



GENDER ISSUES IN COMPARATIVE LEGAL HISTORY

**Between Rape and Adultery: the Influence of Gender, Social Status
and Race on the Punishment of Sex Crimes throughout History**

Assist. Prof. Dr Nina Kršljanin



Sex crimes – broad classification

- 1. Violent crimes
 - Primary example: rape (but also: abduction, sexual harassment)
 - Historically: only male offenders, almost only female victims
 - Today: trend towards gender-neutral regulation
- 2. Non-violent, but socially unacceptable
 - Primary example: adultery (but also: fornication, incest, homosexual relations)
 - Historically: adultery mostly punishable only for the wife and her lover
 - Today: trend towards decriminalization

I. Antiquity – rape

- Only male offenders – victims mostly female, rarely male (Greece)
- Mostly meant to protect not the victim, but her husband or father
- Exception: the crime of ‘seduction’ (female offender, male victim)
- As with other crimes, punishment depends on social status
- Parallels between rape and abduction
- Sources don’t always clearly show whether there was consent
- Rape of one’s own slaves not legally possible, as the master is considered to have the right to sexual intercourse with them



Antiquity – adultery



- Mostly punishable just for a wife and her lover
- Problem with determining paternity (more than rape)
- Considered more damaging for the husband's honour than rape
- The very accusation severely threatens a woman's honour and virtue (and is often punishable if false)
- Frequent problem with both: evidence and false accusations
- Excursus: frequent mythological examples of abduction, rape and adultery (often not so negatively portrayed)

Code of Ur-Nammu (cca. 2100 B.C.)

- „If a man violates the right of another and deflowers the virgin wife of a young man, they shall kill that male.“ (art. 6)
- „If the wife of a young man, on her own initiative, approaches a man and initiates sexual relations with him, they shall kill that woman; that male shall be released.“ (art. 7)
- „If a man acts in violation of the rights of another and deflowers the virgin slave woman of a man, he shall weigh and deliver 5 shekels of silver.“ (art. 8)
- „If a man accuses the wife of a young man of adultery, but the River Ordeal clears her, the man who accused her shall weigh and deliver 20 shekels of silver.“ (art. 14)



Code of Lipit-Ishtar (cca. 1930. B.C.)

- „If a man's wife does not bear him a child but a prostitute from the street does bear him a child, he shall provide grain, oil and clothing rations for the prostitute, and the child whom the prostitute bore him shall be his heir; as long as his wife is alive, the prostitute will not reside in the house his first-ranking wife.“ (art. 27)
- „If a young married man has sexual relations with a prostitute from the street, and the judges order him not to go back to the prostitute, (and if) afterwards he divorces his first-ranking wife and gives the silver of her divorce settlement to her, (still) he will not marry the prostitute.“ (art. 30)
- „If a man claims that another man's virgin daughter has had sexual relations but it is proven that she has not had sexual relations, he shall weigh and deliver 10 shekels of silver.“ (art. 33)



Code of Eshnunna (cca. 1770. B.C.)

- „If a man brings the bridewealth for the daughter of a man, but another, without the consent of her father and mother, abducts her and then deflowers her, it is indeed a capital offense – he shall die.“ (art. 26)
- „If he concludes the contract and the nuptial feast for(?) her father and mother and he marries her, she is indeed a wife; the day she is seized in the lap of another man, she shall die, she will not live.“ (art. 28)
- „If a man should deflower the slave woman of another man, he shall weigh and deliver 20 shekels of silver, but the slave woman remains the property of her master.“ (art. 31)





Code of Hammurabi (cca. 1750. B.C.)

- Only regulated case of rape: „If a man pins down another man’s virgin wife who is still residing in her father’s house, and they seize him lying with her, that man shall be killed; that woman shall be released.“ (art. 130)
- As in other codes, cases of ‘ordinary’ rape must have been left to customary law, or maybe other, unpreserved, regulations
- Adultery (next slides) and incest (art. 154-158) regulated in much more detail

Code of Hammurabi (cca. 1750. B.C.)

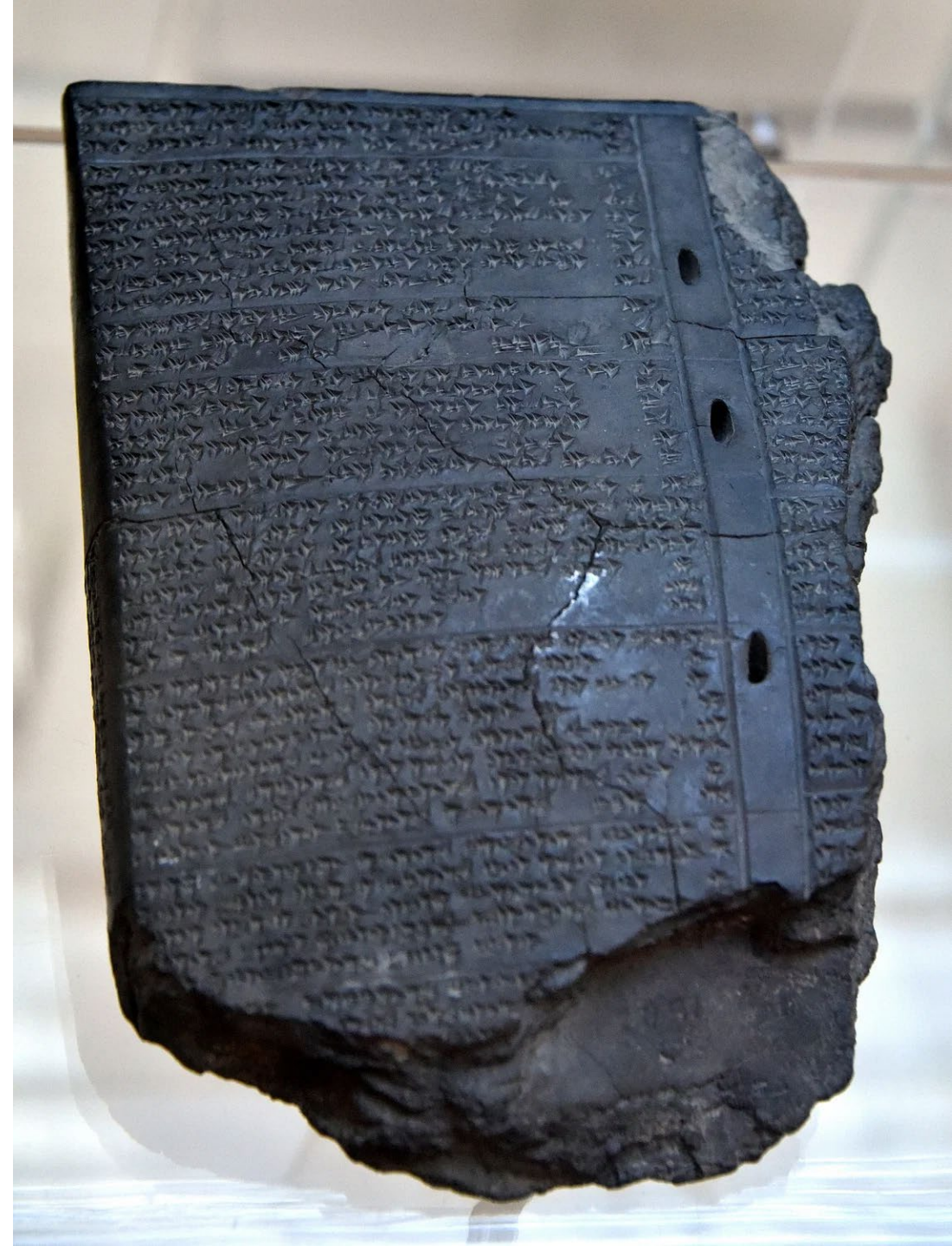
- „If a man causes a finger to be pointed in accusation against an *ugbaltu* (~nun) or against a man's wife but cannot bring proof, they shall flog that man before the judges and they shall shave off half his hair.“ (art. 127)
- „If a man's wife should be seized lying with another male, they shall bind them and cast them into the water; if the wife's master allows his wife to live, then the king shall allow his subject (i.e. other male) to live.“ (art. 129)
- „If her husband accuses his own wife (of adultery), although she has not been seized lying with another male, she shall swear (to her innocence by) an oath by the god, and return to her house.“ (art. 131)
- „If a man's wife should have a finger pointed against her in accusation involving another male, although she has not been seized lying with another male, she shall submit to the divine River Ordeal for her husband.“ (art. 132)

Code of Hammurabi (cca. 1750. B.C.)

