

# On Adultery From Comparative Perspective

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## Abstract

What is adultery? The definition in Big Dictionary of Chinese is that men and women who are not the couple, in the case of one or both have spouses, have sexual behavior willfully with each other. It shows that adultery is an extramarital sex. In Chinese legal system, neither the Criminal Law nor any other norms of crime explicitly defines adultery as a crime. In Rules of Disciplinary Action of the Communist Party of China, adultery is defined as a serious violation of socialist morality.

## Keywords

Adultery, Comparison, Incrimination.

## 1. The Basic Definition of Adultery

What is adultery? The definition in *Big Dictionary of Chinese* is that men and women who are not the couple, in the case of one or both have spouses, have sexual behavior willfully with each other. It shows that adultery is an extramarital sex. In Chinese legal system, neither the *Criminal Law* nor any other norms of crime explicitly defines adultery as a crime. In *Rules of Disciplinary Action of the Communist Party of China*, adultery is defined as a serious violation of socialist morality.

## 2. The Comparative Study of Adultery

### 2.1 The longitudinal Comparison- A Historical Investigation of the Crime of Adultery in China.

The earliest origin of the social system was the marriage system, with the marriage system there was also adultery to violate the marriage system. The characteristic of adultery was sexual intercourse. Therefore, adultery also called fornication. The ancient laws of the past all defined adultery as a crime. The earliest one about adultery was found in *Shang shu*: "If men and women have a promiscuous sexual behavior, they will be executed by the castration." Castration as a criminal penalty, it was more painful than death penalty. Qin Dynasty, it had already instituted the relevant provisions of the sentence of punishment, *Shih Chi-Biography of Emperor Qin* wrote: "If a woman with children get marry with another man, this behavior will mean she betray her husband. To separate inside and outside prevention, prohibition of debauchery, couple should chastity and integrity. If Husband is found fornicating with other women, killing him will be not a crime, men should obey the rules. If wife escapes to get marry with other men, children won't call her mother. These rules can help rectify customs and honest."<sup>[1]</sup> In this code, the fornicator could be killed without the law, so lynch was also legitimate. Han Dynasty's law was same with Qin Dynasty's law, the fornicator must be killed. According to *Zhangjiashu Bamboo Slips* from the tombs of the Han Dynasty, it recorded that "all the men who fornicate with women, they will be punished by repairing the Great Wall, the women will be punished by pounding rice in the mortar. If an officer commits adultery, he can be convicted of rape." In the early Han Dynasty, Wen and Jing period, the law added a more gentle corporal punishment that was the castration. During Tang Dynasty, the feudal legal system developed to its highest peak in the

history of our country, and changed from a serious crime to a misdemeanor on the adultery. This had to be regarded as a huge leap in the history of the legal civilization. *Tang Law* provided that ordinary people committed adultery, he would be in prison for a year and a half, slaves fornicated with common people who would be in prison for two and a half years, people fornicated with relatives would be in prison for three years until hanged, the misdemeanor finally became grave crime. Although the society of Tang Dynasty was relatively open, the punishment of the adultery of officials did not relax at all. *The Tang Law Explanation* recorded: "Adulterers, both man and woman must be in prison for a year and a half." People can arrested and sent them the official government, the resisters would be killed. To the officials fornicated with women in him area, this phenomenon called "supervisor's adultery" by the law. "The supervisor's chief fornicate with women in his area, he will get double punishment." It meant that the officials who committed the crime of adultery within their own jurisdiction were given more harsh punishment. Besides, they would be demoted [2]. By the Song Dynasty, adultery basically continued the provisions of the Tang Dynasty law. In the Yuan Dynasty, the emperor again allowed to use lynch, husband could not only catch his wife with another man, but also kill adulterers on the spot. In addition, there were some new supplementary provisions, such as *History of the Yuan Dynasty*, Vol. 103, *The Criminal Annals* recorded: "All adulteries will be caned 87 times". And when a woman was caned, in order to humiliate her, they would strip her off and hit her. In other words, the penalty for passive women was heavier than men. In the Ming Dynasty, Zhu Yuanzhang continued to follow the law of the Yuan Dynasty, but beyond that, he allowed husband to arrest and kill adulteries on the spot [3]. The punishment was that: "the woman who has no husband is caned 80 times, if she has, she will be caned 90 times." Beyond that, "The woman who is punished needs to take off all clothes. By Qing Dynasty, this law was continued to execute.

