

Carmen de Burgos and the Question of Divorce

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Until the foundation of the Second Republic in 1931 Spanish women were seriously disadvantaged by their legal status. Being considered *la eterna menor* (Burgos 1927: 135), a woman often went from the guardianship of her father to that of her husband. Single women had at least some rights: they could look after their own financial and commercial affairs, become director of a bank or any other commercial entity.¹ However, they were under the guardianship of their father until the age of 25 (despite legally coming of age at 23),² and as soon as they married, most rights were lost. "El marido debe proteger a la mujer, y ésta obedecer al marido," was a principle enshrined in the law (*Código Civil* 1889: art. 57). This was based on the hypothetical moral and intellectual superiority of men and allowed a man to be the legal representative of his wife. Without his consent she could not have her own business, and an unmarried woman would, through marriage, automatically forfeit all her commercial rights to her husband.³

The husband was also "el administrador de los bienes de la sociedad conyugal, salvo estipulación en contrario y lo dispuesto en el artículo 1384" (*Código Civil* 1889: art. 59). Article 1384 referred to the *bienes parafernales*⁴ which the woman was allowed to administer herself unless she wanted to hand them over to her husband by means of a notary order. Articles 1387 and 1388, however, gave the husband control over his wife's property and possessions.⁵ So the apparent autonomy given over the *bienes parafernales* was swiftly denied, since although the wife was given control over them in one paragraph, according to other paragraphs she could not freely administer them. A husband could control virtually every detail of his wife's life: he could choose the conjugal residence, he had the right to see his wife's correspondence, forbid any contact with people he did not approve of and choose the people his wife had to frequent. A wife needed her husband's permission to travel anywhere and even to buy jewellery or other luxury items.⁶

Marriage, then, constituted a complete loss of independence and it comes as no surprise that the absence of a full divorce law was one of the key issues early twentieth-century feminist activists tried to rectify. This deficiency was regarded as one of the prime causes for women's lack of freedom and, in turn, their suffering. Feminist activists like Margarita Nelken, Clara Campoamor and Carmen de Burgos argued—possibly for tactical reasons—that a divorce law could be advantageous for men as well as women. Both parties should have the right to dissolve a situation which might cause mutual unhappiness.

This article is part of a wider study in the interdisciplinary area of law and

literature, which, amongst many other things, deals with the treatment of law in its literary representation. Carmen de Burgos, feminist activist as well as popular writer, was a fervent critic of the law and its implications for women. In this particular article, which is divided into two parts, I shall concentrate on her critique of the divorce law in both her theoretical writings and her fiction. In the first part I will discuss Carmen de Burgos's campaign for a divorce law, which started with a public survey in 1903 (published in book form in 1904) and culminated in her treatment of the subject in her main theoretical work *La mujer moderna y sus derechos*, published in 1927, five years before the actual law was passed; the second part deals with de Burgos's novella entitled *El artículo 438* in which she fictionalizes the issue of a woman trapped in an unhappy marriage.⁷ As I shall demonstrate, the events of the novella encapsulate many of the ideas presented in de Burgos's theoretical works. The publication of the novella in a format for mass-consumption was a calculated move (and another step in the political campaign) at a time when feminist activists were calling for the abolition of an article of the Spanish Penal Code that condoned a husband's killing of his adulterous wife. As Geraldine Scanlon notes:

Además de la actividad colectiva de las organizaciones femeninas, hombres y mujeres exigían individualmente una reforma, destacándose en especial la actividad de Margarita Nelken, Clara Campoamor y Carmen de Burgos. Carmen de Burgos abogó por la causa de la reforma legal no sólo en sus artículos periodísticos, sino también en su labor literaria; su relato *El artículo 438* es un apasionado alegato propagandístico. (Scanlon 1986: 139)

The lack of a divorce law in the modern sense of the term made the precarious legal status of women blatantly obvious. To be precise, the *Código Civil* of 1889 did provide a divorce law, but, article 104 clearly states: "El divorcio sólo produce la suspensión de la vida común de los casados", and article 105 gives the limited number of reasons which make divorce (*de facto* meaning separation) possible:

- 1.^a El adulterio de la mujer en todo caso, y el del marido cuando resulte escándalo público ó menosprecio de la mujer.
- 2.^a Los malos tratamientos de obra, ó las injurias graves.
- 3.^a La violencia ejercida por el marido sobre la mujer para obligarla á cambiar de religión.
- 4.^a La propuesta del marido para prostituir á su mujer.
- 5.^a El conato del marido ó de la mujer para corromper á sus hijos ó prostituir á sus hijas, y la connivencia en su corrupción ó prostitución.
- 6.^a La condena del cónyuge á cadena ó reclusión perpetua.

