

Исследование по вопросу о применении в судебном порядке уголовного наказания за сексуальное насилие со стороны лиц, на которых возложены обязанности по уходу Research on the Judicial Application of the Crime of Sexual Assault by Persons with Care Duties

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Аннотация. Поправка к уголовному законодательству (XI) добавляет в состав преступлений сексуальное насилие со стороны лиц, на которых возложены обязанности по уходу за другими лицами. Поскольку это преступление является новым, в судебной практике возникло много противоречий и проблем, таких как определение законных интересов, связанных с этим преступлением, точное определение «особых обязанностей», понятия «вступал в сексуальные отношения» и оценивал «отягчающие обстоятельства». Эти проблемы не только влияют на справедливое применение закона, но и ограничивают эффективную защиту жертв. Исходя из этих проблем следует уточнить правовые интересы, связанные с преступлением, и критерии определения понятий «субъект преступления», «сексуальные отношения» и «отягчающие обстоятельства», чтобы повысить эффективность применения закона. Кроме того, следует проанализировать соотношение между сексуальным насилием со стороны лица, на которое возложены обязанности по уходу, и изнасилованием, с целью прояснения границ и различий в применении закона и обеспечения надежной теоретической поддержки и руководства для судебной практики.

Ключевые слова: преступление сексуального характера, совершенное лицами, на которых возложены обязанности по уходу; несовершеннолетние женщины; сексуальная автономия; сексуальное насилие; судебное применение

Abstract. The Criminal Law Amendment (XI) adds the crime of sexual assault by persons with care duties, and since this crime is a new crime, many controversies and problems have arisen in judicial practice, such as how to identify the legal interests of this crime, accurately define “special duties”, understand “having sexual relations”, and assess “aggravating circumstances”. These problems not only affect the fair implementation of the law, but also restricts the effective protection of victims. In response to these problems, the legal interests of the crime should be clarified, and the criteria for determining the “subject of the crime”, “sexual relations” and “aggravating circumstances” should be clarified in order to enhance the operability of the application of the law. In addition, the relationship between the crime of sexual assault by a person with care duties and the crime of rape should be analyzed, with the aim of clarifying the boundaries and differences in the application of the law and providing strong theoretical support and guidance for judicial practice.

Keywords: crime of sexual assault by persons with care duties; female minors; sexual autonomy; sexual assault; judicial application

In today's society, with the increasing awareness of the protection of vulnerable groups such as minors, the elderly and persons with disabilities, the issue of sexual assault crimes, especially those committed by persons with care duties, has become a focus of social concern. Against this background, Article 27 of the Criminal Law Amendment (XI), adopted in 2020, provides for the addition of the crime of sexual assault by a person with care duties after the crime of rape under article 236 of the Criminal Law Code, which states: "A person who has special duties such as guardianship, adoption, caretaking, education and medical care for a minor female who has reached the age of fourteen or less than sixteen, and who has sexual intercourse with such a minor female, is punishable by a term of imprisonment of not more than three years; if the circumstances are aggravated, the penalty shall be sentenced to imprisonment of not less than three years but not more than ten years. An in-depth study of the crime of sexual assault by persons with care duties is not only a defense of the rights and interests of the victims, but also a pursuit of social justice. In order to apply the law accurately, give full play to its positive effects and safeguard the legitimate rights and interests of the parties concerned, we are now discussing issues related to the crime of sexual assault by persons with care duties.

1. Overview of the crime of sexual assault by persons with care duties

1.1. Legislative evolution

In China's criminal law system, there was no relevant legislation at first, until the occurrence of the "Bao Yuming case" ¹ once again touched the deep sensitive nerves of the society, provoking the public to call for the severe punishment of sexual assault of underage females by persons with care duties. The Criminal Law Amendment (XI) responds to the needs of reality by adding Article 236 of the Criminal Law, "Sexual Assault by Persons with Care Duties", which provides: "If a person who has special duties such as guardianship, adoption, caretaking, education or medical care for a female minor who has reached the age of 14 but are not yet 16 years old has sexual intercourse with such a female minor,

are to be sentenced to fixed-term imprisonment of not more than three years; if the circumstances are aggravated, the sentence is between three and ten years imprisonment. If any of the acts in the preceding paragraph also constitutes the crime provided for in Article 236 of this Law, it is to be convicted and punished in accordance with the provisions on heavier penalties. As this crime is a new crime, many controversies have arisen in its application, Articles 5 and 6 of the "Interpretation" of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law in Handling Criminal Cases of Rape and Indecent Assault of Minors (hereinafter referred to as the "Interpretation") explain the application of this crime such as "aggravating circumstances".

