

Sex and the Law

During the late imperial era, the only type of sexual intercourse that the state recognized as legitimate was that between a husband and wife (or concubine). All other sexual relations between men and women were defined as “illicit sex.” What was illicit sex? The courts defined it as “intercourse without morality,” in which “morality” implied the ritual sanctity of marriage. In theory, then, sexual activity undertaken by any unmarried man or woman was grounds for prosecution. In reality, however, such cases were only brought to the magistrate’s attention when the male stewards of a sexually active female felt that the wrong done unto—or by—the woman in question had somehow negatively impacted their family’s name and resources. The state saw itself as a champion of the sanctity and perpetuation of the male lineage lines and gender hierarchies that placed men in a position of superiority over women. This lesson will examine four aspects of the late imperial state’s involvement with the regulation of sex: rape, sodomy, widowhood, and prostitution.

Rape

Late imperial jurists were not interested in protecting the individual rights of women or their bodily freedom. Indeed, such ideas would have been abhorrent to them, as they would have been to jurists in nearly every other settled and stratified society elsewhere in Eurasia at this time. To them, rape meant the pollution of another man’s descent line, damage to the reputation of the patriarchal clan, and diminishment of a key social and economic asset common to every family: the chastity of their wives and daughters. There was no single law on the books that was capable of being applied to all cases of rape. Instead, it largely depended upon the degree to which a female victim was believed to have been chaste prior to the alleged assault. A woman who could prove her sexual purity and chastity prior to an assault of rape would warrant a far more severe penalty for her rapist in the event that he was convicted. Conversely, a woman who could not demonstrate these qualities would warrant a significantly reduced penalty for her attacker, if he was punished at all. The logic was clear: the magnitude of his crime was entirely commensurate with the degree of purity and chastity—and thus the value of the commodity claimed by her family—he had managed to sully. Rape of a chaste woman usually brought the death penalty (strangulation or beheading), even if the victim survived the assault. Rape of an unchaste woman—who had no chastity to protect—usually resulted only in beatings or possibly exile.

As a result, whenever an accusation of rape was brought before a magistrate’s court, the burden was on the female victim to prove both her lifelong chastity prior to the assault as well as her ferocious resistance to the attempted rape. Failure to convince the magistrate of both of these things was likely to result in exoneration or a reduced penalty for the rapist. How was chastity proven in court? In short, a woman had to show evidence that she had resisted the rape attempt in a continuous and violent fashion. A woman could not claim rape if it was determined that she had given her consent at any point during the assault, even if she retracted it later. The legal code thus contained language describing women who had “consented at first but later were coerced” and those who had “been initially coerced but later consented.” Both situations negated any accusation of rape: consent to engage in “illicit sex” at any point disqualified the entire act from being considered as rape. (For legal purposes, “consent” could signify anything from active

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enjoyment to terrified submission). A woman who gave her consent at any point, no matter the circumstances, was guilty of violating the sexual monopoly over her body that her husband—or future husband if not yet married—was legally allowed to claim.

The burden of proof was quite high for any woman who hoped to convict their attacker on charges of rape. Qing courts described it thus:

Illicit intercourse will be determined to have been consummated only if a weapon was used to threaten the woman, or because she was overpowered and tied up, so that even though she wished to struggle free she was unable to do so; it shall be further required that the woman cried out and cursed, and that she exhibit evidence such as torn clothing and broken skin. Only then shall the offender be sentenced to strangulation.

In the view of the courts, the object of the assault—her chastity—represented such a significant element of her identity as a “good woman” that she was expected to resist unto death when put to the test. Witnesses would need to be produced who could attest to having heard screams and a struggle throughout the assault. Without such witnesses, only severe bodily harm could be expected to convince a magistrate that a woman had truly resisted with all her might.

