

CRIMINAL ADULTERY AND FORNICATION IN THE PHILIPPINES: A RE-EXAMINATION

By

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INTRODUCTION

There seems to be some sort of "credibility gap" between what modern society considers perfectly permissible sexual behavior and what the law says is forbidden. Sexual behavior within or without the marital union is not spared. With the ever-increasing clamor for liberalizing sex codes and practices, it is not surprising that there should be a continuing and spirited debate between morality and the criminal law.¹

The history of man indicates that as soon as he created the relationship of marriage, adultery was not far behind.² More than mere historical considerations, however, have prompted this brief paper. The Philippines is the only Christian nation in the Far East, with about 90% of its population of more than 32,000,000 being Roman Catholics.³ Quite naturally, divorce is not recognized. Adultery is a crime under a penal code promulgated as early as 1932 based on the Spanish Penal Code of 1870 which, in turn, is based on the French Penal Code of 1810. This makes the penal code of the Philippines more than 150 years old.⁴ Fornication, however, is not punishable unless the circumstances of its commission amount to concubinage. At the other end of the picture is a modern society brought about by a rapid "democratization" in the fifty years that the Philippines came under the authority and influence of the United States. A backward agricultural economy is gradually becoming industrialized. Society has become urbanized and, at the same time, has increased its mobility. Modern methods of communication and transportation, and all forms of mass media are bringing to the consciousness of the people the social "revolutions" in other parts of the world, including "new" ideas on sexual relations.

The setting speaks for itself. Perhaps, it is about time that the antiquated provisions of the penal code of the Philippines on adultery

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¹ See among others, DEVLIN, *THE ENFORCEMENT OF MORALS* (1959); Rostow, *The Enforcement of Morals*, 1960 CAMB. L.J. 174 (1960); Hughes, *Morals and the Criminal Law*, 71. YALE L.J. 662 (1962); FULLER, *LAW AND MORALITY*, HART, *LAW, LIBERTY AND MORALITY* (1962); Devlin, *Law Democracy and Morality*, 110 U. PA. L. REV. 635 (1962).

² Murray, *Ancient Laws on Adultery*, 1 J. FAMILY LAW 89 (1961).

³ See 1963 UNITED NATIONS DEMOGRAPHIC YEARBOOK, Table II.

⁴ See 1 AQUINO, *THE REVISED PENAL CODE OF THE PHILIPPINES* 1-2. (1961).

be re-examined. The re-examination will include a comparative study of similar provisions, or lack thereof, in several states of the United States, including trends and attitudes of American criminologists and lawmakers towards the subject.

ADULTERY

A. *Codal Definitions and Jurisprudence*

In the Philippines, adultery is primarily a crime committed by a married woman. Her paramour becomes liable for adultery only if he knows that the woman is married.⁵ Thus, Article 333 of the penal code provides:

"Art. 333. *Who are guilty of adultery.* — Adultery is committed by any married woman who shall have sexual intercourse with a man not her husband, and by the man who has carnal knowledge of her, knowing her to be married, even if the marriage be subsequently declared void. x x x"

In most jurisdictions in the United States, adultery is committed by either the man or the woman, or both. It is enough that there be sexual intercourse between two persons either of whom is married to a third person, provided the other has knowledge of such marriage.⁶ It will, at once, be noticed that the law in the Philippines does not require cohabitation, lewdness, openness, nor notoriety, which, one or the other is required in California, Illinois, and Indiana.⁷ A single intercourse, regardless of how privately or discreetly done, would suffice to convict. As the Supreme Court of the Philippines reasoned out in one case,⁸ adultery is "a crime of result and not of tendency," and is not a continuing offense. This reasoning may lead to some absurd results, as what happened in that case where the Court ruled that the parties may be held liable for as many crimes of adultery as the number of sexual intercourses, because, in the colorful language of the Court, adultery is "an instantaneous crime which is consummated and exhausted or completed at the moment of the carnal union." The justification offered by the Court for this ruling is the claim that the marriage status re-

⁵ This follows the traditional definition of adultery. See Moore, *Diverse Definitions of Criminal Adultery*, 30 U. KAN. CITY L. REV. 219 (1963).