Carmen de Burgos was for decades at the forefront of the campaign for a modernization of the divorce law. She herself had left her husband around 1900, becoming a single mother, when she moved with her daughter from Almería to Madrid. Beginning her literary career as a journalist, she had soon made a name for herself under the pseudonym *Colombine*. As early as 1903 de Burgos, in one of her newspaper columns, drew attention to a "club de matrimonios mal avenidos", which was to study the problems of a divorce law with the intention of having it later presented in parliament (Burgos 1903: 1). Subsequently, she

launched an opinion poll in the *Diario Universal* directed at both her readers in general and eminent personalities of Spain's literary and political world in particular. The survey was published in her book *El divorcio en España* and shows some interesting results: of the general readership there were 1462 people in favour of divorce and 320 against (Burgos 1904: 137). A whole spectrum of opinions ranged from the most conservative, considering divorce to be an egotistical desire that will be the end of society as we know it, to those of liberal opinions who thought it was high time Spain became a civilized country and introduced a divorce law.⁸

Amongst the literary élite, two factions stand out: those who are in favour of divorce for liberal considerations and those who are uninterested in the topic. Pío Baroja for example tells us:

Soy partidario de él [el divorcio] porque todo lo que sirva para resquebrajar esta costra de leyes, de preceptos, de costumbres, de dogmas intangibles é inmutables que no nos dejan vivir, me parece bueno. Soy partidario de él porque creo que hay que afirmar que todo es revocable, que nada es definitivo, que todo puede transformarse y mejorar. (Burgos 1904: 12)

Blasco Ibáñez goes even further than that when he states: "Soy partidario decidido del divorcio, por lo mismo que creo en el amor y no en el matrimonio" (Burgos 1904: 13),⁹ a statement so radical that it explains the fears of those opposed to divorce.

Then there are those who are completely uninterested. Unamuno confesses that:

Me pasa con eso del divorcio lo mismo que con las novelas de adulterio: muy rara vez logran interesarme. [...] De aquí que el feminismo me llame muy poco la atención, considerando que algunas de las cuestiones que plantea lo son de organización y reglamentación del trabajo y otras de cultura general. La mayor parte de los males de que las mujeres se quejan son males de que padecemos también los hombres. (Burgos 1904: 84)

Quite an error of judgement, given the legal discriminations that women were subjected to. Even more astounding is Pardo Bazán's reply, given that she herself had separated from her husband over his opposition to her writing:

Muy señora mía y de mi aprecio: No contesté á usted porque no tengo opinión alguna sobre el divorcio, y por lo tanto no me es posible emitirla. Necesitaría dedicarme á estudiar esa cuestión, y no dispongo de tiempo. Para que no parezca descortesía el insistir en mi silencio respondo á usted, y celebro esta ocasión de saludarla, quedando de usted afectísima s.s.q.b.s.m., Emilia Pardo Bazán. (Burgos 1904: 71)

More negative still were the attitudes of two (conservative) feminists of the *Unión Ibero-Americana*, María del Pilar Contreras de Rodríguez and Concepción Jimeno de Flaquer, who were both against divorce. The latter—in one sweeping generalization—decided that "la mujer española no es partidaria del divorcio; [...] no sé si la oposición de ellas consiste en que están muy encantadas de sus maridos, ó en que tienen tan mala opinión de ellos que les aterra se les facilite el medio de satisfacer sus inconstantes pasiones" (Burgos 1904: 44). One obvious fear here is that men will use divorce to abandon their wives.

The author herself (1904: 137) concludes that “los defensores del matrimonio indisoluble, fueron pocos y tibios los argumentos basados en la ciega fe que no discute.” None of those opposed could argue their case convincingly, so that religious, political and moral pseudo-arguments were used. Canon law prohibited separation (“lo que Dios ha unido, no lo separe el hombre”) while the socio-political fear was that of family upheavals, damage to the children and thus damage to society as a whole. Moral considerations, in line with religious restrictions, were also paramount. These were most bitterly attacked by Carmen de Burgos, pointing out that what was, in fact, immoral was *not* to allow proper divorce. As long as there is love, she reasons, marriage is no problem for either party, but, once abhorrence sets in, it is morally wrong to ask people to stay together:

Divorciados moralmente los esposos, no están lejos las traiciones, el odio, el engaño y hasta el crimen... Es horrible el hogar de dos seres que se aborrecen y que saben que sólo la muerte puede separarlos. En estas condiciones es absurdo condenar el adulterio. Cuando teniendo facultad de separarse y de formar un hogar nuevo los esposos se engañan, la pena debe ser severísima; pero mientras las leyes les obliguen á vivir juntos, la traición es una consecuencia lógica; no todos los seres humanos tienen bastante voluntad para ser héroes ó mártires. (Burgos 1904: 139)

After this public debate had set the tone, Carmen de Burgos continued to campaign for divorce in various mediums. Her theoretical writings *Mujer en España* (1906) and *Misión social de la mujer* (1911), both lectures given and later published in the form of a pamphlet, were next on the agenda, tackling the issue from a different angle: the wrongs of courtship and marriage itself. Interestingly, according to de Burgos the “gender war” starts in childhood through lack of co-education. By keeping girls and boys apart during childhood girls start to see boys as the enemy, as merely a necessary evil to achieve the one socially acceptable goal in a woman’s life: marriage.