The crime of rape was really a crime against her husband or, if unmarried, her father. In fact, rape cases only went to court when a male relative submitted a petition on the woman’s behalf. Another way of saying this is that accusations of rape were only pursued when a man with vested interests in the social and economic capital that a woman represented to him felt that these assets had been damaged. What would a father or husband hope to achieve by taking the court to case? Other than punishment for the rapist and some form of exoneration for the family name, most men hoped that they could get some form of official recognition that the rape had not been as damaging to their family interests as once thought. Assuming the female victim had resisted—few men would take the trouble to defend a woman lacking any pretensions to chastity—the courts were expected to determine whether or not the rape had been “consummated.” This was relevant for two reasons: if the rape was determined to have been consummated (*cheng* 成), then the woman’s chastity—and her husband’s claim to her chastity—was sullied beyond repair. Even if she died during the assault, she was no longer eligible to be recognized posthumously as a “chaste martyr,” a designation so publicly commendable that it might have served as an acceptable substitute for the social and economic capital her family had lost through her death. Similarly, if she survived the assault but did not successfully prevent “consummation”—no matter how hard she resisted—the lineage line of her husband would be considered to have been irrevocably polluted, and her standing in it (both living and posthumous) would decrease enormously. The only way a woman who failed to prevent consummation during a rape attempt could hope salvage any of what remained of her chastity was to commit suicide afterward. In other words, no woman could be thought of as “respectable” if she allowed a man other than her husband to consummate sexual intercourse with her and she did not sacrifice her life either during the rape attempt or after. This is why all husbands and fathers who brought a rape case to court were hoping to procure a certified document from the court that the rapist had “not consummated” (*weicheng* 未成) the act, thus ensuring the preservation of their wife’s or daughter’s chastity—and by extension her future standing in both her natal and betrothed family. The courts did not provide such certification, however, without an extensive and

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precise examination process. What, after all, constituted consummation? According to legal documents taken from rape cases, “consummation” specifically referred to “penetration” of the female genitalia by the male genitalia. This was the only way for “pollution” of the male line and female chastity to take place, and it was irreversible if it was determined to have occurred. Ejaculation was not necessary, and penetration by any other body part or object did not suffice to fulfill the legal criteria (and yes, there are examples of such things in the case records). In order to make this determination, the court typically brought in a midwife, who would then make a physical examination of the woman’s body to determine whether or not “consummation” had taken place. The stakes were high for all parties concerned, and the opinion of the midwife could affect the fates of many different people for decades to come.

Sodomy

The late imperial state never prohibited or even discussed the phenomenon of homosexual intercourse among women, for the specific reason that no penetration by male genitalia—and thus no pollution of a male descent line—was possible. This was not the case for sex among men, however. What was at stake was not necessarily the “chastity” of a man, as that concept did not apply to men. Legislation against sodomy (which the Qing described as “chicken rape” [*jijian* 雞姦]) was more concerned with the upending of the gender hierarchy, the intense social stigma attached to a man who was believed to have lost his “masculinity” by having been penetrated by another man, and the larger reputation of the family to which he belonged. Sodomy legislation existed to protect the interests of a patriarchy that had been sullied by the realization that one of its men had been cast in the gendered role of a woman. Women were imagined to be passive vessels, the opposite of men. Thus the crime that was being committed in cases of sodomy was that a man had either compelled another man to assume the role of a woman, or that the penetrated man had allowed himself to be degraded to the status of a woman. This is evidenced by similar legislation that contained penalties for a cross-dressing man (*bu nan* 不男, literally “not being a man”). Prior to the Qing, there were no specific laws against sodomy; instead, such cases were prosecuted in accordance with the statute on “pouring foul material into the mouth of another person during a fight,” suggesting that public humiliation and bodily pollution were the chief transgressions taking place. Unlike in cases of heterosexual rape, no social stigma was attached to the male penetrator. He was simply assumed to be a sexually insatiable bully—similar to someone who starts a fight—and thus prone to taking advantage of men whenever women could not be found, humiliating them and attaching a social stigma to their family in the process. Though he might be subject to legal punishment, public knowledge of his status as a “penetrator of males” would not impede his ability to start a fully respectable traditional family with a future wife later on down the road. But for the penetrated man whose role as the recipient of homosexual activity was made public, it would be very difficult to assume the male privileges and duties of a traditional head of a household later on in life, and his relatives, too, would suffer by association with his “womanly status.” Therefore, to be capable of being raped was to be regarded as being *socially female*, the ultimate insult to notions of male masculinity. (In the salacious late Ming novel *Jinpingmei*, one of the characters experiences ultimate karmic retribution through the reversal of his sexual roles: whereas

