

# The Crime of Sexual Assault of Persons with Care Duties from The Perspective of Legal Doctrine in China

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**Abstract:** From the perspective of legal doctrine, whether the perpetrator constitutes this crime should be judged strictly from the legal right protected by this crime. The sexual assault by person with care duties protects the right to sexual autonomy and the right to physical health of minor females aged 14 to 16 under care, rather than simply assuming that a person with care responsibilities constitutes this crime as long as he has sexual relations with a female under care. "Sexual relations" is an inherent expression of Chinese law, the scope of which must be determined not only according to the law but also according to the level of social development. In addition, the act of indecent assault should also be included in the scope of sexual relations. This crime is a pure identity offense, in which the perpetrator must formally have special care duties and substantially use the advantageous position arising from the special duties to have sexual relations with a minor female between the ages of 14 and 16. In the situation that the perpetrator is mistaken, the victim's age and the will of the perpetrator must be accurately determined in order to properly convict and punish.

**Keywords:** *Sexual Assault by Person with Care Responsibilities; Rights protected by law; Objective aspects; Subject; Age error*

## 1. Problem statement

A sexual assault case in 2020 has caused great repercussions in the society. Although it is impossible to identify suspect as a sexual assault crime due to insufficient evidence available, the social reality and legislative loopholes revealed in this case have attracted the attention of the legislature. In order to effectively deal with the disputes on criminal imputation caused by social issues, further improve the protection system of the sexual rights of underage women, filling the legal gap, and make up for the legal loopholes in which the perpetrator sexually assaults underage women who have reached the age of 14 and under the age of 16 without using violence and coercion, but it is difficult to be investigated for criminal responsibility, the

Criminal Law Amendment (11) of People Republic of China added the crime of "sexual assault by persons with care responsibility", and included such sexual assault with special personal relationship characteristics into the scope of criminal law regulation.

With the formal establishment of this crime, the theoretical problems related to it inevitably appear in front of legal workers. According to the specific constituent elements of this crime, how to correctly deal with crime and non-crime, and the distinction between this crime and the other crimes in judicial practice affects the appropriateness of conviction and sentencing of suspect. Therefore, in the context of seeking judicial response to social issues and judicial staff seeking the basis for law enforcement, it is extremely urgent to study and define the criminal constitution of this crime.

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## **2. Legal right protected by the sexual assault by person with care responsibility**

The legal right is the object of the crime, and the theorists have many different views on the protection of the legal right of this crime. Among them, Li Lizhong, Zhang Yong and other scholars hold the view that the legal right protected by this crime is a single legal right, which can be divided into the theory of sexual autonomy and the theory of the right to physical and mental health according to the different emphasis.

### **2.1 Academic theoretical viewpoints**

The main view in the academic circle that the protected legal right of the sexual assault crime committed by the person with care duties is a single legal right. However, there are two views about this single legal right. Li Lizhong [1] believe that "the protection legal right of this crime is the sexual autonomy of underage women aged 14 to 16". They believe that sexual autonomy is the general protected legal right of sexual crimes in China, and the sexual autonomy of underage women aged 14 to 16 will be affected in specific relationships. That is to say, because of the special relationship between the two parties, even if the underage women aged 14 to 16 have made an objective commitment to consent to sexual relations, such commitment can hardly be said to be their true meaning because of the influence of the special relationship. They may worry that if they do not agree, the other party will not perform the relevant care responsibilities and thus have a significant impact on their own lives. Therefore, the consent made based on the impact of special relationship is a kind of non-positive consent. Zhang Xinrui and Chen Hongbing [2] believe that "this crime actually infringes the right to healthy development of underage women aged 14 to 16". They believe that more emphasis should be placed on judging the physical and mental health of minors from the objective level, whether they have been violated due to sexual relations, rather than on judging whether the occurrence of sexual relations violates the wishes of underage women aged 14 to 16 according to the sexual autonomy theory.

### **2.2 Author's view**

As Zhang Mingkai [3] said: To explore the legal right protected by this crime from a substantive perspective, the answer is often closer to the legislative purpose added by this crime." The concept of substantive legal right includes two aspects, negative standard and positive standard. The negative standard requires the legislature to abolish crimes that do not protect legal right, while the positive standard requires the legislature to add new charges to protect legal right". The addition of this crime is the content of the positive standard in the concept of substantive legal interest. According to this, the author believes that the protected legal right of this crime is a complex object, that is, the right

of sexual autonomy and the right of physical and mental health of underage women.

