

The Relevance of DIVORCE in the Philippines



**Women's Legal Bureau, Inc.
for
SIBOL**

1998

Prepare and published by the *Women's Legal Bureau, Inc.* in February 1998 as part of the *Sama-samang Inisyatiba ng Kababaihan sa Pagbabago ng Batas at Lipunan* (SIBOL) Project, "A Concerted and Contiguous Legislative Advocacy Strategy Towards Mobilizing Support for Women's Health," with the financial assistance of the United Nations Population Fund (UNFPA).

1st reprinting, 2001
with financial assistance from The Global Fund for Women

Researcher/Writer: Jennifer M. Bernardo
Research Consultant: Lorna Q. Israel
Over-all Editor: Evalyn G. Ursua

Comments on this position paper would be appreciated. Please send comments to: Women's Legal Bureau, Inc., 11 Matimtiman St., Teachers Village, Diliman, Quezon City 1101, Philippines, Tel. Nos. (632)9213893/9218053; Fax No. (632)9214389, E-mail: wlb@philonline.com.ph. The Women's Legal Bureau, Inc. is a feminist legal resource NGO servicing women and women's groups. It is engaged in legal services and development, legal and policy research and advocacy, developmental legal education and training, and legal information services and development.

ISBN 971-91961-6-5

Table of Contents

Introduction	1
Divorce and Existing Philippine Laws	2
The Question of Discriminatory Policy and Religious Impositions	5
The Relevance of Divorce Law in the Philippines	5
What Can Be Done	8
References and Endnotes	9

The Relevance of Divorce in the Philippines

Women's Legal Bureau, Inc.
for SIBOL

1998

INTRODUCTION

Marriage is both a tradition and an institution in Philippine society. As a tradition, it is replete with ceremonies and celebratory rituals. As an institution, it is recognized and protected by law. Marriage is a sacred sacrament in institutionalized religions. Marriage laws define the rights and duties of husbands and wives. The dissolution of marriage is discouraged and marriage break-ups are frowned upon. Marriage is supposed to be an "act by which a man and woman unite for life, with the intent to discharge towards society and one another those duties which result from the relation of husband and wife." (Tolentino, 1987).

National laws have entrenched the permanent nature of marriage in the Philippines through various acts, court rulings and decrees. However, the concept of divorce is not new. Divorce was practiced in pre-colonial Philippine communities (Fernandez, 1976; Mosqueda, 1977). Spanish colonization and the imposition of Christianity prohibited divorce and allowed only legal separation. During the American period, divorce was allowed under Act No. 2710 (passed on 11 March 1917 by the legislature) but only for adultery on the part of the wife and concubinage on the part of the husband. During the Japanese Occupation, a new divorce law, Executive Order No. 141, was promulgated. This law gave nine more grounds for divorce, in addition to adultery and concubinage. These

grounds were: (1) attempt by one spouse against the life of the other; (2) a second or subsequent marriage contracted by either spouse; (3) incurable insanity which has reached such a stage that the intellectual community between the spouses has ceased; (4) loathsome contagious disease contracted by either spouse; (5) impotence; (6) repeated bodily violence by one against the other to such an extent that the spouses cannot continue living together without endangering the lives of both or either of them; (7) intentional or unjustified desertion for one year; (8) intentional absence from the last conjugal abode continuously for three consecutive years; and (9) slander by deed or gross insult by one spouse against the other to such an extent as to make further living impracticable. Executive Order No. 141 was repealed with the establishment of the Commonwealth Government under the Americans in 1944, and Act No. 2710 was revived. Six years later, on 30 August 1950, the Civil Code of the Philippines took effect, repealing Act No. 2710 and providing only for legal separation. The Family Code, which became effective on 3 August 1988, replaced the provisions of the Civil Code on marriage and family.

This paper seeks to examine the existing remedies relating to marriage, and discuss the reasons why a divorce law must be enacted in the Philippines.

DIVORCE AND EXISTING PHILIPPINE LAWS

Divorce legally terminates a *valid* marriage and capacitates the divorced individuals to remarry. Presently, divorce is not allowed under the Family Code. In contrast, Presidential Decree No. 1083 (1977), otherwise known as the Code of Muslim Personal Laws of the Philippines, allows divorce for Muslim Filipinos. Divorce under the Muslim Code applies to marriages where both spouses are Muslims or where only the male is Muslim but the marriage was solemnized in accordance with Muslim Law. Some provisions of the Family Code make possible the termination of a marriage or the separation of the spouses, but the remedies are unlike the concept of divorce and are limited to certain well-defined grounds.

