

Comparative study

The offence of abandon of marital and family obligations on payment of alimony and alike (Financial abandon of family); A Comparative study

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ABSTRACT: This study aims to shed light on criminal responsibility of the abandonment and abstention of alimony payment and alike. All divine laws and international conventions had paid their attention to regulate the affairs of the family, by dealing with marriage, divorce, maintenance, alimony and many more. Alimony can be paid in form of checks, cash, or money orders. However, this alimony is not treated as your child support, as it utterly belongs to the individual right of the spouse. Therefore, the role of criminal law for threatening and stands lookout for every assault on the family system. It also represents the abandonment of the marital and family obligations on payment of alimony and alike.

Keywords: Alimony, Marital Abandonment, Criminal Law, Financial, Responsibilities

Introduction

The family is the basis of a society; therefore, it is said that the strengthened family is directly associated with enforced society^[1,2]. Among the manifestations of legislations about family system, some constitutions have confirmed that the family enjoys the protection of the state^[3]. In addition to the personal status act and the civil code, it is found that the penal code includes certain rules that protect the family system. The requirements of its security and stability are directly associated with the respect for all their rights^[4]. Marriage, like any other contract, organizes rights and obligations on both sides. It establishes the basic cell of society and family life, which is based on interdependence, solidarity, good cohabitation, good education, manners and renounces social

ills^[5]. It can be observed from the practical life that certain committed persons may refrain from this duty to pay the alimony imposed upon them for beneficiaries. Such complications can lead to troubles for the eligible person of alimony, and might sometimes harm the society. The convict may refrain from executing the judgment unlawfully, after having its ability to pay alimony and alike^[6]. It is necessary that the criminal legislator intervenes to ensure the protection of family in terms of physical needs, which requires special criminal protection for good functioning and coherence. The criminal legislator has also intervened and arranged non-paying financial commitments to reduce the negative consequences^[7].

General Overview

In the first step, it is explained that the legislator did not have any intention by criminalizing abandon marital and family obligations on payment of alimony. Criminal legislature has really recognized that the seriousness of the failure of paying alimony is related when one of the parents finds himself separated from his former wife and his children, from his side is getting more^[8].

History of Criminalizing the Abandonment of Family in French Law

¹ Ali Adnan Yahya Alfil: "studies in Islamic criminal jurisprudence: compared with the positive criminal law", Dar Al elyazori, Amman, Jordan, 2010, p. 10.

²International conventions included – like Sharia law-texts for the protection of family rights, consistent with the core principles, in particular the best interests of the family in all legislative procedures; Abdullah Ali Abou Sultan: "the role of international criminal law in the protection of human rights", Dijla House, Amman, Jordan, 2010, p. 5.

³As the UAE Constitution in article 15 that "the family is the basis of society which is rooted in religion, morality and patriotism, and ensure that its law and safeguarded and protected from delinquency, article (16) of which States that "community care of children and mothers and protects minors and others. " ; As well as the Algerian Constitution, in article (58).

⁴Dr. Mohamed Abdel Hamid al-Alfi: "family crimes-the criminal protection of family ties, according to the latest provisions of the Court of Cassation and the Supreme Constitutional Court and legal constructs", 1999, without publishing, p. 5.

⁵Abdul Aziz Saad: "offences against the family system", 2nd Edition, 2002, ONAS educational works, Algeria, p. 13.

⁶Egyptian Supreme Constitutional Court, case No. 1 of 5 (Constitutional), June 29, 1974.

⁷Dr. Hassan elmarsafawy: "the offence of abandonment of the family", Egypt, the journal of the Department of Government, issues, eighth year, no. 1, January-March 1983, p. 109.

⁸S. LORVELLEC : " La maltraitance en question: l'exemple français", R.I.C.P.T., 1988, p. 423; R. LINDON: " La nouvelle législation sur le divorce et le recouvrement des pensions alimentaires", J.C.P., 1975.I.2728.

The first criminalization under abandonment of the family in French law was dated in 7 February 1924^[9], which was punished for holding pays for food in favor of a spouse^[10]. In the beginning, there was no amendment to the crime, but later, it came up with the French law dated 23 July 1942^[11], where the French legislature added a new offence about moral abandon beside the financial one^[12]. The law of 1810 had allocated a special place for abandonment of the family in article 351-1 of old French Penal Code^[13]. It is ranked alongside with the financial abandonment in accordance with article 357-2 of the old French Penal law^[14].

The components of the offence of abandon of marital and family obligations on payment of alimony and alike

The idea of abandoning the marital and family obligations on payment of alimony arises in relations of spouses or parents with children. By looking at the offence of abandonment of the marital and family obligations on payment of alimony and alike, it is found that this offence is broadly defined^[15] and cannot be met unless all prerequisites (pre-conditions) and the constitutive elements are altogether.

