Even though the article wishes to examine issues of victim care and satisfaction with the performance of the Turkish police, and other criminal justice professionals, it seemed that it was very difficult to find appropriate materials and statistics. Therefore a comparative study became necessary. The subject matter is thus analysed within an historical account of how American and English systems have developed. It is hoped that this end will be an appropriate guidance for the development of Turkish system.

Key Words: Police, Marital Rape (Spousal Rape), Sexual Assault, Non-consensual Intercourse within Marriage.

Introduction

“Prove rape by my husband, for gosh sakes,” Anne Tebedo argued while she is voting against a 1988 bill to make sexual intercourse in marriage as a crime (rape) in her state. She further stated “This kind of thing just takes another chink out of the sanctity of marriage..... There are some areas the state just doesn't belong in... There are personal things...” She strongly emphasised the critical danger of newly introduced legislation as “I think if a woman is having problems, she might abuse it... All of a sudden she gets tired of him and she yells “Rape!”” (Russell, 1990:xx)

“Marital rape...has never occupied a central theoretical role in the discussions of marriage or the victimisation of women in American society. One reason the police do not worry about marital rape is that few people care enough to discuss the issue in public” (Schwartz, 1989:12)

The **marital rape** (also called **spousal rape**) is a non-consensual sexual assault in which the perpetrator is the victim's spouse. Conceptual differentiation between "real rape" and "forced sexual intercourse in marriage" may lead to different treatment in the Penal Code.¹ The former is usually a one-time event and is clearly understood as rape (as it is committed by a stranger). However, the latter is likely to happen repeatedly, but it is not understood as traumatic as the former because, as often assumed, spouses have been sexually intimate. This assumption also finds its basis from victim-blaming attitudes toward women who are raped by their husbands.² In contrast to cases of child abuses, or rape by stranger, people, therefore, sympathise less, and they come to the conclusion that these victims are responsible for their own suffering.³

¹ It is now a crime in most parts of the Western world, but exemptions still apply in some places; i.e., in some places marital rape cannot be prosecuted if a couple were living together at the time of the assault. As the concept of human rights has developed, the belief of a marital right to sexual intercourse has become less widely held. In December 1993, the United Nations High Commissioner for Human Rights published the Declaration on the Elimination of Violence against Women. (See UNICEF, *The Progress of Nations*, 1997, 48) It is in this declaration that marital rape is understood as a human rights violation. However, not all UN member states recognized criminalization of the marital rape. In 2003, for instance, UNIFEM reported that more than 50 states recognized it as a human rights violation. (See United Nations Development Fund for Women (UNIFEM), not a minute more: *Ending Violence Against Women*, 2003) In 1997, however, UNICEF reported that just 17 states criminalized marital rape. (*Ibid*) In 2006, the UN Secretary General found "Marital rape may be prosecuted in at least 104 States. Of these, 32 have made marital rape a specific criminal offence, while the remaining 74 [*sic*] do not exempt marital rape from general rape provisions. Four States criminalize marital rape only when the spouses are judicially separated." (*Ibid*)

² Historically, many cultures have had a concept of spouses' conjugal rights to sexual intercourse with each other. The proposition of Christian teaching's influence in Western culture, Islamic teaching in Islamic world and other religious teachings are almost sharing the same point of view that in a marriage life the husband and wife render to each other upon the affection due each other. Therefore, the wife does not have authority over her own body in order to refrain from sexual relations. This presumption logically put the husband in a position that he has the authority on the wife's body. From the same point of view it can also be said that the husband does not either have authority over his own body, but the wife does. For instance, the following authoritative writing has had influential values in western culture until 90's. "Do not deprive one another except with consent for a time, that you may give yourselves to fasting and prayer; and come together again so that Satan does not tempt you because of your lack of self-control." (1 Corinthians 7:3-5, NKJV). Additionally, one has to keep in mind that in Islam, as in all other holy religions, adultery is among big sins (Qur'an provides the punishment for adultery in verses 15 and 16 of Surah 4, Women) and marriage is encouraged to refrain from this big sin. From this point onwards Qur'an in the same surah verse 34 recognizes the men rights and fulfillment and obedience of women towards those rights. Ali Ünal, *THE QUR'AN with Annotated Interpretation in Modern English*, The Light, Inc. Married men thus automatically think and believe that having sex with their own wives are helpful at least in two ways: one you do not commit one of the biggest sins; and second enjoyment of physical needs with peaceful mind regardless of women consent. The consent is assumed to be given by way of marriage; it is a part of marriage contract. The new law in Turkey is a total denial of what has been perpetually believed by men – and women- up to now. This will surely invites complications.

³ Until the belief of victim-blaming attitude changes this approach will not fade away among the judiciaries and police officers. *Ibid*.

However, in both cases, trauma from the rape adds to the effect of other abusive acts or abusive and demeaning talk. Against this, one can claim that in the case of marital rape the history of the relationship affects the victim's reactions, and thus this could easily be classified as part of an abusive relationship. It seems that there was a widely held view that a man or woman surrenders consent upon entering a marriage, thus the law has been slow to criminalize this form of sexual assault.⁴ It is said that "many sexual assault programs see marital rape as a 'family violence problem,' and many programs for battered women see it as a 'sexual assault issue'" (Lynn Thompson-Haas, 1987).

