

Reintroduction of Divorce into Philippine Law

by

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Abstract

The Philippines and Vatican City are the only states left in the world without divorce. While the Philippines recognize relative divorce, or legal separation as termed under its Family Code, it has not sanctioned absolute divorce in the country except for Muslims and foreigners. During pre-colonial times and the Japanese occupation of the country, absolute divorce was legal and widely practiced. The thesis argues for the reintroduction of absolute divorce into Philippine law on a legal, pragmatic, and rights-based approach. It argues that divorce protects and strengthens the family; it is legal, constitutional, and in compliance with the international human rights obligations of the Philippines; it answers the issues on and inadequacies of the existing legal framework on nullity, annulment, and legal separation; it is one of the solutions to decrease, if not end, spousal violence; and its absence is discriminatory on the grounds of social class, religion, and nationality.

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Table of Contents

Introduction	1
Chapter 1	
Divorce as it exists then and now	7
Divorce then	7
Divorce now	10
Opposition to divorce	13
Conclusion	16
Chapter 2	
Existing legal framework on marriage: Nullity, annulment and legal separation in the Philippines	16
Definition of marriage	17
Requisites for a valid marriage	18
Declarations of nullity and annulment of marriage	19
Legal separation	25
Status of marriages in the Philippines	28
Conclusion	30
Chapter 3	
Why nullity, annulment, and legal separation are insufficient	31
Actions for nullity and annulment do not recognize domestic violence as a valid ground for terminating a marriage	32
Existing remedies of nullity, annulment, and legal separation do not cover other plausible causes of separation	33
Psychological incapacity, as a ground for nullity of marriage under Article 36 of the Family Code, is prone to and has been in fact been subject to abuse	36

Default participation of the state in actions for nullity, annulment, and legal separation hinders the realization of the spouses' desire to separate from each other	37
Prohibitive costs of pursuing an action for nullity, annulment, and legal separation discriminate among social classes	38
Permitting divorce among Muslims and foreigners violates the Constitution and international human rights law	39
Conclusion	42
Chapter 4	
Why the Philippines needs to reintroduce divorce	42
Divorce protects and strengthens the family	43
Reintroducing divorce is in compliance with international human rights obligations	49
Divorce is legal and constitutional	50
Divorce reduces the incidence of domestic violence	54
Divorce terminates a valid marriage on grounds occurring during the marriage	57
Muslim and non-Muslim Filipinos and foreigners deserve equal treatment in terms of divorce	57
Filipinos favor divorce	59
Conclusion	60
Chapter 5	
Towards a Philippine law on divorce	61
Contemporary attempts for a law on divorce	62
Summary and conclusion	65

List of Tables

Table 1	Grounds for nullity, annulment, and legal separation
Table 2	Comparison of divorce bills

Introduction

The Philippines, located in Southeast Asia, is composed of 7,107 islands and populated by 48.2 million women and 49 million men.¹ Of these figures, more than 29 million are single while roughly 30 million are married.² Together, they make up a predominantly Roman Catholic population.³ Under the 2012 United Nations Development Programme's Human Development Index, the country is in the medium human development category ranking 114 out of 187 countries and territories.⁴ Twenty-two out of one hundred families are estimated to be poor and 10% of the entire population are living in extreme poverty.⁵

The Philippines has a constitutional, democratic and republican government.⁶ It is a party to major international human rights treaties⁷ and “adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.”⁸ Despite the predominance of Catholicism in the country, the inviolability of the separation of the church and state is recognized.⁹

¹ Of the total 97,594,040 projected population for 2012, 9,051,520 are men and 48,542,520 are women. See “Gender Quickstat” *National Statistics Office* (August-October 2012), online: National Statistics Office <<http://www.census.gov.ph>>.

² *Ibid.* (The reference period is 2007.)

³ The population is divided into: Roman Catholic (81%); Protestant (7.3%); Iglesia ni Kristo (2.3%); Philippine Independence Church (2.0%); Islam (5.1%); Buddhism (0.1%). Central Intelligence Agency, “CIA World Factbook” (14 November 2012), online: Central Intelligence Agency <<https://www.cia.gov>> [CIA].

⁴ The HDI is a summary measure for assessing long-term progress in three basic dimensions of human development: a long and healthy life, access to knowledge and a decent standard of living. See the “2013 Human Development Report (Philippines)” *United Nations Development Programme* (2013), online: United Nations Development Programme <<http://hdrstats.undp.org>>.

⁵ National Statistical Coordination Board, *2012 First Semester Official Provincial Poverty Statistics of the Philippines* (Makati, Philippines: National Statistical Coordination Board, 2013), online: <<http://www.nscb.gov.ph>>.

⁶ *Philippine Constitution*, 1987, a II, s 1.

⁷ See *Ratification of International Human Rights Treaties - Philippines*, online: iHumanRights Project <<http://www.ihumanrights.ph>> for a full list of ratified international human rights treaties by the Philippines [iHumanRights].

⁸ *Philippine Constitution*, 1987 a II, s 2.

⁹ *Philippine Constitution*, 1987, a II, s 6.

The country was under Spanish rule from 1521 until the Philippine revolution and declaration of independence in 1898.¹⁰ It was then occupied for a shorter period by United States and Japan until the end of World War II.¹¹ As a result of more than 300 years of Spanish colonization, Philippine culture is replete with Spanish influences. The influences are apparent particularly on the language, cuisine, and religion of the country.¹²

The views of the Catholic Church (Church) weigh heavily over the customs and norms of Filipinos; they account for the many conservative laws in the country and the absence of policies that permit or regulate such matters as abortion,¹³ contraception,¹⁴ and divorce.

Divorce was recognized in the Philippines before the enactment of the Civil Code of the Philippines (Civil Code).¹⁵ At present, it is not recognized in the country save for some

¹⁰ See Maria Christine Halili, *Philippine History*, (Manila, Philippines: Rex Book Store Inc, 2004) at 162-169 [Halili] for history leading to the declaration of Philippine independence and Luzviminda Francisco, “The Philippine-American War” in Daniel B Schemer & Stephen R Shalom, eds, *The Philippine Reader: A History of Colonialism, Neocolonialism, Dictatorship, and Resistance* (Cambridge, Massachusetts: South End Press, 1987) at 8, 8-19 for history on the revolution against Spanish rule.

¹¹ See Luis Francia, *A History of the Philippines: from Indios Bravos to Filipinos* (New York, New York: Overlook Press, 2010) at 227-278; Ikehata Setsuho & Ricardo Jose, eds, *The Philippine Under Japan: Occupation Policy and Reaction* (Quezon City, Philippines: Ateneo de Manila University Press, 1999); Thelma Kintanar et al, *Kwentong Bayan noong Panahon ng Hapon (Everyday Life in a Time of War)* (Quezon City, Philippines: University of the Philippines Press, 2006).

¹² See Halili, *supra* note 10, at 40-64 (for history on pre-colonial Philippines.).

¹³ See *Revised Penal Code of the Philippines*, Act No 3815, 1930, b 2, a 256-269 [*Penal Code*]. Abortion is punishable as an offense whether practiced by another person or the woman herself. See also Catholic Bishops’ Conference of the Philippines (CBCP), *We must reject House Bill 4110: A Pastoral Statement of the Catholic Bishops’ Conference of the Philippines*, online: CBCP <<http://www.cbcponline.net>> (The Church considers abortion as the “most abominable crime.”).

¹⁴ “[The Church says that] any form of artificial contraception is anti-life and goes against Catholic doctrine. These artificial means are fatal to human life, either preventing it from fruition or actually destroying it.” Winnie Monsod, *Sex education needed to curb abortions*, GMA News Online (1 May 2012), online: GMA News <<http://www.gmanetwork.com>>. On 21 December 2012, the Responsible Parenthood and Reproductive Health Act of 2012 which guaranteed access to methods on contraception, fertility control, maternal care and sexual education was signed into law by the President. On 20 March 2013, a 120-day status quo ante (SQA) order was issued by the Supreme Court to temporarily stop the implementation of the law until June 18 of the same year. On 16 July 2013, the SQA order was extended until further orders from the Court.

¹⁵ *Civil Code of the Philippines*, Republic Act No 386, 1949 [*Civil Code*].

exceptions.¹⁶ The Philippines and Vatican City are the only remaining states in the world without divorce.¹⁷

Divorce is the “legal termination of a marriage by a court in a legal proceeding, requiring a petition or complaint for divorce by one party.”¹⁸ It is the “legal separation of man and wife, effected, for cause, by the judgment of a court, and either totally dissolving the marriage relation, or suspending its effects so far as it concerns the cohabitation of the parties.”¹⁹ It can also refer to termination of a marriage that is without any fault on the part of either parties and without “need to find out if any misconduct occurred.”²⁰ There are two kinds of divorce: (1) absolute divorce or *divortio a vinculo matrimonio*, and (2) relative divorce or *divortio a mensa et thoro*. The first is used to refer to dissolution or “divorce from the bond of matrimony” and the latter is used to refer to the “suspension [or] divorce from bed and board.”²¹ Marriage bonds are severed under absolute divorce while they subsist under relative divorce.

The type of divorce argued for in this thesis is absolute divorce or *divortio a vinculo matrimonii* as differentiated from relative divorce or *divortio a mensa et thoro*. The term ‘divorce’ as used in this thesis refers to absolute divorce unless otherwise indicated.

The Family Code of the Philippines (Family Code) provides for three remedies on the dissolution or suspension of marriage bonds: nullity, annulment, and legal separation.²² Unlike divorce, the grounds for nullity and annulment must exist before or at the time of the celebration of marriage to terminate marriage bonds. In contrast to divorce, legal separation merely grants spouses the right to live separately from each other but does not dissolve marriage bonds.

¹⁶ See discussion, *infra* pages 10-13.

¹⁷ Prior to 2011, Philippines, Vatican City and Malta had no divorce law. In 2011, Malta passed a divorce law.

¹⁸ *US Legal Definition*, *sub verbo* “divorce”, online: US Legal <<http://definitions.uslegal.com>>.

¹⁹ *Black’s Law Dictionary*, 2d ed, *sub verbo* “divorce”.

²⁰ *Ibid*, *sub verbo* “no fault divorce”.

²¹ *Cyclopedic Law Dictionary*, 2d ed, *sub verbo* “divorce”.

²² *Family Code of the Philippines*, Executive Order No 209, 1987 [*Family Code*]. See discussion, *infra* pages 16-28.

The enactment of a divorce law has been strongly pushed for by Gabriela Women's Party, a party-list²³ launched by General Assembly Binding Women for Reforms, Integrity, Equality, Leadership, and Action (GABRIELA) which is a national coalition of women's organizations. Women's groups claim that petitions for declaration of nullity of marriage, annulment, and legal separation are inadequate options for an abused spouse.²⁴ They maintain that spouses who want to separate from each other and terminate their marriages are met with rigid limitations in the present laws' response to the countless causes of failed marriages. These groups claim that remedies of declaration of nullity and annulment do not cover the problems that occur after the celebration of the marriage while legal separation does not put an end to marriage. The lack of divorce is questioned as a "discriminatory policy and religious imposition" on non-Muslim Filipinos.²⁵

On the other hand, opposers led by the Church treat the concept of divorce with disdain and contempt primarily because it destroys Filipino families which the State has vowed to protect.²⁶ The biblical argument that "what therefore God hath joined together, let not man put asunder" still remains popular among the antagonists. They praise the family as the highest value in Filipino culture.²⁷ Keeping the family intact is considered as one of the features of a successful life. Harmony especially within the family is highly esteemed by Filipinos. The value of the family is maintained through *pakikisama*,²⁸ non-confrontation, *hiya*,²⁹ submissiveness to leaders,

²³ See *Party-List System Act*, Republic Act No 7941, 1995.

²⁴ Women's Legal Bureau Inc, *The Relevance of Divorce in the Philippines*, 1998 [WLBI].

²⁵ *Ibid*, at 5.

²⁶ Most of the senatorial candidates during the 2013 local elections were against divorce. See Andreo Calonzo & Kimberly Jane Tan, *Most female senatorial bets against legalization of divorce in PHL* (8 March 2013), online: GMA News Online <<http://www.gmanetwork.com>> & *PHVOTE 2013 (Candidate Briefs: Senatorial Candidates)*, online: Rappler <<http://www.rappler.com>>.

²⁷ See Angeles Tan Alora, "Philippine Culture and Bioethics" in Ren-Zong Qui, ed, *Bioethics: Asian Perspectives: A Quest for Moral Diversity* (Netherlands: Kluwer Academic Publishers, 2004) 71 at 72 [Alora] & Tomas Quintin Andres, *Understanding Filipino values: A Management Approach* (Quezon City, Philippines: New Day Publishers, 1981).

²⁸ "to subordinate one's personal desires, convictions and standards to those of his group, be it family, clan, social group or *barkada* (gang)." See Alora, *supra* note 27, at 74 (citations omitted).

²⁹ defined as "shame." It may stress a negative meaning as it "arrests or inhibits one's actions" or a positive one that, "contributes to peace of mind and lack of stress by not even trying to achieve." See Emerita Quito, "The Ambivalence of Filipino Traits and Values" in Manuel B Dy, Jr, ed, *Values in Philippine Culture and Education, Philippine Philosophical Studies I* (1994) III (7) Cultural Heritage and Contemporary Change at para 8, online: Council for Research in Values and Philosophy <<http://www.crvp.org>>.

and *utang na loob*.³⁰ Any form of separation, more so with divorce, is considered a threat to the family.

