

Research on Legal Protection of Minor Females from the Perspective of Soft Paternalism

Yue Sun*

Major of Criminal Law, People's Public Security University of China, Beijing 100032, China

*Corresponding author: Yue Sun, 2308042070@qq.com

Copyright: © 2024 Author(s). This is an open-access article distributed under the terms of the Creative Commons Attribution License (CC BY 4.0), permitting distribution and reproduction in any medium, provided the original work is cited.

Abstract: Soft paternalism involves limiting an individual's freedom in situations where the person cannot make rational decisions, aiming to protect them from actions that may not align with their true intentions. Soft paternalism provides a foundation for the study of the criminal law protection of minor females in China. The inclusion of the crime of sexual assault committed by individuals with caregiving responsibilities has brought about a transformation in China's conventional single-age protection system for sexual crimes. This modification entails the categorization of the age of protection into three segments: absolute protection age, equal protection age, and relative protection age, thus establishing a comprehensive age protection system. Regardless of whether minor females between the ages of 14 and 16 consent, individuals with special responsibilities should be deemed to have committed this crime. It is essential to clearly define "special responsibilities" in this case.

Keywords: Soft paternalism; Underage female consent; Protection age; Special responsibility

Online publication: January 29, 2024

1. Introduction

The 11th Amendment of Criminal Law introduces an addition to Article 236, which specifies the offense of "sexual assault by caregivers." While certain scholars argue that thorough legislative research is necessary for crimes of this nature, it is evident that, to some extent, their emergence is influenced by public opinion and media trends, raising questions about their legislative foundation. However, there is no doubt about the legitimacy of this kind of crime. The increasing cases of sexual assault necessitate both the advancement of the rule of law in our country and a judicious application of legal paternalism. Without proper implementation, there is a risk of infringing upon the rights of minor women between the ages of 14 and 16, potentially leading to unjust convictions of perpetrators. Soft paternalism serves as a foundation for the legislative legitimacy of the crime of sexual assault by caregivers and the effective enforcement of related laws^[1].

2. Soft paternalism and its application

2.1. The origin of soft paternalism

Paternalism entails responsible and caring behavior, treating others as parents would treat their children. Legal paternalism is the concept that the state can enforce laws to punish individuals, preventing them from causing harm to themselves. It can be categorized into hard paternalism and soft paternalism based on the extent of intervention and coercion on individuals ^[2].

Soft paternalism is a guiding principle that intervenes in individual freedom under the premise that the decision-maker lacks the ability to make rational decisions. Essentially, it asserts that only decisions are deemed “true.” This form of paternalism restricts and intervenes solely in cases involving weakened decisions resulting from factors such as coercion, false information, excitement or impulse, impaired judgment, and immaturity or lack of mental capacity ^[3]. As Feinberg puts it, soft paternalism protects participants from dangerous choices that do not truly reflect their will. Soft paternalism is therefore not a hindrance to autonomy; rather, it functions as a means of preserving and enhancing autonomy ^[4].

2.2. The essence of soft paternalism in criminal policy

Scholars who endorse soft paternalism commonly share the perspective that individuals may not always act rationally. They acknowledge that people might lack accurate self-awareness, express desires that differ from their true wants, or be influenced by external factors. Insufficient information, a lack of knowledge, or deceptive influences can impede or even negate an individual’s capacity to make rational decisions. In such instances, interference or coercion is seen as a means to protect the individual from potential harm that they may be unable to anticipate.

Soft paternalism also emphasizes the proper motives of the intervenor. The act of restricting liberty is deemed acceptable only if the intervenor’s motivation aligns with two key principles: (1) protecting the individual from harm or loss of interest, and (2) having a conviction or certainty that the individual does not consent to such harm. Interventions are only considered legitimate when they are aimed at protecting the interests or freedom of the individual.

2.3. The connotation of soft paternalism in the crime of sexual assault by caregivers

The application of soft paternalism is subject to strict conditions. In the context of sexual assault by caregivers, several aspects underscore the applicability of this principle in judicial practice.

Firstly, at the subjective level, female minors aged 14 to 16 may possess sexual autonomy. However, it is argued that they lack the essential decision-making capacity when it comes to adults who have special relationships with them and serve as their caregivers.

Secondly, the motive and purpose of this legislation is to safeguard the interests of minor females. A core principle of soft paternalism involves “promoting the interests of the weak.” Essentially, the law acts like a parent meeting the needs of a community or nation, actively working to improve the lives and alleviate the suffering of those who are vulnerable. ^[5].