- „If a man should be captured and there are sufficient provisions in his house, his wife [..she will not] enter [another's house].“ (art. 133a)
- „If that woman does not keep herself chaste but enters another's house, they shall charge and convict that woman and cast her into the water.“ (art. 133b)
- „If a man should be captured and there are not sufficient provisions in his house, his wife may enter another's house; that woman will not be subject to any penalty.“ (art. 134)
- „If a man's wife has her husband killed on account of (her relationship with) another male, they shall impale that woman.“ (art. 153)

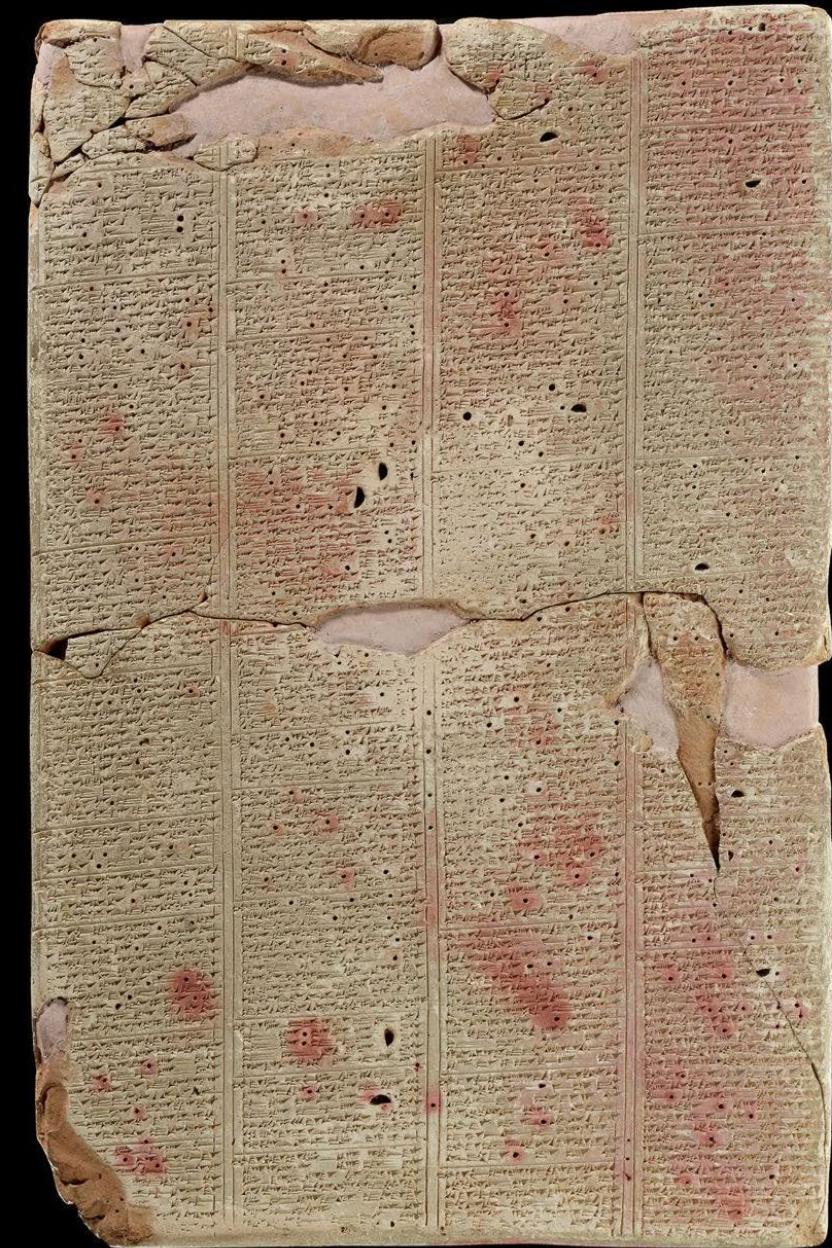
Hittite Code (cca. 1450. B.C.)

- „If a man has sexual relations with his own mother, it is an unpermitted sexual pairing. If a man has sexual relations with his daughter, it is an unpermitted sexual pairing. If a man has sexual relations with his son, it is an unpermitted sexual pairing.” (art. 189)
- „If they ... with the dead—man, woman —it is not an offense. If a man has sexual relations with his stepmother, it is not an offense. But if his father is still living, it is an unpermitted sexual pairing.” (art. 190)
- „It a free man sleeps with free sisters who have the same mother and with their mother—one in one country and the other in another, it is not an offense. But if it happens in the same location, and he knows the women are related, it is an unpermitted sexual pairing.” (art. 191)
- ...etc, also relating to marriage. (art. 192-196)



Hittite Code (cca. 1450. B.C.)

- „If a man seizes a woman in the mountains (and rapes her), it is the man's offense, but if he seizes her in her house, it is the woman's offense: the woman shall die. If the woman's husband discovers them in the act, he may kill them without committing a crime.” (art. 197)
- „If he brings them to the palace gate (ie., the royal court) and says: “My wife shall not die,” he can spare his wife's life, but he must also spare the lover and ‘clothe his head’. If he says, “Both of them shall die,” they shall ‘roll the wheel.’ The king may have them killed or he may spare them.” (art. 198)



Middle Assyrian Code (cca. 1075. B.C.)

- „If a man lays a hand upon a woman, attacking her like a rutting bull(?), and they prove the charges against him and find him guilty, they shall cut off one of his fingers. If he should kiss her, they shall draw his lower lip across the blade(?) of an ax and cut it off. “ (art. A9)
- „If a wife of a man should walk along the main thoroughfare and should a man seize her and say “I want to have sex with you!”—she shall not consent but she shall protect herself; should he seize her by force and fornicate with her—whether they discover him upon the woman or witnesses later prove the charges against him that he fornicated with the woman—they shall kill the man; there is no punishment for the woman.” (art. A12)
- „If the wife of a man should go out of her own house, and go to another man where he resides, and should he fornicate with her knowing that she is the wife of a man, they shall kill the man and the wife.” (art. A13)

Middle Assyrian Code (cca. 1075. B.C.)

- „If a man should fornicate with another man’s wife either in an inn or in the main thoroughfare, knowing that she is the wife of a man, they shall treat the fornicator as the man declares he wishes his wife to be treated. If he should fornicate with her without knowing that she is the wife of a man, the fornicator is clear; the man shall prove the charges against his wife and he shall treat her as he wishes.“ (art. A14)
- „If a man should seize another man upon his wife and they prove the charges against him and find him guilty, they shall kill both of them; there is no liability for him (i.e., the husband). If he should seize him and bring him either before the king or the judges, and they prove the charges against him and find him guilty—if the woman’s husband kills his wife, then he shall also kill the man; if he cuts off his wife’s nose, he shall turn the man into a eunuch and they shall lacerate his entire face; but if [he wishes to release] his wife, he shall [release] the man. “ (art. A15)

Middle Assyrian Code (cca. 1075. B.C.)

- „If a man [should fornicate] with the wife of a man [... by] her invitation, there is no punishment for the man; the man (ie., husband) shall impose whatever punishment , he chooses upon his wife. If he should fornicate with her by force and they prove the charges against him and find him guilty, his punishment shall be identical to that of the wife of the man.“ (art. A16)
- „If a man should say to another man, “Everyone has sex with your wife,” but there are no witnesses, they shall draw up a binding agreement, they shall undergo the divine River Ordeal.“ (art. A17)
- + more complex cases of adultery (art. A22-24, 36, 45)

Middle Assyrian Code (cca. 1075. B.C.)

- „If a man says to his comrade, either in private or in a public quarrel, “Everyone has sex with your wife,” and further, “I can prove the charges,” but he is unable to prove the charges and does not prove the charges, they shall strike that man 40 blows with rods; he shall perform the king’s service for one full month; they shall cut off his hair; moreover, he shall pay 3,600 shekels of lead.” (art. A18)
- „If a man furtively spreads rumors about his comrade, saying, “Everyone sodomizes him,” or in a quarrel in public says to him, “Everyone sodomizes you,” and further, “I can prove the charges against you,” but he is unable to prove the charges and does not prove the charges, they shall strike that man 50 blows with rods; he shall perform the king’s service for one full month; they shall cut off his hair; moreover, he shall pay 3,600 shekels of lead. “ (art. A19)
- „If a man sodomizes his comrade and they prove the charges against him and find him guilty, they shall sodomize him and they shall turn him into a eunuch.” (art. A20)

Middle Assyrian Code (cca. 1075. B.C.)