1. Historical Background

It is commonly believed that by their mutual matrimonial consent to a marriage contract the wife has given herself in relation to sexual intercourse (together with the commonly shared idea that she cannot retract her decision), and thus the husband cannot be guilty of a rape committed by himself upon his lawful wife.⁵ The House of Lords abolished the marital rape exemption in England and Wales in 1991.⁶ It is as recent as 2005 that the Penal Code of Turkey (hereinafter TPC) has criminalised "non-consensual sexual intercourse within marriage" subject to a complaint by the victim.⁷ The exemption was therefore abolished in

⁴ It is claimed it was "abnormal logic" to allow a man to file a rape charge against a woman. He also disagrees with making a crime of a husband raping his wife as this would be difficult to effect since many Thai wives were dependent on their husbands and would not want to divorce them or put them in jail. (Meenakanit, 2007).

⁵ See *supra* note 2.

⁶ See the case of *R v R* [1992] 1 AC 599. Although it had never been a rule of statute, and was not supported by any judicial authority, the exemption was believed to be a logical consequence of the laws of marriage and rape as historically understood.

⁷ Although there are different approaches in Turkish doctrine we adopted the view that the wife rape was not a crime according to previous Turkish Penal Code. The wording of the previous TPC has not referred to a specific provision that exempts the husband rape as it read "...non consensual sexual intercourse...to any body". (Article 416) It is thus argued that the exemption of marital rape was not there as the Code did not refer to the distinction of attacker if he is husband or foreign. This argument further appeared in the Court of Cassation. Briefly, Sami Selçuk, has made a distinction between anal and vaginal intercourse. The latter was not classified as wife rape but the former was recognised as rape. (For a detail argument see Bıçak 1998, ss. 68-70 and accompanying text). However, the Court of Cassation has employed the concrete view that the act of husband was not a crime (*Ibid foot note 3*). We share the same view. The TPC has given broader definition of this subject-matter under the title of 'Sexual Assault'. It does not use the term 'marital rape', but it seeks for sexual intention. It does not make any differentiation between the acts of husband and wife. Why this article does not use the term 'Rape' is not clarified. However, the scope of this article is now much more broader than the one defining the crime as 'rape'. See Art. 102/2.(For English version: Bıçak, 2007).

Turkey by TPC.⁸ This is of course a radical change in law and it may take a long time for the public to adjust to it. The public approval of this new law, as the police are part of the public, is an important element for its fulfilment. The majority of police officers all over the world are male.⁹ Should the male police officers strongly believe that the sexual intercourse demanded by a husband is a perfectly natural right of marriage, fulfilment of this new law might become difficult.¹⁰ The police

⁸ This broadened provision reformulates the concept of the aforementioned crime. Accordingly, sides, wife and husband (!), of the marriage could be victim of the aforementioned crime. This is a *sui generis* outcome for Turkish law. Same year India, the Protection of Women from Domestic Violence Act 2005 (passed August 2005; entered into force October 2006) created a civil remedy for victims, however it did not criminalize marital rape and jail is only available if a court order has been violated, (Huggler, 2006). However, recent countries to criminalize marital rape include: Mauritius (2007), Rape and the Sexual Offences Bill Beyond the illogical, punitive attitude..., "l'express, 23 April 2007. Thailand (2007). See "Thailand outlaws marital rape," AFP, June 22, 2007.

⁹ For example, in Turkish police force the proportion of male is 95% and female is 5%. Almost everybody holds the view that the new law is either a direct translation of western law or is made without consideration of our own culture where the husband and wife have already given consent to sexual relationship at first day of their matrimonial ceremony. Some of the police officers and members of the society have even told me that this regulation is destructive to Turkish family life. Some others claimed that Turkey has to adopt this kind of unfamiliar values to Turkish Law as Turkey's accession to EU obliges Turkey to do so. If there is a perception that the exercise of legal reform is strategically chosen by the Government to join the European Union, what efforts were being made by the Government to do away with that perception and to reinforce the national machinery to improve implementation? What efforts were being made to sensitize women on the enactment of the new laws? From the point of economic view of the dependency of Turkish wives, and the heavy burden of the husband's prison sentence (from 7 years to 12 years imprisonment), one point can be made. That is if the wife depends upon her husband's income she will be highly unlikely go to the public prosecutor (in some areas to the police) and put a claim against her husband unless perhaps it becomes fatal or unbearable. Even though the law is there, there may be practical impossibilities of its fulfillment. Having argued that point of view it may be true to claim that this formulation in Turkish law is a fantasy. It was of course necessary to obtain statistical information about how many marital rape cases were reported since the exemption in Turkey was abolished. However, we could not find any statistics. Turkish Judicial Statistics available by TÜİK in 2008 has no information on this question. So, this difficulty of accessing information must be overcome for a more detailed analysis. By way of statistical analysis the question of if the legislation was necessary would have found an objective answer.

