



Sexual Rape with the Emphasis of the Afghan Penal Code

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Abstract

Sexual rape is one of the crimes that, in addition to religious teachings, has been addressed by lawmakers and legal customary systems throughout various periods of history and is among the natural crimes. Every society exposes a number of its population, including women, to the constant risk of being victimized by this crime. The Afghan legislature has defined sexual rape as an act in which a person engages in sexual intercourse with another person by force, coercion, or other means, taking advantage of the victim's physical or mental incapacity or lack of consent, whether the victim is a woman or a man, or by administering intoxicating drugs or other substances impairing judgment, or by inserting body parts or objects into the victim's mouth or anus. The Afghan legislature has attempted to criminalize acts such as inserting objects like pens or body parts like fingers or genitalia into the mouth or anus of the victim, not only acts that lead to sexual intercourse but also acts that lead to touching, caressing, or any form of sexual contact, under the charge of assault on innocence. This crime is legally, materially, and morally assessable. The criteria for consent or lack thereof in cases of sexual rape, the examples of sexual rape, whether sexual rape is considered a borderline crime on the one hand and a crime against public decency and morality on the other hand, are all subjects of investigation. Therefore, when a criminal act takes a dual approach, its conditions vary, which will be addressed in this research.

Keywords: *Sexual Rape; Criteria of Consent; Criteria of Non-Consent; Examples of Non-Consent; Examples of Sexual Rape; General and Specific Conditions of Sexual Rape*

Introduction

Dealing with sexual rape is important from two perspectives. On one hand, this crime is one of the oldest crimes recognized in human societies. If we categorize crimes into natural and artificial crimes, without a doubt, sexual rape will be considered a natural crime because, throughout history, this behavior has been criminalized. For example, it was punishable by death in the Code of Hammurabi and the laws of Prophet Moses. Today, in all legal systems, the crime called sexual rape or sexual assault exists in criminal law texts. On the other hand, this crime is among the limited crimes that a portion of society perceives itself to be potentially vulnerable to, a situation known as "fear of rape." However, in Islamic

jurisprudence, there is no independent crime called sexual rape; instead, it is interpreted as forced adultery by Islamic jurists. Fundamentally, this crime can be examined from various perspectives, namely:

1. Legal element.
2. Material element, a crucial aspect in the formation of this crime, encompasses issues of consent, non-consent, material components, and examples of non-consent.
3. Moral elements of this crime, including criminal intent and knowledge of the matter.
4. Conditions of sexual rape, which include general and specific conditions that are significant in the formation of this crime.

Definition of Sexual Rape

A. According to Lexicographers

The term "Rape" in Arabic means forgiving someone's sin, refraining from sin. In Persian culture, "Rape" is commonly used to mean exceeding limits, going beyond one's boundaries. In the Quran, "tajavoz" means exceeding one's limits. For example, in Surah Al-Maidah, verse 87, Allah says: "O you who have believed, do not prohibit the good things which Allah has made lawful to you and do not transgress. Indeed, Allah does not like transgressors." In this research, the exact meaning of exceeding limits or going beyond one's boundaries is intended in the context of sexual rape.

B. According to Islamic Jurists

Islamic jurists interpret sexual rape as forced adultery. They agree that if a woman is forced into adultery without her consent, then according to the religious texts, the prescribed punishment (hudud) will not be applied to her. The Hadith narrated by the Prophet of Islam confirms this: "My Ummah is absolved of mistakes, forgetfulness, and what they are coerced into." In Sunni Hanafi jurisprudence, forced adultery or rape does not have an independent legal status for punishment, as stated by Sayyid Mortaza, who argues that the punishment of killing the coercer of adultery is specific to Shia jurisprudence. According to Imam Abu Hanifa, adultery is defined as the insertion of the male organ into the female's vagina, where neither the ownership of the right nor the ownership of marriage exists, nor is there any doubt about the ownership of the right or the ownership of marriage. However, according to Shia jurists, adultery is defined as any unlawful intercourse, whether in the direction of the vagina or anus. Consequently, it can be said that according to Islamic jurists, the independent title of sexual rape is not discussed, but forced adultery is discussed, which is addressed under the subset of forced adultery in Shia jurisprudence and discussed by Sunni jurists based on whether the woman is chaste or not.