My thesis is that the reintroduction of divorce into Philippine law is necessary for all Filipino couples who are in hopeless and irreparable marriages. I argue that divorce protects and strengthens the family; it is legal, constitutional, and in compliance with the international human rights obligations of the State; it answers the issues on nullity, annulment, and legal separation; it is one of the solutions to decrease, if not end, spousal violence; and its absence is discriminatory on the grounds of social class, religion and nationality.

In the first chapter, I discuss divorce as it existed before and after the enactment of the Civil Code. A brief history of divorce in the Philippines is provided because divorce was recognized previous to the enactment of the Civil Code. I then describe the present exceptions to the ‘no divorce policy’ in the country which either limits divorce to certain individuals or grants it in the context of relative divorce. After, I summarize the major arguments against divorce brought forward by the Church and some members of the government.

In the second chapter, I establish how marriage as an ‘inviolable institution’ and ‘special contract’ is defined under the 1987 Philippine Constitution (Constitution) and the Family Code. I then turn to identify the essential and formal requisites of a marriage. Following this is a discussion of the current legal mechanisms relating to separation and nullification of marriages available to Filipino spouses. I distinguish the remedies of declaration of nullity, annulment and legal separation as to their grounds, procedure, and consequences. Finally, I provide background on the status of marriages in the country to show how Filipino couples use the existing remedies.

³⁰ defined as “internal debt of gratitude” or “reciprocity or recognition of a debt of gratitude or honor that imposes corresponding obligations and behavior expectations. It is a debt which can never be fully repaid and the recipient is expected to act generously as long as he lives. See *Alora, supra* note 27, at 76; and Evelyn Miranda-Feliciano, *Filipino Values and Our Christian Faith* (Mandaluyong, Philippines: MF Literature Inc, 1990) at 52 & 70 [Feliciano].

In the third chapter, I identify the problems with the existing remedies of nullity, annulment, and legal separation. I enumerate and discuss six challenges against the three remedies: (1) actions for nullity and annulment do not recognize domestic violence as a valid ground for terminating a marriage; (2) existing remedies of nullity, annulment, and legal separation do not cover other plausible causes of separation; (3) psychological incapacity, as a ground for nullity of marriage under Article 36 of the Family Code, is prone to and has in fact been subject to abuse; (4) default participation of the State in actions for nullity, annulment, and legal separation hinders the realization of the spouses' desire to separate from each other; (5) prohibitive costs of pursuing an action for nullity, annulment, and legal separation discriminate among social classes; and (6) permitting divorce among Muslims and foreigners discriminates against non-Muslim Filipinos.

In the fourth chapter, I provide arguments in favor of reintroducing divorce to the country. Taking into account the existing remedies available to spouses, status of marriages in the country, and arguments against divorce, I put forward justifications for the legalization of divorce in the country which are: (1) divorce protects and strengthens families; (2) enacting a law on divorce is in compliance with international human rights obligations; (3) reintroducing divorce is legal and constitutional; (4) divorce reduces the incidence of domestic violence; (5) divorce terminates a valid marriage based on grounds occurring during the marriage; (6) Muslim and non-Muslim Filipinos and foreigners deserve equal treatment in terms of divorce; and (7) Filipinos favor divorce.

In the final chapter, I describe the contemporary attempts in the Congress of the Philippines (Congress) to reinstate divorce to show the continuing demand for such law to be passed. I then give a brief recapitulation of the entire thesis and provide my concluding remarks.

Chapter 1

Divorce as it exists then and now

Virtually every country in the world today recognizes divorce – with the Philippines and Vatican City being the two exceptions. Things, however, were not always like this. There once existed a time, well before the enactment of the country’s Civil Code, when divorce was a legally recognized procedure, practiced extensively by the people.

This chapter outlines the history of divorce and discusses the three exceptions to the present ‘no divorce policy’ in the country. It also sums up the arguments against divorce mostly advanced by the Church and backed up by some members of the government, including the Commission on Human Rights (CHR).

Divorce then

Long before the advent of Spanish colonial rule beginning in the early 16th century, absolute divorce had been widely practiced among the ancestral tribes - the Tagbanwas of Palawan, the Gadangs of Nueva Vizcaya, the Sagadas and Igorots of the Cordilleras, the Manobos, Bila-ans and Moslems of Visayas and Mindanao islands, to name a few.³¹

During the Spanish occupation, the law on divorce was the *Siete Partidas*, which allowed only legal separation.³² Under these provisions, legal separation or *divortio a mensa et thoro* may be

³¹ House Bill 1799, *An act amending Article 26 of Executive Order of 209, as amended, otherwise known as the Family Code of the Philippines, and repealing Article 36 of the same Code, and for other purposes*, 1st Sess, 15th Cong, 2010, at explanatory note [*House Bill 1799*].

³² *Siete Partidas*, 1251-1265, Laws of Titles 2, 9, & 10, Partida IV [*Siete Partidas*]. See *del Prado v de la Fuente* (1914) 28 Phil 23.

granted when: (1) one of the spouses sought to enter a religious order and the other granted permission to do so; (2) adultery had been committed by either of the spouses; and (3) either of the parties had become a heretic.³³

Upon the acquisition of the Philippines by the United States, the law on marriage in force in the country was Articles 44 to 78 of the Law of Civil Marriage of 1870, otherwise known as the Spanish Marriage Law, which was extended to the Philippines by a royal decree on 13 April 1883.³⁴ On 18 December 1899, Major General Otis as Commander-in-Chief of an American army in the Philippines promulgated General Order No. 68. While the Order expressly repealed some of the provisions of the Spanish Marriage Law, the law on divorce continued in force.³⁵

In 1917, Act 2710 was passed by the Philippine Legislature repealing the *Siete Partidas* by allowing divorce only on the grounds of adultery on the part of the wife and concubinage on the part of the husband.³⁶ To grant divorce, the guilt of the defendant had to be established by final sentence in a criminal action.³⁷ In 1920, the Supreme Court of the Philippines (Supreme Court) declared that, “the divorce consisting of judicial separation without the dissolution of the bonds of matrimony, which was formerly granted for the adultery of either of the spouses, has been abrogated and in its place has been substituted the absolute divorce *ex vinculis matrimonii*, obtainable only under the conditions stated in said Act.”³⁸

On 25 March 1943, during the Japanese Occupation, Executive Order No. 141 was promulgated by the Chairman of the Philippine Executive Commission which provided eleven grounds for

³³ *Ibid.* See Deogracias Reyes, “History of Divorce Legislation in the Philippines since 1900” (1953) 1 Philippines Studies 42 at 42-43 [*Reyes*].

³⁴ *Garcia v David* (1939) 67 Phil 279.

³⁵ *Reyes*, *supra* note 33, at 43.

³⁶ *Philippine divorce law*, Act No 2710, 1917, s 1 [*Philippine Divorce Law*].

³⁷ *Ibid*, s 8. See *Francisco v Tayao* (1927) 50 Phil 42.

³⁸ *Valdez v Tuason* (1920) 40 Phil 943. When Act 2710 declared that a divorce is procurable only under specific conditions, this meant that no divorce of any sort is procurable under other conditions.

divorce.³⁹ The law lasted until 1944 when Gen. Douglas MacArthur, by a Proclamation, re-established the Commonwealth Government.⁴⁰ Through the Proclamation, Act 2710 was revived and the Japanese law on divorce repealed.

Attempts to relax the provisions of Act 2710 were made after the country was liberated from Japanese occupation. Proposals to do away with the condition precedent of conviction for adultery or concubinage and make continued absence as an additional ground for divorce were eventually rejected.⁴¹ Parallel to these attempts were efforts to completely abolish divorce because, according to then Congressman Agustin Kintanar, it is “unchristian and fundamentally alien to the Filipino temperament and way of life” and, as noted by then Congressman Francisco Perfecto, “something scorned and looked down upon.”⁴²

On 30 August 1950, Act 2710 was repealed when the Civil Code took effect which allowed only legal separation. During the deliberations on the Civil Code, the majority of the members were in favor of liberalizing the provisions on divorce; however, they were asked by then President Manuel Roxas to be conservative on the subject.⁴³ Last minute attempts by then Congressman

³⁹ *Japanese divorce law*, Executive Order No 141, 1943, s 2. The grounds for divorce are: (1) adultery on the part of the wife and concubinage on the part of the husband committed under any of the forms described in the Penal Code; (2) attempt of one spouse against the life of the other; (3) second or subsequent marriage contracted by either spouse before the former marriage has been legally dissolved; (4) loathsome contagious diseases contracted by either spouse; (5) incurable insanity which has reached such a stage that the intellectual community between the spouses has ceased; (6) impotency on the part of either spouse; (7) criminal conviction of either spouse of a crime in which the minimum penalty imposed is not less than six years imprisonment; (8) 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 of either of them; (9) intentional or unjustified desertion continuously for at least one year prior to the filing of the action; (10) unexplained absence from the last conjugal abode continuously for three consecutive years prior to the filing of the action; (11) slander by deed or gross insult by one spouse against the other to such an extent as to make further living together impracticable.

⁴⁰ *Proclamation of 23 October 1944*, 41 OG 148, at para 3 provides that, “all laws, regulations and processes of any other government in the Philippines than that of the said Commonwealth are null and void and without legal effect in areas of the Philippines free of enemy occupation and control.”

⁴¹ See *Reyes*, *supra* note 33, at 48-49.

⁴² *Ibid*, at 49 (citations omitted).

⁴³ *Ibid*, at 50-53.

Hermenegildo Atienza to include divorce provisions were futile. As a result, the Civil Code made divorce illegal, except under an accompanying measure enacted the same month.⁴⁴

Two legal exceptions to the ban on absolute divorce were later recognized. The first exception was made in 1977 when then President Ferdinand Marcos enacted Presidential Decree No. 1083 (Muslim Code) which recognized Muslim divorce.⁴⁵ The second was added when the Civil Code, amended in 1988 by the Family Code, recognized divorce obtained by foreigners abroad against their Filipino spouses.⁴⁶

Divorce now

At present, while there is no explicit divorce law to speak of, there are three well-defined scenarios where the process (or at least its effects) is somewhat recognized by law: (1) valid foreign divorce as provided under Article 26 of the Family Code; (2) Muslim divorce under the Muslim Code; and (3) legal separation under Articles 55-67 of the Family Code.

Owing to the nationality principle,⁴⁷ only Filipinos are covered by the policy against absolute divorce, the same being considered contrary to public policy and morality. Divorce obtained abroad either by a foreigner or a Filipino who has become naturalized in another country is recognized. Explicitly, the Family Code provides that, “where a marriage between a Filipino citizen and a foreigner is validly celebrated and a divorce is thereafter validly obtained abroad by

⁴⁴ *An Act Authorizing For a Period of Twenty Years Divorce among Moslems Residing in Non-Christian Provinces in accordance with Moslem Customs and Practices*, 1950. The Act authorizes divorce among Muslims residing in non-Christian provinces for a period of 20 years from 18 June 1949, the date of its approval.

⁴⁵ *A Decree to Ordain and Promulgate A Code Recognizing the System of Filipino Muslim Laws, Codifying Muslim Personal Laws, and Providing for its Administration and for Other Purposes*, Presidential Decree No 1083, 1977 [Muslim Code]. See discussion, *infra* pages 12-13 on Muslim divorce.

⁴⁶ See discussion, *infra* pages 10-11.

⁴⁷ *Civil Code*, *supra* note 15, a 15 provides 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.”

the alien spouse capacitating him or her to remarry, the Filipino spouse shall have capacity to remarry under Philippine law.”⁴⁸ This exception is understood to allow a Filipino, divorced by a spouse who has acquired foreign citizenship and remarried, to likewise remarry as if the other party were a foreigner at the time of the solemnization of the marriage.⁴⁹

After an alien spouse obtains a divorce decree, either of the spouses may file an action for recognition of such foreign judgment or invoke such judgment as an integral aspect of his or her claim or defense in another action.⁵⁰ The burden of proof lies with the person alleging the fact and validity of divorce because “no sovereign is bound to give effect within its dominion to a judgment rendered by a tribunal of another country.”⁵¹

The twin elements for the recognition of foreign divorce decree are: (1) valid marriage that has been celebrated between a Filipino citizen and a foreigner; and (2) valid divorce obtained abroad by the alien spouse capacitating him or her to remarry.⁵² It must be shown that the decree of divorce is valid according to the national law of the foreigner because a foreign judgment or final order against a person constitutes only as “presumptive evidence of a right as between the parties and their successors in interest by a subsequent title.”⁵³

⁴⁸ *Family Code*, *supra* note 22, a 26 (2). *See Pilapil v Ibay-Somera* (1989) 174 SCRA 653 (A decree of divorce obtained by a German citizen in his country was recognized in the Philippines insofar as respondent is concerned in view of the nationality principle in our civil law on the status of persons.). *See also Van Dorn v Romillo* (1985) 139 SCRA 139 [*Van Dorn*] (When divorce is validly obtained abroad divorce by one spouse against his or her Filipino spouse, the former loses standing to sue as a spouse entitled to exercise control over conjugal assets.).