The prohibition against divorce in the Family Code applies even to non-Muslim Filipinos abroad because of the rule that "laws relating to family rights and duties, or to the status, condition and legal capacity of persons are binding upon citizens of the Philippines, even though living abroad." (Art. 15, Civil Code). Thus a divorce obtained by a non-Muslim Filipino national abroad is considered invalid under Philippine law. A subsequent marriage entered into by a Filipino national who

obtains a divorce is considered bigamous and void under Philippine law. Only a divorce obtained by a foreigner whose national law allows divorce is recognized in the Philippines.

Under the Family Code, non-Muslim couples may only avail of three remedies to change the status of their marriage: legal separation, declaration of nullity, and annulment.

Legal separation. Legal separation allows spouses to live separately but they may not remarry. Their marriage stays regardless of the length of their legal separation. The grounds for legal separation relate to acts occurring during the marriage, such as sexual infidelity and acts of repeated physical violence.¹ When legal separation is granted, the marital obligations cease, except that the guilty spouse may be ordered to provide financial support to the other spouse.

Declaration of nullity. Though both divorce and a declaration of nullity of a marriage allow the spouses to remarry, the two remedies differ in concept and basis. A declaration of nullity presupposes that the marriage is void from the beginning and the court declares its non-existence. Nothing can be done to make it valid. The law enumerates the grounds for the declaration of nullity of a marriage. These grounds

relate to the absence of one or more legal requirements for a marriage to be validly celebrated, such as age (at least 18 years of age), absence of a pre-existing marriage, and a marriage license.² Beyond these grounds specified, declaration of nullity is not possible.

Annulment. In annulment, the marriage of the parties is declared defective from the beginning, albeit it is considered valid until annulled. The defect can be used to nullify the marriage within a specified period but the same may be ignored and the marriage becomes perfectly valid after the lapse of that period, or the defect may be cured through some act. The defect relates to the time of the celebration of the marriage and has nothing to do with circumstances occurring after the marriage is celebrated.³ In annulment, the marriage is legally canceled, and the man and woman are restored to their single status.

Divorce is different from the three remedies. In divorce, a *valid* marriage is terminated. The grounds for its termination have nothing to do with any defect or omission at the time the marriage is celebrated. It focuses on what happened during the existence of the marriage.

Is Article 36 sufficient? Since August 3, 1988, couples have been given a way out of failed marriages through Article 36

of the Family Code. Article 36 of the Code provides that:

"A marriage contracted by any party who, at the time of the celebration, was psychologically incapacitated to comply with the essential marital obligations of marriage shall likewise be *void* even if such incapacity becomes manifest only after its solemnization."

The remedy provided under Article 36 is declaration of nullity of the marriage. The article voids a marriage where one party is "psychologically incapacitated" to comply with the essential marital obligations. Consistent with the concept of void marriages (where the remedy is declaration of nullity), the law requires that the incapacity must have existed at the time of the celebration of the marriage. For some time, there were no clear standards in the determination of "psychological incapacity" by trial courts. The absence of standards led to different interpretations of "psychological incapacity," and, in some cases, judgments of nullity were obtained through judicial corruption by couples desperate to terminate their marriages. Eventually, the Supreme Court set guidelines for the application of Article 36, particularly in the case of *Republic vs. Court of Appeals and Molina* (G.R. No. 108763, 13 February 1997). A petitioner in an Article 36 case is now required to prove, through medical or clinical experts, that the psychological incapacity exists, that

its root cause existed at the time of the celebration of the marriage, that it is permanent or incurable, and that it is grave enough to bring about the disability of the party to assume the essential marital obligations.

If the guidelines of the Supreme Court are strictly followed, it would be difficult to get a declaration of nullity under Article 36. But even the guidelines will not rule out judicial corruption, or differing standards in interpretation. In practice, Article 36 has become a form of divorce, as valid marriages are declared void every day in the guise of "psychological incapacity." The innumerable Article 36 cases brought to trial courts is an indication of the elasticity of Article 36 to accommodate the needs of many couples desiring to terminate their marriages. It is proof that divorce is needed in the Philippines. Article 36 provides a remedy only for spouses who can prove "psychological incapacity." The concept certainly cannot accommodate all cases where divorce would have been necessary. What we need is a divorce law that defines clearly and unequivocally the grounds and terms for terminating a marriage. That law will put an end to the creative efforts played daily in courtrooms across the country to accommodate a wide range of cases in order to prove "psychological incapacity."

