

# Jurisprudential Discussion on a Homosexual Prostitution Case

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**Abstract:** There is no specific law and legislative intent to prohibit homosexual prostitution. Criminal statutes should be read narrowly so as to cover only those areas where it was clear that parliament wanted the law to apply. As for purposive approach, orthodox morals and rules toward homosexual are absence too. Liberal construction has its limitation. The guilty decision made by the basic-level people's court is inadequate when the supreme people's court has no confidence in making a judicial interpretation. Either the unintentional absence or intentional ignorance of power leads to the legal loophole, which no longer deal with confused legal practice. The tolerance toward homosexual in Chinese traditional culture is no longer adaptable to homosexual rights protection too. So relevant legislation or clear legal interpretation is needed.

At the beginning, we need to introduce the case –the first inviting suspicion to homosexual prostitution in Jiangsu Province which attracts a lot of attention, because of its characteristic and references to legal loophole. According to the procuratorial organ's accusation, since January in 2003, Li Ning has premeditated with Liu, Leng and so on to employ “male PR”, by the means of posting advertisements on newspapers. Then they recruited and organized these young men to commit homosexual prostitution with male consumers in their “Golden Kylin”, “Gallery Bridge” and “Zheng Qi” Bars; it has been ascertained that he had organized seven times prostitution activities and had reaped staggering profits as 124,700 yuan. Up to the present, after the People's Police's submission for approval of arrest, the procuratorial organ has dispute on determining the nature of the circumstances of the case. Homosexual prostitution has not been clearly defined by Article 358 of

*Criminal Law of the People's Republic of China* as “making arrangements for another person to engage in prostitution” yet. In light of the principle of “any act is not to be convicted without being deemed by explicit stipulations of law as a crime”, the suspects should be acquitted of a charge. Thus, the People's Procuratorate made a decision of disapproval of arrest, while the suspects have already been detained for 30 days. Then the People's Police applied for the People's Procuratorate's reconsideration, at the same time Li Ning among and others were set free. Finally, the People's Procuratorate's decision was affirmed by the reconsideration. In view of the case characteristic, the prosecutorial office and the police reported to the superior department, resulting in the seminar held by the politico-legal departments of Jiangsu Province. As the seminar's decision, Jiangsu Province's the higher People's Court asked the People's Supreme Court for instruction and the Supreme Court made a report to the Standing Committee of the National People's Congress. Consequently, the Standing Committee made a verbal response: an offender who arranges for young men to engage in homosexual prostitution must, in comparison with one who arranges for another person to engage in prostitution, be convicted and given punishment. After hearing the case, the court held that “another person” in “making arrangements for another person to engage in prostitution” indicated female, as well as male. Therefore, Li Ning was sentenced to fixed-term imprisonment of eight years and fined 60,000 yuan.

The rise of legal hermeneutics in jurisprudential circle of China is contemporaneous with the rise of the legists in China. As the core of the legal practice, the activities of legal interpretation will get more and more incisive by the deepening of activities of the legal practice, whenever the legal hermeneutics get improvement as well. Accordingly, it is believed that some new discoveries would be found out, resulting from the application of the legal hermeneutics to an unacquainted field in the present case. After this case was disclosed, both traditional and Internet media have already commented on the procedure or substance aspect. And now we focus to discuss the key problem—the gender. Based on different opinions on “another person” in

“making arrangements for another person engage in prostitution” stipulated in Article 358 of *Criminal Law*, there are various conclusions on whether the trial’s conviction obeyed the principle of “nulla poena sine lege” or not.

The con-conviction side thinks that the conviction revives the analogy system and violates the principle of “nulla poena sine lege”. That is because that “prostitution” in crime of organizing other persons to engage in prostitution is interpreted by the criminal authority of China as the “conduct of having unjustifiable sexual intercourse with others at the expense of selling one’s body in order to procure physical or unphysical interests”, which usually are deemed as women prostituting themselves to men, but sometimes men to women (*Criminal Law*, edited by Gao Mingxuan and published by Beijing University Press in 1998). Meanwhile, the common people generally regard prostitution as women selling their bodies (*the Contemporary Chinese Dictionary*, published in 1985). Both the common understanding and the authoritative interpretation do not ever comprehend or accept “the conduct of providing homosexual intercourse” as the “prostitution” in crime of organizing other persons to engage in prostitution.

