

Study on the Illegality of Marital Rape

—Based on the Consideration of Cohabitation Rights and Obligations

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Abstract: The second nature of criminal law (sekundare-Natur) determines that the issue of "marital rape" is not only a question of criminal law, but also a problem of civil law. Regarding this issue, the focus of debates on various theories comes down to the cohabitation right. Only by analyzing the right of conjugal cohabitation and its legal attributes can we logically accomplish the basic rechtfertigung of the illegality of marital rape behaviors.

1. Introduction

The issue of "marital rape" has become the focus of debates in academic circles in recent years, and it is very rare that a series of marital rape cases has different judgement results entered into such a large scope from guilty to not guilty and to even other convictions. Therefore, a comprehensive review of legal evaluation of the "marital rape" issue has become an urgent need for the current theory and the judiciary. It should be noted that the marital rape behavior discussed in this article is the narrowest form, that is, the subject of the act is the husband with no accomplices, and the object of the act is the wife with no object recognition mistakes.

2. Illegality of Marital Rape

At present, there are opinions on the criminalization of marital rape in the academic community. Therefore, many scholars try to elaborate their views from the perspectives of sociology, history, and jurisprudence to verify the illegality of marital rape. In fact, to the problem that whether marital rape behaviors can be criminalized, the first issue should be resolved is whether the marital rape act is illegal, that is, whether the husband has the right to forcibly engage in sexual intercourse with the wife under conjugal relationship. For example, some scholars believe that marriage is a promise made by the husband and the wife to each other during the entire existence of the marriage, and the husband does not need to ask for the wife's consent before each sex. Although the husband's mandatory sexual intercourse violates the will of the wife, it is not illegal.^[1] Prof. Ji Xiangde proposed that although marriage means sexual rights and performance of sexual obligations are proper, the sex life of the husband or the wife is voluntary, not coercive. Sexual rights and sexual obligations can lead to "sexual defaults", but do not necessarily lead to "sexual violence".^[2] However, neither of the proposals, which actually based on the height of the legislation theory and creates new concepts to evaluate behaviors, has returned to the origin of the problem or answered to the root cause of the illegality of the act, and is deficient in rationalize the violation of the act within the framework of the current law.

In fact, although marital rape is usually used as a criminal law research topic, the solution to this problem needs the help of civil law. As Professor Otaki Toru said, unlike other department laws, the criminal law has a second nature (sekundare-Natur). The judgment of whether an act constitutes a crime cannot be viewed from the surface only to see if the act conforms to the criminal constitution of the criminal law. Instead, it should use the common ground and convergence of the criminal law and other department laws to gain a full and profound interpretation of the legal evaluation of the act. Therefore, in terms of the same kind of objects of personal rights, the criminal law punishes an

illegal act that is seriously violate civil rights. There is not much controversy that the legal benefits of marital rape behaviors infringe women's sexual autonomy.^[3] What needs to be explored is whether marital rape is illegal. The focus of debates is whether the husband has the right—the right here refers the right of cohabitation in private law—to forcibly engage in sexual intercourse with the wife in marital relationship. In other words, the cause of the problem is whether or not the right of cohabitation can be used as the elimination of illegality of marital rape. Therefore, only by clarifying the right of cohabitation and its legal attributes can it be logically reasonable to prove whether marital rape is illegal.

3. Analysis of Legal Attributes of Cohabitation Rights and Obligations

Cohabitation is divided into marriage cohabitation and unmarried cohabitation. The occurrence of cohabitation rights is marked by the effective establishment of a marriage relationship.^[4] The right of cohabitation is the right that one spouse requires the other to live together during the existence of the marriage relationship with the spousal sex life as the primary content. The cohabitation right is a right of both spouses and a statutory duty of both parties, which has the integrity of rights and obligations.^[5] Therefore, cohabitation rights are also called cohabitation obligations. Therefore, during existence of marriage relationship, the couple enjoys the right of cohabitation and also has the obligation of cohabitation.^[6]

According to the above, many scholars who hold negative opinions on marital rape believe that since the spouse enjoys the right of cohabitation and the sexual life is the primary content of cohabitation rights during the existence of marriage relationship, the husband's forced sexual intercourse with his wife is the practice of the right of cohabitation, and the wife's unwillingness to engage in sexual acts is actually a violation of cohabitation obligations. Therefore, the husband's behavior is not illegal and dose not need to bear any responsibility, and the act that the wife reports the husband's marital rape is ridiculous.^[7] In fact, this kind of view is a misinterpretation of the right of cohabitation. The analysis of whether cohabitation rights can be used as the elimination of illegality can not be judged only by the surface meaning. Only by analyzing the legal attributes of cohabitation rights can we draw the conclusion.