In 1911, Article 289 of *Interim New Criminal Law* was promulgated after the Revolution of 1911, it referred crime of adultery: "Person who fornicates with married woman is sentenced to fixed-term imprisonment of not more than four years or criminal detention. The woman is same with the man." This law tactfully used the principle of statutory guilty to stipulate that unmarried women can't apply for adultery. In 1928, *Criminal Law* made a new provision: "Person who fornicates with married woman is sentenced to fixed-term imprisonment of not more than two years. The woman is same with the man." we can find that the punishment for this crime has been reduced by half. Until January 1, 1936, *Criminal Law* promulgated a reciprocal punishment on crime of adultery: "Spouses who fornicates with other person are punished by imprisonment of not more than one year. The adulterer is punished, too." Now Taiwan follows the provisions of this *Criminal Law* of the Republic of China.

There wasn't crime of adultery in the new China's *Criminal Law*. At that time, there was a big debate about whether adultery was convicted. When adjudicatory committee of bill scrutinized the draft criminal law, members such as Shao Lizi insisted on adultery. Peng Zhen made it clear that the crime of adultery could not be generalized in the law. On the one hand, it didn't work effectively, on the other hand, it was easy to bring about other social problems. Subsequently, after many studies, the law convicted bigamy and the crime of destruction of military marriage without a general rule of adultery. While it was not a crime under normal circumstances in the China's *Criminal Law*, adultery could be a crime under certain circumstances (bigamy and the crime of destruction of military marriage).

From the attitude of Chinese law on adultery, we summarized the following characteristics: Firstly, in most historical period the law stipulated adultery as a serious crime accompanied by severe penalties. Few feudal dynasties recognized the legal validity of lynching, the conditional admission of the legitimacy of lynx indicated that the ruler undoubtedly chose to maintain ethics between ethics and legal order. This choice for China with Confucian moral system was a matter of course. And we had to admit that we had a profound historical and cultural foundation for punishing adulterers in our country. Secondly, when both men and women also committed adultery, the punishment for the woman was obviously more heavily than the man. This kind of Confucian ethics maintained the abnormality of the female chastity and actually reflected a great discrimination for women in the ancient Chinese

patriarchal caste society. The feudal legal system whose core was the ethics and morality would inevitably embody such unequal treatment of women. Finally, as the time went on, the development of human civilization was higher, the penalty was less serious. This seemed to be a regular pattern of the development of human civilization. Whether adultery was certified a crime or not and the severity of punishment could reflect country's development of the legal civilization. However, this wasn't absolutely correct. From the perspective of Chinese history, we found that during all the historical periods people regarded adultery as a crime with strict punishment. Except for the Tang Dynasty, people reduced adultery to misdemeanor and reduced penalty for it. In the contemporary era, the protection of human rights has become the basic idea of the constitutions of all countries. Under the background that most countries in the west have removed adultery from criminal offenses in criminal law, the government of the Republic of China, out of awe of traditional ethics, remained adultery as a crime in the *Criminal Law of the Republic of China* and has been used until now.

These historical investigation of the crime of adultery shows that it is inevitable that the specific provisions of the criminal law of a country will be affected by the unique historical and cultural traditions of the country and the realistic social environment. It is not inevitable that the abolition or retention of adultery has a relationship with the civilization of the rule of law in the country. It is hard to say that the crime of adultery, excluding corporal punishment and unequal treatment of men and women, is a regression of the rule of law civilization. At the same time, adultery is recognized as crime don't violate our country's constitution.