THE QUESTION OF DISCRIMINATORY POLICY AND RELIGIOUS IMPOSITION

The most common argument against divorce is the one advanced by the Catholic Church and other religious sects that "what has God put together, let no man put asunder." The strong influence of the Catholic Church in the Philippines accounts for the lack of a divorce law. This situation only highlights the anomalous situation existing where divorce is allowed for Muslim Filipinos but disallowed for non-Muslim Filipinos. Why are religious standards applied in civil law? If the basis for allowing divorce among Muslim Filipinos is religion, aren't other Filipinos who do not subscribe to the religious dogma against divorce entitled to avail of divorce as well? The same principle stated in the Muslim Code, "that the State shall consider the customs, traditions, beliefs and interests of national cultural communities in the formulation and implementation of state policies," should also apply to those who do not subscribe to the belief that marriage should remain permanent.

The proper approach to the issue of divorce is to provide spouses with the option to avail of divorce under certain circumstances and leave them to decide in accordance with their religious beliefs.

THE RELEVANCE OF A DIVORCE LAW IN THE PHILIPPINES

From the ideological: the mystique of marriage and the family

In the popular consciousness, the family as a basic social unit is regarded as the "fount of love and care," "the pillar of safety," and the "bastion against social decadence." Marriage is prescribed as the basis on which the family should be founded. It is considered no less sacrosanct. It is viewed as the embodiment of romantic love and the rock of living-happily-ever-after. Although there is enough evidence to show that the institutions of marriage and the family are not embodiments of love, care, and safety but rather the locus of inequality, oppression and violence, the myth of the heaven-made marriage and the indestructible family maintains its strong hold on popular consciousness.

Marriage, as it is structured today, is a monogamous institution that is dominated by men (as decisionmakers and holders of economic power), nurtured and maintained by women (as wives, mothers, and domestic workers), and "demanding absolute fidelity of wives (to ensure paternity) while granting men sexual license." Society expects women to sacrifice everything — their

THE QUESTION OF DISCRIMINATORY POLICY AND RELIGIOUS IMPOSITION

The most common argument against divorce is the one advanced by the Catholic Church and other religious sects that "what has God put together, let no man put asunder." The strong influence of the Catholic Church in the Philippines accounts for the lack of a divorce law. This situation only highlights the anomalous situation existing where divorce is allowed for Muslim Filipinos but disallowed for non-Muslim Filipinos. Why are religious standards applied in civil law? If the basis for allowing divorce among Muslim Filipinos is religion, aren't other Filipinos who do not subscribe to the religious dogma against divorce entitled to avail of divorce as well? The same principle stated in the Muslim Code, "that the State shall consider the customs, traditions, beliefs and interests of national cultural communities in the formulation and implementation of state policies," should also apply to those who do not subscribe to the belief that marriage should remain permanent.

The proper approach to the issue of divorce is to provide spouses with the option to avail of divorce under certain circumstances and leave them to decide in accordance with their religious beliefs.

THE RELEVANCE OF A DIVORCE LAW IN THE PHILIPPINES

From the ideological: the mystique of marriage and the family

In the popular consciousness, the family as a basic social unit is regarded as the "fount of love and care," "the pillar of safety," and the "bastion against social decadence." Marriage is prescribed as the basis on which the family should be founded. It is considered no less sacrosanct. It is viewed as the embodiment of romantic love and the rock of living-happily-ever-after. Although there is enough evidence to show that the institutions of marriage and the family are not embodiments of love, care, and safety but rather the locus of inequality, oppression and violence, the myth of the heaven-made marriage and the indestructible family maintains its strong hold on popular consciousness.

Marriage, as it is structured today, is a monogamous institution that is dominated by men (as decisionmakers and holders of economic power), nurtured and maintained by women (as wives, mothers, and domestic workers), and "demanding absolute fidelity of wives (to ensure paternity) while granting men sexual license." Society expects women to sacrifice everything — their

identities, needs, rights, and interests — for “love and marriage,” and, necessarily, for motherhood. The maintenance of marriage and the family is considered a woman’s ultimate goal and fulfillment. Consequently, everything that a woman is and does must serve the inviolability of marriage and the solidarity of the family.

