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# **Casting Gender Light on Authoritarian Legality in China: An Inquiry of Sentencing and Punishment in Rape Cases**

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## Abstract

This research provides a rare yet much-needed gender perspective on authoritarian legality in China, drawing upon sentencing and punishment for the crime of rape. First, several controversial cases – cases extensively discussed in the media or online – are reviewed to identify the attributes that triggered the controversy. Four categories of cases were selected, based on four sexual relationships embodying various power dynamics between the offender and the victim: public official and citizen/sex worker; husband and wife; adult and child; caregiver and dependent. A search was then made for “like cases” using these attributes as keywords in the China Judgments Online database. Finally, a qualitative analysis of these cases was carried out, in particular of the judicial reasoning provided by the judges, to explore how these controversial cases are handled by the judiciary, and the implications of this on the interplay between gender, sex, sexuality and authoritarian power in the context of authoritarian legality in China. This research argues that the criminal justice system in China embodies and reinforces a particular gendered order and “sex hierarchy,” instrumentalised by the state to maintain its authoritarian power.

## INTRODUCTION

In 2020, the former Chairman of the listed company Future Land Development Holdings (*xin cheng kong gu*) and member of the Chinese People’s Political Consultative Conference in Shanghai, billionaire Wang Zhenhua, was sentenced to five years’ imprisonment for raping a nine-year-old girl, whereas in the same year, a man who raped a four-year-old girl was sentenced to death by the Intermediate People’s Court in Harbin. In 2021, a university student in Zhejiang was sentenced with a reprieve for raping a drunk classmate, as the offender obtained the victim’s forgiveness in reconciliation, yet just one month later, a man convicted for raping his drunk colleague was still sentenced to imprisonment after obtaining the victim’s forgiveness. These cases, especially the leniency in sentencing contrary to the provisions of the Criminal Law, are particularly striking given the Chinese government’s recent commitment to judicial equality. Since 2013, the state has implemented various tools, including the case guidance system (*anli zhidao zhidu*), reference case system (*cankao anli*), and the system of

sentencing guidelines (*liangxing guiding*) to try to get more consistent outcomes in the criminal justice system for fulfilling the goal of “rebuilding judicial credibility”.<sup>1</sup> Why does the Chinese criminal justice system – even with its new safeguards designed to produce consistent outcomes in accordance with the law – produce such disparate outcomes for blatant cases of sexual violence? Given these disparities in sentencing and punishment, in what sense does the rape law reflect or produce particular gendered orders in Chinese society? And further, what can this tell us about the role of the judiciary in the functioning of China’s authoritarian state?

To answer these questions, this paper studies cases sentenced under Article 236 of the Criminal Law of the People’s Republic of China, i.e. the crimes of rape and sexual assault committed by people with the responsibility of care (*fuyou zhaohu zhize ren yuan xingqin zui*). The rationale and basic framework for the crime of rape mostly follows the provision of China’s first Criminal Law promulgated in 1979, and in many ways reflects the Party’s power in shaping conceptions of gender, sex, and sexuality in Chinese society. For one thing, Chinese law implicitly stipulates that only men can perpetrate rape and only women can be victims of rape, establishing the penetration of the penis into the vagina as the legal standard for rape. This definition represents a patriarchal notion of sex and sexuality and reproduces the stereotype that women are – or should be – sexually passive and subservient, that they are born both physically and psychologically weaker than men.<sup>2</sup>

Methodologically, this research approaches law as discourse – that is, a full understanding of the engendered meanings of laws is not only based on their written provisions, but also, and very importantly, “[on] their particular sites of interpretation” in actual practice.<sup>3</sup> It therefore employs an in-depth investigation of rape law, and how it is deployed in practice. Specifically, this investigation looks into these “particular sites of interpretation:” controversial rape cases; the judicial practice of sentencing in rape cases; judicial reasoning for the sentencing; judicial transparency around rape cases; and the interaction or interface between judicial practice and the public in rape cases. Since sentencing and punishment are crucial to the nature and function of the criminal justice system, with specific aims, forms, rules

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<sup>1</sup> Sarah Biddulph, ‘Justice at the Margins: Notions of Justice in the Punishment of Prostitution’ in Flora Sapio, Susan Trevsles, Sarah Biddulph, Elisa Nesossi (eds), *Justice: the China Experience* (Cambridge 2017), 72, 312-55.

<sup>2</sup> Nie Changjian and Tu Kaihan, ‘Suggestions and Improvements on the Legislation of Rape Crime (Qianjian Zui De Lifa Jianyi He Lifa Wanshan)’ (2019) 18 *Journal of Taiyuan Normal University (Taiyuan Shifan Xueyuan Xuebao)* 48-53; Harriet Evans, ‘Defining Difference: The “Scientific” Construction of Sexuality and Gender in the People’s Republic of China’ (1995) 20 *Signs* 385, 357-394.

<sup>3</sup> Zillah R. Eisenstein, *The Female Body and the Law*. (University of California Press 1988) 43.

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and regulations informed by a country's political regime, scrutiny of the criminal justice system's role in regulating and shaping gender, sex, and sexuality in the contextualization of authoritarian legality in China could shed crucial light on the relationship between the state and individuals, between power and rights, as well as between patriarchy and authoritarianism. In a nutshell, this investigation provides insights into the central role played by gender, sex, and sexuality for authoritarian rule and also into the tensions between the authoritarian regime, seeking to uphold the gendered order, and elements of Chinese society challenging the fairness and justice of sentencing in rape cases.

The first part of this paper introduces the context of gender in the Chinese state under the Chinese Communist Party's rule. It then discusses the judicial system in China, in particular the recent reforms on judicial transparency and judicial reasoning, in the context of what has been termed "authoritarian legality". The next part critically examines existing literature on the crime of rape in China, mostly quantitative studies. It then explains the methodology of this research, which first employs the framework of *minyī* or "penal populism" to identify key issues in selected controversial cases, before searching for "like cases" using the identified issues as keywords in the China Judgements Online database. A qualitative analysis is made of the judicial reasoning in the judgments and the findings of this qualitative examination are discussed in a third section. Drawing upon these findings, the conclusion analyses their implications for the interface between sex, sexuality, gender and authoritarianism. By and large, this paper argues that the dynamics of the Chinese judiciary as shown in sentencing in rape cases embody and also further strengthen a particular gendered order and "sex hierarchy," instrumentalised by the state to maintain its authoritarian power and rule.

## **GENDER AND AUTHORITARIAN LEGALITY IN CHINA**

### ***Socialism, the Chinese State, and Gender Relations***

Sex, sexuality, and gender are "not merely the expression of natural instincts but are social as well as political constructs" constituted within fields of power.<sup>4</sup> They link to one's innermost sense of self, and thus can show how one's intimate, personal existence is reflected and

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<sup>4</sup> Véronique Mottier, 'Sexuality and Sexology: Michel Foucault' In Terrell Carver and Véronique Mottier (eds) *Politics of Sexuality: Identity, Gender, Citizenship* (Routledge 1998) 113, 113-123.

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structured by power relations.<sup>5</sup> Research also notes the importance of the political ordering of sexuality in understanding China.<sup>6</sup>

Since the establishment of the People's Republic of China in 1949, as argued by Judith Stacey, the Chinese Communist Party (hereinafter the "Party") has linked sexuality with the construction of socialism.<sup>7</sup> According to Stacey, the Party promulgated its distinctively Chinese Communist sexual code linking sexuality with felicitous marital relationships, and attempting to "mandate conjugal bliss as the single acceptable Communist lifestyle"<sup>8</sup> – since diversity of lifestyle was deemed as a threat to labour and political discipline. Although it has been widely acknowledged that there was a sexual liberation after China's opening and market-oriented economic reform in the 1980s, alongside the Party's reduced direct control over individual lives, the Party is still "concerned with regulating the sexual and intimate lives of citizens".<sup>9</sup> In the eyes of the authoritarian ruler, sexual liberation is a sign of political liberation, closely associated with greater autonomy on the part of citizens.<sup>10</sup>

From the 1950s to the 1970s, women's reproduction was also controlled through marriage to expand a family's labour supply.<sup>11</sup> This Communist sexual code involved sexual mores imposed on both men and women. For instance, masturbation, premarital sex, and adultery were condemned and disciplined; there were recommended best times and frequencies for sexual intercourse by married couples – and all this was implemented under the proclaimed goal of an individual's "responsibility for country and the socialist system."<sup>12</sup> Since sexuality was imbued with political implications, the sexual conduct of both men and women was also under close supervision in their work units and the neighbourhoods.<sup>13</sup> Meanwhile, the researchers also noted the especially vulnerable position of women in this sexual code. For one thing, women's transgressions were more easily identified and disciplined.<sup>14</sup> Also, a particular responsibility for maintaining the Party's moral code was

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<sup>5</sup> Tiantian Zheng, 'Introduction: Gender and Sexuality in Contemporary Asia' In Tiantian Zheng (ed) *Cultural Politics of Gender and Sexuality in Contemporary Asia* (University of Hawai'i Press 2016) 3, 1-22.

<sup>6</sup> Petula Sik Ying Ho, Stevi Jackson, Siyang Cao, and Chi Kwok, 'Sex with Chinese Characteristics: Sexuality Research in/on 21st-Century China' (2018) 55 (4-5) *The Journal of Sex Research* 487.

<sup>7</sup> Judith Stacey, *Patriarchy and Socialist Revolution in China*. (University of California Press 1983) 188.

<sup>8</sup> *Ibid.* 188-189.

<sup>9</sup> *Note 6*, 488.

<sup>10</sup> Gary Sigley, 'Sex, Politics and the Policing of Virtue in the People's Republic of China' In Elaine Jeffreys (ed) *Sex and Sexuality in China* (Routledge 2006) 44, 43-61.

<sup>11</sup> *Note 7*, 208.

<sup>12</sup> *Ibid.* 231.

<sup>13</sup> Xuewen Wang, 'How Does Justice Speak Out: Reflections and Improvements of Judicial Reasoning (Zhengyi Ruhe Fasheng: Xingshi Caipan Wenshu Shuoli Wenti De Fansi Yu Chaoyue).' (2016) 32(4) *Shandong Justice (Shandong Shenpan)* 95, 98.

<sup>14</sup> *Note 7*, 231.

imposed on women.<sup>15</sup> The socially required self-discipline for women included covering their bodies (normally in bulky uniforms), not appearing sexually attractive and fashionable, and not exposing their menstrual blood and debris.<sup>16</sup> Additionally, it is a long-lasting feature of the “hand-in-hand collaboration of the state and the patriarchal family” in China that the authorities typically define a woman’s duty to the state via her commitment to her husband and children – one example is the large number of women who volunteered for or were forced into early retirement during the reform of state-owned enterprises since the 1980s.<sup>17</sup> Moreover, in China’s family planning policy, the emphasis is also mainly on the woman’s body, as women are responsible for contraception and other forms of birth control.<sup>18</sup> The subordination and suppression of women can likewise be considered instrumental goals of state-building and development.<sup>19</sup> Stacey (1983) refers to this as “patriarchal-socialism,”<sup>20</sup> embodying the state’s pivotal role in structuring and institutionalizing gender and sexuality.<sup>21</sup>

### ***Controlled Judicial Transparency and Unsystematic Judicial Reasoning***

With deep roots in the criminal law of the USSR, the Chinese legal system has been classed as “functionalist” or “instrumentalist” and is widely discussed in the framework of “authoritarian legality” or “legality within an ‘authoritarian’ political order”.<sup>22</sup> This conception of “legality” entails a formalistic understanding of laws that does not take into consideration or question the substantive content of a law but rather asks for the law to be followed and enforced.<sup>23</sup> For instance, Biddulph et al. note that notwithstanding Xi Jinping’s political agenda of “governing the nation according to the law” (*yifa zhiguo*), the priority of the criminal justice system remains fulfilling the political objective of “defending the security of the state and the political power of

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<sup>15</sup> Michael Palmer, ‘On China’s Slow Boat to Women’s Rights: Revisions to the Women’s Protection Law, 2005.’ (2005) 11(1-2) *International Journal of Human Rights* 157, 151-177.

<sup>16</sup> Note 13, 101.

<sup>17</sup> Tiantian Zheng, *Red Lights: The Lives of Sex Workers in Postsocialist China*. (University of Minnesota Press 2009), 21.

<sup>18</sup> Note 13, 93; Note 15, 157.

<sup>19</sup> Note 5, 5.

<sup>20</sup> Note 7.

<sup>21</sup> R. W. Connell, 1990. ‘The State, Gender, and Sexual Politics: Theory and Appraisal.’ (1990) 19 *Theory and Society* 507-544.

<sup>22</sup> Jacques Delisle, “Authoritarian Legality in East Asia: What, Why, and Whither?” In Weitseng Chen and Hualing Fu (eds.) *Authoritarian Legality in Asia: Formation, Development and Transition*. (Cambridge University Press 2020), 17, 25, 17–58; Weitseng Chen and Hualing Fu ‘Authoritarian Legality, the Rule of Law, and Democracy.’ In Weitseng Chen and Hualing Fu (eds.) *Authoritarian Legality in Asia: Formation, Development and Transition*. (Cambridge University Press 2020), 1–14.