⁴⁹ *See Republic of the Philippines v Orbecido* (2005) 472 SCRA 114 [*Orbecido*] and *Llorente v CA* (2000) 345 SCRA 592.

⁵⁰ *Corpuz v Tirol-Sto. Tomas* (2010) 628 SCRA 266 (While only the Filipino spouse can invoke the second paragraph of Article 26 of the Family Code, an alien spouse has the legal interest to file an action for recognition of the foreign divorce decree.).

⁵¹ Oscar M Herrera, *Remedial Law II* (Manila, Philippines: Rex Bookstore, 2007) at 529. *See Garcia v Garcia-Recio* (2001) 366 SCRA 437.

⁵² *See Orbecido*, *supra* note 49.

⁵³ Bar Matter No 803, *Rules of Court*, 1997, r 39, s 48 (b) [*Rules of Court*]. The judgment or final order may be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact. *See Van Dorn*, *supra* note 48 and *Philsec Investment Corp v CA* (1997) 274 SCRA 102, at 110 (With respect to actions *in personam*, as distinguished from actions *in rem*, a foreign judgment merely constitutes *prima facie* evidence of the justness of the claim of a party and, as such, is subject to proof to the contrary.).

The second exception to the ‘no divorce policy’ arises where both parties to the marriage are Muslims or where only the male party is a Muslim, and the marriage is solemnized in accordance with Muslim laws or the Muslim Code in any part of the country.⁵⁴ The Muslim Code governs the essential requisites and legal impediments of a Muslim marriage as well as divorce, paternity and filiation, guardianship and custody of minors, support and maintenance, claims for customary dower (*mahr*), betrothal, breach of contract to marry, solemnization and registration of marriage and divorce, rights and obligations between husband and wife, parental authority, and the properly relations between husband and wife.⁵⁵ Accordingly, where the marriage is between a Muslim and a non-Muslim, solemnized not in accordance with Muslim law, the Family Code applies.⁵⁶

Under the Muslim Code, divorce is the “formal dissolution of the marriage bond granted only after the exhaustion of all possible means of reconciliation between the spouses.”⁵⁷ It may be effected by several means: (a) repudiation of the wife by the husband or *talaq*;⁵⁸ (b) vow of continence by the husband or *ila*;⁵⁹ (c) injurious assanilation of the wife by the husband or *zihar*;⁶⁰ (d) acts of imprecation or *li’an*;⁶¹ (e) redemption by the wife or *khul’*;⁶² (f) exercise by the wife of the delegated right to repudiate or *tafwld*;⁶³ and (g) judicial decree or *faskh*.⁶⁴

Shari’a Circuit Courts have exclusive original jurisdiction over all civil actions and proceedings involving disputes relating to marriage and divorce recognized under the Muslim Code.⁶⁵ However, these courts are not vested with exclusive jurisdiction when it comes to marriages celebrated under both civil and Muslim laws since the Muslim Code does not provide for this

⁵⁴ *Muslim Code*, *supra* note 45, a 13 (1).

⁵⁵ *Ibid*, a 13 (3).

⁵⁶ *Ibid*, a 13 (2).

⁵⁷ *Ibid*, a 45.

⁵⁸ *Ibid*, a 46.

⁵⁹ *Ibid*, a 47.

⁶⁰ *Ibid*, a 48.

⁶¹ *Ibid*, a 49.

⁶² *Ibid*, a 50.

⁶³ *Ibid*, a 51.

⁶⁴ *Ibid*, a 52.

⁶⁵ *Ibid*, a 155.

kind of situation.⁶⁶ The regular trial courts may still exercise its general jurisdiction over actions for nullity of these marriages.

Relative divorce or legal separation is the third exception. Unlike the first two instances which recognize absolute divorce, marital ties are not severed in legal separation and the spouses are only permitted to live separately.⁶⁷

Opposition to divorce

As far as obstacles to divorce legislation go, none stands taller and more formidable than the Roman Catholic Church, whose influence extends to state affairs despite the principle of separation of church and state in the Constitution.⁶⁸ The Church considers divorce to be immoral and unconstitutional. Divorce is claimed to lead to promiscuity, to destroy families, and to cause spouses to easily give up on their marriage.

The religious authority, through the Papal Nuncio to the Philippines, describes the absence of divorce as a “point of honor” for the country,⁶⁹ given the perceived threat it poses to the Filipino Family.⁷⁰ Archbishop emeritus Oscar Cruz believes that “marriage is a permanent thing and should not be treated like any other commodity,” and that “the best option [for a married couple] would be reconciliation, for the sake of the children.”⁷¹ According to Monsignor Hernando

⁶⁶ See *Tamano v Ortiz* (1998) 353 Phil 775.

⁶⁷ See *Family Code*, *supra* note 22, a 63; and discussion, *infra* pages 25-28.

⁶⁸ *Philippine Constitution*, 1987, a 2, s 6.

⁶⁹ See Philip Tubeza, “No divorce an ‘honor’ for Philippines, say Vatican envoy”, *Philippine Daily Inquirer* (30 July 2011) online: Inquirer Global Nation <<http://globalnation.inquirer.net>>.

⁷⁰ See Joseph Ubalde, “Church-state rift may worsen as lawmakers tackle divorce bill”, *InterAksyon.com* (31 May 2011) online: InterAksyon.com <<http://www.interaksyon.com>> [*Ubalde*]. For a critique of the promarriage movement, see Beth Chattel & Julie Artis, “Critiquing the Case for Marriage Promotion: How the Promarriage Movement Misrepresents Domestic Violence Research” (2004) 10 (11) *Violence Against Women* 1226.

⁷¹ *Ubalde*, *supra* note 70.

Coronel, for some breathing space, couples should just physically separate for a while,⁷² instead of resorting to divorce which is a “violation of the moral order and which will not contribute in any way to the moral good.”⁷³ The Catholic Bishops’ Conference of the Philippines (CBCP) believes that the legalization of divorce will lead to violations of the children’s right to a stable family as a result of the irreversible breakdown of a family, and the right of married couples to contract an indissoluble marriage.⁷⁴ Fr. Melvin Castro preaches that couples should simply “seek perfection in marriage [and] not seek a perfect husband nor wife nor a perfect marriage.”⁷⁵ In explaining the impact of divorce on the human person, then Pope Benedict XVI declared that divorce like abortion are “grave sins which - in various ways and with due evaluation of subjective responsibilities - injure the dignity of the human person, involve a profound injustice in human and social relationships, and offend God Himself, the guarantor of the marital bond and the architect of life.”⁷⁶

With all the arguments the Church presents to the debate, the government is not ideally supportive of divorce either. The current President, Benigno C. Aquino III, does not consider a divorce policy to be a priority of his administration.⁷⁷ Joining him are other members of the government who have gone to the extent of expressing their disdain for the policy for being an “anathema to the Filipino family”⁷⁸ and filing an anti-divorce and unlawful dissolution of

⁷² See Ben Rosario, “Divorce bill debate heats up”, *Manila Bulletin* (19 March 2005) online: Manila Bulletin <<http://www.mb.com.ph>> [Rosario].

⁷³ Catholic Bishops’ Conference of the Philippines (CBCP), *Pastoral Statement on the Defense of Life and Family* (2000), online: CBCP <<http://www.cbcponline.net>>.

⁷⁴ *Ibid.*

⁷⁵ See Jerome Aning, “Church remains firm against divorce – CBCP”, *Philippine Daily Inquirer* (25 May 2012) online: Inquirer News <<http://newsinfo.inquirer.net>>.

⁷⁶ “Pope: The Church’s opposition to divorce and abortion is a ‘yes’ to human dignity,” *Catholic News Agency* (7 April 2008) online: CNA <<http://www.catholicnewsagency.com>>.

⁷⁷ Tarra Quismundo, “Divorce bill not a priority—Aquino”, *Philippine Daily Inquirer* (2 June 2011) online: Inquirer News <<http://newsinfo.inquirer.net>>. Benigno “Noynoy” Aquino, III, current President of the Republic of the Philippines was previously quoted in 2010 as saying that “I cannot support something like they do in Las Vegas. The stereotype is you get married in the morning [and] you get divorced in the afternoon.” However, he recognizes that “there are unions that no matter what interventions are done, no matter what counseling is done, they really cannot stay together and there are dangers to either one or both parties.” See Jam Sisante, “Aquino: No to divorce, yes to remarriage after legal separation”, *GMA News* (19 August 2010), online: GMA News <<http://www.gmanetwork.com>>.

⁷⁸ See Rosario, *supra* note 72.

marriage bill to ensure that no divorce law will be passed.⁷⁹ The CHR has declared divorce to be inconsistent with Article 16(3) of the United Nations Declaration of Human Rights (UDHR),⁸⁰ for violating the human rights of the innocent spouse and children whom the guilty spouse is allowed to abandon or neglect.⁸¹ Toeing the line espoused by the Church, the CHR sees divorce with the right to remarry as a “grave offense against natural law” and therefore “immoral.” For the CHR, divorce is bound to destroy the family as a social institution and violates Sections 1-3, Article XV⁸² and Section 12, Article II⁸³ of the Constitution, including the concept of marriage under Article 1 of the Family Code⁸⁴ and Article 220 of the Civil Code.⁸⁵ For the CHR, divorce

⁷⁹ See House Bill 2768, *An act providing for the protection of marriage as an inviolable social institution and the family as the foundation of the nation and for other purposes*, 1st Sess, 15th Cong, 2010 [*House Bill 2768*]. The bill was refiled in 2013 (1st Sess, 16th Cong) as House Bill 37.

⁸⁰ See United Nations General Assembly, *Universal Declaration of Human Rights*, GA res 217A (III), UN Doc A/810 at 71 (1948), a 16 (3) [*UDHR*] (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”).

⁸¹ Commission on Human Rights (CHR), *Position Paper on the Legalization of Divorce* (2001), online: CHR <<http://www.chr.gov.ph>> [*CHR paper*].

⁸² The pertinent provisions provide:

Section 1. The State recognizes the Filipino family as the foundation of the nation. Accordingly, it shall strengthen its solidarity and actively promote its total development.

Section 2. Marriage, as an inviolable social institution, is the foundation of the family and shall be protected by the State.

Section 3. The State shall defend:

1. The right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood;
2. The right of children to assistance, including proper care and nutrition, and special protection from all forms of neglect, abuse, cruelty, exploitation and other conditions prejudicial to their development;
3. The right of the family to a family living wage and income; and
4. The right of families or family associations to participate in the planning and implementation of policies and programs that affect them.

⁸³ The pertinent provision provides:

The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. It shall equally protect the life of the mother and the life of the unborn from conception. The natural and primary right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character shall receive the support of the Government.

⁸⁴ The pertinent provision provides:

Marriage is a special contract of permanent union between a man and a woman entered into in accordance with law for the establishment of conjugal family life. It is the foundation of the family and an inviolable social institution whose nature, consequences, and incidents are governed by law and not subject to stipulation, except that marriage settlements may fix the property relations during the marriage within the limits provided by this Code.

⁸⁵ The pertinent provision provides:

In case of doubt, all presumptions favor the solidarity of the family. Thus, every intendment of law or facts lean toward the validity of marriage, the indissolubility of marriage bonds, the legitimacy of children, the community of property during marriage, the authority of the parents over their children, and the validity of defense for any member of the family in case of unlawful aggression.

is “not the answer to marital woes, as even the opportunity to separate from an intolerable spouse and subsequently remarrying will not assure a new marriage that will be happy and permanent.”⁸⁶

Conclusion

Divorce once existed in the Philippines but as the law stands and subject to only three exceptions, the Family Code does not allow divorce. Divorce is neither a novel concept for Filipinos nor an unfamiliar legal and cultural approach to Philippine marriages. To recognize divorce is to reintroduce what was once legal in the country during the pre-colonial era and before the Civil Code was enacted. While politics and religion have influenced the absence of divorce in the country, a decision to restore and legalize divorce must be guided by law and reality.

The subsequent chapters expose the inadequacies of the existing legal framework on marriage and highlight the legal and practical considerations to legalize divorce in the Philippines.

Chapter 2

Existing legal framework on marriage: Nullity, annulment and legal separation in the Philippines

Marriage is highly regarded in the Philippines both by law and its people’s culture.⁸⁷ The absence of divorce is the most apparent manifestation of such fact. On the one hand, there are the

⁸⁶ *Ibid.*

⁸⁷ See *PT&T v NLRC* (1997) 272 SCRA 596 (A company policy against female employees contracting marriage “strikes at the very essence, purpose, and ideals of marriage as an inviolable social institution and ultimately of the

stringent requirements that need to be established in order to uphold the validity of a marriage; on the other, the exclusive grounds prescribed by statute that allow for the declaration of its nullity and/or annulment.⁸⁸ Whether it is for voiding a marriage or its annulment, the grounds must exist before or at the time of the celebration of the marriage. Acts, events or circumstances occurring after the celebration of the marriage (i.e, repulsiveness, intolerability, or irreconcilability between the spouses) may only be cause for the legal separation of the spouses, but do not, in any way, affect the validity of their union.