The crime of sexual assault by persons with care duties is second article of rape in the criminal law, which is subordinate to the framework of punishment of sexual crimes in China. Based on the position of the crime in the provisions of the criminal law, it can be seen that the protected legal right of this crime is the general protection of the legal right of the sex crime, which is the women's right of sexual autonomy. Jia Jian [4] said: the right of sexual autonomy can be divided into sexual autonomy and sexual self-determination. The former is the substantive 'consent', while the latter is the pre-emptive 'consent' right. In summary, one of the protection legal rights of this crime is the right of sexual autonomy of the minors aged 14-16 to decide whether to agree to have a relationship with others, how to have a relationship, and when to have a relationship. Another legal right is the exclusive right to physical and mental health of underage women aged 14 to 16. According to the textual interpretation, the right to physical and mental health can be divided into the right to physical health and the right to mental health. The right to physical health refers to the right of underage women to ask the person who has the responsibility of care to protect their body from infringement." As Wang Linhong [5] Stated: the adolescent women are still in the puberty development period, their own protection mechanism has not been fully established, all potential risks of sexual behavior are easily magnified in the adolescent women, increasing the possibility of harm to their bodies. The right to mental health refers to the right of the adolescent women to ask the person responsible for care to care about their mental health, and desire for bright development. Once sexual abuse leaves traces in the psychology of underage women, on the one hand, it will damage their physical and mental health, and in serious cases, it will cause psychological distortion, on the other hand, it will cause underage women to lose their trust in persons responsible for care and even the whole society.

## **3. Definition of the objective aspect of the sexual assault by person with care responsibility**

The objective aspect of this crime is expressed as "sexual relations" in the law, but the scope of the meaning of sexual relations is not clearly defined in Chinese law, and it is also difficult to determine the general concept of society. Therefore, the scope of the sexual relationship plays a vital role in the conviction and sentencing of this crime.

### **3.1 The scope of behavior of "having sex"**

The legal concept of "having sexual relations" first appeared in the "Decision of the Standing Committee of the National People's Congress on the Severe Punishment of Criminals Who Abduct, Sell and Kidnap Women and Children" issued by the Standing Committee of the National

People's Congress in 1991. Since then, the Supreme Court and the Supreme People's Procuratorate have determined in the supporting judicial interpretation that in the process of being abducted and trafficked, even if the suspect did not use violence and coercion, even if the injured women did not resist, as long as both parties had sex, the suspect should be found guilty of rape. In the process of being abducted and trafficked, since the victim is already under the control of the suspect, in this case, the victim's forced acceptance and seeking self-insurance should not be considered as voluntary. From the above-mentioned Decision and judicial interpretation, it can be seen that sexual relations do not necessarily involve violence and coercion, and victims do not necessarily need to resist. The scope of "sexual behavior" should be comprehensively judged according to the situation of the victim at the time of the crime, social reality and other factors.

From a worldwide perspective, the term "sexual relations" first appeared in countries such as the United Kingdom and the United States, and then gradually extended to other regions. Toshiji Kato [6] said: The legislators of Japan's Criminal Code believes that anal sex, oral sex and adultery have the same legal right infringement in law, so the punishment of rape in Japanese criminal law is no longer limited to rape. Article 184 h of the German Criminal Code stipulates that "sexual acts only refer to sexual acts that have a significant impact on the protected legal rights. Wang Huanting [7] stated that the scope of sexual assault of the criminal law in Taiwan refers to the following invasive acts not based on a legitimate purpose: first, the act of entering another person's sexual organs, anus or oral cavity with sexual organs; second, the act of entering another person's sexual organs, anus with other body parts or objects other than sexual organs."

Some scholars will think that China society's understanding of sexual relations has not reached the same level as several foreign countries like American and British, so this article will take an example to prove that there is no big gap between China society's understanding of sexual relations and foreign countries.

In 2003, the perpetrator Li Ning organized men to engage in same-sex transactions in Nanjing, and reported to the Standing Committee of the National People's Congress for instructions along the way "[8]. Finally, the special committee under the Standing Committee of the National People's Congress heard the report of the case and made an oral explanation, and determined that the case constituted the crime of organized prostitution." This case caused people to reflect on the understanding of the crime of organized prostitution in China, it also triggered the public to rethink the organization of prostitution. In the past, our understanding of prostitution was limited to commercial sexual transactions between women and non-specified men. After the case occurred in 2003, the understanding of prostitution in both theoretical and practical circles changed to the behavior of non-specified people and non-specified

people engaging in sexual transactions for the purpose of profit. Is this interpretation of prostitution against the principle of legality? Has it broken the general concept of the public? The author believes that the above explanation is a reasonable interpretation that conforms to the development of the times.

