FRONTIERS OF LAW IN CHINA
VOL. 9 JUNE 2014 NO. 2
DOI 10.3868/s050-003-014-0015-5

ARTICLE

PROTECTION OF MALE SEXUAL RIGHTS IN THE CRIME OF RAPE

DONG Jingshu,[*] *WANG Zhendong*[**]

Crimes relevant to sexual offence in the current Criminal Law of the PRC, such as the crime of rape, the crime of forcible molestation and humiliation of women, the crime of indecency with a child, establish a relatively close net for protecting female sexual rights. However, the protection of male sexual rights is surprisingly neglected or disregarded. In current China, sexual offences against males (including sexual offence against a male by male and sexual offence against a male by female) are getting worse. Unfortunately, male victims of sexual offences cannot seek for legal remedy due to the lack of legal provisions. In theory, the Criminal Law needs to bring in the protection of male sexual rights. This thesis will focus on the issue relevant to sexual offences against males on the crime of rape. The authors will present increasing evidence of sexual offences against males and explore the reasons. We will analyze the necessity of amending the provisions of the crime of rape based on theoretical and practical research, and learn from the advantages of legislations of different times and places in China and other countries. We will conclude with suggestions for amending the current Criminal Law about the crime of rape in order to fill up the gap in legal protection of male sexual rights in China.

INTRODUCTION ····· 254
I. REASONS OF INCREASING NUMBER OF SEXUAL OFFENCES AGAINST MALES AND COMMON PATTERNS OF SEXUAL OFFENCES AGAINST MALES ····· 255
A. Reasons of Increasing Number of Sexual Offences against Males ····· 255
1. Change in the Conception of Sex and Enhancement of Female Consciousness of Sex: Women's Sexual Offences against Men ····· 255
2. Emergence or Exposure of Group of Homosexual Men and Sexual Acts between Men: Men's Sexual Offences against Men ····· 256
3. The Rising Possibility of the Achievement of Sexual Offences against Men ···· 257
4. The Heavier Social Pressure, the More Desire to Pursue Stimulation ····· 257
5. Influence of Traditional Conception ····· 257

[*] (董静姝) Ph.D candidate in jurisprudence, at School of Law, Renmin University of China, Beijing, China. Contact: nydia@ruc.edu.cn

[**] (王振东) Associate Professor in jurisprudence, at School of Law, Renmin University of China, Beijing, China. Contact: wzhendong@ruc.edu.cn

6. Legal Loophole and Difficulty in Collecting Evidence ····· 257
B. Common Patterns of Sexual Offences against Men ····· 258
II. NECESSITY TO AMEND PROVISIONS ON THE CRIME OF RAPE OF THE CRIMINAL LAW OF CHINA TO PROTECT MALE SEXUAL RIGHTS ····· 259
A. Harm of Sexual Offences against Men ····· 259
1. Harm to Society ····· 259
2. Harm to Male Victims ····· 260
B. Juristic, Constitutional and Criminal Analysis of the Necessity for Amending Provisions on the Crime of Rape to Protect Male Sexual Rights ····· 261
1. Juristic Necessity for Amendment of Provisions on the Crime of Rape to Protect Male Sexual Rights ····· 261
2. Constitutional Necessity for Amendment of Provisions on the Crime of Rape to Protect Male Sexual Rights ····· 262
3. Criminal Necessity for Amendment of Provisions on the Crime of Rape to Protect Male Sexual Rights ····· 263
III. SUMMARY OF CRIMINAL LEGISLATION ON THE CRIME OF RAPE IN HISTORY AND IN OTHER COUNTRIES AND REGIONS ····· 265
A. Relevant Criminal Legislations in Different Times and Places of China ····· 265
B. Relevant Criminal Legislations in Other Modern Countries ····· 267
1. Target and Subject of the Crime ····· 267
2. Definition of "Sexual Relations" (Or "Sexual Intercourse") ····· 268
IV. SUGGESTIONS FOR AMENDING THE CRIMINAL LAW OF CHINA ON THE CRIME OF RAPE ····· 270
A. Object of the Crime ····· 270
B. Target of the Crime ····· 270
C. Pattern of the Objective Aspects of the Crime ····· 270
1. The Actor Obviously Suppresses the Victim's Resistance by Violence, Coercion or Other Methods ····· 270
2. The Actor Goes against the Victim's Will ····· 271
3. The Actor Has Sexual Intercourse with the Victim: Modification of the Concept of Sexual Intercourse (or Sexual Relations) ····· 271
D. Subject of the Crime: Women Can Become the Solitary Principal Offender of the Crime of Rape ····· 271
E. Criminal Intent ····· 272
F. The Crime of Rape and the Crime of Molestation ····· 272
G. Suggestions for Amending the Crime of Rape in China ····· 273
H. Some Transitional Measures for Protecting Male Sexual Rights ····· 274
CONCLUSION ····· 274

INTRODUCTION

In recent years, the news media covers more cases of sexual offences against men in China than ever before.[1] Nevertheless, none of the male victims obtained an appropriate legal remedy and their sexual rights could not be protected because of the legal vacuum of protection for male sexual rights in the current Criminal Law and because of other individual or social factors. The reported cases reveal that some victims chose to keep silence; some chose to retaliate perpetrators on their own and thereby committed crimes; some chose to reach a compensation settlement with the perpetrator; and some reported the case to the public security organ but could not get the case on record, or perpetrators were punished in the name of other crimes such as the crime of injury. In spite of the punishment in some cases, the protection of male sexual rights is still far behind the reality.

The number of cases of sexual offences against males is not small in China. The cases mentioned above are all covered by the news media. According to the principle of journalism, most relevant cases cannot be reported and thereby are not known to the public. The statistics of Beijing Prison Administration, for example, show that the number of crimes caused by sexual offences between men accounts for 4% of the total number of crimes from 2003 to 2004, and among these cases approximately 70% of the criminals are victims of sexual offences between men. Furthermore, sexual offences against men by men are increasing year by year according to relevant data.[2] And the above mentioned cases reveal that sexual offences against men are committed not only by male but also by female perpetrators.

---

[1] Here are some cases of sexual offences against men described in papers and articles. In 2004, Zhang, a male student of Harbin was forced by Mrs. Li, his teacher, to have sex with her several times. The miserable experience made Zhang both physically and psychologically ill. Zhang finally summoned up his courage to report a case of rape to the public security organ after a long silence about the nightmare. However, the police stated that the case did not meet the criterion for file and refused to put it on record. In 2005, Fang Xiao, a boy, who left home to work in Ningbo, was sexually offended by a man, Bo Shao. Fang Xiao was so indignant that he killed the offender and was accused of intentional killing. Because Bo Shao had gross fault and Fang Xiao was under the age of 18 and Fang Xiao's attitude of confession was good, Fang Xiao was given a lighter sentence. In 2007, a boy was sexually assaulted by a man who pretended to be a teacher of a well-known university. However, the boy's family found no way to obtain any compensation. In 2009, two men robbed and then sexually abused a peasant worker in turn. The two perpetrators were arrested and sent to the court. But they could only be convicted of the crime of robbery. In 2010, a drunk security man sexually assaulted his roommate. The victim reported the case to the public security organ but was refused. The perpetrator and his roommate victim settled the matter privately in the end. In the same year, a man Li, forced his colleague to have sex with him and caused the victim to suffer from anal fissure. The case was sued to the court and Li was convicted of the crime of intentional injury.