<sup>23</sup> Fu, Yiqin, Yiqing Xu, and Taisu Zhang, ‘Does Legality Produce Political Legitimacy? An Experimental Approach.’ (2021) *Stanford King Centre on Global Development Working Paper No. 2008* 1-66.

the people's dictatorship and socialist system."<sup>24</sup> Furthermore, the state shapes the values that underpin the legal system, which "prioritizes state interest and is firmly anchored in centralism".<sup>25</sup> Under centralism, which requires institutional dependence, the judicial system is functional as only "part of the division of labour within the political-legal system".<sup>26</sup> And the ultimate accountability of judges, the police, and prosecutors is to act with Party-defined political correctness.<sup>27</sup> Some scholars also contend that after Xi Jinping came into power in late 2012, there was, counterintuitively, a "turn towards law" even in a context of deepening authoritarianism.<sup>28,29</sup> Still, in tandem with the functions of authoritarian legality, this "turn towards law" has arguably been deployed by the Party to exert centralized control via institutional oversight and rule-based conduct, while simultaneously boosting its political legitimacy.<sup>30</sup>

Against this backdrop, China's Supreme People's Court (SPC) launched two prominent, inter-related reforms: first, a campaign to promote judicial transparency and second, a campaign to improve judicial reasoning; both are purported to improve judicial fairness and enhance judicial credibility. That is, as the Party had pledged, fairness and justice must not only be realised, but be realised in a way that the people can see. First, following the Party's pledge in 2013 as to "improving judicial transparency by encouraging open trials and open prosecutions [...] and promoting access to court documents," the SPC established an open-access database, China Judgments Online (CJO) in July 2013, to make public full-text court verdicts and other documents from all-level courts across the country.<sup>31</sup> In the same year, the SPC also issued the Regulations on Online Publication (hereinafter "the SPC Regulations"), stipulating that "in principle, all court decisions must be published online from January 2014". In 2016, the SPC announced that CJO was "the largest collection of public cases globally with

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<sup>24</sup> Sarah Biddulph, Elisa Nesossi, and Susan Trevaskes, 'Criminal Justice Reform in the Xi Jinping Era.' (2017) 2(1) *China Law and Society Review* 101, 63-128.

<sup>25</sup> Hualing Fu, and Michael Dowdle. 2020. 'The Concept of Authoritarian Legality: The Chinese Case.' In Weitseng Chen and Hualing Fu (eds.) *Authoritarian Legality in Asia: Formation, Development and Transition*. (Cambridge University Press 2020) 85, 63-89.

<sup>26</sup> *Ibid*, 85.

<sup>27</sup> Eva Pils, 2009, 'The Dislocation of the Chinese Human Rights Movement.' In Stacy Mosher (ed.) *A Sword and a Shield: China's Human Rights Lawyers*, (China Human Rights Lawyers Concern Group 2009) 141-159.

<sup>28</sup> Taisu Zhang and Tom Ginsburg, 'Legality in Contemporary Chinese Politics.' (2018) *University of Chicago Public Law and Legal Theory Working Papers No. 689* 1, 1-64.

<sup>29</sup> *Note 23*.

<sup>30</sup> *Note 28*, 40, 50.

<sup>31</sup> *Note 24*, 73.

tens of millions of cases available online”.<sup>32</sup> Publishing judgments in the CJO has also been made a performance indicator for courts nationwide.<sup>33</sup> Second, in the fourth Five-Year Reform Outline of the People’s Court (2014-2018), the SPC stated a requirement to set up incentive and assessment mechanisms for judges to provide sufficient reasoning in their judgments, following the renewed emphasis on increasing legal professionalism and judicial capacity. Further, in 2018, the SPC issued Guiding Opinions on Strengthening and Standardising Judicial Interpretation and Reasoning in Judgements. In these Opinions, the SPC detailed four requirements for judicial reasoning: to elucidate the facts of the case and the basis and reasons for the judgment; to interpret the legal rules on which the judgment is based and the reasons for applying the legal rule; to demonstrate the spirit of combining law, reason and sentiment (*fa li qing*); and to provide judicial reasoning in a clear, precise, and logical way.<sup>34</sup>

Nevertheless, despite these reforms, China remains a highly centralised authoritarian regime where the courts continue to operate under the leadership of the Party. Specifically, the leadership of the courts, including presidents and vice presidents, are determined and appointed by the Party’s organisation departments.<sup>35</sup> The president of a court also serves as the Party secretary of the respective court, who determines personnel issues such as judges’ appointments and promotion within that court.<sup>36</sup> The Party also sets up the Political and Legal Committee (*zheng fa wei*) at each level of its administration. The court presidents are members of the Political and Legal Committee of the corresponding level. The Political and Legal Committee can influence the work of courts both in general and in individual cases. Judges are mostly Party members and, “in principle, are first and foremost loyal to the Party and subject to its instruction and discipline”.<sup>37</sup> Yet it might be an over-simplification to describe this relationship between the Party and Chinese courts or judges as: “there is no judicial independence.” As argued by Tamir Moustafa (2014) in the study of a judicialization of authoritarian politics more generally, courts are rarely “mere pawns” of an authoritarian regime

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<sup>32</sup> Margaret E. Roberts, Benjamin L. Liebman, Rachel E. Stern, and Alice Z. Wang, ‘Mass Digitization of Chinese Court Decisions: How to Use Text as Data in the Field of Chinese Law.’ (2017) *Columbia Public Law Research Paper No. 14-551* 6, 1-48.

<sup>33</sup> Jinfan Yuan and Li Xiang, ‘Xingshi Caipan Wenshu Jinzhi Shangwang Wenti Yanjiu (Research on the Prohibition of Online Access of Criminal Judgments).’ (2021) 23(135) *Journal of Southwest University of Political Science and Law (Xinan Zhengfa Daxue Xuebao)* 107, 100-12.

<sup>34</sup> Lei Lei, ‘The Inference and Reasoning in Judicial Judgments (Sifa Caipan Zhong De Tuili Yu Shuoli).’ (2022) 3 *China Journal of Applied Jurisprudence (Zhongguo Yingyong Faxue)* 95, 94-108.

<sup>35</sup> Shucheng Wang, ‘Guiding Cases and Bureaucratization of Judicial Precedents in China.’ (2019) 14(2) *University of Pennsylvania Asian Law Review* 101, 96-135.

<sup>36</sup> *Ibid.*

<sup>37</sup> Hualing Fu, ‘Building Judicial Integrity in China.’ (2016) 39(1) *Hastings International and Comparative Law Review* 168, 167-182.



and “must enjoy some degree of real autonomy” for the functions of authoritarian legality to work.<sup>38</sup> Thus, courts are usually found to serve as “dual-use institutions” in authoritarian regimes.<sup>39</sup> Moreover, judges, perhaps as a result of their professional training, may sometimes demonstrate their reform-mindedness or even substantive conceptions of rights in their judgments.<sup>40</sup> This complexity is well reflected in China. Several scholars have observed a “legal dualism” or “dual state” in China.<sup>41</sup><sup>42</sup> Basically, with the ultimate aim of supporting an adaptive and resilient authoritarian regime, courts and judges can have a large degree of operational independence, in accordance with the nature of the case being considered.<sup>43</sup> Most cases, such as ordinary civil and criminal cases, can in practice be handled by judges in a professional way based on legal regulations.<sup>44</sup> By and large, for authoritarian rulers, courts and judges are a double-edged sword – the functions of authoritarian legality are the benefits they want to achieve.<sup>45</sup> Nevertheless, the “by-product” of resorting to laws and judiciary, such as citizens’ awareness of rights and freedoms, and the autonomy and independence of the judiciary, is what they must avert.

This complexity of the Chinese legal and judicial system in the context of authoritarian legality both motivates and enables this research, which draws on published judgments and the judicial reasoning in the judgments. Nonetheless, a somewhat contradictory attitude by the authorities concerning the role of courts and judges can also be seen in these two reforms. Regarding the CJO, while stipulating publishing as a principle and requirement for the majority of judgments, the SPC Regulations also list several circumstances under which judgements should not be published. At the end of this list, the SPC grants some discretionary power to the local courts as they decide whether or not there is any “other circumstance that the court thinks inappropriate to publish” a judgment.<sup>46</sup> In reality, as a number of researchers have found, a large number of cases are missing from this database. For example, with a focus on court decisions in Henan province, Margaret Roberts et al.<sup>47</sup> note that as of 2016, an average of 47 percent of court decisions had not been placed online. A comprehensive examination by Yuan

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<sup>38</sup> Tamir Moustafa, ‘Law and Courts in Authoritarian Regimes.’ (2014) *Annual Review of Law and Social Science* 281-299.

<sup>39</sup> Ibid, 287.

<sup>40</sup> Ibid, 288.

<sup>41</sup> Eva Pils, ‘China’s Dual State Revival Under Xi Jinping.’ (2023) 46(3) *Fordham International Law Journal* 339-376.

<sup>42</sup> Note 37.

<sup>43</sup> Ibid, 174.

<sup>44</sup> Note 35, 102.

<sup>45</sup> Note 38, 289.

<sup>46</sup> Note 33, 101.

<sup>47</sup> Note 32, 4.

Jinfan and Li Xiang in 2016 indicates that nearly half of all decisions made by Chinese courts are missing from the CJO.<sup>48</sup> More recently, in early 2022, Luo Jiajun and Thomas Kellogg reported a constant decrease of cases when they searched for certain keywords in CJO, and more than 11 million cases were reportedly taken down from the site over three months in early 2021.<sup>49</sup> A quantitative study by Yuan and Li further shows that cases of rape are also severely affected by this phenomenon – in 2019, 277 out of 395, i.e. some 70% of the rape judgments rendered by courts in Chongqing were not published online.<sup>50</sup>

In a similar vein, as a jurisdiction built upon a civil law tradition, China has no case law in the sense of a common law jurisdiction. According to the Constitution, the Chinese courts and judges are mere executants of the legislation; their judgments or reasoning have no binding force as precedents to other courts – from the point of view of the authoritarian regime, legislative power granted to the courts may erode the courts' role as mere executants of the legislature, which is a power that should be kept by the state (i.e. the People's Congress and its Standing Committee).<sup>51</sup> A range of studies have found that most criminal judgments are still rather brief in their reasoning (or provide no reasoning). For example, Zhuang Xulong noted that many criminal judgments devoted over 90% of the text of the judgment to a list of evidence.<sup>52</sup> Wang Xuewen, based on a quantitative study of 350 criminal judgments, found that 13.43% of them had no reasoning at all, while 53.14% had reasoning not specific to the case being tried.<sup>53</sup> Zhou Fangfang (2016) studied 200 criminal judgments issued between 2014 and 2015 across four crimes (traffic accident, intentional injury, rape, and theft, examining 50 cases for each crime) and found that none of them provided reasoning – even in the three cases where the defendants argued that the evidence had been obtained illegally through torture, the judges did not respond with reasoning in the judgments.<sup>54</sup> Some scholars have pointed out that the problem of weak or absent reasoning is especially concerning for sentencing (compared with conviction). According to Peng Wenhua, drawing on 100 criminal judgments between 2014 and 2015, the sentencing part of all the judgments was simply a text

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<sup>48</sup> Note 33, 100.

<sup>49</sup> Jiajun Luo and Thomas Kellogg 'Verdicts from China's Courts Used to Be Accessible Online. Now They're Disappearing.' (2022) *ChinaFile*, <https://rb.gy/rf4nel> (accessed 27 April 2022).

<sup>50</sup> Note 33, 102.

<sup>51</sup> Note 35, 107.

<sup>52</sup> Xulong Zhuang, 'The Institutional Rationality and Practical Context for 'Difficulties with Reasoning' (Caipan Wenshu 'Shuoli Nan' De Xianshi Yujing Yu Zhidu Lixing).' (2015) 11 *Journal of Law Application (Falü Shiyong)* 83, 83-92.

<sup>53</sup> Note 13, 28.

<sup>54</sup> Fangfang Zhou, 'Private Customization' of Reasoning in Criminal Judgments (Lun Xingshi Panjue Shuoli De 'Siren Dingzhi').' (2016) 3 *Oriental Law (Dongfang Faxue)* 127-134.

announcing the punishment without reasoning.<sup>55</sup> Jiao Yueqin investigated 75 criminal judgments published in the CJO and found that only 32% gave sufficient reasoning for the punishment.<sup>56</sup>

On the basis of these studies, the *status quo* regarding judicial transparency and judicial reasoning may be described as controlled transparency and unsystematic reasoning, to a large extent defined by the nature of authoritarian legality itself. On the one hand, according to some scholars, the primary purpose of the reform is to advance standardisation (*guifanhua*) in judicial decision-making, namely to ensure similar judgments in similar cases (*tong'an tongpan*).<sup>57</sup> And the rationale of standardisation is to restrain judicial discretion and to further centralise judicial authority under the central power of the Party.<sup>58</sup> Also, given the Party's control of the judiciary, judges, potentially out of self-protection, tend to avoid detailed reasoning in their judgments in order to circumvent possible issues with litigants or the public, as well as political risks that might occur in the context of an authoritarian regime – in particular, if/since the judgments are publicly available online.<sup>59</sup> In a nutshell, the authoritarian regime's reluctance towards full transparency is caused by a calculation of the costs and benefits of authoritarian legality. As noted by Zhuang Liu et al., the cost of transparency would be deemed as high when it discloses autocrats' incompetence and may impair their rule. In this context, judges, as bureaucrats working within a context of authoritarian legality, "have every reason to obscure information" to shun scrutiny.<sup>60</sup>

Yet, on the other hand, it is noteworthy that these judicial reforms provide a valuable opportunity to study China's legal and judicial systems. By "taking missing data seriously," scholars can explore patterns in the handling of specific types of cases by various courts and address some deeper questions regarding "how" and "why" a case is missing from the database.<sup>61</sup> Moreover, based on the available cases, both case studies and quantitative research can be used to explore the factors affecting case outcomes, as well as the behaviour

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<sup>55</sup> Wenhua Peng, 'Sentencing Reasoning: Practical Issues, Logical Approach and Technical Regulations (Liangxing Shuoli: Xianshi Wenti, Luoji Jinlu Yu Jishu Guizhi).' (2017) 1 *Legal System and Social Development (Fazhi Yu Shehui Fazhan)* 108, 106-127.

