



Women's Priority Legislative Agenda for the 17th Congress

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Eliminating Discrimination Against Women in the Revised Penal Code (RPC): Decriminalizing Adultery and Concubinage

Philippine
Commission
on Women



POLICY BRIEF NO. 3

This policy brief provides the rationale for repealing Revised Penal Code provisions on Adultery and Concubinage (Articles 333 and 334)

WHAT IS THE ISSUE? WHAT HAS BEEN OUR RECENT EXPERIENCE/S WITH REGARDS TO THE ISSUE?

The Philippines is one of the few countries that still considers adultery and concubinage as criminal offenses.

Adultery and concubinage are crimes against chastity under the Revised Penal Code (RPC) and which are referred to as sexual infidelity in the Family Code or marital infidelity in a general sense. Although these crimes are of the same nature and both constitute infidelity, there is a higher burden put on women/wives than on men/husbands. This disparity in the treatment of these laws has a huge underlying difference if the infidelity was committed by the male (concubinage) or female (adultery) spouse, and in the imposition of penalty which is heavier for adultery compared to concubinage. The crime of adultery is easier to prove as the husband must only prove that his wife had sexual intercourse with a man other than him. For concubinage, the wife has to prove first that her husband has committed either one or all of the following: had kept a mistress in the conjugal dwelling; had sexual intercourse under scandalous circumstances; and/or had lived together with his mistress in any other place. In adultery, the penalty is the same for both the guilty wife and her paramour which is imprisonment for a maximum period of 6 years but in concubinage, the penalty for the guilty husband is lower by one degree which is imprisonment for a maximum period of 4 years and 1 day only, while his concubine is given a separate penalty which is “destierro” or banishment and not imprisonment.

According to Gabriela Women's Party's bill, adultery and concubinage are often resorted to only as

“bargaining suits” to get the other party in a nullity petition to “cooperate” or to capitulate in support negotiations. These suits, while pursued in the initial stages, are often withdrawn or dismissed. Worse, separated or abandoned wives, who have no legal remedy in the absence of a divorce law, are always under a constant threat of suit from their estranged husbands. They are blackmailed by their estranged husbands through adultery, and while they also have a ground to file concubinage, they face the difficulty of proving the crime due to the inherent difficulty in the standards set by the law. In many cases, women who are faced by these threats are forced to forego legitimate custodial claims of their children while some are forced to give up their claims over conjugal properties, assets and the like.¹

According to the United Nations Working Group on Discrimination against Women, adultery law or the criminalization of sexual relations between consenting adults, as it applies to both women and men, is a violation of the right to privacy.² The Working Group also recognizes that adultery provisions in penal codes in many countries have usually been drafted and almost implemented in a manner prejudicial to women. They also acknowledge that in accordance with some traditions, customs or civil law systems, adultery may constitute a matrimonial offense bearing legal consequences in divorce cases, such as in the custody of children or in the denial of alimony, among others. However, it should not be considered as a criminal offense that is punishable by fine and/or imprisonment. Maintaining adultery as a criminal offense for both women and men means in practice that women will continue to face extreme vulnerabilities, and violation of their human rights to dignity, privacy and equality, given continuing discrimination and inequalities faced by women compared to men.³

WHY IS THE ISSUE IMPORTANT?

Provisions in the RPC on adultery and concubinage do not treat women and men equally since they establish harsher rules and impose higher penalties for women offenders compared to men offenders. There are systemic evidences of unfairness or discrimination against women involved in these crimes as regards the elements, circumstances and penalties, and in their implementation. Concubinage is more difficult to prove in court than adultery. Moreover, concubinage is punished less severely than adultery.

The disparity in the treatment of adultery and concubinage arises from gender biases in being more lenient or seemingly accepting the infidelity of men as normal, but more stringent on women who are expected to be faithful to her husband. These discriminatory provisions in the RPC should be removed or repealed.

WHAT ARE THE EXISTING LAWS OR POLICIES RELATED TO THE ISSUE?

The Magna Carta of Women (MCW) or RA 9710 provides for the amendment or repeal of laws that are discriminatory to women including Articles 333 and 334 of the Revised Penal Code on adultery and concubinage (Section 12).

The 1987 Philippine Constitution – Article II on Declaration of Principles and State Policies provides that “The State recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men” (Section 14).

WHAT ARE THE EXPERIENCES OF OTHER COUNTRIES IN ADDRESSING THE ISSUE?

In 1947, the House of Councilors of Japan abolished adultery as a crime as suggested by their government in the spirit of the new constitution providing equal rights for women.⁴ In 1996, the Guatemalan Constitutional Court struck down the penal code’s punishment of marital infidelity or adultery on the basis both of the constitution’s equality guarantees and human rights treaties, including the CEDAW.⁵ In 2005, a Decree in Haiti was promulgated which, in the context of regulating offenses of sexual aggression and eliminating discrimination against women, decriminalized adultery.⁶ In 2007, the Ugandan Constitutional Court overturned the adultery law that penalized women for adultery while leaving their male partners

unpunished. In 2011, Mexico abolished and decriminalized adultery as a way to condemn a crime historically construed to allow men to hold women as property.⁷ Recently, on 26 February 2015, the Constitutional Court of South Korea struck down a 62-year old law that made adultery a criminal act carrying a prison sentence of up to two (2) years. The ruling of the Court declared that adultery was unconstitutional as it infringed upon an individual’s “right to sexual self-determination,” and “right to privacy” under the Constitution⁸, and the decision whether to maintain marriage should be left to the free will and love of people.⁹

All European nations have decriminalized adultery and, while it is not considered a criminal offense in most Western parts, it may still have legal consequences, especially in divorce proceedings.¹⁰ Adultery is also not a crime in Canada and China but a valid ground for divorce. It has also been decriminalized in most of the Latin American countries and in Australia. In the Asia-Pacific region, only Taiwan and the Philippines treat adultery as a crime.