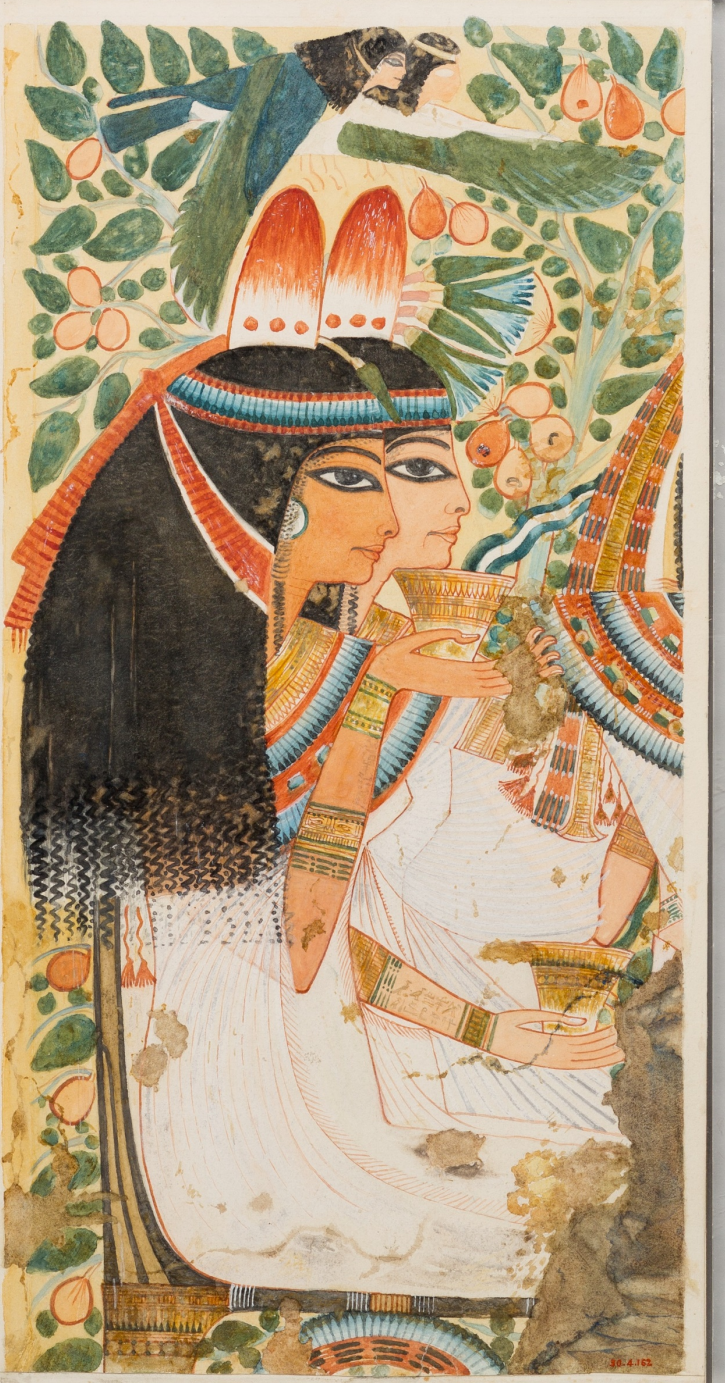
- „If a man forcibly seizes and rapes a maiden who is residing in her father's house, [...] who is not betrothed(?), whose [womb(?)] is not opened, who is not married, and against whose father's house there is no outstanding claim— whether within the city or in the countryside, or at night whether in the main thoroughfare, or in a granary, or during the city festival— the father of the maiden shall the wife of the fornicator of the maiden and hand her over to be raped; he shall not return her to her husband, but he shall take (and keep?) her; the father shall give his daughter who is the victim of fornication into the protection of the household of her fornicator. If he (the fornicator) has no wife, the fornicator shall give “triple” the silver as the value of the maiden to her father; her fornicator shall marry her; he shall not reject(?) her. If the father does not desire it so, he shall receive “triple” silver for the maiden, and he shall give his daughter in marriage to whomever he chooses. “ (art. A 55)
- „If a maiden should willingly give herself to a man, the man shall so swear; they shall have no claim to his wife; the fornicator shall pay “triple” the silver as the value of the maiden; the father shall treat his daughter in whatever manner he chooses..“ (art. A56)

Old Testament

- „If a man takes a virgin, who has not given her word to another man, and has connection with her, he will have to give a bride-price for her to be his wife. If her father will not give her to him on any account, he will have to give the regular payment for virgins.“ (Exodus, 22.16-17)
- „ If any man takes a wife, and having had connection with her, has no delight in her, and says evil things about her and gives her a bad name, saying, I took this woman, and when I had connection with her it was clear to me that she was not a virgin: then let the girl's father and mother put before the responsible men of the town, in the public place, signs that the girl was a virgin: and let the girl's father say to the responsible men, I gave my daughter to this man for his wife, but he has no love for her; and now he has put shame on her, saying that she is not a virgin; but here is the sign that she is a virgin. Then they are to put her clothing before the responsible men of the town. Then the responsible men of the town are to give the man his punishment; they will take from him a hundred shekels of silver, which are to be given to the father of the girl, because he has given an evil name to a virgin of Israel: she will go on being his wife, he may never put her away all his life. But if what he has said is true, and she is seen to be not a virgin, then they are to make the girl come to the door of her father's house and she will be stoned to death by the men of the town, because she has done evil and put shame on Israel, by acting as a loose woman in her father's house: so you are to put away evil from among you.“ (Deuteronomy, 22.13-21)

Old Testament

- „If a man is taken in the act of going in to a married woman, the two of them, the man as well as the woman, are to be put to death: so you are to put away the evil from Israel. If a young virgin has given her word to be married to a man, and another man meeting her in the town, has connection with her; then you are to take the two of them to the doorway of the town, and have them stoned to death; the young virgin, because she gave no cry for help, though it was in the town, and the man, because he has put shame on his neighbour's wife: so you are to put away evil from among you.
- But if the man, meeting such a virgin in the open country, takes her by force, then only the man is to be put to death; nothing is to be done to the virgin, because there is no cause of death in her: it is the same as if a man made an attack on his neighbour and put him to death: for he came across her in the open country, and there was no one to come to the help of the virgin in answer to her cry.
- If a man sees a young virgin, who has not given her word to be married to anyone, and he takes her by force and has connection with her, and discovery is made of it; then the man will have to give the virgin's father fifty shekels of silver and make her his wife, because he has put shame on her; he may never put her away all his life.“
(Deuteronomy, 22.22-29)

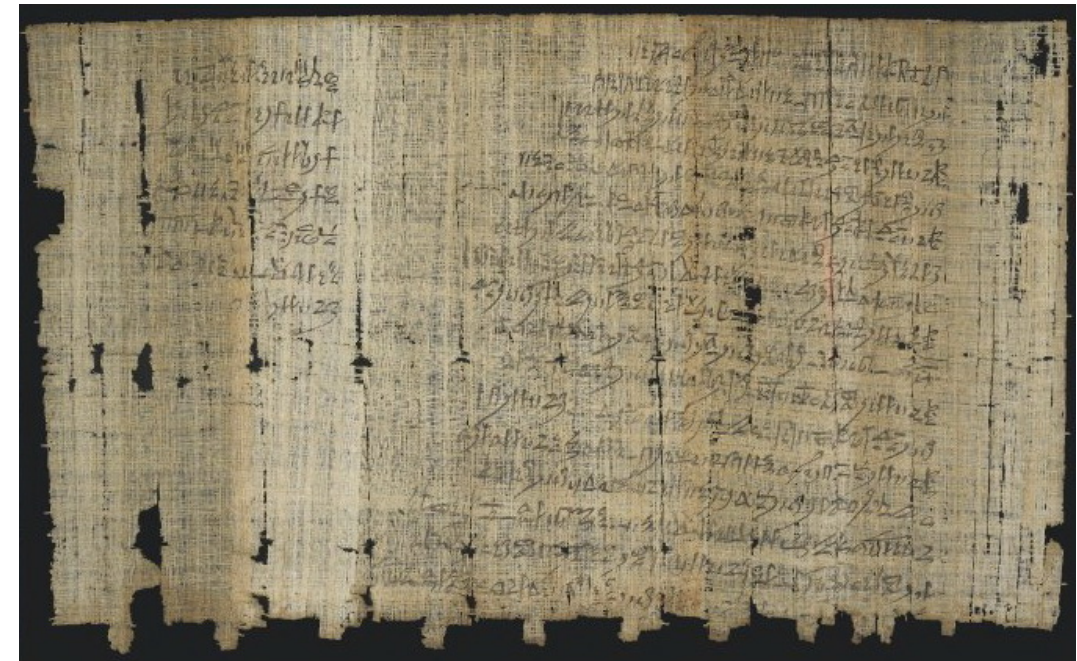


Law of Ancient Egypt

- No direct legal sources on the matter
- Rape – death penalty, maybe castration; exile for foreigners
- A woman's adultery – perhaps severing the nose (Diodor of Sicily – though doubtful) and divorce with the husband keeping the dowry
- Literary sources heavily condemn adultery and mention the death penalty (or a fitting narrative death), but legal sources do not
- Penalty for the lover - flogging
- A man's adultery, still, is not punished

Law of Ancient Egypt

- Example: *Salt 124* papyrus – a construction foreman in charge of building tombs in the Valley of Kings fired around 1200 B.C. due to a series of crimes, including the sexual abuse and lewd behaviour with multiple women
- „[Charge concerning his robbing (?) Yeyemw]aw of her garment and he threw her on the top of the wall and violated (?) her.“ (*Recto*, 1.19.)