C. Legal Scholars

Here, we present some definitions as proposed by legal scholars. Abdul Qader Oudeh, in his book "Special Penal Law," defines sexual rape as follows: "Sexual rape is adultery by coercion, unlawful copulation, and wrongdoing in which the woman does not consent and is coerced by the man to commit it." (Oudeh, 2015, p. 426) Other legal scholars have defined sexual rape differently: "Sexual rape is the act of fornication and sodomy by coercion, compulsion, and deprivation of the opposite party's choice." (Istankoozi, 2010, p. 65)

Another definition of sexual rape has been proposed by American legal scholars, published by the Department of Justice of that country, which is different from the definitions provided by other legal scholars. According to this definition, sexual rape is defined as follows: "Sexual rape is the insertion and thrusting of genitalia; body parts, or objects, even if painless, into the mouth, anus, or vagina of another person without their consent." (Department of Justice, 2012, p. 1) Finally, a definition in legal terminology has been provided: Sexual rape is the act and instigation of engaging someone in sexual activity without their consent, whether it involves physical action or not. (Jafari, 2006, p. 477)

D. Penal Code

The legislator has allocated a chapter in the first section of the eighth chapter to the crime of sexual rape and its punishment, covering Articles 636 to 642 of the Penal Code. In paragraph (1) of Article 636, sexual rape is defined as follows: "A person who, by force, coercion, or other intimidating means, or by threatening, or by taking advantage of the physical or mental incapacity of the victim or the victim's inability to express consent, whether the victim is a woman or a man, or by administering intoxicating drugs or other substances impairing judgment, engages in sexual intercourse or inserts body parts or objects into the mouth or anus of another person, is recognized as committing sexual rape." (Ministry of Justice, 2017, Article 636) Therefore, considering the criminalization of sexual rape by the legislator in the Penal Code and its lack of definition, we can derive the following definition:

Sexual rape is the act of inserting and thrusting genitalia or body parts such as fingers or objects such as wood or pens into the genitalia or anus of a person without their consent. As observed, the definition of sexual rape in the three definitions mentioned above provided by jurists, legal scholars, and the penal code has differences that will be discussed further:

1. Site of Insertion: In the definition proposed by jurists, the site of insertion is the genitalia and anus of the woman, but in the definitions provided by some legal scholars and the penal code, the site of insertion includes not only the genitalia and anus of the woman but also the anus of the man. American legal scholars include the mouth in addition to the genitalia and anus.
2. Means of Insertion: The definition proposed by jurists and some legal scholars infers that the means of insertion are only the male genitalia. In contrast, the definitions provided by the penal code and American legal scholars also include body parts and objects.
3. Victim: In the definition by jurists, the victim of forced adultery is only a woman, whereas according to legal scholars and the penal code, the victim includes both men and women. Additionally, according to Article 638 of the Penal Code, it includes children.
4. Unconsented Sexual Intercourse: According to the definitions by jurists and legal scholars, forced adultery with a woman who is in a valid marriage contract is not considered sexual rape. However, what the Penal Code and American legal scholars have stated includes sexual rape, as they express a lack of consent in general terms and do not consider any exceptions. In Western law, the lack of consent of the spouse in establishing sexual relations is regarded as sexual rape. (Yousefi, 2013, p. 42).

Elements of the Crime of Rape

A: Legal Element

According to paragraphs 1 and 2 of Article 2 of the Penal Code, Afghan criminal law states, "This law regulates crimes and punishments." Let's closely examine paragraph 1 of Article 2 of the Penal Code. It refers to the two dimensions (hudud and ta'zir) of crimes and exclusively regulates punitive measures. Thus, the discussion of the punitive measures for sexual assault has been delegated to the Hanafi jurisprudence. Although there are legal provisions, they only specify the punitive measures for sexual assault. For the legal element of sexual assault, reference can be made to Articles 636 to 642 of the Penal Code. In the Rome Statute adopted in 1998, rape, sexual slavery, forced pregnancy, forced prostitution, forced sterilization, and other forms of sexual violence of comparable severity were recognized as crimes against humanity and war crimes for the first time. This indicates the legal element of this crime in international documents as well.