This chapter defines marriage and discusses the existing Philippine legal framework on marriage. It distinguishes the available remedies of nullity, annulment, and legal separation by providing for a discussion of their respective grounds, procedure, and consequences. It concludes by presenting facts and figures relating to the status of marriage in the country, specifically with respect to nullity and annulment cases filed by Filipino spouses.

Definition of marriage

The Philippines, as its Constitution proceeds to express, recognizes that “marriage, as an inviolable social institution, is the foundation of the family.”⁸⁹ The government “recognizes the sanctity of family life and declares to protect and strengthen the family as a basic autonomous social institution.”⁹⁰ Marriage and the family are considered so crucial to the stability and peace

family as the foundation of the nation.”); *Wassmer v Velez* (1964) 12 SCRA 648 (It is contrary to good customs to “formally set a wedding and go through all the preparation and publicity, only to walk out of it when the matrimony is about to be solemnized.”); *Baksh v CA* (1993) 219 SCRA 115; *Constantino v Mendez* (1992) 209 SCRA 18; and *Hermosissima v CA* (1960) 109 SCRA 629 (Only fraudulent and deceptive protestations of love for and promise to marry are actionable wrongs.).

⁸⁸ There is a presumption in favor of the validity of marriage, because the “State is interested in the preservation of the family and the sanctity of the family is a matter of constitutional concern.” See *Balogbog v CA* (1997) 269 SCRA 259; and *Rules of Court*, *supra* note 53, r 131, s 3 (aa).

⁸⁹ *Philippine Constitution*, a XV, s 2.

⁹⁰ *Philippine Constitution*, a II, s 12.

of the nation that their nature, consequences, and incidents are governed by law and not subject to the whim of the parties.⁹¹ In more explicit terms, the Family Code characterizes marriage as –

a special contract of permanent union between a man and a woman entered into in accordance with law for the establishment of conjugal and family life. It is the foundation of the family and an inviolable social institution whose nature, consequences, and incidents are governed by law and not subject to stipulation, except that marriage settlements may fix the property relations during the marriage within the limits provided by this Code.⁹²

Requisites for a valid marriage

To be a valid contract, a marriage must have all the essential and formal requisites prescribed by law. The two essential requisites for a valid marriage are: (1) contracting parties must be male and female and have the legal capacity to enter into marriage,⁹³ and (2) consent of the contracting parties must be freely given before a solemnizing officer.⁹⁴ The absence of at least one essential requisite renders the marriage void *ab initio*.⁹⁵ A defect in any of them, however, will not affect the validity of the marriage.⁹⁶ The formal requisites,⁹⁷ on the other hand, are as follows: (1) presence of authority of the solemnizing officer;⁹⁸ (2) valid marriage license;⁹⁹ and

⁹¹ *Domingo v CA* (1993) 226 SCRA 572, at 579.

⁹² *Family Code*, *supra* note 22, a 1.

⁹³ *Ibid*, a 5 (Legal capacity means that the parties are at least eighteen years of age at the time of the celebration of the marriage and does not suffer from any legal impediment to marry.). See *Silverio v Republic* (2007) 537 SCRA 473 (A petition to change the entries in the birth certificate as to names and sex on the ground of sex reassignment was denied because it will “substantially reconfigure and greatly alter the laws on marriage and family relations xxx [and] allow the union of a man with another man.”).

⁹⁴ *Family Code*, *supra* note 22, a 2 (2).

⁹⁵ “From the beginning; entirely; as to all the acts done; in the inception.” *Cyclopedic Law Dictionary*, 2d ed, *sub verbo* “ab initio”. See *Republic of the Philippines v CA & Castro* (1994) 236 SCRA 257 (Lack of marriage license renders the marriage void *ab initio*.).

⁹⁶ See *Family Code*, *supra* note 22, a 4 (While the validity of the marriage is not affected, the party or parties responsible for the irregularity shall be civilly, criminally and administratively liable.).

⁹⁷ *Ibid*, a 3.

⁹⁸ *Ibid*, a 7 in relation to as 26-27, 31-32. A marriage may be solemnized by any mayor of a city or municipality within his jurisdiction; incumbent member of the judiciary within the court's jurisdiction; any priest, rabbi, *imam*, or minister of any church or religious sect duly authorized by his church or religious sect and registered with the Civil Registrar General, acting within the limits of the written authority granted by his church or religious sect and provided that at least one of the contracting parties belongs to the solemnizing officer's church or religious sect; any

(3) an actual marriage ceremony where the contracting parties appear before the solemnizing officer, with no less than two witnesses of legal age.¹⁰⁰ Should any of these three be absent, the marriage shall also be considered void *ab initio*. In the same manner, any irregularity will have no effect on its validity, other than rendering the party or parties responsible therefor as being civilly, criminally and administratively liable.¹⁰¹

Declarations of nullity and annulment of marriage

Under Philippine law, a marriage adjudged to be valid from the start cannot be terminated under any ground.¹⁰² This, notwithstanding, there exist the remedies of nullity and annulment which both legally sever a particular marriage bond. In a nullity action, a spouse seeks to prove that the marriage is void dating back to the time of its celebration, while in an annulment action, he or she must establish that the marriage is afflicted with a defect that already existed when the marriage was formalized.

The Family Code provides for nine (9) exclusive grounds upon which a marriage may be declared null and void *ab initio* by a competent court:¹⁰³ (1) it was contracted by parties below eighteen years of age;¹⁰⁴ (2) it was solemnized by a person without legal authority;¹⁰⁵ (3) it was

ship captain or airplane chief only in marriages *in articulo mortis*; any military commander of a unit to which a chaplain is assigned, in the absence of the latter, during a military operation, likewise only in *in articulo mortis*; and any consul-general, consul or vice-consul for marriages solemnized abroad. See *Local Government Code of the Philippines*, Republic Act No 7160, 1991, s 444.

⁹⁹ See *Family Code*, *supra* note 22, as 9-25 outlining the procedure for obtaining a marriage license. Marriages (1) *in articulo mortis*, (2) in remote places, (3) among Muslims or members of the ethnic cultural communities, (4) before the consul, (5) ratified by a prior five-year marital cohabitation, and (6) Mohammedan or pagan marriages may be exempted from the license requirement. See Edgardo L Paras, *Civil Code of the Philippines Annotated*, 11th ed, (Manila, Philippines: Rex Bookstore, 1984) at 302-310; *Family Code*, *supra* note 22, as 27-34; *The Marriage Law*, Act No 3613, 1929, s 25; *People v Janssen* (1929) 54 Phil 176; and *Manzano v Sanchez* (2001) 354 SCRA 1.

¹⁰⁰ While there is no prescribed form or religious rite, the marriage must be solemnized publicly. For exceptions to public solemnization, see *Family Code*, *supra* note 22, as 6 and 7 in relation to a 29.

¹⁰¹ *Ibid*, a 4 in relation to a 35 (2) (A marriage is still valid despite the absence of authority of the solemnizing officer when either or both parties believed in good faith that the officer had the legal authority to do so.).

¹⁰² See *Table 1* for the grounds for nullity, annulment, and legal separation.

¹⁰³ See *Family Code*, *supra* note 22, a 35.

¹⁰⁴ Consent of parents or guardians will not render the marriage valid.

solemnized without a marriage license;¹⁰⁶ (4) it is bigamous or polygamous in nature;¹⁰⁷ (5) it was contracted through mistake of identity; (6) it was subsequently contracted without prior recording with the appropriate civil registry and registry of properties of the judgment of annulment or nullity of marriage, partition and distribution of the properties of the spouses from a previous marriage, together with delivery of the children's presumptive legitimes;¹⁰⁸ (7) it was contracted by any party who, at the time of the celebration, was psychologically incapacitated to comply with the essential martial obligations of marriage;¹⁰⁹ (8) it is incestuous in nature;¹¹⁰ and (9) it was contracted against public policy.¹¹¹ An action or defense for declaration of nullity does not prescribe.¹¹²

¹⁰⁵ Belief by either or both parties that the officer had the legal authority to do so renders the marriage valid however, the party or parties responsible for the irregularity shall be civilly, criminally and administratively liable. *See Cosca v Palaypayon* (1994) 237 SCRA 249; *Navarro v Domagtoy* (1996) 259 SCRA 129; and *Aranes v Occiano* (2002) 380 SCRA 402.

¹⁰⁶ Subject to the exceptions provided under *Family Code*, *supra* note 22, as 27-34. *See Ninal v Bayadog* (2000) 384 Phil 661; and *Republic of the Philippines v Dayot* (2008) 540 SCRA 435.

¹⁰⁷ *See Family Code*, *supra* note 22, a 41 in relation to *Civil Code*, *supra* note 15, a 391. A marriage is not considered bigamous or polygamous when the prior spouse had been absent for four consecutive years and the spouse present has a well-founded belief that the absent spouse was already dead. Absence of two years is sufficient if the prior spouse was (1) on board a vessel lost during a sea voyage, or an aeroplane which is missing; (2) a person in the armed forces who has taken part in war; or (3) a person who has been in danger of death under other circumstances and his existence has not been known. A summary proceeding for declaration of presumptive death must be instituted by the spouse present before remarriage. For the effects of the reappearance of the absent spouse, *see Family Code*, *supra* note 22, as 42-44.

¹⁰⁸ *See Family Code*, *supra* note 22, a 53 in relation to a 52.

¹⁰⁹ *See Santos v CA* (1995) 310 Phil 21 [*Santos*] where Vitug, *J.*, for the Court, has adopted three characteristics of psychological incapacity: (1) gravity, (2) juridical antecedence, and (3) incurability. "The psychological illness must be so grave and so permanent as to deprive one of awareness of the duties and responsibilities of the matrimonial bond one is about to assume. It must be rooted in the history of the party antedating the marriage, although the overt manifestations may emerge only after marriage and must be incurable, or even if it were otherwise, the cure would be beyond the means of the party involved." *See also Republic of the Philippines v CA & Molina* (1997) 268 SCRA 198 [*Molina*] for the eight guidelines laid down by the Supreme Court in interpreting the term 'psychological incapacity.'

¹¹⁰ *Family Code*, *supra* note 22, a 37 (A marriage is incestuous when contracted (1) between ascendants and descendants of any degree, and (2) between brother and sisters, whether of the full or half blood, and whether the relationship between the parties be legitimate or illegitimate.).

¹¹¹ *Ibid*, a 38. Marriages against public policy are those (1) between collateral blood relatives whether legitimate or illegitimate, up to the fourth civil degree; (2) between step-parents and step-children; (3) between parents-in-law and children-in-law; (4) between the adopting parent and the adopted child; (5) between the surviving spouse of the adopting parent and the adopted child; (6) between the surviving spouse of the adopted child and the adopter; (7) between an adopted child and a legitimate child of the adopter; (8) between adopted children of the same adopter; and (9) between parties where one, with the intention to marry the other, killed that other person's spouse, or his or her own spouse.

¹¹² *Ibid*, a 39. The imprescriptibility does not apply to marriages celebrated before the Family Code and void by reason of psychological incapacity of either or both parties. Such action or defense shall prescribe after a ten-year period from date of effectivity of the Code. As clarified in *Memorandum Circular No. 85* (7 November 1988), the Code took effect on 3 August 1988. Therefore, at present, all actions or defenses have already prescribed.

In comparison, annulment of a marriage may be upheld when any of the following causes, existing at the time of marriage, is established: (1) a party was eighteen years of age or over but below twenty-one when the marriage was solemnized and no parental or substitute parental consent was secured;¹¹³ (2) a party was of unsound mind;¹¹⁴ (3) consent of either party was obtained by fraud;¹¹⁵ (4) consent of either party was obtained by force, intimidation or undue influence;¹¹⁶ (5) there is a continuous and incurable physical incapacity to consummate the marriage by either of the parties;¹¹⁷ or (6) either party was afflicted with a serious and incurable sexually-transmissible disease.¹¹⁸ Unlike an action or defense for declaration of nullity, an action for annulment can prescribe.¹¹⁹

An action for annulment or declaration of nullity is filed in the Family Court of the province or city where either of the parties is residing for at least six months prior to the date of filing.¹²⁰

¹¹³ *Ibid*, a 45 (1). Lack of parental consent may be cured if after attaining the age of twenty-one, the party freely cohabited with the other and both lived together as husband and wife.

¹¹⁴ *Ibid*, a 45 (2). If the party, after coming to reason, freely cohabited with the other as husband and wife, then the marriage can no longer be annulled on such ground.

¹¹⁵ *Ibid*, a 45 (3) in relation to a 44. If such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband and wife, then the marriage can no longer be annulled on such ground. Only the following circumstances constitute fraud: (1) non-disclosure of a previous conviction by final judgment of the other party of a crime involving moral turpitude; (2) concealment by the wife of the fact that at the time of the marriage, she was pregnant by a man other than her husband; (3) Concealment of sexually transmissible disease, regardless of its nature, existing at the time of the marriage; or (4) Concealment of drug addiction, habitual alcoholism or homosexuality or lesbianism existing at the time of the marriage. Misrepresentation or deceit as to character, health, rank, fortune or chastity does not constitute fraud. *See also Anaya v Palaroan* (1970) 36 SCRA 97 (Non-disclosure to a wife by her husband of his pre-marital relationship with another woman is not a ground for annulment of marriage.).