The existence of a family debt (credit)

For the existing of abandonment of the marital and family obligations on payment of alimony, there must be a family debt, which stemmed from family ties and obligations. Despite the agreement between penal legislation on requesting the condition, it was differed in defining its scope between too narrow or wide. Both French and Algerian legislators were talking about food expenditure (Pension alimentative)^[16]. Later they have expanded their scope to include the alimony or any planned spending to support his family^[17]. While the Omani legislature outlined the scope of protection on alimony^[18], the Egyptian legislature^[19] and the UAE's^[20] has added to

⁹Amended on 3/1/1928.

¹⁰P. CASANOVA : " l'abandon de famille en droit pénal français", Bibliothèque de l'Institut de criminologie de l'Université de Toulouse, 1931.

¹¹P. EISMEIN: "Abandon de famille", J.C.P., 1942.I.297.

¹²M. MABILLE DE LA PAUMELIERE: " L'abandon de famille en droit français", Université de Caen, 1945.

¹³Doyen P. COUV RAT: " Le droit pénal de la famille", RSC, 1969.807.

¹⁴S. KIEFE: " Abandon de famille en droit français", G.P., 1972.II.720.

¹⁵J.Y. CHEVALLIER: " Réflexions impertinentes sur la protection pénale de la femme", in La terre, la famille, le juge", Etudes offertes à H.D. Cosnard, Economica, 1990.248.

¹⁶J. HAUSER: " Le fondement du délit d'abandon de famille", J.C.P., 1974.I.2617.

¹⁷Ibid 17.

¹⁸Ibid 16.

¹⁹Ibid 11

its custody. In France, the French legislature broadened the scope of criminal protection; so article 227-3 of the new French Penal Code is related with expenses, contributions, grants, financial assistance, and any claims that might arise from one of family obligations set in chapters' V to VIII of book I of the French civil code^[21]. Noted that various legal texts speak about the debt generated by the current family ties by decoding the marriage bond.

Persons entitled to alimony

Criminal legislations differ in defining the characteristics of the affected persons awarded alimony funds for their maintenance, At the time, it is found that Jordanian^[22] and Palestinian^[23] legislature limited the protection of the rights of minor alimony, who has not reached 15 years of age. Other legislations were marked by comprehensive, clarity, and brevity texts, such as French and Algerian^[24] legislation, which has limited legislation of alimony related with either spouse, ascendants or descendants.

Some criminal legislations extended the scope of criminal protection to include each of the spouses or relatives or ascendants or descendants, as the case was related with Egyptian Penal Code^[25] as well as in the UAE's^[26]. It also extended the protection to include the spouse or a relative or any other person, who must be legally supported. The Omani's legislator^[27] also included the spouse or his wife or his ascendants or any other person legally binding support. The Syrian^[28] and Lebanese^[29] legislators included his wife or ex-wife or his ascendants or descendants or any other person under the convicted obligation of alimony or maintenance or upbringing.

The Debt Generating by Decoding the Marriage Bond

²⁰Ibid 10.

²¹Ibid 18.

²²Article (290/1/b) of the Jordanian Penal Code, where limited protection to minors who has not completed the age of 15, and considered a minor who had not completed 12 years of age an aggravating circumstance.

²³Article (290/2) of the Palestinian Penal Code limited the protection for less than 12 years of age; actor offence it might be parents, guardian or Wali hitherto legally or legally maintained and cared for.

²⁴Article (331) of the Algerian Penal Code, mentioned persons subject of alimony "And the performance of the full value of alimony assessed by the spouse or ascendants. ".

²⁵Article (293) of the Egyptian Penal Code, stipulates that any judgment rendered enforceable alimony for wife or relatives or descendants.

²⁶Ibid 10.

²⁷Ibid 16.

²⁸Ibid 14.

²⁹Ibid 15.

The debt generated by decoding the marriage usually appears mainly when the divorce or separation of parents occurs in the alimony during the waiting period (iddah) ^[30]. The husband cannot derogate from the payment of alimony to his ex-wife during the revocable waiting period ^[31]. If the alimony is resulting from decoding the marriage and dissolution, the beneficiaries are spouse and minor children ^[32]. More specifically, it concerns the food expenses owed to wife and children, whether compensatory aid in any manner as the benefits or profits and any other compensation can be awarded to the wife ^[33]. French courts have adopted this solution before modifying the text on 11/7/1975, where the old text was contained in law 23/12/1942, which refers to the spouse only without the ex-one. The Syrian ^[34] and Lebanese ^[35] legislators did the same when they mentioned explicitly and exhaustively "wife or ex-wife".

The Existence of Judicial Decision

A judicial decision concerning family debt is the second precondition for the offence of financial abandonment family, this necessary condition is devised from the explicit text. Many legislations have sought explicitly the need of alimony judgment which was mentioned in French law and in many other Arabic legislations such as the UAE's ^[36], Egypt ^[37], Syria ^[38], Lebanon ^[39], Algeria ^[40] and Oman ^[41] etc., but, neither in Jordan nor in Palestine ^[42].

An indispensable judicial decision

This offence assumes the existence of a judicial judgment, which defines the duty assigned to the person for his family

³⁰ Organizing with the laws on personal status (family) in most Arabic or civil law in Western countries such as France. Organized the provisions in Chapter VI of the first book of French civil law.

