COMMENTS ON CRIMES AGAINST FAMILY SOLIDARITY AS PROVIDED FOR IN THE PROPOSED CODE OF CRIMES

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INTRODUCTION

Philippine society has, since time immemorial, recognized the fact that the family is its most basic and stable unit. Our customs and traditions lean strongly towards the preservation and strengthening of family ties, and this has been buttressed by the teachings of the Catholic Church.

Our laws acknowledge this fact. The Civil Code categorically states that the family is a basic social institution that public policy cherishes and protects,[1] and this was given constitutional mandate in the present constitution which says that the state shall strengthen the family as a basic social institution.[2] Among the statutes recognizing family ties are the Child and Youth Welfare Code,[3] the Labor Code,[4] and the laws establishing the Juvenile and Domestic Relations Courts.[5]

Against this background of tradition and policy, the Code Commission created by Pres. Manuel A. Roxas in 1947 [6] deemed it proper to include a specific chapter in a proposed Code of Crimes entitled "Crimes Against Family Solidarity" (Book II, Title XI, Chapter 11). The commission worked on the premise that since the family is the foundation of society, acts impairing its solidarity injure not only the individuals involved, but also the state.[7] Thus it must be placed within the realm of the Criminal Law.

However, this approach necessarily creates certain problems. Primarily, there is the question of just how far the state should enact laws delving into

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[1] CIVIL CODE, art. 216. The code commission said that "it would seem to be wise to lay down certain principles that would sustain the solidarity of the family (in the Civil Code) not only for the guidance of the courts and administrative officials, but also for their wholesome influence upon the members of the family." (REPORT OF THE CODE COMMISSION ON THE CIVIL CODE, p. 17.)

[2] CONST., art. II, sec. 4.

[3] Pres. Decree No. 603 (1974).

[4] Pres. Decree No. 442 (1974), as amended.

[5] CIVIL CODE, art. 359(4), and art. 361 suggests the establishment of Juvenile Courts. For Manila and Quezon City, Rep. Act No. 1401 and Rep. Act No. 4836 established these courts, respectively.

[6] Executive Order No. 48, dated March 20, 1947. The commission was to "revise all substantive laws of the Philippines and codify them in conformity with the customs and traditions as well as idiosyncracies of the Filipino people and the progressive principles of law.

[7] Interview with Judge Guillermo Guevara, August 12, 1977.

morality, for family ties and relationships are, to a large extent, within the spheres of morals and ethics. The law, even if it is generally a reflection of social morality, must not require strict adherence to some pre-determined moral norms, for the moral standards of society is always flux and subject to change. Law and morality, although complementary to one another, must each be distinct to keep the laws stable and morality adaptive to everyday situation.[8]

Secondly, the question of what guarantees must be included within the statutes so as not to unduly interfere with individual rights, yet allow the law to achieve its ends, must be resolved.

I. The Proposed Code of Crimes

To understand the chapter on Family Solidarity, we have to delve deeply first into the proposed code, since the said chapter forms an integral part of the code.

History

The proposed Code of Crimes is the second code prepared and submitted by the code commission. The first was the new Civil Code enacted into law on June 18, 1948 as Republic Act No. 386.

The prime mover of the Code of Crimes was Guillermo B. Guevara, an advocate of the positivist school of Criminology. Other members of the commission were Pedro Y. Ylagan, Francisco R. Capistrano and Arturo M. Tolentino. Jorge Bocobo was the commission chairman.

The code was to replace the existing Revised Penal Code which was enacted December 8, 1930 as Public Act No. 3815. The Penal Code was, according to the code commission, a "mere retouching of the Spanish Penal Code of the year 1870, which was based in turn on the early Spanish Penal Code of 1848, so that the philosophic foundation of the existing code may be said to be at least 100 years old".[9]

A printed copy of the project was submitted to Congress as early as October, 1950. However, despite the support of the "enlightened segments of society" and the influence of Judge Guevara, the Code of Crimes ran into stiff opposition. It was not until the Sixth and Seventh Congress in 1972 that the proposed Code of Crimes passed first reading as House Bill No. 305 under the sponsorship of Representative Fermin Caram. Congressman Manuel Zosa steered the approval of the code by the House of Representatives as consolidated House Bills No. 1200 and 1855.[10] However,

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[8] Interview with Prof. Bienvenido C. Ambion, September 12, 1977.

[9] Report of the Code Commission, p. 2.

[10] Philippines (Republic) House of Representatives, 79 Congress Congressional Records.

Congress, for reason of simplicity and in the interest of the greater autonomy of the local governments, felt it better to leave to the latter the regulation and punishment through ordinances of misdemeanors and minor infractions of the law.[11] Thus, Book Three of the code was deleted.[12]

However, Martial Law was declared and Congress was abolished before the Senate had the opportunity to even consider the proposed code. In 1974, spurred by a letter of Judge Guevara, President Marcos referred the code to a Committee of Undersecretaries, which in turn delegated the project to the legal panel composed of representatives of the Department of Justice, Legal Office of Malacañang, Department of Social Welfare, National Economic Development Authority, and the U.P. Law Center. The present updated version was edited by Teodoro Bay of the Legal Office of Malacañang in consultation with Prof. Sulpicio Guevara, head of the Division of Research and Law Reform of the U.P. Law Center. It was finalized in February, 1977.

Basically, the present draft followed closely the text of the original Code of Crimes prepared by the Code Commission and as advocated by Judge Guillermo Guevara.[13] Moreover, it reincorporated Book Three which dealt with misdemeanors, leaving it to the discretion of the President to accept the proposed code entirely or with revisions, including the deletion of certain portions.

Basic Philosophy

The updated proposed Code of Crimes, like its original model, leans towards the positivist school which considers the actor rather than the act itself. The code commission, criticizing the present Penal Code, said that the present criminal code bases criminal liability on human free will and emphasizes the retributive aspect of penalty. Following the classical school, it is based on the theory that man is essentially a moral creature with an absolutely free will to choose between good and evil. So long as that free will remains unimpaired, man should be adjudged and held liable for wrongful acts. The Penal Code thus placed more stress upon the effect or result of the felonies than upon the man-criminal himself, and endeavored to establish a mechanical and direct proportion between crime and penalty.[14]

On the other hand, the positivists, led by Dr. Cesare Lombroso, Prof. Rafael Garafalo and Prof. Enrico Ferri, held that man is a creature subdued occasionally by a strange and morbid phenomenon which constrains him to do wrong, inspite of or contrary to his volition. The central idea of positivist thought is the defense of the community against these anti-social activities, actual or potential, and against the morbid type of

11 Letter of Judge Guevara to President Marcos, August 12, 1974.
12 CONGRESSIONAL RECORDS, *loc. cit.*
13 Interview with Prof. Sulpicio Guevara, August 8, 1977.
14 REPORT OF THE CODE COMMISSION, p. 2.

man who is called a "socially-dangerous person". Premised upon the proposition that man is primary, while the deed is only secondary, the positivist school takes the view that crime is essentially a social and natural phenomenon, and as such, it cannot be checked by the application of abstract principles of law nor by the imposition of a punishment, fixed and determined "a priori".[15] Rather, individual measures in each particular case after a thorough, personal and individual investigation conducted by a competent body of psychiatrists and social scientists is ideal.

Although the proposed Code of Crimes leans towards the positivist school, it retains the principle of moral blame or free will in every act or omission (Art. 13 and 15), but at the same time the actor is considered as more important than the act itself (Art. 103 and 110). Moreover, the concept of the morbid type of man to which the Italian School gave the term "pericoloso" or dangerous, from which society must be protected, is also adopted.[16] Therefore, the commission has on one hand declared crime to be an intentional or voluntary act repressed by law (Art. 15) and on the other hand, has recognized the existence of a type called "socially dangerous" because of his "certain morbid predisposition, congenital or acquired by habit, or by destroying or enervating the inhibitory controls, favors the inclination to commit crime.[17]

The proposed Code of Crimes gives wider discretion to the judiciary in imposing penalties, since the code commission did not deem it wise to prescribe in detail the imposition of fixed penalties. Thus, unlike the present code which observes a mathematical proportion between crime and penalties, thus reducing the courts into a mere manipulator of a calculating machine in the administration of justice, the proposed Code of Crimes will give the courts greater leeway in correcting criminals, since the positivist school believes that penalties should not be retributive but curative. The code commission reasoned that

> . . . it is impractical and unwise to determine beforehand a long term of imprisonment for no other reason than that the crime is grave or serious. All are aware that no physician can fix in advance the precise time within which the patient will be cured; rather, the patient is under constant observation, and the suitable remedy is applied from time to time, in accordance with the results of such observation.[18]

II. Family Solidarity in the Proposed Code of Crimes

The chapter on Family Relations in the proposed Code of Crimes grows out of the idea that a strong and stable Filipino nation must be based on a strong and stable Filipino family. Originally, there were 20 articles

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[15] *Ibid.*, p. 5.
[16] *Ibid.*, p. 4.
[17] Art. 105 of the Proposed Code of Crimes, updated draft.
[18] *Ibid.*, Code Commission, p. 7.

in the chapter but the Committee on Revision trimmed the present draft to only twelve articles.