¹¹⁶ *Family Code, supra* note 22, a 45 (4). If force, intimidation or undue influence have disappeared or ceased and such party freely cohabited with the other as husband and wife, then the marriage can no longer be annulled on such ground.

¹¹⁷ *Ibid*, a 45 (5). "Impotency being an abnormal condition should not be presumed. The presumption is in favor of potency." *See Marciano v San Jose* (1951) 89 Phil 62 in *Jimenez v Canizares* (1960) 109 Phil 273. If the party is physically capable of consummating the marriage but refuses to do so, the party may be considered psychologically incapacitated and the marriage void *ab initio*. *See also Chi Ming Tsoi v CA* (1997) 266 SCRA 324, where the Court through Torres, Jr., J. ruled that, "senseless and protracted refusal of one of the parties to procreate through sexual cooperation is equivalent to psychological incapacity."

¹¹⁸ *Family Code, supra* note 22, a 45 (6).

¹¹⁹ *Ibid*, a 47.

¹²⁰ Administrative Matter No 02-11-10-SC, *Rule on the Declaration of Absolute Nullity of Void Marriages and Annulment of Voidable Marriages*, 2003, ss 2 (b) & 4 [*Rules on Nullity*]. In case the respondent is residing outside

The appearance and active participation of the State through the public prosecutor is mandated in all actions for annulment or declaration of absolute nullity of marriage¹²¹ because the State “decrees marriage as legally inviolable and protects it from dissolution at the whim of the parties.”¹²² The public prosecutor assigned to the trial court must “take steps to prevent collusion between the parties and to take care that evidence is not fabricated or suppressed.”¹²³ To prevent collusion, a declaration of default is not allowed even when the respondent in an action for annulment or declaration of nullity fails to file an answer.¹²⁴ A public prosecutor, ordered by the court to conduct an investigation, must submit a corresponding report.¹²⁵ The Solicitor General may also be required to file its own memorandum if the court considers the case as having significant interest to the State.¹²⁶ Vehement opposition by the other spouse to the proceedings negates collusion and non-intervention of the public prosecutor is not considered fatal to the validity of the proceedings.¹²⁷ In addition to the participation of the prosecutor, the court may also require a social worker to conduct a case study and submit the corresponding report before the pre-trial.¹²⁸

During the pendency of the action, provisional and protection orders may be issued, with or without hearing, by the court *motu proprio* or upon verified application by any of the parties,

the Philippines, petitioner may also opt to file the petition where ever the respondent may be found in the Philippines.

¹²¹ In *Molina*, *supra* note 109, it was held that the Office of the Solicitor General is required to issue a certification to whether it is agreeing or objecting to the action for annulment within fifteen days from the date the case is deemed submitted for resolution. This requirement, however, has been dispensed with by the *Rules on Nullity*, *supra* note 120. See *Antonio v Reyes* (2006) 484 SCRA 353 [*Antonio*] & *Navales v Navales* (2008) 556 SCRA 272 [*Navales*] where the Court clarified that the *Rules on Nullity* has dispensed with the *Molina* guideline on the matter of certification.

¹²² *Perez-Ferraris v Ferraris* (2006) 495 SCRA 396, at 403 [*Ferraris*].

¹²³ *Family Code*, *supra* note 22, a 48.

¹²⁴ *Rules of Court*, *supra* note 53, r 9, s 3 (Even if an answer is filed but it does not tender an issue, the court shall still order the public prosecutor to investigate whether collusion exists between the parties.). See *Rules on Nullity*, *supra* note 120, ss 8 & 9.

¹²⁵ Administrative Matter No 02-11-11-SC, *Rule on Legal Separation*, 2003, s 6 [*Rule on Legal Separation*].

¹²⁶ *Rules on Nullity*, *supra* note 120, s 18.

¹²⁷ *Tuason v CA* (1996) 256 SCRA 158 [*Tuason*].

¹²⁸ *Rules on Nullity*, *supra* note 120, s 10.

guardian or designated custodian.¹²⁹ The court may provide for the support of the spouses and the custody and support of their common children.¹³⁰ A hold departure order may be issued to prevent a child from being brought out of the country.¹³¹ An order of protection may also be issued by the court as provisional relief¹³² as well as an order appointing any of the spouses or a third person as receiver or sole administrator of the common property if a spouse without just cause abandons the other or fails to comply with his or her obligations to the family.¹³³

The presiding judge of the trial court personally conducts the trial of the case.¹³⁴ The proceedings are treated with utmost confidentiality. The records of the case or parts thereof cannot be copied, taken, examined or perused by any person other than a party or counsel of a party without court order.¹³⁵

Judgments on the pleadings, summary judgment and confession of judgment are not allowed.¹³⁶ The court must render a decision expressing clearly and distinctly the facts and the law on which it is based.¹³⁷ After the court renders a decision granting the petition, it proceeds with the liquidation, partition and distribution of the properties of the spouses including custody, support of common children, and delivery of their presumptive legitimes.¹³⁸

¹²⁹ Administrative Matter No 02-11-12-SC, *Rule on Provisional Orders*, 2003, s 1 [*Provisional Orders*].

¹³⁰ *Ibid*, ss 2 (b) & (c), 3-5; and *Family Code*, *supra* note 22, a 49. *See also Pablo-Gualberto v Gualberto* (2005) 461 SCRA 450 (Lesbianism is not a ground for loss of child custody.).

¹³¹ *Provisional Orders*, *supra* note 129, s 6.

¹³² *Ibid*, s 7.

¹³³ *Ibid*, s 8.

¹³⁴ The reception of evidence may be delegated to a commissioner only on matters involving the property relations of the spouses. *See Rules on Nullity*, *supra* note 120, s 17.

¹³⁵ *Ibid*, s 17 (4).

¹³⁶ *Family Code*, *supra* note 22, a 48; and *Rules on Nullity*, *supra* note 120, s 17. *See Rules of Court*, *supra* note 53, r 34 (on judgment on the pleadings) & r 35 (on summary judgment). Confession of judgment is when the defendant appears in court or files a pleading confessing the right of the plaintiff to judgment or expressly agreeing to the plaintiff's demand. *See also de Ocampo v Florenciano* (1960) 107 Phil 35 [*de Ocampo*].

¹³⁷ *Philippine Constitution*, 1987, a VIII, s 14.

¹³⁸ *Rules on Nullity*, *supra* note 120, s 21.

Any of the aggrieved parties or the Solicitor General may appeal from a decision granting or denying the petitions for nullity and annulment. However, a motion for reconsideration or new trial must be first filed before an appeal may be perfected.¹³⁹

A decree of nullity or annulment produces a number of consequences: (1) children conceived or born out of a void or annulled marriage are considered illegitimate and an amended birth certificate indicating the new civil status of the children affected is ordered by the court unless the judgment of nullity or annulment was based on Article 36¹⁴⁰ and 53;¹⁴¹ (2) the absolute community of property or the conjugal partnership, as the case may be,¹⁴² is dissolved and liquidated, but if either spouse contracted the marriage in bad faith, his or her share of the net profits of the community property or conjugal partnership property shall be forfeited in favor of the common children or, if there are none, the children of the guilty spouse by a previous marriage or in default of children, the innocent spouse;¹⁴³ (3) donations by reason of marriage remain valid, except that if the donee contracted the marriage in bad faith, such donations are revoked by operation of law;¹⁴⁴ (4) the innocent spouse may revoke the designation of the other spouse who acted in bad faith as beneficiary in any insurance policy, even if such designation be stipulated as irrevocable;¹⁴⁵ (5) the spouse who contracted the subsequent marriage in bad faith is disqualified to inherit from the innocent spouse by testate and intestate succession;¹⁴⁶ and (6) if both spouses of the subsequent marriage in Article 53 acted in bad faith, said marriage is void *ab*

¹³⁹ *Ibid*, s 20.

¹⁴⁰ *Ibid*, s 22. If the marriage was declared null and void by reason of the psychological incapacity of either or both of the contracting parties, children born or conceived before the finality of the judgment of nullity are considered legitimate.

¹⁴¹ If the marriage was declared null and void because it was a marriage subsequently contracted absent prior recording with the appropriate civil registry and registry of properties of the judgment of annulment or nullity of earlier marriage, partition and distribution of the properties of the spouses and delivery of the children's presumptive legitimes, the children born or conceived during the subsequent marriage remain legitimate.

¹⁴² Property relations of marriages celebrated after the effectivity of the Family Code are governed by the absolute community of property unless spouses, prior to their marriage, agreed otherwise in their marriage settlements. *See Family Code, supra* note 22, as 1, 88 & 105.

¹⁴³ *Ibid*, a 43 (2).

¹⁴⁴ *Ibid*, a 43 (3).

¹⁴⁵ *Ibid*, a 43 (4).

¹⁴⁶ *Ibid*, a 43 (5).

initio and all donations by reason of marriage and testamentary dispositions made by one in favor of the other are revoked by operation of law.¹⁴⁷

Legal separation

Once it is established that a marriage was celebrated with all the prescribed essential and formal requisites, there are no other legal means to end it within Philippine jurisdiction.¹⁴⁸ The only recourse left for either or both spouses is to ask for relative divorce or, as termed under the Family Code, legal separation.

A petition for legal separation may be filed based on any of the following grounds: (1) repeated physical violence or grossly abusive conduct directed against the other spouse, a common child, or a child of the spouse;¹⁴⁹ (2) physical violence or moral pressure to compel the other spouse to change religious or political affiliation; (3) attempt to corrupt or induce the other spouse, a common child, or a child of the spouse, to engage in prostitution, or connivance in such corruption or inducement; (4) final judgment sentencing either of the spouses to imprisonment of more than six years, even if pardoned; (5) drug addiction or habitual alcoholism;¹⁵⁰ (6) lesbianism or homosexuality;¹⁵¹ (7) contracting a subsequent bigamous marriage, whether in the Philippines or abroad; (8) sexual infidelity or perversion;¹⁵² (9) attempt on the life of the other; or (10) abandonment of spouse without justifiable cause for more than one year.¹⁵³ As in the case

¹⁴⁷ *Ibid*, a 44.

¹⁴⁸ See discussion, *supra* pages 10-13 for exceptions to the ‘no divorce’ policy in the country.

¹⁴⁹ See *Ong v Ong* (2006) 505 SCRA 76.

¹⁵⁰ See *Republic of the Philippines v Cuison-Melgar* (2006) 486 SCRA 177 [*Cuison-Melgar*].

¹⁵¹ See *Agraviador v Amparo-Agraviador* (2010) 637 SCRA 519.

¹⁵² See *Paras v Paras* (2007) 529 SCRA 81 [*Paras*]; and *Navales*, *supra* note 121. See also *Gandionco v Peñaranda* (1987) 155 SCRA 725 (No criminal proceeding or conviction is necessary to issue a decree of legal separation on the ground of concubinage.).

¹⁵³ *dela Cruz v dela Cruz* (1968) 22 SCRA 342 (The term “child” shall include a child by nature or by adoption. To constitute abandonment of the wife by the husband, there must be “absolute cessation of marital relations and duties and rights, with the intention of perpetual separation.”). See also *Republic of the Philippines v Cabantug-Baguio* (2008) 556 SCRA 711 [*Cabantug-Baguio*].

with annulment and nullity, this list of grounds is limited and exclusive.¹⁵⁴ It should be noted, however, that if any of these grounds are physical manifestations of a psychological illness resulting in the incapacity to perform any of the essential marital obligations,¹⁵⁵ an action for nullity may prosper.¹⁵⁶

The procedure followed in an action for legal separation does not stray far from those observed in nullity and annulment cases. Provisional orders for spousal support, custody and support of common children, visitation rights, and administration of community and conjugal property may also be issued by the trial court.¹⁵⁷ Once the petition has been filed, the spouses are entitled to live apart.¹⁵⁸ Mandatory investigation by the public prosecutor to determine the existence of collusion,¹⁵⁹ and a discretionary case study by a social worker are also conducted.¹⁶⁰ Unlike in an action for nullity and annulment, however, pre-trial is set only after a mandatory six-month ‘cooling off’ period has been observed.¹⁶¹ The objective is to provide the couple ample opportunity to reconcile.¹⁶² Before proceeding with the case, the court is required to take all steps toward the reconciliation of the spouses; it must be fully satisfied that, despite such efforts, reconciliation is highly improbable.¹⁶³ The trial proceedings themselves are always personally conducted by the judge and remain confidential unless otherwise ordered by the court.¹⁶⁴ Memoranda may also be required from the parties, including the public prosecutor, before the case is submitted for decision.¹⁶⁵

¹⁵⁴ See *Family Code*, *supra* note 22, a 55; and *Rule on Legal Separation*, *supra* note 125, s 2.

¹⁵⁵ See *Family Code*, *supra* note 22, as 68-73 for the rights and obligations between husband and wife.

¹⁵⁶ See *ibid*, a 36; *Antonio*, *supra* note 121; *Tuason*, *supra* note 127; *Camacho-Reyes v Reyes* (2010) 628 SCRA 461 [*Camacho-Reyes*]; and *Azcueta v Republic of the Philippines* (2009) 588 SCRA 196 [*Azcueta*].