³¹ Dr. Mostafa Magdy Harja, 1995. "Comment on the Penal Code in the light of the jurisprudence and the judiciary", 3rd ed., University publications, Alexandria, p.1126.

³² That the wife deserves alimony from her husband from the moment of marriage until its decoding, divorced wife also has the right to alimony during the waiting period (iddah).

³³ In application of Articles (232, 234, 250-1, 255, 258, 266, 270, 303, 370, 373-2-2-373-2-5 of the French civil code.

³⁴ Ibid 14.

³⁵ Ibid 15.

³⁶ Ibid 10.

³⁷ Ibid 11.

³⁸ Ibid 14.

³⁹ Ibid 15.

⁴⁰ Ibid 17.

⁴¹ Ibid 16.

⁴² Although the text of the Jordanian legislature in (article (290/1/b) of the Penal Code) and the Palestinian in (article (290/2) of the Penal Code)

^[43]. Generally, the view goes to that felony of abandonment in regards of marital and family obligations on payment of alimony ^[44]. Therefore, such offence is reportedly directed against the authority of judicial decisions⁴⁵. Moreover, the financial abandonment without a judicial decision cannot be forecasted, and judges must determine any judicial decision, which was accused to the obligation for contributing the needs of the creditor ^[46].

An executable decision

The offence of refusal to obey the court order of alimony assumes that this judgment must have an executive characteristic. Such aspects indicate that this decision includes content, which defines domestic obligation on the accused and specifically determined enough ^[47].

Final decision (definitive) or temporary (provisory)

There seems to be a disparity between the positions of some Arabic legislations and the French Court of Cassation. As for the Arabic legislations, legislations disagreed about the nature of the decision, which performs the physical element of the offence in the Syrian Penal Code ^[48], the Lebanese ^[49] and Omani's. The legislator required that the judgment must acquire judicator force ^[50] or firm decision, which was accepted by opposition. While the UAE ^[51] and Egyptian ^[52] legislator needed only executive decision whether it was primary or final ^[53].

Considering the legislature and the judiciary, certain actions are taken by the judge in family matters, which are executive to the rule of law despite the contestation by appeal or opposition ^[54]. Therefore, some text censure expressly that the exercise opposition do not have impact on attitude regarding

⁴³ Crim., 17 février 1938, B.C., n 45; DH. 1938.230.

⁴⁴ M.-L. RASSAT: " Droit pénal spécial", précité, n665.

⁴⁵ It is equal whether the alimony had been established under a judgment of a court of personal status or other, or whether the decision was passed in the original suit or casual suit (subset).

⁴⁶ Crim., 13 November 1980, B.C., n 296, RSC, 1981.872, obs. G. Levasseur.

⁴⁷ Crim., 10 janvier 1984, B.C., n10, D., 1984, I.R., p. 221, obs. Roujou de Boubée; Caen, 12 janvier 1987, Juris Data, n 50380.

⁴⁸ Ibid 14.

⁴⁹ Ibid 15.

⁵⁰ Ibid 14 and 15

⁵¹ Ibid 10.

⁵² Ibid 11.

⁵³ Dr..SharifSayedKamel:"Legal protection", p. 154.

⁵⁴ Crim., 21 mai 1980, B.C., n 157, RSC, 1981.91, obs. Levasseur; Crim., 10 avril 1991, Dr. Pén., 1991, co.,. 228, et les articles 1074-1 et 1087, N.C.P.C.

interim or temporary measures imposed^[55].

The judicial settlement

In the beginning, the article 357-2 in the old French Penal Code defined financial abandonment, which holds assistance or claims imposed by judicial decision, and it restricted the punishment in the second paragraph for not emerging payment "after divorce or separation or expiration of marriage". The jurisprudence through that text concluded that criminalization is applied when the non-payment issues of executive judicial decision final or temporary, but not from an interim or temporary agreement, even though this agreement has obtained the authentication of the judge^[56]. Finally, the new French Penal Code put an end to this dispute by including in the article 227-3 of new penal Code without specifying the language. Therefore, the French legislature requires a judicial decision, but it considers that the debt of alimony can be based on any another basis agreement^[57], contract, bequest, recognition, and reconciliation.^[58]

Judicial decision notified (signified) to the concerned

The Justice system emphasizes that the executable judgment must have been informed and communicated to the debtor by notification, in accordance with the procedure and conditions provided by law^[59], which may be made orally or warning by the record. The Algerian Supreme Court has confirmed the condition of notification in many of its decisions^[60]. Some

⁵⁵Ex. : art. 51, déc. Du 5 décembre 1975 et, aujourd'hui, art. 1987, N.C.P.C.; Crim., 18 novembre 1981, B.C., n 306; Crim., 10 avril 1991, précité.

⁵⁶Trib. Corr., Bressuire, 9 décembre 1980, G.P., 1981.I.167, note Brazier, et RSC, 1981.383, obs. Levasseur; Paris, 15 mai 1984, G.P., 1985.I.somm.I.