<sup>56</sup> Yueqin Jiao, 'Survey on the Current Situation and Reform Approach of Sentence Reasoning in Criminal Judgments (Xingshi Panjueshu Liangxing Shuoli Xianzhuang Diaocha Yu Gaige Lujing Yanjiu).' (2016) 34(2) *Hebei Law Science (Hebei Faxue)* 77, 75-85.

<sup>57</sup> Note 24, 72.

<sup>58</sup> *Ibid*, 70, 90.

<sup>59</sup> Note 35, 12; Note 52, 86.

<sup>60</sup> Zhuang Liu, T. J. Wong, Yang Yi, and Tianyu Zhang, 'Authoritarian Transparency: China's Missing Cases in Court Disclosure.' (2022) 50(1) *Journal of Comparative Economics* 222, 221-239.

<sup>61</sup> Note 32, 8, 31-32.

of judges in administrating China's judicial system.<sup>62</sup> There is also much research on selected judgments with detailed and strong judicial reasoning, offering an important lens on judges, courts and the judiciary in China. Some scholars have commented that such impressive judicial reasoning itself suggests that Chinese judges cannot only be cogs in a machine, but also have their own independent thinking.<sup>63</sup> Some research has also found that various cases, ranging from the "guiding cases" issued by the SPC, "like cases" retrieved by the judges themselves or submitted by lawyers, to good judicial reasoning in other cases, have *de facto* influence on and are taken as references by judges in their judicial practice.<sup>64</sup> Therefore, this research is motivated, enabled, and based upon (albeit limited by) such deficient judicial transparency and judicial reasoning, frequently deployed and controlled by the authoritarian regime in a context of authoritarian legality.

## **METHODOLOGICAL REVIEW: CONTROVERSIAL CASES AND QUALITATIVE ANALYSIS OF "LIKE CASES" RETRIEVED FROM CHINA'S CASE DATABASE**

This research aims to examine authoritarianism in China from a gender perspective based upon the crime of rape. A review of the existing, albeit still sparse, research on rape cases drawing upon the CJO reveals an almost exclusive use of quantitative methods. For example, Xiong et al. conducted a comprehensive examination of 1,254 rape verdicts between 2010 and 2017 in 86 basic-level courts.<sup>65</sup> By analysing and comparing required sentences (*liangxing qingjie*) and the sentences rendered by different courts, they found a pattern of "sentencing balance" (*liangxing junheng*) in rape cases across China – i.e. similar outcomes in cases with similar required sentences – and they note that this is due to a multi-year effort by the SPC to standardise sentencing and to introduce a range of mechanisms to restrict judges' discretionary power.<sup>66</sup> Similarly, a quantitative analysis conducted by Zhao Xiangru shows the influence of each required sentence in 154 cases of rape of juveniles under 14.<sup>67</sup> The research

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<sup>62</sup> Björn Ahl, Lidong Cai, and Chao Xi, 'Data-Driven Approaches to Studying Chinese Judicial Practice: Opportunities, Challenges, and Issues.' (2019) 19(2) *China Review* 10, 1–14.

<sup>63</sup> Note 34, 102-103; Note 55, 107; Note 54, 128.

<sup>64</sup> Note 34, 102-103; Note 55 106; Note 54, 131-133.

<sup>65</sup> Moulin Xiong, Li Zhining, and Hu Jingxuan, 'The Chinese Experience of Sentencing Balance: An Empirical Study Based on the Rape Crime (Liangxing Junheng De Zhongguo Jingyan: Jiyu Qiangjian Zui De Shizheng Yanjiu).' (2021) 5(2) *Law and Modernization (Fazhi Xiandaihua Yanjiu)* 119, 120 116-38.

<sup>66</sup> *Ibid.* 131, 135.

<sup>67</sup> Xiangru Zhao, 'An Empirical Analysis of Structure of Penalty in the Crime of Gaping Minors (Qiangjian Weichengnianren Fanzui De Liangxing Jiegou Shizheng Fenxi).' (2021) 6 *Issues on Juvenile Crimes and Delinquency (Qingshaonian Fanzui Wenti)* 6: 64-76.

by Hu et al. uses quantitative methods to analyse trials for the crime of raping minor girls under 14, analysing factors such as legal representation, the time and place of the crime, the profile of the offender and victim, as well as the term of imprisonment.<sup>68</sup> These quantitative studies, mostly comparing the various elements across multiple cases, are of great significance to identify general patterns in sentencing for specific crimes. Yet both the nuanced factors and wider context leading to disparities in sentencing in individual cases can get lost in the general patterns revealed in the process of quantification. Here arises the need for qualitative analysis on judgments in coded “like cases.” This method is conceptualised by Kathleen Daly (1994) as “disparity studies” in her analysis of the justifications provided by judges in transcripts of sentencing remarks in “like cases,” where women and men respectively were defendants in courts in New Haven.<sup>69</sup>

As mentioned in the Introduction, this research was triggered by certain cases that attracted widespread public attention, discussion, and criticism on the internet for their sentencing. This phenomenon is referred to by some scholars as *minyī*, i.e. “people’s spontaneous reactions to controversial cases” or “penal populism,” that is people’s “expressions of anger, disenchantment and disillusionment with the criminal justice system”.<sup>70</sup> The existing research on controversial criminal cases in China shows that public opinion, *minyī*, reflects various major social, systematic, and structural problems in contemporary China, such as those relating to the abuse of money and power, corruption, social unrest, the birth control policy, and the demolition and relocation policy.<sup>72</sup> For instance, according to Bin Liang and Jianhong Liu, in cases related to officials who raped minor girls yet were sentenced leniently, online criticism addresses on the close relationship between power and money, and how officials can wield both to “buy themselves more justice” in China.<sup>73</sup> Focusing on public opinion in death penalty cases, Fu Hualing points out that this “penal populism,” as he terms it, “represented the anger and frustration of the underdogs toward the more privileged class in Chinese society [...] pitching the poor against the rich, the powerless

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<sup>68</sup> Ming Hu, Bin Liang, and Siwen Huang, ‘Sex Offenses Against Minors in China: An Empirical Comparison.’ (2017) 61(10) *International Journal of Offender Therapy and Comparative Criminology* 1099–1124.

<sup>69</sup> Kathleen Daly, 1994. *Gender, Crime, and Punishment* (Yale University Press 1994).

<sup>70</sup> Bin Liang, and Jianhong Liu, *Chinese Netizens’ Opinions on Death Sentences: An Empirical Examination*. (University of Michigan Press 2021) 7.

<sup>71</sup> Hualing Fu, ‘Between Deference and Defiance: Courts and Penal Populism in Chinese Capital Cases.’” In Bin Liang and Hong Lu (eds.) *The Death Penalty in China: Policy, Practice, and Reform*, (Columbia University Press 2016) 274-299.

<sup>72</sup> Note 70, 169.

<sup>73</sup> *Ibid*, 174.

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against the powerful, or individuals against the state.”<sup>74</sup> For its core instrumental function of maintaining social order and providing legitimacy, public opinion is taken seriously by the authoritarian ruler in a system of authoritarian legality. In any given case, the authorities’ response is uncertain and some studies have found that “penal populism” did affect the judgment in certain cases.<sup>75</sup> However, in the controversial cases reviewed here, the judgment and penalty were not affected – and in the first controversial case involving a policeman and a sex worker, the judgments of both the first and second instance trials were simply removed from the database (without any reason being provided); some public discussions on social media were also deleted by the authorities.

In this research, it is argued that the wider meaning and connotation of these controversial cases constitutes a significant foundation for this inquiry and also criteria for selecting “like cases” in the CJO database for “disparity studies,” i.e. a qualitative study of the judicial reasoning provided by the judges to see why and how such controversies or disparities in cases arose, as well as their broader implications. Specifically, this approach first identifies the main issues in the selected controversial cases and then uses these issues as keywords to search for “like cases” in the CJO database; these “like cases” then form the basis for a qualitative inquiry into the judicial reasoning – if there is any – in the judgments.

It is also noted that there have been abundant discussions on the problems with the legal definition of rape as stipulated in Article 236. However, by focussing on sentencing measures, this research adopts the legal framework currently provided for in the Chinese Criminal Law. Regarding the legal framework for the crime of rape, Section 1 of Article 236 of the Criminal Law defines rape as “[anyone] who rapes a woman by violence, coercion, or other means” and the prescribed punishment is “imprisonment of not less than three years nor more than ten years.” Section 2 of the Article is termed statutory rape, i.e. “[anyone] who has a sexual relationship with a minor girl under the age of 14 shall be sentenced severely” – severe punishment means within the spectrum prescribed in Section 1 of this Article. Section 3 provides factors for aggravating punishment, which are detailed in part three of this paper. In December 2020, Amendment XI of the Criminal Law added a new section to Article 236, defining as statutory rape “[anyone] who has a sexual relationship with a minor girl having reached the age of 14 but under the age of 16 for whom he has a special responsibility such as guardianship, adoption, nursing, education or medical treatment.” Its prescribed punishment is “imprisonment of not less than three years” and where there are “heinous

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<sup>74</sup> Note 71, 277.

<sup>75</sup> Note 71.

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circumstances,” the punishment shall be “imprisonment of not less than three years nor more than ten years.”

Based upon this legal framework and for the purposes of applying the metric of “like cases,” this research further divides offences culpable under Article 236 into four main categories, covering four different sexual relationships between the offender and the victim. They are:

- As prescribed in Section 1, rape, where the victims are adults;
- As also prescribed in Section 1, rape, but where the defender and the victim are/were married, i.e. marital rape, a category that has been subject to extensive controversy;
- As prescribed in Section 2, rape, where the victims are girls under 14, i.e. *younú* as defined by the Criminal Law;
- As prescribed in the newly added section, rape, where the defendant has a responsibility of care towards a victim who is over 14 but under 16.

Based on these four sexual relationships, four controversial cases – cases extensively discussed in the media or online – were selected for this research. The first case concerns a rape committed by a policeman. The public outcry driven by the lenient punishment imposed in this case may cast some light on the role of the power or status of the offender in sentencing in the crime of rape. A close-up on this case further reveals that the victim was a sex worker. The second controversial case concerns marital rape. Not only have marital rape cases long provoked many discussions by the public and in scholarship, but they may also be the most typical type of controversial case, spotlighting the interplay between gender, sex, sexuality and authoritarian power. The third case concerns a rape committed against a minor girl (under 14). The focus here is on what the public has criticised most, namely lenient punishment for public officials. Finally, I examine the newly added section of the Criminal Law concerning the relationship between a caregiver and their dependent. The existence of this section in itself can be viewed as a response to the recent public outrage in cases where adults and underage girls were in a relationship of unequal power.

In these case studies, the aim is to identify the key issues triggering the public controversy or criticism, and then to use these issues as keywords to search the CJO database to retrieve “like cases.” The database search aims to investigate whether or not, or to what extent, such issues also exist in these like cases. A qualitative study of the judicial reasoning presented explores why and how the issues arose, and the ramifications concerning the interface of sex, sexuality, gender, and authoritarian power. As discussed in the previous part, the limitations of the database mean that the search by no means presents a full picture of relevant cases in China. Yet this research does not seek to provide an exhaustive quantitative

analysis. And, although the limited judicial reasoning that is often provided may entail a risk that little reasoning is available for an in-depth qualitative inquiry, the complex picture of judicial reasoning under the current legal reform also indicates the possibility and value of undertaking this research.

## **CASES, JUDGMENTS, AND JUDICIAL REASONING**

In addition to the standard punishment for rape, which is imprisonment of not less than three years nor more than ten years, and the general requirement of severe punishment (within this spectrum) for statutory rape, Section 3 of Article 236 specifically provides factors for aggravated punishment, namely imprisonment of more than ten years, life imprisonment, or the death penalty. These factors include 1) raping a woman or having a sexual relationship with a minor girl with heinous circumstances (*qingjie elie*); 2) raping more than one woman or having sexual relations with more than one minor girl; 3) raping a woman or having a sexual relationship with a minor girl in front of others or in a public place; 4) gang rape; 5) having a sexual relationship with a minor girl under the age of 10, or causing harms to a minor girl under the age of 14; and 6) causing a severe injury, death or other serious consequences to the victim. The SPC and the Supreme People's Procuratorate have issued Guiding Opinions on Sentencing for Common Crimes (hereinafter the "Opinions") in which more specific rules can be found. The latest Opinions issued in 2021 provide a starting point (*liangxing qidian*) for sentencing under a range of circumstances and restrict the possibility of reprieve in some circumstances.

### **i). Police and Citizens: Does the Status of the Offender Lead to a Lenient Punishment?**

This section starts with a controversial rape case in which the offender, a policeman, received a lenient punishment. Yet searching for like cases in the CJO database and on the internet provided contradictory results, including rape cases in which police officers were sentenced harshly. In the initial case, the victim was a sex worker, and similar cases were searched for in the CJO. The results of this search and a qualitative analysis of the judicial reasoning in multiple verdicts reveal a somewhat complex picture regarding both prostitution and judicial practice in China today.