## 2.2 The Horizontal Comparison - the Historical Investigation of Adultery in the West.

Ancient foreign law not only instituted harsh sentences on adultery, but also asserted husband's rights openly, so the legal status of men and women was unequal. The concept of adultery had had in the criminal law of ancient Babylon. The ancient Hebrew's *Moses Code* stipulated that adultery would be hanged, and those who had fornicated with married women or kinsfolk would suffer more heavier punishment, such as stone or criminal punishment. Ancient India's *The Laws of Manu* stipulated: "Married women who commit adultery are sentenced by a few dogs to bite them in public." The early Roman law provided that if the wife fornicated with other men, her or husband's father could judge and sentence her death or exile. The husband could also kill the wife on the spot. Later, the *Yulia Law of Adultery* amended: "when the wife fornicated with other person, she will be exiled by the courts, citizen in Rome can prosecute this adultery." In the middle Ages, especially in the 11th and 12th centuries, the pre-Reformation Church Law (also called *Ecclesiastical Law*) used the Christian doctrine as its basic doctrine. The article emphasized the permanent union of monogamy as the will of God and the prohibition of divorce, otherwise it was a crime and blasphemy. It also stipulated people committed the crime of adultery, incest and fornication should be punished by cruel corporal punishment.

*Criminal Code* in The early bourgeois still criminalized adultery. In 1810, the *Public Administration & Law* stipulated that a wife adulterer should be sentenced to imprisonment of not less than three months but not more than two years, the husband who fornicated with other women in the home should pay a fine of one to two thousand francs. Crime was handled with complaint meant that the victim's husband or wife could prosecute. Besides, it should be forgiveness when husband who caught the wife and other man at home intentionally killed them. Article 172 of the German Penal Code of 1871 stated: "When a divorce occurs on the basis of adultery, Spouses and adultery are sentenced to light punishment of less than six months." Article 183 of the Japanese Penal Code of 1907 provided that when a married woman was punished for adultery, she would be punished under two years with the same punishment as her adulterer. The crime should be sued by the husband himself. But when her husband connived at his wife to commit adultery, his prosecution was ineffective. In recent decades, the laws of capitalist countries have repealed the provisions of adultery. Adultery was the legal justification for divorce because it violated the obligation of virginity between husband and wife. [4] However, there were still a certain number of countries that have kept adultery provisions for their own

reasons. For example, the French Criminal Code of 1994 stipulated: "Sexual offenses other than rape are punishable by five years of imprisonment and a fine of 500,000 francs, of which mainly refers to adultery." Article 516 of the Federal Penal Code of 1910 stated: "Anyone who commits adultery is to be sentenced to up to three years' imprisonment. Married women fornicate with unmarried men, both men and women commit crime of adultery. Married men fornicate with unmarried women, men commit crime of adultery." Article 560 of the Italian Criminal Code of 1968 not only stipulated for adultery but also stipulated for the husband's crime of keeping a concubine. In the Spanish Penal Code of 1971, there was a chapter on adultery which stipulated in detail that both men and women should be sentenced to short imprisonment of six months to six years. Section 304 of the former Romanian Penal Code stated: "Married persons are imprisoned for one to six months." In addition, in many states like India and Cambodia, as well as most Islamic countries and the United States, adultery was identified as a criminal act.

Through the above analysis of the history of adultery in Western countries, adultery has been criminalized and accompanied by severe penalties over a very long period of history in the West. By the time of the Protestant Reformation and the Renaissance, along with the Bourgeoisie Enlightenment and the appearance of democracy, the rule of law and human rights, the principle of prohibiting extramarital sex was only shaken. But even so, Western countries, such as the United States and Italy, who regarded liberty and human rights as their criterion, and especially those with a deep tradition of Christian faith, up to now still criminalized adultery. Christian taboos, similar to Chinese Confucian ethics, have become the firm ethical foundation of adultery. There was an inherent coherence in universal values, such as freedom, democracy, human rights, human dignity and the protected ethical order by the adultery.

