



**Women's  
Priority  
Legislative  
Agenda  
for the 18th Congress**

# Repealing the Revised Penal Code provisions on Adultery and Concubinage

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*This policy brief provides the rationale for repealing Articles 333 and 334 in the Revised Penal Code*

## **WHAT IS THE ISSUE? WHY IS THE ISSUE IMPORTANT?**

### **On the Definitions of Adultery and Concubinage**

Adultery and Concubinage are penalized under separate provisions in the Revised Penal Code (RPC) according to the sex of the offending spouse. Although these crimes both refer to marital infidelity, the law places a greater burden upon wives than husbands due to the disparity in the definition of the crimes, the evidentiary proof required, and the penalties imposed upon the offending parties.

Adultery, as defined under Article 333 of the RPC, is committed by a married woman and her paramour who knows of her marital status, when they engage in sexual intercourse. Thus, the law only requires proof of an offending wife's sexual relations with another man during the marriage so that she may be convicted of the crime.

On the other hand, concubinage, as defined under Article 334 of the RPC, is committed by a married husband by (a) keeping a mistress in the conjugal dwelling; (b) having sexual intercourse under scandalous circumstances with a woman who is not his wife; or (c) cohabiting with her in any other place. Unlike adultery, proof of extra-marital sex alone is not sufficient to convict an offending husband of concubinage since the law requires that any of the three circumstances must be shown.

These differences also affect the number of times that the offending spouse may be held liable for an extra-marital affair. An offending wife and her paramour may be held criminally liable for each act of adultery as may be proven by the offended husband since the crime is merely committed through extra-marital sexual intercourse. However, the plurality of extra-marital sexual acts in the crime of concubinage does not have that same implication, since the crime may be committed through cohabitation with a paramour.

### **On Penalties**

The provisions also differ in terms of the severity of prescribed penalties. In adultery, the prescribed penalty for the offending wife and her guilty paramour is *prisión*

*correccional* in its medium and maximum periods (imprisonment which ranges from 2 years, 4 months and 1 day to 6 years). In concubinage, however, the offending husband alone may be punished by a lower penalty of *prisión correccional* in its minimum and medium periods (imprisonment which ranges from 6 months and 1 day to a maximum of 4 years and 1 day). Unlike in the crime of adultery where both guilty partners may be imprisoned, the impossible penalty for the concubine is only *destierro* or banishment.

Justifications for the harsher penalties impossible in the crime of adultery revolve around the concept that adultery opens the possibility of bringing illegitimate children into the family without the knowledge of the husband<sup>i</sup>.

### **Manifests gender bias**

RPC Articles 333 and 334 violate the equal protection clause of the 1987 Constitution since the sex-based classification does not justify the setting of different elements for the same act of engaging in extra-marital relations. Moreover, the justification for harsher penalties for the crime of adultery, as first laid down by the Supreme Court in 1911, may no longer be applicable a century later. Questions on the paternity and filiation of children could already be resolved by availing of the remedies under Articles 172, 173 and 175 of the Family Code; and by medical advancements such as DNA testing<sup>ii</sup>.

The criminalization of marital infidelity does not only impact women and men disproportionately, but it also constitutes excessive State interference in the private lives of its citizens, which violates fundamental law. Private sexual activities between consenting adults are covered by the principle of privacy as enshrined in the International Convention on Civil and Political Rights (ICCPR) and jurisprudence<sup>iii</sup> based thereon. Laws that penalize marital infidelity in effect, infringe upon the rights of consenting adults to their privacy.

### **Decriminalization of marital infidelity in other countries**

Despite these, the Philippines, Brunei, and Taiwan remain to be the only countries in the Asia-Pacific Region that treat adultery as a crime. Other countries in the region such as Japan (1947) and India (2018) have already abolished

adultery on the basis that it violates the equal protection guarantees under their respective constitutions and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). Other countries such as South Korea declared its 62-year old adultery law to be unconstitutional as it infringed upon an individual's "right to sexual self-determination" and "right to privacy". The Constitutional Court stressed in its ruling that decision to maintain marriage and family should depend on the free will and affection of individuals, which should not be controlled by criminal punishment, adding that it would not be an effective means to achieve the purpose to protect the marriage system<sup>iv</sup>.

Adultery has also been decriminalized in Australia, Canada, Haiti, Uganda, most Latin American countries, as well as in all European nations. Legal consequences of marital infidelity still apply mostly to such countries, as a valid ground for divorce and/or claim for damages for "alienation of affection" under common tort law against the third person.

According to the United Nations Working Group on Discrimination against Women, the criminalization of sexual relations between consenting adults is a violation of the right to privacy.<sup>v</sup> It also acknowledged that 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.<sup>vi</sup>

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

The 1987 Philippine Constitution 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" (Article II, Section 14).

Republic Act No. 9710 or the Magna Carta of Women 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 International Covenant on Civil and Political Rights (ICCPR) which was ratified by the Philippines in 1986, 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 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which was ratified by the Philippines in 1981, requires State Parties 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).

### POLICY RECOMMENDATION

It is recommended that Articles 333 and 334 of the Revised Penal Code be repealed. Marital infidelity constitutes a violation of the marriage contract (i.e., the obligation to observe, among others, fidelity) hence, the liability for such violation should be civil in nature.

Notwithstanding such repeal, the following should remain in effect:

1. The remedies of an offended spouse under the Family Code to (a) file for legal separation on the ground of sexual infidelity; (b) file a petition for declaration of nullity of marriage when the sexual infidelity is of such nature that it manifests a psychological incapacity to comply with their essential marital obligations;
2. The remedy of an offended spouse under Article 26 of the Civil Code to file a complaint for damages against the paramour or mistress for meddling with, or disturbing, their private life or family relations (i.e. alienation of affection);
3. The remedies of an offended wife as defined under R.A. No. 9262 or the 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.

<sup>i</sup> US v. Jacinta Mata, et al. (G.R. No. L-6300, March 2, 1911)

<sup>ii</sup> See Section 9(c) of the Rule on DNA Evidence (A.M. No. 06-11-5-SC)

<sup>iii</sup> Toonen vs. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)

<sup>iv</sup> Constitutional Court of Korea, Decision on the Petition of Park O-Soon, et al. (Case No. 2009Hun-Ba17 February 26, 2015)

<sup>v</sup> Joint Statement by the United Nations Working Group on discrimination against women in law and in practice, 18 October 2012, available at <http://www.wlumf.org/news/un-joint-statement-%E2%80%9CAdultery-criminal-...>

<sup>vi</sup> Background 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](http://www.ohchr.org/Documents/Issues/Women/WG/BackgroundNoteAdultery2.doc).