To sum up, this paper believes that the scope of sexual relations should include all kinds of sex-related behaviors for the purpose of meeting sexual needs.

### **3.2 Whether indecent behavior belongs to the objective aspect of this crime**

This crime belongs to Article 236 (Raping Charge) of the Criminal Law, which has caused many scholars to debate the objective behavior of this crime. Some scholars, such as Professor Li Lizhong believes that the objective behavior of the crime of sexual assault committed by persons with care duties should be consistent with the crime of rape, that is, to have sexual relations with underage women by means of violence, coercion or other means, and that the standard of accomplishment is the insertion theory. Another part of scholars, such as Chen Bo, believe that this crime is a supplement and improvement to the crime of sexual assault, and indecent behavior should also be an objective aspect of this crime. The author believes that the view that this crime is a supplement and improvement to the crime of sexual assault can better reflect the legislative purpose of this crime in the realistic context, for the following reasons:

According to the foregoing textual interpretation of the meaning of sexual assault, it can be concluded that sexual assault includes rape, indecent acts and all other acts that endanger women's right to sexual self-determination. Chen Bo [9] believed that "Whether the perpetrator commits adultery or indecency to the victim, it is an infringement to the victim. The inclusion of indecency in the objective aspect of sexual assault committed by persons with care duties will be more conducive to protecting the right of sexual autonomy and the right of physical and mental health of underage women aged 14 to 16". Only the adultery committed by persons with care duties will be punished, and their indecency will not be punished, this is not in line with the original purpose of this crime, that is, to protect underage women aged 14 to 16.

There will be doubts in the academic circles that including indecency into the objective aspect of this crime will expand the scope of criminal punishment, which is not conducive to protecting the legitimate rights and interests of suspect in judicial practice. However, in judicial practice, if this crime only includes adultery, the public security department may force the suspect to make a confession subjectively intended for adultery for the purpose of cracking down on the crime, which is not conducive to protecting the legitimate rights of suspect. At the same time, due to the misdemeanor attribute of this crime, if the indecent act is not included in the objective aspect of this crime, the perpetrator is likely to perform the indecent act

on the victim to avoid the felony, thus causing greater physical and psychological harm to the victim.

### **3.3 Serious consequences caused by the sexual assault by person with care responsibility**

The content of the legal provisions of this crime stipulates that "the situations are serious", but it does not specify the specific circumstances of "the situations are serious", nor does it issue relevant judicial interpretations to clarify them. This article believes that this crime is stipulated in Article 236 of the Criminal Law and belongs to the system of sexual crimes in China. Therefore, the interpretation of the bad plots of this crime should be combined with the crime of rape, forced indecency, insult and the bad plots specified in the Opinions on Sexual Abuse issued in 2013. The judgment of the seriousness of the sexual assault committed by the person with care duties should be based on the severity of the sexual assault on the underage female, the number of victims, injuries, serious consequences of death and other criminal facts that affect the constitution of the crime. Specifically, "bad plots" should include the following situations: (1) sexually assaulting more than one minor female; (2) Long-term sexual assault on the same minor female; (3) Sexually assaulting a minor female in public; (4) Two or more persons jointly commit sexual assault; (5) Causing minor injury or other serious consequences to the minor victim;

With regard to the third point, "sexually assaulting minors in public places" refers to public places, which only require places with the possibility of access by an unspecified number of people, regardless of whether the people present actually see it or not, and should include the residence of minors, student dormitory, campus, swimming pool, amusement park, etc.

With regard to the fourth point, in the case of joint crime, if every actor is a person who has the care duties for the victim, then everyone should be identified as a person who has the care responsibility for sexual assault. However, if only one of the multiple co-prisoners has special care duties for the victim, and there is no relationship between the other co-prisoners and the victim, the role of the person responsible for care in the crime should be judged separately. If the person responsible for care is the principal offender in the joint crime, and the other accomplices are coerced accomplices, helpers or abettors, all the accomplices shall be deemed to be guilty of sexual assault by the person with care responsibility, and each accomplice shall be deemed to be a joint crime within the scope of sexual assault. If the person responsible for care is an accomplice, coerced accomplice, helper or abettor, the case should be identified as rape or compulsory indecency, and each accomplice should establish an accomplice within the scope of rape or compulsory indecency. In this case, the person who has the care responsibility will be convicted and punished according to the principle of accomplice, and will no longer be separately identified as the crime of sexual assault by the person of care duties. In addition, if a minor

female who has reached the age of 14 but is under the age of 16 has sexual relations with several adults on the basis of subjective willingness at the same time latitude, the person who has the care duties of the minor female will be separately punished for the crime of sexual assault by the person with care duties. Since there is no caring relationship between other actors and underage women who have reached the age of 14 to 16, and the sexual relationship is voluntary behavior of underage women, other actors should be treated as innocent because they do not have objective illegality.