No existe la coeducación. Se acostumbra á la niña á ver en el hombre un enemigo al que hay que temer y engañar; es un enemigo fuerte y necesario, puesto que se le dice á la mujer que no tiene más carrera que el matrimonio. Separados desde la infancia, no ejerce la mujer la influencia de su dulce carácter sobre la rudeza masculina, no se conocen, y el matrimonio es pocas veces hijo del amor y la reflexión. (Burgos 1906: 41)

Both boys and girls, then, are pushed into stereotypical behaviour simply because they are kept apart in childhood. To make matters worse, during courtship they are again not given enough opportunity to get to know the opposite sex:

[...] durante el tiempo del noviazgo la mujer y el hombre mienten... mienten sin esfuerzo... ella muestra sólo gracias, él condescendencia y dulzura. [...] La vida en común revela los defectos y los días se cuentan por las decepciones. [...] Y de esta manera se va al matrimonio en un país donde no existe el divorcio. Esto perjudica más a la mujer. El hombre es más fuerte: las costumbres toleran muchas de sus faltas, hasta el punto de llamar el Código adulterio á la de la mujer y absolver al marido que la mata, mientras que denomina sólo infidelidad á la del hombre y nada atenúa la venganza de la esposa. (Burgos 1906: 41–42)

To be trapped in an irrevocable marriage is particularly hard on women, as men are given more freedom both by law and custom. Nevertheless de Burgos states very clearly that she is not against the institution of marriage itself:

Es tanto lo que significa para mí la santidad de la unión de los seres que han de formar el hogar y la familia que no quisiera que se uniesen más que por amor y estimación mutua. Un matrimonio que no esclavice á las personas sino que una las almas. Por eso quiero á la mujer independiente, para que no se case por necesidad; para que tenga derecho á elegir; para que sea consciente de sus actos. (Burgos 1911: 17)

After 24 years of campaigning and writing about marriage, divorce and adultery de Burgos uses *La mujer moderna y sus derechos* to give a more complete overview of her position. Published in 1927, it is—at some 350 pages—Carmen de Burgos's most comprehensive and most mature theoretical work. Yet, by today's standards, her feminist theory is lacking in “theorizing”. She fails to abstract her very many discerning observations and does not offer any conclusive theoretical overview. According to Humm's definition of feminist theory, however, de Burgos's writings can be considered theoretical: “Feminist theory begins with women's experience of oppression and argues that women's subordination extends from private circumstances to political conditions” (Humm 1989: 223–4).

De Burgos's starting point is that feminism actually favours marriage. Women, she argues, increasingly resist marriage not because of lack of love for men or interest in marriage, but because they know how much their civil rights are restricted once they do marry. Married women are those with least rights, both single women and widows have by far more control over their own destiny.

The advantages of divorce, de Burgos argues, are quite clear from empirical evidence from other countries: in those countries that have implemented a full divorce law the number of marriages actually increases (Germany, Great Britain, Hungary, United States, and above all, the Soviet Union are named as examples). What is more, not only would the number of marriages increase but also the number of instances of adultery would drop drastically. Adultery, she maintains, is directly correlated to the absence of a proper divorce law in Spain:

Los dos grandes males del matrimonio son la subordinación de la mujer y la indisolubilidad. Del mismo modo que el matrimonio tiene una razón de ser en la naturaleza, la tiene el divorcio. Desde el momento en que la vida nos demuestra que no siempre el amor es eterno, no debemos obstinarnos en que el matrimonio sea indisoluble. Es la indisolubilidad del matrimonio la que da origen al adulterio. (Burgos 1927: 161)

Adultery is one of the reasons for separation under article 105 of the *Código Civil*, or indeed, for justifiable murder under article 438 of the Penal Code:

El marido que sorprendiendo en adulterio á su muger matare en el acto á esta ó al adúltero ó les causare alguna de las lesiones graves, será castigado con la pena de destierro. Si les causare lesiones de otra clase, quedará exento de pena. Estas reglas son aplicables en iguales circs. á los Padres respecto de sus hijas menores de 23 años y sus corruptores, mientras aquellas vivieran en la casa paterna. El beneficio de este art. no aprovecha á los que hubieran promovido ó facilitado la prostitución de sus mugeres ó hijas. (*Código Penal* 1870: art. 438)¹⁰

The decisive detail here is that he catch her *in flagrante delicto*. Alvarez Cid explains in his 1908 commentary on the Penal Code that:

Para aplicar la atenuante privilegiada de este art., no basta que el marido conozca la infidelidad de su muger, sino que es condición indispensable, que la sorprenda en el adulterio. No tiene aplicación este art., al marido que sorprende á su muger escribiendo un billete que ella arrojó al patio, y que dirigía á su amante, pero sí al marido que sorprende á su muger con un antiguo criado, á quien por sospechas había despedido, juntos en una alcoba á oscuras y desnudos, con señales de haberse acostado en la cama que allí había. (*Código Penal* 1870: 215-16)

So husbands cannot just kill their wives whenever they feel like it; they need to catch them in the act or, at the very least, there has to be strong circumstantial evidence for article 438 to become applicable. If the wife is killed, they are punished with *destierro*—the most lenient punishment on the scale for serious crimes—ranging from 6 months to 6 years.¹¹ In case of mere assault and battery, the husband gets off scot-free. The same offence committed by a woman, i.e. a wife killing her husband, under any circumstances, was treated as *parricidio* and punished with the death penalty.¹²

De Burgos herself admits—to the modern reader's surprise—that if a man really catches his wife *in flagrante* and kills her instantaneously in hot blood, these could be considered mitigating circumstances. Yet in almost all cases, she suggests, “el marido sospecha primero, espía, adquiere la evidencia y en lugar de acudir a la ley se deja llevar de la cólera y comete un verdadero asesinato con premeditación. Esto es un crimen vulgar, que no debe absolverse” (Burgos 1927: 164-5).