¹⁵⁷ *Rule on Legal Separation*, *supra* note 125, s 2 (b); and *Family Code*, *supra* note 22, as 61 and 62.

¹⁵⁸ *Family Code*, *supra* note 22, a 61.

¹⁵⁹ See *Rule on Legal Separation*, *supra* note 125, ss 5 & 6; and *Family Code*, *supra* note 22, a 60.

¹⁶⁰ See *Rule on Legal Separation*, *supra* note 125, s 7.

¹⁶¹ *Family Code*, *supra* note 22, a 58 (An action for legal separation shall in no case be tried before six months shall have elapsed since the filing of the petition.).

¹⁶² *Araneta v Concepcion* (1956) 99 Phil 709.

¹⁶³ *Family Code*, *supra* note 22, a 59.

¹⁶⁴ *Rule on Legal Separation*, *supra* note 125, s 14.

¹⁶⁵ *Ibid*, s 15.

To avoid the possibility of collusion, judgments on the pleadings, summary judgment and confession of judgment are, like in annulment and nullity actions, not allowed.¹⁶⁶ Notwithstanding the existence of any of the grounds for legal separation, a petition may be denied if there is condonation,¹⁶⁷ consent,¹⁶⁸ connivance,¹⁶⁹ *in pari delicto*,¹⁷⁰ collusion,¹⁷¹ and prescription.¹⁷² If the court grants the petition, the decree of legal separation shall be issued only after liquidation, partition, and distribution of properties.¹⁷³

Similar to actions for nullity and annulment, any aggrieved party may appeal from a decision granting or denying the petition for legal separation after a motion for reconsideration or new trial is filed and resolved.¹⁷⁴ The Solicitor General is given this same opportunity, on behalf of the State.

What makes a decree of legal separation distinct from that of nullity or annulment is that it does not affect the validity and existence of the marriage, even after the obligation of mutual support between the spouses ceases to exist and even with the parties already entitled to live apart.¹⁷⁵ Nevertheless, its effects are nothing short of significant. In the case of succession, for instance, the guilty spouse is disqualified from inheriting from the innocent spouse by intestate succession.

¹⁶⁶ *Ibid*, s 14; and *Family Code*, *supra* note 22, a 60. See also *Pacete v Carriaga* (1994) 231 SCRA 321.

¹⁶⁷ *Family Code*, *supra* note 22, a 56 (1). See *Bugayong v Ginez* (1956)100 Phil 616 (“Condonation is conditional forgiveness or remission, by a husband or wife of a matrimonial offense which the latter has committed x x x Single voluntary act of marital intercourse between the parties ordinarily is sufficient to constitute condonation, and where the parties live in the same house, it is presumed that they live on terms of matrimonial cohabitation.” (citations omitted)).

¹⁶⁸ *Family Code*, *supra* note 22, a 56 (2).

¹⁶⁹ *Ibid*, a 56 (3) (The parties connived in the commission of the offense or act constituting the ground for legal separation.).

¹⁷⁰ “equally in fault.” *Cyclopedic Legal Dictionary*, 2d ed, *sub verbo* “in pari delicto”. See *Family Code*, *supra* note 22, a 56 (4) (Both parties have given ground for legal separation.).

¹⁷¹ See *de Ocampo*, *supra* note 136 (“There would be collusion if the parties had arranged to make it appear that a matrimonial offense had been committed although it was not, or if the parties had connived to bring about a legal separation even in the absence of grounds therefor.”).

¹⁷² *Family Code*, *supra* note 22, as 56-57 (An action for legal separation shall prescribe after five years from the time of the occurrence of the cause.). See *Rule on Legal Separation*, *supra* note 125, s 16; and *Brown v Yambao* (1957) 102 SCRA 168.

¹⁷³ *Rule on Legal Separation*, *supra* note 125, ss 16 & 19.

¹⁷⁴ *Ibid*, s 1.

¹⁷⁵ *Ibid*, s 16; and *Family Code*, *supra* note 22, a 63 (1).

Where there is a will, any testamentary provision made by the innocent spouse in his/her favor is accordingly revoked.¹⁷⁶ Regarding the property regime governing the marriage, it is properly dissolved and liquidated, with the share of the guilty spouse to the net profits thereof being forfeited in favor of the common children or, if there are none, the children of the guilty spouse by a previous marriage. In default of children, the innocent spouse stands to receive the same.¹⁷⁷ Custody of any minor children is normally awarded to the innocent spouse, even as all relevant considerations – such as the choice of the child over seven years of age (unless the parent chosen is unfit) - are fully taken into account.¹⁷⁸ The innocent spouse may also revoke any donation made in favor of the offending spouse. This includes the designation of the latter as beneficiary in any insurance policy, even if it was stipulated therein that the designation is irrevocable.¹⁷⁹

In the event that reconciliation between the parties should ensue before a decree of legal separation is issued, all legal proceedings are immediately terminated.¹⁸⁰ If it occurs after a final decree of legal separation has already been issued, it is properly set aside.¹⁸¹ In similar fashion, where one party should die while the action is still pending, the case itself terminates following the legal maxim, *actio personalis moritur cum persona* (death of one party to the action causes the death of the action itself).¹⁸²

Status of marriages in the Philippines

Both the numbers of celebration and nullification of marriages are on the rise. According to civil registration records, at least 400,000 marriages are held in the Philippines every year.¹⁸³ That

¹⁷⁶ *Rule on Legal Separation*, *supra* note 125, s 16; and *Family Code*, *supra* note 22, a 63 (4).

¹⁷⁷ *Family Code*, *supra* note 22, a 63 (2) in relation to a 43 (2).

¹⁷⁸ *Ibid*, a 63(3) in relation to a 213.

¹⁷⁹ *Ibid*, a 64. The action to revoke the donation must be brought within five years from the time the decree of legal separation become final.

¹⁸⁰ *Ibid*, a 66 (1).

¹⁸¹ *Ibid*, a 66 (2).

¹⁸² *Lapuz-Sy v Eufemio* (1972) 43 SCRA 177.

¹⁸³ The numbers of marriages in a year are 492,254 in 2009; 486,514 in 2008; and 490,054 in 2007. “National Quickstat” *National Statistics Office* (October 2012), online: National Statistics Office <<http://www.census.gov.ph>>.

translates to around 33,000 a month, or 1,100 a day. At the same time, however, the number of those seeking to end their union has also been steadily increasing. In the past ten years, the number of nullity and annulment cases filed annually has more than doubled from 4,520 in 2001 to 10,528 in 2012.¹⁸⁴ Eighty-five percent (85%) of the cases filed for declaration of nullity are grounded on psychological incapacity of either or both spouses.¹⁸⁵ Most of the cases praying for termination of marriage are initially granted.¹⁸⁶

Young age influences the course that marriages eventually take; gender often determines who decides when to nullify that marriage. The majority of the cases filed for declaration of nullity of marriage involved spouses between the ages of 21 and 25. Almost half of the cases involve husbands between the ages of 21 and 25 followed by those between 26 and 30;¹⁸⁷ while wives aged between 21 and 25¹⁸⁸ are involved in 58% of the cases followed by those below 20 which comprise 17%.¹⁸⁹ Reflecting quite a minor disparity, nullifying a marriage is sought by wives (58%) more than by husbands (42%).¹⁹⁰ No specific profession is prevalent in those who are filing for nullity of their marriages.¹⁹¹

As the marriage lasts longer, there is less probability for either spouse to seek for its nullity. Most of the cases are filed while spouses have been together between one and five years¹⁹²

¹⁸⁴ Office of the Solicitor General (OSG), *Statistics: Nullity and Annulment of Marriage Cases*, 2012 [OSG]. The number has steadily increased from 8,283 in 2010 and 9,133 in 2011.

¹⁸⁵ *Ibid.* Based on a random sampling of 2008 cases, 11% of cases filed is grounded on Article 35 while 2% is on Article 45.

¹⁸⁶ *Ibid.* Based on a random sampling of 2010 and 2011 cases made by the OSG, 94% of cases are granted by the trial courts. As per random sampling of cases made by the author of cases decided by the Supreme Court between 1995-2011, only 11% of cases are granted in favor of the dissolution of marriage.

¹⁸⁷ *Ibid.* (28% of cases involved those between the ages of 26 and 30, followed by 13% between 31 and 35, 10% below 20, and 4% between 36 and 40.).

¹⁸⁸ *Ibid.* (Based on 2008 cases, 43% involved wives aged between 21 and 25.).

¹⁸⁹ *Ibid.* (16% of cases involve those between the ages of 26 and 30 and 4% between 31 and 35.).

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.* There is no known available data on income brackets and educational background of spouses filing for the nullity of their marriages.

¹⁹² *Ibid.* (Based on a random sampling of 2008 cases, 35% are sought by spouses who have been together between one and five years.).

followed by those who have been married between six and ten years.¹⁹³ The numbers decline as the duration of the marriage increases.¹⁹⁴

There is significant preference for a spouse to allege that he or she, or his or her spouse, or both are afflicted with a serious psychological illness or disorder for lack of other legal grounds to anchor a petition for nullity. Eighty-five percent (85%) of cases alleged psychological incapacity while 11% are based on lack of legal capacity of the parties, lack of authority to solemnize marriage and bigamous marriages.¹⁹⁵ Two percent (2%) of the cases are based on lack of parental consent, unsound mind, invalid consent, impotency and affliction of sexually-transmitted disease while the remaining 2% are based on presumptive death and recognition of foreign divorce.¹⁹⁶

Looking at the statistics, it is troubling, if not alarming, that nullity and annulment cases are on the rise even when, most often, results are against the dissolution of marriages. The rate reflects the grim realities that not all marriages last as couples hoped they would when they exchanged their vows, and that spouses are willing to avail of any remedy regardless of whether or not the grounds apply to them hoping that the courts will ultimately decide in their favor, which is most often not the case.

Conclusion

When interpreting the Constitution, the State always favors the preservation of marriage as an institution. Nowhere is this more apparent than in the mandatory participation of the public prosecutor in all actions for nullity, annulment, and legal separation. Unfortunately, the

¹⁹³ *Ibid* (Based on a random sampling of 2008 cases, 26% are sought by spouses who have been together between six and ten years.).

¹⁹⁴ *Ibid* (The numbers are as follows: 17% (11-15 years); 8% (16-20 years); 6% (21-25 years); 2% (26-30 years); and 1% (31-35 years). 5% are comprised of those married for less than a year).

¹⁹⁵ *Ibid*. Based on random sampling of 2008 cases.

¹⁹⁶ *Ibid*.

seemingly benevolent involvement of the State in these actions generally contradicts with a couple's decision to separate and terminate their marriage, and the real intent of the Constitution to protect and strengthen the family.¹⁹⁷

The state's primary interest in the preservation of marriage, coupled with the limited mechanisms for separation and/or its termination, are substantial hurdles faced by spouses trapped in irreparable marriages. Unlike ordinary contracts with terms and conditions that are more or less malleable and subservient to the wishes of the contracting parties at any point in time, the marriage contract has rigid conditions that are virtually immune to any contrary stipulation by the spouses, after it has already been executed.¹⁹⁸ This is on top of the limited and exclusive nature of the grounds by which it may be nullified or annulled, or through which legal separation may be successfully secured.

Chapter 3

Why nullity, annulment, and legal separation are insufficient

The most fundamental argument in favor of the enactment of a divorce law is the very glaring inability of the existing legal mechanisms to address the often complex and multiple causes behind separation cases and failed marriages. The following points, which are discussed *seriatim*, serve to elaborate on this argument even further: (1) actions for nullity and annulment do not recognize domestic violence as a valid ground for terminating a marriage; (2) a number of other plausible grounds for separation exist but are not recognized by any of the three existing remedies; (3) psychological incapacity, as a ground for the nullity of a marriage under Article 36

¹⁹⁷ See *Cuison-Melgar*, *supra* note 150; *Cabantug-Baguio*, *supra* note 153; *Azcueta*, *supra* note 156; *Dedel v CA* (2004) 421 SCRA 461 [*Dedel*]; *Republic of the Philippines v Iyoy* (2005) 470 SCRA 508 [*Iyoy*]; *Bier v Bier* (2008) 547 SCRA 123 [*Bier*]; *Padilla-Rumbaua v Rumbaua* (2009) 596 SCRA 157 [*Padilla-Rumbaua*]; *So v Valera* (2009) 588 SCRA 319 [*So*]; *Suazo v Suazo* (2010) 615 SCRA 154 [*Suazo*]; and *Lim v Sta. Cruz-Lim* (2010) 611 SCRA 569 [*Lim*] (In all the cases, after the trial courts granted the petitions for nullity, the decisions were appealed by the Solicitor General and eventually reversed by the Supreme Court.).

¹⁹⁸ *Family Code*, *supra* note 22, a. 1.

of the Family Code, is prone to and has in fact been subject to abuse; (4) the default participation of the State in actions for nullity, annulment, and legal separation often obstructs – to the point of being unreasonable - the realization of a mutual desire to separate by two consenting adults; (5) the prohibitive cost of pursuing any of the existing legal remedies discriminates among social classes; and (6) on a related note, permitting divorce for Muslims and foreigners actually discriminates against non-Muslim Filipinos.