Fifth, how to understand "causing minor injury or other serious consequences to the victim". Although the crime of rape takes serious injury and death as the aggravating punishment, since the victims of this crime is the underage women aged 14 to 16, the principle of strict protection for underage women should be adhered to. As long as the perpetrator causes minor injury or more to the victim, the circumstances of this crime can be considered as bad, so as to better protect underage women. At the same time, the pregnancy, sexually transmitted diseases and suicide of the minor female victims can all be other serious consequences.

## **4. Identification of the subject of conduct**

This crime is a pure identity crime. Accurately judging whether the responsibility of the perpetrator is the care responsibility specified in the law is the prerequisite for judging whether the perpetrator can constitute this crime, and at the same time, judging whether the perpetrator has violated the sexual autonomy of minors by taking advantage of the special advantages brought by the care responsibility, so as to correctly convict and sentence the perpetrator.

### **4.1 Meaning and judgment standard of care duties**

According to the legal provisions, this crime is a real identity crime, that is, custody, adoption, care, education, medical treatment and other special duties are conviction status rather than sentencing status. If the actor does not have these special duties, it is impossible to constitute this crime in the case of a single principal offender. The specific meaning of guardianship, adoption, care, education and medical treatment stipulated in the law should be comprehensively recognized based on the Civil Code and other relevant laws such as the supporting judicial interpretation before the relevant judicial interpretation is issued, and in combination with general social concepts. As Zhang Mingkai [10] stated: Whether the facts of the case conform to these elements can be concluded only by general cognitive activities and basic comparative judgments".

The guardianship and adoption of this crime can be determined by referring to the relevant provisions of the Civil Code, but there has a large number of illegal adoptions in social life, are they the subject condition of this crime?

This article believes that adoption should not be rigidly judged only by the relevant provisions of civil law, but also by the general concept of social life. Illegal adoption is actually a kind of factual adoption, which does not meet the substantive adoption requirements or the formal adoption requirements specified in the relevant provisions. Although it does not meet the constitutive requirements of the law, the minor women who are adopted in fact need the protection of the criminal law even more. Even though the adoptive relationship between the adopter and the adoptee cannot be recognized and protected in the civil law, the trust relationship between the adoptive parents and the adopted children generated by the adoption in fact should be protected. At the same time, according to the relevant data, there are many cases of illegal adoption in the poorer and remote areas, which are also the areas with high incidence of sexual abuse cases. Therefore, the criminal law also needs to intervene in order to more fully protect the right of sexual autonomy and physical and mental health of minors in legal or de facto adoption.

The "care, education and medical treatment" stipulated in the law has no clear meaning and extension in law, but according to the interpretation rules of the same kind, it can be concluded that care, education and medical treatment should be equivalent and similar to guardianship and adoption. Zhang Yong [11] believed that only by establishing a personal dependency relationship of deep trust with minor women they can belong to the care, education and medical responsibilities stipulated in this law. The meaning of 'etc' stipulated in the law also requires deep dependence and deep personal trust to be included in the special duty of this crime". For example, person who are responsible for training and rescuing minor women, legal aid undertakers, judges and procurators in cases of sexual assault on minors can be included in the special duty of this crime.

#### 4.2 Whether special responsibilities are required

The Law do not contain such statements as "taking advantage of power and opportunity" or "taking advantage of the influence of being a guardian" as stipulated in the Japanese criminal law, but it cannot be considered as a crime as long as the perpetrator who has the responsibility of caring has sexual relations with a minor female. Fu Liqing[12] thinks the most important thing is to examine whether the perpetrator's sexual relationship with a minor female has taken advantage of its dominant position and violated the legal rights protected by this crime. In judicial practice, if we do not have a clear understanding of this issue, it will directly affect the principle of adaptation of crime, responsibility and punishment and the functioning of the penalty system. If a minor female admires the head teacher for a long time and strongly demands that the head teacher have sexual relations with her, and the two even develop to the point of marriage and forming a family in the future, it is obviously unreasonable to determine that the

head teacher constitutes the crime of sexual assault by the person with care responsibility, because the occurrence of the relationship between the head teacher and the minor female does not infringe on the sexual autonomy and the right of physical and mental health of the minor female, However, the rigid application of the law to identify as a crime will only expand the scope of punishment of the criminal law, and is not conducive to the realization of the criminal law's task of punishing crimes and protecting the people.