⁵⁷If the wife had agreed with her husband to pay her a certain amount expense to them, this does not fit basically doing an offense to abandon their marital and family obligations to pay alimony and the like if the husband breached including commitments made in this agreement, which concluded with his wife

⁵⁸Art. IIII N.C.P.C. NCPD, 2016 - Novo Código de Processo Civil - LEI Nº 13.105 de 16 DE MARÇO DE 2015.

; In accordance with Article 214 of the French civil law; T. corr. Paris 5 déc. 1973, J.C.P., 1974.II.17711, note Toulemon: The presence of a foreign divorce judgment based on other reasons different from those accepted in French law, if the parties attached to are French, had no effect in France and, therefore, has no effect on the offense of abandonment of the family; Crim., 1^{er} février 1973, B.C., n 161, RSC, 1973.412, obs. G. Levasseur; Crim., 29 janvier 2003, D., 2004, somm. 307; Dr. Ahsan Bosgeah, 2002. "Brief in the criminal law, crimes against persons and crimes against money", Dar Homa, Algeria, p. 45

⁵⁹The notification is reported when the verdict was announced to husband as general rules of declaration of judicial decisions.

⁶⁰It says in a statement issued by the misdemeanors and infractions room dated 11/23/1982, file number 63 194 as follows: "If officiated text of article 331 of the Penal Code

decisions in 1960s led to the belief that some of the French Court of Cassation decisions has considered formality as a useless, while some went in fact to that notification, which is not necessary when the alimony has acknowledged the decision^[61]. If the debtor knew about the sum of alimony from the moment of Declaration of divorce following the decision of non-compromise, the failure to pay is a criminal behavior, so that these formalities take place of notification^[62].

Constitutive elements

The offence of financial abandon of family consists of two elements, which mainly include material and moral.

The Material Element

It is not rare to find the offence of financial abandon under the form of the attached offence, which exists in the French legislation^[63]. If it is stayed within the main offence in the strict sense, the offence of financial abandon of family assumes that the debtor had remained a certain period without payment of full financial obligations of alimony and alike^[64]. Therefore, the offence stands through non-payment of full financial obligations (a) and over a certain period, at the same time (b).

The abstention of (integral vestment) payment of full financial obligations

An offense of omission

The offence of financial abandon is considered as a negative offense, which is punished by an explicit text in respect to the principle of legality. It is not about being an omission, which requires an offender. The behavior of the perpetrator is negative because of failure to pay alimony as decided. Therefore, the first item in its material element is the failure to pay the debt of alimony^[65].

Total or partial omission

Criminal legislations stipulate, which satisfied the full payment of the amount of the alimony mentioned in the decision, so the partial fulfillment is negligible and does not

penal sentence of imprisonment and a fine on each of the deliberately refrained exceeded for a period of two months to pay the adjudged alimony he must make up for the beneficiaries because it is required to follow the penal this offense to be sentenced has reached according to the law governing the judge alimony and eliminate otherwise is an error in the application of the law.

⁶¹Crim., 9 janvier 1962, B.C., n 13.

⁶²Crim., 9 octobre 1996, Dr. Pén., 1997, comm. N 58.

⁶³Stipulated in Article (227-4) of the new French Penal Code.

⁶⁴Ibid 10 and 18.

⁶⁵GEBLER M. Le paiement direct des pensions alimentaires. Commentaire de la loi. 1973(73-5):107

deny the offense^[66]. Thus, the partial payment of such obligations does not preclude the application of punishment; And French justice does not stop repeating this principle since the adoption of the legal texts so far till now^[67].

Creditor

What if the person who has the charge of the alimony was the creditor of beneficiary?

The French Court of Cassation decided that the accused could not get benefit from the payment of compensation or set-off between the debtor's debts owed to him by the creditor.

To others

Is the payment of the amount of alimony is fulfilled by paying to others? Generally, there is omission even though if the accused paid the amount of alimony indirectly to the creditor of the beneficiary of it, by paying to the landlord the rent on the property, like the husband who pays for the apartment occupied by his wife^[68], nor may protest payment for his son to get rid of its obligation to pay assessments for the mother^[69]. Nor can the accused also benefit of payments made by third parties in order to support his sons^[70], he cannot resolved from the alimony payments received by his spouse, as family assistance^[71]. It also does not matter the percentage of the amount in late, it is enough if that there is no payment for the full amount, even if that resulted from the lack of documentation^[72].

Advance payment

There is no provision, which has prevented any debtor of alimony to be discharged of his debt via the prepaid alimony. Thus, the accused must be acquitted of the charge of financial abandonment in regards of the family^[73].

Specific deadline (Emolument of a certain delay)

It is not sufficient for the offense of financial abandonment that the abstention of the debtor to pay the sum of alimony, but it needs to continue this attitude on his part, a certain delay. The aim of the legal time limit is to give the debtor of alimony certain time to fulfill its obligation to pay the sum of alimony

⁶⁶The payment of the debtor of part of the debt of alimony does not prevent the offense, though it may be taken into account when assessing the penalty.