### **3. The Social Harmfulness of Adultery in Our Country and Analysis of Incrimination**

#### **3.1 Analysis of the Social Harmfulness of Adultery**

The social harmfulness that should be punished by the penalty was the essential feature that some kind of behavior constituted a crime. The social harmfulness of adultery mainly manifested in the following several aspects:

Firstly, adultery has seriously damaged family ethics. Family is the basic cell of society. The stability of family is the basic condition of social stability. The obligation of loyalty is obeyed by husband and wife, it is the basic ethical requirement of family survival and stability. Adultery directly breaks the ethical basis of the marriage and family system and is the greatest harm to the monogamous modern family pattern. Statistics show that currently 40% to 50% of divorce cases in our country are caused by the involvement of a third party. At the same time, the phenomena such as "find a sugar daddy", "concubine," "have a concubine", illicitly cohabitation and extramarital affair have been increasing year by year and spreading continuously in many cities in China.

Secondly, a large number of adultery greatly corrupted social atmosphere. If adultery could not be effectively suppressed or even greatly appreciated, it would gradually collapse the entire social moral system. Some decades ago, people were afraid to talk about adultery. At that time, even if there was no legal constraint on adultery, the parties could not afford the negative pressure of public opinion. Today, we do not know what thoughts have distorted people's minds, "have a concubine" become a phenomenon to show off their ability. And more people blatantly proclaim that they want to be a concubine, take away others' wives or husbands. These people have no sense of shame at all. Many people worry that the current level of social morality is one of the worst periods of Chinese civilization in 5000 years. Many people's moral decay is not terrible. The fear is that more people are not ashamed with it. In turn, they pursue "true love," "sexual liberation," and "sexual freedom" as reasons to achieve their purpose.

Thirdly, adultery has produced a series of very serious social problems. Thinking realistically, the social problems such as intentional injury, killing people, setting fire, family breakdown, economic disputes, emotional disputes and official corruption are caused by the spread of adultery. These problems are inevitably placed in our society to be solved. Nowadays, there are numerous reports of various vicious criminal cases caused by adultery. Such criminal cases are often reported in the form of murder, disfigurement, violence and even "family extermination." Adultery is often the real reason to cause these vicious criminal case in society.

Fourthly, since the 18th National Congress of the Communist Party of China, adultery has suddenly become the standard of officials who have been dismissed from their posts. And the frequency is faster and faster, from provincial officials to the development zone directors, they commit the crime of adultery. According to a study by the Renmin University of China's Crisis Management Research Center, 95% of corrupt officials maintain illicit sexual relations, which are generally based on the provision of money, of which 60% keep mistresses. The principle of "deal between power and sex" in the officialdom has become the well-known "unspoken rules". The current social moral decline is inextricably linked with adultery. In addition, the adultery of corrupt officials has gone beyond the realm of personal life. In most cases, adultery has caused serious damage to the public interest. Many women have the privilege of upgrading their positions, contracting projects and running businesses by the principle of "deal between power and sex". This shows that apart from having a bad influence on society, corruption caused by officials' adultery has become a political and legal issue that has developed to the point where it is imperative to resort to legal means to contain it.

### 3.2 Analysis of Adultery Incrimination

Whether a behavior constitutes a crime, in terms of criminal law theory, the following six aspects need to be investigated: First, in most people's view, the threat posed by this act to the community is significant. It can not be tolerated from all major aspects of society. Second, to sentence this act is in line with the purpose of the penalty. Third, controlling this behavior doesn't result in the prohibition of socially beneficial conduct. Fourth, we can deal with this behavior in a fair and non-discriminatory manner. Fifth, when we deal with such acts in criminal proceedings, there is no burden of quality or quantity. Sixth, the penalty is irreplaceable and the most appropriate way to deal with this behavior.[5] In today's society, the overwhelming majority of our nationals hate adultery. Its threat to society is also significant, it not only destroys the moral foundation of society and destroys people's values, but also causes grave harm to our society, especially to victims of adultery and their families. The social harmfulness of adultery cannot be tolerated at both the value and the realistic levels.