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he begins as an eager penetrator of other men's wives, he ends the novel as a man who is unwillingly penetrated by another man).

It should not surprise us, then, to learn that many of the same standards and procedures were adopted for sodomy cases as for heterosexual rape. There was still an intense desire to determine whether or not “consummation” (i.e., penetration of the anus) had taken place, and a court-appointed forensic official was ordered to conduct the bodily examination in place of a midwife. The standards of prior “chastity” were also upheld, which in cases of sodomy simply denoted whether or not the penetrated man had “shamelessly” consented to be treated as a woman previously, or if this was his first time. Unlike in cases of heterosexual rape, however, both the male penetrator and penetrated would be punished when all was said and done: the penetrator in severe fashion for being the aggressor, but also the penetrated (in less severe fashion, perhaps a beating) for having “consented to be penetrated”—i.e., consented to be treated as a woman, with all the attendant implications of public humiliation and loss of face for his immediate and extended family. Like a female victim, he would need to show extensive evidence of violent and continuous resistance in order to convince the court that he had not consented to be treated as a woman. Death was in the offing for a male penetrator who succeeded in “consummation,” while beatings or exile were likely for those who did not realize consummation.

By and large, however, most sodomy legislation was concerned with accusations of rape between two men of vastly different ages, with the younger man usually being a boy. The magistrate was always skeptical of grown men claiming rape by other grown men. The apparent belief was that any adult male would have had the wherewithal to resist a homosexual attacker if he so desired, and that the completion of the act itself must have signified consent at some point. More often than not, the court assumed in such cases that accusations of rape materializing between two grown men were probably false pretexts with which to get another man in trouble with the law, likely owing to some other, unrelated enmity. This was especially the case when only one of the men survived the encounter; accusations that a dead man was actually an aggressive homosexual rapist who was killed in self-defense were rarely given credence. As a result, most rape victims who found justice in the courts were described in legal documents as the “sons or younger brothers” of their senior male relatives, who pursued cases on their behalf for the same motivations of patriarchal self-interest as they pursued accusations of rape against their wives and daughters. From the magistrate's perspective, the most believable cases of homosexual rape occurred when the victim was a prepubescent boy who was fifteen to twenty years younger than his attacker. This lent substance to the idea that the boy would have been unable physically to resist his adult rapist.

Chaste Widows

During the late imperial era, there were only two types of women who had the legal right to refuse to marry: chaste widows (*jiefu* 節婦) and Daoist or Buddhist clergy. No other woman had the right to refuse the marriage that the men around her had arranged for her. Our focus here is on the chaste widow, who wielded more independence and authority in her day and age than most women could ever hope to aspire. To be a chaste widow, first your husband had to die. After he dies, it is essential that he left you

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some amount of financial resources or property. If he died destitute or just barely at the subsistence level, the vast majority of widows would have no choice but to remarry almost immediately. They had to pay for their dead husband's coffin, settle any debts he may have had, and feed both themselves and their kids. To do any of these three things, a new widow would have to remarry and tap into the financial resources of her new husband and his family. However, if her dead husband had left her some property or savings, she could choose to aspire to chaste widowhood. The Qing state granted chaste widows the strongest rights to property and inheritance of any women, but these rights depended upon her continued devotion and chastity to her dead husband. The state still considered her to have a husband—he just happened to be dead. Thus she was still legally capable of committing adultery against him and his line of descent. To maintain her enviable legal status as a chaste widow, she would need to forswear sexual relations with any other man for the rest of her life.