1.2. Analysis of legal interest

As one of the core concepts of criminal law, the importance of legal interest is self-evident. It is not only the cornerstone of the establishment and application of criminal law, but also the key to understanding the nature of crimes, defining crimes and non-crimes, and the boundaries between this crime and other crimes. "The purpose of criminal law is to protect legal interests, and the essence of crime is to violate legal interests."² The issue of legal interest is the basic problem in the composition of the crime, only to accurately grasp the legal interest of a crime, in order to ensure that in judicial practice to achieve accurate conviction, appropriate sentencing, and then realize the value of criminal law of justice and efficiency.

Returning to the crime of sexual assault by persons with care duties, there are three main views on the legal interests of this crime: the theory of sexual autonomy, the theory of the right to physical and mental health, and the theory of compound legal interests.

1.2.1. Physical and mental health theory

Commentators who hold the physical and mental health perspective argue that the purpose of this crime is to ensure that young girls are able to grow up physically and mentally healthy and are not subjected to sexual assault by persons with care duties. ³ These scholars believe that the Criminal Law Amendment (XI) to actually partially raises the age of sexual consent for female minors, i.e., in general, the age of sexual consent for female minors is 14 years old,

¹ Since April 2024, the media have reported that Bao Yuming sexually assaulted his "adopted daughter" Han, causing great concern in society. After in-depth investigation, it was found that the available evidence did not prove that Bao Yuming's actions constituted the crime of rape. Although Bao Yuming had a relationship with Han in the name of "adoption", Han was actually an adult and had not gone through the adoption procedures, so the relationship between the two parties violated social ethics. For more information, see "The Supreme People's Procuratorate and the Ministry of Public Security Joint Supervision Group Reports on the Investigation of Bao's Alleged Sexual Assault Case," Supreme People's Procuratorate website // URL: https://www.spp.gov.cn/spp/qwfb/202009/t20200917_480227.shtml (accessed: August 30, 2024).

² Zhang Ming-kai. New Criminal Law and the Theory of Infringement of Legal Interests // Legal Studies. 2000 (1). P. 20.

³ Zhang Ming-kai. Criminal Law (Next). Beijing : Law Press, 2021. P. 1143.

however, when the perpetrator is in a special position of responsibility, the age of sexual consent for female minors is raised to 16 years old. Specifically, the age of sexual consent for females under our Criminal Law is 14 years old, so only females who have reached the age of 14 have sexual autonomy. And according to the provisions of this crime, as long as a person with special duties has sexual relations with a minor female between the ages of 14 and 16 shall be criminalized, regardless of whether or not she has consented. This essentially raises the age of sexual consent to 16 years of age in the event of a special relationship between the parties, in order to protect the physical and mental health of minor females. Therefore, the legal interest protected by this crime is the physical and mental health of females who have reached the age of 14 but not yet 16.

When discussing the legal interests of sexual assault by persons with care duties, a physical and mental health perspective does have unique value and merit. However, there are still limitations that cannot be ignored in taking physical and mental health alone as the protective legal interest of this crime:

Firstly, the universal consideration of "physical and mental health theory." The right to physical and mental health is not exclusive to minors, but a concept of legal interests that applies universally to all individuals, whether they are adults or minors, whose physical and mental health will be harmed when they are sexually assaulted. Therefore, it is inappropriate to consider physical and mental health as the legal interest of this crime.

Secondly, "physical and mental health theory" is not conducive to judicial practice. Physical and mental health is too broad and its degree cannot be determined, making it difficult to provide a clear sentencing basis for specific cases in judicial practice, and resulting in judges facing difficulties in assessing the degree of harm of criminal behavior and deciding on penalties. This uncertainty may affect judicial fairness and efficiency.

