FEMINIST PERSPECTIVE TO TEENAGE RAPE
IN CHINESE CRIMINAL LAW

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Rape is a very serious offense in many jurisdictions for which potentially substantial prison sentences are either required or permitted. Many jurisdictions, by statute, interpretation, or in application — tend to emphasize either compulsion or lack of agreement in the rape crime. Chinese criminal law uses a similar approach to criminalize rape in article 236 by stating that whoever, by violence, coercion or other means, rapes a woman is to be sentenced to not less than three years and not more than 10 years of fixed-term imprisonment. Article 236(2) further states that whoever has sexual relations with a girl under the age of 14 is deemed to have committed rape and is given a heavier punishment. However, a judicial interpretation elaborating on this provision drew a huge amount of public debates in China, which has not stopped until recently. On January 17, 2003, The Supreme People’s Court issued a “Reply on the Question of Whether the Perpetrator will Commit a Crime of Rape if He has no Knowledge that the Girl is under the Age of 14 and had Sexual Intercourse with Consent.” According to the Judicial Interpretation, if a person has sexual intercourse with a girl with the knowledge that she is under the age of 14, he will be accused of rape in spite of consensual sex and he will be convicted according to article 236(2). If the person does not know the age of the girl and it is impossible to know it through her physical appearance, and if the circumstances are clearly minor and the harm is not serious, the person is not guilty of rape. When the Interpretation was issued, there had been a lot of serious debates and discussions among scholars. In fact, in early 1995, the Supreme People’s Court issued judicial interpretation decriminalizing consensual casual intercourse with a teenage girl, and another judicial interpretation in 2000 reaffirming that provision.
However, the 2003 Interpretation encountered huge criticism from social science scholars who regard the interpretation as a tolerance of rape, while the scholars of criminal justice supported the interpretation firmly by stating that criminal law should insist on the integrity of objective and subjective elements. According to criminal law scholars, the interpretation promoted the consummation of Chinese criminal law and the signal of Chinese criminal law walking towards the rule by law. Surprisingly, there is scarcely any literature available from Chinese feminists about this interpretation.

This paper reviews the interpretation and provisions in criminal law from a feminist perspective. The purpose of this article is not to offer new ideas for improving Chinese rape provisions, nor to criticize current criminal policies in regard to women. Reforms need to be grounded in accurate perceptions of social reality, including a realistic understanding of teenage sexuality under the backdrop of the current open society. Conversely, the aim of the paper is to lay a foundation for feminist discussion on reforms by reexamining the judicial interpretations in Chinese criminal law. This paper explores three problems: first, it looks at the regulations of teenage sexuality in Chinese law. It reviews interpretations of the Chinese Supreme Court with regard to rape, and analyzes several problems such as consensual sex, minor circumstance and no harm further. Secondly, it describes the integrity principle of object and subject in Chinese criminal law and shows fallacies of this principle by analyzing the criminal concepts in other related articles of Chinese Criminal Law. Finally, it argues the rape provisions in Chinese criminal law from feminist perspectives and suggests that the current interpretation on rape crime not only highlights the contradiction in Chinese criminal law, but also shows the confusion of Chinese criminal policies in regard to teenage sexuality.

1. Rape Crime in Chinese Criminal Law
Rape, as commonly defined, revolves around force and lack of consent in sexual intercourse. In Chinese criminal law, it is a crime of infringing upon the rights of the person and the democratic rights of citizens. The first criminal law promulgated in 1979 divided the rape crime into the crime of raping a woman and the crime of raping an underage girl. These crimes are formed only if a person raped a woman by violence, coercion, or other means, or has a sexual intercourse with an underage girl. According to this provision, although raping an adult woman requires the integrity of act and mental state, sexual intercourse with
an underage girl did not demand mental state or prerequisite knowledge. The crime of raping an underage girl is formed only if a person has sexual intercourse with an underage girl. In the twenty years since, Chinese criminal law avoided emphasizing the knowledge level in order not to stir up public anger, and did not require knowledge about the age of victim although it is one of the important factors in the process of adjudication on rape crime. Legislators also tried to avoid answering this problem directly. The second amendment of Chinese criminal law also kept the crime of raping underage girl in article 236(2). Before and after the second amendment of Chinese criminal law, the Supreme Court and Supreme Procuratorate issued legal interpretations on rape crime and interpreted the criminalization of sexual intercourse with an underage girl in 1984 and 2000 respectively. In these two explanations, law scholars explained the rape crime in Chinese criminal law as strict liability and advocated strict liability on the Chinese criminal law. In 2002, the crime of raping an underage girl was cancelled and it was put under the crime of rape. The current Chinese criminal law defines rape crime as (1) by violence, coercion or other means, rapes a woman, and (2) has sexual relations with a girl under the age of 14.