Greece: Law Code of Gortyn (cca. 450. B.C.)

- „If a person commits rape on a free man or a free woman, he shall pay 100 staters; and if on account of an *apetairos*, 10; and if a slave commits it on a free man or a free woman, he shall pay double; and if a free man on a male or female serf (*voikeios*), 5 staters. If a person should forcibly seduce a slave belonging to the home, he shall pay two staters, but if she has already been seduce (i.e. was not a virgin), one obol by day, but if in the night, to obols; and the slave shall have preference in the oath.“ (2nd column)

Law Code of Gortyn (cca. 450. B.C.)

- „If someone be taken in adultery with a free woman in a father's, brother's or the husband's house, he shall pay 100 staters; but if in another's, 50; and if with the wife of an *apetairos*, 10; but if a slave with a free woman, he shall pay double; and if a slave with a slave, 5. Let (the captor) proclaim in the presence of three witnesses to the relatives of the one caught in (the house) that he is to be ransomed within five days; and to the master of the slave in the presence of two witnesses; but if he should not be ransomed himself, it is to be within the power of the captors to deal with him as they may wish; but if anyone should declare that he has been taken by subterfuge, the captor is to swear, in a case involving 50 staters or more, with four others, each calling down solemn curses upon himself, and in the case of an *apetairos* with two others, and in the case of a serf the master and one other, that he took him in adultery and not by subterfuge.“ (2nd column)

Ancient Sparta

- All sources circumstantial (foreigners' accounts)
- No reliable data regarding punishment of rape
- Adultery not punishable? (a woman's intercourse with a stronger, fitter man seen as desirable due to better progeny)
- An old husband can select a younger man to father 'his' children with his wife (issue of woman's consent)



Ancient Athens

- Rape: a penalty (damages) paid to the victim – personally if male, to her *kyrios* (head of household) if female
- Persecution of a rapist for *hybris* (ὑβρις) possible, which would allow for a death penalty, but no such case is preserved in the sources
- A crime broader than adultery: *moicheia* (μοιχεία) – sexual intercourse with another man's wife or female relative under his authority (unmarried daughter or sister, widowed mother...)



Ancient Athens

- A woman's *kyrios* may freely kill a *moichos* ('adulterer') caught in the act; theoretically usable in the case of rape as well
- If he leaves him alive, he may charge damages and publicly humiliate him
- An adulteress is forbidden to enter temples and wear jewelry (closest to *atimia* – loss of honour – for women); her husband must divorce her or suffer *atimia* himself
- Solon's citizenship law demands for both parents to be citizens of Athens (which could be brought into question in case of adultery)

Ancient Athens

- „Thus the lawgiver, sirs, considered that those who use force deserve a less penalty than those who use persuasion; for the latter he condemned to death, whereas for the former he doubled the damages, considering that those who achieve their ends by force are hated by the persons forced; while those who used persuasion corrupted thereby their victims' souls, thus making the wives of others more closely attached to themselves than to their husbands, and got the whole house into their hands, and caused uncertainty as to whose the children really were, the husbands' or the adulterers'.“
(Lysias 1, 32-33)

Rome – Kingdom and Republic

- Adultery is a private delict, punishable by a woman's *pater familias*
- Rape – initially private vendetta
- Later included in the crime of *vis* (*lex Lutatia*, *lex Plautia de vi*, *lex Iulia de vi*) punishable by death, „even if the woman's father was ready to forgive“ (Marcian)
- Victim designated as boy, woman or girl (*lex Iulia* – or anyone else)
- *Stuprum* – a broad crime of “seduction” of a girl (virgin), widow or young man (varies greatly, somewhat comparable to *moicheia*)
- Possible compensation through the delict of *iniuria* (both for the victim and the *paterfamilias*, even as the owner of a slave)



Rome - Principate

- *Lex Iulia de adulteriis coercendis* – adultery as a public delict (5-year statute of limitations)
- Only a married woman and her lover are punished, though a wife can press charges against her husband for adultery with another married woman
- A father can kill his daughter and the adulterer (always both!) if caught *in flagranti*; a husband can kill only the adulterer, and only if he is of low social status and they are caught in the husband's house
- The husband must divorce his wife, even if he doesn't press charges
- If the father or husband don't persecute the adulteress, anyone can
- Penalties: for patricians, exile to (different) islands confiscation of 1/2 of the man's property, and 1/3 of the woman's property and 1/2 of her dowry; for commoners, forced labour (e.g. in the mines)

Rome - Principate

- *Lex Iulia de vi* – there is no statute of limitations on rape; if the defendant proves the victim's consent, he can still be punished for adultery or *stuprum*
- Persecution for *iniuria* possible in the case of false accusation of rape
- *Stuprum* reduced to cases not encompassed in adultery or rape
- Concrete punishments changed several times, but all crimes remain serious and severely punished, particularly rape
- Not legally possible against certain categories(e.g. prostitutes); wartime rape not punishable

Rome – Dominate (Constantine)

- Accusation of adultery by a third party no longer possible
- New crime – *raptus* (abduction of a girl without her parents' consent)
- Death penalty for the abductor, but also for the consenting girl; various penalties for accomplices
- Exile for parents who attempt to conceal the crime by letting their daughter marry the abductor (from 374 – 5-year statute of limitations, marriage is convalidated afterwards)
- Christian influence – or the other way around?
- Some Church fathers (e.g. Basil the Great) consider pretend abduction (elopement) not to be punishable



Rome – Dominate (Constantine)

- „Emperor Constantine Augustus to the People:
If any man who had not previously made a pact with the parents of a girl should ravish this girl against her will, or if he should abduct a girl who was willing, hoping to obtain protection from the consent of the girl, although it was because of the fault of frivolity and the inconstancy of her sex and judgment that a girl was altogether excluded by the ancients from conducting suits in court and from giving testimony and from all matters pertaining to courts, the consent of the girl shall be of no advantage to him, as it would have been under the ancient law, but rather the girl herself shall be held liable as a participant in the crime “. (Codex Theodosianus, 9.24.1.)

II. Middle Ages - overview



- In Europe the regulation of these crimes develops with the ever growing influence of Christianity
- Rape – only female victims, because male homosexual relations are punishable even if consensual (sodomy)
- Marital rape mostly not punishable (a wife is considered obligated to intercourse with her husband)
- Adultery – now nominally forbidden to both spouses, but it is still mostly just a woman's adultery that is punished (more severely)
- Fornication – any intercourse outside marriage

Rhomaian Empire (Byzantium)



- In addition to lay regulations (see below), canon law prescribes numerous spiritual penalties
- Adultery: flogging, cutting of hair and severing the nose (for both the wife and her lover); the wife is sent to a monastery and 1/3 of her dowry is confiscated; accomplices are exiled
- Husband can still kill the adulterer caught in his home (if he is of lower origin), but not his wife
- The husband may take his wife back from the monastery within 2 years; if not, she must become a nun
- The same applies in the cases of invalid marriage, concubinage or betrothal

Rhomaian Empire (Byzantium)

