

## **A Comparative and Legal Analysis of the Cambodian Law on Monogamy**

On September 1<sup>st</sup> 2006, the Parliament of Cambodia voted a law criminalizing bigamy, incest as well as adultery. The Law on Monogamy, currently known as the Adultery Law, was adopted with a majority of 64 over the 69 lawmakers present for the vote. The National Assembly of Cambodia counts 123 seats. According to *Bangkok Post*, “dozens of [...] members of the nation's National Assembly boycotted the vote<sup>1</sup>”. This paper analyses the new law by comparing it to similar laws in other Asian countries.

It is important to note that the version of the Law on Monogamy in our possession is an unofficial translation of the draft Cambodian law. The real wording may differ from the wording used in this analysis. This version is available on the website of the Cambodian Defenders Project at URL

[http://www.cdpcambodia.org/monogamy\\_law.asp](http://www.cdpcambodia.org/monogamy_law.asp)

### **Similar Laws in Asia**

Laws criminalizing adultery exist in many Asian countries, such as Burma, Laos, South Korea, the Philippines and Papua New Guinea. Indonesia and Malaysia also have such provisions, but due to the fact that these provisions are generally based on religious principles promoted in the Shari'a, the analysis of their respective laws will not be undertaken in this paper.

#### *Analysis of the Burmese Penal Code*

Military decrees of the ruling military junta, Burmese customary law, and the amorphous provisions of Burmese statutory law (i.e. those written laws passed in the State prior to the advent of the present regime) currently form the basis of rulings by the Burmese judiciary. The current Penal Code in Burma dates from 1860 (British colonial rule). Sections 493 to 498 of this code deal with offences relating to marriage and deceit in the enactment of the marital contract. Section 497 criminalizes adultery sex by a man with another man's wife, if the husband does not give his approval. Section 498 criminalizes enticing, taking away, or detaining a married woman with criminal intent or intent of illicit intercourse.

**497.** Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

As we can see, in the Burmese penal code, adultery is not defined in gender neutral terms. Adultery is understood as a crime committed against the husband's rights over his wife and can

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<sup>1</sup> “Cambodia Votes to Jail Adulterers”, *Bangkok Post*, September 1<sup>st</sup> 2006.

only be committed by a man. The wife is thus relegated to the status of her husband's possession. Moreover, the law doesn't criminalize intercourse between a married man and an unmarried person.

Nevertheless, it is unknown to what extent this legislation is actually applied in practice. Being embedded in the criminal code, the standard of proof applying for the crime of adultery is proof beyond reasonable doubt and only the public prosecutor may bring an action. No definition of "sexual intercourse" is provided in Article 497, but the intercourse should not amount to the offence of rape to be treated as an adultery case.

#### *Analysis of the Adultery and Enticement Act of Papua New Guinea*

Article 2 of the *Adultery and Enticement Act* of 1988 stipulates that: "An act of adultery is committed where a spouse engages in voluntary sexual intercourse with a person other than his spouse." Article 3 also renders unlawful the mere act of persuading or attempting to persuade the spouse of another person to commit an act of adultery. Under Article 4 of the Act, the person whose spouse has committed an act of adultery is entitled to bring an action. However, Article 5 identifies circumstances in which a relative may also bring an action on the behalf of the victim. The action can be brought against (a) the spouse, (b) the person with whom the spouse has committed the act of adultery; or (c) both of them. Article 9 provides a non-exhaustive list of defences that could be raised by a defendant. Article 19 establishes that the standard of proof to be applied in proceedings is proof on the balance of probabilities. Article 19 has been repealed and replaced by the *Adultery and Enticement (Amendment) Act* 1989 (No. 13 of 1989), but the amendment has proven to be impossible to find. The penalties envisioned in the Act are strictly limited to financial compensations (Article 11).

In Papua New Guinea, adultery is defined in a gender-neutral way thus applying to married men and women indiscriminately. No definition of sexual intercourse is provided, but the use of the word "person" enlarges the definition as to include homosexual relations.

#### *Analysis of the Philippine Marital Infidelity Law*

The Republic of the Philippines had a law making adultery as well as *concubinage* a criminal offence, under articles 333 and 334 of the Revised Penal Code. These provisions were strongly criticized because they didn't respect the principle of gender equality. In fact, only women could be found guilty of adultery, while men could only be found guilty of *concubinage*, which implies a lesser penalty than adultery. The law was discriminatory towards women.