[2] DING Tian, 论刑法视域下性权利的平等保护 (*On the Equal Protection of Sexual Rights from the Criminal Perspective*), 3 法制与社会 (Legal System and Society) 238, 239 (2012).

The provisions of sexual crimes in the current Criminal Law of China aim to protect female sexual rights. Because of the influence of traditional gender culture of "Male = The Advantaged Group," the Criminal Law pays comparatively little attention to the protection of male sexual rights. Women's social status is improved along with the development of society, the development of feminism and the disintegration of male supreme power. In addition, people's consciousness, including the awareness about sex, attains continuous emancipation with the development of science, including medical science. Sexual behaviors are increasing and the forms become more complex. As said above, sexual offences committed by men against men or by women against men are not unusual, and the patterns of sexual behavior are more diversified. Although male sexual rights are increasingly violated and the harm is not less than that to female sexual rights, male victims cannot obtain proper legal remedies because of the defects in the current Criminal Law and judicial practice. This leads to very feeble protection of male sexual rights. Looking at the current situation, we will appeal for the legal protection of male sexual rights in this thesis. Because of the space limits, we will only focus on the crime of rape in order to have full and thorough discussion and will not discuss about other sexual crimes.

This paper consists of four parts. Part Ⅰ is a research on reasons why sexual offences against males are increasing in China and possible patterns of sexual offences against males. Part Ⅱ is an analysis of the necessity for protecting male sexual rights in the crime of rape. In this part, we will analyze the harm caused by sexual offences against males, including the harm to society and the harm to male victims. We will further analyze the necessity for enacting a legal amendment to the crime of rape to protect male sexual rights respectively from juristic, constitutional and criminal perspective. Part Ⅲ is a study of relevant criminal legislations in both China of different times and places and foreign countries. We will introduce and evaluate some representative criminal legislations in order to offer some constructive and feasible suggestions for relevant legal modification in China. The last part concludes with systematic suggestions for relevant legal modification in China. In this part, we will have an overall research on the target, object, subject, objective and subjective aspects of the crime of rape and will propose reasonable and practicable suggestions based on the research. In addition, some transitional measures for protecting male sexual rights will be presented considering the possibly long process of legal modification.

I. REASONS OF INCREASING NUMBER OF SEXUAL OFFENCES AGAINST MALES AND COMMON PATTERNS OF SEXUAL OFFENCES AGAINST MALES

A. Reasons of Increasing Number of Sexual Offences against Males

As said in the introduction, sexual offences against males are increasing in China recently. Now, we will try to analyze the contributors to the increase.

1. Change in the Conception of Sex and Enhancement of Female Consciousness of

Sex: Women's Sexual Offences against Men. — Along with the reform and opening-up of China, some Western conceptions including sexual conceptions pour into China. Women began to have more access to these new conceptions. Influenced by new conceptions, especially the conception of sexual freedom and sexual liberation which originate from western campaigns of feminism and sexual liberation, Chinese people's sexual conceptions are becoming more open. Women's awareness of independence begins to wake. Women do things which were usually done by men, including sexual offences. Some women are no longer passive in sexual acts, and they became active. They dare to pursue or they are even eager to pursue sexual satisfaction by themselves. The overflow of sexual consciousness causes some women to have sex by wrong methods with other persons irrespective of other's will in order to satisfy their sexual desire.[3]

2. Emergence or Exposure of the Group of Homosexual Men and Sexual Acts between Men: Men's Sexual Offences against Men. — Based on past sociological research, it has been difficult for people to directly face up to homosexual men who have been existing for a long time. Homosexual men used to hide themselves deeply, scarcely exposed. But along with the change in sexual conception mentioned above, sociological scientists begin to have research on homosexuals and people become more tolerant of them than they did in the past. According to relevant authoritative statistics in 2004, the number of homosexual men in China has reached about 5 million to 10 million.[4] This is a very large number taking the total population of China into account. As a matter of fact, this group exists in various stratums, despite of educational levels and vocations. From grassroots to elites, from illiteracies to doctors, and from farmers to government officials, there are homosexual men. According to some scholars, homosexual men (and bisexual men) are the major (potential) group that commit sexual offences against men. Thus the population of homosexual men can affect the number of cases of sexual offences against men to a certain degree. In addition, what should be noted is that men who have sexual relations with men are not confined to homosexual men and bisexual men. According to Zhang Beichuan's estimation, the population of men who have sexual relations with men is 4 to 5 times more than the population of homosexual men and bisexual men.[5] This means the subject of sexual offences between men is not only confined to homosexual man and bisexual man. Actually, in the male group whose sexual desire cannot be satisfied, there are also sexual acts and even sexual offences between men (the relatively representative groups include peasant workers, soldiers, prisoners, etc.[6]). By this we can conclude that

---

[3] LI Yinhe, 性文化研究报告 (*Research Report on Sexual Culture*), Jiangsu People's Publishing House (Nanjing), at 261–87 (2003).

[4] 中国首次公布男同性恋人数 (China Publishes the Population of Homosexual Men for the First Time), at http://news.xinhuanet.com/health/2004-12/01/content_2280536.htm, (1ast visited Dec.1, 2004).

[5] See DING, fn.2.

[6] DING Yansong, 对男性性侵犯予以犯罪化的立法思考 (*Legislative Thinking of Criminalization of Sexual Offences against Men*), 6 山东省青年管理干部学院学报 (Journal of Shandong Youth Administrative Cadres College) 108, 108–9 (2007).

the number of (potential) subjects of sexual offences between men is by no means small.

3. The Rising Possibility of the Achievement of Sexual Offences to Men. — Because of the features of men's physiological structure, it is hard to have sex under common circumstances if a man does not want to do So, especially when the perpetrator is a woman. However, the invention of drugs for stimulating sexual excitation makes it possible that a man is physiologically "willing" to have sex with a perpetrator although he is extremely unwilling to do so.[7]

4. The Heavier Social Pressure, the More Desire to Pursue Stimulation. — In modern society, people live under heavier stress than they did in the past. Stresses related to further education, employment, economy, medical care etc., make people exhausted, bored, depressed or irritable. When the negative emotion cannot be released and discharged in a timely and effective way, one may easily become psychologically distorted and even go to extremes. Consequently certain wrong activities, such as drug-taking and adultery, in pursuit of stimulation to release negative emotion have been triggered. "Male prostitutes" are not rare either. In actual life, some lawbreakers force men to provide sexual services to others and thus seriously violate male sexual rights. In addition, some heterosexual men, whose sexual orientation and other physical and psychological conditions used to be normal, began to commit abnormal sex (*e.g.* anal sex with another man) after suffering from setback in social life to "prove" they are real man or to vent their anger.[8]