The present chapter highlights these inadequacies of the existing legal framework in order to lay the basis for the reintroduction of divorce in the Philippines.

Actions for nullity and annulment do not recognize domestic violence as a valid ground for terminating a marriage

The rate of domestic violence incidence in the Philippines is steadily rising, with spousal or intimate partner violence being the most common form of violence committed against women aged 15-49.¹⁹⁹ For married women (currently and/or previously), the primary perpetrators of physical violence are husbands (46.8% current, 10.3% former).²⁰⁰ Among them, one in seven have experienced physical violence while 8% have experienced sexual violence.²⁰¹ The more common types of spousal abuse, however, are emotional and other forms of non-personal violence.²⁰² It is worth noting that men are also victims of abuse, with 16% of wives admitting to having inflicted some form of physical hurt upon their husbands.²⁰³

¹⁹⁹ Philippine National Statistics Office (NSO) & ICF Macro, *National Demographic and Health Survey 2008* (Calverton, Maryland: National Statistics Office and ICF Macro, 2009) at 213 [NDHS]. See Lenore Walker, *The Battered Woman* (New York, US: Harper Collins Publishers, 1979) at 55 (for a discussion of the battering cycle.).

²⁰⁰ NDHS, *supra* note 199, at 206.

²⁰¹ *Ibid*, at 214.

²⁰² *Ibid*, at 213 (23% of ever married women experienced non-personal violence.).

²⁰³ *Ibid*, at 222.

One factor perceived as perpetuating domestic violence incidence is the absence of a divorce law.²⁰⁴ This is premised on the theory that marriage facilitates the commission of violent and oppressive actions which,²⁰⁵ without proper intervention, lead to more severe and more frequent violent incidents.²⁰⁶

Seemingly oblivious to the alarming statistics, Philippine law still refuses to recognize domestic violence as a valid ground for terminating a marriage. At best, an aggrieved spouse may only cite physical abuse as proper basis for the filing of an action for legal separation.²⁰⁷ Inexplicably so, a scenario characterized by some other type of abuse (e.g., psychological, sexual, financial, etc.) offers no similar remedy.²⁰⁸

Existing remedies of nullity, annulment, and legal separation do not cover other plausible causes of separation

Outside of domestic violence, there is a virtual sea of reasons that causes, or at least contributes to, the end of a marital union.²⁰⁹ When asked to respond to them, the prevailing legal regime largely proves itself inadequate and oftentimes ineffective.²¹⁰ Issues ranging from marital

²⁰⁴ See Lori Heise et al, “Violence Against Women: A Neglected Public Health Issue in Less Developed Countries” (1994) 39 *Social Science Medical* 1165 at 1169-1171 (discussing the factors that operate to perpetuate gender-based violence. The three other strong factors identified were economic inequality between men and women, pattern of using physical violence for conflict resolution and male authority and decision-making in the home.).

²⁰⁵ *House Bill 1799*, *supra* note 31, explanatory note.

²⁰⁶ See Rebecca Dobash, *Violence against wives: A case against patriarchy* (New York, US: Free Press, 1979); Mildred Pagelow, *Woman-battering: Victims and their experiences* (Beverly Hills, CA: Sage Publications, 1981); and Lee Bowker, ed, *Women and crime in America* (New York, US: Macmillan Publishing Co, 1981) at 277-300.

²⁰⁷ See *Family Code*, *supra* note 22, a 55 If the abused spouse is the wife, she may file a criminal action under the *Anti-Violence Against Women and Children Act of 2004* and request for a protection order. If the abused spouse is the husband, he may file an action under the general criminal laws (*See Penal Code*, *supra* note 13).

²⁰⁸ If the sexual abuse committed amounts to corruption or inducement to engage in prostitution, or the financial abuse amounts to abandonment, then the abused and/or abandoned spouse may file for legal separation. See discussion, *supra* pages 25-26.

²⁰⁹ See Paul Amato & Denise Previti, “People’s Reasons for Divorcing: Gender, Social Class, the Life Course, and Adjustment” (2003) 24 *Journal of Family Issues* 602 at 604-605 & 615-616; and Gay Kitson, et al, “Who Divorces and Why: A Review” (1985) 6 (3) *Journal of Family Issues* 255 at 262-282 (for a summary of reported causes of divorce in US.).

²¹⁰ *House Bill 1799*, *supra* note 31, explanatory note.

infidelity, incompatibility, alcohol or substance abuse, personality problems, loss of love, failure to comply with marital obligations, to personal growth, and emotional immaturity have all been invoked at some point whenever the preservation of marriage is called to question.²¹¹

In an informal survey of decided cases, justifying the termination of a marriage has involved reasons such as: physical violence,²¹² verbal abuse,²¹³ abandonment,²¹⁴ minimal or lack of support,²¹⁵ emotional immaturity and irresponsibility,²¹⁶ being a mama's boy,²¹⁷ sexual abuse and perversion,²¹⁸ being a pathological liar,²¹⁹ alcoholism,²²⁰ drug abuse,²²¹ infidelity,²²² jealousy,²²³ stalking,²²⁴ conflicting and opposing personalities,²²⁵ frequent quarrels,²²⁶

²¹¹ Sexual infidelity, drug abuse, and alcoholism are only grounds for legal separation. Incompatibility, personality problems, failure to comply with marital obligations, personal growth and emotional immaturity, unless amounting to psychological incapacity under Article 36 of the Family Code, cannot render a marriage null and void. See citations, *supra* note 109.

²¹² *Ferraris*, *supra* note 122; *Tuason*, *supra* note 127; *Cuison-Melgar*, *supra* note 150; *Azcueta*, *supra* note 156; *Suazo*, *supra* note 197; *Carating-Siayngco*, *supra* note 236; *Hernandez v CA* (1999) 377 Phil 919 [*Hernandez*]; *Marcos v Marcos* (2000) 397 Phil 840 [*Marcos*]; *Republic of the Philippines v Dagdag* (2001) 351 SCRA 425 [*Dagdag*], *Pesca v Pesca* (2001) 356 SCRA 588 [*Pesca*]; *Dimayuga-Laurena v CA* (2008) 566 SCRA 154 [*Dimayuga-Laurena*]; *Ting v Velez-Ting* (2009) 582 SCRA 694 [*Ting*]; *Paz v Paz* (2010) 613 SCRA 195 [*Paz*]; and *Kalaw v Fernandez* (2011) 657 SCRA 822 [*Kalaw*].

²¹³ *Iyoy*, *supra* note 197; and *Carating-Siayngco*, *supra* note 236.

²¹⁴ *Santos*, *supra* note 109; *Molina*, *supra* note 109; *Ferraris*, *supra* note 122; *Paras*, *supra* note 152; *Cabantug-Baguio*, *supra* note 153; *Bier*, *supra* note 197; *Dedel*, *supra* note 197; *Iyoy*, *supra* note 197; *Hernandez*, *supra* note 212; *Marcos*, *supra* note 212; *Dagdag*, *supra* note 212; *Dimayuga-Laurena*, *supra* note 212; and *Kalaw*, *supra* note 212.

²¹⁵ *Molina*, *supra* note 109; *Ferraris*, *supra* note 122; *Tuason*, *supra* note 127; *Cuison-Melgar*, *supra* note 150; *Paras*, *supra* note 152; *Camacho-Reyes*, *supra* note 156; *Padilla-Rumbaua*, *supra* note 197; *Dimayuga-Laurena*, *supra* note 212; *Paz*, *supra* note 212; *Republic of the Philippines v Tanyag-San Jose* (2007) 517 SCRA 123 [*Tanyag-San Jose*].

²¹⁶ *Choa v Choa* (2002) 392 SCRA 641 [*Choa*].

²¹⁷ *Cabantug-Baguio*, *supra* note 153.

²¹⁸ *Navales*, *supra* note 121; *Marcos*, *supra* note 212; and *Ting*, *supra* note 212.

²¹⁹ *Antonio*, *supra* note 121.

²²⁰ *Cuison-Melgar*, *supra* note 150; *Bier*, *supra* note 197; *Suazo*, *supra* note 197; *Hernandez*, *supra* note 212; *Pesca*, *supra* note 212; *Tanyag-San Jose*, *supra* note 215; *Ting*, *supra* note 212; and *Kalaw*, *supra* note 212.

²²¹ *Tuason*, *supra* note 127; *Camacho-Reyes*, *supra* note 156; *So*, *supra* note 197; *Tanyag-San Jose*, *supra* note 215; and *Najera v Najera* (2009) 591 SCRA 541.

²²² *Dedel*, *supra* note 122; *Ferraris*, *supra* note 122; *Tuason*, *supra* note 127; *Paras*, *supra* note 152; *Camacho-Reyes*, *supra* note 156; *Iyoy*, *supra* note 197; *Padilla-Rumbaua*, *supra* note 197; *Hernandez*, *supra* note 212; *Dimayuga-Laurena*, *supra* note 212; *Kalaw*, *supra* note 212; *Paz*, *supra* note 212; *Villalon v Villalon* (2005) 475 SCRA 572; and *Toring v Toring* (2010) 626 SCRA 389 [*Toring*].

²²³ *Antonio*, *supra* note 121; *Carating-Siayngco*, *supra* note 236; and *Navarro v Cecilio-Navarro* (2007) 521 SCRA 121 [*Navarro*].

²²⁴ *Navarro*, *supra* note 223.

²²⁵ *Molina*, *supra* note 109.

²²⁶ *Barcelona v CA* (2003) 458 Phil 626; and *Navarro*, *supra* note 223.

dependency on parents,²²⁷ gambling,²²⁸ being afflicted with a sexually transmitted disease,²²⁹ lack of intention to procreate,²³⁰ being forced to change religion,²³¹ being treated as a prisoner,²³² not wanting to work or not bothering to look for a job,²³³ squandering money,²³⁴ and having tantrums and moodiness.²³⁵

In most cases, the condition complained of merely allows for the filing of an action for legal separation. In others - such as where the allegation involves jealousy, conflicting and opposing personalities, frequent quarrels, gambling, not bothering to look for work, or emotional immaturity - a spouse is left without recourse unless condition may be successfully proven as amounting to psychological incapacity, thereby meriting a petition for a declaration of nullity of the marriage.

This state of things is recognized by no less than the Supreme Court, as is evident from the substance of most decided cases. Unfortunately, given the limited and exclusive grounds prescribed by the existing legal framework, the Court has declared time and again that even an unsatisfactory marriage does not always rise to the level of a null and void one.²³⁶ Moreover, as a tribunal, albeit being the highest one in the land, it has constantly reminded parties of the limitations of its power – that it can only apply the letter and spirit of the law, and may not reinvent or modify the same no matter how harsh the application may seem.²³⁷

²²⁷ *Molina*, *supra* note 109.

²²⁸ *So*, *supra* note 197; *Ting*, *supra* note 212; and *Tanyag-San Jose*, *supra* note 215.

²²⁹ *Hernandez*, *supra* note 212.

²³⁰ *Azcueta*, *supra* note 156; *Bier*, *supra* note 197; and *Choa*, *supra* note 216.

²³¹ *Azcueta*, *supra* note 156; and *Dimayuga-Laurena*, *supra* note 212.

²³² *Ngo Te v Yu-Te* (2009) 579 SCRA 193.

²³³ *Azcueta*, *supra* note 156; *So*, *supra* note 197; and *Suazo*, *supra* note 197.

²³⁴ *So*, *supra* note 197; and *Toring*, *supra* note 222.

²³⁵ *Lim*, *supra* note 197.

²³⁶ *Carating-Siyngco v Siyngco* (2004) 441 SCRA 422 at 439 [*Carating-Siyngco*]. See also *Navales*, *supra* note 121; *Ferraris*, *supra* note 122; and *Cuison-Melgar*, *supra* note 150.

²³⁷ *Cuison-Melgar*, *supra* note 150.

Psychological incapacity, as a ground for nullity of marriage under Article 36 of the Family Code, is prone to and has been in fact been subject to abuse

Given the inherent limitations of the three available remedies, a considerable majority of cases have involved couples invoking psychological incapacity – however false or misplaced - when seeking to end their respective marriages. This is especially true considering that issues such as physical violence, infidelity, and abandonment only justify legal separation, and with spouses more inclined to terminate their marital bonds instead of merely having the right to avoid cohabitation and/or have separate property regimes.²³⁸ As such, couples are wont to defame each other and become hostile to one another just to substantiate their allegations. Consequently, this ground has “become a form of divorce, as valid marriages are declared void every day in the guise of psychological incapacity.”²³⁹

The framers of Article 36 recognized that the ground of psychological incapacity “can open the doors to abuse by couples who may wish to have an easy way out of their marriage.”²⁴⁰ While there is a safeguard placed by the law which is the intervention of the State, through the Solicitor General, to prevent collusion between parties, this safeguard has also caused concern as hereinafter discussed.

²³⁸ *OSG, supra* note 184.

²³⁹ *WLBI, supra* note 24, at 4.

²⁴⁰ *Santos, supra* note 109.