Recently, the House of Representatives has adopted amendments to articles 333 and 334, considering that the former provisions presented a gender bias. According to the explanatory note to the amendments produced by Hon. Emmanuel Joel J. Villanueva, the gender bias "creates the impression that infidelity is an ill only of women" and "such disparity promotes infidelity by male spouses".

The analysis of the Filipino articles on adultery are of interest considering that the Philippines are not, compared to other countries with similar criminal provisions, a Muslim country where the Shari'a applies.

## *Overview of anti-adultery provisions in Asia*

Therefore, from this brief overview of anti-adultery provisions in different Asian legal systems we can identify three official motivations to adopt laws on that matter:

- Legal transposition of a religious interdiction;
- Protection of patriarchal privileges and of the male blood line;
- Promotion of social values, such as public morality, deemed of national interest.

The following elements have been in anti-adultery laws that we have examined:

- Identification of the person who can bring charges;
- Standard of proof to be applied;
- Possible defences;
- Penalties.

The definition of adultery can present the following elements:

- Unlawful sexual intercourse;
- At least one party shall at the time be married;
- He or she shall willingly commit the offence.

## **The Cambodian Law on Monogamy**

### *The Purpose of the Law – articles 1 and 2*

#### **Article 1**

The purpose of this law is to protect dignity, to strengthen harmony and happiness in families, and to ensure rights and respect between a husband and a wife (...)

The vast majority of Cambodians practice Theravada Buddhism. Since “(...) Buddhism as a religion does not, as in Islam or Christianity, directly regulate family affairs”<sup>2</sup> it is no surprise that the law is not motivated by a religious interdiction. The stated objective of the law corresponds to the third rationale we identified earlier. The law seeks to promote social values like “dignity”, “harmony” and “happiness in families” as well as mutual respect between spouses.

#### **Article 2:**

A Khmer citizen of either sex who is married must sincerely respect the principles of monogamy, of one husband and one wife, by registering their marriage in front of Commune Council Members pursuant to the Law on Marriage and Family.

From article 2 it is clear that the enforcement of many provisions contained in the act rely on the existence of an official marriage record. This raises two difficulties in the Cambodian context. First, since most of official documents have been destroyed or have disappeared during the Khmer Rouge regime, it is likely that no record of pre-1975 marriages exists. Secondly, it is not known to which extent new marriages are officially registered in

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<sup>2</sup> Myint Zan, *Of Consummation, Matrimonial Promises, Fault, and Parallel Wives : The Role of Original Texts, Interpretation, Ideology and Policy in Pre-and Post-1962 Burmese Case Law*, 14 Colum. J. Asian L., p.156, 2000-2001.

Cambodia, especially in the countryside. The possible gaps in official records are likely to hamper the enforcement of the provisions concerning adultery and monogamy. However, the insistence on the registration process is a positive element of the article. Mandatory registration of all marriages is a useful tool to prevent child marriage and to ensure that women's rights in marriage are protected. The article also includes a reference to "the principles of monogamy", a notion defined and further clarified in Article 3.

#### *Definition and Procedures – articles 3 and 4*

##### **Article 3:**

Monogamy is a marriage in which one man has only one wife and one woman has only one husband. Marriage is a solemn contract by which one man and one woman establish a union that is sanctioned by law and may not be broken only at their wishes.

The marriage shall be dissolved if:

- a spouse is dead
- a court has made a final decision for divorce
- a spouse has been missing for more than one year without any news about him/her whether he/she is still alive or dead

The first part of Article 3 provides a definition for the notions of "monogamy" and "marriage". The second part enumerates the different grounds for dissolving a marriage. In our view, the third and last element of the list presents a problem. Since no mechanism is identified to pronounce the dissolution of the marriage after a 1 year disappearance of one of the spouses, the provision seems to fall into a legal limbo.

##### **Article 4:**

Bigamy is the act of a person who is already married contracting another marriage.

A person commits the offence of bigamy if they register his/her new marriage to another person while his or her prior marriage has not been dissolved.

An accomplice shall be equally liable for conviction and punishment.