The second part of article 236 is concerned is a very ambiguous regulation since it does not elaborate on the required actus reus or mens rea of sexual relations with a girl under the age of 14. Law scholars interpret it either as deliberate or not deliberate while it is hard to judge the age of victim of the rape. That is why this article in criminal law did not attract much attention from the society or scholars until 2003, when the Supreme Court issued a reply to the letter of the Liaoning Higher Court. In the letter of Liaoning Higher Court, it said the victim was 15 years old, 1.65 high and 60.2 Kg heavy when the case happened. She talked with many men on the internet with the name of “crazy woman” and met with them outside, and had sexual relations with six of them. When the case came before local prosecutors, although they came to a consensus on the fact of raping underage girl, they could not come to a consensus on whether it amounted to a crime. They asked the Intermediate Court and the Intermediate Court faced the same problem, so it asked the Liaoning Higher Court. The Liaoning Higher Court could not decide whether to apply article 236(2) and wrote to the Supreme Court. On 17 January 2003, the Supreme People’s Court issued a “Reply on the Question of Whether the Perpetrator will Commit the Crime of Rape if He has no Knowledge of the Girl that she is under the Age of 14 and had a Sexual Intercourse with Her by Consent.”
(herein after Reply 2003). The judicial Interpretation formally elaborated on article 236 (2) for the first time. According to the judicial Interpretation if a person has sexual intercourse with a girl under the age of 14 with the knowledge that she is under the age of 14, he will be accused with the crime of rape, in spite of consensual sex, and he will be convicted according to article 236(2). If the person does not know the age of the girl and it is impossible to know it through her physical appearance, and if the circumstances are clearly minor and the harm is not serious, the person is not guilty of rape. After its release, the 2003 Reply drew serious debate in China's legal society. Criminal law scholars supported this interpretation firmly and advocated that it promotes the legal reform in criminal justice by establishing the position of the principle of subject-object integrity. But scholars from other humanities and jurisprudence objected to this explanation, stating that it only allows more raping of underage girls under the guise of no knowledge about the age of victim.

2. Crime Composition and Rape Crime
In Chinese criminal law, crime and crime composition are different concepts. Article 13 of Chinese criminal law defines crimes as "all acts that endanger the sovereignty, territorial integrity, and security of the state; split the state; subvert the political power of the people's democratic dictatorship and overthrow the socialist system; undermine social and economic order; violate property owned by the state or property collectively owned by the labouring masses; violate citizen's privately owned property; infringe upon citizen's rights of the person, democratic rights; and other acts that endanger society are crimes, if according to law they should be criminally punished. However, if the circumstances are clearly minor and the harm is not great, they are not to be deemed crimes." According to the enumeration, an act will be a crime if it endangers the society, violates criminal law and is punishable by criminal law. Chinese criminal law excludes minor offenses that do not harm society. Chinese criminal law further elaborates on the elements of crime composition. The essence of Chinese criminal law is the crime composition. Crime composition includes object, subject, objective and subjective elements. Subject and subjective elements include the natural and legal entity who posses the legal ability and mental state in committing a crime. Object and objective elements include criminal behavior and criminal result. A judge looks at the crime composition in adjudicating a case. Integrity of objective and subjective element is the
basis of crime. The principle of the integrity of objective and subjective elements means that the establishment of crime not only requires the person to commit an offense that threatens the social security objectively, and possess intentional and negligent purpose subjectively, but also requires the unity of objective content and subjective content of crime. An act is only a crime if a person conducts an act purposefully and his act endangers the social and personal interest objectively. If the person did not act purposefully, and there is no prerequisite knowledge about the object, he should not be responsible for the offense he committed.

