

Original Paper

Study on De-gendering Rape Crime

Zize Zhang¹ & Yujun Cong²

^{1,2} College for Criminal Law Science, Beijing Normal University, Beijing 100875, China

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Abstract

At present, our criminal legislation stipulates that the object of rape crime is only adult female and female, the subject of crime in addition to joint crime and indirect crime can be female the rest of the male, this recognition is gradually behind the social practice. In addition to men and women, intersex people and transgender people are increasingly appearing in the public eye, and their rights should also be protected. Serious assaults on men and other gender people, such as rape, are not suitable for the crime of forcible indecency. Rape only protect women's sexual autonomy to no longer meet the needs of reality, also lags behind other typical countries or regions of the act, the gender differences cannot be does not constitute a rape, the premise of any gender can be the object of crime and the crime of rape, which is reflect equality, guarantee of human rights.

Keywords

Rape, Bisexual, Transgender

1. Introduction

In the current criminal legislation of our country, the provisions of rape crime can be divided into two kinds: the first one is the act of rape in the general sense, which means to use violence, threat or other means to have sex with the victim against the will;

The second is sexual intercourse with a girl under the age of 14, and such rape can be identified directly without asking the girl's subjective will. To learn that the rape victim is a woman, that women and girls, the legal recognition of vulnerable people inferior to men and other gender, which is based on the existing legal provisions, forced sodomy behavior between male and female which did not constitute a rape, force the male sex for the processing of such cases often adopt for a misdemeanor processing does not adapt.

Before the ninth penalty was promulgated, it was difficult to find a basis for the "rape" of males even in the criminal law, so that the rights of victims could not be protected and the purpose of criminal law could not be realized. Punishment issued after nine, for man's violent crime is classified as compulsory

indecent, makes the behavior of “rape” male “laws”, to a certain extent, can solve this kind of embarrassment in practice, however, the legal punishment of rape is to focus on compulsory indecency, in the reality of the case of male was sexually assaulted and injured, To hurt the results of the court will generally in intentional injury, for the evaluation of sexual assault but not, for such cases, violence is mainly based on the sexual assault deliberately implementing crime, even though the result of the injury has hurt intentionally, but the proportion of two kinds of deliberately held by the criminal, a completely different court harm and ignores the fact of sexual abuse evaluation only belongs to the serious trial balance. This kind of verdict violates legal theory, can not achieve the crime and punishment fit, difficult to convince the public.

Ought to say in the legislation of compulsory indecency revisions to some extent is positive, but the continuous development of society, the reality is more complex, such change is to can't compensate for the damage suffered by the victim, also reflects the deficiency of the captors punishment, is nothing more than to change the law when the social reality of compromise. Therefore, many scholars have advocated the comprehensive revision of rape crime to expand the subject of crime and the object of protection.

In addition, when intersex people, transsexuals and other “third gender” people become the subject or object of sexual crimes, it is difficult to judge their qualitative problems based on the existing laws, which causes great confusion in judicial practice.

Therefore, it is necessary to study the de-sexization of rape crime in our criminal law in order to strengthen the full and comprehensive protection of the right of sexual autonomy.

2. The Reasons for the Sexualization Dilemma of Rape are Clear

Views from the current our country's existing regulations for the protection of women's sexual rights is sufficient, but for men as well as the third gender exist the problem of insufficient protection, which is embodied in the judicial practice, a huge number of female victims of sexual crime cases, there is trial, trial imbalances, investigate its reason, mainly include the following:

2.1 The Influence of Stereotypes and Traditional Culture

First, two thousand years of feudal society in China leads to the patriarchal concept is deeply rooted in the hearts of the people, the male is much higher than on the social status of women, at one level of women's sexual autonomy are almost completely deprived of men, men take advantage of social status and physiological sexual intercourse firmly grasp the initiative, and in contrast women for sex is a passive position. As a result of this social phenomenon, the main body of crime in sexual crimes is almost men. Therefore, this tradition leads to the over-conservative legislation in China, which only admits male crimes and ignores and even refuses to admit that women can commit rape.