### **Case study**



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At the beginning of 2021, a rape case happened in Anhui province, in which policeman Zhang Yunlong was sentenced to imprisonment of four and a half years for raping a woman multiple times, triggered much public outrage after its verdict, published on CJO, was reported by the media. The furious voices on social media focussed on the sentence: netizens (*wangmin*, literally, internet citizens) generally thought that four and a half years was way too short and unfair as a) Zhang was a police officer and abused his power in entering the victim's hotel room at midnight (claiming to search for evidence of prostitution) and obstructing her later reporting of the case at the police station; b) Zhang raped the victim three times; c) Zhang tormented the victim using inhumane means; d) Zhang's professional conduct, such as drinking alcohol at work, interrogating female suspects alone and without female police officers, and handcuffing the victim's friends, violated other legal regulations; and e) Zhang appeared to take advantage of the victim's former record of work in prostitution, claiming that he was seduced by the victim and that the sex was consensual (Hu 2021; Wang).

The public outrage that followed this case embodies a view of a disproportionality between the sentence and the crime – while the sentencing spectrum for rape is between three and ten years imprisonment, a sentence of four and a half years was not recognised as a just or right response considering all the attributes of the case. As indicated in the online debates, Zhang committed the crime by abusing his power as a state official, while the criminal justice system may be partial towards abuses of power, given judges' discretion in sentencing. Thus, netizens insisted that Zhang's status as a public official contributed to this lenient punishment. Moreover, the circumstances in this case can be considered as "heinous circumstances" which, according to Section 3 of Article 236, require a sentencing starting point of ten years' imprisonment.

However, is the offender's status as a public official really at the crux of this sentence? An internet search produced other cases suggesting a contrasting conclusion, as other policemen committing rape were punished severely due to their status as public officials. For instance, in a similar case in late 2020, a policeman was sentenced to nine years' imprisonment for attempting to rape a woman after getting drunk in a nightclub. The case did not trigger much public attention or discussion, but some legal professionals commented on this sentence as too heavy under the Criminal Law; they argued that the basis for this heavy sentence, namely the offender's professional status as "aggravating guilt for knowingly breaching the law" (*zhifa fanfa zui jia yi deng*), cannot be recognised as a legal circumstance (Tian 2021).

### **Database search**

Given the vast disparity of sentencing in these two like cases, and in order to explore whether or not, or to what extent, the offender's status as a public official – the core issue in the public's comments and feeling of injustice in Zhang's sentence – plays a role in sentencing in the crime of rape, this research searched for judgments for rape (as cause of action, *anyou*) in CJO using the keywords *gongzhi ren yuan* (public official) or *minjing* (police) in early May 2022. Either keyword leads to only one case, sentenced in 2014 and published in 2019. In this case ([2014] Yi Xing Chu Zi No. 264; [2014] Kun Xing Zhong Zi No. 381), the policeman Li Yao was sentenced to imprisonment of 15 years for raping two minor girls three times. The justification given by the judge reads:

“The defendant, as a state official, raped minor girls multiple times, which caused not only serious physical and psychological harms to the victims, but also extremely bad social impact; [the offence] caused enormous harm to society, and [the defendant] did not admit guilt or express remorse, and thus should be punished severely.”

This sentence can be assessed as in accordance with Section 3 of Article 236 of the Criminal Law. It seems from the justification provided that the offender's status is one of the reasons recognised as causing “extremely bad social impact” and “harm to society.” Due to the extremely small sample obtained in CJO, however, it is hard to reach any conclusive assessment of the weight of this factor in sentencing and punishment.

There is a variable in the case of Zhang Yunlong that is mostly neglected in the existing comments and discussions – the victim was a sex worker and had been punished before for prostitution. Sex workers and prostitution have long been identified by the Chinese authorities as both legally and morally culpable, “poisoning the social atmosphere, undermining the construction of a socialist spiritual civilization and contributing to increasing crime.<sup>76</sup> Could it be possible that it is the victim's status as a prostitute that played a role in Zhang's lenient sentence, as it may demean her and her victim status in a sex-related crime (although it is highly unlikely that such considerations would be included in the judgment)? To seek similar cases with this attribute, this research used the keyword *mai yin* (prostitution) in the crime of rape to search CJO.

As Zhang's case was tried in early 2021, a time period from 2010 to 2022 was selected; the search, undertaken in early June 2022, resulted in 266 verdicts from first and second

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<sup>76</sup> Note 1, 318.

instance trials during this period. By considering accomplished offenses only and excluding those verdicts with the keywords but not fitting in the category,<sup>77</sup> in total there are 53 cases in which the victims were recognised by the judges as engaging in prostitution or as sex workers when rape was committed.<sup>78</sup> There are nine gang rape cases. As gang rape cases are not considered like cases for the purposes of this study, there are in total 44 cases for consideration. The following table shows their distribution of the terms of imprisonment and the judges' justification:

Sentence	Number of cases	Justification
2 years' imprisonment (i.e. lower than the statutory sentencing starting point of 3 years) <sup>79</sup>	1 (2.3%)	voluntary surrendering and confessing the offense
3 years' imprisonment with a 3-year reprieve <sup>80</sup>	1 (2.3%)	compensating the victim for the economic loss and obtaining the victim's forgiveness
≥3 < 4 years' imprisonment	19 (44.1 %)	
≥4 < 5 years' imprisonment	11 (25.6%)	
≥5 < 6 years' imprisonment	8 (18.6%)	
≥6 years' imprisonment	4 (9.3%)	The victim was juvenile under 18; <sup>81</sup> The specific circumstances of committing

<sup>77</sup> Such cases include cases where the victim was raped and then forced into prostitution or raped during or after being forced into prostitution.

<sup>78</sup> In a large number of cases, the offender(s) or his/their lawyer(s) stated that the victim(s) was/were engaging in prostitution or sex worker(s) (as a common defense for consensual sexual intercourse), but this defense was not admitted by the judge.

<sup>79</sup> [2017] Xiang 0624 Xing Chu No. 318

<sup>80</sup> [2018] Zhe 0522 Xing Chu No. 153

<sup>81</sup> Gui 04 Xing Zhong No. 266

		the crime; <sup>82</sup> raping three victims; <sup>83</sup> recidivism <sup>84</sup>
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An examination of the sentences alone shows that, except for the cases with statutory aggravating circumstances, in general, the sentences tended towards the sentencing starting point on the spectrum of punishment prescribed in Article 236. Yet in all cases with less than six years' imprisonment, unlike the case of Zhang Yunlong, no statutory or discretionary aggravating circumstances were indicated – although this might also be due to the deficiency and selective removal/uploading of verdicts in CJO.

In the context of this search, it is noteworthy that the verdicts for the case of Zhang Yunlong had already been removed from CJO – although some news reports and other websites still included a screenshot and copies of the verdicts for both the first and second instance trials<sup>85</sup>. This removal seems to echo the accumulating reports on the disappearance of verdicts from CJO – with no reason provided – yet the disappearance of verdicts for the case of Zhang Yunlong seems to suggest that public discontent or criticism is one reason for removing cases. It is no wonder that some netizens have called for the “salvage downloading” of verdicts, in particular criminal verdicts, from CJO, as a vast number of verdicts in non-politically sensitive cases ranging from theft, gambling, tax fraud, and fraud to traffic accidents, sales of shoddy products, bribery, and embezzlement are withdrawn, on the grounds of “involving state secrets” or “other circumstances that the People’s Court considers inappropriate for publication on the internet,” or simply disappear from CJO.<sup>86</sup> Moreover, the discussion topic and group set up for this case on China’s Twitter-like social media platform *Weibo* was also closed down.

### **Qualitative analysis of the judgments**

<sup>82</sup> [2018] Su 01 Xing Zhong No. 139

<sup>83</sup> [2017] Xiang 31 Xing Zhong No. 183

<sup>84</sup> [2019] Chuan 0114 Xing Chu No. 429

<sup>85</sup> Jinke Hu, ‘Anhui Police Officer Repeatedly Assaulted a Woman When Handling Case after Drunk (Anhui Yi Jingcha Jiuhou Banan Duoci Qinfan She’an Nüzi).’ (2021) <https://www.163.com/dy/article/G0G5TIA00551TQVO.html> (accessed 27 March 2022).

<sup>86</sup> Yadong Liu, ‘How Does China Judgments Online Become a Secret Website? (Caipan Wenshu Wang Za Chengle Baomi Wang?).’ (2021) *Zhimian Chuanmei*, <https://posts.careerengine.us/p/60e933633297a769615ba15e> (accessed 25 February 2022).

On the basis of these findings, it is hard to conclude that a victim's status as a sex worker or experience of prostitution is necessarily a factor leading to a more lenient punishment. For one thing, the pattern of sentencing as shown in the table above represents the spectrum of sentencing for the crime of rape overall. Yiwei Xia et al. found in their quantitative study that the average length of imprisonment in China for cases of rape is 41.5 months.<sup>87</sup> Shi Lei found in a quantitative analysis of 1,016 defendants in rape cases that the average length of imprisonment is 48.10 months, and that, in general, judges are prone to sentence close to the prescribed minimum punishment for the crime of rape.<sup>88</sup> Their findings largely echo the findings here for the specific case of rape involving a sex worker.

In addition, although the majority of the 53 verdicts that I obtained in the database search are brief in justification and do not mention the victim's status or experience, multiple of them did explicitly state the irrelevance of sex work or prostitution in sentencing and punishment for the crime of rape. For instance, in the case of Zhao Jingyang ([2020] Liao 14 Xing Zhong No. 8), the justification reads that "whether the victim is a prostitute or not does not affect the determination of the fact of rape in this case." In the case of Lu Haijiang ([2020] Chuan 0106 Xing Chu No. 466), the justification reads that "the object of rape crime is women's inviolable right to sex. The two victims have the right to make their own decisions about sex. The identity of the two victims as prostitutes is not the reason for the defendant to commit a rape crime." The justification for the case of Lin X ([2016] Yun 0125 Xing Chu No. 105) reads that "although the victim is a 'prostitute,' her inviolable right to sex should still be protected by law." And the judge in the case of Han Yongshuo ([2018] Ji 0181 Xing Chu No. 231) provides the justification that "as for the defence opinion that the victim is a prostitute and had faults for triggering the crime, although the victim is a prostitute, there is no correlation with the criminal act of the defendant. Therefore, the court does not support this defence opinion."

The justifications as such and the sentences seem to indicate that the victim's status or experience of engaging in prostitution is not a factor weakening their status as victims or resulting in a disproportionately light punishment in the crime of rape. Nevertheless, a closer look at these judgments still reveals demeaning attitudes expressed by the judges towards the victims regarding their work or status. For example, in the case of Zhang Yong and Li Zhi ([2016] Yu 0106 Xing Chu No. 764), the judge referred to the victim as "a prostitute who lacks

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<sup>87</sup> Yiwei Xia, Tianji Cai, and Hua Zhong, 'Effect of Judges' Gender on Rape Sentencing: A Data Mining Approach to Analyze Judgment Documents.' (2019) 19(2) *China Review* 135, 125–50.

<sup>88</sup> Lei Shi, 'An Empirical Study on Sentencing in Rape Crime (Qiangjian Zui De Shizheng Yanjiu).' (2021) 23(3) *Journal of Southwest University of Political Science and Law (Xinan Zhengfa Daxue Xuebao)* 130, 126-38.

self-love (*ziai*),” hinting at an attitude of moral derogation. In the case of Wang Zhengguo ([2018] Lu 0613 Xing Chu No. 240), the judge did not adopt the prosecutor’s charge that Wang intruded into the victim’s home to rape her (which carries a heavier punishment) on the grounds that:

“The victim’s rented apartment was both her daily residence and the place where she engaged in prostitution...When she decided to receive the client in the rented apartment, the function of the rented apartment had been transformed into a promiscuous and profitable place, regardless of whether the client really had the intention of prostitution. Although the place is relatively closed and private, it no longer has the functional characteristic of home life, so it does not meet the definition of ‘household’ (*hu*) in the crime of burglary.”

This case suggests that the moral condemnation of sex work and sex workers can indeed disadvantage the victim in criminal trials. In this case of Wang Zhengguo, the defendant Wang was convicted of the crimes of rape and robbery, and was sentenced to imprisonment of ten years for robbery. Yet burglary carries a heavier punishment than robbery, with a stipulated sentence of more than ten years’ imprisonment, life imprisonment, or the death penalty. Apart from this, it is interesting to note that despite the disparate attitudes expressed by the judges in their reasoning, the sentencing for the rape conviction in these cases does not show enormous differences:

Case	Sentence	Individual circumstance affecting sentencing
Zhao Jingyang rape crime ([2020] Liao 14 Xing Zhong No. 8)	Imprisonment of four years	N/A
Lu Haijiang rape crime ([2020] Chuan 0106 Xing Chu No. 466)	Imprisonment of five years and three months	Raped two victims (which is an aggravating circumstance)

Lin X rape crime ([2016] Yun 0125 Xing Chu No. 105)	Imprisonment of three years	The defendant Lin was 17 years old when committing the crime (which is a discretionary circumstance for a lenient punishment)
Han Yongshuo rape crime ([2018] Ji 0181 Xing Chu No. 231)	Imprisonment of four years	Recidivism but pleaded guilty and confessed
Zhang Yong and Li Zhi gang rape crime ([2016] Yu 0106 Xing Chu No. 764)	Imprisonment of ten years	(Ten years' imprisonment is the minimum sentence for gang rape)
Wang Zhengguo rape and robbery crimes ([2018] Lu 0613 Xing Chu No. 240)	Imprisonment of five years and six months (for the rape crime)	Confessed after arrest

Overall, these sentences largely echo the general pattern of leaning toward the minimum sentence in the spectrum of punishment prescribed in Article 236, as shown in the previous chart and other quantitative research. However, the derogatory attitudes expressed by the judges in their verdicts reflect the Chinese authorities' long-lasting policy and posture toward prostitution and prostitutes. Prostitution is officially identified as "a product of the capitalist system of exploitation, a reflection of the corrupted nature of life, the denigrated position of the female sex" and a "social disease" harming the stability and health of society if not treated timely.<sup>89</sup> Prostitutes are officially labelled as "fallen" (*duoluo*) women for "rescue and re-education".<sup>90</sup> In line with this posture, the authorities have also launched several "strike hard" campaigns to punish prostitution and prostitutes, which have been widely criticised as sacrificing legal procedures and regulations<sup>91</sup>.