B: Material Element

Every crime requires a material element. As long as the perpetrator's mental states, actions, and intentions have not manifested into criminal behavior (material element), they cannot be held accountable. The material element is the physical act that constitutes the crime. In most crimes, this act is a positive physical action, a positive mental act (non-physical), or the failure to act, maintain, or preserve a condition or state. It should be noted that for most crimes such as fraud, theft, acts contrary to virtue, forgery, etc., only positive physical actions constitute the material element. Therefore, the failure to act can never constitute the formation of the material aspect of these crimes. Sexual assault, like these crimes, is never realized through the inability to act. Conversely, some crimes, such as rebellion, abandonment of spending, etc., are only realized through the failure to act. According to the definition of sexual assault from Article 636 of the Penal Code, the material element of the crime of sexual assault consists of two parts:

1- Positive Act of Entry

The criminal behavior of the material element of sexual assault involves the positive act of entering, which means inserting genitals, body parts, or objects into the vagina, anus, or neutral organs. In this regard, four aspects need clarification:

- a- Entry Instrument: The entry instrument must be through the genitals. Secondly, entry can be through body parts such as fingers. Thirdly, the entry instrument can be wood, pen, iron, etc. Each of these can constitute parts of the material element of sexual assault.
- b- Entry Location: In sexual assault, the entry location is only the vagina or anus of a living human being (male or female), excluding other body parts such as sexual activity in the mouth, thighs, etc., which do not constitute sexual assault. Thus, if the entry is not into the vagina or anus but into other body parts resulting in sexual arousal or satisfaction, it does not count as sexual assault.
- c- Victim: In sexual assault, the victim can be any living human being, including women, men, intersex individuals, children, and adults. Although this is not explicitly stated in the text of the law, it can be inferred from the content and words used in the law, such as the term "compulsion," intimidating means and threats, or the use of physical or mental incapacity of the victim. Therefore, sexual intercourse with a corpse or inserting objects or body parts into the genitals or anus of a corpse does not count as sexual assault but as disrespect to the dead, punishable under Article 695 of the Penal Code.
- d- Extent of Entry: The extent of entry has not been clearly stated in the Penal Code, but according to Article 2, paragraph 2 of the Penal Code, it has been referred to as Hanafi jurisprudence. Hanafi jurists believe that the extent of entry should be equivalent to penetration, and anything less than that would not be considered entry. Sexual acts that involve less than penetration, such as touching, mutual rubbing, etc., do not constitute sexual assault but are separate crimes.

2- Lack of Consent of the Victim

The second part of the material element of sexual assault is the lack of consent of the victim to entry and sexual intercourse. In Article 636 of the Penal Code, various scenarios indicate the victim's lack of consent. If entry and sexual intercourse have occurred under any of the circumstances mentioned in this article, it suggests the absence of consent of the victim. The scenarios mentioned in this article can be summarized as follows:

- Entry into the genitals or anus of the victim using compulsion, intimidation, or threats.
- Entry in conditions of physical or mental incapacity of the victim or when the victim is unconscious or lacks awareness due to the use of intoxicating substances. Based on this part of the material element of sexual assault, entry under any of the mentioned situations indicates the lack of consent of the victim. Therefore, meeting either of the two parts mentioned in Article 636 of the Penal Code demonstrates the realization of the material element of sexual assault. The question arises whether it constitutes sexual assault when a woman forces a man or boy to engage in sexual intercourse. Coercion by a woman into sexual intercourse is not considered sexual assault since the Penal Code remains silent on this matter. However, Article 2, paragraph 2 of the Penal Code refers to Hanafi jurisprudence, which includes the discussion of adultery, which will be addressed.

3- Components of the Material Element of the Crime of Rape

A: Lack of Consent

The absence of consent in sexual intercourse, assuming the presence of other conditions, categorizes an act as sexual assault. Because the concept of consent is not clearly defined, it can never be definitively stated whether a sexual relationship has occurred with the consent of both parties. The boundaries of the consent concept are unclear, and in this regard, there is room for any interpretation by judges. However, this belief does not mean that all allegations of sexual assault face such a problem. Naturally, specific circumstances can unequivocally indicate the presence or absence of consent from both parties in a sexual relationship. For example, when someone submits to a sexual proposition solely because they were severely physically under the control of the proposer and were deprived of any resistance, it cannot be doubted that this submission was not voluntary. There was no consent involved. Therefore, in the first step, we examine the consent criterion and then discuss instances of lack of consent.