¹⁰ The concept of Wife Rape has difficult ends to analyse. The understanding of the term rape in Turkish *ırza geçme* reflects "the belief that women's bodies were the property of men, and that sexual crimes against women were in fact crimes against the honour of the family". (Report of ESI (2007), s. 13) This term adapted from Arabic: *ırz* (honor or purity), *haya* (shame), *ar* (things to be ashamed of). It treated women's sexuality as a threat that needed to be controlled by society. "The term used for rape is *ırza geçmek* (penetrating one's honour) instead of the common word used for rape in Turkish, *tecavüz* (violation, attack). The use of the word *ırzageçmek* for rape implies that rape is viewed in the code primarily as a violation of honour, and not as a crime committed against an individual's bodily integrity." İlkkaracan, Pinar, *Re/Constructing Sexuality: Re/Forming the Penal Code in Turkey*, p. 4. (cited from *ibid* at accompanying note 76). The new TPC has now deleted the term *ırza geçme* and used sexual assault *cinsel saldırı* at the heading of relevant section (Articles 102, 103, 104 and 105). Wife rape is criminalised and it is made subject to complain. However, this terminological difference in Turkish understanding does not appear to exist in French Penal Code. The term is still used. In doctrine there seems to be a debate that the husband and wife cannot be either

may not welcome the new rule easily in their power to maintain the law and order. Contesting values of cultural background and law may put negative influence upon the attitude of the police. However, the constraint of this study does not allow a further discussion on this point. Therefore it is necessary to give a brief statistics of the marital rape cases reported in west and in Turkey.¹¹ This will mainly help us materializing the subject matter. Further analysis will be about the difficulties of prosecuting spousal rape. The main concern in writing this article was to analyse the attitude of the police. Seeking for a solution of possible problems that may appear in the prosecution of this kind of crimes police position must be clear. Other than that the followings are also important. To what extent do women have access to justice? How an earth poor women will complain their husbands if they depend financially on their husbands? This question gets more difficult to answer if the women do not have any profession to earn their life. Are the judiciaries being adequately trained for pursuing the provisions of the TPC? More importantly, as the police are usually the first stop for most of the criminal cases, are there a special unit for these kinds of cases within the police force? And if so, are they trained properly and efficiently?

2. Statistics

It is unfortunate that as far as Turkey is concerned we could not find any available statistics for this subject matter. There is hardly any academic writing in this field of criminal law.¹² No reference is given by a research or detailed study upon how the enforcement of the law for the protection of wife within a family would be done.¹³ It is therefore questionable how this new law for Turkey was passed by Parliament. Accordingly, one has to raise the question if the public were convinced and given enough time

perpetrator or victim according to the provision of Article 102/1 but 102/2. See Dülger, İbrahim, *Yeni Türk Ceza Kanunu Semineri (Seminer 2005)*, pp. 15-16 (page numbers vary according to the line spacing, we used the version of 1.5 line space)

¹¹ It is already noted that there seems to be no records of statistics particularly focusing on this subject matter in Turkey. *Ibid.*

¹² Bıçak seems the only one who has given a brief seminar and produced an introductory article in the field prior to the new TPC. (Bıçak, 1997 and 1998, respectively). Once the new TPC came into power some seminars and conferences were convened in which concerns about the application of Article 102 were raised. See generally, *Yeni Türk Ceza Kanunu Semineri (Seminer 2005a)*, *Yeni Türk Ceza Kanunu Semineri (Seminer 2005b)* and Report of ESI (2007).

¹³ In this regard, women shelters were the main concerns, and generally the protection of women from the physical abuse. No reference was found to the wife rape (sexual assault) committed by husband/wife within a research of almost 200 pages report. (Filiz, *et al*,2008)

to adopt to the new rule, would its application be therefore easier for those involved? Otherwise the risk is that the law would not be executable and forgotten, as we note for similar cases further in this article.

One of the reason why legislators debate pros and cons of passing a law to make non-consensual marital intercourse or sexual assaults a crime is because of the fear that every second women will flock to the police station or prosecutor offices to report having been raped by their husbands. However, this is not likely to be the outcome. For instance, only three cases of wife rape were reported in Colorado within a year after the criminalisation took place. (Russell, 1990: xx)

On the other hand, there is a great deal of statistics, writing and debates in western society and USA. Diana E.H. Russell, for example, a researcher into rape, reports that 8% of 900 randomly selected women in the U.S. reported they had been raped by a husband. A survey by the National Victim Centre in Arlington, Virginia states that 10% of all sexual assault cases reported by women involved a husband or ex-husband.

In 1975, the results of this American study on many rape situations were published. Russell was so appalled by her findings on rape in marriage that she decided to conduct a research project on this area alone. From the 930 interviews conducted with women from a cross section of race and class, Russell concluded that rape in marriage was the most common yet most neglected area of sexual violence (Russell, 1990).¹⁴

David Finkelhor and Kersti Yllo's 1985 study estimated that 10 to 14 per cent of all married American women have been or will be raped by their husbands. (Finkelhor and Yllo, 1985) In the UK, statistics disseminated by the Rape Crisis Federation yield the information that the most common rapists are current husbands or partners (Myhill and Allen, 2002). From the sources available in the western world and Turkey an immediate conclusion appears. We might have hoped for a strategy for successful adoption of this law, based on relevant knowledge in the areas of sociology and law. As these these were absent this study aspires to be a starting point for this process.