The permanent character of marriage ensures that women remain in the institution of marriage regardless of the problems, and make it their lifelong commitment to make it work. The break-up of a marriage is a woman’s fundamental failure and a source of tremendous guilt for her. Consequently, even in the face of violence, women remain in marriage, taking the blame for the violence and believing that somehow, the blissful marriage is within reach if they work hard enough.

The conjugal contract of permanence has become the invincible shield against any challenge to the character of the family as a social institution, against its male-headed structure, and against the multiple roles and burden it places on women. This perpetual conjugal contract is invoked to maintain women in their place and justify the violations against them. Changing this permanent character through a divorce law is crucial in the process of transforming the nature and structure of the family.

To the more practical: the concrete whys of divorce

It is a reality that not all marriages succeed. The demands and responsibilities of marriage are many and heavy, and some individuals are not mature enough, or are simply incompatible to perform the roles of husband and wife together. Even when couples start out well in marriage, a certain number would still founder because of societal forces. Social, political, and economic realities take their toll on marriages. Married couples should not be forced to remain in a relationship that is a failure and even destructive to both partners. If all efforts to save the marriage have failed, then it is only fair to let go of the marriage and start anew.

The present laws relating to separation of couples and termination of marriage are inadequate to respond to the myriad causes of failed marriages. Particularly, the remedies of declaration of nullity and annulment do not cover problems that occur during the existence of the marriage. Legal separation, on the other hand, while covering problems during marriage, does not put an end to marriage.

It is in this light that a divorce law is being proposed for consideration by our lawmakers and Philippine society in general.

This paper does not seek to detail specific grounds for divorce that should be included in a future divorce legislation, nor does it seek to discuss the effects of divorce on related matters such as support, custody and property. These issues need to be discussed thoroughly with the participation of the general public. Rather, this paper simply proposes the enactment of a legislation on divorce that provides for both no-fault and fault-based divorce. Possible grounds for consideration in a fault-based divorce are also discussed briefly.

No-fault divorce. In other countries, no-fault divorce is available. Through this type of divorce, a marriage can be ended through a mere allegation that it has "irretrievably" broken down or because of "irreconcilable" differences between the spouses. In this kind of divorce, fault on the part of either spouse need not be shown or proved.

A no-fault divorce is ideal given the realities of marriage and the myriad causes of failed marriages. In particular, no-fault divorce is the answer to the reality that nothing can ensure the observance of the ideals on which a marriage is founded — ideals usually identified as love, respect, and support. A no-fault divorce emphasizes the consensuality of the relationship in marriage, and lodges in the couple the same right and responsibility to determine whether the marriage is still viable based on their ideals.

Fault-based divorce. In this type of divorce, a spouse has to prove fault on the part of the other spouse in order to obtain divorce. The following are some grounds for consideration in legislating fault-based divorce:

Desertion or abandonment. Desertion is an informal means to end a marriage. It causes the marriage to end for all intents and purposes, albeit not legally. Often, it is the husband who abandons the family. Many women are left on their own to support and take care of the children. For the deserted spouse, abandonment may be more traumatic than divorce because it usually comes unannounced, or takes the other spouse and children by surprise, or renders uncertain the state of the marriage. Desertion or abandonment for one year is listed as a ground for legal separation under the Family Code, but since the marital vows are not severed in legal separation, the abandoned spouse remains married to one who has no interest at all to perform the obligations of marriage. Divorce should be an option for abandoned spouses.

Violence. The absence of a divorce law is particularly oppressive to women who are trapped in violent marriages. This is further compounded by the lack of a law addressing domestic violence. As things stand at present, a woman is limited to: (1) leaving her marriage and

living away from her husband; (2) going through legal separation; (3) attempting to prove that her marriage falls under Article 36, that is, that the husband is psychologically incapacitated to perform the essential marital obligations. If she does not get an Article 36 judgment in her favor, she stays married forever. In most cases of domestic violence, a woman needs desperately to put an end to her marriage to cut off the husband's sense and exercise of ownership over her. In these cases, a decree of legal separation is insufficient, as husband's insist on asserting their "right" over their wives knowing that the marital bonds have not been severed.

Non-performance of marital obligations. There are many marriages where wives are left to single-handedly support and care for the family because of irresponsible husbands. These women should be given the option to seek divorce.