⁶⁷Crim., 31 mars 1926, D.H., 1926.284; Crim., 26 octobre 1987, B.C., n 367.

⁶⁸Crim., 7 décembre 1967, D. 1968.353.

⁶⁹Crim., 26 octobre 2005, Dr. Pén., 2006, comm. 19.

⁷⁰Crim., 27 janvier 1949, B.C., n 31.

⁷¹Crim., 9 janvier 1962, D., 1962.242.

⁷²Crim., 26 octobre 1987, précité.

⁷³Crim., 20 mars 1984, B.C., n 114, RSC, 1984.739, obs. Levasseur.

imposed upon him, and to avoid falling under law^[74]. Continued duration is a material fact, which can be proved by all means of proof^[75].

The duration of abstinence vary between legislations, while Jordanian^[76] and Palestinian^[77] legislators are silent, it is found that other legislations may set a time limit not exceeding fifteen days as Moroccan legislator^[78], or a month as Iraqi^[79] and Libyan legislators; two months as French, Algerian^[80], Omani^[81] and Mauritania^[82] legislators,; or three months as Egyptian^[83] and UAE's^[84] legislators, as was the case in old French Penal Code at first^[85]. The three-month period was criticized by French jurisprudence, being relatively long, mainly for those in need of maintenance and provision of necessities. Therefore, the French legislature can reduced this period to two months of sentencing in the new French Penal Code^[86], on the one hand, and no longer require prior warning^[87].

Appreciation of two months delay

The issue of appreciation of two months raised many

⁷⁴Dr..Musa Masoud Orhomh, 2000."The crime of refusing alimony performance in the LibyanCriminaland ComparativeLaw", Journal of Law, Kuwait, Vol. 24, No. 2, p. 227.

⁷⁵Abdel Fattah Murad: "crimes of omission on family system", Journal of attorney, Nos. I, II, Year71.1990, p. 91.

⁷⁶Ibid 12.

⁷⁷Ibid 13.

⁷⁸Article 481ofthe Moroccan Penal Code.

⁷⁹Law on criminal proceedings with amendments, 2010.Iraq Penal code 111 of 1969 amended. "Article 38." Issued on 26 September, 1980. "During the month following informing of the verdict was issued to implement it."

⁸⁰Ibid 17.

⁸¹World intellectual property organization, 2016. Omani penal code 16 Feb, 1974. "Article 213."

⁸²Article(336) of the Journal of Criminal Law.

⁸³Ibid 11.

⁸⁴Ibid 10.

⁸⁵A. PETIT,1969."Propos sur la répression d'une infraction invisible (l'abandon pécuniaire de famille) R.P.D.P.,329. The beginning, the French law dated 7 February 1924 the felony of financial abandon of family was after three months of non-payment of alimony.

⁸⁶The French Act of 23 July 1942 had double modifications, at the same time, as it established the offence of moral and material abandonment of family, he decided also to reduce the implementation time limit to two months; Rép. Min., n 14178 du 24 mars 1979, J.O., déb. Ass. Nat., 10 mai 1979, 3655, et J.C.P., 1979.IV.292.

⁸⁷Crim., 11 juin 1949, D., 1949.479, J.C.P., 1949.II.5153, Magnol note; Crim., 30 mars 1954, D., 1954.402; Crim., 23 mars 1981, B.C., n 101.

problems. Specifying that period is related by number of borders about how it can be measured. Firstly, the point of time is determined from the day when the judgment corresponding to the financial commitment of alimony and alike has been communicated to the accused^[88], and continues to the last day, i.e. full length calculated in days not hours^[89]. In the case where payment has been secured in the beginning and then suspended, the time limit begins from the day of suspension^[90]. Therefore; legal texts in France require the abstention of the debtor, which must be for a period of two months from the date of the notice of the sentence^[91].

New items (elements) occurs after timeout of delay

What about new items, which may appear or if the accused might complete some actions after failing to pay alimony for two months? The French Court of Cassation has indicated that it does not matter whether the amounts claimed have been paid after entry into force and expiry of duration^[92], as subsequent fulfillment of the lost timeout does not deny the offense^[93], it does not matter also if a judicial decision abolished the alimony because of the invalidity of a marriage, for example^[94]. In addition, the offence of financial abandonment of family is considered as successive offense, which differs in elements from those that have already been punished through the conviction of former first, new acts independent of the previous one, which could in turn lead to the condemnation of the new^[95,96]. The same solution applies

⁸⁸Crim., 5 novembre 1955, J.C.P., 1956.II.167, B.C., n 439.

⁸⁹This is what the Algerian judiciary, the more correct view spend the months start from the date of notification of the judgment and the expiry of twenty days specified in the assignment or payment obligation set forth record cost him sentenced to pay alimony in accordance with the procedures stipulated in article (330) of the code of civil procedure, and went room misdemeanors and infractions in the Supreme Court to say that "the duration of two months is counted from the date of expiry of the time limit of 20 days in mandating payment", 14/7/1996 file No. 132,869

⁹⁰Dr. Hassan Sadiq Elmarsafawy, op. cit., p. 117.