Carmen de Burgos gives a detailed account of the implications of article 438 and notes that the penal code makes two distinctions between men and women: firstly in the definition of adultery and secondly in its punishment. *Adulterio* is the term used for both female infidelity and male participation in the act (“Cometen adulterio, la mujer casada que yace con varón, que no sea su marido y el que yace con ella, sabiendo que es casada, aunque después se declare nulo el matrimonio” (*Código Penal*: art. 448)),¹³ and is punished with “pena de prisión correccional, en sus grados medio y máximo” while *amancebamiento* is the only form of male infidelity that is defined and punished: “El marido que tuviere manceba dentro de la casa conyugal ó fuera de ella con escándalo, será castigado con la pena de prisión correccional en sus grados mínimo y medio. La manceba será castigada con la de destierro.” (*Código Penal*: art. 452)¹⁴

The difference in terminology makes clear the difference in approach towards female and male adultery. A woman who *once* sleeps with another man can legally be killed by her husband if caught *in flagrante delicto*, while a man can have as much casual sex as he likes; only an illicit union that is conducted in the marital home and/or results in a public scandal is punished. There are, of course, two “good” reasons for this: firstly, in the case of male adultery the only crime was a public scandal undermining patriarchal authority, so that then the law had to punish a man's wrongdoings; secondly and more importantly, female adultery could conceivably introduce another member into the family, which then would have to be accepted by the husband, who is not the father of the

child. De Burgos (1927: 166) also refers to Engels's assertion that female monogamy was essential to the economic family unit of patriarchal society:

Die Monogamie entstand aus der Konzentrierung größerer Reichtümer in *einer* Hand—und zwar der eines Mannes—und aus dem Bedürfnis, diese Reichtümer den Kindern dieses Mannes und keines andern zu vererben. Dazu war Monogamie der Frau erforderlich, nicht des Mannes, [...] (Engels 1884: 86).

[Monogamy developed from a concentration of greater wealth in *one* hand—that of the man—and from the wish to bequeath this wealth to the children of this man and nobody else. For that the monogamy of the woman was required, not that of the man, [...].]

Handing down the family fortune from father to the rightful heir was of the utmost importance and illegitimate children could not be tolerated. Illegitimate children resulting from female adultery, that is; for while a living proof of her adultery was considered a sign of immorality, the father was biologically and legally saved from embarrassment. The law positively prohibited the investigation of the paternity of illegitimate children. In other words, married men could have as many illegitimate children as they liked—and here it did not matter if *they* introduced another child into somebody else's family—without any fear of legal consequences. Put at its simplest, then, biology significantly advantaged men in adultery. Women could become pregnant, men could not.

Finally, de Burgos also draws attention to the discrepancy between the civil and penal codes concerning the position of women, and rightly points out that while the civil law treats women as inferior beings and almost as juveniles, who need protection against themselves as much as against others, the penal code treats them as adults who should assume full responsibility for all their actions and, if they happen to commit adultery, should be punished more severely than men:

En cambio el Código Penal nos iguala al hombre en responsabilidades y penas. Porque si se nos considera incapaces de discernir como el hombre, si se nos considera débiles, debe también en ciertos casos juzgárenos irresponsables, si no es que se quiere sostener la teoría de que el ser incapaz de gobernarse por sí mismo en la vida, es consciente sólo en el mal. Una delicada piedad debe seguir la mayor parte de las veces los pasos de la mujer delincuente. Nuestro organismo está sujeto á alternaciones y desequilibrios que se han exagerado para las leyes civiles y no se toman en cuenta en la ley penal. (Burgos 1906: 45–6)¹⁵

As we have seen, both in definition and punishment adultery was gendered. What this meant in real terms, and how article 438 of the Penal Code could be used to assure male domination, is the subject of one of Carmen de Burgos's most radically feminist novellas and the climax of her campaign in favour of divorce.

El artículo 438

Against the backdrop of de Burgos's feminist essays, *El artículo 438* reads like a classic case study. She takes almost every legal injustice married women are

subjected to and constructs a novella around it: a logical tactic, since *El artículo 438* (1921) was a calculated publication at a time when feminist activists were publicly campaigning to have article 438 of the Penal Code abolished. That very year the Cruzada de Mujeres Españolas and the Liga Internacional de Mujeres Ibéricas e Hispanoamericanas presented a petition to Antonio Maura, the then president of the Comisión Permanente de Códigos, in which, amongst other things, they demanded the abolition of this article (Scanlon 1986: 138).

Before examining the text, it is useful to establish the medium and readership. *El artículo 438* was published in the series *La Novela Semanal* during a literary vogue for popular novellas which set out to satisfy the demands of, and to educate, an increasing reading public. Carmen de Burgos was one of the first authors to publish in *El Cuento Semanal*, the original series which started the vogue, and in its follow-ups, of which *La Novela Semanal* was one. She took advantage for feminist purposes of one of the biggest publishing trends of her time: namely, the conversion of fiction into an article of mass-consumption on an unprecedented scale through the publication of cheap popular novellas in pamphlet form (print-runs were anything between 75,000 and 400,000).