Secondly, in our country on the ideas of sex is to pass, is generally believed that traditional society in the true sense of sexual intercourse refers to birth for the purpose of the combination of the reproductive organs of the opposite sex behavior, so for anal sex between gay and bisexual men

between organ in combination is not considered to be sexual intercourse. At the same time, due to the different structure of male and female sexual organs, female sexual organs are often considered to belong to passive union when having sex. Therefore, sexual crimes only protect female sexual organs from being violated, while male and intersex people are protected.

2.2 The Inadequacy of Legislation on Equal Protection of Sex

In our criminal law in the legislation on special protection to vulnerable groups, this kind of differential protection is conducive to maintaining the principle of equality in real terms, at the same time, based on the tolerance and save the point of view of legislative resources also has certain rationality, but it should be noted that this kind of differentiation should maintain in the scope of a certain degree, once the imbalance will lead to a significant problem in judicial practice.

Lawmakers focus on sex crimes, based on practice, most of the victims were women, and in the face of violence men, women lack of self-help self-preservation ability, so the legal protection on women, the rape of murdered body limit for women, and women identified as crime subject is only limited to the common crime and indirect crime. In the specific stage of development, this recognition has some rationality, but with the development of society has gradually not suitable for the reality.

First of all, there is a large number of homosexual groups in our country. In recent years, there have been more and more cases of homosexual sexual assaults. The existing legislation cannot effectively respond to this kind of cases. Second, economic and social development in people's sexual concept also gradually evolution, the traditional criminal law that rape to protect the legal interests of the female sexual shame, it has a great one-sided sex, the protection of sex and not just in the sense of shame, more should not be only limited to women, so it's more reasonable to protect the legal interests as a sexual freedom and the physical and mental health of children. The subject of sexual freedom should be all citizens rather than restriction and female groups. Appeared in practice, many women forced male sex case, in the case of the male sexual liberties denied, if you still want to women's sexual shame to measure, so the cognizance of such cases whether thinking should be the case, first of all, for sex crimes, because the victim for men do not have sexual shame after exclusion of rape, so that it is ridiculous.

At the same time, the development of medical science and technology makes people across gender become a possibility, a large number of transgender emerged, some men by deformation become women, from the psychological view themselves as women completely, and attitude towards sex also and ordinary women, no doubt, so the legislation should also provide special rules for this type of special group.

To sum up, the deficiency of the provisions on equal protection of sex in the existing legal provisions is increasingly reflected. Legislation should respond to this, otherwise it will lead to the appeasement of criminals, the denial of legal rights, and the harm to the legal belief of victims and the public.

3. Review of Legislation on Desengendering Rape in Foreign Countries

In the United States, legislation stipulates that sexual intercourse includes not only traditional genital intercourse, but also oral and anal sex. Joshua, le claims to “abuse” or “sexual violence crime to the traditional” rape instead, and he proposed forms the core of this type of crime must be contrary to the will of the inserts, for implementing subject not to distinguish, for contact between organ is not confined to the reproductive organs, including the combination of reproductive organs and oral and anal.

The criminal legislation of Russia defines violent sexual crimes as “the use of violence or the threat of violence against a male or female victim or other persons, or the use of the male or female victim’s isolation and helplessness to engage in homosexual intercourse or other sexual acts”. It can be seen that the victim of rape in Russia has been desexualized, and the way of implementation is not limited to sexual intercourse but extended to all sexual acts. The focus of the country’s determination of such crimes is whether to violate the will.

The provisions on rape crime in Japan have also undergone a series of amendments. The latest legislation states that “sexual intercourse, anal sex or oral sex is performed on people over 13 years old by means of violence or coercion”. It can be seen that the provisions in Japan are similar to those in the above two countries, which both reflect the trend of desgendered rape crime.

Taiwan has extended sexual intercourse to “foreign body insertion”, believing that SEXUAL intercourse is not limited to the union between physiological organs but also includes the use of other objects to insert into the body.