Thirdly, there is an inherent conflict between the "physical and mental health theory" and the criminal law system. The Criminal Law Amendment (XI) stipulates that persons between the ages of 12 and 14 shall be held criminally liable for specific crimes and serious consequences. The legislator lowered the age of criminal responsibility to indicate that minors in this age group already have the ability to recognize crimes. It is contradictory to recognize that

a person who has reached the age of 12 but not yet 16 has the capacity to "consent", while at the same time recognizing that a person who has reached the age of 14 but not yet 16 does not have the capacity to "consent".⁴

1.2.2. Compound legal interest theory

According to those who hold the view of "compound legal interest theory", the legal interests protected by this crime are the inviolability of the sexual rights and physical and mental health of female minors.⁵ It is also argued that the legal interests protected by this crime are the incomplete sexual autonomy and social customs of the female minors.⁶ It is argued that there is often an ethical relationship between the caregiver and the female minor, and that the caregiver violates not only the sexual rights of the female minor, but also the interests of society.

"The Compound Legal Interest Theory attempts to find a balance between physical and mental health and sexual autonomy, but the crime of sexual assault by persons with care duties is a personal crime, which is codified in Chapter IV, "Crimes against Citizens' Personal and Democratic Rights", while social customs belong to the social legal interests under Chapter VI, "Crimes against the Order of Social Administration", which is theoretically difficult to be self-consistent.

1.2.3. Sexual autonomy theory

This viewpoint considers that the legal interest protected by this crime is the right to sexual autonomy of underage women.⁷ The right to sexual autonomy is a personal right, which refers to "the right of a natural person to decide independently whether, when and how to have sexual relations with another person in order to realize his or her own sexual will and interests without unlawful interference by others"⁸. Scholars in favor of the right to sexual autonomy argue that female minors between the ages of 14 and 16 who are cared for by others also have sexual autonomy. As guardians, adopters, caregivers and other persons with care duties, they have a relatively close relationship with the victim. Although the cognitive and judgmental ability of female minors who have reached the age of 14 but have not yet reached the age of 16 has been strengthened, and they have a certain ability to defend themselves sexually, their physical and mental development has not yet reached full maturity, and because guardians, teachers, and other persons with special responsibilities have a cer-

⁴ Sun Wan-Huai. The Moral Claims of Criminal Law Amendment // Oriental Law. 2021 (1). P. 112.

⁵ Yang Wan-Ming. Understanding and Application of the Provisions of the Criminal Law Amendment (XI) and Supporting Supplementary Provisions on Crimes (VII). Beijing : People's Court Press, 2021. P. 247.

⁶ Zhao Bing-Zhi. Understanding and Application of the Criminal Law Amendment Act (XI). Beijing : People's University of China Press, 2021. P. 49—50.

⁷ Fu Li-Qing. Protection of Legal Interests and Types of the Crimes of Sexual Assault by Persons with Care Duties // Tsinghua Law Science. 2021 (4). P. 78.

⁸ Yang Li-Xin. On the Law of Personal Rights. Beijing : China Procuratorate Press, 1996. P. 34.

tain degree of dependence and trust, their awareness of prevention is relatively weakened, and it is easier for them to make the "non-substantively voluntary" sexual consent decision.⁹ Therefore, the legal interest protected by this crime is the sexual autonomy of women who have reached the age of 14 but not yet 16.

The "sexual autonomy theory" is currently the mainstream view and is relatively more complete. Firstly, the "sexual autonomy theory" is more universal. Sexual autonomy is the most important legal interest to be protected in sexual assault crimes, which is also in line with the traditional concept. Secondly, "sexual autonomy theory" is in line with the organization of the criminal law system. Chapter IV is "Crimes against Citizens' Personal and Democratic Rights", and sexual autonomy is more in line with the requirements of Chapter IV on personal legal interests. Finally, in the relationship with the crime of rape, this crime should be a supplement to the crime of rape rather than a special case, and the perpetrator of this crime to use "special duties" to exert "invisible coercion" on the victim, which is similar in effect to the "explicit coercion" of rape. Therefore, the legal interest of this crime and the crime of rape is the same, which is the right to sexual autonomy.

To sum up, this paper argues that the legal interest of this crime shall be the right to sexual self-determination of female minors.

2. Dilemmas in the judicial application of the crime of sexual assault by persons with care duties

2.1. Difficulty in identifying the subject of the crime

The subject of the crime of sexual assault by persons with care duties is specific, namely, "persons with special duties such as guardianship, adoption, caretaking, education, medical care, etc.", which indicates that the crime is a status crime and that "special duties" is a necessary condition for the crime, which affects the conviction. However, what the connotation of special duties is and how to define the scope of the subject of this crime remain difficult problems in current judicial practice.