⁹¹Crim., 14 janvier 1991, Dr. Pén., 1991, comm. 172; Crim., 7 décembre 1967, B.C., n 316.

⁹²Crim., 2 aout 1935, D.H., 1935.493; Crim., 23 mars 1981, B.C., n 101, RSC, 1982.349, obs. Levasseur.

⁹³Subsequent payments or arrears may be considered as a positive repentance which may deserve compassion.

⁹⁴Crim., 23 mars 1981, précité.

⁹⁵Crim., 9 février 1965, D., 1965.475; Crim., 2 décembre 1998, B.C., n 326, Dr. Pén., 1999, comm. N 64, J.C.P., 1999.II.10108, note Rebut, R.P.D.P., 2000, p. 246, obs. Chevallier

⁹⁶The Algerian Supreme Court in its decision dated 21/1/1996 "even if children live below his guarantee but food alimony due to the parent exercising custody over children under civilian rule". Mahmoud Zaki shams, 2000."Arabic encyclopedia of criminal jurisprudence" vol. 6, Aleppo, Beirut

when a pardon for the first offense and the passage of two months again without paying alimony^[97].

The moral element

The offense of financial abandon of family is considered as intentional offense, in which the moral element takes the form of intention^[98]. It cannot be imagined by mistake. This offence assumes the knowledge and voluntarily towards the direction of abstention from paying financial commitment for more than two months^[99]. This offense is intended to affect the judiciary as it affects the private interests of creditors' beneficiaries of alimony^[100].

The "mens rea" for the offence is based on knowledge and the will, which suppose knowledge of the elements of the offence and the will to commit the act constituting the offence and the result, no matter about the motive behind the offence^[101].

With regard to knowledge, must debtor of alimony must take note of the judgment against him to pay alimony for right holders, and must be communicated by that decision, so his ignorance negate his knowledge and negatemensrea^[102].

The accused will tend towards refrain from performing alimony, or failure to pay. This trend is the essence of voluntary intent. And, accordingly, if the will did not move towards non-payment, as if it were the result of coercion, for example, there is no intent for the accused, as if there is block on all his money prevents him from acting. Thus, if the force majeure prevented accused, the offense does not stand up^[103].

Burden (charge) of proof

In order to punish the debtor of alimony and alike, mens rea must be fixed, and the burden of proof is on the prosecution, trial court has the final word concerning confirmation of the facts attributed to the accused. Mens rea is a psychic

human rights publications, p. 20.

⁹⁷Colmar, 20 janvier 1967, J.C.P., 1967.II.15134, note Michaud.

⁹⁸Algerian and Moroccan Law. Chapter (480) of the Moroccan Penal Code stipulates that: "... and deliberately held payment on time."

⁹⁹Crim., 28 juin 1995, B.C., n 243, Dr. Pén., 1995, comm. 223, J.C.P., 1996.II.22576, note Dekeuwer.

¹⁰⁰Crim., 10 avril 1991, précité; J. HAUSER: " Le fondement du délit d'abandon pécuniaire de famille", J.C.P., 1974.I.2617.

¹⁰¹Isaac Ibrahim Mansur: "explanation of the Algerian Penal Code, special section, 2nd floor, Office of University publications, Algeria, p. 32.

¹⁰²Almarsafawy, op. cit., p. 117; Dr. Ibrahim Atta branches, op. cit., p. 322.

¹⁰³Evident inability to pay may be in several forms, as if a block has prevented him working as a disease, for example etc., or in the case of unemployment because of his failure to get in on the action, or the debtor's bankruptcy if he was a merchant. Etc.

phenomenon, which is hidden by the accused inside himself, and therefore could not be inferred only by appearances surrounding the accused, which disclose his purpose and intention^[104]. Therefore, Criminal intent is present within the competence of the trial judge, which draws from the facts of the case and its evidence so^[105]. There is no supervision of the Court of Cassation unless it plays any role in selecting its elements and its provisions, as the Court can receive the correct selection, as if the motivation was seen as element of intent. In principle, the trial judge is obliged to indicate clearly whether the intent is available or not available to allow the Court of Cassation to exercise control^[106]. But that does not mean his commitment to talk about it openly, but it is enough to be understood from the words of the provision and the circumstances of the incident as reported by^[107]. But the judges may use presumption of criminal intent.^[108]

Presumption of criminal intent

Some criminal legislation considers that the non-payment of alimony is intentional unless the accused person proves the contrary to facilitate recognition and distribution of workload between the prosecution and the accuser's hand. Thus, it is not the responsibility of the public prosecution to prove bad faith but in contrary the accused must establish his goodwill. So, the mere failure to pay legal alimony is a presumption of intent, but we must notice that this is a simple presumption, as it is scalable to prove the contrary by the accused^[109].