5. Influence of Traditional Conception. — As said above, new conception of sex has influenced Chinese people. But the influence of traditional sexual conception has not vanished. In the thousands-of-years Chinese culture of sex, men have always been seen as the dominator and master of sex. Therefore, men have fairly strong self-esteem in the aspect of sex. Once they are sexually offended, their self-esteem may suffer a severe blow, which seems to be more serious than that of female victims. They are also too embarrassed to tell about it because they take it as a great shame that a man is sexually assaulted and they would rather never uncover the case. It turns out that few male victims tell their relatives and friends about their suffering, not to mention to report to the police. But such "tolerance" has contributed to further increase of sexual offences against men.[9]

6. Legal Loophole and Difficulty in Collecting Evidence. — The crime of rape in the current Criminal Law of China only protects female sexual rights. If a man is sexually offended, it is hard to resort to a legal remedy. Thus perpetrators often can escape from legal sanctions and their arrogance and aggression may be inflated and may sexually assault the same victims again or other men. What's worse, some other persons may also

---

[7] See ZOU Chao, 男性性权利受侵害现象增多的原因及其保护 (*Reasons for the Increase of Violations of Male Sexual Rights and Protection*), 26 法制与社会 (Legal System and Society) 89, 89 (2008).

[8] Id.

[9] Id.

find it a "good chance" to release bestiality without being criminally punished. They are more likely to sexually assault men. This is another cause for the rising number of sexual offences against men. In addition, although the police may put on record a case of sexual offence against a man, it is difficult to collect evidence. If the victim is a woman, it is usually the case that the perpetrator leaves his semen in the victim's vagina. Thus it is easier to collect the criminal evidence. But if the victim is a man, the perpetrator, male for example, often leaves his semen in the victim's anus or oral cavity. If the extraction is not in a timely manner, it will be extremely hard to collect the evidence. Furthermore, no matter whether the victim is voluntary or forced to do so, the harm to anal sphincter is inevitable because the common pattern of sexual intercourse between men is anal sex and the anal sphincter has sensitive reaction and mucous membrane of rectum cannot secrete lubricating liquid. Thus it's not easy to judge whether the injury is caused by a forcible sexual act only relying on medicolegal expertise.[10]

B. Common Patterns of Sexual Offences against Men

Firstly, we discuss about the means perpetrators use to sexually assault men.

Women usually sexually assault men by violence, coercion (*e.g.* to threaten to uncover victims' privacy, to threaten to take economic sanction, etc.) or other methods (*e.g.* to make use of hallucinogenics, afrodyn, alcohol or other materials to intoxicate men) to make target men unconscious, afraid, or unable to resist so as to commit sexual humiliation, or molestation or to have sex with the target men. Nevertheless, considering the differences of physiological characteristics between genders, women rarely only rely on violence to commit sexual offences. They use methods other than violence more often.

Patterns of men's sexual offences against men mainly refer to sexual offences against men in the MSM group[11]. This includes, for example, a homosexual man or a bisexual man sexually offending other men. For another example, in the highly dense same-sex communities such as prisons, bars, and migrant workers' neighborhood, sexual offences between men also occur even if the perpetrator is a heterosexual man. People in these special places are usually sexually repressed or distorted. Sexual offences between men easily take place to release sexual desire. The common patterns are nothing different from that of female perpetrators, but are often more violent. A large proportion of sexual offences between men are forced anal sex or forced oral sex. There are certainly other forms of sexual humiliation, molestation and assault.

Next, we will discuss about the patterns of sexual relations (or sexual intercourse)

---

[10] DONG Li, 关于完善男性间同性性侵犯刑法保护的思考 (*On the Improvement of Protection of Victims of Same Sex Sexual Assault between Men by Criminal Law*), 3 贵州警官职业学院报 (Journal of Guizhou Police Officer Vocational College) 66, 67 (2007).

[11] MSM is the abbreviation of Men who have Sex with Men, including homosexual men, bisexual men, men with sick sexual desire and heterosexual men who had sexual intercourse with men.

which is one of the key concepts in the crime of rape. In the Criminal Law of China, it defines the term "sexual relations" in traditional sense as penis-vagina combination. Thus it cannot subsume anal sex, oral sex and other patterns of sexual relations in a broader sense. Considering the structure of this thesis and for the convenience of argumentation, we will talk about the necessity to modify the definition of sexual relations in the following parts.

II. NECESSITY TO AMEND PROVISIONS ON THE CRIME OF RAPE OF THE CRIMINAL LAW OF CHINA TO PROTECT MALE SEXUAL RIGHTS

A. Harm of Sexual Offences against Men

1. Harm to Society. — The harm of sexual offences against men to society is as follows:

(1) The violation of male sexual rights is a violation of human rights

In present modern civilized society, male sexual rights are an important part of male citizens' human rights. According to article 48 of the Constitution of China, men and women enjoy equal rights, which of course include sexual rights. The violation of male sexual rights undoubtedly harms the fundamental spirit of human rights.

What should be pointed out is that sexual right is a special civil right. When it is infringed, a citizen's right of (physical and psychological) health, right of personal freedom, and right of personal dignity are frequently infringed along with it. If the Criminal Law, the last resort for protecting civil rights, does not recognize or protect male sexual rights, then it's better stop talking about male citizens' human rights.

(2) The violation of male sexual rights is a severe harm to social ethical norms and social order

Ethics and morals related to sex are public sexual conception, and are norms in a society for people to judge whether a sexual act is right or wrong and good or evil. They help people to lead a normal and orderly life. To be precise, they play a key role in maintaining people's healthy sexual relationship and they are also an important method to maintain governing order. Sexual offenses, however, are destructive to ethics and morals in China.

Social order is an important guarantee for the normal and healthy maintenance and development of society. Sexual offences harm social order in various aspects and at various degrees in China. After the perpetrator has conducted the sexual offence, he (or she) will be more insufferably arrogant when he (or she) is aware that his (or her) act will scarcely incur any legal consequence because of the loophole in law. This perpetrator will commit more such offences and other potential perpetrators who also find the loophole will attempt to do the same. In addition, victims may inverse to do evil things which will further harm society. We will make a detailed analysis in the following paragraphs.

2. Harm to Male Victims. — The harm to male victims is as follows:

(1) Harm to the physical health of male victims

According to relevant professional research, victims of sexual offences, especially violent sexual offences, are more possible to be infected with AIDS or VD[12] than in normal sex. Sexual assaults against men can injure men's genital organ more easily.

Sexual offences against men by men are often in the way of anal sex. This does great harm to the physical health of male victims: (i) Male victims suffer from great pain, leading to various physical diseases. The way of anal sex, easily causes physical injury and pain to victims;[13] (ii) Sexual offences between men contribute to the increasing risk of being infected with STD.[14] In the process of anal sex, a perpetrator's semen with HIV comes into contact with the victim's blood through the tiny injury of the victim's rectal mucosa, which causes infection.[15]

(2) Harm to the psychological health of male victims

When a male victim is sexually assaulted, he will suffer from extreme spiritual trauma. This has been sufficiently exhibited by female victims in cases of rape. The spiritual trauma of male victims is probably more severe, especially when victims are under-age boys and when victims are psychologically more feeble.