According to this theory, criminal law scholars insist that if a person has no requisite knowledge about the age and mental/physical state of the girl being raped, and it is impossible to know from her appearance, he should not be convicted. Knowledge and behavior are the main factors in criminalizing such offenses. The 2003 Reply only clarified the principle further and established the position of the integrity of objective and subjective elements. It is wrong to convict a person when he has no knowledge about the age of the victim. In rape law, if a man is convicted for raping an underage girl when he has not inflicted upon her any harm, and it is consensual intercourse, it violates the rights of the man and contravenes the principles of Chinese criminal law. Some law scholars advocate strict liability by invoking product liability in Chinese criminal law, and claimed that consensual sexual intercourse with underage girl should be handled by adopting strict liability. However, other criminal law scholars insist on the impossibility of importing strict liability from common law to Chinese criminal law, and advocate that it is not proper and contravenes the Chinese criminal law to apply strict liability for the rape crime.

However, when we look further at the definition of crime and crime composition in Chinese criminal law and analyze the rape crime logically, we may find some logical contradiction which deserves notice.

First, if we look at the statutory and theoretical definition of crime in Chinese criminal law, we will find that Chinese criminal law enumerates several types of threats which endanger state, society and individual interests. As an exception, Chinese criminal law emphasizes that “if the circumstance is minor and harm is not grave, it is not crime.” Therefore, if the circumstance is serious and harm is grave, but the offense is not regulated in criminal law, it still should be put under the criminal law. In practice, in those kinds of cases, local justice systems often ask for a reply or explanation from their higher level courts, and
higher level courts ask the Supreme Court. The Supreme Court issues replies or explanations according to the circumstance. Its explanation sometimes gets away from statutory regulation. In the above case, criminal law jurists confirmed that the Supreme Court issued a correct interpretation, even if it got away from the principle of criminal law.  

Secondly, although strict liability is not welcomed by Chinese criminal law scholars, it was reemphasized through the 2003 Reply, and if we analyze the explanation, we may find the position of strict liability in Chinese criminal law and confirm the applicability of strict liability still by adopting the 2003 Reply and its theory of crime composition.

From the above chart we see that rape crime composes of objective conditions such as violence and non-consent, and subjective elements such as intent and negligence. In regard to raping an underage girl, a person will be convicted of the crime of rape although they have consensual intercourse only if the defendant has some idea about the age
of the crime of rape if he inflicted harm and the circumstance is serious, despite his lack of knowledge about the age of victim. Therefore, may we conclude that the last sentence is equal to strict liability? If we say no and still advocate equal protection of men and women on the basis of integrity of objective and subjective elements, I think we have to adjust criminal composition of the rape crime in Chinese criminal law.

3. Feminist Explanation on Underage Rape in Chinese Criminal Law
Since the early 1970s, China has witnessed a major growth in feminist scholarship in the fields of sociology and literature. This work has begun to challenge the content, as well as the parameters, of knowledge in these areas, and played very important role in empowering women. However, legal area, especially criminal justice, are left unnoticed in Chinese feminism study despite the close connections between criminal justice policy and women.

Similar to other legal systems, Chinese criminal law covers provisions related to women’s rights, such as abducting women, buying abducted women, obstructing the rescue of abducted women and raping adolescent and teen girls in its several articles. The Act of “Protecting the Right of Women” emphasizes the rights of women by stating that a woman has the right to be immune from any sexual harassment. In Chinese criminal law, a perpetrator convicted of rape as a crime of infringing upon the personal rights and democratic rights of citizens can be sentenced to anywhere from a three year prison term to the death penalty, based on the factual circumstance. However, like other jurisdictions, Chinese criminal law governing rape developed more with an eye toward protecting men from false accusations of rape, than with a goal of protecting women from sexual assault. A man gets more protection in rape related cases when the victim can not provide elements such as coercion or requisite knowledge. That is the situation reflected in 2003 Reply also.

According to the words of the 2003 Reply, in consensual sex with an underage girl, the perpetrator will not be convicted of rape crime if a circumstance is minor and harm is not grave, and if he does not know the age of the victim. But how does one look at the harm and circumstance and say “that is not serious?” Can temporary physical result or other actual appearances of harm become a basis of judgment? How can courts measure the harm when harm includes mental and physical harms? I think it is not such an easy job to answer these questions. Any
casual judgment on this problem cannot stand up to logical reasoning of law in the long run, particularly in China as the sexual intercourse problem connects with success of the birth control policy of China.