In fact, the old French penal law, in article (357-2-3) established a legal presumption, which is relatively, so was over draw with hold payment is initially assumed to be voluntary, then the accused has the burden of proof to the contrary^[110] to the General rules of criminal procedures. It has been suggested that a rule of presumption of the criminal intent does not contravene the European Convention on human rights, which establishes that the defendant is innocent until proven guilty by law. And the French judiciary in this regard saw that the reverse of the burden of proof does not violate the presumption of innocence enshrined in the article 6

¹⁰⁴Egyptian Cassation 26/6/1961, a set of provisions, x 12, no. 140, p. 732.

¹⁰⁵Egyptian Cassation, 12/6/1950, a set of provisions, x 1, no. 245, p. 751.

¹⁰⁶Egyptian Cassation, 12/3/1934, a set of legal rules, vol. 3, no. 222, p. 292, 28/12/1936, c-4, no. 28, p. 27.

¹⁰⁷Egyptian Cassation, June 14, 1937, a set of legal norms, c 4, no. 92, pp. 78.

¹⁰⁸Egyptian Cassation, 2/4/1982, jurisprudence, x 20, no. 106, p. 509, 3/5/1989, s. 21, no. 150, p. 636, 8/5/1977, s. 28, no. 116, p. 547; 20/11/1990, 31, no. 198, p. 1025.

¹⁰⁹ GILANI Baghdadi, 2000."Jurisprudence in criminal matters", vol. 1, the national educational works, Algeria, p. 23

¹¹⁰Crim., 27 avril 1984, B.C., n 149; Crim., 23 aout 1989, Dr. Pén., 1990, comm. 57.

of the European Convention on human rights^[111].

The legal regime applicable to the offence of financial abandon of family

(The repression of family abandon)

The procedure

At the procedural level, the punishment for the abandonment of the family has some privacy on moving the case (I) and on the competence (II) at the same time^[112].

Moving the case (pursuits)

Some criminal legislation tried to restrict criminal proceedings in the family abandoned by certain formalities as a complaint by the victim or also first warning. This is what the Algerian legislature adopted like the old French Penal Code.

Complaint Submission

Much Arabic legislation requires submission of the complaint of the victim in proceedings concerning non-payment of alimony as the case with the UAE and Egyptian legislator, as it was in old French law. The old French Penal Code required a special condition, the complaint of the creditor of alimony against the debtor, to lawsuit against him. This complaint might be submitted from either victim by himself or by his legal representative, and is submitted to the competent authority to receive complaints, such as the police (JPA) or the prosecutor^[113]. The complaint was followed by an important result, as public prosecutor recovers his full freedom for the General case, he can raise it or not with his own appreciation^[114]. On the other hand, the victim was entitled to withdraw any complaint whatever it was the case, as long as it did not end with a final judgment, and this assignment concludes to the movement of public proceedings^[115].

The competence

As exception to the general rule of local or regional *rationed loci* that confer jurisdiction on the Court of the domicile of the public proceedings of the accused or the Court of the place of

¹¹¹Crim., 27 avril 1984, précité, et les remarques critiques de M.M. Lévassieur, RSC, 1984.740, et Vitu, RSC, 1985.65.

¹¹²The new French Penal Code entered into force in 1994.

¹¹³To prosecutor and when the complaint in front of prosecutor, he examines whether the accused has a precedent, and extract the Registrar of the Court, which is located in his constituency residence of the accused, or demand a photocopy of the decision concerning alimony for interest of beneficiary to append to investigate.

¹¹⁴Dr. Abdul Salam Moklid."Crimes attached to the complaint and its own procedural rules", edition 1989-University of Cairo publications .

¹¹⁵It was a complaint by the victim is necessary before legislation in connection with proceedings concerning the abandonment of the marital home, in accordance with article (357.1-1) from old French Penal, or abandonment of pregnant woman in accordance with article (357.1-2) of the same Act.

the offence or the Court of the place of arrest or one of its partners^[116], some criminal legislations stipulate expressly that the competent court on the offense of abandon of family is the court is the place of residence of the person of the victim, for convenience and facility in one hand, and to deter a deserter from another party, this is stipulated by both the French and Algerian legislators^[117].

In France, the article (357-2), which was in the old French Penal Code contained provisions relating to the identification of the competent court of abandonment? This last text, affirmed in the third paragraph, that specializes in abandon of family, the misdemeanor prescribed in article (327-3) of the Penal Code, the Court of the domicile or residence of the person recipient of the alimony or contributions or subsidies or other assistance provided in that article.

This rule mentioned in the third paragraph of article (382) for the financial abandonment, is not inevitably correct. It can be applied where the accused was convicted of abandon of family by imprisonment with probation, and it does not matter whether this case return to the competence of the judge to apply penalties of another court^[118]. Finally, the rule mentioned in article (382-3) of the French Code of criminal procedure concerning the creditor resident abroad, where the regular rules of jurisdiction were applied. The case can be brought before a French judge, especially when the possibility of stabilizing the offense in the territory of France. This is the case in a situation where the creditor resides abroad and the omission done by the debtor in France^[119].