¹⁴ Furthermore, in 1994, Patricia Easteal, then Senior Criminologist at the Australian Institute of Criminology, published the results of survey on sexual assault in many settings. The respondents were survivors of numerous forms of sexual assault. Of these, 10.4% had been raped by husbands or *de facto* spouses.

3. A Comparison Approach: Development of Marital Rape Concept in USA, UK and Turkey

Since the early 1990s there has been a significant increase in reports of this subject matter in the UK and USA. Although some studies have examined the problem of wife's rape and sexual assault under the title of moral and family values in the sense of what is expected from a wife, other research has examined such issues as the problem of wife's sexual victimisation within institutional settings, within the general population, and has also examined the nature, dynamics and impact of wife's victimisation.¹⁵ The study would have dealt with the subject matter in the context of the treatment of wife victims who have sought help from the criminal justice system in Turkey, but there are not enough publications in this area. To this end we must confess that there is no statistics on wife complainant's experiences of the court process and the police treatment of wife complainants.¹⁶ It should be our concern that wife victims may not be believed by the police in Turkey because of the cultural approach to the wife's role in the family; Would it be extraordinary to fear that the relevant institutions and its personnel may approach the wife as frigid and thought to be responsible for not being woman enough to please their husbands? In this way is it not true to claim that victims in Turkey may not either report, or if they do, hypothetically, is not there a risk that they may receive inappropriate treatment by the police and in the courts? Should the treatment the victims receive be 'worse than the offence itself' how could we encourage them to come forward? So far there has been no specific in-depth domestic study of wife's experiences of the police that has brought together the existing literature, as well as original material in Turkey.¹⁷ This may be approached as if the crime has no dubious end in

¹⁵ "Rape in marriage should rather be seen as being at one end of a marital sex continuum, with voluntary, mutually desired and satisfying sex at the other end. Rape-like behaviour such as coercive sex (without physical force or threat of physical force), unwanted sex, sex in which the wife is totally passive, servicing her husband, would be somewhere in the middle of such a continuum. Taking wife rape out of a violent, battering context, highlights the connections between wife rape and other prevalent negative marital sexual experiences reported by women." (Russell, 1990:xxvii)

¹⁶ On the other hand, however, on rape cases there are plenty literature to examine. See, for instance, for Turkey, http://www.unodc.org/pdf/crime/eighthsurvey/8th_all_050331.xls. It is said that there are 1682 convictions in 2002 with a rate of 2.4%. Then, the wife rape was not criminalised yet (see *supra note 7*). For a limited literature see *ibid*.

¹⁷ See *supra note 11*. TÜİK (Turkish Statistical Institute) does not record a single case of wife rape in 2008. Erişim Tarihi: 12/12/2008, http://www.turkstat.gov.tr/VeriBilgi.do?tb_id=1&ust_id=12 However, There appeared to be 5 possibly relevant cases of this study from the sources that are accessible by the Court of Cassation's Judges or Public Prosecutors, UYAP. Among those, however, only one of them was directly regarding the Article 102/2 (Decision No: 2008/7921, the Court of Cassation, 5. Criminal Circuit, UYAP). In this case, the complainant has withdrawn her complaint. So

Turkey, as established in Western countries; and it is fully executable without any bias opinion of the authority. Or indeed the crime is not a concern of public interest and even if it is committed it is between wives and husbands. The former is denied by our personal interviews,¹⁸ and the act of wife rape exists in Turkey as well as any other country. However, the approach to this crime is commonly that there is no interest of public so therefore there shall be no public interferences. From a deeper examination of the aim of the law wording and character of the wife rape we can conclude that the law making power has also kept this point in mind and formulated the crimes trial subject to the claimant claim. In the ordinary rape cases however, trial is automatically made by the public prosecutor as long as the crime is known to him. This last point is not the only difference but the sexual assault occurred between the parties also has further problems as pointed out next.

4. Problems in Prosecuting Spousal Rape

A new development regarding criminalising marital rape in Turkey is approached as a praiseworthy thing. The Turkish Parliament passed the TPC in 2004, into force 2005, for it criminalized sexual assault within marriage. However, prosecuting the perpetrators of spousal rape bears many problems. It is, first of all, a fairly newly approved concept of a crime. Therefore, during the application of it there may be some hesitations by the relevant personnel. This is mostly because of the belief that the Parliament (in its decision-making power) is criminalising and imprisoning spouses for doing what was once their right, according to the law and culture (in the latter case men are still commonly believe it is their rights to have sex with their wives regardless of consent in Turkey). In relation to Turkish police force one has to mention the proportion of male and female officers. The majority of the police force in Turkey is men. This fact is important for they are the ones who would handle the

the case was dropped. No imprisonment was given. I would like to thank to two individuals who were very helpful to reach these sources. These are, namely, Mr. Aydın Tezcan and Mustafa Ernalbant, Public Prosecutor at the Office of the Public Prosecutors of the Court of Cassation, Ankara. The later prosecutor has confirmed that he has been reading sexual assault cases over 15 years. He has mostly come across the issue of wife rape claims for a cause of divorce. Last year has confirmed that he has not seen at all a case of wife rape. He alone views an average of 50 cases in a week.