Specifically, male victims' representative psychological situations after sexual assaults are as follows: (i) male victims suffer from RTS[16]; (ii) male victims may have a

---

[12] VD is the abbreviation of Venereal Disease.

[13] Anal sex is to insert the male genital organ into the sexual target's anus. Because of the sensitive reaction of anal sphincter and the inability of rectal mucosa to secrete lubricating liquid, one feels intense pain when his anus is inserted by a male genital organ. Anal sex may cause muscular injury, infection and the lack of contractility of anal sphincter.

[14] STD is the abbreviation of Sexually Transmitted Disease.

[15] See DING, fn.6 at 109–10.

[16] RTS refers to "Rape Trauma Syndrome." The "rape trauma syndrome" consists of three stages: the acute stage, the outer adjustment stage, and the renormalization stage. Behaviors present in the acute stage include: diminished alertness; numbness; dulled sensory, affective and memory functions; disorganized thought content; vomiting; nausea; paralyzing anxiety; pronounced internal tremor; obsession to wash or clean themselves; hysteria, confusion and crying; bewilderment; acute sensitivity to the reaction of other people. The acute stage occurs in the days or weeks after a rape. Durations vary as to the amount of time a survivor may remain in the acute stage. The immediate symptoms may last a few days to a few weeks and may overlap with the outward adjustment stage. Survivors in this stage seem to have resumed their normal lifestyle. However, they simultaneously suffer profound internal turmoil, which may manifest in a variety of ways as the survivor copes with the long-term trauma of a rape. In a 1976 paper, Burgess and Holmstrom note that all but 1 of their 92 subjects exhibited maladaptive coping mechanisms after a rape. The outward adjustment stage may last from several months to many years after a rape. There are common behaviors in this stage: minimization (pretending "everything is fine"); dramatization (cannot stop talking about the assault); suppression (refuses to discuss the rape); explanation (analyzes what happened); flight (moves to a new home or city, alters appearance); poor health in general; continuing anxiety; sense of helplessness; hypervigilance; inability to maintain previously close relationships; experiencing a general response of nervousness known as the "startle response"; persistent fear and/or depression at much higher rates than the general population; mood swings from relatively happy to depression or anger; extreme anger and hostility (more typical of male or masculine victims than female or feminine victims. etc.

thought to commit suicide; (iii) male victims often feel that they are weak and incapable and thereby look down upon themselves or blame themselves and their manliness may be impaired; and (iv) male victims may distort their sexual orientation, and they will live the rest of their life differently.[17]

(3) Male victim's vicious inversion and crime

No matter who the perpetrator is, a man or a woman, a male victim probably suffers a great deal psychologically. When he finds that there is no way to seek for legal remedies, the victim may try his best to get private remedies, even by fair means or foul. He may use illegal methods and take criminal acts to retaliate the perpetrator or society which is "absolutely unfair" in his eyes.[18] Consequently, many vicious social events or legal cases take place. Male victims' crime may be categorized into three types in the light of different targets of their crimes after their "vicious inversion:" (i) Direct offence. In order to directly retaliate the perpetrator, the original victim infringes the original perpetrator. (ii) Indirect offence. In order to indirectly retaliate the perpetrator, the original victim infringes the perpetrator's relatives, friends or other persons who have special relationships with the perpetrator; (iii) Indiscriminate offences. The original victim infringes other innocent persons. The male victim becomes aberrant and even develops an antisocial personality.

B. Juristic, Constitutional and Criminal Analysis of the Necessity for Amending Provisions on the Crime of Rape to Protect Male Sexual Rights

1. Juristic Necessity for Amendment of Provisions on the Crime of Rape to Protect Male Sexual Rights. — Since modern times, liberalism has been always playing a predominant role in both theoretical and practical fields. Although postmodern philosophy and other critical philosophy, whose task is to rethink or attack modernity and liberalism, are developing, they cannot shake the predominant position of liberalism in a short time. Freedom is still a sublime value which is protected by laws.

In the sense of law, freedom means that the law takes recognizing, guarding and developing people's freedom as an important task. Law functions to guard and promote people's freedom rather than to confine, disregard or even trample freedom. If a law cannot protect people's freedom effectively, it does not satisfy the requirement of a "good law," and it may even be an "evil law." Karl Marx's remarks can be a criterion for measuring whether a law is a "real law" or lives up to the reputation of "law"; the criterion is: "Law becomes real law only when the free and unconscious natural law

---

[17] WANG Pu, 论男性性权利之刑法保护 (*On the Protection of Male Sexual Rights by Criminal Law*), at http://www.law-lib.com/lw/lw_view.asp?no=7910&page=2 (1ast visited Dec.24, 2006).

[18] FAN Xiaojun, 浅谈男性性权利在强奸罪中的法律保护 (*On the Legal Protection of Male Sexual Rights in the Crime of Rape*), 11 法制与社会 (Legal System and Society) 75, 75 (2011).

transforms into conscious state law. Wherever law becomes actual law, *i.e.* wherever law becomes the existence of freedom, the law becomes people's actual freedom."

Law not only should protect freedom but also should equally protect freedom unless there is a reasonable reason for discriminative treatment. Sexual right, one type of freedom in law, is supposed to be possessed by both men and women. Both genders should be able to freely enjoy their sexual rights and be protected from violations. Law is the means of protecting people's rights and certainly is to protect both men's and women's rights.

2. Constitutional Necessity for Amendment of Provisions on the Crime of Rape to Protect Male Sexual Rights. — Article 33.3 of the Constitution prescribes that the State respects and preserves human rights. According to *Valencia Declaration on Sexual Rights*, sexual right is a basic and fundamental human right. Article 33.2 of the Constitution prescribes that all citizens of the People's Republic of China are equal before the law. This means that anyone's (no matter men's or women's) legal rights ought to be equally treated and protected by law; and legal punishment is equally prescribed, determined and enforced on any behavior which infringes other's legal rights. No privilege over law shall be permitted and no criminals shall be permitted to remain at large. The right of equality is a basic right which is conferred to every Chinese citizen by the Constitution, and is one of the important connotations of the basic principle of China's Socialist Rule of Law.

The above prescriptions signify that both men and women have inviolable sexual rights. The State ought to not only protect sexual rights of both genders but also equally protect them. Therefore, both male sexual rights and female sexual rights are the objects which the Criminal Law should protect. Women are one of the natural genders of human beings, and their various rights are supposed to be in the equal status as men's within the range of the objectively physiological characteristics. Unequal protection of rights between genders in the past class society shall be rectified. But this never means going from one extreme (*i.e.* to be indifferent to the protection of female rights) to the other extreme (*i.e.* to be indifferent to the protection of male rights). Neither shall it be permitted that certain rights of women's are protected but those of men's are simply neglected. Indeed, there is a constitutional term "reasonable differentiation." It is acknowledged that the clause "[A]ll citizens of the People's Republic of China are equal before the law" includes both formal equality and substantial equality. Formal equality aims to fight against unreasonable differentiation while substantial equality is necessary for recognizing reasonable differentiation. Many differentiations between groups of persons are justified and gender differentiation is among them. Considering the physiological distinctions between genders, women cannot do heavy physical labor when they are in the period of menstruation, pregnancy, childbirth and lactation. The Labor Law and other relevant laws prescribe some measures to specially protect women under these circumstances. This differentiation is reasonable. But to merely protect female

sexual rights cannot be justified. There is no convincing reason for merely protecting sexual rights of one gender while neglecting those of the other.