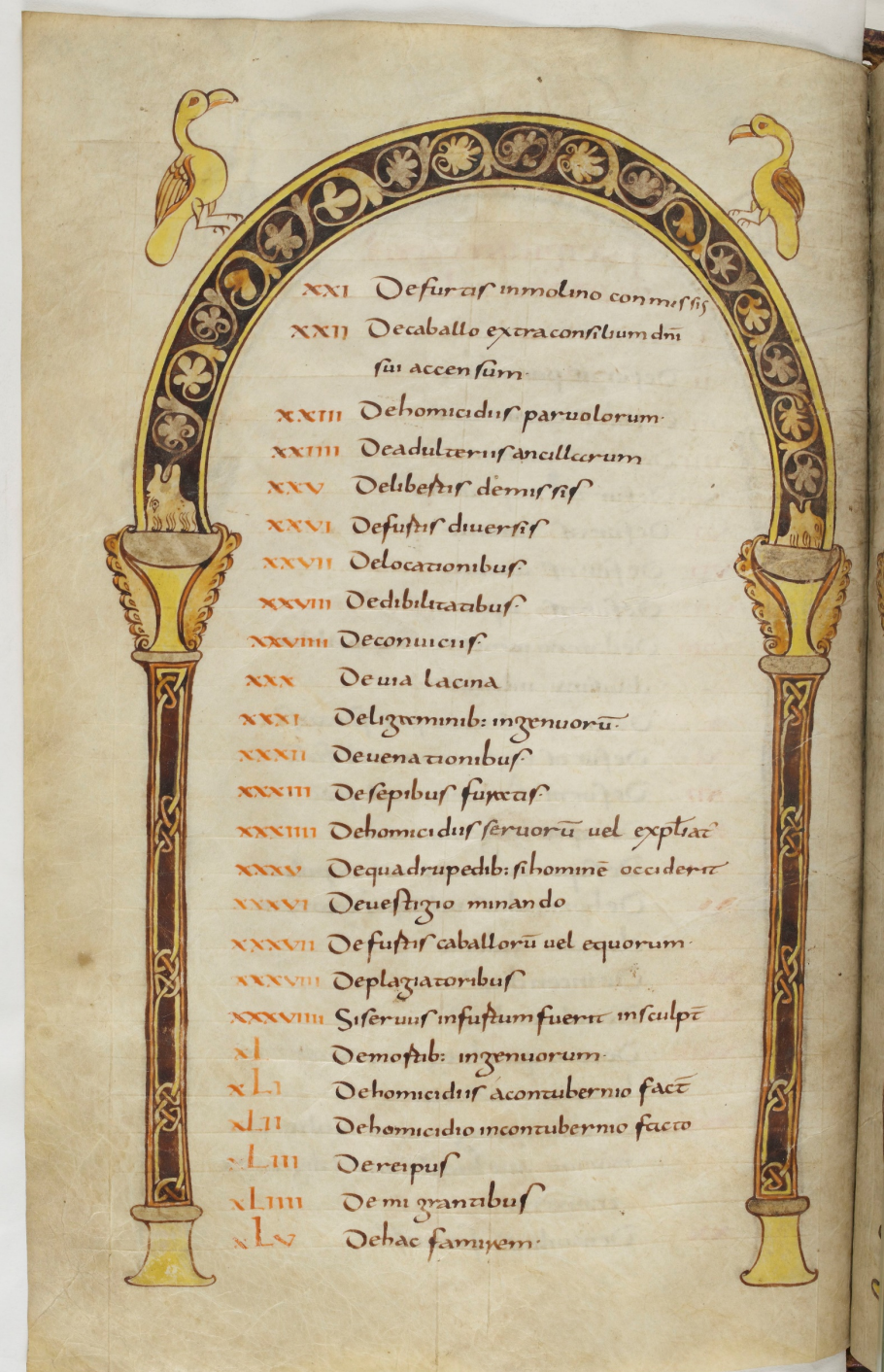
- Abduction: regulations mostly Roman, with multiple changes (woman no longer punished even if she consented; the abductor's property is confiscated and given to the victim)
- If rape also occurred, marriage is (exceptionally) allowed, but then the woman's property is confiscated as well!
- Rape: punishment same as adultery for the male (including the confiscation of 1/3 of his property if the victim was a virgin), woman free of charges
- Sodomy: death penalty for both partners, unless the passive one was younger than 12 (consent not mentioned)

Lex Salica (cca. 500)

- „If three men carry off a free born girl, they shall be compelled to pay 30 shillings. If there are more than three, each one shall pay 5 shillings. Those who shall have been present with boats shall be sentenced to three shillings. But those who commit rape shall be compelled to pay 2500 denars, which make 63 shillings. But if they have carried off that girl from behind lock and key, or from the spinning room, they shall be sentenced to the above price and penalty. But if the girl who is carried off be under the king's protection, then the "frith" (peace-money) shall be 2500 denars, which make 63 shillings. But if a bondsman of the king, or a leet, should carry off a free woman, he shall be sentenced to death. But if a free woman have followed a slave of her own will, she shall lose her freedom. If a freeborn man shall have taken an alien bondswoman, he shall suffer similarly. If any body take another's spouse and join her to himself in matrimony, he shall be sentenced to 2500 denars, which make 63 shillings.”

Lex Salica (cca. 500)

- „If a free man takes hold of the hand, arm or finger of a free woman, and it is proven, he shall be sentenced to pay 15 shillings. If he grips her arm, he should pay 30 shillings. If he touches her arm above the elbow, he shall pay 1400 denars, which is 35 shillings.“ (t. 20)
- „If someone rapes a free girl, he shall be sentenced to pay 62 ½ shillings. If someone fornicates with a free girl with her consent and mutual agreement, he shall be sentenced to pay 1800 denars, which is 45 shillings. If a free man lays with another man's slave woman, and that is proven, he shall be sentenced to pay 600 denars, which is 15 shillings, to the slave woman's master. But if someone lays with the King's slave woman, he shall be sentenced to pay 1200 denars, which is 30 shillings.“ (t. 25)
- „If someone, be it a man or a woman, calls a free woman a harlot, and cannot prove that, he shall be sentenced to pay 1800 dinars, which is 45 shillings.“ (t. 30)



Guta Lag / Gotland Code (cca. 1220)

GUTA LAG
THE LAW OF THE GOTLANDERS



- If a man is caught fornicating with an unmarried woman, he shall be bound and pay ransom; if it was a Gotland woman, his arm and leg may be severed
- If they were not caught in the act, but the woman proves (with compurgators) that a child she gave birth to is his, he shall have to pay compensation – or, if it was a Gotland woman and he is able, he will have to take care of her and the child (ch. 20a)
- Generally, man had to take care of illegitimate children until their adulthood (ch. 20)

VIKING SOCIETY FOR NORTHERN RESEARCH
UNIVERSITY COLLEGE LONDON
2009

Guta Lag / Gotland Code (cca. 1220)

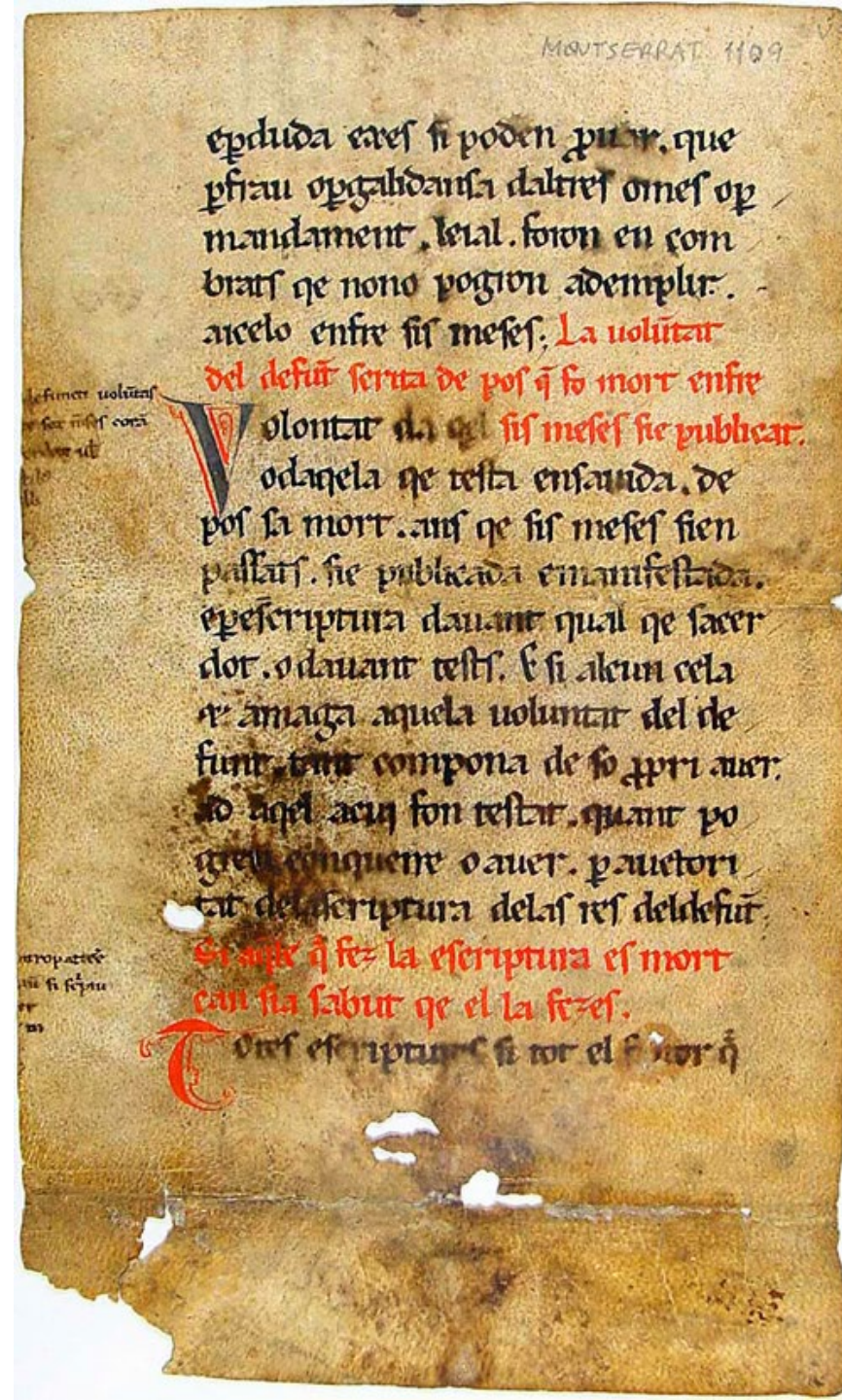
- „If a man commits adultery, he is to pay three marks to the assembly and six marks to the complainant. If a man, <whether a priest or> a layman, commits double adultery then he is to pay twelve marks to the authorities and another twelve to the complainant. If a married man commits adultery with an unmarried woman, he is to pay her consolation. If a lawfully married woman commits adultery with an unmarried man, he is not to pay her consolation. If a man, priest or layman, is discovered in flagrante delicto with another man's wife then he is liable for forty marks or his life and the complainant decides, however, which he would prefer, the money or his (i.e. the defendant's) life. If a man seduces another man's daughter or one of his wards into betrothal without the authority of her father or kinsmen, then he must pay forty marks to the complainant; of this the authorities take twelve marks. If a man takes (i.e. takes in marriage) a woman or maid by force or violence, without the authority of her father or kinsmen, then those who prosecute her case shall decide between his neck or wergild, if the woman is Gotlandic; the authorities take twelve marks of the wergild. If the woman is not Gotlandic, then those who prosecute her case shall decide between his neck and ten marks of silver; the authorities take twelve marks (i.e. in coin) of the wergild.“ (ch. 21)