¹⁸ It is interesting to note that İçli, T., (Ex-Dean of Police Academy, Professor of Sociology has openly admitted that the concept of wife rape is a denial of Turkish family values and a crack of the nexus between husband and wife. Further, she cynically said that “why marry if you would deny the right of your husband to sex”. From a personal interview at the Police Academy.

individual cases. One may raise the fact that the law applies regardless of who has the authority to pursue. To this end it can be argued that the authority's belief in legal matters would ease the process. This pragmatic end in application by authorities would at least, if not more, save extra complications. Their opinions obtained in personal interviews are thus needed and referred above. Our conclusion from these interviews is not very optimistic. It is rather a negative one and it encourages us to claim that the law passed is a premature one and it was passed without applicability in mind. The risk in this regard is as follows. 1- The victims might be misguided because of lack of experience and knowledge; 2- the belief that wife is already given consent to sex anyhow in marriage may lead the police to attempt to mediate the issue;¹⁹ 3- over all denial of justice. In this regard wife may be left to compromise and regret that she made a complaint against her husband, or *vice versa* according to new TPC, Art. 102/2.²⁰

Another problem occurs during the procedural level. The TPC in theory does not make any distinction between wife and husband. This ambiguity is also valid for the distinction which could possibly be made between spouse and any other person in the case of rape. TCP simply defines the act as sexual assault. However, in practice when the case comes to court there will be difficulties in proving that rape in fact took place. Ordinarily if a stranger commits this crime finding a sperm will be enough evidence to prove that non-consent sexual intercourse happened.

¹⁹ It is not an unknown issue that the Turkish police have the reputation for negotiating family matters between wives and husbands. They usually try to solve the problem (even though they are not legally entitled or asked to do) by compromising methods. Otherwise they would usually refer the complainant to the public executor with/out sympathy. It is one of the unfortunate realities in Turkish culture (perhaps in most of the world) that if a woman goes to the police station as a complainant against her husband, especially in demand of marital rape, the approach will not be very understanding. In the case of complaint by a husband (Turkish law allows this) would be even worse. Imminent reaction and the thought come into mind would be whose fault is this: "YOURS, the complainant". As partner you must fulfill your duties! To this regard personal interviews have shown that the women are prejudicially judged and somehow found guilty. Amongst the reasoning's there are the common sayings; who knows what the wife's fault is as she dares to make a complaint against her husband?; there must be more serious things than sexual intercourse; sex between wife and husband is for joy not for complaint; it is a duty for wife to satisfy the husband sexually and deliver babies; prostitutes are much cheaper than these kind of wives and you always get consent why take risk of seven years or even up to twelve years imprisonment for the wife; and etc. Some people even have the opinion of a very extreme conclusion that the wife must be worse than a prostitute! (Prostitution is still legal in Turkey subject to licensing) Until the mentality of public as whole changes regarding the subject matter difficulties in dealing with marital rape will remain and lawful and objective solution will be a dream.

²⁰ See Dülger, İbrahim, *Yeni Türk Ceza Kanunu Semineri (Seminer 2005b)*, pp. 15-16 (page numbers vary according to the line spacing, we used the version of 1.5 line space)

But in marriages, sexual relations are to be expected, and if the defence claims consent, the evidence mentioned above will not be appropriate evidence, and therefore the evidential burden turns to be a very difficult one for the prosecution to discharge. In marriages it is more often that the complainant will be under responsibility to provide further evidences like physical marks of used force, bruises etc. Whereas, this is not required in ordinary rape cases. It is indeed a very awkward situation.

Moreover, having aware of other possible complications in this regards, one has to mention the economical dependency of women in Turkey.²¹ The family structure of Turkish life despite of little recent changes is mostly male oriented/patriarchal. The table below clearly shows that women have very little economical independency.²² Men take the outside work and women take the inner work. It is assumed that the duty women burdens in marriages is to provide pleasure to the men regardless at that particular moment of her psychological and physical needs. So, the complication of the following problem comes into being. Should a woman go to the police to notify and start a complaint procedure heading to the court, how could she sound rational? It is usually thought that she may basically want to divorce as the punishment might be up to 12 years.²³ From the socio-economical and psychological point of view, it can be said that the circumstances that wives go to court (if ever) result from either economical dependency that has no influence on her decision or she is under an unbearable situation. Other than these situations, she has to make a compromise in most cases in sacrificing herself for whatever motivating power behind, such as, economical

²¹ Our concern is only valid for the women in Turkey, males despite very few exceptions are not included. So, this paragraph's analysis only refers to the cases of marital rape!