3. Criminal Necessity for Amendment of Provisions on the Crime of Rape to Protect Male Sexual Rights. — The criminal necessity of amending the crime of rape to protect male sexual rights is as follows:

(1) Prescription of the crime of rape in the current Criminal Law and its problems

Article 236 of the current Criminal Law prescribes:

> *Whoever rapes a woman by violence, coercion or any other means shall be sentenced to a fixed-term imprisonment of not less than 3 years and not more than 10 years. Whoever has sexual intercourse with a girl under the age of 14 shall be deemed to have committed rape and shall be given a heavier punishment. Whoever rapes a woman or has sexual intercourse with a girl under the age of 14 shall, in any of the following circumstances, be sentenced to fixed-term imprisonment of not less than 10 years, life imprisonment, or death:*
> *(i) the circumstances being flagrant;*
> *(ii) raping several women or girls under the age of 14;*
> *(iii) raping a woman before the public in a public place;*
> *(iv) raping a woman with one or more persons in succession;*
> *(v) causing serious injury or death to the victim or any other serious consequences.*[19]

We have an understanding of the definition of the crime of rape from this provision, which is specifically to violate women's will and have sex with women through violence, coercion and other means intentionally. Further conclusions can be drawn as follows.

Looking at the target of the crime, it can only be women, men excluded.

Looking at the object of crime, it can only be women's sexual right, mainly referring to the right of sexual autonomy and the right of sexual freedom, men's right of sexual autonomy and right of sexual freedom excluded.

The objective aspects of crime, "by violence, coercion and other means" rarely cause any controversy. The problem is in the content of "sexual intercourse." The traditional common view is as follows: by "sexual intercourse" the crime of rape (accomplished offence) means a man's genital organ inserts into a woman's genital organ. The definition of "sexual intercourse" here is fairly narrow. If a perpetrator forces a woman (or a child, no matter boy or girl, under the age of 14) to have anal sex, oral sex or other sexual acts, the perpetrator's act cannot be deemed as having committed rape, only the crime of forcibly molesting a woman or the crime of molesting child instead.

---

[19] See *Criminal Law of the People's Republic of China (97 Revisions)*. at http://www.lawinfochina.com/display.aspx?lib=law&id=354&CGid= (last visited Jul. 31, 2013).

In terms of the subject of crime, women can only be the abettor, accessory, indirect principal or joint principal. They cannot be the solitary principal offender, *i.e.* women's act alone cannot directly fulfill criminal constitution. If a woman intentionally has sexual intercourse (in the traditional sense) with a boy under the age of 14, she ought to be only convicted of the crime of molesting a child. However, if a man intentionally has sexual intercourse (in the traditional sense) with a girl under the age of 14, he ought to be convicted of the crime of rape and be given a heavier penalty. It is obvious that the current Criminal Law pays much less attention to protecting boys' sexual rights than to girls'.

In terms of the subjective aspects of crime, women's intention to rape men and to molest male adults is excluded. Men's intention to rape men and to molest male adults is also excluded.

(2) Reason from the perspective of Criminal Law for amending the crime of rape

The definition of crime prescribed in article 13 of the Criminal Law is: "A crime refers to an act that endangers the sovereignty, territorial integrity, and security of the state, splits the state, subverts the State power of the people's democratic dictatorship and overthrows the socialist system, undermines public and economic order, violates state-owned property, property collectively owned by the working people, or property privately owned by citizens, infringes on the citizens' rights of the person, their democratic rights or other rights, and any other act that endangers society and is subject to punishment according to law. However, if the circumstances are obviously minor and the harm done is not serious, the act shall not be considered as a crime."[20] In terms of spreading the concept, there is no reason to exclude the protection of male sexual rights from the range of protection of legal rights by the Criminal Law.

The gap between the law on criminal protection of male sexual rights and judicial practice makes the court at a loss when confronted with cases of sexual assault against men. When a case involves violence, coercion or other forcible means that a perpetrators uses to force the male victim to have sexual intercourse with him (or her) and thereby infringes the sexual right of the male victim, the court often attempts to resort to the crime of intentional killing, the crime of intentional injury, the crime of accidental killing, the crime of serious accidental injury, the crime of insult, the crime of abuse, the crime of child molesting and other crimes for legal penalties according to the essence of the offensive act.

However, the crime of intentional killing requires that in the process of the sexual offence there exist an intention and act to cause death and actually causes the result which is more serious than slight injury. Otherwise the actor shall not be convicted of the crime. The crime of intentional injury requires that in the process of the sexual offence there

[20] Id.

exist an intention and act to injure the victim and actually causes the result which is more serious than slight injury. Otherwise the actor shall not be convicted of the crime. The crime of accidental killing requires that in the process of the sexual offence there exist the result that the victim is dead. Otherwise the actor shall not be convicted of the crime. The crime of serious accidental injury requires that in the process of the sexual offence there exist the result that the victim is seriously injured. Otherwise the actor shall not be convicted of the crime. The crime of insult requires the publicity of the offensive act, *i.e.* the offence should be or probably be known by the public. If the actor insults the victim and there is no other person or persons on the spot, or it is impossible that other person or persons know it there and then, the actor shall not be convicted of the crime. The crime of abuse requires that the victim and the actor should be family members who are in the same family and live together. If the victim and the actor do not meet this requirement, the actor shall not be convicted of the crime. The crime of child molesting requires that the target of crime is a child under the age of 14. If the target of sexual offence is a man above the age of 14, the actor shall not be convicted of the crime. Before the enforcement of the 1997 Criminal Law, the actor (whether a man or a woman) who commits sexual offence against a man could be convicted of the crime of hooliganism according to the 1979 Criminal Law. But the 1997 Criminal Law abolishes the crime of hooliganism.

The above analysis indicates that we cannot wholly rely on other articles of the current Criminal Law to completely protect male sexual rights. Even if under certain circumstances male victims of sexual offences may resort to other relevant provisions of the Criminal Law for vicarious remedy, those provisions cannot mirror properly the social relationship that should be protected. One may suggest that the court make analogous application of article 236. That will violate the principle of a legally prescribed punishment for a specified crime and so it is forbidden. Thus it is necessary that the Criminal Law adopt male sexual rights in the crime of rape as legally protected rights.