Of concern is the last sentence of Article 4 which calls for equal punishment of an accomplice in the perpetration of an "act" of bigamy. However, in the absence of a definition of the term "accomplice" this provision raises multiple problems and opens the door to injustice. We are very concerned by the fact that the term "accomplice" could be construed as to include a person who has been deceived into marrying someone whose former marriage hasn't been dissolved yet.

#### *Analysis of articles 7 and 8*

##### **Article 7:**

Adultery is the act of a married man having sexual intercourse with a woman who is not his wife, or the act of a married woman having sexual intercourse with a man who is not her husband.

A person commits the offence of adultery if:

- He has sexual intercourse with another woman while he is still married to his wife and his marriage is

not yet dissolved.

- She has sexual intercourse with another man while she is still married to her husband and her marriage is not yet dissolved.

**Article 8:**

At the request of the spouse of the suspect, the prosecutor may discontinue any prosecution under article 7.

*Parties involved*

It is to be understood that only the married party is punishable for the act of adultery. No provision seems to apply to the possible accomplice, except if this other person is also married, and therefore, guilty of adultery on his/her side. In comparison, article 117 of the Laotian criminal code penalizing adultery establishes that “The accomplice in adultery is punishable of the same penalties”, while the Korean Criminal Act provides in article 241.1 that “The same [penalties] shall apply to the other participant.”

*Sexual Intercourse*

The notion of sexual intercourse lacks a definition, and therefore, its interpretation seems open to arbitrary interpretation. Does it refer to complete sexual relations or does it include all acts of a sexual nature?

The notion of sexual intercourse can present various interpretations. In an article published in 1990, *Judicial concepts of adultery, intolerability and damages in Nigeria*, E.N.U. Uzdiike explains the prevailing interpretation of sexual intercourse under the law of that country.

Adultery “need not be a *vera copula*, but there must be some penetration of the female by the male organ no matter how slight. For this reason it was held that manual masturbation of the co-respondent by the respondent does not come within the ambit of mutual sexual intercourse and was therefore not adultery. Similarly it would seem that adultery is not committed where oral intercourse takes place. Nor does it occur where the intercourse was proved to be anal or between two men or two women<sup>3</sup>”.

It is interesting to note that the wording of article 7 puts forward a definition of sexual intercourse as being an act between a man and a woman, and therefore leaves beside homosexual extra-marital sexual intercourse, compared to the Filipino provisions, which are inexplicit regarding of the gender of the unfaithful partner and its accomplice: “Any married person who shall have sexual intercourse with another not her or his legal spouse [...] (art. 333, Revised Penal Code, Philippines)

*Notion of Consent*

The consent notion is not present in the actual wording of the law. This lack is quite important for it can introduce confusion and/or an overlap with the notion and the provision regarding rape. This gap seems to affect women more than men. A question might be asked here as to whether a married person can be sued both for rape and adultery.

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<sup>3</sup> E.N.U. UZODIKE, “Judicial Concepts of Adultery, Intolerability and Damages in Nigeria”, 34 *J. Afr. L.* 93, 1990, p.94.

### *Prosecuting the act of adultery*

Article 8 states that the charges of adultery can be discontinued at the request of the spouse. Although it is possible to suppose that the person entitled to drop the charges is also the one enabled to file a complaint, the article does not specify whether the complaint shall be filed by the spouse, or if it can be filed by anyone. The draft New Indonesian Penal Code is to enable anyone, notably neighbours and relatives, to file a complaint for adultery. The pursuing party should therefore be specified, to make sure the provisions prohibiting adultery do not turn to set off real witch hunts throughout the country. Also, article 241.2 of the Korean Criminal Act stipulates that “The crime in the preceding paragraph shall be prosecuted only upon the complaint of the victimized spouse. If the victimized spouse condones or pardons the adultery, a complaint can no longer be made”. This formulation is more specific than the one available in the Cambodian law.

### *Standard of proof and admissible defences*

The standard of proof as well as the possible defences are not specified in the law, and in the absence of a Code of Criminal Procedure in Cambodia, this lack is very important. The Burmese Penal Code and the Adultery and Enticement Act of Papua New Guinea give two standards of proof applicable to cases of adultery.