Guta Lag / Gotland Code (cca. 1220)

- A raped woman must follow her rapist and cry for help; those who hear her must testify as if they had seen the crime. If nobody hears her, she must press charges before witnesses on the first day, and tell the man's name. If she doesn't know him, she can press charges later, when she learns who he is, with compurgators.
- If he is convicted, he shall pay 12 marks in silver if it was a Gotland woman, 5 if she was not, 6 öre if she was a slave. If the woman is married – wergild or death penalty. If he is a slave, and the woman Gotlandic, he is convicted to death unless she prefers the wergild. (ch. 22)
- Many fines for assaults on a woman's decency (various touches and disturbing her clothing – ch. 23)
- All insults have the same penalties and evidence procedure, but calling someone an adulteress or witch is mentioned only for a woman (ch. 39)

Visigothic Code (cca. 654)

- Abduction of a woman (book 3, ch. 3): if there was no rape, confiscation of ½ of the property in her favor; if there was, confiscation of all property (unless he has legitimate children), public whipping, and the offender is handed over to the woman or her family as a slave
- Murder of a rapist is not punishable; 30-year statute of limitations on rape
- Marriage with abductor forbidden under threat of death for both (+ fines for family members who agree); marriage with a rapist allowed



Visigothic Code (cca. 654)

- Adultery (book 3, ch. 4): the adulterer himself and all his property (if he has no children) are handed over to the husband or fiancé; if it was not rape - so is the wife; he can punish them as he likes
- The husband and father can kill adulterers when they find them as in Roman law
- If a husband cheats on his wife - in the same way, the adulteress is given over to his wife (but not the unfaithful husband himself)
- Milder punishments and procedures for priests!
- Adultery with a slave woman - whipping, without infamy

Zakon Sudnyi Liudem / Court Law for the People (cca. 900)

- "When someone seduces a virgin girl against the will of her parents, and then they reconcile, let a wedding be arranged, if he wants to marry her and her parents agree. If for some reason she is no longer to his liking, and he is known for his wealth, let him pay the girl a liter of gold, i.e. 72 stilenza, for her shame. If he doesn't have that much, let him give half of his property. If he has nothing, let the local judge beat him and expel him from his territory. The culprit should undergo fasting for seven years, as we have already prescribed." (art. 8)



Zakon Sudnyi Liudem / Court Law for the People (cca. 900)

- "When someone rapes a virgin girl in a deserted place, where there is no possibility to help her, let him be sold, and his property should be given to the girl." (art. 9)
- "Whoever rapes a virgin girl under the age of twenty should be sold along with his entire property, and the proceeds should be given to the girl. According to ecclesiastical law, as provided for in the same act with a betrothed girl, he will be subjected to a seven-year fast, as we said before in the case of a married woman." (art. 10)
- "He who has relations with a girl, even with her consent, and she is betrothed to another, should have his nose cut off." (art. 11)
- More about fornication, bigamy, incest...

Medieval Serbia

- Many Rhomaian regulations transplanted in the Abbreviated Syntagma and the scl. Justinian's Law; only two articles in Dušan's Code (1349)
- „And if a nobleman takes a noblewoman by force, let both his hands be cut off and his nose be slit; if a commoner takes a noblewoman by force, let him be hanged; if he takes his own equal by force, let both his hands be cut off and his nose slit.“ (art. 53)
- „And if a noblewoman commits fornication with her man, let the hands of both be cut off and their noses slit.“ (art. 54)



Statute of Cathari / Kotor (early 14th century)

- „ If someone rapes or assaults someone's maid against her will, and it can be proven, he will pay 50 perpers, and if he has no means to pay, if the master of the maid and the maid herself are willing, the assailant will take her as his wife without a dowry. If the master and the maid are unwilling, he will be put in prison for up to 3 months until he pays the said fine. If he does not pay, the first finger of his right hand, which is called the thumb, will be cut off. If this maid is out of work, he will pay 100 perpers under the said penalty and in the form and manner aforesaid. If she is of medium status and from good commoners, and the woman's side and she herself is willing, he will take her as a wife without a dowry, otherwise he will pay 500 perpers. And until he pays within 3 months, he will be put in prison. If he does not pay by the deadline, two fingers of his right hand will be cut off, namely the thumb and the last one, which is called the ear.“ (ch. 100)

Statute of Cathari / Kotor (early 14th century)

- „ And if she is of noble birth, if the woman's side and she herself wants it, he will take her as a wife without a dowry, if not, he will pay 1000 perpers and until he pays within 3 months he will be put in prison. And if he doesn't pay by that deadline, his right hand will be cut off. If it cannot be proven, the criminal will justify himself in any case with six of his best and closest friends. Of the said punishments, the Prince receives from the first 1 perper, from the second 2 perpers, from the third 3 perpers, from the fourth 4 perpers and from the rest the Commune receives a third and the one who suffered the evil two thirds. Those who would rape or molest married girls or other respectable women are subjected to similar punishments.“ (ch. 100)

Statute of Scutari / Skadar (early 14th century)

- "If a man rapes an honest unmarried woman, and the rapist is unmarried, we order him to take the woman as his lawful wife. If the woman is married and the rapist is married, he pays a fine of 50 perpers, half of which belongs to the Prince and half to the woman. The woman must provide convincing proof of the said." (ch. 201)
- "If someone rapes a maidservant (*ancila* - maid, slave woman) of a man or a woman and if the maidservant dies in childbirth, we order that those who raped her must provide the master with another maidservant. The son and daughter born of the maidservant will be servants to the maidservant's master." (ch. 202)

Medieval / Renaissance Venice

- Rape - punishment in the amount of the woman's dowry according to the judge's assessment; if he does not pay within 8 days - removal of both eyes (there is no data that it was applied in practice). If the crime is not exactly rape or cannot be clearly proven, judges are free to assess the punishment. If she agrees to marry him - there is no penalty. (*Liber promissione malefici*, around 1232.)
- Adultery - punishments at the judge's discretion, usually fines and imprisonment; it is perceived primarily as a crime against the husband's honor and property
- "...and in a criminal way he stole his property from his house..." (from a verdict for adultery from 1332)



Edle Venetianerin.

Erste Hälfte des XV. Jahrhunderts.

England - Common law

- Abduction of a girl – paying her 'bride-price' and a big fine
- II Statute of Westminster (1295) – if the woman does not sue the abductor for rape, her husband can sue him for abduction and a judicial duel ensues
- Only forced vaginal intercourse between a man and a woman is considered rape; everything else is sodomy (even if the victim is a woman)
- Common punishments are blinding and castration; at first they are carried out by the victim herself; the death penalty is also possible



England - Common law

- Adultery: "If [one] freeman lies with the wife of [another] freeman, he shall pay [the husband] his [or her] wergeld, and procure a second wife with his own money, and bring her to the other man's home." (from the Law of King Æthelberht)
- When 'bride-purchase' is no longer mandatory, instead of 'compensation' a fine is paid depending on the estate
- It is permissible to kill an adulterer caught in the act (besides the husband, so can the father, brother or son)
- From Henry I on, an adulterer is tried by the king, and the woman by a bishop
- The lawsuit *per quod servitium amisit*, created in 1350 for a servant or employee who leaves his master, or those who take them away, begins to be used for adultery from the 17th century ("loss of consortium")
- A servant's adultery with his master's wife or daughter is treated as 'petty treason' and is punishable by death.