It is noted that the question regarding an overly light punishment as the trigger for public

<sup>89</sup> Heqing Zhang, "Female Sex Sellers and Public Policy in the People's Republic of China." In Elaine Jeffreys (ed.) *Sex and Sexuality in China*, (Routledge 2006) 156, 139-58.

<sup>90</sup> Ibid, 156.

<sup>91</sup> Note 1, 318-320.

outrage in the case of Zhang Yunlong remains unanswered – there may indeed be unknown causes for judges’ abuse of their discretionary power in individual cases. Nevertheless, the database search and qualitative examination show a somewhat complex picture concerning rape crime where the victim was a sex worker. On the one hand, the sentencing in these cases does not deviate significantly from the general pattern of sentencing rape cases. And multiple judges explicitly stated the irrelevance of this factor in their judicial decisions. Yet on the other hand, demeaning attitudes in line with the authorities’ position were still found in a couple of judgments. This might be viewed as a clash between the official position and more liberal attitudes towards sex (and sex work) in society driven by China’s overall opening-up and marketization. The market has been cultivating “new market individuals” as “desirous subjects”, acting in their self-interest and fulfilling their sexual desires.<sup>92</sup> Nowadays, there are highly innovative and new “enterprising, aspirational, and consumption-oriented desirous subjects”.<sup>93</sup> For example, a report on the sex trade in Dongguan in 2014 found that prostitution generated 10% of the city’s gross domestic product (GDP); a study in 2012 reported that the corresponding figure for China as a whole is 6% to 8%, despite the Party’s official condemnation of prostitution.<sup>94</sup> The landscape of judicial reasoning in rape cases involving prostitutes also shows the characteristics of authoritarian legality – although there is a degree of standardization in the verdicts, some diversity can also be seen, especially by zooming in on the judges’ reasoning. Nevertheless, overall, the somewhat contradictory attitudes towards sex and sexuality between the authoritarian regime and the Chinese people still highlight the patriarchy of authoritarianism. On the one hand, the state profits from prostitution and the sex industry; on the other, sex workers face condemnation and suppression by the authorities for breaching the state-sanctioned sexual morality.

## **ii). Husband and Wife (Marital Rape): Is the Existence of a “Normal Marriage” a Shield Against a Rape Conviction?**

This section spotlights a type of case that is often controversial, namely acquittals in marital rape cases. As shown in this research, judicial practice in this area is based upon the principle established by the SPC in the 1990s through two sample cases: a “normal” or “abnormal” marriage is employed as the standard for conviction in marital rape cases. Although the search

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<sup>92</sup> Tiantian Zheng, ‘Sexuality, Class, and Neoliberal Ideology: Same-Sex Attracted Men and Money Boys in Postsocialist China.’ In Tiantian Zheng (ed.) *Cultural Politics of Gender and Sexuality in Contemporary Asia*, (University of Hawai‘i Press 2016) 23-40.

<sup>93</sup> Note 6, 491.

<sup>94</sup> Ibid, 501.



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for similar cases in the CJO led to a very small sample, examining the judicial reasoning in the judgments sheds light on the “sex hierarchy” upheld by the authoritarian regime, often by sacrificing women’s rights and interests.

### **Case study**

The Criminal Law in China does not exclude any relationship from the crime of rape. However, in judicial practice, several rape cases have raised discussions over whether or not a husband can be legally recognised as the perpetrator of a rape crime. For instance, in 2010, in a reported “first ever marital rape case in Foshan,” a man who was charged with raping his wife was acquitted by the court (Enorth 2010).<sup>95</sup> The justification supplied by the presiding judge reads:

“During a normal marriage, either party has the obligation to cohabit with the other party, and sex is an integral part of a couple’s life of living together. In this circumstance, sentencing a husband who forcibly has sex with his wife for the crime of rape is contrary to the facts and the law, and is not in line with China’s ethical customs, hence the husband should not be the subject of the crime of rape.”<sup>96</sup>

This *de facto* green light to rape in marriage is not an innovation by the local court in question. It is a principle established much earlier by the SPC via two cases in its Criminal Trial Reference (*xingshi shenpan cankao*).<sup>97</sup> In Case No. 20, in 1997, a man, Bai Junfeng, who forcibly had sex with his wife was acquitted on the same grounds. In a similar vein, the justification mentions that:

“Although sexual intercourse within marriage may not always have the consent of the wife, it is fundamentally different from forcible intercourse against the will of women, which constitutes the crime of rape. According to the Marriage Law, a legal marriage produces a specific personal and property relationship between husband and wife.

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<sup>95</sup> Enorth. ‘Man Acquitted in First Instance Trial of ‘Marital Rape’ Court Says Conviction Is Unethical (Nanzi ‘Hunnei Qiangjian’ Yishen Wuzui Fayuan Cheng Dingzui Buhe Lunli),’ (2010) <http://news.enorth.com.cn/system/2010/12/07/005453969.shtml> (accessed 13 May 2022).

<sup>96</sup> *Ibid.*

<sup>97</sup> Ke Zhang, ‘The Criminalization Of ‘Marital Rape’ from the Perspective of Feminist Jurisprudence (Cong Nüxing Zhuyi Faxue Shijiao Kan ‘Hunnei Qiangjian’ Ruzui).’ (2015) 7 *Legality Vision (Fazhi Bolan)* 20-24.

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Cohabitation and sexual life are the basic elements of reciprocal personal rights and obligations between husband and wife, and the voluntary registration of marriage between the two parties is a legal commitment to cohabitation and sexual life (@Xingfa Xueren Fang Peng, 3 March 2022)."

Later, in 1999, in Case No. 51, the husband in the case was sentenced to three years' imprisonment with a three-year reprieve for raping his wife. The justification for this conviction and punishment was the victim's initiation of divorce litigation which had been granted by the court prior to the rape charge, although the divorce judgment had not taken effect at the time of the charge (Bao 2021). Via the justification given in this case, the SPC established the principle that:

"During the abnormal existence of a marriage, such as during the divorce proceedings, i.e. the marital relationship has entered the legal procedure for termination, although the marital relationship still exists, it can no longer be presumed that the woman has a consensual commitment to the sexual act, thus there is no reason to deny the establishment of the crime of rape based on the marital relationship (Yang 2021)."

In a word, in China's judicial practice, the decisive factor for a judge's recognition of marital rape is a "normal" or "abnormal" marital relationship. In the 1999 rape conviction, there was no legally recognised "normal marital relationship" and the sentence of three years' imprisonment with three years' reprieve can thus be viewed as rather lenient, especially given the fact that the victim suffered various injuries caused by the violent means used in the rape.<sup>98</sup> The relatively lenient sentence in this case, albeit without explicit justification by the SPC, seems to constitute a *de facto* principle for the Chinese judiciary to apply in similar cases.

As discussed earlier, China is not a case law jurisdiction and its judiciary is highly centralised. Yet, as part of its efforts to "expand its authority over local courts and limit local discretion," the SPC regularly issues model cases, "guiding cases," and judicial interpretations.<sup>99</sup> As such, the cases compiled and issued by the SPC carry quasi-law force,

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<sup>98</sup> Tinglifang. 'The Case of Wang Weiming -- Whether the Husband Can Be the Subject of Rape Crime (Wang Weiming Qianjian An -- Zhangfu Kefou Chengwei Qianjian Zui De Zhuti).' (2020) <https://www.scxsls.com/knowledge/detail?id=145768> (accessed 26 April 2022)

<sup>99</sup> Note 24, 94.

functioning as “references” in similar cases to guide judicial practice nationwide.<sup>100</sup> Indeed, similar cases related to marital rape continue to be reported by the media and provoke public debate. For example, in a 2021 case in Fuzhou, the husband was sentenced (rather leniently, below the minimum penalty of three years’ imprisonment) to eight months’ imprisonment for raping his wife, in a case where the wife had already filed a divorce suit at the court and the couple lived separately when the crime took place (Yongtai Government 2021).

**Database search**

Seeking similar cases involving marital rape, the CJO database was searched in early May 2022 using the keyword *hunyin* (marriage) in rape as the cause of action. Given the extremely small sample of results in the database, no time scope was applied. Nonetheless, the search still resulted in only 14 verdicts from first and second trials; eight of these relate to marital rape.<sup>101</sup> In order to examine only similar cases, one discontinuance of crime is excluded from the analysis here. Notably, in all eight cases retrieved from the database, the marriages were not “normal” according to the principle established by the SPC. The following table shows the sentences and justifications given by the judges in the seven cases eligible as “like cases”:

Case	Sentence	Justification
Hong Decun rape crime ([2016] Qiong 0107 Xing Chu No. 248)	Imprisonment of 3 years	Marriage is only a pre-condition for the legitimacy of sexual intercourse, but the real basis for the legitimacy of sexual intercourse is consent to sexual intercourse. Sexual intercourse can only be legitimate if the husband and wife have consented to it. Although the defendant Hong Decun and the victim were husband and wife, both parties filed for divorce due to conflicts. In particular, after the victim suffered domestic violence from the defendant several times, the victim left the defendant, filed for divorce several times, and they lived apart for a long time. The relationship between the couple was broken.

<sup>100</sup> Jiajun Luo, ‘Institutional Purposes of Chinese Courts: Examining Judicial Guiding Cases in China Through a New Analytic Framework.’ (2017) *University of Hong Kong Faculty of Law Research Paper No. 2017/012*: 16, 1-59.

<sup>101</sup> Those having the keyword *hunyin* yet not related to marital rape include the judgments read “it is a crime arising from the aggravation of conflicts in relationships, marriages, and families thus sentenced leniently,” or mentioning that one of the parties was in a “normal marriage” when the crime happened.

<p>Zuo Weiyou                  trespass                  and rape                  crimes                  ([2016] Gan                  01 Xing                  Zhong No.                  360)</p>	<p>Imprisonment                  of 3 years and                  3 months (for                  the crime of                  rape)</p>	<p>The victim and Zuo Weiyou were divorced [one month before the crime happened].</p>
<p>Li Fajun                  rape and                  illegal                  detention                  crimes                  ([2017] Qing                  01 Xing                  Zhong No.                  49)</p>	<p>Imprisonment                  of 3 years (for                  the crime of                  rape)</p>	<p>This case was triggered by conflicts in marriage and family, and the victim was his ex-wife, so the harmful consequences were relatively light.</p>
<p>Gao Diwei                  rape crime                  ([2017] Su                  01 Xing                  Zhong No.                  789)</p>	<p>3 years'                  imprisonment</p>	<p>Gao Diwei had sex with the victim against her will after their marital relationship was dissolved by the court, so his behaviour did not meet the circumstances of mitigating punishment.</p>
<p>Liu Xu rape                  crime                  ([2017]                  Shan 0113                  Xing Chu                  No. 1126)</p>	<p>Imprisonment                  of 1 year and 8                  months</p>	<p>Given that the defendant Liu Xu had limited criminal responsibility at the time of committing the crime, and truthfully confessed the main facts of the crime, in addition to the two parties' marital relationship status, the punishment may be mitigated according to the law.                  [The defendant and victim divorced four months before the crime took place.]</p>

<p>Deng Guiping rape crime ([2019] Yue 1391 Xing Chu No. 196)</p>	<p>Imprisonment of 3 years with 4 years' reprieve</p>	<p>The defendant Deng Guiping and the victim's obligation to cohabit as husband and wife is an ethical obligation presumed from the act of voluntary marriage and is not a mandatory obligation under the law. There had been irreconcilable differences between the two parties and they lived separately. Since they were no longer committed to fulfilling the obligation of cohabitation between husband and wife, they did not have a normal relationship as a couple.</p> <p>... The defence raised the point that the defendant raped his wife, which is different from an ordinary rape, and truthfully confessed, repented, and was a first-time offender, hence requested a lighter punishment. This defence is justified and accepted.</p>
<p>Luo Zhihao rape crime (Yue 17 Xing Zhong No. 64)</p>	<p>Imprisonment of 3 years and 6 months</p>	<p>After the defendant Luo Zhihao and the victim agreed to divorce [three months before the crime happened], the marital relationship ended. The defendant violated the victim's sexual rights by forcibly having sex with the victim against her will.</p>

**Qualitative analysis of the judgments**

The judgments in these cases suggest that, although a couple of judges did not identify with the grounds provided by the SPC, i.e. presuming sexual intercourse as a legal obligation in marriage, and explicitly highlighted consent as the justification for sexual intercourse regardless of the relationship between the parties, they still upheld the principle established by the SPC to distinguish rape even between a divorced couple from “ordinary rape,” rendering lenient punishment to the offenders. Except for the case of Liu Xu where the offender had a mental illness, the other sentences were near the minimum sentence for the crime of rape. As discussed earlier, against the backdrop of the SPC’s promotion of detailed judicial reasoning, albeit within the limited framework of authoritarian legality, some judges demonstrate here their professionalism and a more liberal, rights-based mindset in their judgments. But their decision and sentencing are restrained by the centralised principles or standards, even if these principles or standards may contradict their judicial reasoning. The judicial practice of marital

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rape cases reviewed here suggests the effectiveness of the SPC's initiatives on limiting judges' discretionary power and "standardising" sentencing and punishment – since there is generally lenient sentencing for rape crimes even in "abnormal" marriages.