1- Criterion of Consent

The Afghan legislature has not explicitly addressed the criterion of consent in the crime of sexual assault. Therefore, we specifically address the issue of the criterion of consent in the crime of sexual assault to see under what conditions it can be said that individuals have consented to a sexual relationship. Consent can prevent the occurrence of sexual assault only if it is freely given and devoid of defects and the consenting party is rational, mature, and competent. Otherwise, the consent lacks validity.

2- Criterion of Lack of Consent

Today, interpreting the concept of lack of consent in sexual assault cannot be limited to behaviors where someone forcefully and violently violates another. In modern times, sexual intercourse with another person may appear to occur with their consent, while in reality, such consent does not exist. For example, in situations where someone deceives another about the nature of the act or misleads them about their personality, thus persuading the victim to consent to sexual intercourse through means like inducing intoxication or hypnotism, it must be said that the perpetrator has acted without the victim's consent and is liable to be prosecuted as a perpetrator. In this section, we examine each instance of lack of consent.

B: Instances of Lack of Consent in the Crime of Sexual Assault

Instances of Lack of Consent Can Be Outlined as Follows

1- Lack of Consent in a State of Sleep or Deception

Indeed, when someone coerces another into engaging in sexual intercourse, consent is absent, and the perpetrator's action can be considered sexual assault. Now the question arises: if the victim was

intoxicated or deceived at the time of consenting to sexual intercourse, can the apparent consent given to the sexual act be considered genuine? In this case, the perpetrator exerts no force or coercion, so the victim does not apply physical resistance. However, it should be clear that the victim's consent is not genuine, and external factors have influenced their inclination towards the relationship. Thus, this behavior constitutes sexual assault.

2- Lack of Consent in a State of Intoxication

One scenario where a person may involuntarily become a victim of unwanted sexual intercourse is when they are intoxicated and incapacitated, succumbing to the sexual desires of others. The question is whether such a person becomes a victim of sexual assault or not. In other words, does the influence of intoxication and incapacitation negate consent, similar to the effects of sleep or deception?

In response to this issue, we must distinguish between two different situations. First, intoxication or incapacitation may occur voluntarily and freely. For example, a woman voluntarily drinks alcohol at a mixed party. Second, intoxication or incapacitation may occur entirely involuntarily and forcefully. In the latter case, it can indeed be said that engaging in sexual intercourse with such a person without their consent constitutes sexual assault. Therefore, sexual intercourse that occurs while the person is intoxicated constitutes a non-consensual relationship and a precise instance of sexual assault. The Penal Code explicitly states in Article 636 that a person who engages in sexual intercourse using intoxicating substances or means of depriving someone of their mental faculties is considered to have committed sexual assault.

However, the situation in the first case is not as straightforward. A person who freely consumes a large amount of alcohol at a mixed party has essentially exposed themselves to potential events. It seems that engaging in sexual intercourse with this woman. At the same time, intoxicated cannot be considered sexual assault because she has implicitly consented to subsequent actions by her initial voluntary act.

3. Administering Sedative Drugs or Any Other Substances That Impair Cognitive Function

This issue is taken seriously in the penal code, and one of the conditions for the crime of sexual assault is considered to be administering sedative drugs or using any other substances that impair the victim's cognitive function. If a person engages in such actions, they are recognized as committing sexual assault. This is explicitly stated in Article 636, paragraph 1, which mentions: "A person who... administers sedative drugs or any other substances that impair cognitive function to another person, and engages in sexual intercourse with them... shall be recognized as committing sexual assault."

4- Underage (Under 18 Years Old)

In the penal code, the failure to reach the legal age, even if the victim and the consenting party consent to the sexual act, is considered one of the instances of lack of consent. This means that if a girl or boy has not reached the legal age, and a man engages in sexual intercourse with them with their consent, their consent is not valid in any way. The perpetrator is pursued judicially and is subject to punishment. Article 638 of the penal code explicitly states: "If a man engages in sexual intercourse with a person below the legal age (under 18 years old), his action is recognized as sexual assault, and the consent of the victim is not valid."