Shariah law – Qur'an

- „ And the women who commit lewdness, you shall bring four witnesses over them from amongst you; if they bear witness, then you shall restrict them in the homes until death takes them, or God makes for them a way out.” (4.15)
- „ And do not come near adultery, for it is a sin and an evil path.” (17.32)
- „The adulteress and the adulterer, you shall lash each of them one hundred lashes, and do not let any pity take you over God's system if you believe in God and the Last Day. And let a group of the believers witness their punishment.” (24.2)
- „ The adulterer will only marry an adulteress or one who is an idolatress. And the adulteress, she will only be married to an adulterer or an idolater. And this has been forbidden for the believers.” (24.3)
- „ And those who accuse honest women and they do not bring forth four witnesses, then you shall lash them eighty lashes and do not ever accept their testimony. Those indeed are the evildoers.” (24.4)
- „ Those who accuse honest chaste believing women, they will be cursed in this world and the Hereafter, and they will have a painful retribution.” (24.23)

Shariah law

- The same term – *zina* – is used for both adultery and fornication, but the punishment is different
- According to Sunnah and Ijtihad, the punishment is flogging and banishment for one year for those who are not married, and stoning for those who are.
- "Malik narrated to me on the authority of Ibn Shihab on the authority of Ubaydullah ibn Abdullah ibn Utba ibn Masud that Abdullah ibn Abbas said: I heard Umar ibn al-Khattab say, 'Stoning is in the Book of Allah for those who commit adultery, male or female, when they are muhsan (married) and when there is clear proof of pregnancy or recognition'." (Al-Muwata, 43.1.8)



Shariah law

- Rape is much less mentioned in the Qur'an and Sunnah, but it is treated as violent *zina*: stoning for the rapist, no punishment for the victim
- Different point of view: the rapist must pay the victim the amount of the 'bride-price' according to her position
- Unlike *zina* (if it is not considered a part of it), the testimony of 4 male witnesses is not necessary to prove rape



III. Modern Age - overview

- Punishment for sexual offenses remains mostly nominally under the influence of the church, but the view in practice is changing slightly
- Often singling them out as crimes against (sexual) morality - reducing morality to sexual morality?
- Greater and longer influence of religion: Islamic countries, strong Catholic countries (e.g. Spain)
- Breaking with tradition: socialist law (although there are often not many substantive changes behind the change of ideology)

French Penal Code (1810)

- „Who shall commit the crime of rape, or shall be guilty of any other attack upon the modesty, consummated or attempted, with violence, against an individual of either sex, shall be punished with solitary imprisonment.“ (art. 331)
- „If the crime has been committed upon the person of an infant, under the age of fifteen years complete, the criminal shall undergo the penalty of hard labour for time.“ (art. 332)
- „The penalty shall be perpetual hard labour, if the criminals are of the class of those who have authority over the persons upon whom they have made such attack; or if they are public officers, or ministers of worship; or if the criminal, whoever he may be, has been assisted in his crime by one or more other persons.“ (art. 333)

CODE PÉNAL DE L'EMPIRE FRANÇAIS.

ÉDITION CONFORME A CELLE DE L'IMPRIMERIE
IMPÉRIALE.

Prix, 60 centimes, broché.



A PARIS,

Chez {
PRIEUR, Libraire, rue des Noyers, n.º 45.
BELIN fils, Libraire, rue Saint-Jacques, n.º 41.
MERLIN, Libraire, quai des Augustins, n.º 29.
RONDONNEAU, Libr., place du Palais de justice.

1810.

French Penal Code (1810)

- „The adultery of the wife cannot be denounced, except by the husband; nor by him, if he be in the case provided for by article 339.“ (art. 336)
- „The wife, convicted of adultery, shall undergo the penalty of imprisonment, during not less than three months, nor more than two years. The husband shall have the power of stopping the effect of this condemnation, by consenting to take his wife again.“ (art. 337)
- „The accomplice of the adulterous wife shall be punished with imprisonment, during the same space of time, and, moreover, with a fine of from 100 to 2,000 francs. The only proofs which can be admitted against the person charged as an accomplice, (except his being taken in the fact) shall be such as result from letters or other papers, written by the person accused.“ (art. 338)
- „The husband, who shall keep a concubine in the house, where he and his wife live, and who shall be convicted, upon the complaint of the wife, shall be punished with a fine of from 100 to 2,000 francs.“ (art. 339)

French Penal Code (1810)

- „Murder, committed by the husband, upon his wife, or by the wife, upon her husband, is not excusable, if the life of the husband or wife, who has committed such murder, has not been put in peril, at the very moment when the murder has taken place. Nevertheless, in the case of adultery, provide for by article 336, murder committed upon the wife as well as upon her accomplice, at the moment when the husband shall have caught them in the fact, in the house where the husband and wife dwell, is excusable.“ (art. 324)
- „The crime of castration, if it has been immediately provoked by a violent outrage to chastity, shall be considered as an excusable murder or wound.“ (art. 325)

Serbian Penal Code (1860), based on the Prussian (1851)

- "With imprisonment for up to 15 years is to be punished:
 1. who forces any person, male or female, to commit fornication with him or with another person by force or threat;
 2. who abuses a person deprived of free will and consciousness, whether said person was intentionally placed in that state by the perpetrator, or was otherwise in that state, for fornication and gratification of his bodily instincts;
 3. who commits fornication with persons who have not reached the age of 13, even if it happens with their volition.If in one of these three cases the abused person died, the culprit should be punished by death, if he could reasonably foresee that consequence; otherwise, imprisonment for up to 20 years." (art. 191)
- In the Prussian Code: the basic punishment is up to 20 years, the limit for children is 14 years, the punishment in case of death is life imprisonment (art. 144)

Serbian Penal Code (1860), based on the Prussian (1851)

- "Whoever commits fornication with someone else's wife shall be punished with imprisonment for up to 12 months. The wife should be punished in the same way." (art. 196)
- "Whoever takes someone else's wife with her consent, but without her husband's knowledge or against his will, or refuses to give her up her at the request of the latter, shall be punished with imprisonment from 3 months to 5 years, and the woman from 3 months to 2 years." (only if the husband presses charges – art. 197)
- "Whoever keeps a mistress in the house in addition to his living, undivorced wife, and the wife sues him, shall be punished with imprisonment from 1 to 6 months, and the mistress shall immediately be expelled from the house..." (art. 199)
- In the Prussian Code: imprisonment from 4 weeks to 6 months for the adulterer and lover (regardless of sex), only if this led to a divorce and if the other spouse is not opposed (art. 140)

Russian Penal Code (1845)

- "A person who is married and is caught in adultery, is subject to this, upon the complaint of the offended spouse: imprisonment in a monastery, if there are monasteries of their confession in that place, or in prison, for a period of six months to one year, according to the circumstances, which more or less aggravate or mitigate his guilt, and, in addition, if he belongs to one of the Christian denominations, he submits himself to ecclesiastical penance according to the decision of his spiritual superior.

In the case where there was no charge of adultery and it was discovered in the investigation of some other crime, the secular court sends the culprits to the spiritual court.

The person with whom adultery has been committed, if he or she is not married, is sentenced, also according to the circumstances that more or less aggravate or mitigate their guilt: either to a prison sentence for a period of three to six months, or to detention for a period of three weeks to three months, and if they profess the Christian faith, they are also submitted to ecclesiastical penance.

Note. Muhammadan spiritual places also prescribe spiritual repentance and correction for the guilty in adultery proceedings." (art. 2077)

УЛОЖЕНИЕ О НАКАЗАНИЯХЪ

УГОЛОВНЫХЪ И ИСПРАВИТЕЛЬНЫХЪ.

САНКТПЕТЕРБУРГЪ.

ВЪ ТИПОГРАФИИ ВТОРОГО ОТДѢЛЕНІЯ СОБСТВЕННОЙ
ЕГО ИМПЕРАТОРСКАГО ВѢЩЕСТВА
КАНЦЕЛЯРИИ.

1845.

Criminal Code of the Kingdom of SCS (1929)

- "A husband or wife will be punished with imprisonment for up to two years for adultery committed by one of them with another person, who will also be punished with the same punishment."
- Prosecution is undertaken by a private lawsuit, and this can only be filed if the marriage is divorced or separated from bed and board because of that adultery. With the death of the offended husband or wife, the right to sue is extinguished.
- If the spouses were living separately at the time adultery was committed, the court can also exempt them from any punishment." (§ 292)

СЛУЖБЕНИ ДЕО

73.