### **Adultery and international law**

Amnesty International, discussing a condemnation for adultery in the United Arab Emirates, has stated that the group “opposes to any law that erects in infraction sexual relations taking place in private between consenting adults. Treating adultery as well as extra-marital sexual relations as criminal infractions is considered by Amnesty International to be contrary to international human rights norms. The United Nations Human Rights Committee has explicitly indicated that sexual activities between consenting adults and taking place in private are incontestably covered by the notion of private life.” [Unofficial translation from French – available at URL <http://news.amnesty.org/library/Index/FRAMDE250062006?open&of=FRA-392> ]

In fact, in its 76<sup>th</sup> session, the United Nations Human Rights Committee published its concluding observations regarding the respect by Egypt of the International Covenant on Civil and Political Rights. At par.19, “the Committee notes the criminalization of some behaviours such as those characterized as “debauchery”. The State party should ensure that articles 17 and 26 of the Covenant are strictly upheld, and should refrain from penalizing private sexual relations between consenting adults.”<sup>4</sup>

Article 17.1 of the Covenant states that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”<sup>5</sup> Cambodia is a party to the International Covenant on Civil and Political Rights, and consequently the same observations shall apply to Cambodia.

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<sup>4</sup> United Nations Human Rights Committee, Concluding observations of the Human Rights Committee: Egypt, CCPR/CO/76/EGY, November 28<sup>th</sup> 2002.

<sup>5</sup> International Covenant on Political and Civil Rights, art.17.1.

## **General comments on the Cambodian Law on Monogamy**

The official motives for passing the law seem to be of two types: firstly, is said to be an attempt by the government to prevent government officials from sustaining mistresses with public funds. Secondly, the Government defends its decision to go forward with the law by stating the need to protect the virtue and the family. Cambodian opposition members and media have questioned the decision of the government to move forward with this law.

The Cambodian media as well as members of the opposition parties have criticized the government's decision to adopt a law that would be hard to enforce by the police, in a context where the applicability of the Law is generally deficient. The authors of this research are very concerned by the many weaknesses of the Law. While the Cambodian judicial system is struggling to tackle adequately many violent crimes, the anti-adultery dispositions of the Law are likely to impose an unnecessary burden on the Courts. Furthermore, opponents have stressed the need for essential laws such as the law against corruption. This law is considered by some members of the opposition as a political manoeuvre to embarrass the opposition rather than a law designed to revive and protect the virtues of Cambodia.

With regard to the Cambodian historical background, “[some opponents say] the ban on polygamy is reminiscent of the absolute and harsh rules imposed by Cambodia's former Khmer Rouge regime<sup>6</sup>” according to VOA News in a press release. “The ultra-Maoist who led the Khmer Rouge during its brief but genocidal rule – from 1975 to 1979 – decreed that adultery and polygamy were crimes punishable by death<sup>7</sup>”.

It is quite surprising that the act of incest presents a penalty which is almost as important as the one under the act of adultery, which we feel is closer to rape and serious in nature. For example, in the Laotian Criminal Code, incest is punishable of six months to five years of imprisonment (art.124) compared to 3 months to a year of imprisonment or correctional penalty without privation of liberty for the act of adultery (art. 117).

## **Comments on the Cambodian Law on Monogamy: the potential impact on women**

This law presents the theoretical advantage to insure that there is no gender bias: according to the wording, men and women have an equal right to sue their unfaithful partners. The Philippines had to introduce amendments to its former law to fill this gap.

Nonetheless, the Cambodian Defenders Project has declared in a press release that women are more subject to be asked by their relatives and community to discontinue the case, for their dependence over their husband is known to be greater than the opposite.

In Korea, article 241 of the Criminal Law outlaws the act of adultery. Yang Hai Kyoung, chief advisor of the *Korean Women Link* doubts this measure can have a positive impact on women: " People used to think that the law was intended to protect women but this is not the real situation [...] Even though men commit adultery more than women do, men complain about adultery more than women. Women tend to bear the burden of adultery. Therefore, the law is not effective in dealing with adultery." It is possible to think that these remarks might apply similarly to Cambodian women.

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<sup>6</sup> VOA News, available at URL <http://www.voanews.com/Khmer/archive/2006-08/2006-08-31-voa1.cfm>

<sup>7</sup> Id.