

Dispute of the Illegality of Marital Rape under Chinese Law

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Abstract: Marital rape is a prevalent form of sexual violence that exists worldwide. Due to its occurrence within the context of marriage, it possesses certain nuances, leading to ongoing debates on whether it should be considered a crime or not. In comparative law, many countries have already included marital rape within their legal systems for assessment and evaluation. However, China still lacks legislation addressing this issue, resulting in inconsistent verdicts for similar cases. In light of the development history of marital rape in comparative law, the current focus of the academic community in China revolves around the points of contention and the study of typical cases. This article posits that although entering into a marital relationship confers certain status upon women, the protection of women's sexual autonomy remains indispensable, and the sexual autonomy of married women should still be considered within the framework of criminal law. Nevertheless, given the distinctive characteristics of the marital relationship, it is necessary to devise new regulations for the recognition and application of marital rape.

Keywords: Sexual Autonomy, Criminalization, Marital rape

1. Introduction

The term "marital rape" is used to describe the act of a husband engaging in sexual intercourse with his wife against her will, through the use of violence, coercion, or other means, during the existence of their marriage. Marital rape represents one of the most serious forms of violence in intimate relationships. Women who are raped by their husbands are likely to suffer multiple attacks and often experience severe long-term physical and emotional harm [1].

As research indicates, marital rape is a common phenomenon in China and other countries. Estimates published by the World Health Organization (WHO) indicate that globally, approximately one in three women (30%) have experienced marital rape. It is estimated that one-third of women worldwide have experienced physical and/or sexual intimate partner violence or non-partner sexual violence at some point in their lives. In a global survey of women aged 15-49 years who have been in a relationship, 27% reported that they had been subjected to some form of physical and/or sexual violence by their intimate partner [2]. Despite the prevalence of marital rape in China, it has been largely overlooked.

From a comparative law perspective, an increasing number of countries are gradually including marital rape in the scope of criminal law evaluation. In 1975, the German Criminal Code Article 177 defined "forcing a woman to engage in extramarital sexual intercourse with oneself or others by means of violence or coercion" as rape, expressly denying the criminalisation of marital rape.

Nevertheless, the German Criminal Code Article 177 was amended in 1998 to state that "threatening others to tolerate sexual acts against themselves or a third party, or to commit sexual acts against themselves or a third party," explicitly incorporating excluded marital rape acts into the evaluation system of rape. Taiwan previously defined rape as sexual intercourse by a man outside of marriage. However, Article 229 of the "Crime of Sexual Autonomy Interference," enacted on March 30, 1999, stipulates that rape may also occur within marriage, albeit as a crime of private prosecution (Antragsdelikt). In France, Articles 222 to 223 of the Penal Code in 1994 state that "any act of sexual penetration using violence, coercion, threat, or in circumstances where the victim is unable to provide consent, regardless of its nature, constitutes rape," and specifically excludes "spousal exemption."

In addition, countries such as Italy, Sweden, Denmark, Norway, etc., recognize that a husband can be charged with rape against his wife. The emergence of new social issues drives changes in the legal system, and changes in the legal system reflect changes in societal views. It can be seen that after World War II, with the rise of human rights movements, the awakening of women's rights consciousness, and the development of egalitarian ideas, marital sexual violence by husbands gradually triggered societal discontent and attention.

Although an increasing number of countries are gradually incorporating marital rape into their legal frameworks, there is still debate in academia regarding whether husbands can be considered the perpetrators of marital rape in China. Overall, China's regulations on marital rape are not comprehensive enough. For example, in the case of Wang's rape, despite the perpetrator Wang being convicted of rape for having non-consensual sex with the victim Qian while their divorce was not yet finalized, he was only sentenced to three years in prison with a three-year suspension of sentence. In the case of Bai Junfeng, the perpetrator's rape act resulted in the victim experiencing convulsions and losing consciousness. However, this did not constitute rape because the marriage was still valid. This is evidence of the lack of specific provisions on marital rape in criminal law and judicial interpretations, which can result in situations of "different verdicts for similar cases" in judicial practice.