III. SUMMARY OF CRIMINAL LEGISLATION ON THE CRIME OF RAPE IN HISTORY AND IN OTHER COUNTRIES AND REGIONS

A. Relevant Criminal Legislations in Different Times and Places of China

Criminal punishment on sexual offences against men has precedents in China in history. The *Collection of Criminal Cases* (刑案汇览) compiled in the Qing Dynasty recorded a case which happened in the 24th year of Jiaqing. Wentong Zhang slavered over a good-looking boy at the age of 12. He colluded with Jincai Shi to sexually assault the boy in turn. The court heard the case and made an analogical sentence of penalties on the crime of raping women in turn. Wentong Zhang, the principal offender, was sentenced to immediate decapitation (斩立决) while Jincai Shi was sentenced to suspended death by hanging (绞监候) as accessory. In the period of the Republic of China, there were definite

prescriptions on sexual offences in the criminal law which have no gender limitation to either the subject or the target.[21]

It may be concluded that male sexual rights used to be protected by law in Chinese history. Although the case recorded in the *Collection of Criminal Cases* involves analogous application which is criminally forbidden in modern times, it's unfair and unreasonable to refuse to acknowledge the justification of the judgment in a modern light. At least the positive law in that period permitted analogous application. The analogous judgment was fair and reasonable in that certain time and space and it indeed reflected the legal attitude to male sexual right protection.

Currently the Hong Kong Special Administrative Region, the Macao Special Administrative Region and Taiwan already have concrete criminal legislations on sexual offences against men.

Article 157.1 of the Macao Penal Code imposes a penalty of imprisonment for 3 to 12 years for anyone who procures a woman by violence or threat, or has sexual intercourse (vaginal or anal) with the victim after making her unconscious or forcing her into a situation where she is unable to resist, or who forces the victim to have sexual intercourse with a third person. In this clause, the target of the crime of rape is confined to women. But in the next paragraph of the same article, it prescribes that whoever commits anal sex to the victim or forces the victim to do anal sex with a third person by the means prescribed in the above paragraph ought to be punished alike. Thus, the target of the crime of rape actually is not only confined to women. It also includes men.[22]

Article 221 of the Taiwan Criminal Code prescribes, "Whoever does sexual intercourse with a man or a woman by violence, coercion, threat, hypnotism or other means which violates the victim's will ought to be sentenced to a fixed-term imprisonment of 3 to 10 years."[23] This article definitely prescribes that both men and women can be the victim of the crime of forced sexual intercourse.

Section 118 of the Hong Kong Criminal Ordinance prescribes the crime of rape. The subject of crime is confined to men while the target of crime is confined to women. But in the crime of non-consensual buggery, the crime of assault with intent to commit buggery, the crime of homosexual buggery with or by man under 21 prescribed respectively in articles 118A, 118B and 118C and other crimes of sexual and related offences in Part XII,

---

[21] See DONG, fn.10 at 68.

[22] See *Macao Penal Code, at* CCLS BUN (Colleage for Criminal Law Sciences of Beijing Normal University Website), at http://www.criminallawbnu.cn/criminal/Info/showpage.asp?pkID=488 (last visited Jul. 31, 2013).

[23] See *Taiwan Criminal Code, at Peking University Law Website, at* http://www.pkulaw.cn/fulltext_form.aspx?Db=twd&Gid=939524655&keyword=%e5%88%91%e6%b3%95&EncodingName=&Search_Mode=accurate (last visited Jul. 31, 2013)

the target of crime includes men.[24]

B. Relevant Criminal Legislations in Other Modern Countries

1. *Target and Subject of the Crime.* — Article 222–23 of the French Penal Code prescribes: "Any act of sexual penetration, whatever its nature, committed against another person by violence, constraint, threat or surprise, is rape. A raper shall be sentenced to 15 years' imprisonment."[25] It is obvious that there is no gender limitation to either the target or the subject of the crime of rape.

Section 177.2 of the Germany Criminal Code prescribes: "In especially serious cases the penalty shall be imprisonment of not less than 2 years. An especially serious case typically occurs if (1) the offender performs sexual intercourse with the victim or performs similar sexual acts with the victim, or allows them to be performed on himself by the victim, especially if they degrade the victim or if they entail penetration of the body (rape); or (2) the offence is committed jointly by more than one person."[26] It can be seen that the Germany Criminal Code does not prescribe gender limitation to the target and the subject of the crime of rape. It uses gender-neutral terms such as "offender," "victim," and "person."

Article 178 of the Spanish Criminal Code prescribes: "Whoever offends against the sexual freedom of another person, using violence or intimidation, shall be punished for sexual assault with a sentence of imprisonment for 1 to 5 years." Article 179 prescribes: "When a sexual assault consists of vaginal, anal or oral penetration, or inserting body parts or objects into either of the former two orifices, the offender shall be convicted of rape with a sentence of imprisonment for 6 to 12 years."[27] Article 178 prescribes on the crime of sexual assault and article 179 prescribes circumstances under which the legal punishment is heavier. Both prescriptions have no gender limitation to the target and the subject of the crime of sexual assault.

Article 131 of the Criminal Code of the Russian Federation firstly defines the crime of rape as sexual intercourse with the use of violence or with threat of its use against a victim or other persons, or in taking advantage of the victim's helpless condition. This definition shows that the gender of the victim is not confined to women. This article then prescribes the condition for heavier punishment in which there is still no discriminative

---

[24] *Hong Kong Criminal Ordiance*, at http://www.hklii.hk/eng/hk/legis/ord/200/ (last visited Jul. 31, 2013)

[25] 法国刑法典 (*The Penal Code of France*), translated by LUO Jiezhen, China People's Public Security University Press (Beijing), at 64–65 (1995)

[26] 德国刑法典 (*The Criminal Code Of German*), translated by XU Jiusheng & ZHUANG Jinghua, China Legal Publishing House (Beijing), at 145 (2000).

[27] 西班牙刑法典 (*The Criminal Code of Spain*), translated by PAN Deng, China University of Political Science and Law Press (Beijing), at 68–69 (2004).

treatment according to the gender of either the offender or the victim.[28]

The Penal Code of Texas, USA, prescribes on the crimes of sexual offences in Chapter 6. Section 21.01 defines sexual offences: "[I]n this chapter, (1) deviate sexual intercourse means (i) any contact between any part of the genitals of one person and the mouth or anus of another person; or (ii) the penetration of the genitals or the anus of another person with an object; (2) sexual contact means, except as provided by Section 21.11,[29] any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person. (3) sexual intercourse means any penetration of the female sex organ by the male sex organ..." The provisions show that in addition to sexual intercourse in the traditional sense, there is also deviate sexual intercourse which has no gender limitation to the target and the subject. In addition, Section 21.06 prescribes exclusively on homosexual conducts.[30]

2. Definition of "Sexual Relations" (*Or "Sexual Intercourse"*). — According to the above analysis of the criminal laws of some major foreign countries and special administrative regions of China, we may summarize the patterns of sexual intercourse or the patterns of sexual acts as follows.

(1) Vaginal sex and anal sex

Article 157 of the Macao Penal Code, cited above, emphasizes that sexual intercourse includes vaginal sex and anal sex. This provision does not regulate oral sex. But nevertheless, the next article refers to the concept of "important act of sexual desire." Actually, in Article 158, the prescription relevant to sexual coercion includes some important acts of sexual desire such as oral sex, sexual act by object, etc.