Judge Guevara considers the chapter necessary to the Code of Crimes since the code, he said, is a moralistic one, and the family is one of the main focal points of the country's morals. Secondly, the chapter is to be a deterrent to those who tend to abuse family relationships, and thirdly, it is to make miscreants feel the "error" of their ways, and to answer to the state for the damage they did against the family.[19]

The inclusion of the chapter, however, caused many to criticize the code as being too idealistic and as intruding into the sphere of morality. Family ties, they argue, is best left to the individuals concerned, and the state should consider only those matters directly disruptive to society. Moreover, the provisions necessitate a certain amount of government intervention into the troubled families, and thus may even cause greater disunity.[20] The chapter might also negate the effects of Article 26 of the Civil Code since it would in effect allow third parties to intrude into the family lives of individuals, on the pretext of investigating or enforcing the provisions of the code.

It is ironic to note that the updated draft of the proposed code eliminated some of the provisions which the code commission considered essential to the chapter as discussed in their report.[21] The eight provisions deleted are:

1. Collusion for Legal Separation or Annulment of Marriage (Art. 619 of the original draft). According to the code commission, this will help preserve the sanctity and stability of marriage.[22]

2. Abandonment by Spouse (Art. 620 of the original draft). The purpose of the provision, the commission said, is to stop philandering husbands or wives from leaving the family to the detriment not only of the aggrieved spouse and their children, but to the state as well. In numerous instances, the abandoned spouse is left helpless and in distress, thus becoming a ward of the state.

3. Negligent Management of Trust Property (Art. 623 of the original code). The provision is to protect beneficiaries from negligent and irresponsible trustees, and to emphasize the latter's obligations.

4. Depriving Heirs of Legitime (Art. 626 of the original draft). One of the more sensitive aspects of family relationship is inheritance, and it is not rare for some to connive with unscrupulous third persons for gain or for revenge, thus depriving heirs of their rightful legitime.

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[19] Interview with Judge Guevara.
[20] Interview with Prof. Ambion.
[21] *Op. cit.*, p. 70, wherein the Code Commission discusses the chapter on Family Solidarity.
[22] *Ibid.*, p. 70.

5. Impugning Legitimacy of Child (Art. 628 of the original draft). The provision will stabilize family relationships, and will assure individuals of their rightful legal rights as members of the family.

Crimes Against Family Solidarity

1. Alienation of Affection

Between two persons who are legally married, their union is made intact through their own mutual understanding of each other, learning from one another what is common, enjoying each other's company, and constancy brings about a deep and affectionate relationship which is sometimes considered as sacred mystery. The sanctity of marriage can be attributed to the fact that a family remains a happy one for so long as the parents continue to live in harmony and mutual understanding. The interference, therefore, of a third person who would persuade, procure and entice one spouse to leave the home, would bring about the breakdown of the family.

There are numerous acts, short of criminal unfaithfulness, whereby the husband or wife breaks the marital vows thus causing untold moral suffering to the other spouse. Article 26 of the Civil Code provides:

> Every person shall respect the dignity, personality privacy and peace of mind of his neighbors and other persons. The following and similar acts, though they may not constitute a criminal offense, shall produce a cause of action for damages, prevention and other relief:
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> (1) Prying into the privacy of another's residence;
>
> (2) Meddling with or disturbing the private life or family relations of another; . . .
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> x x x x x x x x x

In the proposed Code of Crimes, these acts aforementioned constitute a crime subject to penal sanction. Article 483 of the Proposed Code of Crimes provides:

> Any person who entices or alienates the affection of another's wife or husband, shall be repressed with restraint or a fine of not more than 15 days' earnings. The same repression shall be imposed upon the offended party's spouse.
>
> The prosecution shall be commenced only upon complaint of the offended spouse against either or both offenders.

Such being a delict, the state considers such acts as an offense against the People of the Philippines. That the prosecution shall commence only upon complaint of the offended spouse gives such action the nature of a private crime similar to those private crimes punishable under the present penal code, whereby only upon the offended party's complaint is the prosecution commenced.

The purpose of maintaining family solidarity is a state policy. Alienation of affection necessarily implies that there are two parties who have consented or actively participated in the commission of the crime: the third party who wooed the other spouse and one of the spouses who acquiesced to the third party's advancements and proposals. The ensuing gap between the spouses is brought about by the interference of a third party and subsequently the offending spouse's participation in the crime. The offended party finds out that the souring of their relationship is brought about by these two conditions.

The second paragraph of the same provision is primarily intended to function as the reconciliation factor. This is in view of the fact that the offended spouse may condone the act of the other spouse. However, condoning one of the offenders does not bar nor preclude the offended party from filing a proper complaint against the uncondoned offender.

Under the Civil Code of the Philippines, alienation of affection is not expressly prohibited. No express provision with regard to alienation of affection as a ground for an action can be found in Philippine statutes. Rather, the cause of action can be implied as falling under Article 26 of the Civil Code. The acts mentioned in the said article are to be taken in their broadest meaning. Although no mention of "alienation of affection" is made in the provision, by implication it can be said that such is covered. This is the intention of the law as the Code Commission explained in its Report:

> The privacy of one's home is an inviolable right. Yet the laws do not squarely and effectively protect this right. The acts referred to in No. 2 are multifarious, and yet many of them are not within the purview of the laws in force. Alienation of affection of another's wife or husband, unless it constitutes adultery or concubinage, is not condemned by the law, much as it may shock society.
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> There are numerous acts, short of criminal unfaithfulness, whereby husband or wife breaks the marital vows thus causing untold suffering to the other spouse. Why should not these acts be the subject matter of a civil action for moral damages?[23]

If alienation of affection is considered an actionable wrong under the Civil Code, should there be a penal provision in this regard? Is not the Civil Code provision sufficient and effective enough in restraining persons from committing the same act?

One must first understand the nature of the action, and from such understanding and study one can fully realize if there is indeed a need to include a provision in the Code of Crimes with regard to alienation of affection.

[23] *Ibid.*, pp. 32-34.

The law condemns any invasion and a cause of action for alienation of affection will accrue whenever a third person, by enticement, seduction or other wrongful and intentional interference with the marital relation deprives either husband or wife of the consortium or conjugal fellowship of the other.

In *Winsmore v. Greenbank*,[24] the court recognized the right of a husband to an action against one who intentionally "persuaded, procured and enticed" his wife to leave the house, "per quod consortium amisit," by means of which the husband lost her comfort, society and assistance. This seems to be the earliest reported case of an action involving alienation of affections. The court admitted that there appeared to be no legal precedent for such an action.

That alienation of affection is actionable tort is not only recognized under the Philippine jurisdiction, but a cursory study of decisions of American cases from which we borrowed the term, suggest that damages is sufficient to remedy the wrong. In *Hargraves v. Balleu*,[25] the court held:

> In most states, alienation of affection is an actionable tort... Criminal conversation is a different tort... The wrong done in alienation of affection is the deprivation of the spouse of the right to the aid, comfort, assistance and society of the other spouse in family relationships. The wrong done in criminal conversation is the violation of the spouse's right to the exclusive privilege of sexual intercourse... Alienation of affection is not conclusively presumed to have been caused by criminal conversation. Whether such result has followed is a question of fact... Enticing away without debauchery entitles a husband to a compensatory damages. If criminal conversation can be found resulting in alienation of affections, damages are awarded everywhere for the latter wrong as an aggravation of the former.

The husband is entitled to the society, comfort and assistance of his wife and has always had the right to sue for damages in his own name, whoever, by alienation of her affections, deprives him of his conjugal rights.[26]

The motive of the defendant is controlling element. This requires that he should take an active and intentional part in causing the estrangement.[27] There should be a conscious purpose to accomplish this end, though personal malice toward the husband is a requisite.

On the other hand, the wife's cause of action is substantially the same as where a husband is plaintiff, except that she usually has suffered the loss of her husband's support.

One would wonder, therefore, as to the rationale behind the inclusion of alienation of affection as a crime; to the offender, to be charged in a

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[24] 125 Eng. Rep. 1330 (1745).
[25] 47 R.I. 186, 131 A. 643 (1926).
[26] Lane v. Dunning, 186 Ky. 797, 218 S.W. 269 (1920); Francis v. Outlaw, 127 Md. 315, 96 A. 517 (1916).
[27] Pugsley v. Smyth, 96 Ore. 448, 194 P. 686 (1921).

criminal action presupposes that a wrong has been done by him not only against the individual but also against the state. Insofar as contemporary jurisprudence is concerned, conservative as it may seem, alienation of affection is still considered to be sufficiently covered by the Civil Code. Such act is not directly destructive of the state. Perhaps, to the marital union, such alienation of affection is destructive of the solidarity, but to the state, it would be best that the state participate merely in the regulation of such marital relations and intrusions into the same.