To sum up, throughout the legislative provisions of various regions, the United States has the most open identification of violent crimes, expanding the subject of crime, the victim and the way of fact. In terms of subject and victim, the identification of rape crime in the United States was previously limited to violent sexual acts carried out by men on women. However, with the development of society, some states have expanded the scope of application of rape crime in law reform, with more women being the subject of crime and more men being the object of crime. Men and women are replaced by others in the indictment of rape crime in Russia, Japan and Taiwan, or others are listed in parallel with men and women, which to a certain extent provides a basis in criminal law for other genders to become the subject or victim of the crime. In the way of behavior, the provisions of countries are basically the same, the crime of rape not only includes sexual intercourse in the traditional sense, but extends to anal sex, oral sex. From the combination of heterosexual reproductive organs to sexual insertion, that is, as long as the sexual organs into the other person’s sexual organs, anal, oral, constitute the crime of rape. Taiwan’s rules are more progressive, limiting the act not only to “sexual penetration” but also to “foreign object penetration,” broadening the protection and scope of the crime of rape.

4. Justification for De-gendering Rape

4.1 The Rights of Men and People of Other Genders will be Further Enhanced by Equality for All

Law of our country shows the positive attitude for the guarantee of human rights, for citizens' legal rights, the national respect and equal security, gender equality is one of the connotation of the equality, the law for men, women or even across gender, double gender and gender should be equal protection, also should be equal to pursue when the illegal. The provisions of our criminal law on rape crime obviously violate the constitutional provisions. On the one hand, only female victims are protected, and on the other hand, women cannot become perpetrators, thus protecting female offenders in a disguised way. The Constitution not only protects the human rights of female citizens, but also should protect the human rights of other gender citizens. Sexual rights are also an essential part of human rights. The legal interest protected by rape crime is sexual autonomy, which is not exclusive to women. Men also have sexual autonomy, and even people of other genders have sexual needs and sexual autonomy.

It is true that the setting of rape crime in the criminal law has certain special considerations, but with the development of society and the change of public ideas, when the factors considered in the legislation are no longer suitable for social reality, the criminal law should be adjusted to be consistent with the content of the Constitution. In rape cases where the victim is female, the female victim often suffers great psychological damage. It seems that such victims will be labeled as "rape victim", which is not conducive to the psychological recovery of the victim. In fact, in sexual assault cases where men are the victims, men also suffer psychological damage. Because the crime of rape, a felony, can not protect male victims, so that male victims tired of pleading, can only suffer in silence.

So everyone is equal in order to further reflect and protect the rights of men and other gender groups, should be rape to gender, break the barriers of gender discrimination, equal protection of each gender subject, no matter what the gender of people can feel their sexual rights are concerned, when their sexual rights are violated, actively seeking legal protection, protect their legitimate rights and interests.

4.2 Resolve Conflicts between Medical Judgments and Judicial Judgments, and Improve Judicial Efficiency

In sexual assault cases, if the biological sex of the person concerned is consistent with the gender of the person, there is no difficulty in judicially determining his gender. However, if the person concerned is an intersex or transgender person, there will be a dispute in the judicial determination of their gender.

In the case of rape of intersex people, the judicial organs first conduct a biological forensic evaluation of the third sex person, and at the same time determine their gender in combination with their growth environment, lifestyle, and social relations, and finally analyze the gender that should be judicially determined by combining the above judgment. It is worth considering, however, that in such cases, where the perpetrator has inserted the male genitalia into the female genitalia, according to the "insertion theory", the perpetrator's conduct fully meets the constituent elements of the crime of rape, and to a certain extent, the proof of the victim's sex is nothing more than to remove conceptual obstacles to the imposition of rape.

In addition, if the intersex victim was identified by the judicial authorities as a woman in this case, if he became the perpetrator of the crime of sexual assault in the other case and forcibly inserted male genitalia into other female genitalia by means of violence, how should the nature of his conduct be determined? If, according to the previous determination of gender, the sex of the perpetrator is female, then the woman cannot be a direct perpetrator of the crime of rape, although the perpetrator has committed the act of inserting male genitalia into female genitalia, and also because it does not meet the subject requirements, the determination of the crime of rape is excluded; If the focus is on the perpetrator inserting male genitalia into female genitalia to commit the violation, from the perspective of sexual function, the perpetrator is no different from the male, and his behavior is fully in line with the implementation of the crime of rape, and it is not inappropriate to evaluate it as a male in a single case, even if the social sex of the perpetrator is female, it also constitutes the crime of rape, but this is also caught in the strange conclusion that the same natural person is identified as a woman by the judicial organ when he is a victim, and is identified as a male when he is the perpetrator.

