

## **The Crime of Engaging in Prostitution with an Underage Girl in Chinese Criminal Law**

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## INTRODUCTION

Sexual exploitation of children is a serious crime and will not be tolerated.<sup>1</sup> The public awareness on prosecuting sex crimes against children has risen. Since a state has a compelling interest in safeguarding children, the crime, especially the prostitution of underage girls throughout the world, must be universally condemned by the international community.<sup>2</sup> Many states have explicitly criminalized a variety of sexual offenses against underage girls, and China is no exception. China has enacted laws specifically addressing the need for attempts to prevent and punish child sexual abuse.<sup>3</sup> One of the most controversial offences in Chinese criminal law, the offence of Engaging in Prostitution with an Underage Girl (EPUG)<sup>4</sup>, was intended to fight the prostitution of

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<sup>1</sup> Wang Huasheng (王华胜), *Cong Bijiaofa Shijiao Zailun Piaosuyounvzui (从比较法视角再论嫖宿幼女罪) [Re-discussing the Crime of Engaging in Prostitution with Young Girls from a Comparative Law Perspective]*, 6 SICHUAN JINGCHA XUEYUAN XUEBAO (四川警察学院学报) [JOURNAL OF SICHUAN POLICE COLLEGE] 52, 56 (2009) (China)

<sup>2</sup> Peng Wenhua (彭文华), *Piaosuyounvzui zhi Zuixing Bianxi (嫖宿幼女罪之罪刑辨析) [A Study on the Nature and Penalty of the Crime of Engaging in Prostitution with a Girl under the Age of Fourteen]*, 6 HENAN SHIFAN DAXUE XUEBAO (河南师范大学学报) [JOURNAL OF HENAN NORMAL UNIVERSITY] 152, 152 (2006) (China)

<sup>3</sup> See Liu Yan (刘焱), *Piaosuyounvzui Fenjie Guiru Qiangjianzui yu Weixieertongzui ji Lifa Xiuding Yanjiu (嫖宿幼女罪分解归入强奸罪与猥亵儿童罪及立法修订研究) [Desegregating the Crime of Engaging in Prostitution with a Girl under the Age of Fourteen to Rape and Child Molestation and Amending the Relative Criminal Legislation]*, 5 FUNÜYANJIULUNCONG (妇女研究论丛) [COLLECTION OF WOMEN'S STUDIES] 43, 43-45 (2012) (China)

<sup>4</sup> *Zhonghua Renmin Gongheguo XingFa (中华人民共和国刑法) [Criminal Law of the People's Republic of China]* (promulgated by Order No. 83 of the President of the Peoples Republic of China, March 14, 1997, effective October 1, 1997; revised for the eighth time on Feb 25, 2011), art. 360. [hereinafter *Criminal Law*]. Article 360 of the *Criminal Law* provides:

Those engaging in prostitution or visiting a whorehouse knowing that they are suffering from syphilis, clap, or other serious venereal diseases are to be sentenced to five years or fewer in prison or put under criminal detention or surveillance, in addition to having to pay a fine.

Those who visit young girl prostitutes under 14 years of age are to be sentenced to five years or more in prison an addition to paying a fine.

young girls. The criminal provisions pertaining to intercourse [with/by] underage girls are of particular concern.

A series of notorious cases has drawn public attention to the problem of underage girl prostitution.<sup>5</sup> Although the provisions of EPUG have received a wide range of academic attention from their date of their enactment, it has been those notorious cases that have captured the public's imagination and become the central concern of public outrage and policy reform.<sup>6</sup> By far the most sensational case took place in Xishui county, southwest China's Guizhou Province. Eleven schoolgirls were reportedly forced into the sex trade and raped for months. Six men, including four government officials, a teacher, and a taxi driver, were prosecuted and found guilty under EPUG, instead of statutory rape.<sup>7</sup> According to Chinese criminal law, rapists can be jailed from 3 to 10 years, while a death sentence can be handed out to those convicted of raping a girl under 14 years old. In contrast, the punishment for EPUG is only 5 to 15 years in prison. As Wen Jie, vice-president of Guizhou Provincial Higher People's Court, viewed the issue, the prosecutors should identify the boundary between having sex with underage prostitutes and child rape very carefully.<sup>8</sup>

[T]he general public is watching closely whether the punishment meted out to these offenders are exemplary and in order to deter others from laying their hands on underage girls . . . [and] [a]ny leniency in dealing with such criminals will be seen as being unreasonable circumvention of the law, if not de facto connivance.<sup>9</sup>

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<sup>5</sup> Mei Jin (梅锦), *Cong Xishui Xingqin Hai Younv an Tan Piaosuyounvzui de Shiyong* (从刁水性侵害幼女案谈嫖宿幼女罪的适用) [On Applying the Crime of *Engaging in Prostitution* with a Girl Under the Age of 14 from the Case of Infrafracting the Sex of a Girl under the Age of 14 in Xishui County], 1 GUANGXI ZHENGFA GUANLI GANBU XUEYUAN XUEBAO (广西政法管理干部学院学报) [JOURNAL OF GUANGXI ADMINISTRATIVE CADRE INSTITUTE OF POLITICS AND LAW] 54, 54-55 (2010)

<sup>6</sup> See Pan Xincheng (潘星丞) & Chen Qin (陈芹), "*Zuixing*" *Guanxi zhi Fenxi Fanshi: Fanzui Pingjia Jiagou* ("罪-刑"关系之分析范式: 犯罪评价架构)[The Analytic Paradigm on "Crime-Punishment" Relation: A Crime Evaluation Framework], 1 HUANAN SHIFAN DAXUE XUEBAO (华南师范大学学报(社会科学版)) [JOURNAL OF SOUTH CHINA NORMAL UNIVERSITY(SOCIAL SCIENCE EDITION)] 87, 87(2013)

<sup>7</sup> Cui Jia, *Wrangle over the Right Charge for Suspects*, CHINA DAILY, May 19, 2009, at 8.

<sup>8</sup> *Id.*

<sup>9</sup> Comment, *Abuse, Most Foul*, CHINA DAILY, May 20, 2009, at 8.

The Xishui case illustrates the struggle between criminal justice and children's rights. The objective of this article is to assess whether EPUG is the best way to protect these sexually abused girls, particularly from suffering any mental harm in criminal proceedings. As argued below, such an assessment requires reviews of both China's domestic and international legal environments. Part II begins by reviewing the current sex crimes against children in Chinese criminal law. It also examines the attitude of the Chinese legislature towards prostitution, realizing that prostitution is only an administrative offense rather than a crime in China. Part III will provide an analysis of how historical, cultural and social attitudes influence the manner. Next, Part IV turns to the U.N. Convention on the Rights of the Child, focusing on the principle of the best interests of children. Part V explores the debate over EPUG in some detail, outlining the major arguments. Part VI reaffirms the necessity of rethinking EPUG, asking to what extent the current Chinese law is effective in preventing sexual abuse of children. Additionally, it advances a reform proposal, with a recommendation for abolishing EPUG. Finally, Part VII concludes by discussing the difficulty of China's cultural attitudes toward considering a child-centered approach.

## UNDERSTANDING SEX CRIMES AGAINST CHILDREN IN CHINESE LEGAL SYSTEM

### *Overview*

In order to explore sex crimes, it is first necessary to obtain some perspective on the Chinese criminal law as a whole. Historically, the PRC has been slow to implement criminal laws – Ian Dobinson noted, “[I]t took thirty years for the [People's Republic of China] to promulgate its first criminal code and then another seventeen years to revise it . . . .”<sup>10</sup> Indeed, the PRC enacted its Criminal Law in 1979, which has since been replaced by the more recent Criminal Law (1997). The latter version added 250 new criminal offenses which were not included in the 1979 version.<sup>11</sup> Since 1997, the process of revision has continued as the Standing Committee of the People's National Congress has passed

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<sup>10</sup> Ian Dobinson, *The Criminal Law of the People's Republic of China (1997): Real Change or Rhetoric?*, 11 PAC. RIM L. & POL'Y J. 1, 3 (2002).

<sup>11</sup> *See Id.*

new laws and the Criminal Law has been amended.<sup>12</sup> Since these laws have been written at a relatively high degree of abstraction, they are supplemented by an array of regulations, rules, interpretations, and other forms of legislative and administrative guidance.<sup>13</sup>

### *Sex Crimes in the Chinese Legal System*

The laws regarding criminal sexual activity and the criminality of sex with minors have been enacted by mainly prohibiting a male from having sexual intercourse with a minor female.<sup>14</sup> The Criminal Law, which was intended as the foundation for Chinese criminal law legislation, contains several provisions relating to sex crimes against children. But the Criminal Law (1979) mainly penalized rape, which stated, “Whoever has sexual relations with a girl under the age of 14 shall be deemed to have committed rape and shall be given a heavier punishment.”<sup>15</sup> Sexually exploiting young girls by seducing, coercing, deceiving or other ways would be punished according to clauses concerning the rape of underage girls. Consequentially, the conduct of visiting underage girl prostitutes was also treated as rape. In addition, Regulations of the People’s Republic of China on Administrative Penalties for Public Security (1986) (hereinafter Public Security Regulations),<sup>16</sup> provided, “Whoring with a girl under the age of fourteen shall be dealt with as rape according to the provisions of Article 139 of the Criminal Law.”<sup>17</sup>

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<sup>12</sup> For example, 1997 Criminal Law was revised for the eighth time by the Amendment VIII to the Criminal Law of the People’s Republic of China promulgated by the Standing Committee of the National People’s Congress on Feb. 25, 2011.

<sup>13</sup> See generally Zhonghua Renmin Gongheguo Lifafa (中华人民共和国立法法) [The Legislation Law of the People’s Republic of China] (promulgated by the Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000), 2000 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. (China).

<sup>14</sup> For instance, in accordance with the definition of Article 236 of the Criminal Law (1997), only females could be raped. See Art. 236 of the Criminal Law (1997), *infra* n.33; see also Ye Liangfang (叶良芳), *Cun Yu Fei: Piaosuyounvzui Zuiming Sheli Zhi Shenshi* (存与废：嫖宿幼女罪罪名设立之审视) [*Reserve or Repeal: A Critical Analysis of the Crime of Sleeping with Teenage Prostitutes*], 6 FAXUE (法学) [LEGAL SCIENCE] 118, 122 (2009)

<sup>15</sup> See Art. 139. Criminal Law (1979).

<sup>16</sup> It had been replaced by the latest version – Law of the People’s Republic of China on Penalties for Administration of Public Security (2005) (hereinafter “Public Security Law”).

<sup>17</sup> See Art. 30 of Public Security Regulations.

Similar provisions can also be found in Decision of the Standing Committee of the National People's Congress on the Strict Prohibition Against Prostitution and Whoring (1991) (hereinafter "Congress Decision"), which served as an Amendment to Criminal Law (1979): "Whoever whores with a girl under the age of fourteen shall be punished in accordance with the provisions on the crime of rape as prescribed in the Criminal Law."<sup>18</sup>

In the PRC, rape is defined as penile penetration of a vagina, which is sufficient to constitute sexual intercourse.<sup>19</sup> Generally, a man is said to commit "rape" if he has sexual intercourse with a woman under circumstances against her will or without her consent.<sup>20</sup> A young girl under fourteen cannot consent to sexual conduct because of the developmental nature of adolescence. That is to say, she is unable to understand the nature and consequences of the act when she gives consent.<sup>21</sup> Thus, if a man engages in sexual intercourse with an underage girl, it constitutes rape with or without her consent. Moreover, the criterion of sexual intercourse for raping underage girls involves only the touching of sex organs.<sup>22</sup> Under current Chinese law, only females can be the victims of the crime of rape and no provisions exist which would serve to protect male children from being raped.<sup>23</sup>

Not surprisingly, the 1997 Criminal Law is believed to be one of the efforts to build a more mature legal system and develop towards a rule of law in China.<sup>24</sup> The 1997 Criminal Law drastically amended the 1979 Criminal Law and introduced a number of provisions through the adaptation of principles such as equality before the law, 'no crime, without law' and 'no punishment

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<sup>18</sup> Decision of the Standing Committee of the National People's Congress on the Strict Prohibition Against Prostitution and *Engaging in Prostitution* §2(1) (promulgated by Standing Comm. Nat'l. People's Cong., September 4, 1991, effective September 4, 1991)

<sup>19</sup> Ma Kechang, XINGFAXUE (刑法学)[CRIMINAL LAW] 487 (Higher Education Press 2003).