As a crime, the question of evidence arises. To prove one person guilty of a crime, evidence must be presented by the prosecution in a proper hearing which must be sufficient and convincing for the court to adjudge the defendant guilty beyond reasonable doubt. In *Hartpence v. Rogers*,[28] action was filed by the plaintiff against defendant for the alienation of affections of the plaintiff's wife and for her wrongful abandonment of the plaintiff. The evidence of the plaintiff showed a course of conduct in the defendant to break up the marital ties between the spouses. It is said that a wife may have a good cause to abandon her husband and that a third party in no manner related to her, may, from the best motive, persuade her to do so. The court answered a similar contention in the following language:

> The wife may have a just cause for the separation or divorce, but she may elect to abide by her situation and remain with her husband nevertheless. If she chooses to do so, no stranger has the right to intermeddle with the domestic and marital relations of husband and wife and if he voluntarily does so, he is amenable to the consequences... No one unasked, especially a stranger, has a right to volunteer his advice or protection, and if he does so, he is amenable. It is one thing to actively promote domestic discord, but quite another thing to harbor, from motives of kindness and humanity, one who seeks shelter from the oppression of her own lawful protector. It has been well said that 'such conduct, whatever the motive, is exceedingly perilous on the part of a stranger, generally open to misconstruction and never to be encouraged.'[29]

And in the same breath, the court held:

> It is safe rule to lay down, as this court has done, that a husband makes a prima facie case against a stranger when he shows that such a stranger voluntarily and unasked intermeddled with his domestic affairs, and intentionally urged, persuaded and induced his wife to desert and abandon him; and in the absence of anything in the evidence, as in this case, to justify or excuse such conduct, the plaintiff's right to a recovery, upon proof of such facts.[30]

2. Disturbing family relations.

Where a person intermeddles with the domestic affairs of the family, and such intermeddling does not amount to alienation of affection, under

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[28] 143 Mo. 623, 45 S.W. 650 (1898).
[29] Hartpence v. Rogers, 143 Mo. 623, 45 S.W. 650 (1898).
[30] *Ibid.*

the Proposed Code of Crimes, such act is punishable. Article 484 of the proposed code provides:

> Any person, without being guilty of the act repressed in the next preceding article, engages in any intrigue whereby the family relations of another person are disturbed shall be repressed with restraint or a fine in a sum ranging from the equivalent of not more than 15 days' earnings.
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> The family, within the purview of this article, shall include the spouse, the legitimate or illegitimate ascendants, descendants, brothers and sisters.

This provision in the proposed Code of Crimes would punish any person other than those included in the preceding article (i.e., Article 483) and the primary intention of which is to protect the family from outside intrigue. Thus, any person who is found to have caused disturbance or disharmony in the family through an act or deed, or by communicating information, whether true or false, when such information communication was made to dsirupt the harmonious relationship in the family shall be punished in this provision.

Article 26 of the New Civil Code also covers this situation. As discussed earlier, No. 2 of the provision, "Meddling with or disturbing the private life or family relations of another," will apply to any person. The wrong that is intended to be remedied by Article 484 of the Proposed Code of Crimes is a reiteration of the policy in the Civil Code regarding disturbance of harmonious family relations by a person, he be a stranger or a member of the family. The offender is not necessarily a stranger. This conclusion can be drawn from the literal examination of the provision which states: "Any person...engages in any intrigue whereby the family relations of another person are disturbed shall be repressed..." Without any qualification, therefore, the term *person* can include even a member of the family. In which case, if the offender and the offended party belong to the same family, there would be a breakdown of family solidarity. The filing by the offended party of a criminal complaint against a member of the family will forever severe the line that connects the offender with the family. As a result of which, the possibility of a compromise and reconciliation would be barred forever because of the hatred that was sprung from the litigation.

The law recognizes the right of parents, brothers and sisters or persons otherwise in a relation with her which justifies the giving of advice in personal matters, to advice a married member of the family as to his or her domestic and marital affairs and holds them free from liability for such advice, honestly, though not wisely given, though it may result in estrangement.[31] Where such relations exist, there is no liability unless it is shown that the advice and interference with the domestic affairs was inspired by malice or ill will.

[31] Kleist v. Breitung, 232 F. 555 (1916); Haynes v. Nowlin, 129 Ind. 581, 29 N.S. 389 (1891).

There is of course a marked difference between the rights and privileges of a parent and those of a mere intermeddling stranger, in actions for alienation of affection and disturbing family relations. This is in view of the fact that the circumstances that will be considered as a justification for the interference of parents in advicing their children would not justify similar advice by a stranger.[32] The conduct of a stranger which eventually leads to the disharmony in the family is presumed by law to be malicious in as much as he does not have the natural impulses of a parent or near relative. However, the presence of bad faith must accompany the advice which was unwisely given, otherwise, a stranger would not be liable for honest friendly advice when it is sincerely asked by the spouse.[33]

The proposed Code of Crimes treats such interference not only as an actionable tort under the Civil Code but also as an offense against the state. This could only be the justification for the state's intervention in taking the initiative to prosecute the case. The sanction of repression and fine would serve as a preventive measure to discourage any person from meddling with other's family affairs. But when such sanction is to be considered as a remedy for a wrong that has been done, particularly when the criminal case is brought between members of the same family, then the ideal of strengthening family solidarity is dashed to the stones. Family solidarity becomes an almost impossible task in this case and the fact that causes the family to break is the criminal action itself.

3. Enticing or keeping a minor child.

Parental authority is exercised by parents over their unemancipated children for so long as they live. As long as the parents are living and have not lost their parental authority, either by disability or by emancipation of the child, *patria potestas* is limited to them. But when both parents are dead, substitute parental authority is exercised by grandparents and in their default, the oldest brother or sister who is at least eighteen years of age, or the relative who has actual custody of the child, unless a guardian has been appointed in accordance with the succeeding provision, Article 20 of Pres. Decree 603.[34]

Under the Civil Code of the Philippines, the scope of the rights and duties of parents are defined in Article 316 which provides:

> The father and the mother have, with respect to their unemancipated children:
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> (1) The duty to support them, to have them in their company, educate them and instruct them in keeping within their means, and to represent

[32] Barton v. Barton, 119 Mo. App. 507, 94 S.W. 574 (1906); Payne v. Williams, 4 Baxt. 583 (Tenn.).

[33] Geromini v. Brunelle, 214 Mas. 492, 102 N.E. 67 (1913).

[34] Pres. Decree No. 603 (1975), art. 19, hereinafter referred to as the CHILD AND YOUTH WELFARE CODE.

them in all actions which may redound to their benefit; represent them in all actions which may redound to their benefit;

(2) The power to correct them and to punish them moderately.

The Child and Youth Welfare Code in addition provides:

Article 43. Primary Right of Parents.—The parents shall have the right to the company of their children and, in relation to all other persons or institutions dealing with the child's development, the primary right and obligation to provide for their upbringing.

Art. 44. Rights under the Civil Code.—Parents shall continue to exercise the rights mentioned in Articles 316 to 326 of the Civil Code over the person and property of the child.

In addition to the duties provided for in the Civil Code, the Child and Youth Welfare Code provides under Article 46:

Art. 46. General Duties.—Parents shall have the following general duties toward their children:

(1) To give him affection, companionship and understanding;

(2) To extend to him the benefits of moral guidance, self-discipline and religious instruction;

(3) To supervise his activities, including his recreation;

(4) To inculcate in him the value of industry, thrift and self-reliance;

(5) To stimulate his interest in civic affairs, teach him the duties of citizenship, and develop his commitment to his country;

(6) To advise him properly on any matter affecting his development and well-being;

(7) To always set a good example;

(8) To provide him with adequate support, as defined in Article 290 of the Civil Code; and

(9) To administer his property, if any, according to his best interests, subject to the provisions of Article 320 of the Civil Code.

The father and mother are the natural guardians of the unemancipated children, and as such, they are duty bound and entitled to keep them in their company.[35] The natural affection of parents, nurtured by both blood and love, seeps deeper than any possible advantages of wealth or culture. No showing by a third person that he could furnish the child a better home or education that the parent could furnish, would cause a court to remove the child from the custody of its parents, if the home which they provide was decent and respectable.[36]

Where under the present law the proper remedy to enable the parents to regain custody of a minor who has been enticed by another to live with another person not entitled to parental authority, is *habeas corpus,* the Proposed Code of Crimes includes in it a provision punishing any person who violates this parental right. Article 485 of the Proposed Code of Crimes provides:

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[35] Ibañez de Aldecoa v. Hongkong & Shanghai Bank, 30 Phil. 228 (1915).

[36] Cruz v. Flores, 99 Phil. 720 (1956).

> Whoever, without having committed abduction, shall entice a child under parental authority, or refuse and return him or her to the parent or guardian or other person legally in charge of the child, shall be repressed with confinement.

This provision is similar to Article 483 of the same proposed code of crimes in the sense that the alienation in the former is that of a spouse, while in the latter provision, it is that of a child. As has been said, under the present law, where no abduction is committed, the only proper remedy for parents is a petition for a writ of *habeas corpus*. This was the remedy applied for in the case of *Reyes v. Alvarez*.[37] In this case, the parents of a girl whom they had confided to the care of the Beatrio dela Compania de Jesus from the age of two and a half years and who had lived there for fifteen years, wanted to take her from there in order to have her in their company. The mother superior of that institution stated that if the girl wished to leave and return to her parents, she would not prevent her. The girl said she was there of her own free will and did not want to leave the college. The Supreme Court granted the writ of habeas corpus to enable the girl's parents to regain custody.

In an American case, the court regarded the harboring of a child and alienation of affections as an incident of this enticement. Although not a criminal action, it demonstrates the court's sympathetic attitude towards persons who are recognized to have legal right to exercise the authority. In *Pickle v. Page*[38] the plaintiffs were the grandfather and grandmother of Vernon Owen Pickle, the infant. They had legally adopted the child upon abandonment by his mother. Several years later, the mother, enlisting the aid of the county sheriff, the defendant in this case, caused the child to be abducted from the possession of his foster parents. The defendant, employing violence and exhibiting a reckless defiance of the rights of the lawful custodians, actively aided in procuring the abduction of the infant. The child, who was then five and a half years of age, was given over by the defendant into the possession of the mother. The action was thereupon brought to recover damages from the defendant for the injuries inflicted upon the foster parents by the abduction. On the trial the action was dismissed as to the grandmother and permitted to continue the action in the name of the grandfather as sole plaintiff. In estimating the damages the jury was permitted to consider the wounded feelings of the foster father, and to impose punitive damages upon the defendant.