Therefore, when the crime of rape is de-gendering, regardless of the sex of the perpetrator, as long as he forcibly commits sexual penetration against others, it can be regarded as the crime of rape. In this way, there is no need to conduct a gender identification of the perpetrator, only the sexual function of the perpetrator, so that there is no contradictory conclusion that the same natural person has been identified as different sexes in different cases.

4.3 Harmonize the Criminal Law System

China's current legislation on the implementation of adultery against young children has a clearly different attitude, the law focuses on safeguarding the rights and interests of young girls, sexual acts with young girls are considered rape and the punishment intensity is heavier than ordinary rape, and for male and young children committed adultery, regardless of whether the main body of the perpetrator is male or female is considered to be the crime of child molestation.

From the sentencing point of view, the sentencing range for rape is much higher than that for child molestation, that is, the severity of the penalties for the two crimes is very different. In addition, girls who have not reached the age of sexual consent have sexual relations with adult men, who generally constitute rape; Boys who have not reached the age of sexual consent have sex with adult women, and adult women are generally considered to be child molestation. The crime of rape for specific reasons differs in the protection of adult men and women, as well as in the protection of girls and boys, which ignores the protection of the sexual rights of boys. As mentioned earlier, the existing provisions on rape do not protect the rights and interests of boys, resulting in the meaning of the term "indecency" being different among different offences, making there a contradiction between the offence and the offence and violating the stability of the criminal law.

The inclusion of the act of anal sex in the crime of rape in the manner in which the scope of regulation of the crime of rape and forced indecency is clarified, and the combination of sexual organs and the insertion of sexual organs into the anus are objective aspects of the crime of rape; Acts such as oral sex

and foreign object intercourse are the objective aspects of the crime of forced indecency, so as to realize that the severity of the punishment is commensurate with the nature of the act.

5. The Construction of De-gendering Rape

5.1 Implement De-gendering of Actors

The focus of the crime of rape on the protection of women is inextricably linked to the socio-cultural perceptions and social realities of the time of legislation. The different physiological structures of men and women and the stereotype of “strong men and weak women” in traditional culture make women become a relatively “weak” party, and they are more vulnerable to infringement of sexual autonomy by the strong side, and the criminal law focuses on protecting women’s sexual autonomy; In the past social practice, rape cases were often male offenders raping female victims, and it was rare to hear of men being victims, and even if there were such cases, it was often difficult to solve the rape of men in the legal channels because it was difficult for victims to speak up or ignored by judicial organs. In cases where women rape men, under the influence of traditional culture, men seem to have “taken advantage” and are difficult to become “victims” in the eyes of the public. With the development of society, the situation of gender groups other than women becoming victims of sexual crimes is increasing, and it is difficult to cope with the reality of the situation simply by administrative punishment or private interest. In fact, in cases where women sexually assault men, men also become victims.

At present, the legislation in our country stipulates that the main body of the implementation of the crime of rape is limited to men, in other words, the law believes that women cannot complete the implementation of the crime of rape, and can only be used as a helper or indirect offender, in practice, the forced insertion of male anus against the will of men can only be regarded as the crime of forced indecency, which is actually a great problem, because whether from the subjective malignancy of the perpetrator or from the perspective of the victim’s degree of suffering, such sexual crimes are undoubtedly related to the traditional crime of rape between men and women.