There are many theoretical views on the substance of the "care duties". However, they all agree that the essence of "care duties" is the superiority of the perpetrator of the special duties by virtue of his or her status, position or duties, i.e., that is, the

invisible coercive power over the minor female. This gives a direction to the connotation of special duties. However, these views do not cover the specific extent of the measurement of dominance and influence, which is rather general and does not provide a clear basis for judicial practice. As a result, it is difficult to define the subject of the crime: Firstly, there are no clear criteria for determining the specific occupation of the subject of the crime.

For example, whether education and medical care are limited to such places as schools and hospitals; training course teachers belong to the education industry, but whether the training course teachers belong to the scope of the subject of this crime, these are no clear standards. Secondly, some scholars believe that special duty personnel need to meet the requirements of long-term and continuity, and that it is not appropriate to recognize the perpetrator as the subject of this crime in occasional, short-term occasions such as medical care and nursing.¹⁰

This is actually using the length of time as a criterion for judgment, but the length of time should be used as a consideration for the degree of invisible coercion rather than a qualitative consideration. Moreover, in some cases the length of time is not necessarily proportional to the degree of dependence. Finally, in addition to the list of five specific types of duties, the crime also adds a "etc." provision, leaving room for further interpretation.¹¹ In practice, because of the modesty and prudence of criminal law, the five types of duties listed are often preferred in the process of handling cases, which is to a certain extent not conducive to the protection of legal interests.

2.2. Difficulty in understanding behavioral patterns

The establishment of this crime requires "having sexual relations with the minor female" in terms of the content of the act, and the understanding of "having sexual relations" is very important as it relates to the type of crime. However, how to understand "sexual relations" is also a problem in current judicial practice.

At present, there is no clear definition of "having sexual relations" in China's criminal law community, and there is considerable controversy in the academic community as to what it should mean. The understanding of "having sexual relations" includes two main aspects: one is the narrower meaning, or "penetration", which refers to the union of the genital organs of both sexes. The other is the broader term, or "contact", which means that sexual relations are

⁹ Zhang Yong. The Judicial Application of the Crime of Sexual Assault by Persons with Care Duties // *Juvenile Crime Issues*. 2021 (4). P. 7.

¹⁰ Fu Li-Qing. Protection of Legal Interests and Types of the Crimes of Sexual Assault by Persons with Care Duties // *Tsinghua Law Science*. 2021 (4). P. 85.

¹¹ Zhang Yong. The Judicial Application of the Crime of Sexual Assault by Persons with Care Duties // *Juvenile Crime Issues*. 2021 (4). P. 9.

deemed to have taken place as long as the genitals are in contact. This situation is generally applicable to the determination of adultery for female minors under 12 years of age. According to China's existing judicial practice, "having sexual relations" should refer to the narrow sense.

However, "the Supreme People's Court and the Supreme People's Court" designated this crime as "sexual assault by persons with care duties", and according to the "Sexual Assault Opinion", sexual assault not only includes sexual intercourse in the narrow sense, but also includes indecent assault. This makes it difficult to define the mode of behavior of this crime.

In addition, with the development of the times, people's minds are becoming more and more open, and more and more people use ways other than the combination of sexual organs to pursue spiritual fulfillment, such as anal sex, oral sex and so on. What's more, in order to avoid the punishment of criminal law, intentionally take extraordinary sexual intercourse to meet the criminal mind, based on the modesty of criminal law judicial practice often can only be sentenced to misdemeanor or even not guilty.¹²

Therefore, there are scholars believe that China's criminal law practice of the existing understanding of "sexual relations" lagging behind, "having sexual relations" refers to having sexual relations with the minor female in a narrow sense, and should not include indecent assault, but penetrative sexual acts such as oral sex and anal sex should be included.¹³

2.3. The standard for "aggravating circumstances" is unclear

The Criminal Law Amendment (XI) stipulates that if the person responsible for the care of this crime has aggravating circumstances, he shall be sentenced to fixed-term imprisonment of not less than 3 but not more than 10 years, but there is no specific provision on "aggravating circumstances", which is not conducive to judicial practice in respect of this crime.

Although Article 5 of the "Interpretation" provides relevant explanations in this regard, the criteria for the determination of "aggravating circumstances" in practice are not sufficiently clear, and there is still great controversy over the understanding of long-term sexual relations and miscellaneous provisions in the "Interpretation". Some scholars believe that "long-term sexual relations" should be interpreted as "long-term or many times".¹⁴

This is the scholar's understanding of the "long-term" in the "Domestic Violence Interpretation".