An action of trespass for the abduction of a child was originally maintainable by a father where the child abducted was a source of service... and in actions to recover damages for the abduction of a child, the parent must allege and prove as a condition of his recovery, a loss of the services of the child. However, the court held:

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[37] 8 Phil. 723 (1907).
[38] 252 N.Y. 474, 169 N.E. 650 (1930).

> The true ground of action is the outrage and deprivation the injury the father sustains in the loss of his child; the insult offered to his feelings; the heart-rending agony he must suffer in the destruction of his dearest hopes, and irreparable damage and loss of that comfort and society which may be the only solace of his declining age.[39]

The court affrmed the decision of the lower court in holding for the plaintiff.

Enticing or keeping a minor child as a crime was adopted from the Swiss Code of Crimes. The inclusion of such a crime in the Proposed Code of Crimes merits credit: first, it lessens the occurrence of alienation of affections of the minor who should be under the protective authority of the persons legally entitled to his custody; secondly, the parental authority and the right to the exercise of the same is given full meaning by punishing persons who would seek to encroach into the rights of parents in providing the child the educational, social and religious rearing; and finally, it gives full effect to the state policy that a minor must not be separated from his parents during his minority and tender years because it is at this stage that he needs most the love and care of the natural parents.

4. Causing spouse to leave home

Another original provision included in the Proposed Code of Crimes refers to a spouse driving out the other spouse from the conjugal home without just cause. Article 486 of the Proposed Code of Crimes provides:

> Any spouse who, without just cause, by words or conduct drives away the other spouse from the conjugal home, shall be repressed with confinement, or a fine in a sum ranging from the equivalent of not more than 15 to 30 days' earnings.

The Civil Code of the Philippines treats the offense only by implication in Article 116. In the penal provision however, is contemplated a situation wherein the husband drives away the wife, or vice versa, without just cause. As to what constitutes just cause, the proposed code does not define. It is left to the court hearing the case to determine what is a just cause.

Article 109 of the Civil Code provides:

> The husband and wife are obliged to live together, observe mutual respect and fidelity, and render mutual help and support.

and after a few articles following, Article 116 provides:

> When one of the spouses neglects his or her duties to the conjugal union or brings danger, dishonor or material injury upon the other, the injured party may apply to the court for relief.

Authorities in Civil Law recognize the existence of two aspects in family relations, one internal and the other external. It is only in the

[39] *Ibid.*

external aspect, wherein the public interest and third persons are concerned, that the law fixes rules regulating family relations.

In the internal aspect, which is essentially natural and moral, the family is commonly known to be sacred and inaccessible even to the law. Thus, the law cannot and should not regulate such matters as the sexual relations of the spouses, or the right of each spouse to open correspondence of the other, or their children, or the practices of customs in the domestic life of the family. But the law steps in to protect the rights of the children and wife from the abuses of the father and the husband, to determine the relations of the members of the family in matters where the society has an interest, such as support, parental authority, and the like, and to regulate the liability and the right of the head of the family with respect to the acts of the wife and the children.[40]

Marriage entitles the spouse to each other's society or consortium. This means that they should live under the same roof, and live a common life so that they may better fulfill the obligations inherent in the matrimonial status. Hence, the husband cannot throw the wife out of the conjugal home; and she cannot complain of trespass to dwelling if the husband breaks down the door to enter such abode.[41]

The Philippine Supreme Court has had the occasion to decide cases, which is brought in the future would be considered as a crime under Article 486, involving spouses being separated because of the conduct of one of the spouses. In *Goitia v. Campos Rueda,*[42] the wife was entitled to separate maintenance because she was forced to leave the marital abode without fault on her part. When the object of the marriage is defeated (because of the lascivious sexual intercourse which the husband demanded of her) by rendering its continuance intolerable to one of the spouses and productive of no possible good to the community, relief in some way would be obtainable.[43]

In another case[44] the spouse lived with the mother of the husband, defendant in this case. Due to the constant quarrels between the plaintiff and her mother-in-law, making life difficult the spouses transferred to another place, where the defendant later left the plaintiff. Two years later, the plaintiff found the defendant and sued him for support. The court held that as the marriage vow does not include making sacrifices for the in-laws, it is evident that there is legal justification for the wife's refusal to live with her husband, taking into account the traditional hatred between a wife and her mother-in-law. It is true that the wife is obliged to follow her husband wherever he wishes to establish the residence, but such right does not include

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40 4 SANCHEZ ROMAN, ESTUDIAS DE DERECHO CIVIL 41 (1899).

41 2 PLANIOL & RIPERT, TREATISE ON THE CIVIL LAW 271-2 (1959) citing French Decisions.

42 35 Phil. 252 (1916).

43 *Ibid.*

44 *Ibid.*

that of compelling the wife to live with her mother-in-law, if the latter and the wife cannot get along together.

In an earlier case, the court held, that "ordinarily, it is not the fault of one (of the spouses) that two quarrel, and, in all probability, the plaintiff (wife) is not free from blame, but she was virtually driven out of their home by her husband and threatened with violence if she would return. The separation was deemed necessary and allowance for separate maintenance was granted.[45]

The prevailing view on this matter, however, is found in the case of *Atilano v. Chua Ching Beng*,[46] wherein the Supreme Court held: "Where the root cause of all disagreements between the husband and wife could be traced to disagreements common among relatives by affinity, that misunderstanding with in-laws who may be considered third parties to the marriage, is not the moral or legal obstacle that the lawmakers contemplated in drafting Article 299 of the Civil Code... The law in giving the husband authority to fix the conjugal residence (Article 110, Civil Code) does not prohibit him from establishing the same at the patriarchal home, nor is it against any recognized norm of morality, especially if he is not fully capable of meeting his obligation as such head of a family without aid of his elders.

5. Non-Support

Members of the family are morally obliged to support each other, and this natural obligation is given legal sanction by the Civil Code. The proposed Code of Crime, however, goes one step further. It makes non-support a criminal offense. Article 487 of the proposed code states:

> Any person who, by ill will, idleness or negligence, refuses or fails to furnish legal support, including expenses for education, to any person entitled thereto shall be repressed with light imprisonment, or a fine ranging from the equivalent of 15 to 30 days' earnings.

The provision was taken from Article 217 of the Swiss Code of Crimes, and was slightly revised to conform to Philippine customs and traditions.

It was to be enacted to enable the state to penalize miscreants who leave their families with little or no means of support, thus turning them into wards of the state or worse, into potential trouble-makers in the community.

Elements of the article are: there is a right to legal support; refusal to honor such due to ill will, misconduct, idleness or negligence; and actual non-support.

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[45] Garcia v. Santiago and Santiago, 53 Phil. 952 (1928).
[46] 103 Phil. 255 (1958).

The article complements Title IX of Book One of the Civil Code, wherein support is defined as everything indispensable for sustenance, dwelling, clothing and medical attendance, according to the social position of the family.[47] Although the provisions in the Civil Code may be adequate to justify civil demands for support, the one asking for such is often reduced into desperation before any action can be taken by the courts. It must be demanded at least extrajudicially[48] and the right to support established before it can be payable.[49]

The Supreme Court in *Jocson v. The Empire Insurance Co.*,[50] *and Jocson Logniton* said that:

> . . . the right to support does not arise from the mere fact of relationship, even from the relationship of parents and children, but from 'imperative necessity' without which it cannot be demanded.

The implication here is that before support can be had, there must first be an express demand. At first glance such may be reasonable, but it also implies that the person bound to support can be found or at least be given communications. Oftentimes, however, the person liable is nowhere to be found since non-support in our jurisdiction is oftentimes accompanied by abandonment. Thus, precious time and effort is lost in finding the person who abandons his responsibility, if ever he can be found at all. Besides, the presumption of non-support will have to be proven first and the right of support accepted by the court.[51]

All this means that in the meantime, the family would have to undergo undue hardships. The court may grant support *pendente lite*,[52] but there are exceptions to this rule; such as when the marriage or the duty to support itself is in issue;[53] when there was adultery;[54] or when the wife or person entitled to support did not push through such motion.[55]

Support is not limited to family members only, but include the acknowledged natural child,[56] natural children by legal fiction, and the illegitimate child.[57] In the case of the latter, he has to be recognized.[58]

The result here is that such an action of non-support is clearly disruptive of family solidarity and thus, of the very base of society. The code commission said that this strikes into the very heart of society, and thus of the nation itself.

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47 CIVIL CODE, art 290.
48 CIVIL CODE, art. 298.
49 Marcelo v. Estacio, 70 Phil. 215 (1940).
50 103 Phil. 580 (1958).
51 Francisco v. Zandueta, 61 Phil. 752 (1935).
52 Slade Perkins v. Perkins, 57 Phil. 223 (1932).
53 Yangco v. Rhode, 1 Phil. 404 (1902).
54 Quintana v. Lerma, 24 Phil. 285 (1933).
55 Saavedra v. Ibañez Estrada, 56 Phil. 33 (1931).
56 CIVIL CODE, art. 282.
57 CIVIL CODE, art. 287.
58 Crisolo v. Macadaeng, 94 Phil. 862 (1954).