<sup>20</sup> Zhou Daoluan & Zhang Jun, XINGFAZUIMINGJINGSHI (刑法罪名精释)[EXACT EXPLANATION FOR ACCUSATIONS OF CRIMINAL LAW] 364 (Court Press 2003).

<sup>21</sup> *Id.* at 364-365.

<sup>22</sup> *Id.* at 365.

<sup>23</sup> Wei Dong & Jiang Chunlin, Lun Jianyinyounv Fanzui Jisui de Rending Biaozhun (论奸淫幼女犯罪既遂的认定标准) [*On the Standard of Holding on the Accomplished Raping Immature Girls*], 4 ZHENGFA LUNCONG (政法论丛) [Journal of Political Science and Law] 48, 48 (2007)

<sup>24</sup> Luo Wei, THE 1997 CRIMINAL CODE OF THE PEOPLE'S REPUBLIC OF CHINA 21 (1998).

without crime.”<sup>25</sup> It is relatively complete, uniform and reasonable. In contrast, the 1979 Criminal Law contained analogy provisions which were designated to have a kind of flexibility.<sup>26</sup> Apart from this principle, many provisions that related to specific offenses were very general and ambiguous in the old criminal code.<sup>27</sup> The use of analogy in Article 79 of the 1979 Criminal Law was criticized as undermining the basic spirit of the rule of law and subsequently conflicted with the 1982 state constitution’s commitment to the rule of law.<sup>28</sup> Therefore, a predominant change in the 1997 Criminal Law was the rejection of analogy through the dropping of Article 79 and the inclusion of the principle of *nullem crimen sine lege* (“no crime without law”).<sup>29</sup> Additionally, the Criminal Law (1997) distinguishes different culpable mental states and their relation to degrees of punishment.<sup>30</sup> Crimes committed with a purposeful or knowing state of mind are usually treated more severely than crimes of neglect or misunderstanding.<sup>31</sup> Clarity was a rather significant concern.

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<sup>25</sup> Lin Zhiqui & Ronald Keith, *The Changing Substantive Principles of Chinese Criminal Law*, 13 CHINA INFO 76, 78-79 (1998).

<sup>26</sup> Xingfa Fa (中华人民共和国刑法法) [Criminal Law of the People’s Republic of China] (promulgated the Order No. 5 of the Chairman of the Standing Committee of the National Peoples’ Congress, Jul. 6, 1979, effective Jan. 1, 1980).

<sup>27</sup> Luo, *supra* note 24, at 11.

<sup>28</sup> Lin & Keith, *supra* note 25, at 13.

<sup>29</sup> Article 3 may be one of the most significant articles of the 1997 Criminal Law, which provides,

For acts that are explicitly defined as criminal acts in law, the offenders shall be convicted and punished in accordance with law; otherwise, they shall not be convicted or punished.

Criminal Law, Art. 3 (1997).

<sup>30</sup> Article 15 of the Criminal Law (1997) provides:

A negligent crime refers to an act committed by a person who should have foreseen that his act would possibly entail harmful consequences to society but who fails to do so through his negligence or, having foreseen the consequences, readily believes that they can be avoided, so that the consequences do occur.

Criminal responsibility shall be borne for negligent crimes only when the law so provides.

Criminal Law, Art. 15 (1997).

<sup>31</sup> Article 14 of the Criminal Law (1997) provides:

An intentional crime refers to an act committed by a person who clearly knows that his act will entail harmful consequences to society but who

China has undergone a significant transformation of its sex crimes. Nonetheless, rape is still of major concern in the 1997 Criminal Law and the most stringent sexual offense penalties are reserved for the crime. It is one of the crimes carrying a possible sentence of life imprisonment or the death penalty. Article 236 of the Criminal Law (1997) provides:

Whoever rapes a woman by violence, coercion or any other means shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years.

Whoever has sexual intercourse with a girl under the age of 14 shall be deemed to have committed rape and shall be given a heavier punishment.

Whoever rapes a woman or has sexual intercourse with a girl under the age of 14 shall, in any of the following circumstances, be sentenced to fixed-term imprisonment of not less than 10 years, life imprisonment or death:

- (1) the circumstances being flagrant;
  - (2) raping a number of women or girls under the age of 14;
  - (3) raping a woman before the public in a public place;
  - (4) raping a woman with one or more persons in succession;
- or
- (5) causing serious injury or death to the victim or any other serious consequences.<sup>32</sup>

Compared to its 1979 predecessor, the Criminal Law (1997) has provided for the criminalization of some new offences. For

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wishes or allows such consequences to occur,  
thus constituting a crime.

Criminal responsibility shall be borne for intentional crimes.

Criminal Law, Art. 14 (1997).

<sup>32</sup> See Xingfa Fa (中华人民共和国刑法) [Criminal Law of the People's Republic of China] (promulgated by the National People's Congress, effective 1997) Art. 236.

instance, one of the significant changes in sex crimes against children is the creation of the EPUG, which was separated from Rape as an independent new offence:

Whoever whores with a girl under the age of 14 shall be sentenced to fixed-term imprisonment of not less than five years and shall also be fined.<sup>33</sup>

This provision indicates that the law-makers have suggested that the harm of sex crime against underage girls should adapt with the changes that contemporary society may undergo in relation to the prostitution of young girls.<sup>34</sup> Such legislation was prompted so as to plug the “loophole”.<sup>35</sup> If it does not make such an act a crime, punishment can no longer be meted out for conduct not specifically designated as a crime.<sup>36</sup> Article 3 of the Criminal Law (1997) states that only acts which are clearly defined as crimes by the law shall carry criminal liability.<sup>37</sup> In reality, however, there is a possible overlap between Article 236 Rape and Article 360 EPUG.<sup>38</sup> Besides, for sexual assault against underage girls which cannot be prosecuted under Rape and EPUG, for example, sexual touching with the use of any body part except sex organs or object, voyeurism, the punishment can be a maximum of five years imprisonment and criminal detention in accordance with Article 237.<sup>39</sup>

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<sup>33</sup> Criminal Law, *supra* note 4.

<sup>34</sup> Mei, *supra* note 5, at 55.

<sup>35</sup> *See Id.*

<sup>36</sup> See Niu Yan & Wei Dong, Bo Piaosuyounvzui Quxiaolun (驳嫖宿幼女罪取消论) [*A Refutation against the Abolishment Argumentation concerning the Crime of Engaging in Prostitution with a Girl under the Age of Fourteen*], 4 GUOJIAJIANCHAGUANXUEYUANXUEBAO (国家检察官学院学报) [JOURNAL OF NATIONAL PROSECUTORS COLLEGE] 51, 54-56 (2009)

<sup>37</sup> Criminal Law, *supra* note 30.

<sup>38</sup> See Zhang Mingkai, Piaosuyounvzui yu Jianyinyounvxing Qiangjianzui de Guanxi (嫖宿幼女罪与的奸淫幼女型强奸罪的关系) [*The Relationship between Engaging in Prostitution with Girls under 14 and Rape of Underage Girls*], 17 RENMINJIANCHA (人民检察) [PEOPLE'S PROCURATORIAL SEMIMONTHLY] 8, 11(2009)

<sup>39</sup> Article 237 of the Criminal Law(1997) provides:

A person who acts indecently towards or insults a woman by force, threat or any other means shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention.

A person who, by means of gathering a crowd or in the public place and in public, commits a crime under the preceding paragraph, shall be sentenced to

Nevertheless, advocates for the principle of *nullem crimen sine lege* seem to have taken their goal to an absurd extreme. A controversial example is a judicial interpretation released in 2003 which stipulated that having sex with a young girl without knowing that she is underage does not constitute the crime of Rape.<sup>40</sup> It has caused much confusion in practice. The scope for discretion is considerable and the protection of children from sexual abuse has been weakened in light of the judicial interpretation.<sup>41</sup> Finally, it was abolished in 2013, because it contradicted the provisions of Rape and EPUG in the Criminal Law (1997).<sup>42</sup>

Rape and EPUG are similar sex crimes but are provided in different chapters in the criminal law. The reason is that they reflect different attitudes of law makers and values in Chinese society. In 1997 Criminal Law, Rape is Article 236, which is stipulated in Chapter IV: Crimes of infringing upon the rights of the

fixed-term imprisonment of not less than five years.

A person who acts indecently towards a child shall be sentenced heavily in accordance with the provisions of the preceding two paragraphs.

Criminal Law, Art. 237 (1997).

<sup>40</sup> The full name of the judicial interpretation is

ZUIGAO RENMINFAYUANGUANYU XINGWEIREN BUMINGZHISHI BUMANSHISIZHOUSUIDEYOUNVSHUANGFANGZIYUANFASHENGXINGGUANXISHIFOU GOUCHENGQIANGJIANZUIWENTI DEPIFU (最高人民法院关于行为人不明知是不满十四周岁的幼女双方自愿发生性关系是否构成强奸罪问题的批复)[Written Reply of the Supreme Court to Liaoning High Court concerning Whether a Man Who Has Sexual Relations with a Young Girl Upon Her Consent But not Knowing She is Underage Shall be Convicted of Rape]. It is a Supreme Court Interpretation, issued on Jan. 17, 2003. The judicial interpretation in China includes the Supreme Court Interpretation and the Supreme Procuratorate Interpretation. The former made by the Supreme Court is to deal with the issues in court trials and the latter made by the Supreme Procuratorate, the state prosecutor, is responsible for the issues in the procuratorial work.

<sup>41</sup> See Chen Qihua, Piao suyounvan zhong Weichengnian Shouhairen Hefaquanyi Baohu Yanjiu (嫖宿幼女案中未成年受害人合法权益保护研究) [*Study of the Protection of Minor Victims' Rights and Interests in the Case of Engaging in Prostitution with Underage Girls*], 5 QINGSHAONIANFANZUIWENTI (青少年犯罪问题) [ISSUES ON JUVENILE CRIMES AND DELINQUENCY] 64, 66(2012)

<sup>42</sup> The 2003 judicial interpretation has been abolished by another Supreme Court Interpretation, issued on Feb 26, 2013. The 2013 judicial interpretation is named Zuigao Renminfayuan Guanyu Feizhi 1997 nian 7 yue 1 ri zhi 2011 nian 12 yue 31 ri Fabu de Bufen Sifajieshi he Sifajieshi Xingzhi Wenjian (Dishipi) de Jueding (最高人民法院关于废止 1997 年 7 月 1 日至 2011 年 12 月 31 日期间发布的部分司法解释和司法解释性质文件 (第十批) 的决定) [Decision of the Supreme Court on Abolishment (the Tenth) of Some Judicial Interpretations and Documents Equivalent to Judicial Interpretations Promulgated During the Period from Jul. 1, 1997 to Dec. 31, 2011].

person and the democratic rights of citizens, while EPUG is Article 360, which is provided in Chapter VI: Crimes of disrupting the order of social administration. Chapter IV mainly sets out the law relevant to serious crimes against the person, such as homicide, assault, rape, sexual molestation, kidnapping, and abduction. Among them, Rape is classified as a grave sexual assault, which is clearly reflected by the use of severe punishment, including the death penalty. Chapter VI covers crimes relating to public order with which the government has been concerned, in particular crimes with respect to drug trafficking and prostitution.