МИ

АЛЕКСАНДАР I

по милости Божјој и вољи Народној
КРАЉ СРБА, ХРВАТА И СЛОВЕНАЦА

На предлог Нашег Министра Правде, а по саслушању Председника Нашег Министарског Савета, прописујемо и проглашујемо:

КРИВИЧНИ ЗАКОНИК

за Краљевину Срба, Хрвата и Словенаца.

I. ОДСЕК: ОПШТИ ДЕО.

ГЛАВА I.

Уводне одредбе.

§ 1.

Нико не може бити кажњен за дело, за које није закон, пре него што је учињено, прописао да ће се и како ће се казнити онај који га учини.

§ 2.

Ако је по учињеном кривичном делу изменен кривични закон, онда се примењује блажи закон. Мере безбедности се примењују по новом закону и ако се учинилац не би по њему осудио на казну.

§ 3.

На свакога ко учини у Краљевини Срба, Хрвата и Словенаца кривично дело, примениће се овај закон.

Овај ће се закон применити и на дела учињена на домаћем броду или ваздухоплову и онда кад се ови у време учињеног дела не налазе у области Краљевине Срба, Хрвата и Словенаца.

§ 4.

Овај закон примениће се и на онога ко ван Краљевине Срба, Хрвата и Словенаца учини које од кривичних дела предвиђених у §§ 91.—98., §§ 102.—104., §§ 106.—110., § 115. од. 1., § 215., бр. 1. и 2., § 222., § 225., § 229., §§ 234.—239. и § 283.

§ 5.

Овај ће се закон применити и на странца који ван Краљевине Срба, Хрвата и Словенаца према њој или њеном држављанину учини какво друго кривично дело (§ 4.) за које овај закон прописује најмање казну затвора, ако у Краљевину дође или ако буде издан неним властима.

IV. Modern trends - adultery

- Adultery decriminalized in most Western legislation
- The same applies to voluntary homosexual relations - only forced ones are punishable
In Islamic countries, severe punishments are still applied for both crimes, including death
- According to UN data, adultery is still a criminal offense in 33 countries, mostly predominantly Muslim (but also, for example, the USA and Venezuela), in most of them gender-neutral on paper
- The ECtHR considers the death penalty for adultery to be an inhuman punishment (deportation judgments - Jabari v. Turkey, N. v. Sweden)
- Social attitudes condemn adultery elsewhere as well, but it is considered that prosecution would violate the right to privacy and that the social danger is low.

Modern trends – rape

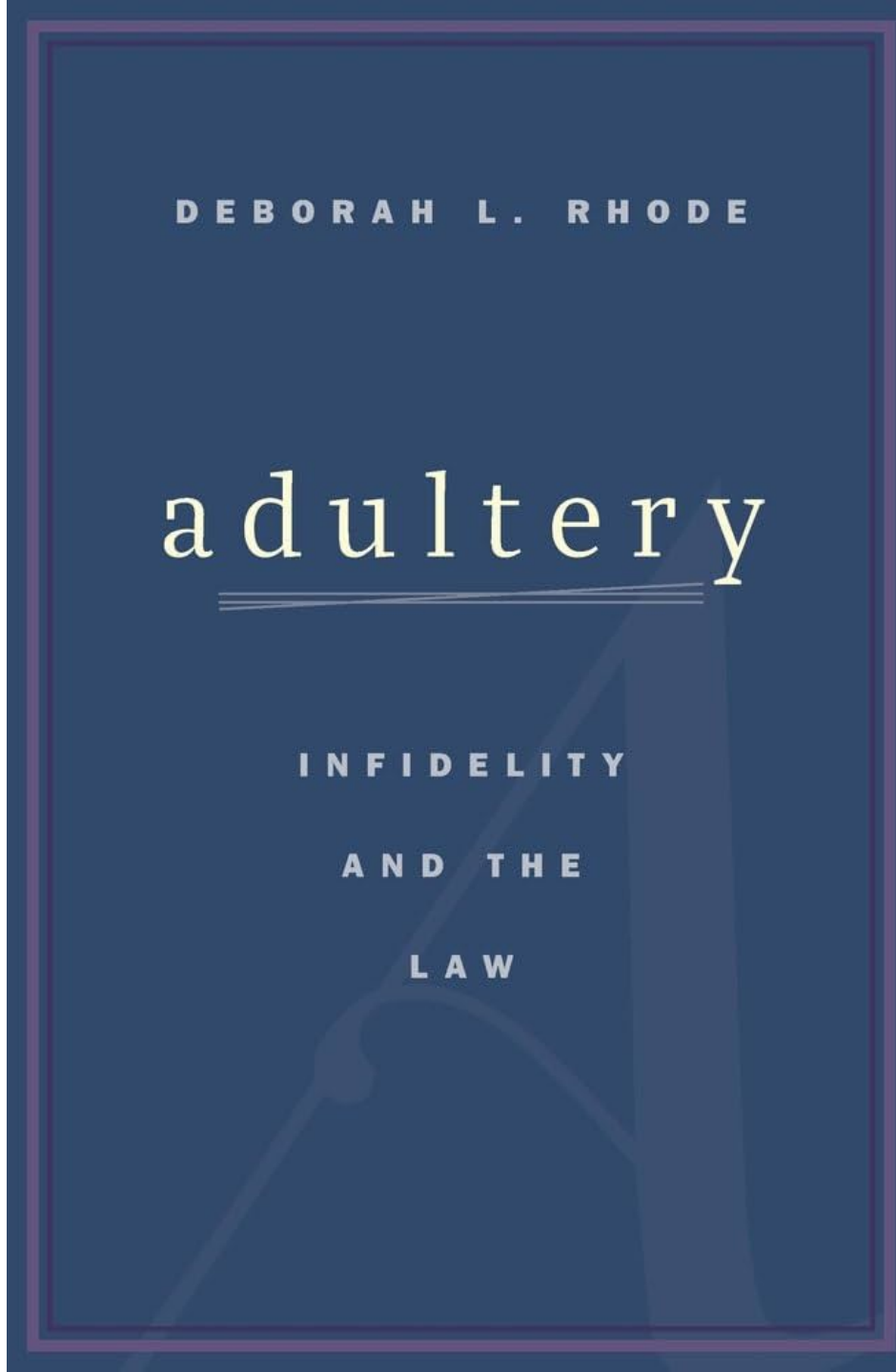
- In Western countries, rape is increasingly prescribed as a gender-neutral crime, but in many laws it is still divided
- Serbian Criminal Code (2005):

"Whoever forces another to intercourse or an act equivalent to it by using force or threatening to directly attack the life or body of that person or a person close to them, shall be punished by imprisonment of 5 to 12 years."

(art. 178.1 - merging with the former crime of 'unnatural fornication')
- However, rape is mostly interpreted as forcible penetration

Example: USA – adultery

- Adultery is still a crime under the laws of most US states
- Criminal prosecution is rare in practice, penalties are mild
- Is there discrimination when it comes to prosecution?
- Decriminalization mostly does not happen for political reasons - it is unpopular to legalize adultery



Example: UK - rape

- Until 1995, rape meant only a male perpetrator and a female victim
- Since 1995, a separate male rape has been introduced
- Sexual Offenses Act 2003 - the victim can be of either sex, but the perpetrator is still only male; the sentence goes up to life imprisonment
- Forcing a man to penetrate another person (of any gender) is punished as "causing a person to engage in sexual activity without consent" with a maximum of 10 years in prison

Social perception of rapists

- „Many years ago, two of my friends (on separate occasions) experienced a similar thing happen to them. They both fell asleep at a party, severely inebriated, and woke up to find a stranger having sex with them. The reactions from others to these events were very different in each case; one was taken very seriously as a case of rape. The other was seen as a bit of a joke, and my friend was asked whether the rapist had been ‘hot.’ Indeed, this friend was happy to go along with this, or at least appeared to be.

If you haven’t worked it out already, the reason for the difference in responses was that the first of my friends is a woman who had woken up to find a man having sex with her; the second friend is a man who had woken up to find a woman having sex with him.”

Natasha McKeever, “Can a Woman Rape a Man and Why Does It Matter?”, *Criminal Law and Philosophy* 13/2019, 599-600.

Subjects for thought

- Women are undeniably less likely to commit violent sexual offenses (and when they do occur, they are often only accomplices to men), but:
 - How representative are the statistics, and how much are they the result of social stereotypes? What is the dark figure of male victims?
 - Does the perpetrator being a woman and the victim a man make these crimes less severe? And what if the victim is also a woman?
- Is adultery as a criminal offense justified in modern society, if it is gender neutral?
 - Is punishment for adultery an important protection of morals and the family, or an unjustified invasion of private life?
 - What is the gap between a gender-neutral norm and practice?