First, exclusion of teenage sex from criminal law on the basis of no harm not only violates the principle of criminal law, but also contravenes the spirit of law. The rape crime is regarded as a crime of no victim if the sexual intercourse is conducted voluntarily. A no-victim crime is a crime conducted by two parties in consensus and the victim accepts the infliction upon him/her voluntarily. Both parties do not feel harm in those cases. But most jurisdictions impose punishment on these offenses in order to protect society. For example, prostitution is a crime under “Crimes of Disrupting the Order of Social Administration.” The purpose of establishing this crime is to keep the social order. According to a rationalistic model, laws are created as rational means of protecting the members of society from social harm. An act of harming is one which causes harm to people; it is a setback to their interest. State interests, individual interests and the interests of society may be frustrated from different harms. But, the word “harm” is vague in legal sense. As far as the rape crime is concerned, the harm of a rape crime may not be as direct and quick as other crimes against women and teenage girls, and any consensual sex does not reflect the willingness of teenage girls. Social science research already indicates that teenage girls consent to sex for a variety of reasons that lie well beyond sexual desire and love. Some teenage girls have sexual intercourse without understanding the future consequence at all. The state takes the responsibility of protecting teenage girls from harm by regulating special rules and imposing strict responsibility on those who want to harm teens. The reluctance of lawmakers to regulate teenage sex reflects the bias of law, and in the long run, causes the failure of law when many people lose belief in its effectiveness.

Therefore, failure to regulate teenage sex frustrates the whole society by ruining the social morality and order. Consensual sex not only brings setbacks to the interest of teenagers, but also spoils the goal of state to keep good social order. The result of teenage sexual intercourse can be seen in different ways. It is clear that there are considerable risks inherent in adolescent sexual conduct. Let alone a myriad of ways in which minors, because of their inexperience, are vulnerable to exploitation in their sexual interactions. Scholars from various fields have documented these risks, and explored the harms suffered by victims of abusive sexual conduct. Perhaps, the most obvious, though by no
means the most grave, of these risks is unintended pregnancy, and the social consequences of teenage child bearing. Those who are familiar with the problems stemming from teen pregnancy immediately understand the far reaching implications of this information. The failure to use contraception, particularly condoms, exposes teenagers to many additional risks, such as sexually transmitted diseases, and even HIV. Girls who have their first children as teens are less likely to complete high school, less likely to marry, less likely to be able to support their families, more likely to have children who are prone to participate in criminal activities, and more likely to require public assistance at various points in their lives than are girls who postpone childbearing until after their teenage years. At the risk of stating the obvious, teenage pregnancies, which have increased dramatically over the years, have significant social, medical and economic consequences for the mother, the child, and the state. Of particular concern to the state is that approximately half of all teenage pregnancies end in abortion, and of those children who are born, their illegitimacy makes them likely candidates to become wards of the state.

Thirdly, the State, as the organizer of social activity, has a compelling interest in preventing such pregnancies and diseases caused by them. China implemented a birth control policy in the 1970’s and achieved great success in family planning policy. But moral crises came contingent with the development and challenged the birth control policy, bringing about some social problems. The women in Chinese society used to be conservative, and the “virginity” of a girl was regarded as very important for her happiness. But with the development of China, the moral attitude of people to sex has experienced great changes. Co-living and having a baby before marriage are accepted by people. Teenage maturity sped up as the result of more information that became available to them. Of course, contemporary society’s relatively promiscuous climate makes it extremely difficult to articulate the appropriate role for the criminal justice system in approaching non-violent, no-knowledge sexual intercourse, and as the result the interest of women and teenage girls are neglected by legislators. The 2003 Reply reflects the situation. As far as I am concerned, and for many feminists, removing teenage sexual intercourse from the scope of “morality” and emphasizing the factual knowledge of the rape crime does not sit well with many people. The law of statutory rape reflects an attempt to protect teenagers from themselves, as well as from those who may prey upon their vulnerability. The revival of interest in statutory rape in China reflects a concern
with teen pregnancy and the harm it causes to the social fabric, and in particular, to the public coffers. Chinese legislators should consider the logical connection between women’s right and the birth control policy, and put the sexual right of teen age girls on salient position.