Yet such "standardisation" and uniformity entail the sacrifice of the victim's rights and justice. Fundamentally, the rationale underlying the judicial principles and practice in marital rape cases may be viewed as "male immunity".<sup>102</sup> By imposing sex as an obligation in marriage, rather than starting from an individual's rights and autonomy, Chinese criminal law illustrates the core tenet of patriarchy: a wife is viewed as an affiliation or property of her husband and women's right to sex is viewed as contingent on their relationships with men.<sup>103</sup> This judicial practice in marital-related rape conforms to the rationale of the rape crime as mentioned in the Introduction: sexual activity is recognised by the authorities for the purposes of maintaining the state-sanctioned relationship and mainly from the perspective of reproduction. This rationale echoes what Gayle S. Rubin has termed the "sex hierarchy" in accordance with the morally "good" or "bad" sex defined by the authorities. In China, largely in support of the authoritarian regime's goal of maintaining social stability, this sex hierarchy is built upon a marital relationship and reproduction.<sup>104</sup> This sex hierarchy may also explain the Party's attitudes towards prostitution as discussed above: although it is needed for economic reasons, prostitution and prostitutes are morally condemned as "bad" – at least partly because sex work in itself embeds non-reproductive and non-marital sex and sexual relations. In this sense, the rape law in China also signals the authorities' categories of permissible and impermissible behaviours for women, as set out by Ann D. Jordan:

"All women should be protected from strange rape. Virtuous women should remain untouched by anyone until marriage... by classifying sexual intercourse as rape, non-rape according to the relationship between the defendant and the victim, the law and the legal system ignore the fact that all instances of non-consensual sexual intercourse violate the woman's right to physical integrity. [...] The patriarchal view of male rights and female subordination within the family and personal relations had limited the

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<sup>102</sup> Yongkun Zhou, 'A Jurisprudential Analysis of the Crime of Marital Rape (Hunnei Qiangjian Zui de Falixue Fenxi).' (2001) 10 *Law Science (Faxue)* 12-16.

<sup>103</sup> Anping Zhou, 'Public Power's Control of Sex (Xing De Gongquan Kongzhi).' (2003) 25(5) *CASS Journal of Law (Faxue Yanjiu)* 93-108.

<sup>104</sup> Gayle S. Rubin, 'Thinking Sex: Notes for A Radical Theory of the Politics of Sexuality.' In Richard Parker and Peter Aggleton (eds.) *Culture, Society and Sexuality: A Reader*, (Routledge 2007) 159-161, 150-187.

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definition of ‘women’s rights.’”<sup>105</sup>

Notably, the sample in this research is rather small – yet here the primary reason may not be deficiencies in the CJO database. The SPC’s principles in cases concerning marital rape indicate that rape in a “normal” marriage would be very unlikely to enter the legal system, let alone the database. In fact, according to some lawyers, many Public Security Bureaus and courts would just not accept such cases for consideration; consequently, wives usually do not bring rape charges alone but often include them within charges of domestic violence (Ming 2022). However, their rape allegations – together with their domestic violence claims – may be “erased” by the judges. For instance, in a case as found by Xin He in fieldwork on divorce litigation in China, rape by father-in-law raised by the wife as part of her domestic violence allegation was exploited by the judge as a bargaining chip to facilitate a solution in mediation and close the case as soon as possible.<sup>106</sup> Worse still, China’s Anti-Domestic Violence Law which was finally adopted in 2015 fails to include rape within marriage, since the Marriage Law stipulates sexual intercourse as a mutual obligation in marriage.<sup>107</sup> As argued by some scholars, the state-sanctioned principle of family harmony and state stability has effectively directed the police and judges in China to turn women away from formal legal proceedings (they will be channelled to mediation, for example) in so-called “family disputes,” at the expense of women’s suffering.<sup>108</sup> The analysis of marital rape cases here further reveals how an individual woman suffering sexual violence from a man who has or once had a marital relationship with her is let down or completely erased from the criminal justice system in China.

This downplaying or erasure of women’s rights as victims in the criminal justice system has far-reaching implications for society, since violence in itself “binds different aspects of hierarchy and domination together”.<sup>109</sup> It can also be argued that rape by one’s partner cause much greater harm and trauma to the victim compared to rape by a stranger, while the Chinese authorities have essentially allowed it and made the family a place where this crime can be committed.<sup>110</sup><sup>111</sup> Such attitudes by the authorities, as well as current judicial practices, further

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<sup>105</sup> Ann D. Jordan, ‘Women’s Rights in the People’s Republic of China: Patriarchal Wine Poured from a Socialist Bottle.’ (1994) 8(1) *Journal of Chinese Law* 89-90, 47-104.

<sup>106</sup> Xin He, *Divorce in China: Institutional Constraints and Gendered Outcomes*. (NYU Press 2021) 119.

<sup>107</sup> Tiantian Zheng, *Violent Intimacy: Family Harmony, State Stability, and Intimate Partner Violence in Post-socialist China*. (Bloomsbury Publishing Plc 2022) 87.

<sup>108</sup> *Ibid.*

<sup>109</sup> Lizzie Seal, *Gender, Crime and Justice*. (Palgrave Macmillan 2021) 26.

<sup>110</sup> Note 97.

<sup>111</sup> Rhonda Copelon, ‘Intimate Terror: Understanding Domestic Violence as Torture.’ In Rebecca J. Cook (ed.) *Human Rights of Women: National and International Perspectives*, (University of Pennsylvania Press 1994) 122-126, 116-52.

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contribute to sexual privileges held by men/husbands and exacerbate the widespread problem of sexual violence or abuse between partners. For example, a survey conducted in 2011 involving 1,103 women and 1,017 men in a Chinese county found that nearly one in four male participants reported forcing their female partners to have sex; one in eight male participants reported using violence in raping women; and one in seven male participants held the opinion that the relationship empowered them to demand sex from their partners, even by means of violence.<sup>112</sup> Eight percent of the female participants reported having been raped twice or more by their partners; six percent reported having been raped once.<sup>113</sup> In this sense, the family forms a “parallel state” that goes hand in hand or interacts with the state to impose gendered controls and abuses of women.<sup>114</sup>

### **iii). Adult and Child: Do the Legal Revisions Bring (More) Justice?**

Among controversial cases, it is perhaps those where state officials were punished quite leniently for raping minor girls (under the age of 14) that for many years have triggered the most public discussions. Although the case study examined here suggests a continuance of the problems with the crime of soliciting prostitutes under 14, before this crime was abolished in the 2015 revision of the Criminal Law, a search in the CJO did not produce any like cases. This section instead examines cases of raping minor girls more generally, given the controversies surrounding reportedly lenient punishments for offenders who plead guilty. The database search seems to support this observation and also suggests that judges consider the existence of a (factual, even illegal) marital relationship when sentencing leniently. This also reflects the sex hierarchy and instrumentalism maintained by the authoritarian regime – even when children, as the most vulnerable group, are concerned.

#### **Case study**

In 2019, a case in Qidong County, Hunan Province went viral online. A father posted an open letter on his social media account describing how his 12-year-old daughter had been illegally detained in a karaoke (KTV) club for nine days and raped multiple times by five men including two state officials. However, despite the age clearly indicated on his daughter’s identity card,

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<sup>112</sup> Xiangxian Wang, Fang Gang, and Li Hongtao, ‘A Quantitative Survey on Gender Violence and Masculinity in China (Zhongguo Xingbie Baoli He Nanxing Qizhi Yanjiu Dingliang Diaocha Baogao).’ (2013) *UNFPA China*: 17, 24, 1-95.

<sup>113</sup> *Ibid.*, 17.

<sup>114</sup> Note 111, 132.



the prosecutor refused to arrest the suspects, claiming that his daughter's age was suspicious.<sup>115</sup> Only after the father's letter was widely reported by the media and discussed heatedly on the internet were the suspects arrested by the People's Procuratorate – and even this was under the directives of the county government. Also, following the county government's order to "rectify" (*zhengdun*) all KTV clubs across the county, the KTV involved in this case was closed several days after the suspects were arrested. At the same time, however, online discussions about this case as a listed "hot topic" on the social media platform Sina Weibo also disappeared. Some netizens then checked the shareholders of the KTV and the relationship between the suspects and the KTV, and identified possible connections among the KTV, one suspect in the case, and the local mafia.

This exposure, together with the prosecutor's inaction, continues to fuel criticism over the authorities' protection of the local mafia and their criminal collusion. Although the sentences handed down in this case in 2020 were reported by some media organizations as "heavy," netizens still widely commented on this case and the punishments as unjust and disproportionately lenient: the prime culprit, Wang Wen, a state official, received the heaviest punishment of 15 years' imprisonment, since he was also found guilty of raping other minors and adults; Ding Lei, who also raped other minor girls, was sentenced to ten years' imprisonment; the other state official in this case, Zou Zhong, was sentenced to eight years' imprisonment; Jiang Huabin was sentenced to seven years' imprisonment and Wang Gang to two years' imprisonment for attempted rape. In essence, the public contended that – given the various aggravating factors under Section 3 of Article 236 – the heaviest sentence for the prime culprit was unreasonably light, at only 15 years' imprisonment, while the terms of imprisonment for Zou and Jiang were below the threshold of ten years' imprisonment for gang rape. Some commentators also argued that the public authorities were interfering with the judicial process, leading to the disproportionately lenient punishments.

In fact, there have long been discussions and criticisms of the overly light punishment for state officials convicted of raping minor girls. This is also the leading reason that the crime of soliciting prostitutes under 14 was finally removed from the Criminal Law in 2015 after years of debate, since this crime was found to be more and more frequently abused by offenders, especially officials with the power to "designate" the minors they raped as prostitutes in order to circumvent heavier punishment stipulated in Article 236 for raping minor girls (the maximum

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<sup>115</sup> Nütong Baohu, 'The Crime of raping a Minor Girl: How to Presume 'Knowingly'? (Jianyin Younü Zui: Ruhe Tuiding 'Mingzhi'?),' (2019) <http://www.gongyibaodao.com/shgz/12260.html> (accessed 16 May 2022).

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sentence for the crime of soliciting prostitutes under 14 was imprisonment for 15 years).<sup>116</sup> Has this removal from the criminal code of the separate crime of soliciting prostitutes under 14 brought more justice for the crime of raping minor girls? This case from Qidong seems to suggest otherwise. To explore whether, or to what extent, the status of the defendant as a public official plays a role in sentencing in the crime of raping minor girls, the keywords *younü* (minor girl) and *gongzhi ren yuan* (public official) were used to search for the crime of rape in CJO, yet no cases were found in the database. This category of case is not explicitly listed as “cases not published” according to Article 4 of the 2016 Provisions of the Supreme People’s Court on Publication of Judgment Documents by the People’s Courts on the Internet. Very likely, their absence from the database is the consequence of the courts’ discretionary power – since the 2016 Provisions indeed open a window for the courts’ discretion to withdraw judgments that “the court considers inappropriate to publish on the Internet.” The absence from the database of cases in which public officials raped minor girls may be caused by the courts’ concern over public outrage or *minyì* in such cases, especially given the fact that a number of cases of this category have provoked extensive criticism over the lenient sentencing after they were exposed by the media. Yet such a “standard” or “uniform” withdrawal of judgments from public scrutiny across the country may indicate the rampancy, seriousness, and continuance of the observed problem with obtaining justice in cases of this kind, and, in this sense, the criminal justice system may be considered as playing a role in conspiring with the crime, rather than protecting girls’ rights.

In fact, the issues arising in this Qidong case indeed resemble those in many cases for the former offence of soliciting prostitutes under 14 committed by public officials. For one thing, judgments containing details of the proceedings and justifications are not made public. For another, these cases include features suggesting that it is the media and the public that push for action by the Procuratorate, which implements a campaign-style enforcement of the law under the directives of the government. Campaign-style law enforcement may in itself be a sign of loose or flawed enforcement of the law. Fundamentally, by sacrificing the independence and integrity of the judiciary and legal procedures, such campaigns may facilitate further power abuses and violations of the laws. The case of Qidong and the persistent rampancy of officials “prostituting minors” may be both the consequence and reflection of the problems with campaign-style law enforcement. Yet such campaigns are still ongoing in the country. For instance, most recently in March 2022, the High People’s Court, People’s Procuratorate, Public Security Bureau, and Justice Bureau in Chongqing jointly launched a one-year special action

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<sup>116</sup> Note 68, 1104-06

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campaign proclaiming to severely crack down and punish crimes against minors.<sup>117</sup>

Moreover, concerning abuses of power in cases of where minor girls were raped by public officials, in addition to the problems of intervention during case handling and lenient sentences, there are various reports revealing that officials being sentenced received multiple commutations while in prison, which also embodies an arbitrary wielding of power. One example is the case of Guo Yuchi, an official whose crime of raping a four-year-old girl in 2013 sparked outrage nationwide and was incorporated as a top ten legal news story by the official outlet Procuratorate Daily that year. Although Guo was sentenced to eight years imprisonment in 2013, his sentence was commuted three times in jail as a reward for being “proactively reforming” (*gaizao jiji fenzi*) and he was released in 2018.<sup>118</sup> As pointed out by some lawyers, according to the Criminal Law, such rewards only may be (*keyi*) considered as a condition for commutation while commutation should (*yingdang*) take into account an array of issues such as the nature and specific circumstances of the crime, as well as its harm to society.<sup>119</sup> That is to say, there seems to be an unjust use of discretionary power by the judiciary in commuting Guo’s sentence for such a grave crime. However, due also to the lack of verdicts publicly available, this research is unable to explore a pattern for similar cases involving the rape of minor girls by public officials.