Additionally, it is essential to consider individual autonomy and the constraints on the interference of criminal law. In modern society, each person is regarded as an individual with free will, and the “autonomy of citizens” has consistently been a paramount principle in private law. However, in the realm of criminal law, often perceived as having a public law nature, questions arise about the extent to which individuals have the freedom to make their own decisions ^[5]. In jurisprudence, individual freedom is expressed through three closely connected propositions: first, it involves freedom from interference by others; second, restrictions on freedom arise when values equal to or higher than freedom exist; and third, a minimum level of freedom must

be maintained ^[7]. This principle is evident in the realm of criminal law, which routinely assesses and categorizes legal interests using the principle of measurement ^[6]. Sexual autonomy, being a significant legal interest, is therefore subject to reasonable limitations on individual will.

2.4. Adjustments in the sexual crime system after the addition of sexual assault by caregivers

The introduction of the offense of sexual assault by caregivers not only aligns with the criminal policy of soft paternalism but also marks a significant departure from the traditional single protection age system for sexual crimes in our country. This modification categorizes the protection age into absolute protection age, equal protection age, and relative protection age, using 14 and 16 years old as the dividing points.

(1) Absolute protection age

Children under the age of 14 are under absolute protection under China's Criminal Law. Its criminal law states that individuals under the age of 14 do not have sexual autonomy, meaning minors in this age group do not possess the right to make decisions regarding engaging in sexual activities. Because these young girls cannot distinguish and identify the meaning and consequences of sexual behavior with others, their sexual freedom rights are restricted. This restriction is explicitly outlined in Criminal Law, utilizing three benchmarks at the ages of 10, 12, and 14 to protect these young minors.

(2) Equal protection age

While minors between the ages of 14 and 16 can consent to sexual activities and enjoy sexual freedom, concerns arise when the other party holds responsibilities such as guardianship, adoption, care, education, and medical care. Failing to protect the freedom of these young females in such situations may lead to the exploitation of the vulnerable by those in positions of authority or influence. The concept of equal age protection in this legal framework signifies the safeguarding of victims who are considered "willing." This involves restrictions on perpetrators with caregiving responsibilities and the prohibition of the victim's consent as a valid defense to evade legal consequences. It is important to note that the criminal law, in the case of sexual assault by individuals with caregiving responsibilities, does not impose similar requirements of "using special duties." Instead, it focuses on the abstract danger to sexual autonomy, not necessarily involving direct, or even indirect, infringement upon the victim's sexual autonomy ^[8].

(3) Relative protection age

Female minors between the ages of 16 and 18 are both more physically and psychologically mature compared to those under the age of 16. If the law restricts their freedom from the standpoint of paternalism, it will not align with the principles of soft paternalism. Under the acknowledgment that individuals between the ages of 16 and 18 have sexual autonomy and the freedom to decide with whom, when, and where to engage in sexual activities, Article 236 of Chinese law does not introduce additional special provisions for the protection of minor females in this age range. However, it specifies that if an individual forcibly engages in sexual relations against the will of a minor female between the ages of 16 and 18, using violence, coercion, or other means, it constitutes the crime of rape.

3. Problems in enforcing laws related to sexual assault by caregivers

3.1. Consent of underage women

In cases of sexual crimes, the crucial determinant is whether the behavior is contrary to the woman's will. This criterion is particularly relevant in instances of sexual assault involving caregivers. In such cases, where the

perpetrator holds a special relationship with the minor female and bears responsibilities of care, assessing the authenticity of the woman's will becomes an additional consideration alongside determining if the act goes against her wishes.

The provisions of Article 236 of the Criminal Law do not explicitly outline the subjective aspects pertaining to the victims of the crime—minor girls aged 14 to 16. The legislator's information does not provide insight into the connection between the commission of the crime and the genuine will of these minor girls. Consequently, regarding the voluntary will of underage women regarding sexual behavior, cases involving sexual relations between underage women and perpetrators with special duties can be categorized into the following three groups, considering the perspective of soft paternalism.

3.1.1. Genuine consent

Certain scholars argue that in such cases, individuals with special responsibilities should not be considered as committing this crime, as there might be a genuine “mutual agreement leading to naturally occurring sexual relations” between the two parties. However, my viewpoint is that even if a minor female willingly, actively, or even spontaneously expresses a desire to engage in a relationship with a person having special responsibilities, the perpetrator should still be identified as committing the crime of sexual assault by a person with care responsibility^[9].

The first justification for this viewpoint is physical development does not necessarily align with psychological development. Research indicates that the onset of female puberty typically occurs between the ages of 12 and 14. During this period, female hormones are secreted, and there is a gradual maturation of female organs, accompanied by the emergence of secondary sexual characteristics. Due to improved material living standards, the development of minors often advances. While those under the age of 14–16 may appear physically mature, their psychological development is still in a state of naivety. This vulnerability makes these girls more susceptible to exploitation by adult men.