### *Chinese Legal Treatment of Prostitution*

In order to understand the new crime of EPUG, it is necessary to explore prostitution within the context of China's legal system. Interestingly, while prostitution is not lawful in China, no law stipulates that it is a crime.<sup>43</sup> Crimes are enumerated in the specific provisions of the criminal law, while non-crime minor "offenses" are included under the administrative penalty laws. An act will not be considered a crime "if the circumstances are obviously minor and the harm done is not serious."<sup>44</sup> China has enacted numerous administratively applied rules and regulations. The 2005 Law of the People's Republic of China on Penalties for Administration of Public Security (hereinafter Public Security Law) is the most prominent of the administrative laws.<sup>45</sup> According to this law, both prostituting and visiting prostitutes are merely administrative offenses but not crimes and the law breakers in such circumstances are subject to an administrative sanction instead of criminal responsibility:

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<sup>43</sup> Prostitution itself is not a crime provided in the Criminal Law (1997). See Section 8 of the Criminal Law (1997): Crimes of Organizing, Forcing, Luring, Sheltering, or Procuring Other Persons to Engage in Prostitution. Only those engaging in prostitution or visiting a whorehouse knowing that they are suffering from syphilis, clap, or other serious venereal diseases are to be convicted of the Crime of Spreading Venereal Diseases. See *supra* note 4.

<sup>44</sup> Criminal Law, Art. 13 (1997).

<sup>45</sup> The purpose of the Law is to maintain the order of public security, safeguard public safety, protect the lawful rights and interests of citizens, legal persons and other organizations, and regularize and guarantee performance of the duties for administration of public security by public security organs and people's police according to law. See Article 1 of the Public Security Law (2005). The predecessor of the law was the Public Security Regulations.

A prostitute or a person who goes whoring shall be detained for not less than 10 days but not more than 15 days and may, in addition, be fined not more than 5,000 Yuan; and if the circumstances are relatively minor, she or he shall be detained for not more than five days or be fined not more than 500 Yuan.

A person who, at a public place, touts for prostitution or invites another person to engage in prostitution shall be detained for not more than five days or be fined not more than 500 Yuan.<sup>46</sup>

Clearly, one of the important aspects of Chinese legal system is the dichotomy drawn between criminal crimes and administrative offenses.<sup>47</sup> The distinction could be compared to the felony/misdemeanor or indictable/summary dichotomies in common law.<sup>48</sup> This so-called crime/non-crime category has, in effect, created two separate systems of liability and punishment/penalty.<sup>49</sup> The criminal law remains the principal instrument of state policy and strict social control. Criminals are brought before the court and punished in accordance with the criminal law. The minor offenses are under the authority of the Public Security Bureau and it makes a decision whether or not to impose an administrative penalty.<sup>50</sup> For most penalties, the person may be punished with fines or up to twenty days of administrative detention.<sup>51</sup> This approach is

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<sup>46</sup> Article 66 of the Public Security Law (2005).

<sup>47</sup> Public Security Law (2005), art. 2 states:

A person who disturbs public order, endangers public safety, infringes on the rights of person and property or hampers social administration, which is harmful to the society and which, according to the provisions of the Criminal Law of the People's Republic of China, constitutes a crime, shall be investigated for criminal responsibility according to law; and if such an act is not serious enough for criminal punishment, the public security organ shall impose on him a penalty for administration of public security according to this Law.

<sup>48</sup> Dobinson, *supra* note 10, at 52.

<sup>49</sup> *Id.*

<sup>50</sup> Public Security Law, Art. 66, *supra* note 46.

<sup>51</sup> "Penalties for acts against the administration of public security are divided into the following types: (1) warning; (2) fine; (3) administrative detention; and (4) revocation of licenses issued by public security organs," Article 10 of the Public Security Law (2005). "Where a person commits two or more acts against the administration of public security, decisions shall be made separately but executed concurrently. Where penalties of

conceived to avoid inappropriate penalties by using different criteria, which takes the damage done to society into consideration. However, the distinction between acts that are treated as crimes and those that trigger administrative sanctions is arbitrary.<sup>52</sup>

When considering the distinction between crimes and administrative offenses in cases of public order, particularly in prostitution, the legal age limit of consent for sexual activity plays a crucial role. Although many crimes pertaining to prostitution are provided in the criminal law,<sup>53</sup> prostitution is believed to be “minor” by the designation of such an offense as a non-crime, and by the fact that the administrative penalties are not criminal punishments. However, whether visiting prostitutes is just an administrative offense under the Public Security Law (2005) or charged as a crime is simply determined by the age of the girls involved. The bottom line is that the age of the prostitutes must be over fourteen. Otherwise, men who are willing to pay to engage in sexual intercourse with underage girls are faced with severe criminal sanctions.

### HISTORICAL AND CULTURAL INFLUENCES

Although underage girl prostitution, as a form of child sexual exploitation, has been documented throughout history, the offence of EPUG has been rooted firmly in the historical, cultural and social context of China. This section explores these aspects and presents some explanations of Chinese legal history and culture, with an eye to shed some light on the explanation of the status quo in terms of the social and cultural attitudes toward the crime.

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administrative detention are concurrently executed, the maximum term of such detention shall not exceed 20 days.”

Public Security Law, art. 10 (2005).

<sup>52</sup> See Dobinson, *supra* note 10, at 53.

<sup>53</sup> Crimes relating to prostitution, which range from Article 358 to Article 362, are provided in Section 8 of the Criminal Law. They include the crimes of Organizing, Forcing, Luring, Sheltering, or Procuring Other Persons to Engage in Prostitution.

Criminal Law, Art. 358-62 (1997).

### *History of the Chinese Legal Tradition*

In order to fully understand the background of EPUG, we need to understand why the current Chinese system has inadequate child protection resources and cannot truly guarantee the rights of underage girls. The supremacy of state power over individual rights had a profound effect on the laws. The traditional Chinese legal culture is prominently characterized as one stressing more on obligations than on rights.<sup>54</sup> Early Chinese conceptions of human rights were mainly imported from the West.<sup>55</sup> “Fundamentally, notions of political and civil liberties and concepts of inherent legal rights associated with them are extremely underdeveloped in China today and are only beginning to be accepted.”<sup>56</sup> Confucius, the greatest philosopher in China, introduced the concept of the importance of society over the individual in order to achieve social harmony.<sup>57</sup> Underlying these philosophies is an emphasis on harmony and unity, rather than individuality and difference.<sup>58</sup> Individuals passively fulfilled their obligations to the state and their family with little awareness of enjoying rights, for fear it would cause confusion and chaos.<sup>59</sup> It is for this reason that the Emperor has maintained strict control of most elements in Chinese society, including the functioning of the legal system—the law was a mere tool of social control. Because he was concerned primarily with maintaining order, his attention, and likewise the attention of local bureaucrats, was hardly drawn to what would be called individual rights today. While codification of laws was undertaken a long time ago in China, most of these codes focused on punishment for administrative breaches of bureaucratic procedure or for conduct considered disruptive of social order.<sup>60</sup>

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<sup>54</sup> See Liang Zhiping, *XinBosirenXinzha* (新波斯人信札) [*The New Persian Letters*] 122–123 (China Legal Publishing House 2000).

<sup>55</sup> Gun Luoji, *A Human Rights Critique of the Chinese Legal System*, 9 HARV. HUM. RTS. J. 1, 3 (1996)

<sup>56</sup> Stanley Lubman, *Bird in a Cage: Chinese Law Reform after Twenty Years*, 20 NW. J. INT'L L. & BUS. 383, 412 (2000)

<sup>57</sup> See generally Huang Chichung ed. & notes, *THE ANALECTS OF CONFUCIUS (LUN YU)* (1997)

<sup>58</sup> See generally Sam Hanson, *The Chinese Century: An American Judge's Observations of the Chinese Legal System*, 28 WM. MITCHELL L. REV. 243, 245 (2001).

<sup>59</sup> See Liang, *supra* note 193, at 127–128.

<sup>60</sup> Cf. George Jamieson, *CHINESE FAMILY AND COMMERCIAL LAW* 4-8 (1921); William C. Jones et al., *LAW OF THE PRC* III, 10 (1993) (noting “[O]ver half the [Ching] Code is devoted to the regulation of the official activities of government officials.”).

Before exploring the concept of rights in the Chinese legal context, I should pause briefly to discuss some changes in the evolution of China's modern legal system. "Although Chinese legal history is quite ancient, Chinese historians argue that the Chinese legal system as it currently exists has little connection to the past."<sup>61</sup> As a result, its culture and society have developed in an individualized manner.<sup>62</sup> It was not until modern times that China began to have frequent contact with other civilizations.<sup>63</sup> By the end of the Qing dynasty (1644-1912), the last ruling dynasty in imperial China, few law reforms took place.<sup>64</sup> Since then, a number of modern legal notions and systems in the West, especially the legal systems of civil law countries such as Germany and Japan, have flowed into China.<sup>65</sup> Rights were, for the first time, legally stipulated before they could actually be realized.<sup>66</sup> Following the May Fourth Movement in 1919, the general public had a stronger legal awareness of individual rights than before.<sup>67</sup> Greater importance has been attached to protecting individual rights and ensuring freedom. Additionally, ideas like "Everyone enjoys equal rights" and "one needs to act in accordance with law", for example, have been introduced.<sup>68</sup> Before the founding of the PRC in 1949, early Communist Party leaders in pursuit of power asserted that human rights were to be enjoyed by people of all classes.<sup>69</sup> It appears that the historical command-and-control political culture in

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<sup>61</sup> Dobinson, *supra* note 11, at 5.

<sup>62</sup> Littlewood, *supra* note 165, at 427.

<sup>63</sup> *Id.* at 427.

<sup>64</sup> See Zhang Jinfan, *Zhongguo Fazhishi* (中国法制史) [The Legal History of China] 289 (CUPL Press 2007)

<sup>65</sup> Shen Deyong, Justice of the Supreme People's Court of PRC, Chinese Judicial Culture: From Tradition to Modernity, Speech by the Hon. Justice Shen Deyong at Brigham Young University Law School (Oct 21, 2009), in 25 *BYU J. PUB. L.* 131,139 (2011)

<sup>66</sup> See Zhang, *supra* note 206, at 302.

<sup>67</sup> See Gao Like, *Wusi Lunli Geming yu Gongmin Jingshen* (五四伦理革命与公民精神) [*Ethical Revolution and Spirit of Citizenship in the May 4th Movement*], *ZHEJIANG SHEHUIKEXUE* (浙江社会科学) [ZHEJIANG SOCIAL SCIENCES] 122, 123-127 (1999).

<sup>68</sup> See Su Jing, *Dui Wusi Shiqi Faxue shang Fanchuantong de Xin Pingjia* (对五四时期法学上反传统的新评价) [*New Comments on Anti-tradition of the Science of Law in the May 4th Movement Stage*], 3 *ZHONGGUO FAXUE* (中国法学) [CHINA LEGAL SCIENCE] 113, 122-126 (1989).

<sup>69</sup> Gun, *supra* note 197, at 3.

China was under increasing pressure to yield to individual rights and liberties. Yet many believe these pro-Western changes are merely symbolic rather than substantive and the historical impact still impacts modern China.<sup>70</sup> The state has generally neglected to ensure the concrete embodiment of such rights in the laws. Even though much Chinese legislation since 1979 has created new rights and obligations, the assertion of rights is still relatively novel in Chinese society.<sup>71</sup> Thus, the public awareness, for a long period of time, is that infringement of children's rights has never been heard.

### *Hierarchical Order*

Chinese judicial culture intertwined the law with ethics (“To Embed Rites in Laws and Combine These Two”), and is thus has some distinct Chinese characteristics.<sup>72</sup> Rites and laws were two systems of rules with profound influences on ancient China.<sup>73</sup> As early as the Western Zhou Dynasty (1046 BC -771 BC), Rites became “the general principle in social relations and the fundamental guideline in judicial decisions.”<sup>74</sup> Rites were meant to “maintain a hierarchical order in the society and families, such as the relations between the close and the distant, the noble and the humble, as well as the superior and the inferior.”<sup>75</sup> Confucius defined five cardinal relationships: between ruler and ruled, husband and wife, parents and children, older and younger brothers, and friends.<sup>76</sup> Among the pairs, the former was known as the “superior” and the latter was known as the “inferior.”<sup>77</sup> Confucius emphasized the complete obedience and loyalty of the inferior to the superior while also mentioning the benevolence of the superior to the inferior.<sup>78</sup> Moreover, in order to maintain social harmony, the stress is favoring the “superior” at the expense of the “inferior”. A well-regarded judge from the Ming Dynasty has been attributed as saying, “[w]henver there is any reasonable doubt with a case, we’d rather

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<sup>70</sup> *See id.*

<sup>71</sup> Lubman, *supra* note 198, at 406.