"Long-term" is not a normative concept, and there is no definite range of standards in criminal law. Everyone has a different understanding of long-term, and the lack of a clear and uniform standard greatly affects judgments in judicial practice, which may lead to different biases in similar cases. In addition, there is still no unanimity in the understanding of the miscellaneous provisions, which is not well grasped in judicial practice.

3. Pathways to solving the issue of sexual assault by persons with care duties

3.1. Identification of the "criminal subject"

Defining the subject of the crime is of vital importance in criminal cases, it is the basis for determining the attribution of criminal responsibility, and it is of great significance in ensuring the fair implementation of the law, protecting the lawful rights and interests of minors and maintaining social order. This paper argues that the following aspects need to be paid attention to in determining the subject of this crime:

Firstly, to clarify the meaning and source of "special duties". This paper argues that the word "special" has no special meaning, is a modifier, expressed is not general, refers to the specific relationship between the perpetrator and the minor of the five types of occupations listed. The term "special duties" emphasizes the word "duties", which can be based on both facts and legal provisions: one is derived from the express provisions of the law. For example, the relationship of guardianship between parents and brothers arises as a result of legal provisions, or as a result of adoption. The second is a duty that arises based on a civil contract. For example, training organizations, caretaking, etc. The third, duties based on factual behavior. For example, if a minor female is adopted but the relevant formalities are not completed in a timely manner, and a de facto adoption relationship has been formed between them, then it should be deemed that a duty exists.

Secondly, to clarify duties are specific duties, not abstract duties. That is to say, a substantial duty must exist between the perpetrator and the minor female. For example, in the school, the teacher has substantive responsibility for the students, while the school security guards have the duty to protect the students of the school is an abstract duty, which does not necessarily produce dominance or influence, so the school security guards should not be recognized as the subject of this crime in this case.

¹² Wang Zheng. Research on the Judicial Application of the Crime of Sexual Assault by Persons with Care Duties [D] // Master's thesis, Inner Mongolia University, 2023. P. 16.

¹³ Fu Li-Qing. The Scope of the Legal Network of the Crime of Sexual Assault by Persons with Care Duties // Law Monograph. 2022 [2]. P. 131.

¹⁴ Guo Zhi-Long and Hao Jie. Understanding and Application of "aggravating circumstance" in the Crime of Sexual Assault by Persons with Care Duties // China Prosecutor. 2023 [16]. P. 30.

Thirdly, should be based on "invisible coercion". The definition of the subject of this crime, should not be based solely on the existence of "special duties" as a judgment condition, but should clarify whether the perpetrator has dominance or influence over minor females, which is the basis for determining the subject of this crime. The judgment of whether there is invisible coercion is usually related to the time factor, that is, in the perspective of the minor female, the special relationship between the two has stability and continuity. However, when the minor female's dependence on the perpetrator is deeper (involving economic and mental dependence, etc.), even if the time is short, it can also produce a strong dominance.

Fourthly, the understanding of the word "etc.". The word "etc.", as a miscellaneous provisions, makes the subject of this crime not limited to the five types of "guardianship, adoption, caretaking, education and medical care", but the understanding of the word "etc." needs to be comparable to the previous five types: First, the perpetrator needs to have substantial caring duties for the minor female. This crime is a status offense, and the existence of a special relationship between the two is a necessary condition for the establishment of this crime; Second, there needs to be invisible coercion. If there is no such dominance, there is no impairment of the minor female's autonomy.

Fifthly, the duty exists at the time of the act. The crime is a status offense, and the act must occur when there is a special duty between the two; if the duty does not exist, then the invisible coercion does not exist, and there is no damage to the legal interests.

3.2. Restricted interpretation of "having sexual relations"

As mentioned above, the current understanding of "having sexual relations" mainly includes three views: a narrow view, which is the union of the organs of the male and female sexes; a broad view, which recognizes that sexual relations occur when the sex organs of a man and a woman come into contact with each other; and the broadest view, which includes anal and oral sex, in addition to the traditional view of penetration. In this paper argues that "sexual relations" should be interpreted in a restrictive manner, that is, the narrow view should be applied.