From this article, it can be inferred that if a man contracts marriage with a girl who has not reached the legal age specified in civil law or personal status law, he is deemed to have committed sexual assault because the child's consent is not valid. The act does not fall outside the scope of sexual assault, even if the conditions of marriage have been met, unless the marriage contract is concluded with the permission of the guardian.

5- Physical or Mental Incapacity of the Victim

Another element of the material component of the crime of sexual assault is the physical or mental incapacity of the victim. In the first scenario, if the victim has physical incapacity, such as an illness preventing them from expressing consent, and the perpetrator engages in sexual intercourse with them using this illness, the perpetrator is considered to have committed sexual assault. These individuals cannot perceive and express consent, as inferred from Article 89 of the penal code.

In the second scenario, if the perpetrator engages in sexual intercourse with the victim using the victim's mental incapacity, such as if the victim is mentally deficient, and the perpetrator takes advantage of this mental state to engage in sexual intercourse with them, the law does not consider the victim's consent valid. The law protects these individuals and does not consider their consent valid to prevent harm to their societal status. The perpetrator is held accountable and subject to legal prosecution. Article 636, paragraph 1, of the penal code, explicitly states: "A person who, through coercion, intimidation, or taking advantage of the physical or mental incapacity of the victim or the inability to express consent, whether it be a woman or a man... engages in sexual intercourse... is recognized as committing sexual assault."

6-Coercion and Force

The lexicon's term (coercion or force) means severity, harshness, and against consensus (Amid, 2006, p. 1737). In the context of coercion, it refers to performing an act using force without the consent of the rightful owner, even if it involves a physical act, not just rape (Jafarilangroodi, 2006, p. 476). Therefore, sexual assault is an act that occurs through the use of force, coercion, or the deprivation of the person's will and consent, resulting in the violation of a woman's dignity without her permission. In Afghanistan's penal code, the term (compulsion) is not used in the context of sexual assault; instead, the word (coercion) is used in Article 636.

A question may arise here is whether (compulsion) and (coercion) differ. Before answering this question, it is appropriate to become familiar with the concept of (coercion): (coercion) is compelling someone to do or not do an act so that the coerced person's will is wholly eliminated. The act is performed according to the will of the coercer, whether it involves performing an act or refraining from it. Now, suppose the deprivation of will and intention of another person occurs through physical means (such as physical pressure or a knife to the coerced person's neck). In that case, it is called (physical coercion) (Rezaei, 2015, p. 36).

Suppose the reason for compulsion is non-physical, and the coerced person is mentally under pressure and coercion to the extent that they lose their free will in committing the crime. In that case, it is called (mental coercion), similar to the fear resulting from a death threat (Goldouzian, 2014, p. 210). According to this definition, the meaning of (coercion) is more specific than (compulsion), because in (compulsion), the threat may reach the level of (coercion), meaning that the coerced person's will is eliminated, or it may not get that level, meaning only the coercion of desire and will, not the compulsion.

It is worth mentioning that if the perpetrator of the crime is a man, meaning the man forces a woman to commit a heinous act of sexual assault, in such a case, the unanimous opinion of Islamic jurists, both Shia and Sunni, is that compulsion is achievable on the woman's side. However, suppose the compulsion to commit sexual assault comes from the woman's side, meaning the woman forces and compels the man to engage in physical intercourse with her. In that case, the question arises whether compulsion to commit sexual assault is achievable on the man's side or not. There is disagreement among Islamic jurists, but the dominant opinion among Imami jurists is that compulsion can also be achieved on the man's side. Sheikh Sani believes that the correct opinion is the possibility of attaining compulsion on the man's side (Sheikh Sani, 2015, p. 26).

Hanafi jurists have different opinions regarding compulsion on the man's side. Imam Abu Hanifa initially believed that if the compulsion comes from the ruler's side, it is achievable on the man's side, but otherwise, it is not feasible; in his second opinion, he established that compulsion by the man is also accepted; because the erection of the genitals is sometimes a sign of manhood, not a sign of consent. Muhammad and Abdullah, the two companions of Imam Abu Hanifa, also considered compulsion achievable on both the man's and woman's sides and thought it relieving criminal liability. However, Zafar, another companion of Abu Hanifa, believes that compulsion on the man's side is not achievable, whether the coercer is the ruler or not (Rezaei, 2015, p. 42).