<sup>72</sup> Shen, *supra* note 65, at 133.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*, at 134.

<sup>75</sup> *Id.*

<sup>76</sup> Hong Lu & Terance D. Miethe, *Confessions and Criminal Case Dispositions in China*, 37 LAW & SOC'Y REV. 549, 552 (2003).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

wrong the younger brother than the elder one; rather the nephews and nieces than the uncles; rather the rich than the poor; rather the unruly than the obedient.”<sup>79</sup> He goes on to say, “If the case is about quarrels and dignity, we’d rather wrong the humble than the noble in order to preserve social normality.”<sup>80</sup>

In accordance with Rites, filial piety has been the predominant guiding principle for socializing children. Owing to the expectation that children should obey and respect their parents without question, absolute authority over children was the commonly accepted approach to child rearing.<sup>81</sup> Parents (mainly fathers) and other caretakers exercised practically unlimited power over children; reflecting a view that parents are incapable of error. This kind of parenting was meant to duplicate the state governance “characterized by both affection and absolute authority” in patriarchy.<sup>82</sup> Besides, children were regarded as property that could be disposed of at the will of their parents.<sup>83</sup> For example, Chinese citizens have traditionally viewed physical punishment as an important component of child rearing. The use of corporal punishment or other conduct injurious to human dignity was a common practice in a Chinese family. Another influence of the Rites has been shaped into a tradition favoring boys and disparaging girls. Boys enjoyed much higher status than girls, which conforms to the characteristic of patriarchal society. In ancient China, it was not surprising that prostitutes, who existed just as “tools” and “commodities” to satisfy men’s sexual demand, were in the lowest class of the society and could not press their interest in public forums in the manner generally employed by other adult groups.<sup>84</sup> They were not only looked down upon by the other classes but also

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<sup>79</sup> Shen, *supra* note 207, at 134.

<sup>80</sup> *Id.*

<sup>81</sup> See Ho Tingpong & Kwok Waiming, *Child Sexual Abuse in Hong Kong*, 15 CHILD ABUSE & NEGLECT 597, 599 (1991).

<sup>82</sup> Shen, *supra* note 207, at 141.

<sup>83</sup> See Ho & Kwok, *supra* note 220, at 599, citing W.S. Tseng & J. Hsu, *The General Attitude Towards Parental Authority as Expressed in Chinese Children’s Stories*, 26 ARCHIVES OF GENERAL PSYCHIATRY 28-34. (“In Chinese children’s stories (for example, the classic 24 stories of filial piety), defiance of parental authority results in the admonition, punishment, or death for the disobedient child.”)

<sup>84</sup> See Ding Shuya, *Shehui Diwei Shiyexia Tang Song Chuanqi Zhong Jinv zhi Bijiao* (社会地位视野下唐宋传奇中妓女之比较) [Comparison of Social Status of Prostitutes in Legends Between Tang and Song Dynasties], 2 HENANJIDIANGAODENGZHUANKEXUEXIAOXUEBAO (河南机电高等专科学校学报) [JOURNAL OF HENAN MECHANICAL AND ELECTRICAL ENGINEERING COLLEGE] 65 (2012).

placed in a status similar to slaves.<sup>85</sup> Building on this idea, one can foresee the attitude of Chinese society towards underage girl prostitutes. Females, prostitutes, and children alike have labels of “inferior” and “humble” on their bodies. As China lacks the tradition and belief of equality before the law among people of different social statuses, it seems likely that Chinese society will disregard their rights in favor of maintaining these Rites.

### *Family and State Culture*

The concept of family in China played a significant role in its judicial culture. Interestingly, the word for “state” in Chinese is “Guo Jia”, which is combined by two characters “Guo” and “Jia”. The former means “state” and the latter, “family.” In imperial China, state and family meant almost the same thing and it was sometimes difficult to distinguish between them.<sup>86</sup> Clearly, there is a peculiar relation between the family and the state in Chinese society. The most predominant doctrine underlying both conceptions of family and state is the natural harmony of Confucianism, which emphasizes social/legal obligations mainly in the form of filial piety/loyalty. By enhancing the role of family, it appears that the obligations was prevalent in all relationships and turned society into one enormous family with the emperor as the head.<sup>87</sup> Indeed, Confucianism took the hierarchical relationship form of the family, brought it into the sphere of all social relations, and “transformed society into a pyramid of overlapping father-son relations that culminates in the sovereign.”<sup>88</sup> On the other hand, the central government, through unrelenting fortification of traditional familial and social hierarchies, also transformed the family into a de facto extension of the bureaucratic state.<sup>89</sup>

In ancient times, everyday local affairs were regulated, not from “Yamen”, but by institutions such as family and clan, which

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<sup>85</sup> *See id.*

<sup>86</sup> Liang Zhiping, *Jia Yu Guo: Guanyu Zhongguo Chuantong Falü Wenhua de Sikao Zhiyi* (家与国：关于中国传统法律文化的思考) [Home and State: A Reflection on Chinese Traditional Legal Culture], 2 *ZHENZHIXUE YANJIU* (政治学研究) [STUDIES ON POLITICAL SCIENCE] 1 (1989).

<sup>87</sup> *See Hayden Windrow, A Short History of Law, Norms, and Social Control in Imperial China*, 7 *ASIAN-PAC. L. & POL'Y J.* 244, 292 (2006).

<sup>88</sup> *Id.*, at 252.

<sup>89</sup> *Id.*, at 301.

were firmly rooted in local usage, and reflected local kinship ties.<sup>90</sup> A family was an agency of local self-government.<sup>91</sup> Family and clan codes prescribed standards of personal conduct for their members and enforced them through their own courts.<sup>92</sup> Family heads became the unpaid foot-soldiers of government authority, implementing its policies without direct compensation, because maintenance of the political/legal system granted them powers and privileges over their subordinates.<sup>93</sup> Under Family-and-State centered law, the state and family neither confirmed nor protected individual rights and the law was a mere tool to maintain social order. Because the philosophy underlying the law led them to deal with legal cases in terms of a situation to be restored rather than in terms of individuals seeking justice.<sup>94</sup> With strict social control through the local self-government of the family and based on severe punishment social order may be maintained. This emphasis on family control also affects China's cultural disposition towards young girl prostitution.

Although it has been globally admitted that young girl prostitution is a kind of child sexual exploitation, it is important to bear in mind that traditional Chinese political and legal aspects influence the level of awareness of the problem. Sexual abuse remains predominantly a secret, and is thus an under-reported phenomenon.<sup>95</sup> Aside from the "seduction process" by which offenders entice girls into a web of secrecy, the sexually abusive experience also makes the victim less likely to testify in the presence of the accused.<sup>96</sup> Being less able to speak for themselves than any other population, the apparent inability of the Chinese to prevent abuse from occurring in the first place is not surprising. However, there are clearly other factors operating to prevent cases

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<sup>90</sup> See J. L. Brierly, C.B.E & D.C.L., *LAW AND GOVERNMENT IN PRINCIPLE AND PRACTICE* 313 (ODHAMS PRESS). ("Yamen" is both the local government and court, with its chief both the administrative official and judge; the clan was a grouping of families with a common surname, claiming descent from a common ancestor.)

<sup>91</sup> See *id.*

<sup>92</sup> *Id.*, at 317.

<sup>93</sup> Windrow, *supra* note 226, at 301.

<sup>94</sup> See Brierly, *supra* note 232, at 316.

<sup>95</sup> Cf. Carol R. Hartman & Ann W. Burgess, *Sexual Abuse of Children: Causes and Consequence*, in *CHILD MALTREATMENT: THEORY AND RESEARCH ON THE CAUSES AND CONSEQUENCE OF CHILD ABUSE AND NEGLECT* 95, 122-23 (Dante Cicchetti & Vicki Carlson eds., 1989).

<sup>96</sup> See Roland C. Summit, *The Child Sexual Accommodation Syndrome*, 7 *CHILD ABUSE & NEGLECT* 177, 181 (1983).

from being reported, which make the situation worse. Parents sometimes would not report it to authorities even though their girls are sexually exploited due to some influence of traditional Chinese family culture. Such issue was viewed as “domestic” and largely outside state control. China has developed a culture that prizes virginity in female children, which is at essence a reflection of its favoring of male concerns. As previously outlined, the traditional Chinese family is a male-dominated close unit. Law and society have treated sex involving an underage girl as an indignity of a family (*Jiachou*).<sup>97</sup> This attitude further reflects the importance of family reputation and secrecy over individual suffering. It is therefore deemed as a “family problem” inflicted by parents and other caretakers if it occurs between family members. Chinese people are inclined to maintain secrets within the family, so frequently it is only during a period of intense conflict that a parent may bring the abuse to the attention of authorities, despite the fact that the abuse may have been occurring for quite some time. Additionally, nor is the family encouraged to disclose incidences of the sexual exploitation. The notion that underage girl prostitution is a voluntary act rather than sexual exploitation, though inconsistent with the realities of child development, also makes the process of disclosing the crime very difficult. The problem is often treated as an unfortunate problem, like poverty, but not as infringement of rights. Thus, there is good reason to believe that the number of underage girl victims is greater than we wish to acknowledge. Accordingly, it seems likely that the figures have underestimated the scope of the problem.

As we have seen, the traditional values pervade China today. Likewise, historical and cultural influences cannot be excluded when we reconsider the discussion on the death penalty for EPUG. As discussed earlier, the public debate over the punishment of EPUG is mainly concerned with whether it is appropriate to remove it from the scope of the death penalty. In assessing this, it is important to place the development of criminal law in a historical context. In the long river of history of China, law meant nothing more than criminal law and punishment.<sup>98</sup> In a word, criminal law-

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<sup>97</sup> *Jiachou* means a family scandal, which should not be let known to outsiders, otherwise it would be a loss of face for the whole family or clan.

<sup>98</sup> See Liang Zhiping (梁治平), *Zhongguofa de Guoqu, Xianzaiyu Weilai: Yige Wenhua de Jiantao* (中国法的过去, 现在与未来: 一个文化的检讨) [The Past, Present and Future

centralism is a pronounced feature in the traditional Chinese Family-and-State culture.<sup>99</sup> Death as punishment is an option for a number of different crimes which are considered the most heinous in China. Sex crimes against young girls involve actions that have been rated the most despicable in the patriarchal culture and described as bestial.<sup>100</sup> More importantly, the society has expressed a concern that such crimes might undermine the stability and natural harmony of family. Any act jeopardizing a family will also be deemed as a challenge to the rule order of state.<sup>101</sup> Hence, the government turned its attention to those serious crimes. Since the crimes defile the whole family, the eradication of the crime evil must begin at the roots of society. With increasingly harsh penalties, more stringent penalty sanctions for sex crimes against underage girls have been articulated. It is not surprising that public pressure keeps making the death penalty available for such offenses. Furthermore, “traditional ethics and norms require that no leniency is permissible for such a crime.”<sup>102</sup>

#### THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD

Child sexual abuse has occurred throughout history.<sup>103</sup> Underage girl prostitution involves actions so intolerable that no human being, state, or institution could possibly argue for its permissibility.<sup>104</sup> It represents the very worst form of commodification and exploitation of humans. Prostituted girls are essentially without identity and considered akin to animals and slaves. They “can be raped, beaten . . . emotionally abused, tortured,

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of Chinese Law: A Review from the Perspective of Culture], 2 *BIJIAO FA YANGJIU* (比较法研究) [J. COMP. L.] 19 (1987).

<sup>99</sup> *See id.*

<sup>100</sup> CHINA DAILY, *supra* note 9.

<sup>101</sup> *See* Liang Zhiping (梁治平), *supra* note 225, at 5.