A lot was at stake here. The reason is because the late imperial state stipulated that every family's inheritance was to be split equally among all sons. Thus whenever a husband died, there was a good chance that he had any number of surviving brothers who looked at his portion of the inheritance as something that should belong rightfully to them—and not to their newly widowed sister-in-law. But so long as she continued to defend her dead husband's sexual monopoly over her body, the state considered her a chaste widow and thus legally fit to inherit his money and property, and to continue to look after her—more properly *his*—kids. However, two things could endanger her newfound financial independence and social autonomy: adultery or remarriage, either one of which would be a violation of her dead husband's claim on her. It was therefore a common occurrence in case records for in-laws to try and pressure a widowed sister-in-law to remarry, in hopes of gaining legal claim to her dead husband's assets. If she refused to remarry, however, it was still possible to discredit her if she was found to have engaged in "illicit sex" with another man. The most common scenario seen in Qing legal documents is as follows. A widow is left with some property, which she cannot look after entirely on her own. So she hires one or more male laborers to look after her fields and property. Sometimes a sexual relationship would develop with one of these men. If her in-laws learned of it, they could bring suit against her in court as an "adulteress" (in relation to her dead husband). In order to ensure success in court, they would usually wait until the illicit sexual relations had commenced, then burst inside, tie her up naked, and take her immediately to the yamen. Once a widow was convicted of having committed adultery against her dead husband, she lost all claim not only to his assets, but also to her own children, who would be placed under the care of a senior male relative among her in-laws. As for the newly branded "adulteress," her in-laws could now sell her off at a bargain bride price to any man willing to marry such an "unrespectable" woman. A few of the legal cases uncovered also show that some in-laws had little compunction about trying to manufacture accusations of illicit sex against their widowed sister-in-law, in a bald attempt to get at her dead husband's assets. In judging whether a sexual encounter had actually taken place, the same standards from rape and sodomy cases would be utilized.

In the end, the courts would back whichever side of the dispute (widow or in-laws) that had managed to make the most convincing case that they represented the best interests of the dead husband. This was determined through her moral character, which,

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for a widow, meant the degree to which she remained chaste and devoted to her departed husband, and, by extension, to his lineage as represented by his children. If she was determined to have failed the moral criteria for wives—devotion to her husband’s lineage—she would be kicked out of the lineage, denied access to its financial resources, and live to see her kids placed in the custody of a “responsible” male relative drawn from among her in-laws. If, however, she could live up to the moral expectations of a chaste widow, she could enjoy the largest degree of financial and social autonomy afforded to any woman during the late imperial era.

Prostitution

Prior to the Qing, there was no clear legal stipulation as to whether prostitution—defined broadly—was illegal or not. It mattered greatly who was selling sexual services to whom. Officials and other elites could be prosecuted both for selling sexual services or patronizing sexual services. Free commoners could be prosecuted for selling their own bodies, but they were free to patronize the bodies of lower status groups. The only people who were legally permitted to sell sexual access to their bodies were degraded status groups who bore clear social stigmas. These included musicians, actors, and pretty much anyone in the entertainment business. Most commoners could openly and legally purchase the sexual services of such people. Members of the political and social elite could only do so if they later took the effort to purchase their bond price from whomever employed them, and then went to the considerable trouble and legal expense of expunging their degraded status from government records. Not only that, they would then be required to take such newly transformed prostitutes as a concubine.