The correct view is that compulsion on the man's side is achievable because:

Firstly, the erection and enlargement of the genital organs, which occur due to sexual desire, are a natural occurrence and a sign of manhood, not a sign of consent, so it can be said that his act is accompanied by intention.

Secondly, what is valid in achieving compulsion on a forbidden act is that if the coercer did not promise the coerced person harm, he would not have committed the forbidden act; it does not matter whether he had a psychological inclination towards it (meaning if there were no prohibition by Sharia, he would have committed it), or not. What is desired from a legal perspective is abstaining from committing the forbidden act, not removing psychological inclinations, as removing psychological inclinations is among the higher levels of self-perfection, which is not included in the scope of legal requirements or its meaning.

Thirdly, compulsion without psychological inclination is achievable, such as when a man penetrates a woman's genital organs without her being aroused. Therefore, if a woman threatens a man that, she will kill him or ruin his honor if he does not commit adultery with her. The man commits such an act to escape being killed or to preserve his honor; according to the predominant opinion of Imami jurists, the man will be exempt from criminal liability due to compulsion (Rezaei, 2015, p. 44). However, according to the Afghan Penal Code, the ruling on this issue is ambiguous. This ambiguity arises from the fact that according to paragraph 2 of Article 1 of the Afghan Penal Code, the reference and documented ruling in the chapter on boundaries, retribution, and blood money is Hanafi jurisprudence. Hanafi jurists differ regarding compulsion involving men. In terms of what legal reasoning the judge of the court should rely on in case of an allegation of compulsion from the man's side, the Afghan Penal Code has not specified it, and these differences of opinion and rulings among Hanafi jurists in these three areas are evident, some of which are mentioned concerning the discussion.

C-Mental Element

The crime of sexual assault is among a category of crimes that require a mental element. The cognitive component of both intentional and unintentional crimes is intention and negligence, respectively. This means that if a perpetrator of a crime intends to violate the law, their act will be intentional, and if they negligently and inadvertently create the conditions for a legal violation, their act will be unintentional. If a man intends to engage in sexual intercourse with a woman knowing that she does not consent to it, to the extent that his intention can be established in this regard, it must be said that he has committed the crime of sexual assault. Therefore, assuming the establishment of the man's intention to engage in sexual relations with the woman, it must be seen whether he also knew the woman's lack of consent or not. If this knowledge is also established, it must be inevitably concluded that he has committed this crime (Jafari, 2013, p. 116). Generally, it can be said that the mental element of a crime consists of the awareness and understanding of the perpetrator regarding the unlawfulness of the action they are committing (Farid, 2013, p. 45). Therefore, the mental element is one of the essential elements in realizing a criminal act, which manifests in two forms: criminal intent knowledge of the nature of the action and the lack of consent from the victim. If these two aspects are not established, the criminal act will not be punishable.

1- Criminal Intent

According to legal scholars and based on the clarity of the law, the mere commission of a physical act recognized as a crime by law is insufficient to establish the criminality of the perpetrator and their punishment. In intentional crimes, the perpetrator must have psychologically had criminal intent and intentionality to commit the crime. In criminal law, criminal intent can be understood as a definite and accomplished desire to perform or refrain from an action the law prohibits. However, this desire must be expressed under conditions customary to a rational, competent, and mentally and physically mature individual, as the impairment of reason or lack of maturity may distort the criminal intent. Sexual assault is categorized as an intentional crime, and the meaning of intent in this crime is that the perpetrators have intentionally engaged in sexual intercourse or intimacy, meaning that they desired the act. Additionally, apart from intent, they must have knowledge of the lack of consent from the victim for sexual intercourse. For example, if they deliberately resort to violence and coercion. As soon as the general intent of the perpetrator, indicating intentional conduct, such as forcibly inserting their genital organ or body parts into the female genital organ or anus without her consent, is established, regardless of the intended consequences, it suffices to recognize the perpetrator as guilty.