The pro-conviction side does not agree with that explanation. Answering the similar question asked by the host of the TV program “Legal Report”, the Professor Chen Xingliang said:” relatively speaking, the language interpretation of *the Contemporary Chinese Dictionary* is more hysteretic than the reality. Nevertheless, the objective things advance all the time. As a result, the meanings of the expressions would change along with the development of the social life. For instance, there is a wording—road, which was used to mean the carriageway for horses and carriages. Nowadays, we also use road as trafficway for vehicles. That is to say, the circumstances meant by the word may have changed by now, namely representing plural instead of singular, expanding the word’s extension. In one word, you have to understand the words in the light of development of objective things. Certainly, there is a premise that any language has a boundary which could not be surpassed.” Apparently, his opinion is by means of *Criminal Law*’s objective interpretation, but it is lack of persuasion. It is no doubt that considering trafficway as road is a natural interpretation for any dictionary, because of

time changes. If we analogize these with the problem between “homosexual prostitution” and “heterosexual prostitution”, there would be only one conclusion that this analogy is absolute. We could know about it even without checking the dictionary. It would hardly even become the common sense among the jurisprudential circle.

Although Professor Zhang Mingkai indicates that “other persons” includes male in his teaching materials, he thinks prostitution means “having sexual intercourse with unspecified persons of opposite sex or other licentious activities on the purpose of seeking profits”. It is needed to do an analysis for the sake of defending the semantic explanation of dictionaries and textbooks, for the reason that law is authoritative, as well as dictionary. Law often defines the expressions by the predominant way varying from that of dictionary; this is always called “the despotism of legal language”. Whereas when “prostitution” has not been defined by law yet and has been out of the “despotism’s” control, the dictionary’s explanation is one of the appropriate methods among the semantic interpretation. Of course, compared with the social life, dictionary is hysteretic. So does law, doesn’t it? As our judgment would affect someone’s life or liberty, why we do not interpret *Criminal Law* in a conservative way? Why we can not apply the temporal effect notion of “to choose old law and less punishment” to explain the expressions? In like manner, the textbooks edited by criminal legists could inflect the legal ideas of the professional legists to some extent. Especially in China, textbook is a mirror to the jurisprudential circle’s utterance. Hence, when finding that no textbook states explicitly that crime of organizing other persons to engage in prostitution includes “homosexual prostitution”, we could obviously think the definition stated by Article 358 of *Criminal Law* is equivocal.

Even if semantic interpretation is not so easy to do, legal interpretation is more than consulting dictionaries and textbooks; otherwise all the judges need are those for solving the interpretive problems. Furthermore, the pro-conviction side cites *Notice of the Supreme People’s Court and the Supreme People’s Procuratorate on Printing and Distributing the “Answers to Some Questions concerning Implementing Decision of*

*the Standing Committee of the National People's Congress on the Strict Prohibition Against Prostitution and Whoring*" in December 11, 1992. Article 9 of the Notice prescribes that "other persons" in "making arrangements for, assisting in arranging for, forcing, luring, sheltering or procuring other persons" mainly means women, as well as men. Now that the judicial interpretation states that men are included in "other persons" in writing, the conviction surely obeys the principle of "nulla poena sine lege". It embodies logic as follows: since "other persons" including men is expressly stipulated, more over, the fact that most of the whoremongers are men does not need to be prescribed, and it is common people's law-consciousness that prostitution is exchange sex for money. All of these contribute to the conviction. However, there is a loophole in the logic chain. That is, the traditional sense that most of the whoremongers are men merely results from the male-dominated social consciousness on the background of heterosexuality. When it comes to convicting someone of homosexual intercourse, we can not consider which gender men prostitute themselves to. It means that we should upgrade the semantic interpretation problem into logical interpretation one with the view of probing into the legislators' original intention or proceeding to the teleological interpretation.