In ancient societies, laws mostly adopted personality absorptionism. Women did not have independent legal personality. Whether being a father's daughter or a husband's wife, women were regarded as their "private property".^[8] The rights between spouses belong to the exclusive right of dominion and are expressed as the husband's personal control of the wife. For example, in Roman times, the identity order of family members was centered on the father. The father had supreme fatherhood rights of his family, and he could even have the right to kill family members.^[9] The wife and other family members had no independent personality. Married women belonged to the husband, and the husband's rights belonged to the fatherhood rights. Marriage to women is actually the derivation from their original family to the husband's family and obeyed the new fatherhood rights.^[10] In the ensuing early capitalist legislation, the provisions on cohabitation of the husband and the wife still bear the obvious color of discrimination against women. Based on women's physical dependence of the husband, some countries stipulate that cohabitation is the unilateral obligation of the wife, and the husband only has the obligation of making the wife live with him. For example, Article 214 of the French Civil Code of 1804 stipulates that "the wife shall bear the obligation of cohabitation with the husband" and "the husband shall accept and admit his wife." The Japan Civil Code of 1898 stipulates: "The wife bears the obligation to cohabit with the husband. The husband shall allow the wife to live with him."^[11] With the development of feminism and the improvement of women's social status, many countries and regions have revised the marriage legislation one after another since the 1940s, and the provisions for cohabitation between the husband and the wife have become more and more equal. For example, Article 215 of the amended French Civil Code of 1970 stipulates: "Living together is the obligation of both spouses."^[12] Article 752 of the revised Janpan Civil Code of 1974 stipulates: "Spouses shall cohabit, help and assist each other."^[13]

Through the above legislative analysis of the cohabitation rights and obligations, it turns out that

the legislative trend of the world today is from the original exclusion of women's independent personality to the wife's unilateral commitment to cohabitation, and then to women's share of the enjoyment of the cohabitation rights with the husband. The right of cohabitation is not the unilateral right of the husband as considered in traditional law and ideology, but should be the right of both spouses. As Justice Kings of the Supreme Court of the United Kingdom puts it: "In modern society, the wife's sexual relationship with her spouse should be transformed from a sexual slave who is destined to the husband to an equal role of the sexual partner."^[14] In this regard, the academic community has basically reached a consensus, but there is still a lot of disagreement about legal attributes of rights between spouses.

The right of cohabitation is derivated from spouse rights which are typical identity rights. There is not much discussion directly on the attributes of cohabitation rights in the academic community, and most of debates rely on the argumentation of spouse rights or identity rights. Based on the inequality of traditional right of dominion, some scholars have suggested that identity rights are similar to property rights which exclusive and dominating. In marriage relationship, it is not the husband's unilateral domination to the wife, but the mutual domination of both spouses.^[15] This point of view is debatable. The dominance of identity is different from the control of things. If personal rights become objects of materialization, it means that one spouse can arbitrarily use the other's body or even limit the other's personal freedom to achieve one's own purposes without the consent of the other. Moreover, there is a logical problem that cannot be solved: if the husband is controlling his wife and at the meantime the wife is also controlling the husband, is that still "dominion"? In fact, recognition of the dominance of the human body still does not break out of the barriers of personal attachments. It does not conform to the universal values of the society and is contrary to the basic spirits and principles of modern laws.

4. Conclusion

The above debate on spouse rights or identity rights indirectly reflects the academic attitudes toward cohabitation rights. Regardless of the attributes of the spouse's rights, the property of cohabitation rights should be the right of claim rather than the right of dominion. First of all, as mentioned above, in the spirits and principles of modern civilized society and laws, no one's human body can be the object under others' control. Everyone is an independent individual with an independent personality, and is not the subject under the control of anyone. Secondly, the equality of the civil subject in marriage relationship which as a civil legal relationship determines that neither of spouses can enforce the violence on the ground that one party fails to perform the obligations. Establishing on the basis of the right of equality, sexual rights exclude any party from using violence to realize the possibility of sexual rights.^[16] In addition, as far as the content of cohabitation obligations is concerned, it is the obligation of both the husband and the wife to cooperate and support each other. The fulfillment of the cohabitation obligation of both parties must be treated equally with mutual respect, consensus, and true expression of will. One party of the couple cannot ask the other to cohabit by means of violence or coercion. Furthermore, in terms of the respective rights of spouses, marriage does not mean the loss of personal rights, and a marriage certificate cannot be seen as an exemption license for the husband's rape of the wife. Marriage is not a grave for sexual autonomy. Both the husband and the wife have the right of sexual autonomy. Although the marital relationship restricts the free choice of spouses, it does not limit one's right to sexual relation in accordance with their wishes.^[17] The restriction of freedom of choice here comes from the fidelity obligation between husband and wife. Sexual autonomy belongs to the category of personality rights and has the nature of dominion. The demand of the subject of rights must be relied on the right of claim, including that the right of the husband which based on the cohabitation shall rely on the right of claim.^[18]

In summary, the rights and obligations of cohabitation between the husband and the wife are actually the rights for both spouses rather than the right of dominion of the other's sex. If one of spouses requests the other to perform a specific identity act (cohabitation behavior) without the other spouse's agreement and forcibly engages in sexual intercourse, it is an infringement of the

other's sexual autonomy (legal interests). Therefore, marital rape is illegal, and the right of cohabitation between the husband and the wife is not the elimination of illegality.

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