²² Table 1: Economic Status of women and men in Turkey

	Women (percent)	Men (percent)
Working	12	67
Unpaid family worker	8	3
Unemployed	3	10
Housewife	69	-
Retired	4	15
In education	1	3
Ill/disabled	2	2

Source:(TUIK, *Quality of Life Survey*, 2003).

²³ Although the Turkish police has no authority to give judgement upon any case, their treatment may vary according to their decision about how serious the case is.

dependency, children, public opinion, other family member's involvement etc. This is how she is supposed to behave.²⁴

In relation to the issues of consent we face an even bigger problem and deadlock. As commonly known, even social norms permit a varying level of physical intimacy (and freedom) depending on the relationship between the parties, how can one give a specific definition of consent in this regard? As far as the criminal law is concerned, the definition and the elements of crime and its punishment must be very clear and specific. In this regard level of consent and its definition would be very ambiguous or unclear. So the concept of the crime itself is definitely open to criticism. Moreover it may be impossible to get support for the newly passed bill that criminalises marital rape in a country where its Court of Cassation used to set a rapist free if he were to marry the victim and stayed in the marriage for five years.²⁵ It can be said even without the consent of the victim she may be forced to marry her attacker because of socio-economical forces in Turkish life. Therefore, the concerned party to the forced marriage is raped every single day?! It is a big dilemma that if this type of crime executable in Turkey, unless very rarely.

At last but not least, it must be pointed out that although the literacy rate in Turkey is quite high, one out of five women is illiterate.²⁶ While efforts had been made to fight illiteracy, more than a million children, mainly girls, were under-schooled or not schooled at all. The measures taken to deal with this situation obviously are not enough! Despite campaigns over the years to ensure that girls did not drop out of school and get proper education they did not seem to work in Turkey satisfactorily. To this end the obvious question follows: how an earth an illiterate women could defend herself against her husband and escape from non-consensual sex, and if it happens regardless, how could she dare to take it before the court? These are some of the problems that are likely to be observed when the new law of marital rape is enforced. Therefore, the acceptance of this law sounds like a direct adoption of a

²⁴ The stereotype of masculinity will be a very huge bar for men to even to think about putting a complain against their partners. This point is another one that supports our claim that the law passed is not studied throughly in Turkey. See *infra note*16.

²⁵ Yargıtay (the Court of Cassation) has followed this opinion according to the previous criminal code. The new TCP is of course abolished this precedent once it entered into force. In that manner Soyaslan had the opinion of disapproving the development of this new law (TCP 2005). Opinion has publicly announced on national TV channels.

²⁶ 75% of Turkish illiterates are women (10.02.2009), radikal.com.tr, February 5th, 2009, (available at <http://www.umut.org.tr/en/sayilarla.aspx?id=17940>)

Western law and was not studied truly and comprehensively. As our concern is not a legal debate this point must be left to another study.²⁷

Last but not least it must be said that there is a risk of false reports. There is little published work which addresses the issue and concept of false allegation of rape let alone rape of a wife in Turkey. Even so, the risk exists and the ambiguity of how police/prosecutor will take position remains unchallenged especially in a country like Turkey where the wife right to refuse sex with her husband is questionable. This would even become a more difficult issue to overcome if the police/prosecutor thinks that the wife may be using this false allegation in the sense of providing alibi, a means of revenge, a platform for seeking attention/sympathy etc. How we are to train the police/prosecutor to approach this issue as objectively as possible seems unmanageable as it stands. Despite their assumed prejudiced approach towards the value of the marriage life and their belief of what wives' duties are, it is of an essential task for the authorities to educate them. This is another aspect that the recent regulators must have investigated before criminalising the sexual assault (in a broader sense) taken place within marriages and marital rape (under a narrower interpretation). Therefore, we refer to the recent law as a very naive and optimistic transfer of Western developed idea of law into the Turkish system. It seems that the question of whether the Turkish public is ready for this kind regulations has not been examined or even asked. This is a worrying aspect of the new development. (Schafer, 1969:97)²⁸ The law making powers are risking the danger that criminal rates will go up is practising what they believe is their right of sexual intercourse within marriage. This end must be analysed by the authorities if the criminalising non-consensual intercourse within marriage does suit the society. In this regard, we do not want to deny the genuine victims suffering caused by non-consensual intercourse. However, the punishment of husband's rape as heavily as a stranger's rape does sound harsh and it basically means that it is the end of the family concerned.

²⁷ It is more than welcome to witness important developments in the legal field in protecting women, however, much ground remain to be covered regarding traditional values and customs as referred above. In this regard, Turkey should implement a "Mentality Transformation Project". It must be stressed that it is of the importance of training the police on the subject matter including the issue of domestic violence, as they were the first to interact with the victims of violence. To this end it must be asked that what the Government's plan for systematic police training is. These questions are necessarily asked as it is clear that as educational levels increase, the negative implications of customs and traditions decrease.

²⁸ Schafer points out that "since law regulates not only what *is*, and also what *should be*, certain conducts will be defined as crime in order to protect a valuable issue in advance against a possible attack." (Schafer, 1969:97).