Liang Huixing defines the interpretation in accordance with the intention of legislator as a method of construing legal provisions on the purpose of inferring what the legislator meant by. And this method is to analyze the legislator's value judgment and intent to realize on the ground of relevant materials, such as legal bills and proposals, drafts, the records of deliberation and so on from the process of legislating and drafting the laws. In 1997, "forcing a woman to engage in prostitution" in *Criminal Law* of 1979 is revised to "crime of forcing other persons to engage in prostitution" (at the same time the crimes of organizing, luring, sheltering and procuring other persons to engage in prostitution are supplemented). We could tell from the evolution that the legislators intend to expand the scope of the crime objects indeed. However, we could not find any relevant legislative information or suggestion about regulating the homosexual intercourse. What is more important is that the legislators do not mean to

regulate the homosexual intercourse at all, in terms of the way of systematic interpretation. The reason is that if the legislators do think the persons of the same sex could have sexual intercourse and it is necessary to regulate by *Criminal Law*, how could the victims of the crime of rape stipulated by *Criminal Law* only be female? Besides, crime of rape is more serious than crime of organizing other persons to engage in prostitution. Because the latter is deemed as victimless crime by many countries and the former infringes the citizens' rights of sexual autonomy. The query above could be proved reasonable by the way of comparative interpretation. That is, after consulting a lot of countries' criminal laws, we could conclude that as long as the crime of organizing other persons to engage in prostitution involves homosexual intercourse, then the object of the crime of rape could be the persons of the same sex as well. Article 222-23 of *Criminal Law of the French Republic* stipulates that the victims of the crime of rape are "other persons", and the criminal objects of "whoremaster securing benefit" stipulated in Article 225-5 are "other persons", too. Both of their punishments are light, whose maximum sentences are five-year imprisonment (the quoter notes that fixed-term imprisonment of five years is just the starting point of the punishment for the same kinds of crimes in China). Actually, it is not odd that the legislative original intention do not consider the homosexual intercourse, for the reason that the homosexual is not the subject of Chinese laws. They are taken for a man or a woman in the legal vision, not the homosexual. Similarly, having sexual intercourse with a girl under the age of 14 constitutes "crime of rape". However, the same conduct against a boy under the same age merely constitutes "crime of acting indecently against a child", of which the criminal responsibility is unfairly lighter than that of the former. For a country with continental legal system where positive laws dominate, legists are very important to legislation. But it seems that few legists work over this issue. Hence, there is the conclusion: since the legislators do not mean to punish the homosexual intercourse, the only way to criminate the behaviors is appealing to the teleological interpretation. And that is the interpretive method of elucidating the criminal provisions' real meaning, according to the intention of the

criminal regulations.

The object infringed by crime of organizing other persons to engage in prostitution is the order of society. What's more, both of the homosexual prostitution and the heterosexual prostitution are the same kind of infringement to the order of society, too. Therefore, the conduct in question should be criminated as the same as crime of organizing other persons to engage in prostitution. A case to make a conviction by this logic is definitely not wrong. Howbeit, legal hermeneutics is supposed to be a chameleon (said by R.A.Posner), and each case could be likened to the plasticene. Moreover, the saying "if you want to condemn somebody, you can always find out a charge" is exactly the same meaning as above, which itself reminds us to treat the complicity and variety of the interpretive language scrupulously. Even so, it is possible that the "plasticene" could be pinched into another figure by the opposite opinions. That is, when we talked about the order of the society, we totally forgot that there was not such kind of order to regulate the homosexual intercourse. It is usually heard that "men steal and women prostitute themselves" expresses a kind of moral resentment. And this saying itself indicates that different genders have different modes of violating the social norms. For example, there is a usual saying—"it is improper for men and women to be too intimate". However, have you ever heard about a saying stating like this "it is improper for men to be too intimate"? Now, it is clearly enough that legal loophole for homosexual intercourse is not without reasons, and the mainstream of morality ignores these conducts as well. Consequently, the situation that the homosexual are free from rights and duties has many causes. Whereas, does Criminal Law get ready to end this circumstances? Even though the Supreme People's Court often makes judicial interpretations beyond the legislators intention as making regulations, it does not have confidence to make a judicial interpretation for the present case, leading to a report to the Standing Committee of the National People's Congress. Thus, how much power does the Basic-level People's Court have to fulfill the transition?

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