2- Knowledge

The concept of knowledge refers to the actor's awareness of the nature of their committing behavior or their knowledge that their behavior will lead to criminal consequences. Suppose someone has knowledge of the act of sexual assault and is aware of the circumstances, meaning that they know the woman they intend to have intercourse with does not consent and that they engage in sexual intercourse with her by force and coercion (regardless of whether their specific intent is to preserve their honor or anything else). In that case, they are considered perpetrators of sexual assault, and the laws and punishments for sexual assault apply to them. In criminal law, in addition to the issues mentioned in the mental element of this crime, merely the penetration of the male genital organ is not considered sufficient. That is, if the perpetrator, in addition to their genital organ, forcibly inserts body parts or objects into the woman's genital organ or anus, they are recognized as committing the crime of sexual assault.

Conditions for Sexual Assault

Sexual assault, from a jurisprudential perspective, essentially constitutes adultery. Discretionary punishment is applied when the conditions for the hadd punishment are unmet. Conversely, when the conditions for the perpetrator's guilt are met, undoubtedly, the conditions for adultery will apply. While some authors have specified the particular conditions of adultery, most authors have generalized the conditions of the crime of adultery. As previously mentioned, acts of sexual assault or coercion, such as a man approaching a woman from the front without a religious or legal marriage contract, are considered forms of adultery. In such cases, sexual assault (forcible adultery) is considered both a brutal crime and a punishable offense against public morality and virtue. When a criminal act encompasses a dual approach, its conditions differ. In this discussion, we address the conditions of this crime from the perspectives of Hanafi jurisprudence and Shia jurisprudence. This study attempts to categorize the conditions of adultery into two sections: general conditions and specific conditions, and now we discuss both separately.

A: General Conditions of Adultery or Sexual Assault

Hanafi jurists and other jurists have outlined the following general conditions for adultery:

1. Puberty: The individual committing adultery must be an adult. Hence, if a non-adult commits this crime, the harsh punishment for adultery will not be applicable.
2. Sanity: The perpetrator of adultery must be sane. Therefore, if a mentally ill person commits adultery, the hadd punishment will not apply to them.

3. Islam: According to Hanafi jurists, if the perpetrator of adultery is a non-Muslim and if they are of good character, they will not be stoned but will be subject to discretionary punishment. However, according to Shia jurists, it is within the authority of the Islamic ruler to enforce the hadd punishment or delegate it to their subjects for execution according to their own beliefs.
4. Consent: Adultery must occur consensually. If adultery occurs as a result of coercion or sexual assault, it is not subject to the hadd punishment according to the consensus of jurists.
5. Capability of the Adulterer and Adulteress: According to Hanafi jurists, if neither the adulterer nor the adulteress has the capability of committing adultery (e.g., both are minors), the punishment of adultery will not be applicable. However, according to Shia jurists, two similar narrations regarding a young person exist. One of them states that adultery with a young girl or a mentally ill person does not result in stoning but only requires financial compensation. The other narration states that if an immature boy commits adultery with a married woman, the hadd punishment will not be enforced.
6. Marital Status: The adulteress must not be married. If a person commits adultery with a woman who is married or in a marital contract, according to Hanafi jurists, the hadd punishment will not apply to them.
7. Life of the Adulterer and Adulteress: If someone commits adultery with a dead woman, according to the consensus of jurists, the hadd punishment will not apply to them.
8. Vitality of the Person Engaging in Sexual Intercourse: Whether the person engaging in sexual intercourse is alive or dead affects the realization of adultery. Some Imami jurists have declared the vitality of the person a prerequisite for the occurrence of adultery. They consider adultery with a dead person the most heinous and worse than adultery with a living person, and therefore, besides the hadd punishment, they prescribe discretionary punishment. Some Shia scholars have even claimed consensus on this issue. However, according to Hanafi jurists, engaging in sexual intercourse with a dead person does not constitute adultery because the sexual organs (male and female) are non-functional and repulsive, and the human soul naturally abhors and feels repulsed by it. Therefore, there is no need for hadd punishment because the hadd punishment is for deterring the act of adultery, and the human soul naturally abhors and feels repulsed by it.
9. Adulterer's Compliance with Islamic Laws: According to Hanafi jurisprudence, adultery committed by a non-Muslim does not result in stoning, as compliance with Islamic laws is considered a condition for the enforcement of the hadd punishment. However, according to Imami jurisprudence, the adulterer's compliance with Islamic laws is not considered a condition for the enforcement of the hadd punishment in the occurrence of adultery. Therefore, if a hostile non-Muslim commits sexual intercourse with a foreign woman and then returns to an Islamic territory, the hadd punishment will not be imposed on him. Shia scholars do not consider the occurrence of adultery in a non-Islamic territory a condition for the obligation of the hadd punishment.
10. Confession of the Adulterer: Hanafi scholars consider the confession of the adulterer valid for establishing adultery. The confession of a mute person (deaf) does not establish the hadd punishment for adultery. However, Imami jurists have not considered the confession of the adulterer a condition for establishing adultery. This is because a mute person enters into a marriage contract by indicating and also grants divorce by indicating. Therefore, in confession, they suggest and admit to committing adultery.
11. Occurrence of Adultery in a Just Land: The laws of Afghanistan consider the occurrence of adultery in a just land a condition for the imposition of the hadd punishment for adultery. Hanafi scholars consider the occurrence of adultery in a just land a condition for the imposition of the