<sup>102</sup> CHINA DAILY, *supra* note 9.

<sup>103</sup> Sandy K. Wurtele & Cindy L. Miller-Perrin, PREVENTING CHILD SEXUAL ABUSE 1 (1992).

<sup>104</sup> *See generally* David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 *DUKE J. COMP. & INT'L L.* 219, 228-29 (2005).

and even killed by pimps, brothel owners, and customers.”<sup>105</sup> “An unknown but very large number” of teenage girls “are used for commercial sexual purposes each year, often ending up with their health destroyed, victims of HIV/AIDS and other sexually transmitted diseases.”<sup>106</sup> Many of them die with no one “knowing what has happened to them . . . [because] the nature of organized crime and the commercial sex industry makes precise figures hard to come by.”<sup>107</sup>

Underage girls are children. Children have a right to a childhood. Maintaining and prolonging childhood requires legal protection. They “should be given optimal care to guarantee their survival and development.”<sup>108</sup> The UN Convention on the Rights of the Child (hereinafter CRC), “which called for the protection of children from all forms of sexual exploitation and abuse,” “is thus an important step in international law toward recognition of children as rights bearers.”<sup>109</sup> It reminds society of its inadequacies and failure to properly protect its children and “continues to be one of the most widely ratified treaties in force.”<sup>110</sup> “The Convention seeks to establish children’s rights as distinct from their parents.”<sup>111</sup> Simply stated, “children are enjoying human rights.”<sup>112</sup> “It is significant that children’s rights in the Convention do not derive from the rights of adults, but rather children are in essence *sui*

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<sup>105</sup> HUMAN RIGHTS WATCH, *Sexual Abuse and Exploitation, in PROMISES BROKEN: AN ASSESSMENT OF CHILDREN’S RIGHTS ON THE 10TH ANNIVERSARY OF THE CONVENTION ON THE RIGHTS OF THE CHILD* (1999), <http://www.hrw.org/legacy/press/1999/nov/children.htm>.

<sup>106</sup> Sara Dillon, *What Human Rights Law Obscures: Global Sex Trafficking and the Demand for Children*, 17 UCLA WOMEN’S L.J. 121, 128 (2008) (quoting Human Rights Watch’s report, *supra* note 162).

<sup>107</sup> *Id.* at 127-129; see Brian M. Willis & Barry S. Levy, Child Prostitution: Global Health Burden, Research Needs, and Interventions, 359 *Lancet* 1417, 1417 (2002), [http://ac.els-cdn.com/S0140673602083551/1-s2.0-S0140673602083551-main.pdf?\\_tid=aab2de0a-8d6a-11e3-abad-00000aacb35e&acdnat=1391497682\\_51f6e075361b15fdef1bd05a467ef475](http://ac.els-cdn.com/S0140673602083551/1-s2.0-S0140673602083551-main.pdf?_tid=aab2de0a-8d6a-11e3-abad-00000aacb35e&acdnat=1391497682_51f6e075361b15fdef1bd05a467ef475) (providing estimates of the number of children prostituted in various countries).

<sup>108</sup> Paula C. Littlewood, *Domestic Child Abuse under the U.N. Convention on the Rights of the Child: Implications for Children’s Rights in Four Asian Countries*, 6 PAC. RIM L. & POL’Y J. 411, 445 (1997).

<sup>109</sup> *Id.* at 411; Jennifer Bays Beinart, *Beyond Trafficking and Sexual Exploitation: Protecting India’s Children from inter and Intra-familial Sexual Abuse*, 21 IND. INT’L & COMP. L. REV. 47 (2011).

<sup>110</sup> Littlewood, *supra* note 165, at 411-12.

<sup>111</sup> *Id.* at 447.

<sup>112</sup> *Id.* at 412.

*generis*.”<sup>113</sup> “While the Convention is not the first international agreement to address the rights of children, its passage does mark the first binding treaty to deal specifically with children’s rights as separate from both adults and the family.”<sup>114</sup> “Rights for children began, however, as a protective mechanism designed to preserve valued aspects of personhood.”<sup>115</sup> The “main objective” of the Convention “is to facilitate the improved protection of children in its broadest sense,” “not only from a concern for the welfare of children, but . . . also accepted as an obligation owed to society.”<sup>116</sup> “The Convention reinforces this objective through its three basic underlying principles: (1) children need special legal protection beyond that afforded adults; (2) a protective and caring family setting is most conducive to a child’s survival and development; and (3) adults should respect and act in the child’s best interest.”<sup>117</sup>

The Convention provides recommendations on measures to implement laws effectively in order to best serve the interests of children.<sup>118</sup> For example, it requests the provision of supportive services to children throughout the various phases of a lawsuit: investigation, prosecution, treatment, and remediation.<sup>119</sup> Further, it calls for the use of non-stigmatizing language and explicitly prohibits the use of adversarial or accusatory words.<sup>120</sup> It requires that “those involved in the investigative and prosecutorial processes [must] understand both the proper legal basis for prosecution and the needs of the children involved.”<sup>121</sup> This approach would involve attending more to prevention and treatment efforts in order to

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<sup>113</sup> *Id.*; Robert F. Drinan, S.J., *Saving Our Children: Focusing the World's Attention on the Abuse of Children*, 26 LOY. U. CHI. L.J. 137, 138 (1995).

<sup>114</sup> *Id.* at 411-12.

<sup>115</sup> Kohm & Lawrence, *supra* note 58, at 371.

<sup>116</sup> Littlewood, *supra* note 165, at 430, 428.

<sup>117</sup> *Id.* at 416; “Roger J.R. Levesque, *International Children's Rights Grow Up: Implications for American Jurisprudence and Domestic Policy*, 24 CAL. W. INT'L L.J. 193, 214 (1994).”

<sup>118</sup> When States Parties take all appropriate legislative and administrative measures concerning children, “the best interests of the child shall be a primary consideration.” United Nations Convention on the Rights of the Child art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3, *supra* note 73.

<sup>119</sup> See UNICEF, *Justice for Children, in* CHILD PROTECTION FROM VIOLENCE, EXPLOITATION AND ABUSE (May 25, 2012), [http://www.unicef.org/protection/57929\\_57999.html](http://www.unicef.org/protection/57929_57999.html) (arguing that the justice system should consider children’s rights and development more fully so that it better serves and protects their interests).

<sup>120</sup> *See id.*

<sup>121</sup> Beinart, *supra* note 166, at 61.

reduce the harm to victims. The goal is to maintain a child-friendly environment that is tailored to the needs of young victims, making the investigative process more child-friendly and less inquisitorial.<sup>122</sup> States must undertake preventive and treatment programs to this end.<sup>123</sup>

In the global discourse on child prostitution, a child's right to freedom from all forms of sexual exploitation and abuse thus plays a crucial role in the level of awareness of the problem.<sup>124</sup> Accordingly, Article 34 of the Convention protects a child from all forms of sexual exploitation and sexual abuse.<sup>125</sup> Member states are obligated to protect children from all forms of sexual exploitation if they are complying with their obligations under the Convention. The role of the state in child protection and treatment must be clarified and weighed against cultural biases.<sup>126</sup> "If cultural biases are allowed to exempt a state from certain obligations, the most widely ratified Convention in the world may be left devoid of its essential quality."<sup>127</sup> A poor understanding of child rights and a lack of a child-friendly approach may affect "the doctrine of *pacta sunt servanda* in international law," which "requires that promises must be kept."<sup>128</sup> "As to whether states are complying with the provisions of the treaty," "states' reports must therefore outline what domestic measures have been adopted in accordance with the Convention and to what extent progress is being made toward full realization of those rights."<sup>129</sup>

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<sup>122</sup> See UNICEF, *supra* note 176.

<sup>123</sup> See United Nations Convention on the Rights of the Child, art. 19, Nov. 20, 1989, 1577 U.N.T.S. 3., *supra* note 53 (stating that countries should adopt various measures to protect children against abuse).

<sup>124</sup> See UNICEF, *Protection Rights: Keeping Safe from Harm*, [http://www.unicef.org/crc/files/Protection\\_list.pdf](http://www.unicef.org/crc/files/Protection_list.pdf) (stating what governments should do in furtherance of the provisions of the CRC).

<sup>125</sup> United Nations Convention on the Rights of the Child, art. 34, Nov. 20, 1989, 1577 U.N.T.S. 3, *supra* note 73.

<sup>126</sup> For example, "a reservation incompatible with the object and purpose of the present Convention shall not be permitted." United Nations Convention on the Rights of the Child art. 53, Nov. 20, 1989, 1577 U.N.T.S. 3., *supra* note 73.

<sup>127</sup> Littlewood, *supra* note 165, at 448.

<sup>128</sup> *Id.*; Qu Xuewu, Guanyu Quxiao Piao suyounvzui de Lifa Fansi (关于取消嫖宿幼女罪的立法反思) [*Reconsidering Abolition of the Crime of Engaging in Prostitution with a Girl under 14*], 8 FAZHI YANJIU (法治研究) [RESEARCH ON RULE OF LAW] 60, 61-62 (2012).

<sup>129</sup> Littlewood, *supra* note 165, at 412, 416; Karen McSweeney, *The Potential for Enforcement of the United Nations Convention on the Rights of the Child: The Need to Improve the Information Base*, 16 B.C. Int'l & Comp. L. Rev. 467, 483 n.6 (1993).

The National People's Congress of China ratified the CRC and it came into effect on April 2, 1992. While it is clear that the principle of a child's best interest should have been recognized in Chinese laws, the laws did not detail the specific provisions that conform to the principle.<sup>130</sup> As we have seen, it is debatable whether prosecutions and investigations in China are in children's best interests.

Many of the rights and protections contained in the CRC are not available to underage girl prostitutes in the PRC.<sup>131</sup> Sexually abused girls who testify are often traumatized by their experiences, particularly in the criminal justice system.<sup>132</sup> They get more traumatized in the course of the prosecution. This is in violation of the CRC, which emphasizes the supremacy of child's best interest.<sup>133</sup> Moreover, vesting young girl prostitutes with ability to consent to sex, which is not currently legally vested in any individual under the age of fourteen, is not the most appropriate way to care for these girls' best interests. In the current system, children are often left unprotected or are harmed from the victim's perspective.<sup>134</sup> To be sure, investigating and litigating do not, by themselves, inevitably cause harm to children. The legal prosecutorial system aims to promote justice. What is truly at stake is not the justice, but the best interest of the child, which has virtually been ignored. China must revamp its legal system to deal with the modern understanding of the CRC. A useful move would be to change the goal of the legal system and its relationship with children.

Children lack the kind of autonomy and competence presumed by the idea of a right, and therefore, require protection

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"Interestingly, the Committee adopted reporting guidelines which describe generally the information States Parties should submit; consequently, the type of information to be included in the reports is left up to the sole discretion of the submitting Party. *Id.* at 484."

<sup>130</sup> For instance, the principle of a child's best interest has never been articulated and provided in Constitution of the People's Republic of China (hereinafter Constitution), which has been revised in 2004. Nor has it been provided in Law of the People's Republic of China on the Protection of Minors (hereinafter Minors Protection Law), revised in 2012. See Constitution of the People's Republic of China and Law of the People's Republic of China on the Protection of Minors.

<sup>131</sup> The term of EPUG, for example, is contrary to the use of non-stigmatizing language.

<sup>132</sup> Qu, *supra* note 185, at 62.

<sup>133</sup> *Id.* at 61.

<sup>134</sup> *Id.* at 62.

through the laws created by adults.<sup>135</sup> Underage girls cannot fully care for themselves, or “decid[e] many important matters that directly affect them. Children will be either paternalized or victimized. There is no alternative.”<sup>136</sup> Given the difficulty of having children protect themselves, age limits are imposed to “insure that kids grow up a bit before they risk making the wrong kinds of mistakes.”<sup>137</sup> Teen years may be a transition from childhood to adulthood, but a teenage person is not an adult. Underage girls “need to be allowed to experience childhood. They need to be afforded the “right” to be children, not forced to be adults.”<sup>138</sup>

## THE PLIGHT OF EPUG

### *Criticism of Epug*

It was not until the most recent decade that legislators perceived prostitution involving an underage girl as a social problem that required immediate attention. The criminal provisions of EPUG reflect the legislature’s effort to balance the offense of Rape and non-crime prostitution when underage girls are victims. However, the approach is not without flaws and has triggered a sharp debate. The limitation of the current approach stems from the inherent conflict of separating underage girl prostitutes from other underage girls. Although officially enacted, the legislation has been scrutinized for poor drafting and lack of legal insight.