While it is extremely difficult to come to any satisfactory conclusion about the readership, a few points can be established: the illustrations which accompany the text assume a less educated readership (one can actually follow the plot by only looking at the pictures); advertisements for shaving foam and other male utensils suggest that the gender of the readership may not have been entirely female; and most importantly, since these novellas were sold mainly by subscription, we can conclude that people would read the novellas week after week rather than choosing only their "favourite authors". So while her essays were aimed at an audience already interested in feminist issues, her popular fiction reached literally masses of readers who would never have encountered, or indeed be interested in, her theoretical writings. Therefore, it could be argued that *El artículo 438* may have been more successful than her theoretical writings in reaching the general public.

It comes as no surprise, then, that de Burgos turned to melodrama as the genre for her fiction. This allowed her to outrage people so much that, as a result, they could not avoid engaging in the debate. For melodrama, despite its implausibly excessive plots, has the advantage of allowing the author to send a clear, unambiguous and overstated message to her readership. Carmen de Burgos uses the techniques and worldview of melodrama to convey a simple message: women are defenceless in the hands of manipulative men; wives are the innocent victims of their vile husbands, who still today under article 438 of the Penal Code can murder their wives and get away with a very light sentence. A detailed discussion of how de Burgos uses the conventions of melodrama, however, is beyond the scope of this article.¹⁶ My prime intention here is to demonstrate the political use of the genre in the historical and legal situations described above.

Before analysing the legal issues, a brief plot summary might be helpful: *El artículo 438* deals with the premeditated killing of the wealthy María de las Angustias by her nasty and insolvent husband Alfredo. The former feels trapped in her marriage and finally succumbs to her feelings for Jaime, starting an affair

with him in her husband's absence. Alfredo, suddenly returning home, catches the couple *in flagrante*, kills his wife and lives happily ever after on her money.

María de las Angustias Lozano—like her more famous fellow-sufferers Emma Bovary, Effi Briest and Anna Karenina—commits two fatal errors: firstly she marries the wrong man, secondly, and more importantly, she tries to rectify her mistake by starting a relationship with another man. Marriage ending in adultery and then in death: a textbook example of de Burgos's feminist critique, for with a divorce law in existence there would be no need for adultery and, in turn, no justification for killing one's wife.

A woman's path to marital misery starts, according to de Burgos's theory, in childhood: lack of co-education results in lack of knowledge of the other. In the novella *El artículo 438* de Burgos gives an extreme example of this, since in Angustias's case the parents went even further: "Sus padres [...] habían procurado que la niña tuviese una ignorancia absoluta de todas las cosas del mundo" (12)—this complete lack of education would have turned her into a potentially helpless victim of *any* man. Predictably, and these are the wrongs of courtship de Burgos mentions in her essays, she and Alfredo get married without knowing each other well. She immediately falls for the attraction of the unknown ("Se abrió su corazón con el prestigio del forastero" (14)), he finds her equally attractive ("El la prefirió entre todas. Sólo tuvo ojos para ella [...]") (15)), and above all, the parents choose Alfredo as a suitable match.

There are two main legal issues at stake in this novella: the *bienes parafernales* and adultery. As already outlined above, the *bienes parafernales* gave women a false sense of control over their own property. While article 1382 gives women the sole authority over the *bienes parafernales* and article 1384 the right to administer the paraphernal property, articles 1387 and 1388 prohibit any use of this property without the consent of the husband.

In the particular case of María de las Angustias her father left his estate to her and as such it legally falls under article 1384 as *bienes parafernales*. The practical consequences are two-fold: firstly, unlike "normal" marriages, in which the husband is the "administrador de los bienes de la sociedad conyugal", Alfredo needs his wife's consent and signature authorizing him to withdraw money or to sell one of their properties. To be precise, this marriage is abnormal not only because Alfredo is not able to administer the marital estate, but also because he did not bring any estate into the marriage to administer. He quite happily attempts to exert complete control over his wife to finance his expensive, playboy-like lifestyle. Secondly, articles 1387 and 1388 prevent Angustias from using her money for her own ends making a separation legally and practically impossible.

The former, i.e. the legal requirement of Angustias's signature, becomes a deadly issue: Alfredo starts to calculate his wife's death precisely when she starts resisting his authority. As soon as Angustias refuses to sign her inheritance away, he starts planning her downfall. When she decides against giving him any money, he threatens her first with taking their daughter away from her and finally with rape (to both he is legally entitled), at which point she consents to the signature hoping Alfredo will, as promised, leave the country for good. He uses every patriarchal tool given to him by law to control his wife totally. Right

from the beginning of the narrative, he reminds Angustias of his superior status when she tells him to leave:

- Puedes irte cuando gustes.
- Tú me seguirás.
- ¿Y si no quiero?
- Te obligaré. Tú olvidas que yo soy el marido, el hombre. Tengo derecho de administrar los bienes y de elegir el domicilio que me acomode. (5)

María de las Angustias is, in the course of the novella, subjected to almost everything Carmen de Burgos warns us about in her essays: Alfredo threatens to change their residence; he chooses his wife's company ("Era él quien procuraba pervertirla, presentándole amigos; haciéndole alternar con gentes inmorales, humillándola delante de mujerzuelas cuyo trato le imponía." (16-17)); he has the *patria potestad* ("Soy el hombre, el marido, el padre, y tengo el derecho de educarla [a la niña] como me plazca." (8)) and thus not only can he exert control over his wife, but he can also use the daughter as another weapon to control her.

