

**SEXUAL CRIMES IN MEDIEVAL AND POST-MEDIEVAL ROMAN LAW.** Medieval law has no uniform designation for sexual crimes. In the wider sense, they refer to any criminal deeds against the moral code valid at the time, with the common point of reference being sexuality. In the narrow sense, it refers to all forms of sexual intercourse outside of marriage. These include the various forms of illicit sexual acts (*luxuria*), rape (*stuprum*), and the forcible abduction of women (*raptus*), as well as procuration.

The various forms of *luxuria* were subdivided by Gratian, who referred back to Augustine (*De bono coniugale* [On the Good of Marriage], VIII. 8; XI. 12), into various degrees (*gradus*) (c. 32 q. 7 c. 11, 12). These are simple fornication (*fornicatio simplex*), for example brothel visits; adultery (*adulterium*); incest (*incestum* [LMA]) and sins against nature (*peccatum contra naturam*). These are, according to scholastic writers (Thomas Aquinas), the four areas of homosexuality, masturbation (*mollities*), sodomy (*bestialitas*), and “improper intercourse” in marriage (*concupitus non debitus*) such as anal, oral, dorsal, and infemoral intercourse.

In Germanic law, adultery was designated as intercourse between a married woman and another man. In a valid marriage, only the wife could be guilty of punishable adultery. The reason for this was that, during Germanic times, only the man and not the institution of marriage was worthy of protection, so adultery was represented as an assault on the rights of the husband. This explains why the woman was not officially subject to punishment but was at the mercy of the betrayed husband, who, insofar as he did not discover her *in flagrante*, could cast her out in disgrace or kill her without retribution. Death threatened if the adulterer was caught in the act; in the case of conviction, he generally faced a fine in most legal systems. From Frankish times, the attitude of the church began to prevail, according to which both husband and wife could be guilty of punishable adultery, as marriage should be protected as a moral institution. From the eighth century onward, adulterous husbands could also be persecuted by worldly authorities. However, during the following centuries, churchly principles continued to struggle against popular law.

A shift of paradigms can be observed in the late medieval period, when Konrad von Megenberg (d. 1374) demanded strict sexual faithfulness on the part of the wife, as she was more responsible for the production of legitimate successors than her husband; this, however,

was not to be understood as sexual freedom for the man. Both the *Schwabenspiegel* (1275) as well as the emerging jurisdiction of the cities punished adulterous husbands. At the same time, the previously sanctioned penalty for wives was abolished, unless the wife was discovered *in flagrante* by the husband. Acknowledging canon law, the *Carolina* (the first German criminal code, named after Emperor Charles V) (1532) recognized adultery by the man as equivalent to that of the woman (Art. 120) and both parties had the right to press charges. Concerning punishment, the *Carolina* referred to both German and imperial law, thereby creating an extremely contradictory situation in terms of criminal law.

Incest is understood as intercourse between close relatives. Early and mid-medieval *Bussbücher* (penance records) record various churchly punishments. According to interpretations partially still propagated today, intercourse within a forbidden marriage is punishable as incest. After the adoption of the model of marriage postulated by the church in the twelfth century as a consensual contract, incest represents an obstacle to marriage. Accordingly, a marriage could be declared invalid if the partners were related up to the seventh degree or (after the Lateran Council in 1215) up to the third degree. Despite the threat of sanctions, namely confiscation of property, banishment, servitude, or imprisonment, in the Middle Ages incestuous relationships remained a reality in rural and distant areas. It is also known that general prohibitions of incestuous relationships were often accompanied by privileged exceptions. The papal dispensation for an incestuous marriage was a suitable instrument of church politics, allowing the manipulation of the politics of marriage in European aristocracy. Not until 1532 did the *Carolina* (Art. 142 CCB and Art. 117 CCC) punish incest like the *matrimonium illicitum* (illicit marriage), in accordance with Italian authors.

Concerning sins "against nature": based on amendments by Justinian of 538 and 559 (Nov. 77; 141) and on the *capitularia* (short chapters) by the so-called Benedictus Levita (ninth century), a list of sins was compiled according to which the decline of Sodom and Gomorrha as well as earthquakes, pestilence, and so on were interpreted as the revenge of God for sins "against nature." In early- and mid-medieval penance books, these sexual crimes were punished variously by the church. Theologians of the "reform papacy" demanded more severe punishments. The Third Lateran Council decided that homosexual clerics be degraded or sent to a monastery, laypersons however were to be expelled from the church (X 5.31.4). From the thirteenth century on, homosexuality could be used for propaganda purposes—whether true or invented—against politically important persons, as Bonifatius VIII, Edward I of England, or Magnus VII Eriksson of Sweden. Literature of the late Middle Ages proves the existence of "sodomites"

(*sodomitici*) and their persecution. There is no evidence of any standard procedure. Mutilation, public humiliation, fines, and exile (especially for minors and passive partners) were more numerous than death sentences. In Venice, approximately seventy executions were performed in the fifteenth century (most by fire or decapitation followed by incineration). There are no records of the death penalty for women for analogous crimes for the medieval period. According to the *Carolina* (1532), sodomy and homosexuality between men and women was punishable by death by incineration.

From the thirteenth century, those practicing masturbation (*mollities*) were merely castigated with increasing severity. Guilelmus Peraldus compared it with murder and Johannes Gerson developed investigative techniques to probe the conscience of boys and adolescents. The influence of the church on marital sex extended to positions in intercourse: anything that did not correspond to the normal position was regarded as sinful. Referring to medical authorities, Konrad von Megenberg, Cathedral Canon in Regensburg, states that children ensuing from intercourse performed in the manner of animals would be born with deformities.

Rape was understood as forced sexual contact. From Frankish times, rape is often indistinguishable from the capture of women, which will have included rape. Sometimes *raptus mulieris* and rape are distinguished but subject to the same punishment.

In his commentary on C 32.5.14, Gratius distinguishes rape from adultery: the crime of adultery presupposes consent to the violation of marital rights and obligations. Rape, on the contrary, is an external violation (*violentia*) of the woman, whose rejection of intercourse was not respected. As a rule, only a respectable woman (virgin, wife) could be the victim of rape, whereas that performed on a "common woman" (*mulier communis*) was punished mildly or not at all. The *Sachsenspiegel* (Ldr. 3.46.1), *Schwabenspiegel* (256), and the Augsburg *Stadtbuch* (municipal record) of 1276 failed to distinguish between these women. Late medieval city statutes contain varying stipulations on the degrees of penalty, mostly the death penalty, as also set out in the *Carolina* (Art. 119). As evidence of rape, the woman had to cry out loudly or show resistance; otherwise intercourse was assumed. This is one of the reasons that charges of rape could only be made if the persons were caught in the act or within a short interval.

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