2. Divergent Views

At present, there are three theories in China on the crime and non-crime of marital rape.

2.1. Positive Theory

It is affirmed that, during the course of marriage, as long as the husband satisfies the constitutive elements of the crime of rape of "rape of a woman against her will, by violence, coercion or other means", he can be convicted and sentenced for marital rape in accordance with the Criminal Law and relevant judicial interpretations.

There are two reasons for this. First, the subject of the crime of rape is a general subject, and as long as he is at least 14 years old, he can be held criminally responsible for the crime of rape. In the context of a marital relationship, the husband can be considered the corresponding subject. Secondly, Article 236 of the Criminal Law of the People's Republic of China does not explicitly stipulate that the husband cannot be considered the subject of the crime of rape. Consequently, marital rape constitutes an obstacle to the crime of rape and is not guilty of the law. This interpretation is merely an assessment of the guilt of marital rape in the light of the context.

This viewpoint has a broad definition when it comes to the determination of marital rape, and as a result, some scholars have a limited acceptance of it.

(1) Time restriction argument. Scholars who hold this viewpoint believe that marital rape can only be considered as a crime if it occurs within a specific time frame. This includes situations where spouses are living apart for an extended period of time, or when a divorce has been granted in the

first instance but is still pending appeal and has not yet taken effect [3]. Third, although both parties have completed the marriage registration procedures, they have not actually lived together, and the woman has filed for divorce.

(2) The certainty of the situation is affirmed. Scholars who hold this viewpoint believe that marital rape should be determined based on the social danger of the behavior. Actions with low social danger do not constitute rape, while situations with higher social danger may constitute rape [4].

This article's point of departure is not limited to the two reasons given in the affirmative statement. Merely explaining the stance based on the literal meaning of the text is not persuasive enough when the simple semantic analysis reveals that the meaning of the legal provision is clearly inconsistent with its purpose. Therefore, for affirmations, there should be a more comprehensive path of explanation and perspective.

2.2. Negative Theory

The negative argument is that rape does not or cannot occur during marriage. It is held that in a legally valid marriage, there is no wrongfulness in any form of sexual relations between the parties.

One is to start from semantics. In the Chinese context, rape has a double meaning. The first meaning is compulsive. And the second meaning is adulterous. Adultery refers specifically to a spouse having sexual intercourse with a person other than his or her spouse [5]. Therefore, for the literal interpretation, the husband cannot constitute the subject of the crime of rape. The second is to proceed from the identity and validity of the marital relationship. The negative theory holds that once the parties have confirmed a legal and valid marital relationship, it is lawful to engage in sexual acts. Husbands have the right to request sexual intercourse from their wives, and wives have the obligation to engage in sexual activities with their husbands in response to their requests [6]. The Civil Code of China does not explicitly stipulate that the identity and validity of the relationship between husband and wife include the right and obligation to engage in sexual acts. Consequently, there are various sources from which such requests originate. Some scholars posit that spousal rights derived from marital relations are based on spousal rights. This implies that the husband has the right to request his wife to fulfill her sexual obligations, while the wife has the obligation to respond and has no right to refuse. Other scholars argue that it originates from the obligation of cohabitation between husband and wife. Finally, some scholars propose that it stems from the constitutional obligation of husband and wife to have family planning. Thirdly, it is posited that the social harm of marital rape is less than that of ordinary rape, and thus it is inappropriate to evaluate the act of forcible sexual intercourse within marriage as the crime of rape. Fourthly, it is extremely challenging to prove marital rape, and it is almost impossible to collect evidence.