hadd punishment for adultery. Since there is no Islamic ruler in a land of injustice, namely in a land of war and rebellion, the obligation of the hadd punishment does not manifest itself with the occurrence of sexual intercourse between a man and a woman. Therefore, if someone commits adultery with women in a land of war or rebellion and then returns from that place to a land of justice, the hadd punishment will not be imposed on him. Shia scholars do not consider the occurrence of adultery in a land of justice a condition for the obligation of the hadd punishment.

B: Special Conditions of Adultery or Sexual Assault

1. **Illegitimacy:** One of the essential conditions for the occurrence of adultery is that sexual desires between a man and a woman take place entirely without the existence of a legitimate or legal relationship between them (without a marriage contract).
2. **Intention of the Perpetrator:** Like any other crime, the presence of a necessary mental element is essential for establishing adultery or sexual assault. The criterion for determining the cognitive component of the crime of sexual assault is the deliberate intention of the perpetrator to engage in unlawful sexual intercourse.
3. **Absence of Doubt in Consent:** If sexual intercourse occurs due to doubt or uncertainty, the hadd punishment will be invalidated.
4. **Lack of Hindrance between Male and Female Organs:** In jurisprudence, the absence of a hindrance in establishing adultery has not been considered a condition. Adultery can occur even in the presence of a hindrance, whether it is thin (such as contraceptive methods) or thick. Thus, according to Afghan law, the existence of a hindrance between the male and female organs does not interfere with the establishment of adultery.
5. **Completion of Coitus:** Coitus refers to the act of sexual intercourse and the approaching of the male and female for copulation to satisfy sexual desires.
 - a. **Coitus between a man and a woman is considered unlawful when it is inherently forbidden.** This means there is no legitimate or legal marriage contract between the man and the woman with whom he has coitus.
 - b. **Methods of Coitus:** The physical act of copulation between an unauthorized man and woman through inserting the male genital organ into the female genitalia, besides vaginal intercourse, is also considered copulation from a jurisprudential perspective. In other words, whenever the male genital organ penetrates the anus of the woman instead of the vagina, it is regarded as one act and constitutes adultery.
 - c. **Adultery Must Be Beyond Doubt:** Adultery must primarily involve physical copulation, which generally refers to the act of a man inserting his genital organ into the vagina or anus of a woman while considering himself legally allowed to engage in sexual intercourse. Ultimately, it becomes evident that the man's assumption was incorrect.

Conclusion

1. Although sexual assault is a longstanding crime, its definition and delineation vary in legal systems and depend on the political, economic, social, and cultural developments of each society.
2. Forcing a man or boy by a woman to engage in sexual intercourse does not constitute sexual assault; instead, it falls under the category of adultery.

3. Sexual assault, involving the insertion of genitalia, objects, or body parts into the vagina or anus of a living person, can be realized through coercion or instances of compulsion.
4. Establishing an unlawful and coercive relationship is socially, morally, legally, and even medically unacceptable in any society. Laws, religious principles, and ethical standards do not support or condone such acts.
5. Sexual assault does not occur in absolute terms; instead, legislators declare these actions as crimes only when they first define them, then specify the conditions, and finally identify the constitutive elements. In this research, the definition and constitutive aspects of sexual assault were thoroughly discussed concerning the Penal Code of Afghanistan.
6. Sexual assault is subject to a series of general and specific conditions.

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