⁶ E. g. Michigan, M.C.L.A. Sec. 750.20; NEW YORK REVISED PENAL CODE (1967), Sec. 255.17. See table of statutory citations and penalties for adultery in the 50 states and in the District of Columbia and in Puerto Rico in MUELLER, *LEGAL REGULATION OF SEXUAL CONDUCT* 84-90 (1961).

⁷ In California, the law requires "state of cohabitation and adultery," Sec. 269 (a) of the penal code. See *People v. Woodson*, 156 P. 378 (1916). In Illinois, fornication and adultery are punishable only when openly practiced. See Chap. 4, Sec. 9.1, *PENAL CODE*. In Indiana, "cohabitation" is required (*State v. Chandler*, 96 Ind. 591 [1884]).

⁸ *People v. Zapata*, 88 Phil. 688 (1949).

mains undissolved and each encroachment upon that status constitutes a separate offense. One may ask whether that status has really been encroached upon a second time, considering the initial infidelity of the wife. The absurdity is compounded when we come to the discussion of judicial separation.

Because of the strict liability of the married woman and the possibility that her paramour was without knowledge of her being married, the former may be convicted on the uncorroborated testimony of the innocent paramour.⁹ Indeed, a resourceful husband, in collusion with a perjured paramour, may secure the conviction of his wife. Actually, Philippine courts have been satisfied with circumstantial evidence as proof of adultery, recognizing the difficulty of establishing carnal union by direct evidence. Yet, in another part of the penal code dealing with the justifiable killing by the husband of his wife or her paramour or both in the act of committing adultery, the law requires just that—that the culprits be caught *in flagranti delicto*.¹⁰

The double standard in the treatment of adultery, a feature of the Roman law,¹¹ obtains in the Philippines. Not only is this apparent from the quoted provision, but it has been made explicit by the provisions governing the indiscretion of the husband. The husband might have sexual intercourse with a single woman and not be guilty of any crime assuming, of course, that it was done voluntarily (on the part of the husband's paramour) and privately. Otherwise, if there should be scandal, or cohabitation, then the husband commits concubinage and his paramour is equally liable but with a very insignificant penalty.¹² The justification for this distinction between married men and married women with respect to extra-marital sexual intercourse has come down from medieval times and is reiterated by modern cases. Thus, the Philippine Supreme Court, citing early American cases,¹³ ruled that the gist of the crime of adultery is the danger of introducing spurious heirs into a family, whereby a man may be charged with the maintenance of children.

⁹ Cf. N.Y. Rev. P.C., Sec. 255.30.

¹⁰ REV. PENAL CODE, art. 247. See discussion, *infra*, note 15.

¹¹ MORRIS FLOSCOWE, *SEX AND THE LAW* 146-147 (1951). See also, Murray, *supra*, note 2.

¹² Under Article 334 of the Penal Code of the Philippines, the husband commits concubinage in any of the following situations: (1) keeping a mistress in the conjugal dwelling; (2) having intercourse under scandalous circumstances with a woman not his wife; and/or (3) cohabiting with her in any other place. The concubine is punished with *destierro* or banishment. See, *infra*, note 15.

¹³ *State v. Armstrong*, 4 Minn. 335 (1860); *Hood v. State*, 56 Ind. 263 (1877).

not his own, and the legitimate children be robbed of their lawful inheritance.¹⁴ The validity of this reasoning is now open to question because of the availability of the "pill" and other contraceptives. Perhaps, the real reason for the distinction lies in the traditional superiority and ascendancy of the male which will be crushed with a single act of infidelity by the wife.

B. *Incidence and Prosecution*

As mentioned earlier, a husband who kills his wife or her paramour, or both, in the act of committing adultery, is not liable for the homicide but still suffers the penalty of *destierro* or banishment.¹⁵ As explained by the Supreme Court of the Philippines, the banishment is more for the protection of the accused husband from possible vengeance on the part of the slain wife's relatives, than as a punishment.¹⁶ One may wonder whether this legal prerogative of the husband is a greater deterrent against the commission of adultery than the prescribed penalty for the latter.