2.3. Compromise Theory

The compromise theory posits that both affirmative and negative theories are inherently one-sided. On the one hand, the provisions of criminal law create a real possibility of marital rape. On the other hand, the circumstances of marital rape are distinct from those of ordinary rape, and the two cannot be considered equivalent. However, it cannot be considered that marriage is identical to sexual relations. Furthermore, it cannot be assumed that, at the same time as the marriage is contracted, the husband can obtain immunity from the crime of rape on the basis of spousal rights and may have sexual intercourse with his wife in any way he chooses.

In summary, the compromise theory divides marital rape into two situations. First, during the normal existence of the marriage, it is considered not to constitute a crime. Secondly, the crime of rape may be constituted during the period of abnormal existence of the marriage. This may occur in two ways:

(1) Despite the couple having boarded a plane to get married, they have no feelings for each other and live together in a superior position. Furthermore, they have not had sexual relations. The woman then insists on a divorce and the man rapes her.

(2) The relationship between the husband and wife has broken down and the husband has been separated for a long time and rapes.

3. Position and Reasons

3.1. Legal Interests of Marital Rape

Firstly, the establishment of a crime for marital rape should be based on a clear understanding of the legal interests violated by such acts.

According to the prevailing theories in Chinese criminal law jurisprudence, it is recognized that the crime of rape protects the right of women to make decisions about their own sexual conduct [7].

It can be argued that women have the right to engage in sexual intercourse with others and to refuse sexual requests from others. Consequently, due to the inherent relationship within marital rape, the protection of legal interests is limited to the wife's freedom to engage in consensual sexual activity within a valid and lawful marital relationship.

3.2. Protection of Women's Right to Make Their Own Sexual Decisions

At present, when China's Criminal Law and judicial interpretations do not clearly define the crime of rape, judicial practice often holds that the husband is not guilty of rape during the normal existence of the marriage and can only make a limited determination of guilt for the rape that occurred during the abnormal existence of the marriage. Human sexuality is deeply influenced by society, and people's sexual orientation, sexual behavior, and sexual attitudes are all the result of social construction [8]. It is believed that this view is clearly influenced by the long-standing idea of "male superiority and inferiority of women". The essence of love is a kind of contract, and the legal status of both parties to the contract is equal in the civil law, and it is clearly stipulated in the Constitution of our country that men and women are equal, so if the crime of marital rape is evaluated strictly according to whether the "state of marriage exists" is normal or not, I am afraid that it will be biased in value advocacy.

Some scholars believe that if the scope of marital rape is included in the evaluation of the crime of rape, it is not conducive to maintaining the stability of the family and even the stability of society. But marital rape itself undermines the stability of the family and even society. One of the reasons why the marriage rate is so low today is that contemporary young people are afraid of marriage and have a sense of meaninglessness. Does the inability to evaluate the crime of rape that occurs during a seemingly normal marriage exacerbate the development of such fears? If no one gets married, I am afraid that it will be even more impossible to "maintain" the stability of the family and even the stability of the society. To sacrifice women's rights to ensure the stability of the family and even society is a departure from the principle of equality.

The above-mentioned cases of Wang and Bai both occurred during what is known as an abnormal continuation period of marriage. This definition clearly falls short in terms of protecting women's right to decide their own sexual behavior. Regardless of whether the marriage is continuing normally, any act of sexual intercourse that violates a woman's will already infringes upon her sexual autonomy. This legal interest has been affirmed by the Criminal Law and should be adequately protected.

3.3. Perspective of Marriage Law

Women still have the right to make autonomous decisions about their sexuality within the context of marital relationships. Some scholars who hold a negative view argue that the obligation to engage in sexual relations is one of the specific obligations that come with cohabitation between spouses. As the wife has the duty to engage in sexual relations with her husband, he therefore has the right to demand sexual relations from his wife. However, not all obligations within the context of cohabitation are legal obligations [9]. If legislators were to elevate moral obligations within cohabitation to a legislative level, and explicitly establish the legal consequences for violations of cohabitation obligations and the responsibilities that one spouse should bear, only then would such obligations transcend moral obligations and become legal obligations. The Civil Code does not explicitly specify the legal consequences of abstaining from engaging in sexual activity with one's spouse. Therefore, the so-called right of a husband to engage in sexual relations with his wife does not constitute a legal right.