Then, more generally, for cases involving the rape of minor girls, there seems to be a disparity between quantitative findings by researchers and cases reported or commented on online. The quantitative analysis by Zhao Xiangru on 87 cases of raping minor girls sentenced between 2015 and 2020 shows an average of 84 months’ imprisonment for cases where the minors have reached the age of ten but are under twelve years old.<sup>120</sup> Shi Lei notes that the sentencing for raping minors overall follows the SPC’s requirement of punishing the crime severely, with an average term of 63.95 months among 175 samples obtained through searching CJO in 2020.<sup>121</sup> Yet, on the other hand, news reports on offenders receiving rather lenient punishment for raping minor girls keep triggering public outrage and criticism. For example, in two cases in 2020 in Hui’an County, Fujian Province, the defendants, who were

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<sup>117</sup> Chongqing Ribao, ‘Four Departments in Chongqing Jointly Issued Notice Crimes of Sexual Assault Against Minors Must Be Investigated and Punished’ (Chongqing Si Bumen Lianhe Fabu Tonggao Xingqin hai Weichengnianren Fanzui Bi Cha You Zui Bi Cheng). (2022) [http://cq.news.cn/2022-03/07/c\\_1128444789.htm](http://cq.news.cn/2022-03/07/c_1128444789.htm) (accessed 2 June 2022).

<sup>118</sup> Junlin Wu, ‘Official Sentenced to Eight Years for Raping Four-Year-Old Girl Released Early from Prison: Three Commutations in Four Years (Qianjian Sisui Younü Beipan Banian Guanyuan Tiqian Chuyu: Sinian Huo Sanci Jianxing). (2020) [https://www.thepaper.cn/newsDetail\\_forward\\_10404031](https://www.thepaper.cn/newsDetail_forward_10404031) (accessed 12 June 2022).

<sup>119</sup> *Ibid.*

<sup>120</sup> Note 67,67.

<sup>121</sup> Note 88, 131.

convicted of raping a five-year-old girl and a seven-year-old girl respectively, were both sentenced to imprisonment of four and a half years (54 months), which was widely commented on as an unjustly light punishment. These verdicts cannot be found in CJO, but the judges provided a justification to the media:

“The two defendants should be punished heavily according to the law. But given the fact that they voluntarily confessed to the crime and pleaded guilty (*renzui renfa*), they were sentenced leniently.”<sup>122</sup>

These two cases in Hui’an were sentenced in November 2020. Perhaps partly due to the widespread appeals and outrage concerning a general pattern of light punishment in similar cases, on 26 December 2020, the Revision of the Criminal Law (i.e. Amendment XI of the Criminal Law) added a new provision to Section 3 of Article 236, which prescribes a minimum sentence of ten years’ imprisonment for raping minor girls under ten years old or causing harm to minor girls.<sup>123</sup> Yet it remains unclear whether or not, or to what extent, a guilty plea – as the key factor leading to a lenient punishment in the Hui’an cases – still plays a critical role in sentencing and punishment in these cases.

### **Database search**

To check whether this revision to Article 236 has brought changes to judicial practices, the keywords *younü* (minor girl) and guilty plea (*renzui renfa*) in the crime of rape were used for seeking similar cases. This search conducted in May 2022 resulted in 79 verdicts in total. Only three judgments were made after the revision came into force in December 2020. The sentences and justifications are shown in the chart below:

Case	Sentence	Justification
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<sup>122</sup> Pengpai, ‘Two Cases of Raping Underage Girls Sentenced in Fujian Hui’an: Two Defendants Sentenced to Four and A Half Years Respectively (Fujian Hui’an Xuanpan Liangqi Jianyin Younü Anjian: Liang Beigao Fenbie Huoxing Sinianban).’ (2020) [https://www.thepaper.cn/newsDetail\\_forward\\_9997028](https://www.thepaper.cn/newsDetail_forward_9997028) (accessed 12 June 2022).

<sup>123</sup> Lüjie Xiao Xiami, ‘Review of the Case of Wang Zhenhua Molesting 9-Year-Old Girl (Wang Zhenhua Weixie Jiusui Nütong An Huigu).’ (2022) *Zhihu*, <https://zhuanlan.zhihu.com/p/466754754> (accessed 7 June 2022).

Xu X rape crime ([2021] Gan 1024 Xing Chu No. 21)	Imprisonment of five years	Xu X raped a young girl under 14 years old, so should be punished severely according to the law. Xu X confessed the crime truthfully and pleaded guilty ( <i>renzui renfa</i> ) so was given a lighter punishment. Xu committed the crime before the Amendment XI of the Criminal Law took effect, so the sentence follows the legal principle of applying the old law with lighter punishment ( <i>cong jiu jian cong qing</i> ).
Ling Rixiu rape crime ([2021] Gui 0703 Xingchu No. 251)	Imprisonment of ten years and three months	The defendant Ling Rixiu raped a girl under the age of 10, so should be punished severely according to the law. The defendant Ling Rixiu confessed the crime truthfully and pleaded guilty ( <i>renzui renfa</i> ) so was given a lighter punishment.
Yu Chunge rape crime ([2021] Liao 0281 Xing Chu No. 623)	Imprisonment of ten years and two months	The defendant Yu Chunge raped a girl under the age of 10, and his behaviour infringed on the girl's personal rights and physical and mental health and constituted the crime of rape. The defendant Yu Chunge confessed the crime truthfully and pleaded guilty ( <i>renzui renfa</i> ) so was given a lighter punishment.

It can be seen that in all these three cases, the judges, as though following some uniform routine, gave their justification (quite briefly) in line with the judges who had earlier been interviewed by the media. Although the sample is too small to analyse any pattern, it can still be observed from these three cases that, in addition to the great leniency in sentencing in one case (i.e. below the minimum penalty of ten years' imprisonment for raping a girl under 14), the punishment in the two others is close to the minimum required. In these two cases, where the defendant was sentenced to imprisonment of more than ten years, the punishment can still be considered lenient, since, according to Article 236, the minimum sentence for raping a minor girl under ten years old is ten years' imprisonment. In this sense, it seems that this legal revision does not change the "rule" in judicial practice that a guilty plea is a crucial factor in leading judges to sentence leniently – and close to the minimum sentence. As a mechanism formally laid down in the Criminal Procedure Law in 2018 after several years' pilots across

China and a mechanism promoted strongly by the authorities, the potential risk from the abuse of a guilty plea to erode the victim’s rights is worthy of further inquiry.

This database search using the keywords of *younü* (minor girl) and guilty plea (*renzui renfa*) found another concerning issue – as shown in a couple of verdicts, an establishment of a marital relationship seemed to play a substantial role in the judges’ rendering of a lenient punishment, which could even be below the statutory sentencing starting point (i.e., punishing severely in the spectrum of three to ten years’ imprisonment) in the crime of raping minor girls. The details are shown below:

Case	Sentence	Justification
Rao Linyin rape crime ([2020] Qian 0201 Xing Chu No. 419)	Imprisonment of three years and three months	The defendant and his relatives sought a kin relationship ( <i>renqin</i> ) with the victim in accordance with their local custom, and the victim went to live with the defendant’s family thereafter, which led to the occurrence of this case, so the defendant could be punished leniently given these circumstances.  The defendant Rao Linyin confessed his crime truthfully and pleaded guilty.
Cen Guangqiang rape crime ([2021] Gui 0703 Xingchu No. 251)	Imprisonment of two and a half years with a three-year reprieve	The defendant Cen raped the girl in 2008, and after that, the defendant and the victim lived together. In 2009, their son was born.  The defendant Cen voluntarily surrendered himself, confessed his crime truthfully and pleaded guilty; he also obtained the victim’s forgiveness.

**Qualitative analysis of the judgments**

These judgments seem to suggest that a marital relationship can play a role in mitigating the sentence for the crime of rape, even when it concerns minor girls who are protected by law as having no sexual autonomy. This judicial practice seems to further highlight the sex hierarchy supported by the authoritarian regime – the marital/familial relationship and reproduction are more important than protecting the rights of the child – even when this relationship is built upon

raping a minor girl.

Furthermore, the Qidong case (like many other controversial cases involving the rape of minor girls by public officials<sup>124</sup>) implies the Chinese authorities' instrumentalist approach towards the sex industry. In fact, sexualized entertainment, which takes place most often in karaoke clubs, is not only part of the government's income, but also, very importantly, essential to business success in China; it is at such clubs that money, power, and interests are traded, in venues normally full of businessmen, officials, mistresses, and sex workers.<sup>125</sup> The sex industry and popular venues such as karaoke clubs are, by their nature, patriarchal: they are used by men – usually the elite such as government officials and wealthy entrepreneurs – to “massage” their masculine ego with female companions satisfying their various needs and desires.<sup>126</sup> Largely due to the preference of many Chinese men for virgins and the decreasing age of first sexual intercourse following sexual liberation in China, minor girls, some as young as elementary school age, are sent by officials or business partners into these places for “consuming” – “consuming” virgins/schoolgirls can be seen as further proof of masculine success, benefiting from the patriarchal sexual order upheld by the authorities.<sup>127</sup> These girls are called “schoolbag girls” (*shubao mei*) and there is reportedly even an industrial chain in some places in China to seek and send schoolbag girls to government officials and businessmen.<sup>128</sup> The selective crackdown on karaoke clubs and the lenient punishment of the officials involved in the aforementioned rape cases, not to mention the authorities' general inaction in such cases and deliberate withdrawal of such cases from public scrutiny, all point to the authoritarian regime's instrumentalist calculation on this issue, and how underaged girls are marginalized and objectified in such a calculation. Furthermore, the findings in this section indicate that although, as shown in multiple quantitative studies conducted by other scholars, rapes of minor girls are not overall punished leniently, the disproportionately light punishment in the controversial cases examined in this section might be caused by the intersectionality

<sup>124</sup> More controversial cases of this category may be viewed at Yao Peng. 2013. “‘Lightening the Sentence’ in Cases of Officials Raping Minor Girls Deserve In-depth Research (Guanyuan Qianjian Younü An ‘Qingxing Hua’ Panjue Zhide Shenjiu).” *China Women's News*, [https://www.women.org.cn/art/2013/10/17/art\\_9\\_135201.html](https://www.women.org.cn/art/2013/10/17/art_9_135201.html); Wang Xuejin. 2012. “There Should be No Leniency in Punishing Officials Sexually Assaulting Minor Girls (Daji Xingqing Younü De Qinshou Guanyuan Jue Buneng Shouruan).” *China Criminal Justice*, <https://www.criminallaw.com.cn/article/default.asp?id=7261>; and the Dakungpao special issue after the Hainan Wanning case <http://edu.takungpao.com/special/cp1138/>.

<sup>125</sup> Note 6, 502-503.

<sup>126</sup> John Osburg, ‘Pleasure, Patronage, and Responsibility: Sexuality and Status among New Rich Men in Contemporary China.’ In Tiantian Zheng (ed.) *Cultural Politics of Gender and Sexuality in Contemporary Asia* (University of Hawai'i Press 2016) 109, 108-123.

<sup>127</sup> Hongbin Hou, ‘Scums Who Prey on Children Should be Punished by the Laws Dealing with Scums (Dui Youtong Xiashou De Renzha Jiu Yao You Duifu Renzha De Falü Lai Zhi)’ (2019) *Huxiu*, <https://www.huxiu.com/article/307227.html> (accessed 3 November 2023).

<sup>128</sup> *Ibid.*

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involved in these cases, when the offenders are public officials, when there is a marital/familial relationship, or when the offenders have pleaded guilty. Again, this suggests where the girls are placed by the authoritarian regime in the sex hierarchy and the regime's instrumentalist calculation prioritising development and other ends.

#### **iv). Caregiver and Dependent: Is the New Offence a Basis for Better Protection?**

A new offence of rape committed by people with the responsibility of care was added to Article 236 of the Criminal Law in December 2020. The creation of this offence *per se* as well as some cases reported recently by the media suggest progress in protecting girls' rights. Yet the only judgment obtained through searching the CJO for this offence shows an overly lenient punishment, which might have been a factor driving the Supreme People's Court and the Supreme People's Procuratorate to issue the Interpretation on Several Issues Regarding Applying the Law for Handling Cases of Raping or Molesting Minors at the end of May 2023 to specify a range of "heinous circumstances" for severe punishment. Further research is needed into the judicial practice of this newly added offence.