The legislation regarding female adultery, as outlined above, is used by Alfredo to entrap his wife into infidelity. He introduces his old friend Jaime to her and encourages him to stay with his wife while he goes to England: "—Debes quedarte—dijo Alfredo con apresuramiento—. Yo me pienso marchar á Inglaterra y me iría más tranquilo si tú estuvieses aquí para velar por María de las Angustias y la niña" (24). Jaime is the one who effectively foresees Alfredo's premeditated killing:

—Es decir, que un hombre decidido—concluyó—puede burlar las leyes, hacer lo que le dé la gana, casarse si le parece; pero las mujeres, no. Hasta en estos casos en que ellos se han libertado, ellas siguen casadas y sometidas á su potestad.

—Eso es un absurdo.

—Pero es así. Sobre todo, para las mujeres ricas.

Le contaba casos en los que el dinero, móvil de casamientos sin amor, era el factor más importante. No era sólo Alfredo. Maridos que pasaban por serios, por respetables, que ocupaban cargos en la política y en la banca, habían aprovechado la infidelidad de sus mujeres, á veces hipócritamente provocada por ellos mismos, para deshacerse de ellas. [...] Ellos se valían fríamente de la ley, para enviar las esposas á un convento, ó bien para considerarlas dementes y relegarlas á un manicomio. No faltaban algunos que tendían hábilmente su red para cogerlas *in fraganti* y matarlas sin responsabilidad, después de pasar días y días en acecho, con premeditación y alevosía. A veces estaban entendidos el esposo y el amante para tender un lazo á la pobre mujer. De un modo ó de otro, los esposos se quedaban dueños de los bienes y libres para vivir á su capricho. (39)

If husbands cannot exert enough control over their wives in life, they do so in death. Alfredo pulls out all the stops that patriarchal society allows him and does not shy away from the use of article 438. Strictly speaking, he is, of course, not covered by article 438. Two reasons make it inapplicable: firstly it requires a degree of surprise on his part resulting in a crime committed in hot blood, yet Alfredo's crime is premeditated and secondly, as the prosecutor argues, he facilitated the prostitution of his own wife:

Quando el acusador sugirió que Alfredo había facilitado la prostitución de su mujer presentándole á su amigo y marchándose al Extranjero, vendiendo sus derechos por la

firma para enajenar las fincas, la indignación de la sala llegó al límite. "¿El pobre hombre, que se había ido á trabajar confiado en su amigo y en su esposa!" (56)

The possibility that he might have prostituted his wife cannot be proven (just as his infidelities and maltreatments could not be proven sufficiently for Angustias to ask for a formal separation under articles 104 and 105 of the *Código Civil*), so the patriarchal judicial system ("aquella institución incompleta y defectuosa, porque no formaba parte de ella ninguna mujer, [...]," (56)) frees a man who cold-bloodedly killed his wife, because of lack of evidence. According to the letter of the law Alfredo should have been sentenced to *destierro*, yet, with true melodramatic excess, not even that happens: "La moral hipócrita triunfó. Alfredo, absuelto, dueño de la fortuna de su víctima, [...] podría pasar por un hombre honrado al que no faltaría quien estrechase la mano, como no le había faltado abogado capaz de defenderlo". (58)

As we have seen in de Burgos's essays, not only does she condone adultery given the inadequacies of the current divorce law, she also simply considers it a symptom of an unhappy marriage. One of her main arguments in favour of a divorce law is that it is immoral to trap people in marriage. This she illustrates in the form of the affair between María de las Angustias and Jaime. For María de las Angustias, trapped in a loveless marriage, the only way out, i.e. starting an affair with Jaime, condemns her legally and socially. That is her dilemma. Legally—and socially for that matter—Angustias and Jaime are in the wrong and can therefore be found guilty, while Alfredo is moving within the law and within socially accepted standards at any one time. His *borracheras* resulting in his maltreatment of his wife and his womanizing are socially accepted. The social double standards are also reflected in his self-judgement: "Soy un buen marido que no hace ni más ni menos que lo que hacen los demás hombres en mi caso" (8). She, on the contrary, is trapped in marriage with a man who terrorizes her psychologically and is legally entitled to control almost every aspect of her life.

Angustias's only choice between profound unhappiness and exceptional happiness is, quite literally, either Alfredo or Jaime and by choosing Jaime she opts for true love and against oppression in marriage. Yet she does not want to deceive her husband, all she wants is a divorce and thus her sense of justice can be considered superior to his. De Burgos here tries to rebut the common philosophical contention that women have an inferior sense of justice. Contract theorists like Rousseau and Locke have argued that women are naturally incapable of developing a sense of justice, since they would always put private life (love and family) before the public good (Pateman 1989: 21). Angustias seems to be doing exactly that, i.e. following her heart instead of the (public) duty of remaining a faithful wife. However, it is in comparison to her husband that her superior sense of justice and duty becomes obvious: firstly, if she could, she would legally divorce him (adultery, as de Burgos explains in her essays, is but a logical consequence of the non-existent divorce law), and secondly the duty of caring for their daughter is entirely performed by Angustias. Alfredo, in contrast, has not the slightest sense of duty, either private or public, but uses the injustices of patriarchal law to rid himself of his wife.