#### 4.3 Gender restriction of criminal subject

In the previous discussion on the scope of sexual assault, it can be concluded that all acts endangering women's sexual autonomy should include rape and indecency. As mentioned above, because indecent behavior is the objective aspect of this crime, in the case of a single principal offender, this crime is not the same as the crime of rape, but can only be constituted by men. If a woman commits indecent behavior alone, it can also constitute the crime of sexual assault by the person responsible for care.

### 5. Treatment method of age error of criminal object

There are four kinds of wrong understanding of the age of the criminal object of this crime:

(1) The perpetrator lured the victim to have sexual relations with himself under the false belief that the victim had reached the age of 14-16, but the actual age of the victim was less than 14. In this case, the crime that the actor wants to commit subjectively is the crime of sexual assault by the person responsible for care, while the actual crime is the crime of rape. One of its acts simultaneously violates the crime of sexual assault (attempted) and the crime of rape (accomplished) by the person responsible for care. Imagination is the same, so it is finally recognized as the crime of rape.

(2) The perpetrator lured the victim to have sexual relations with himself under the false belief that the victim was under 14 years old, but the actual age of the victim was only 14-16 years old. In this case, the crime that the actor wants to commit subjectively is rape, and has the intention of raping a young girl, which first constitutes rape (raping a young girl), but the objective object of sexual behavior is an underage woman aged 14 to 16, so the actor constitutes rape (attempted). At the same time, although the perpetrator had a wrong understanding of the age of the victim, when he knew that the victim was only a minor between 14 and 16 years old subjectively, he still objectively carried out the act of having sexual relations with the minors under care, which constituted the crime of sexual assault (accomplished) by the person responsible for care. According to the Guiding Opinions on the Sentencing of Common Crimes (for Trial Implementation) and the provisions of Article 236

of the Criminal Law, it can be concluded that in this case, the perpetrator should be punished with the crime of rape.

(3) The perpetrator lured the victim to have sexual relations with himself under the false belief that the victim was 16 years old, but the actual age of the victim was only 14-16 years old. Although the perpetrator has sexual relations with the underage female under care objectively, he has no criminal intention subjectively, so the perpetrator does not constitute a crime in this case.

(4) The perpetrator lured the victim to have sexual relations with himself under the condition that he mistakenly believed that the victim was 14-16 years old, but the actual age of the victim was more than 16 years old. Subjectively, the perpetrator wants to commit the crime of sexual assault by the person who has the responsibility of care, but because the victim has reached the age of 16 and has sexual relations with the person who has reached the age of 16, he is not guilty. Therefore, in this case, the behavior of the perpetrator should be assessed according to the subjective attempt theory, and the perpetrator should be punished as a sexual assault (attempted) by the person with care responsibility. If the act does not cause other serious consequences, the attempted offender may be given a lighter or mitigated punishment in comparison with the accomplished offender.

## 6. Conclusion

The introduction of this crime shows a great importance and necessity to improve the system of sexual crimes in China. This legislation strengthens the punishment of crimes against minors, respond to the legislative purpose of juvenile criminal law protection, which has become one of the core issues of criminal law in the new era in recent years, and also represent the transformation of the function of our criminal law from negative punishment to positive prevention. It is not comprehensive to simply think that as long as the person responsible for care has sexual relations with the underage women aged 14 to 16 who are under care will be determined as sexual assault. Such a practice will expand the scope of punishment in the criminal law, and may also infringe the legitimate rights and interests of underage women, which runs counter to the legislative purpose of this crime. What really needs to be examined is whether the sexual autonomy and the right to physical and mental health of underage women have been violated due to the behavior of the perpetrator requesting sexual relations. The interpretation of this crime from the perspective of legal doctrine can better help the judicial to solve the problem of conviction and sentencing of the perpetrator, and achieve the criminal law effect pursuit that the criminal responsibility and punishment are compatible.

At the same time, the protection of minors cannot rely solely on the criminal law. As the last flood dam, the criminal law can only be applied when it is unavoidable. The author thinks that the legislation should also focus on

other laws for the protection of minors. The Law on the Prevention of Juvenile Delinquency and the Law on the Protection of Minors promulgated in 2021 should also play a considerable role. Only by better improving the relevant laws of minors, taking these relevant laws as the pre-laws, and taking the criminal law as the final guarantee, the social will finally achieve the legislative purpose and value pursuit of protecting minors.

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