It would be impossible to state with precision the incident of adultery in the Philippines. In the first place, the nature of the crime itself makes detection very difficult. Secondly, being a private crime or one which may not be prosecuted without the complaint of the offended husband,¹⁷ the number of cases or complaints filed is far from being an accurate gauge. Most husbands would think twice before filing a complaint which will amount to a public confession of a shameful inability to hold the fidelity of his wife or, worse, of an inability to satisfy the sexual needs of his wife. Among the more sophisticated members of society, there may be other reasons for not filing any complaint, including economic reasons and fear of professional collapse, or it may be a case of plain indifference to be passed off as a false sign of sophistication. Thirdly, because the law requires that both the erring spouse and

¹⁴ U.S. v. Mata, 18 Phil. 490 (1911).

¹⁵ Art. 247 of the Penal Code of the Philippines provides, *inter alia*, that "any legally married person who, having surprised his spouse in the act of committing sexual intercourse with another man, shall kill any of them or both of them in the act or immediately thereafter, or shall inflict upon them any serious physical injury, shall suffer the penalty of *destierro*. . ."

In the controversial case of *People v. Gonzales*, 69 Phil. 66 the husband surprised his wife and her paramour in a place covered by an underbrush, his wife rising up while lowering her skirt, and her paramour buttoning his fly. The husband killed the wife but not the paramour who escaped. Over a very strong dissent, the majority of the Supreme Court affirmed the conviction of the husband for parricide. Cf. proof of adultery under Article 333, see note 10 material, *supra*.

¹⁶ See *People v. Araquel*, 106 Phil. 677 (1959).

¹⁷ REVISED PENAL CODE, art. 344.

the paramour be included in one complaint,¹⁸ there is a possibility that the husband would like to prosecute the paramour but not his wife on a false sense of belief that his wife merely succumbed to the wiles of the paramour. It is, likewise, possible that there has been a condonation or pardon, express or implied, which, under the law, bars any prosecution for adultery.¹⁹ Then, there are cases where the spouses have executed an extra-judicial agreement to separate, expressly or impliedly waiving any right to prosecute the other for concubinage or adultery, as the case may be. Such an agreement has no legal effect but has been construed to bar prosecutions for adultery or concubinage.²⁰ While some of these situations may appear to be no more than educated guesses, this writer has found some evidence to substantiate them in the short period that he practiced law. What all these amount to is that adultery is being committed but criminal prosecutions are so minimal to the extent that one cannot help but doubt whether the law against adultery is serving its purpose of deterrence.²¹

C. *Adultery and Judicial Separation*

In the immediately preceding discussion, mention was made of agreements executed by spouses to live their separate ways which agreements, although void under the law, are nonetheless sufficient to bar prosecutions for adultery or concubinage. This is not merely a legal absurdity but, worse, a mockery of justice. Partly to blame, perhaps is the lack of divorce in the Philippines.

The existing law at the time the Civil Code of the Philippines was being drafted, provided for absolute divorce. The Code Commission which drafted the Code decided to retain the system with a modification that the petitioner may choose between absolute or relative divorce.²² The ground in both cases is limited to adultery on the part of the wife or concubinage on the part of the husband

¹⁸ *Ibid.*

¹⁹ Under Article 344, 2nd paragraph, "the offended party cannot institute criminal prosecution without including both the guilty parties, if they are both alive, nor, in any case, if he shall have consented or pardoned the offenders..."

²⁰ See *People v. Schneckenberger*, 73 Phil. 413 (1942); *Matubis v. Praxedes*, G.R. No. 11766, October 25, 1960, 60 O.G. 6006 (Sept., 1964); *People v. Azur* C.A.-G.R. No. 04827-CR, November 15, 1965. See also 2 AQUINO, REVISED PENAL CODE OF THE PHILIPPINES 1648-1658 (1961).

On the other hand, Article 221 of the Civil Code makes any contract for personal separation between husband and wife void and of no legal effect. See 1 TOLENTINO, CIVIL CODE OF THE PHILIPPINES 477 (1953).

²¹ In New York, where adultery is the only ground for divorce and where from July 1, 1959 to June 30, 1960, approximately 1,700 divorces were granted in New York City alone, there was not a single arrest for adultery. See S. G. KLING, SEXUAL BEHAVIOR AND THE LAW, 17 (1965). Also, Model Penal Code, Tent. Draft No. 4, p. 206 ff.