Penalties

According to the General Law rules about the division of offenses, the offense of abandonment of family is considered as misdemeanor, it is punishable by the penal legislator by principal penalties (a) and complementary (b) or accessory ones (c).

Principal Penalties: Regarding principle penalties, penal legislations were devoted to the offense mentioned, while some legislations punish the offence with imprisonment only, as the Palestinian^[120], Jordanian^[121], Libyan and others, other

¹¹⁶ As article 329 of the Algerian code of criminal procedure; Ahmed Shawki El shalakany-principles of criminal procedure in Algerian legislation-part I Edition 1999-Diwan University publications, Algeria .

¹¹⁷Saad, Abdel Aziz, op.cit, p. 34; and the competence of jurisdiction over the offence according to article 133 of the Penal Code returns to the Court of the domicile or residence of the person scheduled alimony or seized the aid beneficiary.

¹¹⁸Crim., 3 mars 1977, B.C., n 86, J.C.P., 1978.II.18790.

¹¹⁹Crim., 15 janvier 1982, B.C., n 26.

¹²⁰Palestinian legislator punishes (abandonment) of imprisonment of one month to one year.

¹²¹The Jordanian legislature has punished the financial abandonment without the material and moral one, devoted her

legislations combines between the imprisonment and the fine, giving the judge discretion in possible prison sentence plus a fine or simply either, as the French^[122], Algerian^[123], Tunisian^[124] and Moroccan^[125] legislations. The offense of financial abandon of family is considered as a misdemeanor, so the attempt does not fell down under punishment unless there is a particular text punishes for the attempt made^[126].

Where disputed two different directions:

The first direction: That payment of alimony post frosted deadline set by payment is preventing from steeplechase impunity and thus it prevents the implementation of criminal punishment. This is what the UAE's legislator^[127] and the Iraqi^[128], Libyan^[129], Egyptian^[130] and others. Which go generally to pay alimony or provide unacceptable guarantor frosted subject prevents from execution^[131]. The second trend: Represented by French legislation legislations influenced by him, as the Morocco's, which States that late payment or subsequent alimony has no effect. However, the Court may take this into account, offering the possibility of commutation and reduction of pain.

Conclusion

It is clear that the offence of abandonment of the marital and family obligations on payment of alimony and alike does not stand on the side of the debtor unless, where clause terms and

imprisonment from three months to one year, the penalty and Imprisonment for two years and six months if the minor was less than 12 years of age.

¹²²Ibid 18, the perpetrator is exposed to physical or moral abandonment of children defined in article (227.17) from the new French Penal Code, to imprisonment for a term of two years and a fine of € 30000.

¹²³The Algerian lawmaker had been punished for every form of abandonment of the family separately as what was already in the old French legislation, where the strafe on moral and material abandonment in detention from two months to one year and a fine of 25,000 to 100,000 DJ.

¹²⁴Tunisian legislation punishes the moral abandonment of imprisonment of three years and a fine of five hundred dinars, he emphasized the sentence to twelve years ' imprisonment if the neglect of child survival or disabled member.

¹²⁵Ibid 151.

¹²⁶The attempt of this offense can't be imagined; it's either occurred or not occurs, like any other omission.

¹²⁷Ibid 10.

¹²⁸Ibid 127.

¹²⁹ibid 15.

¹³⁰Ibid 11.

¹³¹The guarantor is a guarantor of debtor of alimony, so in case of refusal to perform alimony or insolvency of the sponsor the guarantor is obliged to pay on his behalf.

elements meet. As well as the legal provisions gave rise to some problems was addressing a number of issues.

It has been concluded that criminal protection contained in Jordanian legislation criminalizing non-payment of alimony, which is considered as a major gap in the Jordanian criminal code. This study has emerged with a wide series of recommendations summarized as follows:

1. Report of the special criminal protection for the family and the expansion of the criminal legislator to intervene, and punish on the omission of paying the financial obligations such as alimony in discharged and similar financial commitments, whether omission in face of his wife or parents or children.
2. Expansion the scope of protection to include all alimony, expenditure or any planned spending to support the family, including custody or feeding or housing. All expenditures or contributions or grants or financial assistance or any claims that might arise from one family obligations stipulated by law.
3. Expansion the scope of coverage of the protection to cover all eligible for alimony as assets or subsidiaries or spouse requesting alimony, which requires spending on by law.
4. The need for requiring judgment or judicially approved agreement alimony to the proven capacity of the convicted person to pay. Whether (permanently or temporarily), executable and informed to the person concerned. The judgment in the part as a source of obligation, it confirms the justness foundation of commitment to spending, with the need for authentic equality between judgment and judicial Convention.
5. Criminalization the debtor of marital commitment from abstentions for informing about changing residence within a month of that change, as an attached offense.
6. Requirement of a period for two months to refrain from paying alimony, as by intransigence and insistence found with the accused.
7. Not to require advance payment alert.
8. Not considering subsequent payment as an objection to punishment.

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