In addition, a woman's right to make decisions about her own sexuality is a personal right that belongs to her, which should take precedence over marital rights within the context of marriage and family. Human rights should always be prioritized over spousal rights. However, emphasizing only personal rights and marital rights cannot fully resolve conflicts between these two rights. As sexual activity remains an important foundation of marriage, in cases where personal rights are violated through marital rape, it is important to provide full remedies for personal rights while also allowing for a peaceful and effective resolution through the legal recourse of divorce. At its essence, if one party consistently refuses to engage in sexual activity with the other party, and the spouses cannot come to a mutual agreement, it fundamentally undermines the emotional foundation of the marriage. The occurrence of marital rape shatters the emotional foundation, making it impossible for the spouses to achieve the goal of long-term shared life. Therefore, through this balanced approach, it ensures the protection of the wife's personal rights while also respecting the equal rights and responsibilities of both parties in the marital relationship.

4. Improvement of the Legal Regulation of Marital Rape

4.1. Inclusion of Marital Rape in the Offense of Rape

In accordance with the views discussed earlier, the author believes that the situation of marital rape should be included in the provisions of the offense of rape. Some scholars argue that marital rape should be separately classified as a crime of marital rape outside the existing offense of rape. Although marital rape has its own unique characteristics compared to general rape, the legal interests violated by it are still the same as those in general rape. Therefore, the author believes that there is no need to create a separate crime, but rather to make specific provisions for the situation of marital rape within the offense of rape.

4.2. Substantive Determination of Abnormal Coexistence Period within Marriage

Currently, in terms of abnormal coexistence period within marriage, our country's judicial practice has identified three situations: both parties are living separately; both parties did not cohabit after registering for marriage; both parties are in the process of divorce litigation. This can to a certain extent protect the legitimate rights and interests of women in marriage, but the current level of protection is not sufficient. The author believes that there should be a substantive determination of the concept of abnormal coexistence period within marriage.

For example, the new forms of domestic violence that currently exist. During the existence of marriage, if the husband uses mental violence against the wife for a long time, causing the wife to be

unable to resist, it should also be considered as an abnormal period of marriage existence. Instead of judging based on the standard of long-term severe physical violence.

4.3. The Establishment of Marital Rape as a Private Prosecution

The basis of marital rape is not an ordinary social relationship, but the existence of a marital relationship. In this kind of relationship, the emotional factors between the two parties are often difficult for outsiders to measure. In traditional thinking, it is believed that "family problems should not be made public", so if the judicial authorities intervene forcibly in cases of marital rape, it may violate the will of both parties in the marital relationship. However, at this time, the setting of private prosecution should be established as impure private prosecution. In cases where serious consequences such as serious injuries or death to the victim are caused, the judicial authorities should exclude the victim's will from direct intervention. On the one hand, this can guarantee that women's rights are timely redressed, and on the other hand, it can leave room for the reconciliation of the marital relationship, giving women the initiative to repair the relationship or choose the initiative to seek protection, and also save judicial resources [10].

5. Conclusion

Marital rape, as a long-standing phenomenon of inequality, has only recently sparked discussion and attention. Essentially, marital rape shares the general characteristics of rape, but its unique nature arises from the continuation of the marital relationship. This article primarily elaborates on the divergent views regarding the criminalization of marital rape, typical cases, and the reasons for establishing the crime of marital rape. Furthermore, it proposes a path for the improvement of legal regulation on marital rape. The definition of marital rape not only requires consideration of the rights and interests of the victims but also takes into account the essence of marital relationships and societal values. The inclusion of marital rape in the criminal law evaluation system not only helps safeguard women's rights but also aligns with the requirement of gender equality.

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