Angustias's superior sense of justice also means that she simply does not understand the workings of this unjust legal system. Time and again Jaime has to explain to her how patriarchal law works—a device used by de Burgos to explain the legal situation outlined above to the reader. Interestingly, her use of a male voice criticizing the law can be read ambivalently: it reinforces the author's critique of phallocratic law, which makes women the helpless victims of their overpowering husbands, while at the same time it implies that only men can understand the law. María de las Angustias appears too naive and helpless to work it out herself.

- ... Yo no quiero el engaño. Sería incapaz de acariciar á mi marido y venderlo por la espalda. No le amo, y no lo oculto.
- Haces mal. Estamos en un mundo en que la lealtad se considera cinismo, impudicia.
- Y, sin embargo, la verdadera moral es la nuestra.
- ¿Quién lo duda[?]
- ¿Y no puedo yo pedir la separación?
- No, porque no hay pruebas y testigos de los malos tratos y de los vicios de tu marido.
- [...]
- Y en cambio tú tienes el desprecio de la sociedad, porque rechazas á un hombre indigno y correspondeste á un amor honrado.
- [...]
- Pero es absurdo que sea delito amarse y darse libremente. No ya sólo en este caso, sino en todos. No se puede consentir que las personas sean *propiedad* unas de otras por toda la vida, que lazos que crea el amor se impongan si el amor pasa.
- Claro. Tú llegas por la pasión al conocimiento de todas esas verdades; pero las gentes han legislado contra la Naturaleza, han creado intereses que la libertad ataca, y todo lo que estás diciendo asusta á los hipócritas como la cosa más inmoral del mundo.
- ¿Qué felices deben ser las naciones donde existe el divorcio! (31-2, 37-8)

María de las Angustias's problem of not understanding the law is not so much naivety as the simple disbelief that her natural (and superior) sense of justice is proven wrong by positive law. Yet there is a higher law and the reader, should s/he not be aware of the absurd inconsistency between "la verdadera moral" and the law laid down by men, is made aware of it explicitly in the above dialogue. Even before these conversations the attentive reader realizes that the author condones the illicit affair: Jaime and Angustias meet for the first time in church, implying that the author wants us to condone a union which begins in a sacred place.

The moral is as obvious as it should be in melodrama: with a proper divorce law Angustias could have divorced a husband who used and maltreated her, and she could have found happiness in a normal relationship with her lover Jaime, who is clearly the better partner for her, and father for her daughter. As it stands, Angustias is murdered and Jaime goes to prison for adultery. The final authorial comment sums up the horrendous injustice of the law:

El [Jaime] llevaba en su conciencia el convencimiento del crimen horrendo, de la infamia de un marido que había podido hacerlos víctima, empleando ese arma absurda que ofrecía á la inmoralidad y la codicia aquel funesto artículo 438, vigente aún en el Código Penal, como invitando á causar nuevas víctimas. (60)

In conclusion, *El artículo 438* is a melodramatic example of the opportunities men had within the law to oppress their wives. Although Carmen de Burgos's criticism of article 438 is the centrepiece of the narrative, she also makes a wider point about the all-encompassing control men have over women. This novella, then, is a grim reminder of how men were legally empowered to sacrifice women to the egocentric values of a male-dominated society.

As we have seen, women could choose only between a rock and a hard place: unmarried they were considered almost social outcasts, and married their legal status was reduced virtually to that of a juvenile. Marriage being an exacerbation of women's plight rather than a solution, it was not surprising that the legalization of divorce was considered a step towards freedom and independence. In the law and literature debate one of the perennial questions is how much influence literature can possibly have on law. Therefore, it seems pertinent to point out that de Burgos's efforts to work towards a modernization of the divorce law were so acclaimed that the divorce law expert Francisco Delgado Iribarren (1932: 75) commended her work in his official commentary on the law of 2 March 1932 (when Spain finally received one of the most liberal divorce laws of the time), highlighting her book *Divorcio en España* (1904) and citing some of the opinions expressed. De Burgos was one of the main contributors in working towards legal recognition of women's rights, and the divorce law of 2 March 1932 was a milestone in this struggle, even if some of the more conservative feminists—or indeed the “majority of Spanish women in the 1930s” if Helen Graham is to be believed—“were hostile to a new divorce legislation”, which meant “eroding their economic security and the only social environment they had experience of” (Graham 1995: 105). De Burgos's novella shows, quite to the contrary, that marriage is by no means a guarantee of financial security for women. In any case, and fortunately for those who did oppose the divorce law, it was one of the first legislations to be repealed by the Nationalists in April 1938, even before the end of the Civil War (Graham/Labanyi 1995: 431).

Predictably, contemporary male critics ridiculed Carmen de Burgos's popular fiction as hysterical feminist propaganda bearing little relation to “real life” (Scanlon 1986: 140). However, today's readers may also dismiss it convincing themselves that, since the time of Carmen de Burgos, the women's movement has advanced so much that women's daily lives today bear no resemblance to that of de Burgos's heroine. After all, we would consider it unlikely that María de las Angustias's violent death and more importantly her husband's acquittal could possibly happen here and now. Not so, as recent newspaper reports show. In July 1997 the High Court in Edinburgh sentenced a man to 200 hours community service after he had admitted stabbing his wife to death when she told him she was leaving him for her lover. The judge told him he recognised “the stress involved” (Campbell 1998: 3).¹⁷