In the United States, many states have recognized this, and have enacted penal laws punishing non-support. In *People v. Schenkel,*[59] the Court of Appeals of New York stated:

> In this state the penal statutes leaves no discretion to the court. A person is 'disorderly' who leaves wife or children in danger of being a burden upon the public or who neglects to provide for them according to his means... The public interest, in the opinion of the Legislature, requires that the husband, not the taxpayer, shall bear the burden of (the wife's) support as long as the relationship of husband and wife is not allowed or dissolved by decree of court.

In *Ewell v. State,*[60] the Maryland Supreme Court said:

> Statutes have been passed in almost all of the States which made failure of the husband to perform his duty of support, unless adequately excused, a crime. The statutes fall generally into two classes: those which require the wife to be destitute and necessitous circumstances before the husband's failure to support her is a crime, and those which merely state... that it is a crime for one without cause to... willfully neglect to provide for the support and maintenance of his wife...

Children and descendants and descendants in numerous states are given the duty to give support to their parents, which is quite contrary to common law practice. Such was the ruling in *Lanthan v. State*[61] wherein it was stated:

> At common law, children have no legal duty to support parents and the statute in question departs from the common law by imposing such a duty and by making it a criminal offense for a child to neglect "to maintain and... support his parents." To be guilty of the misdemeanor..., a child's neglect to maintain and support his parents... must be without reasonable cause, (and)... characterized by wilfullness...

It follows that the parents in this jurisdiction must be physically and financially unable to care for himself, and that the child must be of age and financially able to care for himself and the parent. The California Penal Code in Article 270 thereof holds that parents who wilfully withholds support for their children are criminally liable. The proposed New York Penal Law penalizes non-support of a child in Article 265.05, if without legal and lawful excuse as a Class A misdemeanor.

Thus, in many jurisdictions, non-support is a criminal offense and they have been found to be sound and proper in these states. The problem is that these conclusions may not be termed as conclusive in our country due to our unique social and economic structure. It may be said that American Jurisprudence has persuasive effect here, but the provision in the proposed code was lifted from the Swiss Code. Another problem is that Filipino families tend not only to be a single unit composed of the father, the mother and the children, but includes other relatives by blood or by

[59] 253 N.Y. 224, 179 N.E. 474 (1932).
[60] 207 Md. 288, 114 A.2d 66 (1955).
[61] 208 Ind. 79, 194 N.E. 625 (1935).

law. The provisions of Article 291 of the Civil Code may provide for those who are legally bound for support, but the reality of the nuclear family cannot be overlooked. The Filipino nuclear family tends to support everyone within it, thus cases may arise wherein non-support may arise due to troubles with in-laws; or that support, even if given, may be inadequate because there are so many relatives asking for help.

Nevertheless, the problem of non-support is a growing one in our country, probably due to the increase in the rate of urbanization and the waning influence of local customs and traditions. Thus, the provision might be the answer to this problem. By making non-support a crime, persons might have second thoughts about it, or at least, it could serve as a deterrent since the state could interfere and penalize them. As Judge Guevarra succintly said, "We penalize debtors who do not pay their obligations to strangers, what more those who abandon their family obligations?"[62]

6. Abandonment of a pregnant woman

Filipino society has always given special considerations to pregnant women. With this in mind, the Code Commission proposed Article 488, which states:

> Any man, who shall, without just cause, refuse to or fail to give support to an unmarried woman who is pregnant by him, thus leaving her in distress during pregnancy and three months thereafter shall be repressed with confinement, or a fine in a sum ranging from the equivalent of 15 to 30 days' earnings.

Elements of the proposed provision are: pregnancy, paternity of the man is proved, there is non-support, and refusal is without just cause. The provision was taken from the Swiss Code of Crimes but was slightly revised.

The proposed article is based on the theory that a man must face his obligations, especially if by abandoning them another is placed in distress. Thus, the article makes non-fulfillment of a moral obligation, that is, to provide support to a woman one has impregnated, a criminal offense. This is in essence, a supplement of Article 21 of the Civil Code which states:

> Any person who wilfully causes loss of injury to another in a manner contrary to morals, good customs or public policy, shall compensate the latter for the damage.[63]

In the present Civil Code, damages is permissible but by then the pregnant woman would have undue suffering, embarrassment and anxiety due to the man's desertion. Worse, the innocent child in the womb may also suffer.

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[62] Interview with Judge Guevara.

[63] Art. 21 of the Civil Code is considered as a "catch-all" provision since it would vouchsafe adequate legal remedy for that untold number of moral wrongs which would be impossible for common foresight to provide for specifically in the statutes. (REPORT OF THE CODE COMMISSION, p. 40).

The provision runs parallel to the numerous cases of breach of promise of marriage, which the courts have declared to be non-actionable but susceptible to the claim of moral damages under Article 2219 of the Civil Code. In the case of *Velayo v. Shell Company of the Philippines*,[64] the court said that "a moral wrong or injury, even if it does not constitute a violation of a law, should be compensated by damages." In *Pe v. Pe*[65] where the defendant, a married man, seduced the sister of the complainants through trickery, an injury to Lolita's family in a manner contrary to good customs was found by the court and damages were awarded.

It is a well accepted and time-honored custom for Filipinos to be extra-considerate to pregnant women, even if she be unmarried. They go out of their way to furnish her with whatever she may need, and are careful so as not to upset her. The belief is that she is a helpless individual, susceptible to numerous dangers. Thus the ignominy of abandoning a pregnant woman is especially felt in our culture. The Code Commission thus felt that the condition must be expressly safeguarded against.[66]

Moreover, we can argue that here the right of support is not only for the pregnant woman but also for the child. Article 282 of the Civil Code provides that natural children are entitled to support if recognized[67] and retroactive to their birth.[68] Article 287 also states that illegitimate children are entitled to support if their filiation is proved.[69] Thus, applying Article 40 which states that a conceived child shall be considered for all purposes favorable to it to be born can acquire rights[70] and may be acknowledged,[71] can stretch this interpretation to the effect that the unborn child is entitled to support, and thus the argument for support in the previous topic still apply.[72]

In the United States, the New Jersey Supreme Court said in *Hoener v. Bartinate*[73] that "it is now settled that an unborn child's right to life and health is entitled to legal protection even if not viable. In *Smith v. Brennan*[74] the same court held:

> Our criminal law regards an unborn child as a separate entity... And our law of property and decedent's estate considers him in being for purposes beneficial to his interest. It is clear that medical authorities recognize that before birth an infant is a distinct entity, and the law recognizes that rights he will enjoy when born can be violated before his birth. Justice requires

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64 100 Phil. 186 (1956).
65 G.R. No. L-17396, May 30, 1962, 5 SCRA 200 (1962).
66 Interview with Judge Guevara.
67 Tiamson v. Tiamson, 32 Phil. 62 (1915).
68 De Gala v. De Gala and Alabastro, 60 Phil. 311 (1934).
69 Crisostomo v. Reyes, 3 C.A. Rep. 342 (1963).
70 Lagdameo v. Lagdameo, C.A., G.R. No. 10166-R, February 19, 1954, 50 O.G. 3113 (July, 1954).
71 De Jesus v. Syquia, 58 Phil. 866 (1933).
72 Art. 487 of the CODE OF CRIMES (1977).
73 67 N.J. Super. 517, 171 A. 2d 140 (1961).
74 31 N.J. Super. 367, 157 A. 2d 497, 502 (1960).

> that the principle be recognized that a child has a legal right to begin life with a sound mind and body...

The California Penal Code in Article 270 which penalizes non-support of offsprings specifically mentions that unborn children are covered by it.

However, the article poses numerous problems. First, the article imposes support for an unmarried woman, which contrary to the vein of the entire chapter. How can family solidarity be buttressed by this article? Indeed, it may even run counter because it impliedly acknowledges illicit and immoral relationships. Secondly, it may be utilized by unscrupulous women to prosecute their lovers even if their pregnancy was due to mutual carnal desire and may even encourage illicit and immoral relationships since these women if ever they get pregnant, would then be amply supported. Third, it may even be a bar to reconciliation since it is unlikely for a man to propose marriage to a woman who had him arrested, accused and imprisoned.

The case of *Batarra v. Marcos* [75] has ruled that "acts of mutual lusts" cannot be given sanction by the courts. In essence, the provisions runs against this view, and poses dangerous implications, since it would be providing protection for women of doubtful repute, and sanction illicit and immoral relationships.

7. Transferring custody of child to an incompetent person

The Proposed Code of Crimes provides:

> Art. 489. *Transferring custody of child to an incompetent person.*— Any parent, guardian or any other person or intestate in charge of a minor under eighteen years of age, who shall place the latter in the custody of another person who is known by the offender to be incompetent or unfit to take care of the child, shall be repressed with a fine in a sum ranging from the equivalent of 15 to 30 days' earnings.

A similar provision is found in the Civil Code of the Philippines. Article 313 of the Civil Code provides:

> Parental authority cannot be renounced or transferred, except in cases of guardianship or adoption approved by the courts, or emancipation by concession.
>
> The courts may, in cases specified by law, deprive parents of their authority.

The right to parental authority is a personal one, and as such, it attaches to the parent exercising it until his or her death. Prior to the enactment of the Civil Code, *patria potestas* could be validly waived because of the absence of any provision of law prohibiting such waiver. With the enactment of the Civil Code, parental authority became inalienable, and every abdica-

[75] 7 Phil. 156 (1906).

tion of this authority by the parents is void. The prohibition to such waiver is not absolute. The law recognizes four instances wherein parental authority may be validly relinquished: (1) in case of adoption; (2) in case of guardianship; (3) in case of emancipation by concession of the parents; and (4) in case of surrender to children's home or an asylum under Act No. 3049. In any other cases, or where the conditions for such waiver are prohibited or lacking, parental authority may not be transferred in as much as parental authority confers rights and imposes duties upon parents exercising the same.