The damage to the family is surely too high to return normal life. We therefore dare to suggest that a distinction between the treatment and terminology used of wife and normal rape cases must be made. In this regard we do not intend to devalue the concept of any kind of rape. It is rather to suggest that the structural element of family, the closeness of partners in a family, sleeping in the same bed every day and night must be a different situation compared to a stranger's sexual attack on women.²⁹ We believe that for the reasons given above the law currently passed in Turkey is not well thought out and not takes into account the public's lines and sociological facts. Our main concern is thus if the balance between crime and punishment is looked at. For the sake of defending wives against a possible sexual attack the husbands and family structure should not be threatened. Thus the police and prosecutors are left to face an ambiguous situation and act as a judge or public adjudicator. In this regard it can also be asked if this is fair on the relevant authorities.

5. Analysis and Emerging Themes

The first identifiable theme to be taken from the personel interviews is the way in which the wife with negative experiences feels that they are under suspicion or not believed. This can quickly undermine confidence

²⁹ In this way, it may be suggested that the act may still remain as crime but it should be called as an *abuse of position of trust*. In a recent case, known as R v Carrara, Court of Appeal (Criminal Division), the Attorney General referred as unduly lenient a sentence of six years' imprisonment imposed on an offender (C) who had pleaded not guilty to two counts of rape. C had gagged and anally and vaginally raped his ex-wife (W). See Attorney's General Reference (No.66 of 2008), Re. See the following cases for nonconsensual intercourse that a wife was forced to; R. v H. [1997] 2 Cr.App.R.(S.) 339; R. v W. [1998] 1 Cr.App.R.(S.) 375; R. v Mountaine [1998] 2 Cr.App.R.(S.) 66; Attorney-General's Reference No.27 of 1998 (Mahzer H.) [1999] 1 Cr.App.R.(S.) 259; R. v. H. [1999] 1 Cr.App.R.(S.) 470; and etc. There are also some ECHR decisions on the subject matter. See the followings: C.R. v. the United Kingdom, The case is numbered 48/1994/495/577; S.W. v. the United Kingdom, The case is numbered 47/1994/494/576. The ECHR has decided in both cases that there was no breach of Article 7. This Article (art. 7) shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations." So the local court decisions were allowed. (Visited on 12/12/2009: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbk&action=html&highlight=wife%20%7C%20rape&sessionid=21483607&skin=hudoc-en.>) All these cases proved that a wife rape is perfectly punishable and it can take up to 12 years or more if the crime committed repeatedly. For the rate and the number of cases in rape convictions taken place in Turkey (see the document available at United Nations home page http://www.unodc.org/pdf/crime/eighthsurvey/8th_all_050331.xls. visited on 01/02/2009). It is unfortunate case that up to date we could not find any statistic particularly focusing on wife rape in Turkey.

in the investigatory process which can result in an allegation being withdrawn.

A second theme, clearly in evidence in the wider literature, is the linkage between wife rape and family values and the wives role in it. In a survey of police officers we found out that 'some police officers seem to believe that rape can never take place against your own wife and even if it happens it is less traumatic for wife [and are] more likely to regard the testimony of wife victims as "unreliable" ...'.³⁰ A survey done within the students *inter alia* attributed more blame to wife, than to husband. (White and Kurpius, 2002, p. 191) This is indeed a warning finding as these students would be facing the claimant first when they become police officers.³¹

In a variety of informal talks to the public, a third theme to be found is negativity in response to wife's reports of sexual victimisation. In these talks, there were occasions that wife would never be trustworthy and there must be other reasons behind the accusations – the very reason for this is the contract of the marriage-, not taken seriously and allegation must be false – again the nature of marriage and the duty of wife within it- and demeaned as a result of their disclosures – the natural role given to the wife as pleasuring the husband, disclosing private life that only partners share; amazed that how a wife can think of being raped – assumption that partners in marriages have given consent to sexual relationship at the very beginning of marriage. However, the issue is still somehow open to debate as far as victims keep in silence and are reluctant to be re-victimized by an unsympathetic legal system or disbelieving treatment professionals. Thus all concerned sides must be educated and trained. Those who do report a sexual attack must not be experience hostile and isolating reactions from the very service providers that are available to provide help. This should never lead to the victim's experience of humiliation. Otherwise this will cause depression, anger, guilt, sexual confusion, and anxiety that are reinforced in survivors as they become re-victimized by the police, community agencies, and bewildered friends.

Clearly, these findings indicate ignorance, homophobia and insensitive social attitudes towards wife victims of rape and sexual assault. Such reactions might also be explained as an attempt to distance

³⁰ Personal interviews made among police and police officers in Turkey, December 2008.