²² Article III, Draft (Manila, Bureau of Printing, (1948)).

as these are defined in the penal code.²³ During the discussion of the Code in Congress, a very powerful lobby was launched by the Catholic hierarchy who wanted to go back to the system of relative divorce as it was during the Spanish regime and even up to March 11, 1917.²⁴ The biblical mandate that "what God hath joined together, let no man put asunder"²⁵ echoed in the halls of Congress. As a result, absolute divorce was eliminated, leaving only relative divorce. Even at that, the phrase was changed to "legal separation" to avoid the implication which the word "divorce" carries.²⁶ Secular arguments were similarly put forward to the effect that the Filipino family had to be made secure in its traditional cohesiveness.²⁷

Under such a system of relative divorce, or judicial separation, the spouses remain married to each other. Yet, neither of them can openly have sexual relations with a third party. In fact, the wife is in a worse position considering the double standard in illicit extra-marital relations. Should there be no reconciliation which is what the law patiently hopes for, the unbearable situation will quite naturally lead to the giving of license by one spouse to the other for the commission of adultery or concubinage, as the case may be, without any risk of any criminal prosecution therefor. Under such a situation, what reason is left for these crimes to remain in the penal code? Moreover, the situation, muddled as it is by legal absurdities, offers a very strong temptation for blackmail.

D. Trends

A look at the different penal systems around the world may, perhaps, give us some perspectives. Adultery is excluded from the category of crimes in England, the U.S.S.R., Uruguay, and Japan, among others. In the German and Swiss codes, adultery is punished only if because of it, the marriage is dissolved.²⁸ In New York, the Commission on Revision of the Criminal Law recommended that the offense of adultery be omitted from the Revised Penal Law. A

²³ *Id.*, article 112.

²⁴ During the Spanish regime, the Spanish Code was codified only in 1889. It was extended to the Philippines except for the provisions on divorce. The country continued to be governed by the SIETE PARTIDAS, a makeshift compilation of scattered civil laws of Spain. On March 11, 1917, already under the American occupation, Act. No. 2710, known as the Divorce Law, was enacted by the Philippine legislature. Act No. 2710 provided for absolute divorce. Cf. SIETE PARTIDAS.

²⁵ *Matthew*, 19:6. Cf. divorce permissible on the ground of adultery, 19:9.

²⁶ See 1 TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 276 (1953).

²⁷ The CIVIL CODE declares in Article 216 that "the family is a basic social institution which public policy cherishes and protects." Article 218 adds: "The law governs family relations. No custom, practice or agreement which is destructive of the family shall be recognized or given any effect."

²⁸ See Model Penal Code, Tent. Draft No. 4 (1955), pp. 204 ff.

majority of the commission was of the opinion, influenced no doubt by the American Law Institute's Model Penal Code, that the basic problem is one of private rather than public morals, that its inclusion neither protects the public nor acts as a deterrent. Also, it was pointed out that prescribing conduct which is almost universally overlooked by law enforcement agencies tends to weaken the fabric of the whole penal law.²⁹ The legislature, however, rejected the Commission's recommendations. Be that as it is, adultery is considered a class B misdemeanor with a discretionary penalty not exceeding 3 months imprisonment.³⁰

The Model Penal Code of the American Law Institute, a product of conscious and careful deliberation for almost a decade, does not penalize the sexual sins, including fornication, adultery, sodomy, and other illicit sexual activities not involving violence or imposition upon children, mental incompetents, wards or other dependents.³¹ The decision to keep penal law out of the area of private sexual relations was based on the notion that private morality should be immune from secular regulation. And if morals and spiritual values are the concern of entities other than a penal system, such, for instance as religious or temporal bodies, then their regulation, or condemnation, should be left to the latter bodies. Anyway, authority is not lacking that even in the Bible, it has been written that judgment in spiritual matters were for God rather than secular authorities.³²

It cannot be denied that the Philippines is predominantly Roman Catholic. It is also true, however, that the principle of separation of church and state is part of the constitutional framework in the Philippines. The solidarity of the family and the preservation of the institution of marriage do not require that private sexual relations between consenting adults be penalized. There is, of course, the question of whether "harm" results from such activities.³³ Lacking is the element of publicity which may "scandalize" or offend the sensibilities of the other members of society. These leave but the spiritual values which, as shown, should be dealt with by ecclesiastical bodies. It has been argued, however, that modern theories in criminology may not simply be applied without considering the set-

²⁹ See comments to Sec. 155.17 and ff. of NEW YORK REVISED PENAL CODE (1967)

³⁰ Sec. 255.17, in relation to Section 70.15, NEW YORK REVISED PENAL CODE.