Finally, in most jurisdictions, all that is needed to determine culpability is evidence that the victim’s age falls within the framework protected under the state law, and that sexual contact occurred. The defendant’s state of mind, including the extent to which he believed his partner was older than she was, generally is irrelevant. The "Reply" of the Supreme Court intended to embody justice inherent in law under the condition of no harm by repealing consensual sex with teen age sex, contravene to the public policy, and it is a very short-sited decision. Moreover, in spite of the warm welcome by criminal law scholars, the "Reply" neglected the differences of men and women by over mentioning "harm" and "circumstance," while it did not notice the far-reaching physiological and social impact of teenage sexual intercourse has on the whole society. At the same time, I think "strict liability" can be reasoned from the crime concept in Chinese law and fits in to the interest of teen age girls in the rape crime. Chinese criminal law leaves a reasonable opportunity for jurists and other participators by stating that "it is not crime if the circumstances are clearly minor and the harm is not great" which imply that "it is [a] crime if the circumstances are serious and harm is grave" despite the fact that it is hard to define the level of knowledge required to commit the offences. A Chinese judge may consider the indirect social harm of teen age sex and policy goal of government in defining rape.

Conclusion

Legal systems throughout the centuries have treated women as subordinate to men. It is only recently that women have been granted equal rights with men; explicit anti-discrimination statutes are yet more recent. Yet even now, women remain substantially disadvantaged in many aspects of social life, especially teenage girls who do not understand their rights and needs, and are exploited by rapists very easily.

If the safety of even a small group of women is seriously threatened in some way by a particular policy, the policy does not deserve feminist support. In many societies, power is monopolized more by men than women. Criminal law as a state policy reflects the interests of men and protects those interests. Chinese criminal law regulates several provisions in respect to women’s sexual rights. But, like other jurisdictions,
Chinese criminal law cannot avoid favoring men in rape crime in procedural and substantial process. The Supreme Court announced that local courts should not use the 2003 Reply after there had been a lot of resonance objecting to the Reply. But, it is not the success of feminists. It is the just beginning of right conscience. Chinese criminal law is awaiting the active participation of women in its consummation process.

NOTES

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1. Criminal Code 1997 regulated the crime of rape and rape of a teenage girl under the age of 14 separately. But the Supplementary Regulation on Crime Names in the Chinese Criminal Code 2002 issued by the Supreme People's Court and Supreme People's Procuratorate redefined the article 236(2) and named it as crime of rape.

2. Article 236 does not state anything about the mental state of perpetrators, it only enumerate several type of acts used in rape. The mental state is stated in the general provision of Chinese criminal law by elaborating intentional and negligent crimes separately. The Chinese criminal law scholars view it applicable to the crimes in specific provisions. But the “Explanations” mentioned clearly the mental element of the crime of rape through this interpretation.

3. These two interpretations emphasized the outcome of rape and stated that it is not crime if the circumstance is minor and does not cause serious harm. Some scholars attribute it to the objective standard.

4. Chinese Criminal law emphasizes the integrity of objective and subjective elements in composing crime. Objective elements include acts, outcome and casual relations; subjective elements include intention, motive. The composition of crime requires objective and subjective elements together. Therefore some Chinese scholars object to the strict liability according to this principle.


7. But these two interpretations (decriminalized the casual volunteer sexual intercourse among minors with the condition of no serious harm and no threat.


9. Article 236 does not state anything about the mental state of perpetrators, it only enumerate several type of acts used in rape. The mental state is stated in the general provision of Chinese criminal law by elaborating intentional and negligent crimes separately. The Chinese criminal law scholars view it applicable to the crimes in specific provisions. But the “Explanations” mentioned clearly the mental element of the crime of rape through this interpretation.
11. It is not a statutory principle, it is deduced from the general and special provisions of Chinese criminal law and supported by criminal law scholars firmly.
15. See supra, note 6.
16. Article 236(5) enumerated ten years of prison term, life term prison and death penalty for raping a woman, teenage girl, and caused serious harm.