Some researchers have focused on young girls’ competency issues. Lawmakers have designed the traditional doctrine of minority legal status to protect children. Age limits are a legal manifestation of a community’s beliefs regarding the development of a child’s capacities and responsibilities, which vary from activity to activity and country to country. One may claim that children should be able to consent to certain conduct, but are young girls old enough to make a mature decision relating to sexual activity?

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<sup>135</sup> Kohm & Lawrence, *supra* note 58, at 396.

<sup>136</sup> John E. Coons et al., *Puzzling Over Children's Rights*, 1991 B.Y.U. L. REV. 341 (1991). “Clearly, the extreme liberationist can be understood only as provocateur. Yet to dismiss him or her completely is to miss the point. Buried in the rhetoric of ‘kiddie lib’ is an important problem. Children are not static; each is a moving target of social policy.” *Id.*

<sup>137</sup> Bruce C. Hafen, *The Learning Years*, 81 MICH. L. REV. 1045, 1060 (1983) (reviewing Franklin E. Zimring, *The Changing Legal World of Adolescence* (1982)).

<sup>138</sup> Kohm & Lawrence, *supra* note 58, at 405.

When it comes to the criminal provisions of EPUG, the principal problem is not whether the conduct of visiting young girl prostitutes under fourteen should be criminalized and punished. Rather, the focus must be on erroneously vesting underage girl prostitutes with capacity to “consent” to her sexual activity, which is completely inconsistent with the criminal principle that a fourteen-year-old girl cannot “consent” to sex. This conceptual model is one with which criminal law is ill-prepared to deal with underage girl prostitution.

One of the prominent distinctions between Rape and EPUG is that the latter occurs without the consent of anyone but the underage girl herself. EPUG appears to be a logical contradiction to the Rape of underage girls. The controversy focuses on whether a female minor under fourteen has the capacity to “consent” to sexual activity. As previously outlined, it does not matter for a man convicted of raping an underage girl with or without her consent. Under this reasoning, if a young girl under fourteen is deemed not to be mature enough to make her own decision regarding sexual activity, she lacks the capacity necessary to consent to these activities in any circumstance even when some underage girls may be classified as underage girl prostitutes. There is no reason why the underage girl, when labeled as prostitute, is able to make such a decision regardless of her age or maturity. If underage girls could be regarded as prostitutes like adult women because of the fact of their consent and the payment, can their voluntary sexual activity without payment be seen as adultery and not a crime?

The concept of EPUG vests underage girl prostitutes with the capacity to consent to sex, yet discards the possibility that they not only deserve, but even need, protection from having to make these choices. Indeed, it is reasonable to conclude that children should be treated as children. They should not be called “prostitutes” or “sex workers” as they do not have the necessary capacity to make decisions regarding sexual activity. EPUG has also been blamed as discriminatory against underage prostitutes in that it violates the principle that everyone must be equal before the law, regardless of his or her status. Since underage girls cannot give consent, others argue that it is not necessary to enact two crimes for the same kind of conduct.

Another serious problem in this arena is that EPUG and Rape in some difficult circumstances are defined vaguely. Conflicts between provisions governing the two crimes have also raised some

other concerns over the definition. It is perfectly possible to accept that the practice is far more complicated, and that the behaviors of EPUG and rape are frequently linked. The distinction between the definitions of EPUG and rape is vague from a practical perspective, and perhaps unsustainable in principle. For example, it is unclear whether a man who has sexual intercourse with an underage girl by seducing her with money, which is far from rare, should be convicted of EPUG or rape. Without a clear definition, the criminal provisions of EPUG cannot be carefully implemented. Different crimes reflect the seriousness of harm attached to them. Yet the distinction between the degrees of harm of the two crimes is extremely arbitrary. This controversial approach has been criticized because it has produced a dysfunctional social conflict.

### *Social Problems with EPUG*

Critics are also concerned that the provision of EPUG might hinder societal understanding of problems with rape of underage girls.<sup>139</sup> EPUG, coupled with misinformed public perceptions, place emphasis on prostitution instead of children's rights.<sup>140</sup> The focus leads to the public perception that the problem is limited to prostitution.<sup>141</sup> It is unlikely that an explicit law criminalizing EPUG will deter such a behavior, though this is misleading because the Criminal Law makes it a crime punishable up to a maximum of fifteen years imprisonment for anyone who violates the law.<sup>142</sup> As outlined before, because prostitution and visiting prostitutes are not crimes in China, difficulties arise in understanding EPUG as a felony.<sup>143</sup> The controversy revolves around the popular notion that prostitution is not a crime. Since the government does not make it a crime, many seem to believe that a man who visits an underage prostitute may only face an administrative sanction.<sup>144</sup> If a significant number of people in the local community believes that sex with prostitutes is voluntary and customary, society ought not

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<sup>139</sup> See Qi & Zhou, *supra* note 79.

<sup>140</sup> Xiao & Zhao, *supra* note 57, at 118.

<sup>141</sup> See Ye, *supra* note 14, at 123.

<sup>142</sup> See Liu, *supra* note 3, at 44.

<sup>143</sup> Peng, *supra* note 2, at 155.

<sup>144</sup> Xu Chen, Xishui Piaosuyounvan de Shencha yu Rending (习水嫖宿少女案的审查与认定) [*The Examination and Decision of Xishui Case of Engaging in Prostitution with a Girl under the Age of Fourteen*], 6 RENMIN SIFA (人民司法) [THE PEOPLE'S JUDICATURE] 9, 11 (2010).

to protect citizens from themselves, each other, or others, even though the prostitute is an underage girl.<sup>145</sup>

It should be recognized that in terms of children's rights, the suffering of underage prostitutes is, if anything, even more invisible than that of other child victims.<sup>146</sup> "As the exploited girls are under the age of consent, it would be both cruel and perverse to slander them as 'prostitutes.'"<sup>147</sup> They are immature, naive, in capable of defending themselves, and generally in need of guidance. Young girls should not have to bear such an incubus.<sup>148</sup> "The stigma and the trauma of the victims can probably never be healed."<sup>149</sup> The personal value, dignity and freedom of individuals are ignored. "And, it is quite likely that the future of these girls will be ruined."<sup>150</sup>

The crime has been heavily criticized for stressing the idea of "social order" at the expense of the "individual rights."<sup>151</sup> This is clearly reflected by the fact that EPUG is listed in Chapter VI: Crimes of Disrupting the Order of Social Administration, although it is done under the guise of protecting children from the consequences of their sexual activity.<sup>152</sup> Indeed, the efforts to promote the virginity of young girls overshadow the efforts to promote rights of individual victims.<sup>153</sup> The primary underlying principle and policy of EPUG is not the protection of young girls' rights but the concern about societal disorder resulting from immorality.<sup>154</sup> While it is true that EPUG is an attempt to fight disruptions to social order, such as the prostitution of underage girls, there is no reason why concerns over prostitution should not make it

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<sup>145</sup> See Lao, *supra* note 67, at 41.

<sup>146</sup> See Chen, *supra* note 41, at 65-6.

<sup>147</sup> *Supra* note 9.

<sup>148</sup> See Liu, *supra* note 63, at 49.

<sup>149</sup> *Supra* note 9.

<sup>150</sup> *Supra* note 9.

<sup>151</sup> Zhang & Wu, *supra* note 61, at 46-47.

<sup>152</sup> Xia Bing, *Dui Piaosuyounvzui de Foudingxing Pingjia* (对嫖宿幼女罪的否定性评价) [*A Negative Evaluation of the Crime of Engaging in Prostitution and Lodging with a Girl under Age*], 3 TIEDAO JINGGUAN GAODENG ZHUANKE XUEXIAO XUEBAO (铁道警官高等专科学校学报) [JOURNAL OF RAILWAY POLICE COLLEGE] 27, 28 (2006).

<sup>153</sup> See Tong Dehua, *Piaosuyounv Xingwei de Fatiao Jinghe Wenti* (嫖宿幼女行为的法条竞合问题) [The Overlap of the Crimes for the Conduct of *Engaging in Prostitution* with Girls under 14], 6 FAXUE (法学) [LEGAL SCIENCE] 132, 133 (2009).

<sup>154</sup> Liu, *supra* note 63, at 46.

a crime.<sup>155</sup> Underage girls are victimized every day by others who sexually desire them, but the government rarely recognizes that they are individuals with their own rights.<sup>156</sup>

### *Children's Rights Concerns*

One aspect of the ongoing debate is whether the criminal law is in violation of the U.N. Convention on the Rights of the Child (CRC).<sup>157</sup> As will be discussed in greater depth below, the Convention asserts that states should provide for the care, security, and well-being of children.<sup>158</sup> “States Parties shall undertake to protect the child from all forms of sexual exploitation and sexual abuse.”<sup>159</sup> Children need and deserve the utmost protection from states without discrimination.<sup>160</sup> The criminal provisions of EPUG reflect the view that the law is not only intended to punish the sex offenders, but also to condemn the underage girls, as prostitution is deemed an infringement on and damage to social morality.<sup>161</sup> It must be kept in mind that young girl prostitution is a form of sexual exploitation of children, though it has never been so termed in Chinese laws.<sup>162</sup> Despite the deal and payment between the sex offender and the underage girl, all forms of child prostitution are forced prostitution.<sup>163</sup> When underage girls are forced in prostitution, they are victims, although as “prostitutes,” they

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<sup>155</sup> Zhang & Wu, *supra* note 61, at 47.

<sup>156</sup> Zhao, *supra* note 72, at 6.

<sup>157</sup> Zhao He-jun, Piasuyounvzui Zaisikao (嫖宿幼女罪再思考) [*Rethinking of Crime in Engaging in Prostitution with An Underage Girl: From a Perspective of Applying Int'l. Covenants*], 5 FUNVYANJIULUNCONG (妇女研究论丛) [COLLECTION OF WOMEN'S STUDIES] 5, 6 (2011).

<sup>158</sup> See United Nations Convention on the Rights of the Child art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3. (“States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.”).

<sup>159</sup> *Id.* at art. 34.

<sup>160</sup> See *Id.* at art. 2 (“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind...”).

<sup>161</sup> He Junpeng, Piasuyounvzui yu Qiangjianzui zhi Falifenxi (嫖宿幼女罪与强奸罪之法律分析) [*Legal Analysis of Girl Sex Crimes and Rape Crimes*], 5 GUANGXIZHENGFAguanLIganbuXueyuanXuebao (广西政法管理干部学院学报) [JOURNAL OF GUANGXI ADMINISTRATIVE CADRE INSTITUTE OF POLITICS AND LAW] 94, 96 (2009).

<sup>162</sup> Zhao, *supra* note 72, at 7.

<sup>163</sup> *Id.* at 9.

exchange sex for profit.”<sup>164</sup> The demand for female minors’ bodies and the grotesque exploitation of the innocent show the likelihood that intervention, under the current system, may fail or even harm the children.<sup>165</sup>

### *Concerns over the Punishment for EPUG*

The public is also concerned that EPUG may be used for child sex offenders to escape severe punishment through payouts to victims and *guanxi* (connections).<sup>166</sup> In today’s China, as “[w]ealthy people violating laws and escaping punishment by spending money has become quite common in many places, the public [is angry and] strongly resent[s] dirty deals between power and wealth” which results in imposing light punishment for serious crimes.<sup>167</sup> Because a complex web of informal personal *guanxi* runs throughout a society, it is “precisely those people [of high socioeconomic and political status] who are best situated to pay the victims and push for a settlement that might lead to a reduced sentence.”<sup>168</sup> Another notorious recent case is the Yibing case.<sup>169</sup> In the case, just two steps successfully helped a local government official who was charged of underage rape exempt from punishment. First, to label the underage girl victim as a “prostitute” because of the fact of her “consent” and payment; second, the accused claimed that he did not know the “prostitute” was an underage girl, and then he was acquitted of the crime.<sup>170</sup> It seems that the answer to the

<sup>164</sup> Qi Wenyuan & Zhou Xiang, *Xishui Piao suyounvan Zhong Xingweiren de Fanzui Xingzhi* (习水嫖宿幼女案中行为人的犯罪性质) [*The Criminality of the Suspects of Xishui Case*], 6 FAXUE (法学) [LEGAL SCIENCE] 124, 126 (2009).