There must be a distinction between one who entrusts the custody and one who renounces the parental authority. In the former, such entrusting is merely a temporary arrangement between one who entrusts (the parents) and the transferee, while renunciation has the effect of permanent waiver.

The right to parental authority springs from two sources: one is, that he who brings a child, a helpless being, into life, ought to take care of that child until it is able to take care of itself, and because of this obligation to take care of and support this helpless being arises a reciprocal right to the custody and care of the offspring whom he must support; and the other reason is, that it is a law of nature that the affection which springs from any other human relation as that is stronger and more potent than any which springs from any other human relation.[76]

A child is not in any sense like a horse or any other chattel, subject matter for absolute and irrevocable gift or contract. The father cannot by merely giving away his child release himself from the obligation to support it, nor be deprived of the right to its custody. This the court also had occasion to observe in the above cited case. It is a cardinal rule that the welfare of the child is the prime consideration in determining to whom the custody of the child shall be given.

The right of parents to the company and custody of their children is but ancillary to the proper discharge of parental duties to provide the children with adequate support, education, moral and intellectual as well as civic training and development.[77]

By the transfer of the minor into the hands of a person who is incompetent or unfit to take proper care of the child, the law would look at such an action as abandonment. Abandonment is one of the grounds for depriving parents of parental authority over their children.

Article 489 of the proposed Code of Crimes, which is lifted from the Brazilian Code of Crimes, is looked upon as favorable not only to the child but also to society. Laws passed for the benefit of children, is designed to give protection, care and training to children, as a needed statute as recog-

[76] Chapsky v. Wood, 26 Kan. 650, 40 Am. Rep. 321 (1881).
[77] Medina v. Makabali, G.R. No. L-26953, April 28, 1969, 27 SCRA 502 (1969).

nized by the state. The state is ultimately the guardian and protector of children where other guardianship fails.[78]

8. Failure to make funeral arrangements

Controversies among members of a family have often arisen in connection with the burial of the dead, and have increased bereavement of the family and marred the proper solemnity which should prevail in every funeral. The regulation of funerals is covered by the Civil Code of the Philippines. Article 305 imposes a duty and confers a right to make arrangements for the funeral of a relative which shall be in accordance with the order established for support, under Article 294. In case of descendants of the same degree or of brothers and sisters, the oldest shall be preferred. In case of ascendants, the paternal shall have a better right.[79] If there are no such persons or if there are and they are without means to defray the expenses, the duty of burial shall devolve upon the municipal authorities. Section 1104 of the Revised Administrative Code provides:

> Any person charged by law with the duty of burying the body of a deceased person is entitled to the custody of such body for the purpose of burying it, except when an inquest is required by law for the purpose of determining the cause of the death; and, in case of death due to or accompanied by a dangerous communicable disease, such body shall until buried remain in the custody of the board of health or local health officer, or if there be no such, then in the custody of the municipal council.

Under the proposed Code of Crimes, failure to make funeral arrangements is punishable under Article 490 which provides:

> Whoever, without just cause, refuses or fails to make proper arrangements and assumes responsibility for the funeral of his or her spouse or relative — the order of liability being that prescribed by law for support — shall be repressed with restraint or a fine of not more than 15 days' earnings.

Except for some revision in the wordings of the provision, one can readily submit that this provision is lifted from the Philippine Civil Code.

Article 309 of the Civil Code provides:

> Any person who shows disrepect to the dead, or wrongfully interferes with the funeral shall be liable to the family of the deceased for damages, material and moral.

The surviving spouse of any relative whose duty to give a decent funeral must do so in keeping with the social position of the deceased. If the person bound should give a very miserable burial to the deceased, when the latter has left sufficiently large estate and enjoyed a prominent social position in life,

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[78] Commonwealth v. Fisher, 213 P. 48, 62 A. 198, 5 Ann. Cas. 92 (1905).
[79] CIVIL CODE, art. 305.

his other relatives may treat the act of the surviving spouse as one of disrespect to the dead and recover damages under Article 309.

It is the duty of everyone to refrain from doing anything which offends the feeling of the living.[80] It is the right and duty of the living to bury their dead, and they have such interest in the remains as to enable them to carry the dead body to the graveyard, and give it a decent interment. Under the proposed Code of Crimes, such negligence or failure to comply with the duty to bury one's own dead is deemed punishable. It is in consonance with sound public policy that we should respect our dear departed. The imposition of a penalty on these persons who fail to do so when they are with the financial capacity to provide the proper burial would certainly be in the interest of a morally-conscious society like ours.

9. Disobedience or Disrespect by Child

The authority of the parents over their children is universally accepted, and the corollary duty of the child to obey and respect is also recognized within this realm. The Code Commission, recognizing this fact, included the following article in the chapter for family solidarity:

> Art. 491. Any child under parental authority who fails to obey and honor his/her parents, or who shows disrespect towards his/her grandparents, or parents holding substitute parental authority may be subject to moderate corporeal chastisement by the parents or guardian under the supervision of the court or may be placed in a children's home or similar institution until such time as he or she shall show reformation.
>
> The procedure under this article shall be provided for juvenile offenders in chapter 3, or Title IV, Book One.
>
> Whenever the complaint for disobedience referred to in this article is filed by the father or mother who has contracted a marriage subsequent to that in which he or she had the child, the court shall ascertain the effect which the attitude of the stepfather or stepmother may have had upon the child's alleged disobedience.

This was taken without substantial change from the Penal Code of Bolivia, and it has five elements: the child is still under parental authority; there was refusal to obey just orders; or there was disrespect towards those holding substitute parental authority; the disobedience or disrespect was willful and malicious; and there may be a subsequent marriage.

This proposed article complements Articles 311, 318, 319 and 357 of the Civil Code. It was proposed to be a deterrent to children who tend to disobey their parents and to sanctify the role of the parents in the family. Article 45 of the Child and Youth Welfare Code (Pres. Dcree 603) also gives parents the right to discipline children in the manner necessary for the formation of their good character, and may therefore require obedience to just and reasonable rules.

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[80] Finley v. Atlantic Transport Co., 220 N.Y. 249, 115 N.E. 715 (1917).

According to Tolentino,[81] there are two important duties imposed upon children: to obey their parents as long as they are under parental power, and to respect and honor them always. These are remnants of the Roman Law tradition of *patria potesta* wherein parents literally held the power of life and death over their children, but in the development of law has been transformed from a "power" over the children into a "sacred trust for the welfare of the minors".[82]

Act 4002 also provides that any minor child guilty of disrespect and disobedience to his parents incurs criminal liability upon the complaint of the parents, and as such could be imprisoned for not more than ten days (arresto menor in its minimum term). If he is below 16 years of age, the provisions of the first part of Article 80 of the Revised Penal Code shall apply, committing him to the care and custody of a private or public benevolent or charitable institution for orphans, homeless or defective children until he has reached the age of majority.

Article 318 of the Civil Code also provides an additional remedy for parents in the exercise of parental authority. It authorizes the local mayor to assist the parents in their exercise of authority over their children. However, if the child is to be kept in an institution even if less than a month, a court order is necessary.[83] The Child and Youth Welfare Code also permits voluntary confinement by the parents of their children to similar institution, but such has to be in writing.[84] In the hearing, the child shall be allowed to state his side, and for this purpose the court may appoint a guardian *ad litem*. If the child is detained in an institution, the parents must continue supporting the child until said detention is lifted with the approval of the court.[85] However, the parents can no longer participate in disciplining the child during the period of confinement. Both the Civil Code and the Child and Youth Welfare Code specifically state that when the child is confined, the parents are deemed released from their parental authority until the child is released.[86] The child may be freed at the instance of the parents but subject to the approval of the courts.[87]

Other countries have recognized the duty of the child to obey their parents. The old Roman Law concept of *patria potesta* imposes this duty but with the development of law and the influence of Christianity and Liberalism, a corresponding obligation to protect the child is also imposed on the parents.[88] Jean Jacques Rousseau in his famous work "The Social

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[81] 1 TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 609 (1974).
[82] Medina v. Makabali, *supra*, note 77.
[83] CIVIL CODE, art. 319.
[84] CHILD AND YOUTH WELFARE CODE, arts. 154 & 155.
[85] CIVIL CODE, arts. 317 & 319; also CHILD AND YOUTH WELFARE CODE, art. 194
[86] CIVIL CODE, art. 319.
[87] CIVIL CODE, art. 319; also CHILD AND YOUTH WELFARE CODE, art. 151.
[88] Medina v. Makabali, *op. cit., supra*, note 77.

Contract" (1762) said that the protection afforded by the parents over their children demands the corresponding duty of the offspring to obey and respect their parents.

Actual cases involving disobedience of children as the main issue in fact seldom reaches the high courts, and in local jurisdiction, there is a dearth of decisions in this aspect, notwithstanding the fact that there already exists a penal statute penalizing disobedience. Perhaps this is due to the universal acceptance of the proposition that children are duty-bound to obey their parents since it is always presumed that parents will always have the welfare of their children at heart. Another reason is that the parents can always resort to their superior strength to force obedience, and in our culture, family matters are seldom brought out for the public to observe.