³¹ See Schwartz, *Morals Offenses and the Model Penal Code*, 63 COL. L. REV. 669, 673-674 (1963).

³² "...let the marriage bed be undefiled; for God will judge the immoral and adulterous." — *Hebrews*, 13:4 Cf. *John*, 8:4-11.

³³ See Mueller, *Causing Criminal Harm*, in *ESSAYS IN CRIMINAL SCIENCE*, 167 ff. (1961); Also, HALL, *PRINCIPLES OF CRIMINAL LAW* (1961).

ting — in the case of the Philippines, a homogenous, monogamous, and deeply religious society. One cannot help but recall that the traditional Chinese family, the paradigm of cohesiveness, has survived through thousands of years not on harsh criminal laws enacted to preserve the traditional aspects of the family but through philosophical and ethical teachings.³⁴

FORNICATION AND HOMOSEXUALITY

A few words can be given to these topics, purely for comparative purposes with the treatment of adultery. It has been demonstrated that the Philippine society appears, at least through its laws, to be moralistic and intensely religious. Yet, surprisingly, fornication is not considered a crime although this sexual activity has been severely dealt with by Ecclesiastical courts from the medieval times.³⁵ It is only fornication committed under scandalous circumstances by a married man that is being penalized as concubinage. There is, however, no crime should the elements of publicity and the status of being married be lacking. Voyeurism, lewdness, "crimes against nature," sodomy and other abnormal sexual activities are not dealt with in the penal code of the Philippines. However, as early as 1950, there was submitted to the Congress of the Philippines a proposed Code of Crimes to replace the current penal code. The proposed code, however, is so prolix and ponderous, punishing the slightest impropriety as a misdemeanor. Perhaps it is due to the apparent indiscriminate use of the criminal law that eighteen years have passed and no action has been taken on the proposal. It is interesting to note that the Proposed Code of Crimes penalizes such sexual activities described therein as "acts of lust," "unnatural crimes," sodomy, among others. This is not to say that the failure of Congress to act upon the proposal was simply because of the inclusion of these activities as subjects of penal sanctions. But, then, such inclusion may have played a part.

Homosexuality is another sexual activity which is unknown to the penal code of the Philippines. Happily that this is so. There is an unmistakable trend to regard unnatural sexual activities as diseases instead of treating them as criminal acts.³⁵ It is only when violence or intimidation is involved that the acts are considered criminal. This time, however, if the offender is a confirmed sexual psychopath, provisions are made for his institutionalized treatment and rehabilitation, but not imprisonment nor any other criminal sanction.

³⁴ "Lead the people by regulations, keep them in order by punishments and they will flee from you and lose all self-respect. But lead them by virtue and keep them in order by established morality, and they will keep their self-respect and come to you." — Confucius, *Analects* (tr. Derk Bodde).

³⁵ See PLOSCOWE, *supra*, note 11.

CONCLUSION

Without sounding too presumptive, this brief paper merely exposes the writer's views that adultery, even in a Philippine setting, should not be made a criminal offense. This is not being sacrilegious because the Church may act in the premises if only it has the heart to do so. This is precisely the point — that the Church should act on matters affecting moral and spiritual values and not the criminal law. The possibility of another alternative in the form of a tort action may be inquired into. The Civil Code of the Philippines contains a separate title on "Human Relations" covering a variety of causes of action for breach of morals, customs, etc.³⁶ The argument that one cannot measure in pecuniary terms the "harm" and "suffering" of the offended husband in an adultery case, smacks of sentimentality.

Whatever alternatives be taken, the view is still being taken by the writer that the Revised Penal Code of the Philippines can stand some amendments, most especially in the field of sexual offenses.

³⁶ See, among others, Cantor, *Deviation and the Criminal Law*, 55 J. CRIM. L. 441 (1964)

³⁷ CIVIL CODE articles 19 to 20.