First of all, indecency is not the commission of the crime. Indecent act violates the victim's personal dignity and sexual autonomy, which is different from the protection of legal interests in this crime. Since this crime and the crime of rape to protect the same legal benefit, both are the right to sexual autonomy, so the mode of conduct of this crime should also be consistent with the crime of rape. Therefore, this paper argues that the indecency should not be included in the implementation of the crime of behavior within the scope.

Secondly, the crime of "having sexual relations" refers to "sexual intercourse in the narrow sense". From the point of view of the criminal law system, this crime is arranged in article 236 under the crime of rape, indicating that this crime should be a complement to the crime of rape rather than an exception, and in order to maintain the consistency of the internal logic of the law, this crime should be consistent with the crime of rape. Moreover, paragraph 2 of Article 241 of the Criminal Law stipulates that "buying trafficked women and forcing them to have sexual relations, in accordance with the provisions of the crime of rape conviction and punishment." It can be seen that the content of the act of "having sexual relations" here is the same as that of the crime of rape, and the narrow definition applies. Therefore, this crime belongs to article 236, should also apply the narrow sense.

Undeniably, with the development of the times, people's understanding of sex will change, and there will be more and more ways of behaving to meet the sexual excitement. The inclusion of anal sex, oral sex and other acts in the criminal law may provide more comprehensive and detailed protection for female minors, but since there is no adjustment in the current criminal law system, this crime should still be interpreted in the narrow sense.

3.3. Application of "aggravating circumstances"

3.3.1. "Long-term" should be understood as "long-term or many times"

"Long-term", in the context of sexual assault by persons with care duties, usually means that the sexual relations between the perpetrator and the minor female are continuous or repetitive in time, rather than being a single or transient act. Persistence in time on the other hand represents repetition in behavior, however, repeated occurrences do not necessarily occur over a longer period of time, and repeated is not the same as long term, so long term and repeated are intersecting rather than encompassing relationships. With reference to Article 2 of the "Interpretation", in the regulation of rape of minors, rape of young girls will be "many times" as one of the aggravating circumstances, so this paper argues that "many times" in this crime should be recognized as aggravating circumstances, in order to comprehensively protect the legitimate rights and interests of minors. Therefore, the term "Long-term" should be interpreted as "prolonged or repeated."

3.3.2. Understanding of "other aggravating circumstances"

The "Interpretation" has enumerated the specific circumstances of "aggravating circumstances" for this crime, which provides a standard for judicial practice, but this paper believes that further explanation is needed for the miscellaneous provisions of this item.

From the perspective of the relationship between the perpetrator and the victim, "blood relatives, common family life relations" should be recognized as "aggravating circumstances". Guardianship and adoption relationships are special, so sexual relations between such actors and the victim not only infringes on the protection of legal interests, but also challenges social ethics, with extremely serious consequences. Referring to the relevant provisions of Article 25 of the "Opinions on Sexual Assault", persons who have a family relationship with minors who commit rape or indecent assault on a minor shall be severely punished in accordance with the law. Therefore, if the perpetrator and the victim are blood relatives or live in a common household, the act should be recognized as "aggravating circumstances".

From the perspective of the consequences of the act, "causing the victim to become pregnant" should be considered an "aggravating circumstance". Although the "Interpretation" has listed "causing the victim to be infected with HIV or suffering from syphilis, gonorrhea and other serious sexually transmitted diseases" as an aggravating circumstance in terms of the consequences of the act, sexual assault resulting in pregnancy is a common serious consequence. The physical and mental health of minors is not yet fully developed, so causing pregnancy is not only physically damaging to minors, but may even cause mental illness. Therefore, it is necessary to include "causing the victim to become pregnant" as an "aggravating circumstance".

From the point of view of the place of conduct, "having sex in public in a public place" should be considered an "aggravating circumstance". "Public places" here include school classrooms and corridors, restrooms, hospital consulting rooms, clothing rooms and other places where there is always a possibility of being seen by others. "in public" should follow the practice of our judicial practice, does not require the third person actually see, as long as the third person present is recognized as public. Because the public places under the sexual assault on the victim's psychological trauma and private places are completely different, and in public places of crime is a serious provocation of social order and social morals, should be severely punished.

Finally, in addition to the above circumstances, this paper believes that in the judicial practice of this crime, if there is a criminal act that is comparable to the degree of infringement and social harmfulness of several circumstances listed in the Interpretation, it should also be considered as appropriate.