For the provision to be utilized, it is mandatory that the order is morally right, for parents cannot force their children to do acts repugnant to their conscience or dignity,[89] nor to marry against their will,[90] nor to be employed against their will.[91] The second part of the provision punishes disrespect towards those wielding substitute parental authority, and this necessarily intrudes into the field of morality, for it involves disrespect — an intangible matter. Unfortunately, a legal definition of disrespect cannot be said as definite in all cases, and it is doubtful that the courts will intrude into such untable grounds.

The provision prescribes two forms of punishment: corporal chastisement under the auspices of the court; and by placing the offending minor in a foundling home. The first is better left to the privacy of the home although sometimes the inflictment of such penalties is abused, thereby the parents would become liable under Article 492 of the proposed code. To give the child a whipping in public, however, can hardly promote family solidarity: it denotes the failure of the parents to rear their child properly and embarrasses the child such that likelihood of reform is minimal.

The second is rather off-tangent since it literally means the surrender of parental authority to correct the child and instead transfers it to an institution wherein chances for reform is rather doubtful due to the conditions of our present children's homes which can hardly make both ends meet. The child may even meet other unruly elements and become worse. He will also have a criminal record.

Thus, it is doubtful that the proposed article will be beneficial to the formation of a better and more harmonious family relationship. The presence of a similar law in Act No. 4002, and the fact that it is seldom, if hardly ever utilized, boosts this argument.

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[89] DE BUEN, CURSO ELEMENTAL DE DERECHO CIVIL; 2-1 COLIN & CAPITANT 73, quoted by 1 TOLENTINO, *op. cit., supra,* note 81 at 616; also CIVIL CODE, art. 332.

[90] Salvaña & Saliendra v. Gaela, 55 Phil. 680 (1931).

[91] TOLENTINO, *op. cit., supra,* note 81 at 618.

10. Abuse of Correction or Discipline

Child abuse is one of the blights of mankind, and it is rather unfortunate that even in our modern age of enlightenment this unsavory practice is still unchecked. Thus, in Article 492 of the proposed Code of Crimes, although written some 17 years ago, is still very timely. The provision states:

> Any person who abuses measures of correction or discipline to the injury or detriment of a person subject to his authority, shall be repressed with confinement.
>
> If the act constitutes a graver crime, the offender shall be repressed accordingly.

The article was lifted *en toto* from the Penal Code of Italy, and contains the following elements: that there was excessive or harsh corporal punishment, amounting to injury or is detrimental to the child; and that the person imposes such punishment has authority over the injured.

The article supplements Article 316(a) and 332 of the Civil Code wherein the parents are empowered to correct and discipline children moderately and that this authority may be taken away if there is excessive harshness. The procedure in such cases is prescribed in Rule 99, section 7 of the Rules of Court, wherein the proper Court of First Instance, upon petition by a reputable resident of the locality, may step in and after hearing may take away the child from the abusive parents or guardian. This may result in judicial emancipation.[92] It should be noted that the proposed article of the Code of Crimes applies not only to those wielding parental authority but includes all those with power to correct and discipline minors, such as teachers, employers in the case of apprentices, and institution heads. Article 166 of the Child and Youth Welfare Code makes it mandatory for hospitals, clinics and physicians to report within 48 hours from knowledge thereof cases of maltreated or abused childlren to the proper city or provincial officials, and Article 167 of the same code even absolves them from civil or criminal liability due to erroneous reports of these cases if done in good faith.

In the Civil Code, the courts are limited to merely suspending the parental authority, or in some cases to depriving parents of such power. The proposed Code of Crimes will authorize the courts to impose penal sanctions on the abusive parents, and if such would constitute a graver crime, the corresponding penalty would be imposed.

The power to correct and punish children is necessarily included in parental authority. The power, however, should be exercised sparingly and to keep it within the prestige of proper utilization, the Code Commission

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[92] 5 SANCHEZ ROMAN, ESTUDIAS DE DERECHO CIVIL 1121 (1899) as quoted by 1 TOLENTINO, *ibid.*, p. 635.

has prescribed this article. It should never exceed the limits of prudence, moderation, and human sentiments. The reasonableness of the punishment is generally determined by custom; and the means and manner of punishment, not exceeding these limits, are within the discretion of the parents.[93] Most modern educational systems and institutions frown upon or ban the use of corporal chastisement.

Thus, the courts have long recognized that the power to punish or discipline minors is limited [94] and that parental authority or even custody of the child can be taken away due to excessive harshness in correcting the child.[95]

In the case of *Peres v. Samson*,[96] the Court of Appeals said:

> In view of our findings that the mother has been excessively harsh to the child, a 3½ year old girl who was found tied naked to a waterpipe in the toilet of the family home, with scars and abrasions in different parts of the body allegedly due to punishment, and the fact that the petitioners, the couple involved therein, live together in the house, the custody of the child by her father shall be subject to visitation at reasonable times of the day by the Social Welfare Commissioner, or by any of her representatives. Furthermore, the SWA . . . may take such step or action as the law and the Judicial rules may provide with respect to abused children if, in her opinion, there exists compelling reasons therefore.

Foreign tribunals have acknowledged that excessive punishment resulting in injury to children constitutes a crime. In *Fainham v. Pierce*,[97] the Supreme Court of Mississippi decreed that:

> . . . although the father is charged with the duty of raising and disciplining his minor children, a parent has . . . no right to inflict bodily injury . . . and he does not enjoy complete immunity for accountability thereof. Excessively wilful or negligent conduct may forfeit the right to custody, or may constitute crime.

In *People v. Green*,[98] the Michigan court said:

> It is not necessary, to sustain a conviction, to show that the punishment inflicted by the parents was such as to cause permanent injury or disfigurement to the child. It is sufficient to show that the punishment was cruel and unreasonably severe, and such as in its very nature would negate the idea of good faith on part of the parents.

The respondent in the said case was thus found guilty of assault and battery on the person of her daughter.

In *State v. Kronse* [99] it was concluded that:

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[93] 1 TOLENTINO, *ibid.*, p. 612.
[94] Mauricio v. Social Welfare Administrator, 4 C.A. Rep. 85 (1963).
[95] Perez v. Samson, C.A.-G.R. No. 9117-R, September 20, 1952, 48 O.G. 5368 (December, 1952).
[96] *Ibid.*
[97] 141 Miss. 203, 6 N.E. 830, 55 Am. Rep. 452 (1886).
[98] 155 Mich. 526, 119 N.W. 1087 (1909).
[99] 123 Mo. App. 655, 101 S.W. 139, 141 (1907).

> "... the parent is the sole judge of the necessity for the exercise of disciplinary power and the nature of the correction to be given, and the mere fact that a castigation he gives may appear to others as unreasonably harsh or severe does not make his conduct a subject of judicial cognizance ... but where the punishment inflicted is so excessive and cruel as to show beyond a reasonable doubt that the party was no longer acting in good faith for the benefit of the child but for his own evil passion... he is a malefactor, guilty of unlawful assault on a helpless person entrusted to his care and protection.

Even those in substitute authority may be held liable. In *State v. Straight*,[100] it was held that the court expressly disapproves of the view that those standing in *loco parentis* act in a quasi-judicial capacity regarding punishment of the child entrusted to his care, and the malefactor was found guilty.

It cannot be denied that there are indeed some instances wherein abusive parents inflict great harm and injury to their children either because of a misguided sense of authority, mental imbalance or patience. The recent case in local jurisdiction wherein a young girl was blinded for life and stabbed by her mother illustrates this point. The case of *Perez v. Samson* [101] has indicated that special protection for children in some instances is urgently needed, and the courts have shown sympathy to child-welfare laws.

To provide penal sanctions in this aspect may be a step in the right direction so that parents, in wielding their parental authority to correct and discipline their children, will be reminded that their power is not absolute, and that the practice of the Roman Law principle of *patria potesta* is no longer acceptable. In the case of *Medina v. Makabali*,[102] the Supreme Court had said that:

> In the continual evolution of the legal institutions, the *patria potesta* has been transferred from the *jus vitae ac necis* (right of life and death) of the Roman Law, under which the offspring is virtually a chattel of his parents, with a radically different institution, due to the influence of Christian faith and doctrines. As pointed out by Puig Pena, now "there is no powers, but a task; no complex of rights (or parents), but a sum of duties; no sovereignty, but a sacred trust for the welfare of the minor. (Puig Pena, Derecho Civil, Vol. 2, Part 11, p. 153)

11. Abandonment of Parental Home

An old and often-challenged belief of our culture is that the woman's place is the home. The Code Commission, in its defense of Article 403 of the Civil Code which the proposed Article 493 of the Code of Crimes supplements and which prohibits daughters between 21 and 23 from leaving the family without the permission of the parents except to become a wife,

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[100] 136 Mont. 255, 347 P. 2d 482 (1959).
[101] *Op. cit., supra*, note 95.
[102] *Supra*, note 77.

to exercise a profession or calling, or when the parent has contracted a subsequent marriage, said:

> Daughters above 21 but below 23 . . . (should) remain in the parental home. The retention of this rule may be criticized by some, in view of the improvement of education and enlightenment, but wholesome customs should be maintained in the law.

The Provision was taken from Article 321 of the Spanish Civil Code.