Moreover, caregivers are often held in high esteem and trusted by those under their care, attributed to a perception of wisdom. The absence of discernment, coupled with the romanticized portrayal of teacher-student relationships in fictional works, might mislead minors into perceiving such connections as righteous, wholesome, and pure. With a widespread lack of comprehensive sex education in Chinese families and schools, numerous girls find themselves in a situation reminiscent of the Fang Si-Chi in *Fang Si-Chi's First Love Paradise*, where they struggle to distinguish whether it is a love paradise or an emotional abyss.

Third, the obligations of the perpetrator. The perpetrator has not only the obligation to protect the sexual rights of the victim but also the obligation to supervise and stop the danger that may occur in this situation. The reason for this danger is that in the case of guardianship, adoption, care, education, etc., there is a relationship between domination and domination. Under the influence of such unequal relationships, it is difficult for underage girls to have a sound and complete autonomy of will. The bottom line is that adults refrain from developing romantic feelings towards minors under their authority. While girls between the ages of 14 and 16 may not fully grasp the implications of such behavior, adults, given their maturity, recognition, and awareness, should comprehend the nature and consequences of such actions. Recognizing the potential harm to the girl after the incident, even if she expresses voluntary interest, those in caregiving roles should abstain from such interactions.

3.1.2. Visceral disagreement

When minors lack clear intentions, determining in judicial practice whether individuals with caregiving

responsibilities abused their dominant position or employed improper means to ascertain the true and effective consent of minor women becomes challenging. At times, even if the minor female appears to be consenting externally, it may not accurately reflect her true will. To assess whether it is against a woman's will, many jurisdictions worldwide have embraced the "affirmative consent rule." According to this rule, if a woman does not expressly consent to sexual behavior, it is considered a refusal. The affirmative consent rule emphasizes moral self-discipline. Despite historical criteria involving resistance, the contemporary focus is on a woman's explicit consent, which plays a crucial role in determining whether an act constitutes a sexual offense, regardless of the position taken.

It is questionable whether a minor female between the ages of 14 and 16 can express her true wishes when facing an adult who has the responsibility of caring for her. A four-fold unequal power relationship is formed based on age, status, identity, and psychological trauma ^[10]. This means that adult men do not need to use any coercive means to suppress the true will of these underage women. Such an invisible means of coercion already fulfills the criteria for sexual assault. China's legislature also determines that raping a minor female, even without the use of violence, even if no physical force is used, it is usually because of guardianship, adoption, or other special relationships that the minor is afraid, helpless, and unwilling to resist. In order to ensure the healthy growth of female minors, it is necessary to put forward such regulations ^[11]. Therefore, silence in this case should be considered a denial.

3.1.3. Conditions of sexual assault

If a minor female aged between 14 and 16 resists sexual relations, and the perpetrator forces her using violence, coercion, or other means, it aligns with the constitutive requirements of both the crime of sexual assault by personnel with caregiving responsibilities and the crime of rape, as stipulated in Article 236 of the Criminal Law. The second paragraph of Article 236 of the Criminal Law specifies that whoever commits the acts mentioned in the preceding paragraph and at the same time constitutes a crime as provided for in Article 236 of this Law shall be punished in accordance with the provisions for heavier punishment. This implies that under certain circumstances when individuals with caregiving responsibilities engage in sexual relations with underage women, it amounts to both the crimes of sexual assault and rape by the caregiver.

3.2. The identification of the duty of care

According to the law, individuals with responsibilities like guardianship, adoption, care, education, medical care, and other special duties are all included in the subjects of sexual assault by caregivers. The law does not pose any restrictions to the listed subjects, which will likely lead to challenges in interpretation. If it is only a formal identification of "responsibility," it is easy to expand the scope of punishment. For instance, both casual encounters and extended intimate interactions can potentially fall under the jurisdiction of Article 236 of the Criminal Code. Doctors seen for the first time during medical treatment, mentors with limited counseling sessions, instructors from commercial training institutions, and temporary caregivers appointed by parents may, at a surface level, appear to align with the societal understanding of roles specified in Article 236 of the Criminal Law. However, it seems inappropriate to categorize them within the primary scope of the offense. The connotation of special responsibility should be explained substantively, particularly concerning the protective implications for the well-being and development of teenagers ^[12]. power dynamic characterized by supervision and control between the perpetrator and the victim. It is essential to note that the existence of kinship, guardianship, upbringing, education, training, relief, medical treatment, public service, or business relationship between two individuals does not automatically constitute a criminal offense ^[13].