4. The relationship between the crime of sexual assault by persons with care duties and the crime of rape

4.1. Controversy over the relationship between this crime and rape

At present, academic circles have not formed a unified opinion on the relationship between this crime and the crime of rape, and there are two main views in the theoretical circles on this crime and the crime of rape: the competing view and the mutually exclusive view.

Some scholars who advocate the theory of competition believe that this crime and the crime of rape are in a competing relationship between legal provisions, they believe that "the constitutive elements of the crime of rape for" violence, coercion or other means of suppressing women's resistance + commit adultery", and the constitutive elements of the crime of sexual assault by persons with care duties are "persons with special caring duties + having sexual relations", since "adulterous behavior" can be evaluated as "having sexual relations", the two crimes can be thought of logically, that is, there is an intersection of the two crimes, which is in line with the formal criteria of competing laws.¹⁵

Another part of the scholars believe that this crime and the crime of rape is an imaginative concurrence relationship, based on the provisions of paragraph 2 of this crime, they believe that "at the same time and constitute" means that under certain circumstances, the first paragraph of the act constitutes both the crime of sexual assault of a person in charge of a caregiver's duties and the crime of rape, because only if it constitutes several crimes at the same time, can the legislator make the provision of 'convicted and punished in accordance with the provisions of the heavier penalty'. Undoubtedly, only when the subject of the act has sexual relations with a minor woman against her will, the act can be recognized as both the crime and the crime of rape at the same time. Therefore, this crime and the crime of rape are not opposites but competing relationships.¹⁶

Scholars who advocate the theory of mutual exclusivity argue that, from the criterion of whether it is clearly against the will of the female (autonomous will regarding sexual behavior), the crime and the crime of rape are mutually exclusive rather than encompassing or intersecting: the establishment of the crime does not constitute the crime of rape, and the establishment of the crime of rape does not constitute the crime of rape.¹⁷

¹⁵ Zhang Xin-Rui and Chen Hong-Bing. Legislative Commentary and Judicial Application of the Crime of Sexual Assault by Persons with Care Duties // *Juvenile Crime Issues*. 2021 (4). P. 26—27.

¹⁶ Li Li-Zhong. Doctrinal Research on the Crime of Sexual Assault by Persons with Care Duties // *Politics and Law Forum*. 2021 (4). P. 23—24.

¹⁷ Fu Li-Qing. Protection of Legal Interests and Types of the Crimes of Sexual Assault by Persons with Care Duties // *Tsinghua Law Science*. 2021 (4). P. 83.

4.2. Advocacy of the theory of mutual exclusivity

First of all, from the point of view of the legislative purpose, the theory of mutual exclusivity better reflects the legislative purpose. Generally speaking, for a certain behavior, the creation of a new crime is necessary only when the existing criminal law norms are not regulated and there is a general need for prevention.¹⁸ Although both this crime and the crime of rape in the protection of the interests of the law are sexual autonomy, the legislator has listed as a new crime, it means that this crime and the crime of rape is mutually exclusive relationship.

Secondly, in judicial practice, for the crime of rape, both coercion and sexual intercourse "by means of violence, coercion, etc." must be present, whereas for the crime of sexual assault by persons with care duties, the appearance of coercion is not required. Article 6 of the Interpretation stipulates that "If a person who has special duties towards a female minor who has reached the age of 14, takes advantage of his superior position or the victim's isolation and helplessness to force the victim to have sexual relations with her, shall be convicted and punished for rape in accordance with the provisions of Article 236 of the Criminal Law." This indicates that the

perpetrator and the age of 14 years old less than 16 years of age of female minors have sexual relations, if he is a person has with special care duties, then the establishment of this crime, if the use of "violence, coercion" except. So this crime is mutually exclusive of the crime of rape.

5. Conclusion

The establishment of the crime of sexual assault by persons with care duties shows that China's criminal legislation pays full attention to and responds to the voices of society and the demands of citizens, meets the needs of social development, and fully reflects China's emphasis on and protection of the rights and interests of minor women. Although the law has made clear provisions for this type of crime, there are still many controversies and ambiguities, such as the interpretation of the relevant concepts in this crime is still not perfect, the interpretation of "having sexual relations", as well as the interpretation of "special duties" and "aggravating circumstances" are not perfect, and the judicial application of the crime of sexual assault on persons with caring responsibilities still needs to be explored in depth.

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