Thus in Article 494 of the Code Commission proposed:

> Art. 494. Any unmarried daughter between 13 and 23 years of age who shall leave the parental home without the consent of the father or mother in whose company she lives, save in cases mentioned in the following paragraph, shall be repressed with confinement, or a fine in a sum ranging from the equivalent of 15 to 30 days' earnings.
>
> Said daughter may leave the parental home, without parental consent, in any of the following cases:
>
> 1. when she marries.
> 2. when she exercises a profession or calling.
> 3. when the father or mother has contracted a second marriage.
> 4. when she is maltreated by the parents, or members of the family.

The prohibition is to be understood as a limitation to the rights of the emancipated child and not that they are still under parental authority.[104] It was defended by Manresa as merely a limitation in the interest of public decorum.[105] Under the Civil Code, a daughter who violates the prohibition and lives with third parties without qualifying under the exceptions and the consent of the parents, may be compelled to return through habeas corpus proceedings.[106]

This provision, if ever it were implemented, would create more harm than good since it is doubtful that family harmony and solidarity could be promoted by having a daughter fined, or worse, imprisoned. In the present age wherein women are given recognition no longer as man's subordinate but as his equal, the provision is clearly out of place and anachronistic. Except as a deterrent, the imposition of a repression from one to six months of imprisonmnt is of doubtful value to the preservation of family life and harmony. Indeed, if one were prosecuted within the context of the provision, animosity and not harmony would be the result.

The constitutionality of such a provision could also be questioned since the provision is clearly discriminatory and may be said to violate the equal protection of the laws.[107] In the age where women's liberation and rights are being recognized everywhere, the provision would only arouse

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[104] Dy Pia v. Ricardo, C.A.-G.R. No. 3571-R, August 17, 1949, 47 O.G. 5243 (October, 1951).

[105] 2 MANRESA, COMENTARIOS AL CODIGO CIVIL ESPAÑOL 786-7 (1914).

[106] Canua v. Zalameda, G.R. No. 47761, October 1, 1940, 40 O.G. Suppl. 297 (September, 1941).

[107] CONST., art. IV, sec. 1.

the indignation not only of the enlightened women, but also of the liberal sector of the male population. The only defense for such an article is customs and traditions, which is also rapidly adapting to the times. Therefore, the provision is rather questionable, and it is best deleted.

12. Refusal to discuss compromise

It is difficult to imagine a sadder and more tragic spectacle than a litigation between members of the same family. It is necessary that every effort is made toward a compromise before a litigation is allowed to breed hatred and passion in the family. It is known that a lawsuit between close relatives generates deeper bitterness than between strangers.[108]

Thus, under the Civil Code Article 222 provides:

> No suit shall be filed or maintained between members of the same family unless it should appear that earnest efforts towards a compromise have been made, but that the same have failed, subject to the limitations in article 2035.

This rule has been followed in many decisions of the court. In a case [109] the Court of Appeals held:

> It was not the intention of the legislature to exclude from the provisions of the law a case, like the one before us, where the litigants themselves have fixed the allowance or support and the same is approved by the court. In our opinion, to sustain the view taken by the counsel for the appellee is dangerous and would intervene the principle underlying the New Civil Code on family relations, particularly with respect to those having to do with compromises between members of the same family to avoid a litigation, or put an end to one already commenced.

The Supreme Court also had the occasion to hold in the same tenor in *Araneta v. Concepcion.*[110] In this case, the main action was brought by the petitioner against his wife, one of the respondents herein, for legal separation on the ground of adultery. In accordance with the omnibus motion filed by defendant, the respondent judge granted custody of the child to the defendant and a monthly allowance and support of ₱2,400. Upon refusal of the court to reconsider the order, petitioner filed certiorari against said order and for mandamus to compel respondent judge to require the parties to submit evidence before deciding the omnibus motion. The main reason given by the judge, for refusing plaintiff's request that evidence be allowed to be introduced on the issues, is the prohibition contained in Article 103 of the Civil Code which provides:

> An action for legal separation shall in no case be tried before six months shall have elapsed since the filing of the petition.

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108 REPORT OF THE CODE COMMISSION, p. 18.

109 Leal v. Telmo, C.A.-G.R. No. 9756-R, September 29, 1953, 50 O.G. 183 (January, 1954).

110 99 Phil. 709 (1956).

It was held that pending the action *proper* for legal separation, upon preliminary motion for alimony pendente lite, evidence may be adduced for or against support. The purpose of the period of six months is to grant the spouses sufficient time for reconciliation. This should not, however, bar the presentation of evidence upon incidental matters that do not go into the merits of the principal action.[111]

It is conceded that the period of six months fixed in article 103 is evidently intended as a cooling-off period to make a possible reconciliation between the spouses. The recital of their grievances against each other in the court may only fan their inflamed passions against one another, and the lawmaker has imposed the period to give them opportunity for dispassionate reflection.[112]

The proposed Code of Crimes contains a provision which requires as a condition precedent a meeting among quarreling members of the same family to discuss any possibility of a compromise before bringing suit to court. Article 494 of the proposed Code of Crimes provides.

> Any person who, before or during a civil litigation with his or her spouse, descendant, ascendant, brother or sister, refuses without just cause to discuss a possible compromise, shall be repressed with confinement or a fine in a sum ranging from the equivalent of 15 to 30 days' earnings.

This provision speaks only of a civil litigation but makes no mention of a compromise when the litigation is criminal in character. Does this mean that compromise is not available when one has brought a criminal action against a member of the same family? One would think that there is greater need for such compromise when the action involved is criminal.

In ascertaining whether an action has been properly brought to solve a family trouble, in general, certain major considerations will govern the court's decision: the court should determine the prospect of reconciliation; it should determine whether the legitimate objects of matrimony have been destroyed or whether there is a reasonable likelihood that the marriage can be saved. It should consider the ages and temperaments of the parties, the length of their marriage, the seriousness and frequency of their marital misconduct proved at the trial and the likelihood of its recurrence, the duration and apparent finality of the separation and the sincerity of their efforts to overcome differences and live together harmoniously.[113]

In civil actions, the failure of the complaint to plead that the plaintiff previously tried in earnest to reach a settlement out of court renders it assailable for lack of cause of action, and may be attacked at any stage of the case even on appeal. In like manner, in criminal actions, the law must

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111 *Ibid.*
112 *Ibid.*
113 Sharon v. Sharon, 67 Cal. 185, 7 P. 456, 635, 639 (1885).

forbid a suit from being initiated or maintained unless such efforts at compromise appear.[114]

CONCLUSION

The family is a basic social institution, *publici juris*, and the origin of domestic relations of utmost importance to civilization and social progress; hence, the state is deeply concerned in its maintenance in purity and integrity.

The Code Commission of the proposed penal statute, in including, among others, provisions centered on the family security and solidarity, considered the effect of the provisions in enhancing opportunities of members of the family for a useful and happy life. Every member of the family should strive to make the home a wholesome and harmonious place. This is a state policy enunciated in the Child and Youth Welfare Code. As stated therein, "attachment to the home and strong family ties should be encouraged but not to the extent of making the home isolated and exclusive and unconcerned with the interests of the community and the country." The movement towards a national identity, long overdue and lacking among Filipinos, is further encouraged when the state through the laws declare it of national interest the strengthening of family ties with the common goal of contributing to national development.

However, much to the regret of some observers, the inclusion of particular provisions in the proposed Code of Crimes regarding family solidarity bring about or tend to bring about, instead of solidarity, disintegration. It would be unfair, however, to consider all the proposed provisions in the proposed code, (in connection with family solidarity) to be without credit. The provisions calling for the punishment of persons who undermine the sanctity of the family must be considered as desirable. In punishing persons, who, in their adult age ought to act with responsibility and maturity yet show irresponsible and immature attitudes.

The Filipino Society frowns on persons who bring suit against other persons belonging to the same family, whether the action be civil or criminal. By bringing suit, companionship is thereby rendered less agreeable and satisfactory and family life less pleasant. When controversy arises between members of the same family, it has always been the attitude of courts to suggest other means for compromising or settling their differences outside the courtroom. Surely every member of the family is as much as interested as any other member in maintaining the home in wholesome, clean and affectionate relationship. No greater public inconvenience and scandal can thus arise than would arise if they were left to answer complaints brought against them with the Criminal Law invoked against them. It must be borne in mind that the unit of society is not the individual but the family; and

[114] Mendoza v. Court of Appeals, G.R. No. L-23102, April 24, 1967, 19 SCRA 756 (1967).

whatever tends to undermine the family would shake the foundation of such society. Yet, even though an act may be condemned as immoral and derogatory of the family, there may be other reasons why such an act should not be condemned by criminal law. The mischief of hatred being sown among members of the same family because of a criminal action brought by one member against the other would be greater than the mischief produced by letting the disapproved act go unpunished. Litigation of this kind will introduce or add discord and contention into the home.

Positivists would air the doctrine "Nullum Crimen, Nulla Poena Sine Lege," to support their contention that there is a need for provisions regarding family relations in the Code of Crimes to punish persons who undermine the sacredness of the relations. But the deduction is destructive of the premise upon which it rests. Suffice it to say, that instead of bringing harmony into the family, disunity is the inevitable result where suit of criminal nature is brought by relatives against relatives, ascendants against descendants, descendants against ascendants, brother against sister and so forth down the family line wherever the wrongful act occurs. It is apparent that when a person brings a criminal suit against another, there can be no turning back; the damage when done cannot be undone — distrust, hatred and humiliation will have taken root and thus undermine the intention of the law of maintaining and promoting family solidarity. And as a consequence, where the reason of the law fails, the law ceases to operate.