Therefore, for such acts, forced indecency with only a relatively mild punishment violates the principle of proportionality of criminal responsibility and punishment. In the case of the loss of sexual function after the sensational boy was sexually assaulted by three women in previous years, according to the existing criminal law, the three women could not constitute rape, but constituted the crime of forced indecency, and because of the result of serious injury, it also constituted the crime of intentional injury, and it should be found that the crime of forced indecency and the crime of intentional injury were in competition, and the crime of intentional injury was heavier in sentencing, and therefore should ultimately be convicted of intentional injury, but is the outcome of such a trial really justified? I think there are big problems with it, first of all, the evaluation is not comprehensive, and it is reasonable for the result of serious injury to be in the crime of intentional injury, but the court did not fully evaluate the fact that sexual crimes were absorbed at the time of the final sentence. In other words, the

infringement of the right to health is embodied in the crime of intentional injury, and the infringement of sexual autonomy is not matched by the crime, which is extremely unreasonable. Secondly, in this case, the three perpetrators committed the act of gang rape against the victim, and caused serious injuries, from an objective point of view, fully meet the aggravating elements of the crime of rape “two or more gang rape”, if treated according to the crime of rape, at least within the aggravated sentencing range, so that not only can the perpetrator fully evaluate the victim’s infringement of sexual autonomy and health rights, but also can be punished appropriately, so that the criminal responsibility and punishment are commensurate, so that the punishment of the crime is commensurate, It would be inappropriate to exclude the application of the crime of rape solely because the subject of the act was unqualified.

Female rape of an adult male can still cause physical and psychological harm to the victim, not to mention the harm caused by women having sex with boys. In the case of female teachers and male students in Jiangsu, Huang and Wang’s multiple sexual relations have been ascertained facts, and their behavior has conformed to the composition of “sexual intercourse” in the criminal law, and the application of rape is excluded just because Wang is not a woman. If the defendant and the victim were to be gender-swapped in this case, the defendant would undoubtedly constitute rape and be punished heavier. The same is sexual intercourse, why is it that because the victims are different in gender, the crimes committed are different? Or, in the case of such offences, when the victim is a boy, the extension of the term “indecent” is expanded to include the meaning of sexual intercourse; When the victim is a girl, the extension of the word “indecent” is narrowed to exclude the meaning of sexual intercourse. In this way, the meaning of “indecent” in the criminal law system is unstable and inconsistent with the unity of criminal law. At the same time, such a provision does not protect the sexual rights of boys well, and it is difficult to say that boys are the one who takes advantage of them in the face of sexual relations between adult women and boys, thus reducing the responsibility of adult women.

One aspect of the de-genderization of the crime of rape is the expansion of the subject of the act, at which time gender is no longer an obstacle to the exclusion of women from the crime of rape, and women should be included in the main body of the crime of rape. In addition, as long as they are intersex or transgender people who have male sexual organs (penis) or female sexual function organs (vaginas), they can also become the main perpetrators of rape, because their body structure gives them the natural conditions to carry out rape.

5.2 De-gendering of the Crime of Rape

The legal benefits protected by the crime of rape in our country, that is, the main body of sexual autonomy is limited to women, and men’s sexual autonomy is excluded, so the victims of this crime are limited to women, while men and other genders are not among them, in practice, there have been cases where intersex people have been sexually assaulted and found to be rape by the court, but the judgment is also based on the premise that the intersex person is judged to be female, and it is only recognized as

rape. However, sexual rights is a very important part of human rights, sexual autonomy is not exclusive to women, men also have sexual autonomy, even people of other sexes also have sexual autonomy, although there are differences in sexual organs between natural persons of different sexes, but intersex people, transgender people also have sexual desire and sexual impulses, when sexually violated, their physical and psychological injuries are not less than women, so their rights are equally worthy of attention and should be protected.

In the famous Nan'an rape of intersex people, the court discarded the biological sex of the victim and adopted the social sex of the victim, thus concluding that the rape had been completed, and ultimately settling down to determine whether the victim was a "woman under criminal law". For the court's judgment, on the one hand, I deeply agree, such a judgment result has been accepted by the public in public opinion, and in legal theory, it has also achieved the proportionality of criminal responsibility and punishment, punished the crime, and protected the rights and interests of intersex people.