<sup>165</sup> See Liu, *supra* note 63, at 46.

<sup>166</sup> See Peng, *supra* note 2, at 153.

<sup>167</sup> *On the China’s “Second-generation Rich,”* PEOPLE’S DAILY ONLINE (Aug. 27, 2009, 14:01), <http://english.peopledaily.com.cn/90001/90782/90872/6741171.html>.

<sup>168</sup> See Margaret K. Lewis, *Leniency and Severity in China’s Death Penalty Debate*, 24 COLUM. J. ASIAN L. 303, 328-30 (2011).

<sup>169</sup> Lu, division chief of the local taxation bureau in Yibin, Sichuan province, paying for sex with a virgin escaped jail time after insisting he had no idea she was underage. The Yibin police said sex with a 13-year-old is not a criminal offence if the perpetrator is unaware of the child’s age and as long as the sex is consensual. The official Xinhua News Agency ran an unusually harsh commentary, saying the judicial interpretation that the Yibin police relied upon was “a legal loophole” and had resulted in “significant controversies.” See Hu Yinan, *Underage Sex Official Is Sacked*, CHINA DAILY (May 16, 2009, 7:54 AM), [http://www.chinadaily.com.cn/cndy/2009-05/16/content\\_7783527.htm](http://www.chinadaily.com.cn/cndy/2009-05/16/content_7783527.htm).

<sup>170</sup> A judicial interpretation released in 2003 stipulated that having sex with children without knowing that the girl is underage does not constitute the crime of rape. See

question of when to have the capacity or when not to have the capacity to “consent” to sex is dependent particularly on the status of the underage girl.<sup>171</sup> However, the determination of the status of prostitutes is arbitrary, as prostitution is not legally recognized in China. The Yibing case has led to a public awareness of the problem and reported the public’s dissatisfaction with the outcome. Online, tens of thousands of people said that the excuse of the sex offender “is an insult to the intelligence of all Chinese people”.<sup>172</sup> The public hopes to charge the suspect with a severe crime instead of using back-door dealings to obtain lenient treatment. Whether the depth of the defendant’s pockets should directly influence his punishment highlights the issue of how wealth and power impact a case’s handling.<sup>173</sup>

Many have pointed out that Article 236 (Rape) of the criminal law has already protected underage girls from sexual exploitation.<sup>174</sup> By any measure, EPUG should be seen to meet the definition of Rape.<sup>175</sup> Some argue that if having sexual intercourse with an underage girl regardless of her consent is rape, it is also a crime under Article 236 for a man to visit an underage girl prostitute.<sup>176</sup> It does not matter whether a category of underage girls is characterized as underage girl prostitutes. Underage girls, by nature, are not equipped consistently to make choices relating to sexual activities.<sup>177</sup> They are dependent physically, economically, and legally on adults. They should be protected from activities considered to be for adults. The society needs to provide direction

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ZUIGAO RENMIN FAYUAN GUANYU XINGWEI REN BUMINGZHISHI BUMANSHISIZHOU SUIDE YOUNV SHUANGFANG ZIYUAN FASHENG XINGGUANXI SHIFOU GOUCHE NGQIANGJIANZUI WENTI DEPIFU (最高人民法院关于废止1997年7月1日至2011年12月31日期间发布的部分司法解释和司法解释性质文件(第十批)) [Decision of the Supreme Court on Abolishment (the Tenth) of Some Judicial Interpretations and Documents Equivalent to Judicial Interpretations Promulgated During the Period from Jul. 1, 1997 to Dec. 31, 2011], *supra* note 42.

<sup>171</sup> See Ye, *supra* note 14, at 122.

<sup>172</sup> Hu, *supra* note 109.

<sup>173</sup> See *On the China’s “Second-generation Rich,” supra* note 107.

<sup>174</sup> Huang Xuwei, *Piaosuyounvzui Ruogan Yinanwenti Yanjiu* (嫖宿幼女罪若干疑难问题研究) [On Several Difficult Problems of the Offence of *Engaging in Prostitution* Girls under 14 Years Old], 1 *GUIZHOU DAXUE XUEBAO* (武汉理工大学学报(社会科学版)) [JOURNAL OF WUHAN UNIVERSITY OF TECHNOLOGY (SOCIAL SCIENCE EDITION)] 63, 65 (2006).

<sup>175</sup> Wang, *supra* note 1, at 55.

<sup>176</sup> Xiao & Zhao, *supra* note 57, at 118-19.

<sup>177</sup> An, *supra* note 60, at 95.

to the underage girl in the exercise of her right in a manner consistent with her evolving capacities.<sup>178</sup>

While virtually no one would argue that young girl prostitution does not constitute sexual exploitation of children and a severe violation of children's rights, there might well be disagreement as to what punishment should be administered to those who have sexually exploited them. Upon conviction, a sentence is imposed based on the "relevant provisions of the law and in light of the facts and nature of the crime, the circumstance under which the crime is committed and the degree of harm done to the society."<sup>179</sup> This requires looking at both the crime's harm to society and the individual characteristics of the crime.<sup>180</sup> Although not necessarily at odds, the system of Chinese criminal punishments of sex crimes often conflicts in practice.<sup>181</sup> The result is a wide range of vastly different punishments for what are often quite similar offenses. On the one hand, researchers have been concerned with the effect of punishment of EPUG, under which the defendant may receive a lesser punishment than Rape.<sup>182</sup> One of the most intriguing aspects of the issue that has been raised regarding the discussion is about whether the maximum penalty for EPUG should be increased to capital punishment.<sup>183</sup> The defendants in Xishui case were charged under Article 360 of the Criminal Law (EPUG) instead of Article 236 (Rape). Why? Whereas Article 360 carries a maximum penalty of 15 years imprisonment, Article 236 is a death-eligible crime. In contrast to Rape, EPUG actually acts as a *mian si pai* (death exemption card) available to the wealthy and powerful defendants.<sup>184</sup> On the other hand, the threshold of 5 years imprisonment of EPUG is higher than that of 3 years of Rape, which is an illogical and confusing policy.<sup>185</sup> Whether EPUG is an offence with less social harm comparing with Rape is much more confusing than their definitions. Ironically, if the "underage girl" gives her "consent" and receives payment, the sex offender may face heavier

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<sup>178</sup> See Wang, *supra* note 1, at 55.

<sup>179</sup> See FOREIGN AFF. BUREAU OF THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA, THE PEOPLE'S COURTS OF THE PEOPLE'S REPUBLIC OF CHINA 17-18 (1995).

<sup>180</sup> Niu & Wei, *supra* note 36, at 53-5.

<sup>181</sup> Zhang & Wu, *supra* note 61, at 47.

<sup>182</sup> An, *supra* note 60, at 95.

<sup>183</sup> See Niu & Wei, *supra* note 36, at 52.

<sup>184</sup> Chen, *supra* note 41, at 65-6.

<sup>185</sup> Liu, *supra* note 3, at 45.

punishment than in the situation when he rapes the girl without her “consent” and payment.<sup>186</sup> The use of these sanctions has been a major concern for EPUG.

### *Arguments in Favor of EPUG*

In response to considerable criticisms, proponents of EPUG argue that the primary justification for the offence is the principles of *nullem crimen sine lege* (“no crime without law”) and *nulla poena sine lege* (“no punishment without law”).<sup>187</sup> Only acts which are clearly defined as crimes by the law shall carry criminal responsibility.<sup>188</sup> This is particularly significant in light of the fact that the act of EPUG is different from rape.<sup>189</sup> Although underage girl prostitutes, like other underage girls, do not have the necessary capacity *de jure* to make decisions regarding sexual activity, they do have cognitive and express ability *de facto*.<sup>190</sup> In addition, there does exist distinction of degree of harm between EPUG and rape.<sup>191</sup> As China is moving much closer to rule of law, it is suggested that “punishment must fit the crime”.<sup>192</sup> In accordance with taking “facts as grounds” and taking “law as standards”, appropriate punishment should be given to those found guilty.<sup>193</sup> EPUG truly represents progression towards the adoption of the rule of law in China.<sup>194</sup>

In the recent past, the practice of having sexual intercourse with a virgin has formed a part of “fashion” in some places in China

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<sup>186</sup> Peng, *supra* note 2, at 154.

<sup>187</sup> Xu, *supra* note 86, at 11.

<sup>188</sup> Article 3 of the Criminal Law provides: “For acts that are explicitly defined as criminal acts in law, the offenders shall be convicted and punished in accordance with law; otherwise, they shall not be convicted or punished.” See Article 3 of the Criminal Law, *supra* note 30.

<sup>189</sup> Niu & Wei, *supra* note 36, at 53-5.

<sup>190</sup> *Id.* at 54.

<sup>191</sup> Liu Yanmei & Xu Hong, Piasuyounvzui Zhong Younu Gainian Yanjiu (嫖宿幼女罪中“幼女”概念研究) [*Definition of “Young Girls” in the Young Girl Engaging in Prostitution Crime*], 5 ZHONGGUO XINGKEXUE (中国性科学) [THE CHINESE JOURNAL OF HUMAN SEXUALITY] 61, 63 (2012).

<sup>192</sup> Luo, *supra* note 24, at 9.

<sup>193</sup> Article 6 of Criminal Procedure Law provides: “In conducting criminal proceedings, the People’s Courts, the People’s Procuratorates and the public security organs must rely on the masses, base themselves on facts and take law as the criterion. The law applies equally to all citizens and no privilege whatsoever is permissible before law.”

<sup>194</sup> Niu & Wei, *supra* note 36, at 51.

and even become a way to entertain guests.<sup>195</sup> Thus, attention is given to young girl prostitution. There seemed to be no specific offence for protecting young girl prostitutes from sexual exploitation.<sup>196</sup> The status and protection of underage girls would be advanced significantly if the practice were to be outlawed.<sup>197</sup> For many in China, however, EPUG is a clear reflection of the government's concern for the seriousness and frequency of the crime.<sup>198</sup> It reflects the trend of accurate definition of crimes in China's criminal legal system.<sup>199</sup> What is required here is not generality, but certainty and predictability, though somewhat problematic.<sup>200</sup> Therefore, it is inappropriate to introduce such a change as abolition of the crime at such a time.<sup>201</sup>

To deal with the criticism over the similarity between EPUG and Rape, there is no denying that the two crimes may overlap.<sup>202</sup> This is not to say, however, that abolishment of the former is the best way to address the issue.<sup>203</sup> On the contrary, it only represents a fairly simplistic view of the matter.<sup>204</sup> As a general guideline, an approach has been adopted when offenses overlap. Determining which offense applies is first to consider any special provisions that are contained in the Criminal Law.<sup>205</sup> Conviction should depend upon the specifics of the case. This may, for example, relate to specific subjects, specific physical locations or specific time.<sup>206</sup> Then, the offense with the heavier penalty should be preferred.<sup>207</sup> From a practical perspective, those who are found guilty of EPUG

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<sup>195</sup> Liu E, Cong Xishuan Tanxi Piaosuyounvzui (从习水案探析嫖宿幼女罪) [*Study of the Crime of Engaging in Prostitution with Girls under 14 based on Xishui Case*], 1 YUNNAN DAXUE XUEBAO (云南大学学报(法学版)) [JOURNAL OF YUNNAN UNIVERSITY (LAW EDITION)] 106, 108 (2010).

<sup>196</sup> See Liu & Xu, *supra* note 131.