The purpose of the penalty is to prevent crime and then protect the legal interests, adultery has a serious social harmfulness, but in recent years it has shown a trend of spreading in our country. There are two reasons for it: First of all, the adultery condemned by law and the penalties imposed by law are very light. The social critique of the adulterer is only a moral condemnation. However, in law adultery is merely a civil law violation, and a large number of adultery in the community are not sanctioned by law. Secondly, as mentioned before, the large number of adultery committed by corrupt officials is the culprit of social ethics. Adultery and extravagance are often inseparable from corrupt officials. Officials' use of power to hunt for wealth and women is considered a worthy ability to show off. Women also derive benefits from officials through the use of body and emotions and are considered successful in this society. Montesquieu wrote in *The Spirit of Law*: "Prurience born with luxury, luxury flourishes with prurience. " In today's society, the prevalence and proliferation of adultery have set a very scary demonstration.

In China's legal system, both the *Criminal Law* and the *Marriage Law* do not explicitly criminalize adultery, the *Regulations on Discipline by the Communist Party of China* characterize adultery as a serious violation of socialist morality. Article 150 of the ordinance clearly stipulated: "Adultery with others, resulting in adverse effects, to give a warning or a serious warning of punishment. Serious cases, to cancel the party duties or stay party to investigate and punish. In more serious cases, to expel

the party. In case of adultery with the spouse of a serving military member, he or she shall be punished heavier or heavier than before punishment." The fact that relying on morals to regulate the effectiveness of such bad behavior is a question that is debatable in itself, the reality is that our party discipline cannot deter the spread of adultery among corrupt officials at all, when other norms are not enough to protect the important legal interests, they often need to use the last safeguard of the criminal law. To this end, many countries have legislation that can draw lessons from it, as in India, Cambodia, most Islamic countries, and some states in the United States, adultery is considered a crime. So far in South Korea and Taiwan of China, adultery and corresponding punitive measures have been retained. In 2008, South Korean actress Yusuli was sentenced to eight months in prison for adultery, causing widespread concern in the international media.

#### **4. The Analysis of the Crime of Adultery**

##### **4.1 Concept and Legal Interests of Adultery**

Adultery refers to men and women who are not the couple, in the case of one or both have spouses, have sexual behavior willfully with each other.

Adultery is a direct violation of the legal relationship of marriage, which is the most serious threat to marriage and destruction. Mutual loyalty is the common right and obligation of both spouses. The loyalty of husband and wife refers to the fact that both spouses should work together in a common life to safeguard the specificity and exclusivity of the marital relationship. This obligation is also the fundamental requirement of implementing monogamy. In addition, adultery also directly undermine the sexual morality and social atmosphere. Therefore, the crime of adultery should belong to the fourth chapter of our criminal law, which infringes on the citizen's personal rights and the democratic rights.

##### **4.2 Composition of the Crime of Adultery**

The content of adultery is that both men and women who have no lawful marital relationship voluntarily engage in sexual relations with the other party in serious circumstances. First of all, this crime is an opposite crime.[6] The so-called opposite crime refers to more than two prisoners do some behaviors or each other. There are both adulterers and those who commit rape, adultery requires the existence of both parties' conceptions, and adultery is heterosexual. The subjects of adultery are married people and other heterosexuals, and if the heterosexual has a spouse, it constitutes "double adultery." Second, there must be an act of adultery. In the case of one or both have spouses, adulterers voluntarily have sexual intercourse with each other. In the case of one or both spouses, adulterers voluntarily have sexual intercourse with each other. Sexual intercourse refers to the combination of sexual organs of both sexes. Therefore, adultery does not include other infidelity other than sexual intercourse. It can be seen that adultery is an extramarital sex. Sexual relations between unmarried men and women before marriage is not adultery. Marriage here refers to legal marriage, excluding factual marriage. Finally, the act of adultery must be serious in order to constitute a crime. Whether the circumstances are serious depends on the judgment of adultery motivation, duration, and serious consequences, such as suicide, homicide and extremely bad social effects.

The subjective aspect of this sin is intentional. The perpetrator clearly knows the consequences of damaging the other party or his own marriage and family if the partner has a spouse and adultery, and still practices the behavior and hopes or lays aside the psychological attitude toward such an outcome. The content of intentional here refers to intention of the destruction of marriage and family, not the intention of adultery. Its forms of responsibility are both direct and indirect, others knowingly commit acts of adultery that could lead to the breakdown of marriage and family, however, they intend to achieve such a result of harm in order to achieve personal ends, belonging to direct intention. Some people know that their adultery will lead to the destruction of marriage and family, and letting such an outcome occur is an indirect intention. As for what motivation for the actor does not affect the intentional establishment of this crime.