WHAT ARE THE CONSIDERATIONS IN ADDRESSING THIS ISSUE IN THE COUNTRY?

Promoting women’s rights and gender equality

Removing the crimes of adultery and concubinage from the RPC will eliminate discrimination against women and prevent violation of their human rights to dignity, privacy and equality. It will also contribute to ensuring equality before the law between women and men.

Responding to International Commitments

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires the State to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women (Article 2[g]). It also calls on the States Parties to take all appropriate measures to eliminate discrimination against women and ensure equality of men and women in all matters relating to marriage and family relations (Article 16).

The International Covenant on Civil and Political Rights (ICCPR) states that no one shall be subjected to arbitrary or unlawful interference with his/her privacy, family, home or correspondence, nor to unlawful attacks on his/her honor and reputation (Article 17).

The 2006 CEDAW Committee Concluding

Comments on the 5th and 6th Philippine Country Report raised its concern on the lack of progress in undertaking and completing necessary revisions of discriminatory provisions in the RPC, particularly on the Marital Infidelity Bill which is still pending.

The UN Committee on Economic, Social and Cultural Rights echoed this observation of the UN CEDAW Committee in the Concluding Observations to the Philippines under Articles 16 and 17 of the Covenant on Economic, Social and Cultural Rights. The Committee raised its concern on “the lack of sufficient progress in reviewing and repealing discriminatory provisions against women still existing in national legislation, particularly the Marital Infidelity Bill, which seeks to remove the discriminatory provisions in the Revised Criminal Code pertaining to concubinage and adultery and which has not yet been adopted”.¹¹

During the 29th Session of the Human Rights Council, the UN Working Group on Discrimination’s Report on the Issue of Discrimination Against Women in Law and in Practice recommended to “repeal all laws that support the patriarchal oppression of women in families, such as laws that exclude marital rape from the crime of rape, laws that grant pardon to rapists who marry their victims and laws that criminalize adultery”.¹²

POLICY RECOMMENDATION

Adultery and concubinage should be decriminalized or removed from the RPC since they involve violation of marriage contract, hence, liability should only be civil in nature. Taking off adultery and concubinage from the criminal offenses should however, still have the following legal effects:

1. Adultery and concubinage are still illegal/unlawful under the Family Code (civil matter), so an aggrieved/offended/victimized spouse can still file for legal separation on the ground of sexual infidelity, and/or a possible manifestation of psychological incapacity as a ground for declaration of nullity of a marriage;
2. Marital infidelity (concubinage) will continue to be one of the manifestations of psychological violence against women under RA 9262 (Anti-Violence Against Women and Their Children Act), a special law that protects women and their children from abuses and violence by their intimate partners;

3. Sexual infidelity (adultery or concubinage) will continue to be one of the bases for an aggrieved/offended/victimized spouse to sue for ordinary damages under the Civil Code (i.e. psychological pain and suffering) against the offending/guilty spouse and the third party involved.

While it is recommended that adultery and concubinage be no longer considered as criminal offenses, these should still have legal implications in special laws such as RA 9262, Family Code and the Civil Code. Marital or sexual infidelity therefore, should be considered as one of the valid grounds for filing an annulment case.

CONCLUSION

Legislative proposals to repeal RPC provisions on adultery and concubinage were filed but remained pending in the 16th Congress. In the interest of fulfilling the mandates under the Constitution and the Magna Carta of Women, it is hoped that our legislators will prioritize and favor the immediate enactment of the bill repealing adultery and concubinage as criminal offenses under the RPC.

ENDNOTES

¹Explanatory Note, House Bill 4377 by Gabriela Women’s Party, Sixteenth Congress First Regular Session

²Joint Statement by the United Nations Working Group on discrimination against women in law and in practice, 18 October 2012, available at <http://www.wluml.org/news/un-joint-statement-%E2%80%9CAdultery-criminal-offence-violates-women%E2%80%99s-human-rights%E2%80%9D>

³Background Information on the Statement Issued by the Working Group on Discrimination Against Women, by Prof. Frances Raday, Chair of the Working Group on Discrimination against Women, available at www.ohchr.org/Documents/Issues/Women/WG/BackgroundNoteAdultery2.doc.

⁴Pittsburgh Post-Gazette, 13 October 1947, available at <https://news.google.com/newspapers?nid=1129&dat=19471013&id=yJEyAAAIBAJ&sjid=UGoDAAAIBAJ&pg=6064,2855078&safe=strict&hl=en>

⁵See supra note 3.

⁶See supra.

⁷<http://news.abs-cbn.com/global-filipino/world/03/25/11/adultery-no-longer-crime-mexico>

⁸<http://klawguru.com/2015/02/26/adultery-no-longer-a-crime-in-korea/>

⁹<http://www.theatlantic.com/international/archive/2015/03/south-korea-adultery-law-repeal/386603/>

¹⁰<http://www.theweek.co.uk/62723/adultery-laws-where-is-cheating-still-illegal>

¹¹http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.PH.L.CO.4_EN.pdf

¹²A/HRC/29/40 on the “Report of the Working Group on the issue of discrimination against women in law and in practice”.