(2) Vaginal sex, anal sex and oral sex

Article 10.5 of Taiwan Criminal Code defines sexual intercourse: "The word 'sexual intercourse' has the following meanings: (i) to insert one's genital organ into another person's genital organ, anus or oral cavity; (ii) to insert other parts of body or object into another person's genital organ, anus or oral cavity."[31]

It is not hard to find that this definition of sexual intercourse has the following features: (i) the sexual intercourse not only includes the basic form of natural sexual intercourse such as vaginal sex, but also includes the sexual act which involves inserting the penis into anus and oral cavity; (b) the parts of body other than the genital organ and object are deemed as the "quasi-genital organ." To insert the "quasi-genital organ" into

---

[28] See The *Criminal Code of the Russian Federation*. at http://www.russian-criminal-code.com/PartII/SectionVII/Chapter18.html (last visited Jul. 31, 2013)

[29] Section 21.11 of the Texas Penal Code prescribes on the crime of indecency with a child.

[30] See *Texas Penal Code*. at http://law.onecle.com/texas/penal/chapter21.html (last visited Jul. 31, 2013)

[31] See fn. 23.

another person's genital organ, anus or oral cavity can be regarded as sexual intercourse alike; (c) the same emphasis is laid on that "to insert" is one of the constituting elements of sexual intercourse.

The Norway General Civil Penal Code even includes "rectal sex" in the definition of sexual intercourse. Section 206 of this Penal Code prescribes: "When the term sexual intercourse is used in the provisions of this chapter, both vaginal and anal intercourse are meant. Insertion of the penis into the mouth and insertion of an object into the vagina or rectum shall be equated with sexual intercourse. In the case of acts referred to in Section 195,[32] insertion of the penis in and between the labia majora and the labia minora shall also be equated with sexual intercourse."[33]

(3) To substitute the term "sexual penetration" for sexual intercourse

Article 224 of the Danish Penal Code emphasizes that sexual intercourse not only includes natural sexual intercourse but also includes sexual behaviour other than natural sexual intercourse.[34]

Articles 222–223 of the French Penal Code prescribes on the term "sexual penetration." It strictly emphasizes "any act of sexual penetration," *i.e.* the objective patterns of sexual act not only includes inserting penis into vagina, but also includes anal sex, oral sex and other means of sexual act. In this way, citizens' sexual rights including male sexual rights shall be protected more thoroughly.

Chapter 794 of the Florida Laws prescribes on the crimes of sexual battery. Chapter 794.011 defines "sexual battery": "[S]exual battery means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose."[35] It can be seen that this also uses "sexual penetration" which has a broader sense than the traditional "sexual intercourse."

(4) To substitute the term "sexual assault" or "sexual offence" which has broader sense for the term "rape"

The Canadian Criminal Code substitutes the crime of sexual offence for the crime of rape. The crime of sexual offence is divided into three classes in light of the degree of gravity of the force and the degree of harm. The heaviness of punishment ascends by the

---

[32] Section 195 of the Norway General Civil Penal Code prescribes the crime relevant to sexual act with a child under the age of 14.

[33] *Norway General Civil Penal Code*, at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_penal_code.pdf (last visited Jul. 31, 2013)

[34] 丹麦刑法典 (*Danish Penal Code*), translated by XIE Wangyuan, Peking University Press (Beijing), at 59 (2005).

[35] See *Florida Laws*. Chapter 794, at http://law.onecle.com/texas/penal/chapter21.html (last visited Jul. 31, 2013).

class.[36] It shows that Canadian legislators do not entangle themselves in the narrow term "insertion" any longer. Instead, they legislate on punishing sexual offenders according to the class of force and harmful results.

IV. SUGGESTIONS FOR AMENDING THE CRIMINAL LAW OF CHINA ON THE CRIME OF RAPE

Analysis of relevant criminal legislations of different times and space enables us to present suggestions for amending the Criminal Law of China on the crime of rape.

A. Object of the Crime

Sexual right is the right of inviolability of sex, *i.e.* the right possessed by men or women to determine his or her own sexual act according to his or her own will. According to *Valencia Declaration on Sexual Rights*, the contents of sexual rights include the right to freedom, the right to autonomy, integrity and safety of the body, the right to sexual equity and equality, the right to sexual health, the right to wide, objective and factual information on human sexuality, the right to a comprehensive sexuality education, the right to associate freely, the right to make free and responsible choices regarding reproductive life and the right to privacy. The crime of rape mainly infringes a victim's (whether the victim is a man or a woman) right of sexual freedom and the right of sexual autonomy.

B. Target of the Crime

The target of the crime of rape not only includes women but also includes men; not only includes persons above the age of 14 but also includes persons under the age of 14. This range of target of crime will be conducive to protect both female and male sexual rights overall and equally.

C . Pattern of the Objective Aspects of the Crime

1. The Actor Obviously Suppresses the Victim's Resistance by Violence, Coercion or Other Methods. — By "violence" it means that the actor illegally uses visible power to the victim and makes the victim lose the ability to resist. Coercion can be spiritual. The actor tells the victim of possible vicious consequences, making the victim lose his (or her) mind to resist because of fear. Coercion can be violent or unviolent, such as coercing to reveal the victim's privacy, coercing to tarnish the victim's reputation, etc. Other methods

[36] 加拿大刑法典 (*Canadian Criminal Code*), translated by BIAN Jianlin, China University of Political Science and Law Press (Beijing), at 108–18 (1999).

commonly refer to the methods with which the victim's ability to resist is deprived or weakened (such as anaesthesia or alcoholic intoxication) or the methods with which the actor takes advantage of the victim's unawareness or ignorance of resistance (for example, the victim is deeply asleep, in a coma or ill) to commit sexual offence. Nevertheless, if the target is a child under the age of 14 or is a legally incompetent person who cannot distinguish and judge his (or her) own act, no matter what methods the actor uses, the actor's act is deemed as the crime of rape as long as it embodies other constituting elements of the crime.

2. The Actor Goes against the Victim's Will. — When the victim is not willing to have sexual intercourse with the actor, or when the victim is forced to have sexual relations with the actor through the method which is refused and resisted by the victim, the actor violates the victim's will. Nevertheless, if the victim is a child under the age of 14 or is a legally incompetent person who cannot distinguish and judge his (or her) own act, the actor's sexual offence is deemed as "violating the victim's will" anyway.

3. The Actor Has Sexual Intercourse with the Victim: Modification of the Concept of Sexual Intercourse (*or Sexual Relations*). — The current Criminal Law adopts the traditional concept of sexual intercourse, *i.e.* penis-vagina sexual intercourse. The criterion of accomplished offence is the "doctrine of insertion," *i.e.* the intercourse of the male and female genital organs. The above analysis shows that this definition is no longer suitable for the reality of protecting both genders' sexual rights.

Referring to the above definition of sexual intercourse in other countries and regions, and considering the difference between the crime of rape and the crime of molestation in patterns of act (details in Section F of this part), Chinese people's perceived social acceptance and common conception of value, we think the term "sexual intercourse" or "sexual relations" in the crime of rape may be redefined to substitute the pattern of "sexual penetration" for the traditional pattern of "penis-vagina" intercourse. In detail, the forms of sexual intercourse (accomplished) are (i) the penis is inserted into one's (whether the person is a man or a woman) vagina, anus or oral cavity (*i.e.* vaginal sex, anal sex, oral sex); and (ii) the parts of the body other than the genital organ or the manipulated vicarious object is inserted into one's vagina or anus. No matter how deep the insertion is, regardless of whether there is ejaculation, the act is accomplished.