From the perspective of the legitimacy of soft paternalism, the legal basis for establishing the aforementioned crime is rooted in the distinction in status between the personnel with special responsibilities and the minor female. This prolonged relationship has led to the establishment of a power dynamic and the resulting exploitative impact stemming from this position. Therefore, the legislator defines an individual with special responsibilities in a dominant position as a party capable of engaging in sexual exploitation. It's important to note that this exploitative effect cannot be achieved through occasional, short-term contact with underage women; instead, it necessitates long-term, stable accumulation, and maintenance of such a relationship.

In Japanese Criminal Law, the offenses corresponding to the crime of sexual assault by individuals with caregiving responsibilities include the crime of indecent assault by the guardian and the crime of sexual intercourse by the guardian. The law defines a guardian as someone engaged in a relationship of dependence or protection that endures for a certain period, regardless of whether there is a legal right of guardianship. To establish these crimes, continuous economic and emotional dependence, and even protective relations, are required. Simple temporary and material influence is deemed insufficient. Similarly, in determining the “special responsibility” in this crime, the influence of this responsibility must be continuous. If the contact is only for a short time (such as caregiving, education, medical care, etc.), it falls outside the scope of this crime and does not meet the subjective composition of the offense. For the assessment of the duration, if it is not sufficient to create reliance in underage women, it may be deemed as “extremely short.” Therefore, neither a first-time doctor nor a temporary custodian would meet the criteria for “special responsibilities.” In the case of private teachers and adoptive fathers, the judicial practice should specifically examine factors such as the frequency and location of teaching, the duration of the adoption relationship, etc., to investigate their influence and control over the victim. It is crucial to determine whether the particular relationship of influence or dominance still exists at the time of the alleged offense. If the minor female was previously under the special duties of the perpetrator due to guardianship, adoption, care, education, medical treatment, etc., and the specific relationship no longer exists at the time of the alleged offense, it fails to meet the requirements of continuity and can negate the advantageous position created on the basis on “special responsibilities.” Consequently, engaging in sexual activity with the underage minor female would not constitute a crime in such a scenario.

From another perspective, if in the aforementioned first/occasional/short-term relationship with a minor female, her intention is not voluntary and genuine, then the perpetrator should be charged with the crime of rape as per the first paragraph of Article 236 of the Criminal Law. In this situation, the perpetrator is an external third party concerning the minor woman. If the perpetrator is convicted and punished for the crime of sexual assault by caregivers, the maximum statutory penalty is three years in prison. This creates an incongruity between the crime and the punishment, being lenient toward the perpetrator and not conducive to the protection of minor women.

Disclosure statement

The author declares no conflict of interest.

References

- [1] Fu L, 2021, The Protection Law Interests and Crime Types of Sexual Assault Crimes of Persons with Responsibility for Care. *Tsinghua Law*, 15(04): 72–86.
- [2] Sun X, Guo C, 2006, The Application of Legal Paternity in China. *Chinese Social Sciences*, 2006(01): 47–58.

- [3] Feinberg J, 1987, *Moral Limits of the Criminal Law: Harm to Others (Volume 1)*, Oxford University Press, London, 10.
- [4] Feinberg J, 1989, *Moral Limits of the Criminal Law: Harm to Self (Volume 3)*. Oxford University Press, London, 374.
- [5] Feinberg J, 1988, *Moral Limits of the Criminal Law: Harmless Wrongdoing (Volume 4)*, London: Oxford University Press, 66.
- [6] Fu Z, Wang Y, 2021, Legal Paternalism and the Scope Boundary of Legalization of Euthanasia. *Journal of Law*, 42(03): 59–67.
- [7] Hart E, 2006, *Foundations of Bioethics*, Peking University Press, 322.
- [8] Che H, 2012, Self-Determination and Paternalism in Criminal Law. *Chinese Law*, 2012(01): 89.
- [9] Zhang W, 1996, *Research on the Trend of Thought of Western Legal Philosophy in the 20th Century*, Law Press, Beijing, 523–526.
- [10] Zhou X, Meng Z, 2021, Implicit Coercion and Ethical Taboo: The Rationale for the Crime of Sexual Assault by Persons with Nursing Duties. *Journal of Nantong University, Social Science Edition*, 37(02): 97–108.
- [11] Xu Y, 2021, *Interpretation of the 11th Amendment to the Criminal Law of the People’s Republic of China*, China Legal Press, Beijing, 246.
- [12] Zhang Z, 2021, The Embodiment of the Positive Preventive Criminal Law View in Sexual Crimes: A Doctrinological Interpretation of One of the 236 Articles of China’s Criminal Law. *Politics and Law*, 2021(07): 49–63.
- [13] Li L, 2021, Doctrinal Research on the Crime of Sexual Assault by Persons with Caregiving Duties. *Political Science and Law Forum*, 2021(07): 18–29.

Publisher’s note

Bio-Byword Scientific Publishing remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.