However, the case has also sparked some reflection. In general, women in criminal law are based on biological women, while the biological sex of the victim in this case is male, which inevitably leads to different gender judgments in individual cases, and there may be opposite gender judgments in the law for the same natural person according to different gender judgment standards. If intersex persons are identified as women when they are victims of rape, should they be identified as male or female if they act as perpetrators of rape offences to rape women? Moreover, in this case, the way the perpetrator raped the victim also cleared the way the court found the crime of rape in the traditional concept, and the adulterous act committed by the perpetrator was a combination of male genitalia and female genitalia, which according to the "insertion theory", which also meets the requirements of the traditional crime of rape, so there is no conceptual obstacle to the determination of the crime of rape. However, if the perpetrator adopts the method of anal sex in order to satisfy sexual desire, then there is no need to conduct a biological and social sex identification of the victim at this time, because based on the current criminal law provisions, the completed standard of rape is "insertion theory", that is, the combination of male genitalia and female genitalia, then whether it is forced to have anal sex with a person of any sex, it can be determined by forced indecency, and the act of forced anal sex of a woman cannot be recognized as rape. Therefore, blindly abiding by the provisions of the current criminal law may be detrimental to the development of judicial work and the protection of victims. The inclusion of anal sex in the meaning of sexual intercourse is not a criminal law obstacle, but only a conceptual obstacle.

Therefore, the object of the crime is not limited to women, and any natural person can become the object of this crime. In legislation, the provisions on the objects of rape should also abandon the idea of gender-based treatment, treat all genders equally, and protect their sexual rights equally.

5.3 The Crime of Rape is Further Determined in a Manner

The expansion of the subject and object of rape will inevitably lead to the expansion of the mode of behavior, and the sexual intercourse of "male and female genital union" is too narrow to adapt to sexual

assault other than male to female. In fact, the core of sexual intercourse is not “the union of male and female genitalia”, but “sexual penetration”, that is, the genitals of the perpetrator or the victim entering the body of the other party. However, for the “other party’s body” should be properly limited to understand, in this case the body should include only the vagina and anus, although the legislation of other countries and regions to oral sex, or even foreign body sex in the meaning of “sexual intercourse”, but this practice is directly applicable to China is not appropriate, this kind of identification concept on China’s traditional concept of sexuality impact is larger, and the practice of identification is more difficult. In this regard, the appropriate approach should be to start from the actual situation in China, the anal sex into the connotation of sexual intercourse, and in view of the recognition of the tradition of sexual intercourse in China and the degree of acceptance and understanding of the public, it is not appropriate to expand the concept of sexual intercourse to “oral sex” and “foreign sex”.

However, on the other hand, the increase in the mode of conduct will also expand the scope of application of the crime of rape, some scholars believe that it will be difficult to reflect the modesty of the criminal law, and it is not conducive to coordination with the crime of forced indecency, and the way to deal with this should be to force “oral sex” and “foreign sex” into the scope of adjustment of the crime of forced indecency. Such a provision is not only conducive to the further protection of women’s sexual rights, but also to the protection of men and the natural human rights of the third sex, from the perspective of social development trends, it is also easy to be accepted by the public, which is more in line with the actual situation of our country.

In summary, “sexual intercourse” includes the following situations: males have anal sex with other natural persons; Vaginal intercourse between men and other natural persons with female sexual organs; Women have vaginal intercourse with other natural persons with male sexual organs. The “natural persons” here include males, females and intersex and transgender people with corresponding organs.

6. Epilogue

As a relatively high incidence of sexual crimes in China, the crime of rape has always belonged to the focus of practical hotspots and academic research, and the traditional concept of rape in China has always defined rape as only genital intercourse by men against women’s wishes, which has a certain rationality in a specific historical stage But with the development of society, sexual concepts continue to evolve, in recent years there have been a large number of “rape” same-sex, “rape” bisexual and female “rape” of men cases, which makes us have to rethink whether the application of rape should be adjusted accordingly, it can be said that the de-genderization of rape is a trend, the subject of rape, the de-genderization of the object of behavior, and the expansion of the way of behavior are also the inevitable results of the law adapting to social development.

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