D. Subject of the Crime: Women Can Become the Solitary Principal Offender of the Crime of Rape

From the concept of sexual intercourse listed above, a conclusion can be drawn that in reality women are quite probable to become the solitary principal offender of the crime of

rape. A female actor's act mainly includes inserting certain parts of her body or a vicarious object manipulated by the actor into a female victim's vagina or anus; inserting certain parts of her body or a vicarious object manipulated by the actor into a male victim's anus; forcing a male victim's penis into the actor's oral cavity, anus or vagina; or forcing a victim's (irrespective of the victim's gender) certain parts of the body other than genital organ into the actor's vagina or anus. All these patterns shall have been included into the modified definition of "sexual intercourse."

E. Criminal Intent

The establishment of the crime of rape requires that the actor has criminal intent (*i.e.* the actor is fully aware that his or her act will infringe the victim's right of sexual freedom and right of sexual autonomy, but the actor is still determined to rape the victim).

If the target of rape is a child under the age of 14, it is required that the actor is subjectively aware that the target is a child under the age of 14.

What should be stated further is that the intent of the crime of rape is not confined only to certain intent, an uncertain intent can also constitute the crime of rape. If there is a possibility that the actor can deduce that the victim will resist or that the victim is under the age of 14, or if the actor runs the risk of complying with the constituting elements of the crime of rape and is determined to rape the victim irrespective of the situation whether the victim will resist or whether the victim is above the age of 14, then it constitutes the uncertain intent.

F. The Crime of Rape and the Crime of Molestation

Article 237 of the Criminal Law prescribes the crime of forcibly molesting and humiliating women, and the crime of molesting a child: "Whoever acts indecently against or insults a woman by violence, coercion or any other forcible means shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention. Whoever gathers a number of people to commit the crime mentioned in the preceding paragraph or commits the crime before the public in a public place shall be sentenced to fixed-term imprisonment of not less than 5 years. Whoever acts indecently against a child shall be given a heavier punishment in accordance with the provisions of the preceding two paragraphs."[37]

According to the traditional definition, the solitary principal offender of the crime of rape can only be men while the victim can only be women, and the pattern of sexual intercourse (accomplished offence) can only be the combination of the genital organs of

[37] See fn.19.

two genders. Therefore, the objective aspects of the crime of forcibly molesting and humiliating a woman is that the actor (whether a man or a woman) forces to molest and humiliate the female victim with methods other than the traditional sexual intercourse. The objective aspects of the crime of molesting a child is that the actor (whether a man or a woman) molests the victim boy who is under the age of 14 with methods including sexual intercourse in the traditional sense or molests a victim girl who is under the age of 14 with methods other than sexual intercourse in the traditional sense. Thus, if the modified definition of sexual intercourse is adopted, the range of the objective pattern of acts of the crime of molestation is much narrower than that of the traditional definition. As a matter of fact, the criminal codes in some countries definitely no longer differentiate between the crime of forced molestation and the crime of rape, or they just differentiate between the crime of rape and the crime of sexual assault (or sexual aggression or other terms likewise) as a very general term. For example, articles 222–23 to 222–26 of the French Penal Code are the prescriptions on the crime of rape, and article 222–27 is a prescription on "sexual aggressions other than rape." In this way, it can protect both male and female sexual rights more thoroughly.

Although this thesis discusses the necessity of legislative protection of male sexual rights from the perspective of the crime of rape, it's not difficult to derive a conclusion that the crime of forcefully molesting and humiliating a woman should also be modified as the crime of forible molestation and humiliation (*i.e.* to cancel the gender limitation likewise). In the alternative, consider whether it is still necessary to (definitely) differentiate between the crime of rape and the crimes of molestation. Considering that this thesis discusses legislative protection of male sexual rights exclusively from the point of the crime of rape, hereby we will not go into further details on the crimes of molestation.

G. Suggestions for Amending the Crime of Rape in China

We can now give the crime of rape a new definition according to the analysis above (*i.e.* the crime of rape is to violate other's will and to have sexual relations with other person through violence, coercion and other means). Specifically, suggestions for amending the crime of rape in China are as follows.

Whoever, by violence, coercion or other means, rapes another person is to be sentenced to a fixed-term imprisonment of not less than 3 years and not more than 10 years. Whoever has sexual intercourse with a child under the age of 14 shall be deemed to have committed rape and shall be given a heavier punishment. Whoever rapes another person or has sexual intercourse with a child involving one of the following circumstances shall be sentenced to a fixed-term imprisonment of not less than 10 years,

life imprisonment, or death:

(i) raping a person or have sexual intercourse with a child and when the circumstances are odious;

(ii) raping several persons or have sexual intercourse with several children;

(iii) raping a person before the public in a public place;

(iv) raping a person in turn with another or more persons; and

(v) causing the victim serious injury, death, or other serious consequence.

As for the definition of "sexual relations" or "sexual intercourse," referring to the criminal legislations of different regions and countries, (1) it can be prescribed in the article of the crime of rape; (2) it can be prescribed in another independent article; or (3) it can be prescribed in the general provisions. Where the definition prescribed in the Criminal Law does not matter much; and it can even be presceibed in legislative interpretations or judicial interpretations instead of in the Criminal Law. The content of the definition has been analyzed above in Section C of this part.

H. Some Transitional Measures for Protecting Male Sexual Rights

Through the analysis above, we have had an overall understanding of the necessity for legislative protection of male sexual rights. Suggestions for amending the crime of rape are also presented. Thus the Criminal Law should attach importance to this issue. Nevertheless, it will be a long and complex process to amend the Criminal Law through legislation. Currently legislators still have orthodox ideas. The latest amendment to the Criminal Law, *i.e.* the 8th Amendment effective in 2011, modified many articles in the Criminal Law, but adopted an indifferent attitude towards the crime of rape.

Measures should be taken to protect male sexual rights because cases of sexual offences against men keep increasing. Thus, before the Criminal Law is amended to pay attention to the protection of male sexual rights, it will be practical that the judicial organ provides necessary protection of male sexual rights through judicial interpretations. When judicial interpretations are widely adopted and become ripe for amendment, the legislative organ can amend the Criminal Law according to the effective judicial interpretations.

CONCLUSION

It can be concluded that the number of males who are sexually assaulted are increasing in China. From perspectives of jurisprudence, the Constitutional Law and the Criminal Law, it is necessary to pay due attention to the protection of male sexual rights. Through fairly systematic and all-round research on relevant legislations in the history of

China and in other countries and regions, some instructive suggestions are presented for amending the crime of rape. Among all the suggestions, there are two main suggestions that the target of the crime should break through the gender limitation and that the connotation of the term "sexual intercourse" should be amplified or the term should be replaced by the term "sexual penetration" which has a broader sense and thereby can protect sexual rights of both genders more thoroughly.

Finally, the Criminal Law should protect male sexual rights and fill the legal gap in the crime of rape. We sincerely hope that the Criminal Law of China will take a further step in safeguarding and developing sexual rights which equally belong to both males and females.