³¹ *Ibid.*

or as a defensive mechanism. Further, negativity might also result from assumptions about masculinity. At last but not least it must be noted that the wives are also reluctant to report the marital rape because of the probable humiliation of the trial and the lack of public sympathy for their case/plight.³²

Betty Friedan analyses the history of women in West from the Freudian perspective and she comes to decision that women desire no greater destiny than to glory in their own femininity. The mentality of women which devoted their lives from earliest girlhood to finding a husband and bearing children have changed into devoting themselves to seek careers, higher education, political rights – the independence and opportunities that the old-fashioned feminists demanded. (Friedan, 2001) Until recently the old post given to women as housewife and pleasures of their husband was challenged and wife rape became as crime in an evolutionary process. On the other hand the similar evolution was not witnessed in Turkey until recently as said above. Even though the act of husband is now criminalised subject to non-consent of the wife to intercourse, the social demand and belief for this legislation as mentioned elsewhere lacks a detailed research and study. It is a common saying that if a law cannot be enforced, the concept within it becomes devalued. In this regard of the new law will need time to be adjusted to by the Turkish public.

Conclusion

This article has brought together information on the police treatment of wife victims of rape and sexual assault from a variety of sources and jurisdictions. It has also brought into the public domain a small number of interviews with men who have reported their experiences of sexual victimisation to police in England. It would be inappropriate to generalise from these findings and claim that they represent the experiences of all wife victims.³³ However, within these findings; taken together with the wider literature we do see the emergence of certain themes. Some of these themes are also in evidence in the literature involving wife victims.

³² Anne Byrne of Denver's Rape Assistance and Awareness Program mentions a particularly shocking example of punitiveness towards the victim if the husband tried and convicted for wife rape. In her sample Martha Warren lost her job in Georgia in 1985 because of trial and conviction of her husband. (*Warren v. State*, 1986, in Russell, 1990:xx)

³³ Fortunately, the treatment of wife rape victims by the police is the subject of several ongoing studies in Britain.

Women's experiences are varied, some positive, and some negative. The positive experiences emphasise the importance of communication, a sense of being believed and sensitivity on the part of the police. The negative experiences highlight problems with some complainants feeling that they are being met with discouragement or disbelief and ignorance, on the part of some officers, of the dynamics of wife rape. An examination of the wider evidence suggests that there is a basis for arguing that there is linkage between wife rape and family values and the wives role in it. This is usually defined with the terminology of frigidity and negative attributions. These findings indicate the importance of training for criminal justice professionals and others working in support services. In so many respects, this is a crime of violence, not sex. Therefore, it can be said that the following must be established. The police departments and hospitals must be fully equipped with trained experts who could deal sensitively with the physical and emotional issues involved, win the victim's cooperation, in order to catch and successfully prosecute the perpetrator. They need, in short, all the support structures we have built for women victims, and then some. It is time to take wife rape out of the closet and deal with it in the courts properly.³⁴ However, we share the opinion that the problem of education in wife rape is twofold. These are service providers and the survivors. Personal interviews have shown that service providers felt that they are not adequately addressing the problem and thus are not qualified to respond in order to apply the most successful method when providing the service. The myth that service providers do not deal with marital rape because survivors do not want to discuss it might be true, but why survivors are usually silent is because either the counsellor is not ready to deal with the issue or the woman does not know that others view her experience as rape, and that services are available. Thus service providers should be aware of the prevalence of marital rape, the impact, the laws, and ways to facilitate disclosure and resolution of the trauma, (Thompson-Haas, 1987).

The treatment of wife rape and sexual assault appears to be partly influenced by societal attitudes and rape myths. Consequently, the training of criminal justice professionals is important, but so too the challenging of misconceptions and ignorance in wider society. Legal scholars may have a role to play in both these endeavours, but only if they are prepared to listen to women's experiences and not impose

³⁴ *Ibid.*

dubious meanings on our current understanding of wife sexual victimisation. The personnel employed and trained for this purpose may not approach to the issue as serious as they would in circumstances of life threatening situation to the victims of rapes. The simple fact behind this is that wife rape is not considered as life-threatening as serious as physical force used situations.

It is also essential that wife rape crisis centres should be established (if ever established in Turkey). These centres must be equipped properly in order to deal with the victims efficiently. The personnel must bear in mind that the circumstances of wife rape victims who are married to their rapists are extremely different from those of victims raped by strangers and acquaintances. It must be noted that survivors of wife rape need a separate place from their abusive husbands in order to recover. So the centres should offer this kind of facilities which must also be run free from the interference of the husbands. Husbands should not know where their wives are living.

Having assumed that wife rape legislation has a valid basis in Turkish life and surrounding environment, it becomes clear that awareness of wife rape will crucially improve service responses which could also involve the trained police officers with regard to the dynamics and impact of wife rape and sexual assault. In short, should Turkey wish to deal with the issue seriously the suggestions given above must be fulfilled and enriched with further studies. Perhaps a detailed project is necessarily to be programmed and pursued further.

Finally, this article critically questioned claims that if the criminal justice's treatment of wife and wife's rape is influenced by gender bias, and more specifically if the wife's rape or sexual assault is rather tolerated because of the suppressing element of Turkish family values, such as wife has a duty of sexual intercourse if the husband desire! It is clearly pointed out that without the necessary steps taken this will be the case for Turkey regardless of the new TPC.

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