#### **Case study**

This offence of rape by persons with the responsibility of care is in itself an example showing the influence of controversial cases and public opinion in such cases; it has been widely noted that the legislative progress has advanced through a series of cases that provoked much public attention and criticism in recent years.<sup>129</sup> One recent example is the case of Bao Yuming, who was accused online by his adopted daughter Han of raping her multiple times between 2015 and 2019, namely after Han was 14 years old and before she was 18. Bao denied this rape accusation and stated to the media that in their relationship, Han, as a girl seeking the sense of security from her adoptive father, admired him. After an investigation by the Procuratorate and police, Bao was not charged, because for one thing, Han was found to have illegally changed her age on her identity card (when she was adopted by Bao, she was actually 18) – although Bao did not know about this change and had thought that Han was 14 years old when he had sex with her for the first time (and afterwards) – and for another, the existing evidence

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<sup>129</sup> A good example of such discussions about the background, legislation, and application of this newly added section may be seen at Zhou Guangquan, Liu Yanhong, Lao Dongyan, Fu Liqing, Li Lizhong, and Zhang Zixian. 2021. "A Discussion on the Understanding and Application of the Crime of Sexual Assault Committed by People with the Responsibility of Care (Guanyu Fuyou Zhaohu Zhize Renyuan Xingqin Zui Yingdang Ruhe Lijie Yu Shiyong De Taolun)." *The Paper*. [https://m.thepaper.cn/newsDetail\\_forward\\_14202539](https://m.thepaper.cn/newsDetail_forward_14202539).



was allegedly not sufficient to support the rape claim, i.e. against Han's will. Yet such findings of the official investigation did not affect the public discussions focusing on the alleged lack of evidence for this rape accusation. Many netizens pointed out that, regardless of the investigation result, this case highlighted a long-standing loophole in the Criminal Law on sexual violations against minors (having reached the age of 14), especially cases where the offender has some sort of influence or power over the victim due to the unequal positions or special relationship between the two parties, which has been identified by some scholars as a more covert form of rape.<sup>130</sup> As shown in the case of Bao, sexual intercourse in such cases would not be recognised as rape if no evidence of violating the victim's will is found. This, nevertheless, overlooks the special vulnerability of minors in such relationships. In fact, before this legal revision, research found that a special relationship, such as family members or teacher-student, between the offender and the minor victim was mostly not recognised by judges as an aggravating factor in sentencing in sexual offences. For instance, the fieldwork conducted by Chen Xiaobiao and Liu Hua investigating 161 cases involving the offences of raping minors and child molestation prosecuted by nine People's Procuratorates in Chongqing from January 2018 to July 2020 found that among the 18 cases where the offenders and the victims had special relationships of this kind, ten were not sentenced severely.<sup>131</sup>

Before this amendment was adopted, the range of ages for this offence was subject to heated discussion. Finally, an upper threshold of 16 years old was decided on, which seems to balance women's sexual autonomy and the need to regulate these special relationships in which the adult is in an advantageous position in terms of power and influence and a girl is in a much more vulnerable position, normally having to depend on the adult for aspects of her livelihood, knowledge, safety, and psychology.<sup>132</sup><sup>133</sup> The upper threshold of 16 years old for this new offence coincides with the regulation in China's Civil Code on the capacity for civil conduct.<sup>134</sup> According to Article 18 of the Civil Code, a minor over the age of 16 who primarily

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<sup>130</sup> Lizhong Li, 'A Doctrinal Research on The Crime of Sexual Assault by Persons with The Responsibility of Care (Fuyou Zhaohu Zhize Renyuan Xingqin Zui De Jiaoyixue Yanjiu)' (2021) *China Criminal Justice*, <http://www.criminallaw.com.cn/article/?id=18608> (accessed 22 May 2022).

<sup>131</sup> Xiaobiao Chen and Liu Ye, 'Judicial Problems and Countermeasures in Cases of Sexual Assault of Minors (Xingqin Weichengnianren Anjian De Sifa Yinan Yu Yingdui).' (2022) 41(1) *Journal of Chinese Youth Social Science (Zhongguo Qingnian Shehui Kexue)* 133, 130-40.

<sup>132</sup> Jialin Chen and Lü Jing, 'The Interpretation Perspective and Regulatory Boundary of the Sexual Assault Committed by People with the Responsibility of Care (Fuyou Zhaohu Zhize Renyuan Xingqin Zui De Jieshi Shijiao Yu Guizhi Bianjie).' (2021) 27(5) *Zhongnan Daxue Xuebao (Journal of Central South University)* 58, 53-64.

<sup>133</sup> Chengbin He and Gong Tingting, 'Reflections and Proposals for the Legislation of Rape Crime (Qianjian Zui De Fansi Yu Chonggou).' (2003) 25(5) *Modern Law Science (Xiandai Faxue)* 67, 64-68.

<sup>134</sup> Xinrui Zhang and Chen Hongbin, 'Legislative Analysis and Judicial Application of the Crime of Sexual Assault Committed by People with the Responsibility of Care (Fuyou Zhaohu Zhize Renyuan Xingqing Zui

relies on his or her own labour income in living is deemed a person with full capacity for civil conduct (*wanquan minshi xingwei nengli ren*).

In summary, this new offence *per se* represents progress in protecting the rights of the child in terms of recognizing and regulating power imbalances that could facilitate sexual exploitation. The new offence also seems to have resulted in some improvements in judicial practice. For instance, the media has started to report the “first ever” cases sentenced under this law in various places in China. The law also reportedly encourages alleged victims to appeal in cases where the Prosecutor had decided before this new law came into effect not to prosecute, based on insufficient evidence of “against the woman’s will.” It may also help address the societal issues caused by the previous loophole in the Criminal Law; for example, a middle school teacher who was found boasting of his sexual relationships with four students in April 2022 was reported and criminally detained.<sup>135</sup>

### **Database search**

This research also searched CJO with the keywords “*yiman 14 buman 16*” (having reached 14 but under 16), “*fasheng xingguanxi*” (having sex) and “*teshu zhize*” (special responsibility) in mid-May 2022 for judgments under this newly added crime, but found one verdict only. In this case, Shangguan Caifu, an after-school tutor, was convicted of raping his 15-year-old student multiple times, sentenced to imprisonment of four years and ten months and banned from engaging in work related to the education of minors for five years. This judgment is detailed in the chart below:

Case	Sentence	Justification
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De Lifa Pingxi Yu Sifa Shiyong.’ (2021) 4 *Issues on Juvenile Crimes and Delinquency (Qingshaonian Fanzui Wenti)* 19, 16-27.

<sup>135</sup> Pink Club, ‘Middle School Teacher Criminally Detained after Self-revealing Sexually Assaulting Several Students (Zhongxue Laoshi Zibao Xingqin Duoming Xuesheng Bei Xingju).’ (2022) *Sohu.com* [https://www.sohu.com/a/534811282\\_99994258](https://www.sohu.com/a/534811282_99994258) (accessed 3 November 2023).

Shangguan Caifu rape crime ([2021] Min 06 Xing Zhong No. 72)	Imprisonment of four years and ten months  (also ban from engaging in work related to the education of minors for five years)	The defendant Shangguan Caifu should have known honour and shame ( <i>zhi rong ming chi</i> ), disciplined himself, taught and educated others, but in the process of teaching, he exploited the convenience of his position to seriously violate the professional ethics of teachers and repeatedly raped an underage female student.  Shangguan Caifu is a person who had special responsibilities for minors, so should be punished severely and heavily ( <i>cong zhong chufa, cong yan chufa</i> ).
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### **Qualitative analysis of the judgment**

According to this newly added section, where rape is found to have occurred (i.e. sexual activity against the will of a woman or girl, rather than statutory rape only), as in the case of Shangguan Caifu, a heavier sentence of between three and ten years should apply. While Section 3 of Article 236 stipulates a minimum sentence of ten years' imprisonment for "raping women or minor girls under heinous circumstances (*qingjie elie*)," the sentence in this case of Shangguan Caifu seems to indicate that raping a girl towards whom the offender has a responsibility of care is not recognised by the court as an attribute constituting "heinous circumstances" – the judgment for this case also does not say so (though the 58 month sentence was described by the judges as "punishing severely and heavily"). This problem may also have the attention of the authorities: in May 2023, the Supreme People's Court and the Supreme People's Procuratorate jointly issued an Interpretation on Several Issues Regarding Applying the Law for Handling Cases of Raping or Molesting Minors. This most recent Interpretation specifies and details the somewhat vague provision of "heinous circumstances." Further studies are needed to investigate judicial practice with regard to this Interpretation.

### **CONCLUSION: A CRIMINAL JUSTICE SYSTEM INSTRUMENTALISED BY THE AUTHORITARIAN REGIME TO SHAPE AND MAINTAIN A GENDERED ORDER AND SEX HIERARCHY**

Rape committed by men against women/girls (given the existing legal definition in China's Criminal Law) is, by nature, deeply patriarchal. Much research on criminal psychology

suggests that in most rape cases, men rape women not primarily out of sexual desire, but to express their authority, dominance and control over women.<sup>136</sup> In this sense, rape can be viewed as a “powerful force that conduces to the thing-like treatment of persons.”<sup>137</sup> This instrumentalizing of women/girls denies their autonomy and subjectivity, while treating them as objects for male satisfaction, treating sex and sexuality as activities of power and control.<sup>138</sup><sup>139</sup> Punishing the crime of rape can be viewed as an intervention by the state to regulate and rectify such patriarchal power relationships in the realm of gender, sex, and sexuality – as the Chinese authorities describe the crime of rape in the Chapter “Crimes of Infringing upon Citizens’ Rights of the Person and Democratic Rights” in the Criminal Law.

Nevertheless, as explored in this paper, both the legal framework on the crime of rape and its judicial practice embody a somewhat “mixed” understanding of rape promoted by the Chinese authorities. On the one hand, the law is promoted as protecting women’s/girls’ rights and autonomy; yet on the other hand, it reveals a link between sex, sexuality and the state-sanctioned relationship (i.e. the family) and reproduction, which is essentially based on an instrumental conception of sex and sexuality in service of the authorities’ aim of maintaining control over society by establishing a sex hierarchy. At the same time, various controversial cases, reported in the media and discussed on social media, suggest an injustice in sentencing and punishment in rape cases, impairing the rights of women and girls. China’s re-emphasis on and reinforcement of authoritarian legalism through judicial transparency and reasoning in judgments in recent years provides a valuable, albeit deficient, opportunity to investigate the judicial practice in rape cases.

All four categories of rape cases selected for this investigation highlight particular sexual relationships as the foundation for maintaining the sex hierarchy. The findings in the case studies of controversial cases and qualitative analysis of the judgments indicate a criminal justice system embedding the characteristics of authoritarian legality, employing laws and the judiciary as instruments to exert, perpetuate, and reinforce patriarchal control over women/girls, while sacrificing women’s/girls’ rights and interests for “larger goals” such as economic development and political stability. Sex workers are morally condemned by judges, while the sex industry is clamped down on selectively by the government; a “normal” marital relationship is identified by the judiciary as *de facto* grounds for the exclusion of rape as a crime, while an

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<sup>136</sup> Yue Li, ‘Sexual Offences from the Perspective of a Feminist Perspective: Taking Rape as an Example (Nüxing Shijiao Xia De Xing Fanzui: Yi Qiangjian Xianxiang Wei Li).’ (2013) 30(2) *Panzhuhua College Journal (Panzhuhua Xueyuan Xuebao)* 35, 32-35.

<sup>137</sup> Martha C. Nussbaum, *Sex & Social Justice*. (Oxford University Press 1999) 244.

<sup>138</sup> *Ibid.*

<sup>139</sup> Note 136, 35.

“abnormal” marriage is grounds for sentencing leniently; public officials are sentenced overly leniently, in multiple controversial cases receiving less than the minimum penalty stipulated in the Criminal Law; there is a general pattern of sentencing tending towards the minimum punishment as revealed in the database search for the cases involving sex workers and the quantitative studies undertaken by other scholars, while the intersectionality of (more) vulnerable minor girls and other factors, including the offenders’ powerful position/status, a factual marital relationship, and a guilty plea, lead to even lighter punishment; the responsibility of care was not considered an aggravating circumstance by the judge in sentencing. Although some judges, in their judicial reasoning in the judgments, expressed a different, rights-based, and more liberal mindset, their judicial decisions do not show substantial differences with the authorities’ basic position. This phenomenon further highlights that in an authoritarian regime where the judiciary is highly centralized, state power can intervene effectively in the judiciary to advance or uphold gendered norms on sex and sexuality.

In their analysis of the politicisation of the legal process in dealing with political crimes in China, Hualing Fu and Michael Dowdle<sup>140</sup> point to the characteristic of authoritarian legality as “about dominance and submission.” Based on the anatomy of sentencing and punishment in rape cases, the gender perspective is the “missing piece of the jigsaw” for understanding authoritarian legality in China, indicating that more generally (i.e. not only for political crimes), the criminal justice system is instrumentalised to model and uphold the power relationship of dominance and submission in sex, sexuality, and gender. This entails not only the dominance of men and the submission of women/girls, but also, and more significantly, the dominance and control of women/girls by authoritarian power – and, more essentially and profoundly, the authoritarian state’s dominance and control of the discourse on sex, sexuality, and gender. As revealed in the research findings, when there are various issues on the table such as the economy, political stability, legitimacy, women’s/girls’ rights, and sexual autonomy, rights and autonomy are routinely ranked the lowest or sacrificed for other ends by the authoritarian regime. This dynamic may be summed up as the sexualization of dominance and submission in service of overall control and rule by the authoritarian regime.

This research also sheds light on the complexity of the landscape of gender, sex, and sexuality in China today, resulting from the authoritarian power’s efforts to uphold the gendered order and sex hierarchy on the one hand, and the more liberal and rights-based ideas on sex and sexuality emerging in Chinese society on the other, as shown in the wide range of controversial cases and some judicial reasoning in these rape cases. In some areas, this

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<sup>140</sup> Note 25, 74.

conflict may have brought about improvements in the judicial system, such as (potential) changes to the newly-added crimes of rape and sexual assault committed by people with a responsibility of care; in many other areas, however, in particular those concerning the state-sanctioned sexual relationship and sex hierarchy, such as the authorities' attitudes towards sex workers, marital rape, or rape by public officials, there seems to be little change in the authorities' position. This *status quo* suggests that, notwithstanding challenges from society and citizens, the authoritarian power continues to reinforce the gendered order and sex hierarchy by means of authoritarian legality to the benefit of their authoritarian rule.

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