Notes

¹ For more details see Scanlon (1986: 123–5), where she explains that an unmarried woman can “enajenar y gravar sus bienes, arrendar y comprar los ajenos, ser depositaria o depositante, prestamista o prestataria, constituirse en fiadora de otro; [...]. A pesar de la igualdad en estas esferas, había todavía una amplia gama

de actividades donde la capacidad legal de la mujer soltera estaba mucho más restringida que la del hombre. Por lo general, se le negaba a ella los puestos de autoridad o responsabilidad en los que estuviesen implicadas otras personas. Podía dirigir una banca, un comercio, una industria, pero no podía pertenecer a una Cámara de Comercio, aunque fuese elegida por los asociados. Podía ser declarada en concurso o quiebra, pero no tenía, a pesar de esto, capacidad para ser síndico en esos juicios, aunque en ellos tuviese comprometida su fortuna."

² Article 321 of the *Código Civil* (1889) states: "Las hijas de familia mayores de edad, pero menores de veinticinco años, no podrán dejar la casa paterna sin licencia del padre o de la madre en cuya compañía vivan, como no sea para tomar estado, o cuando el padre o la madre hayan contraído ulteriores bodas." Subsequent quotations all refer to the *Código Civil* of 1889.

³ See Scanlon (1986: 127-8), also *Código de Comercio* (1885), article 9: "La mujer que al contraer matrimonio se hallare ejerciendo el comercio, necesitará licencia de su marido para continuarlo."

⁴ Article 1381 of the *Código Civil* defines the *bienes parafernales* as follows: "Los bienes que la mujer aporta al matrimonio, sin incluirlos en la dote, y los que adquiere después de constituida ésta sin agregarlos a ella."

⁵ *Código Civil*, article 1387: "La mujer no puede sin la licencia de su marido enajenar, gravar ni hipotecar los bienes parafernales, ni comparecer en juicio para litigar sobre ellos, a menos que sea judicialmente habilitada al efecto." *Código Civil*, article 1388: "Cuando los parafernales cuya administración se reserva a la mujer consistan en metálico o efectos públicos o muebles preciosos el marido tendrá derecho a exigir que sean depositados o invertidos en términos que hagan imposible la enajenación o pignoración sin su consentimiento."

⁶ See *Código Civil*, articles 56-62, also de Burgos (1927: 141-2). See also Pateman (1989: 12), where she explains that a married woman ceases to have an independent existence.

⁷ For a good general introduction to Carmen de Burgos's work see Davies (1998: 117-36).

⁸ See also Scanlon (1986: 145) where she summarizes the survey: "Mientras que el tono de las cartas de aquellos que estaban a favor del divorcio es, en conjunto, sobrio, aunque en ocasiones sea amargo, el de sus oponentes es frecuentemente histérico."

⁹ See also de Burgos (1904: 37) where Joaquín Dicenta declares: "Creo el divorcio tan necesario, mientras exista el matrimonio, como la quinina mientras existan las calenturas. Claro que sería mejor suprimir las calenturas y el matrimonio; á ello se llegará. Mientras se llega estoy, con los médicos, por la quinina, y con usted, por el divorcio."

¹⁰ For an outline of the history of *adulterio* and its punishment see Sau (1990: 17-20).

¹¹ El *Código Penal* (1870), volumen I, article 89, lists the following range of punishments in order of severity: "Muerte/Cadena perpetua/Cadena temporal/Reclusión perpetua/Reclusión temporal/Presidio mayor/Prisión mayor/Presidio correccional/Prisión correccional/Arresto mayor/Relegación perpetua/Relegación temporal/Extrañamiento perpetuo/Extrañamiento temporal/Confinamiento/Destierro." For comparison see also articles 453 and 460 of the *Código Penal* which treat *violación* and *rapto* respectively; both are punished by the much higher *reclusión temporal* which could be anything from 12 years and a day to 20 years. Subsequent quotations all refer to the *Código Penal* of 1870.

¹² See Scanlon (1986: 131).

¹³ See also de Burgos (1927: 162) where she points out that, if the *adúltero* is married as well, he is not punished because of his own infidelity, but because he committed adultery with another man's wife.

¹⁴ See also *Código Penal*, p. 434, where it is explained that "prisión correccional en sus grados mínimo y medio" ranges from 6 months and a day to 4 years and two months, whereas "prisión correccional en sus grados medio y máximo" ranges from 2 years, 4 months and a day to 6 years.

¹⁵ This discrepancy had first been criticised by Concepción Arenal (1868: 103-5).

¹⁶ For a more detailed treatment of the melodramatic features of *El artículo 438* see my forthcoming article "Melodramatic Feminism: The Popular Fiction of Carmen de Burgos", in Labanyi, Jo (ed.) *Constructing Identity in Twentieth-Century Spain: Theoretical Debates and Cultural Practice*, currently under contract with Oxford University Press.

¹⁷ Campbell's article mainly compares two murder trials: that of a woman who received a life sentence for killing her violent boyfriend on a night when she had faced the prospect of being raped by men brought home by her lover. And that of a man who received a six-year sentence for killing his wife by hitting her with a hammer and, when she was still alive, throwing her out of the window. She had previously asked him for a divorce. Campbell concludes: "[...] the gap between the sort of justice a teenage prostitute from Nottingham and a gynaecological consultant from Beckenham can expect remains as wide as the distance between the places where the killings took place."

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