#### 4.3 Determination of the Crime of Adultery

##### 4.3.1 Distinguish the Boundaries of Adultery and Rape Strictly

The nature of rape is the act of forcing sexual relations with the woman against her will, while adultery is the willful intercourse of both parties. In judicial practice, adultery and rape are often difficult to distinguish. According to the relevant judicial interpretation in our country, the perpetrator's first sexual intercourse violated the will of the woman, but the woman did not prosecute and then volunteered to have sexual intercourse with the man on many occasions. This act is no longer dealt with as rape. Compelling women with their own authority or some dominant position, and forcing women to have sexual relations with them with violating the wishes of women, constitutes rape. Both men and women use each other, and each of them has a picture, the woman is in the condition of having sex as an exchange condition for some kind of benefit, which is not a rape but adultery.

##### 4.3.2 The Accomplice form of Adultery

As mentioned earlier, this crime is a crime that is an essential element of a crime, where there are two or more opposite behaviors. Both men and women should be punished, both parties should be equally punished if they are in line with the crime constitution of the crime. Both sides of the adultery are the principal offenders of the crime and belong to the common criminal. Instigating others and causing others to commit adultery to achieve their own ulterior motives constitutes an instigator of adultery; helping others to commit adultery or providing adultery for others establishes adultery accomplices. For abettors and accomplices, they should be punished according to his role in adultery, it should be noted here that assisting prisoners is quite likely to become the main culprit under certain conditions.

##### 4.3.3 The Criminal form of Adultery

The crime of adultery accomplishes should be the same as the standard of accomplice to the crime of rape, that is to say, as long as both genders combine, it can be concluded as the crime. The attempted form of this crime should not be punished.

#### 4.4 The Punishment of Adultery

Adultery is a crime to be handled upon complaint. According to the provisions of Article 98 of the *Criminal Law*, crime to be handled upon complaint means the case can be handled with the victim's appeal. The victim of adultery refers to the spouse of both parties. In combination with legislation on adultery in other countries, a number of conditions should also be attached to the appeal of adultery: one is the conditions of the appeal that the appeals of crime should be proposed by adulterer's spouse within 6 months of knowing the adultery. The second is to encourage and forgive, The spouse's spouse can not appeal when he or she is adulterated or abusive. Encouraging is an act of promised advance adultery, and forgiveness is an act of adultery after the act of forgiveness. The existence of encouragement or forgiveness does not prevent the establishment of adultery, but merely prevents the right of appeal from happening. The reason why it is stipulated as pro-guilty with additional appeal conditions is mainly because the crime involves the reputation of the victim and arbitrary litigation is a great harm to the reputation of the victim. The crime is misdemeanor, sentencing should choose to control, criminal detention or imprisonment of not more than three years, and may be sentenced to probation. The reason for this not only meets the requirement of modesty and restraint of criminal law but also meets the basic trend of light punishment of modern crimes. The national staff should be punished for committing this crime; because the national staff who commit adultery often pose a tremendous threat to the public interest, its social harm is far greater than the ordinary people guilty of this crime, through the content can not only effectively curb the "transaction of the power and sex" and the deterioration of social ethos, but also conducive to the protection of the public interest.

## 5. Conclusion

Human rights protection and social defense are the different value bases that are pursued by the two major criminal law schools(Criminal classical school and criminal social school), in modern times, and most of the theoretical issues of criminal law are carried out around these two main lines. How to seek a balance between human rights protection and social defense, countries and societies with different cultural traditions will make different choices, the criminal law is regarded as "security law" of other legals, while other norms and laws are unable to fully safeguard the core interests and major value of society, and still not pay attention to the bad behavior of adultery, which itself is the major dereliction of duty of society. We hope to commit adultery as a crime, and at the same time, according to the basic requirements of the modern criminal law, guarantee the legitimate rights and interests of the parties concerned equally, and realize the balance between human rights protection and social defense.

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