Prostitutes were thus a debased caste, whose bodies were regarded as long since polluted. (Men who patronized them, however, were not polluted by sexual contact. The issue with officials or other elites patronizing them was not pollution by a lower class, but rather conduct regarded as unseemly for their elevated status—i.e., fraternizing with debased peoples). The selling of sexual services by anyone else in society was regarded as illicit sex and punished as a form of adultery, rape, or pimping one’s wife. The only other type of sexual intercourse not regarded as illicit was when a member of the landed gentry had sex with a female servant in his household. This was described as “favoring” her (*xing* 幸) with his attentions. However, even this carried complications. After “favoring” a female servant with his sexual attentions, Qing law required such men either to raise her to the status of a concubine or find her a husband among her own economic class. The ideal was clear: all women should be wives, and all sex should take place within marriage.

Prior to the Qing, there was nothing illegal about prostitution per se, so long as it was practiced and patronized by the right people. Practiced by the wrong people—usually destitute commoners—it carried heavy legal consequences. The most common scenarios involved either a destitute family selling the sexual services of a wife and/or daughter in an attempt to stave off economic ruin or hunger, or a husband tacitly consenting to an affair between another man and his wife in exchange for goods or services. The fact that money changed hands was the least objectionable part of the act (unlike today, when the exchange of money is often viewed by courts as the *only* objectionable part of the transaction). From the state’s perspective, it was the damage done to notions of male and

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female morality—and the viability of the Confucian family unit—that was more important. A man who consented in any way, shape, or form to the selling of his wife’s sexual services would most likely be forcibly divorced from his wife by the state. If he sold his daughter’s sexual services, however, he would likely only be beaten, since the state did not believe it had the right to break “Heaven-made bonds.”

In 1723, the Yongzheng emperor officially banned prostitution throughout the empire. From then on, it was technically illegal no matter who practiced it. Events on the ground, however, took little notice of this regulation, and prostitution continued the same as before, and often by similarly stigmatized and destitute social groups. County magistrates, aware that they did not have the resources to stamp out all prostitution in their jurisdictions, did their best to avoid having to confront the issue in the first place. Few magistrates actively sought out prostitution rings or asked probing questions. Yamen runners were usually bought off or otherwise bribed to keep their silence, and brothels would advertise their business as something else. If a magistrate somehow learned that prostitution was taking place within his district, he was obliged to at least make an appearance of shutting it down. In other words, since he is not allowed to tolerate sex work when he learns of it, he would rather not learn of it at all, since he knows he cannot stamp it out entirely. The following quote, from the late nineteenth century, sums up the situation nicely:

Successive reigns have found it impossible to stamp out prostitution, in spite of the strict laws for that purpose; so it would seem that we can do without such laws. If we look at the facts, has it been possible to eliminate even one percent of prostitution? The only result of prohibition has been to create new opportunities for local thugs and yamen clerks and runners to collect protection money. Moreover, even when we punish prostitutes and actors [i.e., male homosexual prostitutes] with the bamboo and the cangue, can we really make them “change their occupations to those proper to commoners”? On the contrary, they just go on being prostitutes and actors, as before.

When forced to take action, however—usually as a result of runaway prostitutes sold into sexual slavery in other jurisdictions—he would shut down token establishments, arrest token ringleaders, and relocate all known prostitutes to the yamen itself. Once there, he was obliged transform these debased women into respectable wives. His method for doing so was to hold a sort of human flesh auction, in which the highest bidder could purchase these prostitutes as their new wife. The prostitutes had no veto power over whose wife they might become. The only criteria was that the man outbid all other men and that he compensate the yamen for lodging expenses incurred on her behalf.

***Note:** The above commentary was written by Prof. Jacobs on the basis of data and analyses put forth in two groundbreaking books authored by Matthew H. Sommer, professor of Chinese history at Stanford University and the world’s foremost historian of sex, gender, and Chinese law. If you are interested in learning more about these topics, you are encouraged to read his work:*

1. Matthew Sommer, *Sex, Law, and Society in Late Imperial China* (Stanford, 2002)
2. Matthew Sommer, *Polyandry and Wife-Selling in Qing Dynasty China: Survival Strategies and Judicial Interventions* (California, 2015)