<sup>197</sup> See Liu, *supra* note 135.

<sup>198</sup> See Liu, *supra* note 135, at 109.

<sup>199</sup> See Mei, *supra* note 5, at 55.

<sup>200</sup> See Liu & Xu, *supra* note 131, at 62-63.

<sup>201</sup> See Niu & Wei, *supra* note 36, at 51.

<sup>202</sup> See Tong, *supra* note 95, at 134.

<sup>203</sup> See Ye Zhusheng, Feichu "Piaosuyounvzui": Cuowei de Jiaolv (废除“嫖宿幼女罪”：错位的焦虑) [Abolishment of the Crime of Engaging in Prostitution with underage Girls: Anxiety of Misunderstanding], 14 NANFENGCHUANG (南风窗) [SOUTH REVIEWS] 30, 32 (2012).

<sup>204</sup> *Id.*

<sup>205</sup> See Tong, *supra* note 95, at 135.

<sup>206</sup> See Zhang, *supra* note 38, at 9-11.

<sup>207</sup> *Id.* at 12.

face a minimum imprisonment of five years and a fine, while the state only imposes a prison sentence of not less than three years on rape offenders. It is important to emphasize that, contrary to popular belief, the penalty of EPUG is heavier than that of Rape in terms of the threshold of the punishment.<sup>208</sup> When the death penalty is at issue, it must be remembered that it is a radical effort for EPUG, which signifies the thought in favor of harsh punishment and runs counter to China's criminal policy "to execute fewer and execute more cautiously".<sup>209</sup>

In China, no category of cases is more highly charged or receives more public scrutiny than capital cases. Conventional wisdom holds that the Chinese public remains firmly behind the death penalty.<sup>210</sup> As a potent weapon in the government's response to crime, it has been a consistent component of China's criminal justice system.<sup>211</sup> To combat the act of EPUG, however, public perceptions are being fueled by inaccurate and semi-accurate information, especially regarding the use of death penalty.<sup>212</sup> The approach reflects the current thinking that tougher law enforcement best serves children. Thus, the persistent belief is that capital punishment must be the most effective approach for child protection.<sup>213</sup> Attempts to prosecute sex offenders, specifically with respect to the death penalty, have become so pervasive that it has become difficult to imagine other ways to protect underage girls.<sup>214</sup> This remains somewhat misguided.<sup>215</sup> The existence of strong laws does not signify that the laws are effective in preventing underage

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<sup>208</sup> See Ye, *supra* note 143, at 31.

<sup>209</sup> See Li Wenyong & Li Yajing, *Piaosuyounvzui Baoliulun* (嫖宿幼女罪保留论) [On the Reservation of the Crime of *Engaging in Prostitution* with a Girl under the Age of 14], 1 *ZHISHI JINGJI* (知识经济) [KNOWLEDGE ECONOMY] 41, 42 (2011).

<sup>210</sup> See Yu Xiaodong, *More Than a Legal Issue*, NEWS CHINA, Nov. 2010, at 26-27 ("Public opinion contrasts sharply with that of experts, with overwhelming support for the death penalty. . . . A more recent online survey conducted by *sina.com.cn* in late August [2010], after the proposed amendment was announced, found that 92.9 percent of 14,891 respondents were against the abolition of the death penalty for all non-violent economic crimes.").

<sup>211</sup> See generally Lu Hong & Terance D. Miethe, *CHINA'S DEATH PENALTY: HISTORY, LAW, AND CONTEMPORARY PRACTICES* (2007) (providing a legal, historical, and comparative overview of the death penalty in China).

<sup>212</sup> Ye, *supra* note 143, at 31.

<sup>213</sup> Liu & Xu, *supra* note 131, at 63.

<sup>214</sup> Ye, *supra* note 143, at 30.

<sup>215</sup> *Id.* at 31.

girl prostitution.<sup>216</sup> The death penalty can have important consequences. Lawmakers are somewhat more cautious about the long-term effects of capital punishment and retain the death penalty only for severe crimes, for example, serious crimes involving violence or large amounts of money.<sup>217</sup> In Chinese culture, the common idiom “ren ming guan tian” (human life and death is a matter that concerns the heavens) expresses that a case involving human life is to be treated with the utmost care.<sup>218</sup> In accordance with the principle “to execute fewer and execute more cautiously,” the Eighth Amendment, which took effect in May 2011, decreased the number of death-eligible crimes despite potential criticisms.<sup>219</sup>

### ABOLITION OF EPUG

Underage girl prostitution is consequentially harmful to both young girls and society as a whole. It often results from poverty and organized crime. To understand the status quo, it is also necessary to become acquainted with the transformations of Chinese society. Agriculture is one of the mainstays of China’s economy. Chinese traditional values reflect the agricultural civilization of ancient China, built on an agrarian economy, which was centered around the patriarchal family and monarchy.<sup>220</sup> Since the late 1970s, with China’s economic reform and the introduction of market economy, the harmony between agricultural communities and

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<sup>216</sup> *Id.* at 32.

<sup>217</sup> Li & Li, *supra* note 149, at 42.

<sup>218</sup> See *Mainland China Clarifies That Evidence Obtained through Coerced Confessions Cannot Be the Basis of a Verdict*, IFENG.COM (May 30, 2010), [http://news.ifeng.com/mainland/detail\\_2010\\_05/30/1566576\\_0.shtml](http://news.ifeng.com/mainland/detail_2010_05/30/1566576_0.shtml) (noting continuing problems with the system for handling capital cases despite the 2007 reforms). See also *The Passing of the “Rules on the Examination and Evaluation of Evidence in Capital Cases” and “Rules on the Exclusion of Illegally Obtained Evidence in Criminal Cases”*, 148CHINA.COM (May 24, 2010), <http://www.148china.com/display.asp?id=1322> (Professor Fan Chongyi of China University of Political Science and Law explaining in an interview that capital cases were singled out in the new evidence rules because they are important, complex, and sensitive).

<sup>219</sup> *Promulgated Pursuant to Authorization: People’s Republic of China Criminal Law Amendment Act (No. 8)*, [XINHUA NET] (Feb. 25, 2011), [http://news.xinhuanet.com/2011-02/25/c\\_121124346.htm](http://news.xinhuanet.com/2011-02/25/c_121124346.htm); Cao Li, *Moves to Cut Down Executions*, CHINA DAILY (July 24, 2010), [http://www.chinadaily.com.cn/china/2010-07/24/content\\_11044407.htm](http://www.chinadaily.com.cn/china/2010-07/24/content_11044407.htm).

<sup>220</sup> See Wang Luyu (王鲁豫), *Zhongguo Chuantong Falü Wenhua de Xingzhi Zhuyi Tezheng* (中国传统法律文化的刑治主义特征) [A Characteristic of Chinese Traditional Legal Culture: Focus on Criminal Sanction], 6 FAZHI YU SHEHUI (法制与社会) [LEGAL Sys.& Soc’y] 29 (2008).

traditional values has been broken. The worship of money has extended into all walks of life. On the other hand, some populations, especially those living in the rural areas, are experiencing economic marginalization. Some female children have been forced into prostitution to support themselves and their families because of the lack of opportunities in education and employment. Investigation revealed that many rural girls, often living near cities, formed the market for young girl prostitution.<sup>221</sup> Other girls with behavioral problems become vulnerable to being prostituted when there are sufficient markers of vulnerability present: social chaos and family breakdown.<sup>222</sup> The lifestyle of a sexually exploited young girl is far from romantic, as the girls face homelessness and lack a formal education.

Children need protection from the sexual exploitation. While it is clear that legal efforts are being made to combat the problem of young girl prostitution in China, it is hard to ascertain whether the offence of EPUG functions well regardless of increasing public concerns. The current child protection approach can never truly be “child-friendly,” as it has lost its focus on the child protection and the need for treatment and prevention. EPUG tends to be counter-productive. This may have something to do with China’s Confucian tradition, the purpose of which is to preserve harmony (social order) rather than to protect the rights of children. Those in favor of EPUG are not necessarily pro-child. Indeed, the very opposite of these trends may more adequately serve the needs of young girls. Young girls should be given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity. Unfortunately, the female child carries the stigma of prostitution into adulthood and frequently is unable to rehabilitate herself or to assimilate into society.<sup>223</sup> This is exactly what is happening. Drawing a distinction between EPUG and Rape of underage girls is not easy, and not necessary. The problem of the artificial distinction between underage girls and underage girl

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<sup>221</sup> See Sun Xiaomei (孙晓梅), *Feichu Piaoosuyounvzui de Yanjiu Zongshu (废除嫖宿幼女罪的研究综述)* [Study on the Abolition of the Crime of Prostitution Involving Underage Girls], 3 *ZHONGHUA NÜZI XUEYUAN XUEBAO (中华女子学院学报)* [JOURNAL OF CHINA WOMEN’S UNIVERSITY] 23, 27 (2013)

<sup>222</sup> Chen, *supra* note 41, at 67.

<sup>223</sup> Special Rapporteur on the sale of children, child prostitution and child pornography, *Rights of the Child*, Comm’n on Human Rights, U.N. Doc. E/CN.4/55, at 29 (Jan. 22, 1992) (by Vitit Muntarbhorn).

prostitutes is that it simply blurs the legal status of underage girls. Underage girls are underage girls. There is no need to create a hierarchy of them.<sup>224</sup> More importantly, this attitude can ultimately lead to the victimization of underage girls as it breaches the principle of best interest of children.<sup>225</sup> The government misallocates its resources toward investigation and prosecution instead of toward helping children. But the death penalty argument for EPUG is based on the incorrect perception that punishing sex offenders best serves children. A careful deliberation must be done regarding the balance between offender punishment and child protection. The Xishui case, arising under the guise of protection of underage girls, is significant because it increased public awareness and sensitivity about the problem. At a minimum, the current heated discussions indicate that the notion of the protection of children's rights has been put forward. Unearthing the worst would bring out the best. In articulating the shortcomings accompanying EPUG, we can envision ways in which China's sex crimes can be reformed.

In the context of examining China's international obligations, most would agree that child protection laws in China have not been developed with an eye to protecting human rights.<sup>226</sup> If the goal is to protect children, there should be, in most circumstances, a rights-based approach. To better tackle the problem, a general blueprint for reform would be to increase the child-centeredness of child protection efforts, whether culturally or legislatively, which may more effectively prevent sexual exploitation of underage girls and protect a greater number from harm. It seems that, especially given the rationale behind offender punishment—to protect children from abuse—the balance should weigh more heavily toward greater child protection. In any case, the pursuit of justice should be subordinate to concerns over the welfare of the child. Thus, I suggest that China focus on taking a victim-friendly approach and consider abolishing EPUG, with a view toward taking “underage girl prostitutes” out of hostile domestic settings. This approach, emphasizing the primary needs of the victim and making the process more child-friendly, both increases children's self-esteem, and protects the human rights of children.

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<sup>224</sup> An Ao (安翱), *supra* note 60, at 95.

<sup>225</sup> Zhao Hejuun (赵合俊), *supra* note 72, at 6.

<sup>226</sup> Sun Xiaomei (孙晓梅), *supra* note 240, at 25.

## CONCLUSION

China is in the early stages of addressing the problem of child sexual exploitation. It must make changes to its sexual assault crimes against children. Yet, this does not mean that there exists a cure-all solution. It is believed that the problem will only be solved when “root causes” are addressed by the state in which the reform is taking place. Until the government takes a more active role, however, it does not seem possible that awareness of the problem of child protection in the prosecution of child sexual exploitation will be raised in China. For it is not only China’s laws that must be restructured to accommodate a new concept of children’s rights set forth by the CRC, but also its cultural attitudes. There are recommendations regarding the effective implementation of international instruments and treaties, such as giving special focus to assessing China’s compliance with the CRC as well as reviewing and commenting on proposed legislation from a child protection perspective. However, it may not be achieved until children are understood as rights bearers within the family as well as in society. Surely, adopting a child-centered protection system and making it more victim-friendly are not without legal obstacles. An effective solution to the problem remains elusive and it will only be known with the passage of time.