Infidelity. Marital infidelity of men is one of the most common problems of women in marriage. Divorce should be an option for women who see their marriage as beyond repair given the loss of trust and caring that results from a husband's periodic infidelities.

WHAT CAN BE DONE

The absence of a divorce law will not keep together couples in failed marriages. Yet, the absence of divorce creates more problems than necessary for many couples, as well as their family members. When a marriage is no longer viable, divorce should be an option.

There are indications that Philippine society is ready to discuss the passage of a divorce law. It is time that a public discussion on its legalization be undertaken toward adopting a meaningful legislation for this purpose.

REFERENCES

Fernandez, Perfecto V., *Custom law in Pre-Conquest Philippines*, 1976

Mosqueda, Roman P., *Marriage and Its Dissolution*. Quezon City, Philippine Education Co., Inc., 1977.

Retizos, Isidro, "There's No Divorce, Still You Can Remarry," MOD Vol. XX, No. 875, June 10, 1988.

Tolentino, Arturo M., *Civil Code of the Philippines*, Vol. 1, 1987.

ENDNOTES

¹ Under Art. 55 of the Family Code, a petition for legal separation may be filed on any of the following grounds: (1) repeated physical violence or grossly abusive conduct directed against the petitioner, a common child or a child of the petitioner; (2) physical violence or moral pressure to compel the petitioner to change religious or political affiliation; (3) attempt of respondent to corrupt or induce the petitioner, a common child, or a child of the petitioner to engage in prostitution, or connivance in such corruption or inducement; (4) final judgment sentencing the respondent to imprisonment of more than six years, even if

pardoned; (5) drug addiction or habitual alcoholism of the respondent; (6) lesbianism or homosexuality; (7) contracting a subsequent bigamous marriage whether in the Philippines or abroad; (8) sexual infidelity or perversion; (9) attempt by the respondent against the life of the petitioner; (10) abandonment of petitioner by the respondent without justifiable cause for more than one year.

² The following marriages are void from the beginning: (1) those contracted by any party below 18 years of age even with the consent of parents or guardians; (2) those solemnized by any person not legally authorized to perform marriages unless such marriages were contracted with either or both parties believing in good faith that the solemnizing officer had the legal authority to do so; (3) those solemnized without a license, except in exceptional cases defined by the Family Code; (4) those bigamous or polygamous marriages; (5) those contracted by mistake of one contracting party as to the identity of another; (6) those subsequent marriages that have not complied with the requirements of the law regarding recording of annulment or nullity judgments and partition or distribution of properties; (7) those marriages where one party at the time of the celebration of the marriage is psychologically incapacitated to perform the essential marital obligations; (8) those marriages considered incestuous

by reason of blood relationship between the parties (descendants and ascendants, and brothers and sisters whether of the full or half blood, and whether legitimate or illegitimate); (9) those marriages considered void by reason of public policy, such as marriages between relatives within the fourth degree of consanguinity, and between parents-in-law and children-in-law. (Arts. 32-38, Family Code)

³ Under Art. 45 of the Family Code, a marriage may be *annulled* for any of the following causes existing *at the time* of the marriage: (1) one party was 18 years old or over but below 21 and the marriage was solemnized without the consent of the parents, guardian or persons having substitute parental authority over the party, unless after attaining the age of 21 such party freely cohabited with the other and both lived together as husband and wife; (2) either party was of unsound mind, unless such party after coming to reason, freely cohabited with the other as husband and wife; (3) the consent of either party was obtained by fraud, unless such party

afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband and wife; (4) the consent of either party was obtained by force, intimidation or undue influence, unless the same having disappeared or ceased, such party thereafter freely cohabited with the other as husband and wife; (5) either party was physically incapable of consummating the marriage with the other, and such incapacity continues and appears to be incurable; (6) either party was afflicted with a sexually transmissible disease found to be serious and appears to be incurable. The circumstances constituting fraud under number 3 above are: (a) non-disclosure of a previous conviction by final judgment of the other party of a crime involving moral turpitude; (b) concealment by the wife of the fact that at the time of the marriage, she was pregnant by a man other than her husband; (c) concealment of STD, regardless of its nature, existing at the time of the celebration of the marriage; (d) concealment of drug addiction, habitual alcoholism, homosexuality, or lesbianism existing at the time of the marriage.