Default participation of the State in actions for nullity, annulment, and legal separation hinders the realization of the spouses' desire to separate from each other

In Canada,²⁴¹ and in predominantly Catholic countries such as Malta,²⁴² and Spain,²⁴³ the state does not participate in marriage dissolution or annulment proceedings.²⁴⁴ The state leaves it to the spouses to oppose any action, or appeal any court decision relative to such matters. The Philippine government adopts a different approach and has the Solicitor General participating in all actions for nullity, annulment and legal separation.²⁴⁵ Such intervention is in no way limited to the determination of whether or not there is collusion between the parties involved, but in fact extends to the filing of a motion for reconsideration or appeal once the court has arrived at a decision.

To date, the government appears keen on exercising its prerogative in this regard. Since 2009, there has been a steady increase in the number of cases appealed by the Solicitor General from the trial courts to the Court of Appeals.²⁴⁶ This has resulted in the reversal of a majority of cases decided by the trial courts, where the relief of termination of marriage was initially granted.²⁴⁷ After going through the entire legal process which typically lasts for several years, spouses are then left to rue their fate, still married to each other and without any other effective remedy.²⁴⁸

²⁴¹ *Divorce Act*, RSC, 1985, c 3 (2d Supp); *Annulment of Marriages Act (Ontario)* RSC 1970, c A-14.

²⁴² *Civil Code (Malta)*, 1870 & 1874, c 16, s 66A-66N (added by XIV.2011.9) [*Civil Code (Malta)*]; and *Marriage Act (Malta)*, 1975, c 255, s 18-20.

²⁴³ *Civil Code (Spain)*, Royal Decree of 24 July 1889, 1889, t IV, c 8-11, as 85-107 [*Civil Code (Spain)*].

²⁴⁴ In countries such as Italy, the public prosecutor participates in divorce proceedings. *See Italian divorce law*, Law of 1 December 1970 No 898 (Italy), 1970 [*Italian divorce law*].

²⁴⁵ *See discussion, supra* pages 22 & 26.

²⁴⁶ *OSG, supra* note 184 (The total number of cases appealed are 29 in 2009; 56 in 2010; 93 in 2011; and 109 in 2012.).

²⁴⁷ *See citations, supra* note 197.

²⁴⁸ Under Article 26 of the Family Code, a Filipino who became a naturalized citizen of a foreign country allowing divorce may obtain divorce and such decree will be considered valid in the Philippines. *See discussion, supra* pages 10-11; *Orbecido, supra* note 49; and *Llorente, supra* note 49.

Prohibitive costs of pursuing an action for nullity, annulment, and legal separation discriminate among social classes

The cost of pursuing an annulment case in the Philippines normally ranges from around Php 300,000.00 to a million.²⁴⁹ This includes filing fees, compensation for the services of a lawyer (and a psychologist, if necessary), and other incidental expenses.

When a nullity or annulment case is filed in court, the plaintiff pays a fixed amount of Php 4,235.00.²⁵⁰ If psychological incapacity is invoked, a psychologist who shall attest to its existence will normally entail a fee ranging from Php 15,000.00 to Php 40,000.00.²⁵¹ In some cases, more than one is called to testify with a view to increasing the probability of having the marriage declared null and void.²⁵² Meanwhile, the cost of legal services usually varies depending on the attendant circumstances, e.g., whether the case is opposed by the other spouse or if it involves settlement of conjugal properties.

With such figures, people have come to view the proceedings as “expensive and discriminatory in favor of the right and powerful,”²⁵³ well beyond the reach of a great majority of the population. Today, the average annual family income in the Philippines is pegged at Php 129,000.00, with the average family expenditure at Php 110,000.²⁵⁴ Twenty-two out of one

²⁴⁹ See Andreo Calonzo & Marc Jayson Cayabyab, “More Pinoy couples seeking annulment despite high cost”, *GMA News* (4 April 2013) online: GMA News <<http://www.gmanetwork.com>> [Calonzo & Cayabyab].

²⁵⁰ Administrative Circular No 35-2004, *Guidelines in the allocation of the legal fees collected under Rule 141 of the Rules of Court, as amended, between the special allowance for the judiciary fund and the Judiciary Development Fund*, 2004.

²⁵¹ Calonzo & Cayabyab, *supra* note 249.

²⁵² Antonio, *supra* note 121; and Camacho-Reyes, *supra* note 156.

²⁵³ Lira Dalangin-Fernandez, “Filed bill seeks to make legal separation easier”, *Philippine Daily Inquirer* (17 January 2011) online: Inquirer News <<http://newsinfo.inquirer.net>>.

²⁵⁴ The amounts are adjusted for the inflation between 2006 and 2009 at 2000 prices. Families in the bottom 30% income group earned an average of Php62,000. In comparison, families in the upper 70% income group earned an average of Php268,000. On a monthly basis, the reported average family income in the bottom 30% income group was Php5,200 in 2009 while it was Php22,300 for the upper 70% income group. See National Statistics Office, *2009 Family Income and Expenditure Survey* (Manila, PHL: National Statistics Office, 2011).

hundred families are estimated to be poor, with 10% living in extreme poverty.²⁵⁵ When 28 out of 100 Filipinos are living in poverty,²⁵⁶ it is a privilege of the few to be able to spend for the costs of an action for nullity, annulment, or legal separation.²⁵⁷ The need for adversarial proceedings warranting the presence of doctors and lawyers whose services demand fees beyond the annual income of an average Filipino should be made to depend on the circumstances of each case. Contentious litigation as a default requirement for all nullity, annulment, and legal separation actions is discriminatory and renders the remedies onerous, ineffective, and unreasonable.

Permitting divorce among Muslims and foreigners violates the Constitution and international human rights law

The Constitution guarantees equal protection of the law and freedom of religion.²⁵⁸ The former is a “guarant[ee] against any form of undue favoritism or hostility from the government.”²⁵⁹ It is embraced under the due process concept and requires that, in the application of the law, “all persons or things similarly situated should be treated alike, both as to rights conferred and responsibilities imposed.”²⁶⁰ Absolute equality among residents is not called for, and neither is the principle infringed by a statute which applies only to those belonging to a specific class, provided that it equally applies to all persons within such class, and there are reasonable grounds

²⁵⁵ National Statistical Coordination Board, *2012 First Semester Official Provincial Poverty Statistics of the Philippines* (Makati, PHL: National Statistical Coordination Board, 2013) [NSCB].

²⁵⁶ *Ibid*, at 4.

²⁵⁷ Not ignoring the seeming discrimination created between the rich and the poor, proposals to attenuate the costs associated with the existing remedies on nullity and annulment have been made such as standardization of fees of psychologists and psychiatrists, handling of cases by the Public Attorney’s Office, and presumption of psychological incapacity of the spouse in case spousal violence, infidelity, or abandonment is committed to avoid the need for psychologists. These proposals have yet to be adopted. See Christina Mendez, “Chiz seeks cheaper annulment costs”, *The Philippine Star* (16 June 2012) online: Philstar <<http://www.philstar.com>>; Paolo Romero, “Bill filed to make annulment accessible to poor”, *The Philippine Star* (18 January 2011) online: Philstar <<http://www.philstar.com>>; and Evelyn Macairan, “Bishop bucks expansion of grounds for annulment”, *The Philippine Star* (19 January 2011) online: Philstar <<http://www.philstar.com>>.

²⁵⁸ *Philippine Constitution*, 1987, a III, ss 1 and 5.

²⁵⁹ *Biraogo v Philippine Truth Commission* (2010) 637 SCRA 78, at 166.

²⁶⁰ *Ichong v Hernandez* (1957) 101 Phil 1155 in *Fariñas v Executive Secretary* (2003) 417 SCRA 503, at 525 [*Fariñas*].

for making a distinction between those who fall within such class and those who do not.²⁶¹ With freedom of religion, a distinction has to be made between freedom to believe and freedom to act on one's beliefs. The first is absolute, as long as the belief is confined within the realm of thought; the latter may be regulated where the belief translates to external acts that affect the public welfare.²⁶²

At present, married Filipinos do not enjoy the same protections vis-à-vis the availability of divorce as a legal remedy to a tumultuous marriage. On the one hand, there are the Muslim Filipinos who may avail of any of the legal remedies under both the Family Code (i.e., nullity, annulment and legal separation) and the Muslim Code (divorce); on the other, the non-Muslim Filipinos who are constrained to help themselves with the limited options under the Family Code. The distinction is uncalled for given that both are presumed to be covered by the constitutional mandate of the Philippine government to protect families and marriages. The strong influence and moral arguments of the Church still prevents divorce under the general civil laws of a predominantly Catholic country.²⁶³ As a result and in violation of the equal protection of laws, majority of Filipinos who are non-Muslims are unduly denied of divorce.²⁶⁴

State parties to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)²⁶⁵ condemn racial discrimination and “undertake to engage in no act or practice of racial discrimination against persons, groups of persons or institutions.”²⁶⁶ In signing and ratifying ICERD,²⁶⁷ the Philippines undertakes to “prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, in the enjoyment of the right

²⁶¹ *Fariñas*, *supra* note 260.

²⁶² Isagani Cruz, *Constitutional Law* (Quezon City, Philippines: Central Book Supply, 1991) at 176-178.

²⁶³ *WLBI*, *supra* note 24, at 5.

²⁶⁴ *See* discussion, *infra* pages 57-59.

²⁶⁵ United Nations General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, GA res 2106 (XX), Annex, 20 UN GAOR Supp. (No. 14) at 47, UN Doc A/6014 (1966)[*ICERD*].

²⁶⁶ *Ibid*, at a 2.

²⁶⁷ ICERD was signed by the Philippines on 7 March 1966 and ratified on 15 September 1967.

to marriage and choice of spouse.”²⁶⁸ Despite this, divorce obtained by a foreigner under Article 26 of the Family Code clearly constitutes discrimination on the ground of nationality. A foreigner may obtain divorce abroad and such decree is recognized in the country, while a Filipino is prohibited from doing the same unless there is a prior change in citizenship.²⁶⁹

There is also the International Convention on Civil and Political Rights (ICCPR) and International Convention on Economic, Social and Cultural Rights (ICESCR)²⁷⁰ which both recognize the rights to non-discrimination and family. Interpreting the provisions of the ICCPR on family, the Human Rights Committee declared that, “any discriminatory treatment in regard to the grounds and procedures for separation or divorce, child custody, maintenance or alimony, visiting rights, or the loss or recovery of parental authority must be prohibited.”²⁷¹ As a state party to the ICCPR,²⁷² the Philippines undertakes to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²⁷³ Considering such commitment by the country, it is difficult to justify the exceptions involving divorce sanctioned by Muslim laws and that limited to foreigners. By all accounts, it constitutes discrimination on the ground of nationality and religion by placing Filipino Muslims and foreigners in a more advantageous position compared to the majority of the Filipino population. Divorce obtained by

²⁶⁸ *ICERD*, *supra* note 265, a 5.

²⁶⁹ *See Orbecido*, *supra* note 49.

²⁷⁰ United Nations General Assembly, *International Convention on Civil and Political Rights*, GA res 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc A/6316 (1966), a 23 [*ICCPR*]. United Nations General Assembly, *International Convention on Economic, Social and Cultural Rights*, GA res 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3; 6 ILM 368 (1967), a. 10 [*ICESCR*].

²⁷¹ Human Rights Committee (HRC), *General Comment No 19: Protection of the family, the right to marriage and equality of spouses*, UN Doc CCPR/C/21/Rev.1/Add.5, reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.1 at 28 (1994) at para 9 [*HRC, General Comment 19*].

²⁷² The Philippines signed the ICCPR on 19 December 1966 and ratified it on 23 October 1986 including its Two Optional Protocols. *See* United Nations General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 59, UN Doc. A/6316 (1966); and United Nations General Assembly, *Second Optional Protocol to the International Covenant on Civil and Political Rights*, GA res 44/128, Annex, 44 UN GAOR Supp (No 49) at 207, UN Doc A/44/49 (1989).

²⁷³ *ICCPR*, *supra* note 270, a 2.

a non-Muslim Filipino is illegal - immoral even, if detractors are to be believed – while that secured by a Muslim Filipino or foreigner is allowed.

Conclusion

Spouses cannot be obliged to remain in a marriage that neither nor both of them want. Keeping spouses in already failed and hopeless marriages does not solve marital problems. Maintaining the permanency of marriage is not always tantamount to protecting the family. As aptly argued by the women's groups and discussed in this chapter, the existing remedies have not effectively addressed the realities of life in general and marriage in particular. The issues on insufficiency and abuse of remedies, discrimination based on social class, religion and nationality, and default state intervention call for an amendment or overhaul of the existing legal framework.

The problems arising out of the three available remedies - nullity, annulment, and legal separation - are amplified in the next chapter through the arguments supporting the need to reintroduce divorce into Philippine law.

Chapter 4

Why the Philippines needs to reintroduce divorce

Daunting challenges notwithstanding, a genuine and effective divorce policy in the Philippines is long overdue. Despite the unwavering opposition by the Church and some members of the government, a change in the existing legal framework in this regard could not come at a more appropriate time. The positive effects of divorce have ample support from various studies done on the subject. Coupled with the experience of other Catholic countries, and the glaring problems

of the existing legal remedies, they all proceed to affirm and usher in what could only be described as a law that is nothing short of inevitable.

This chapter puts forth the legal and practical motivations behind an initiative to reintroduce divorce into Philippine law. Most serve to elaborate on the arguments provided in the recently concluded chapter.

Divorce protects and strengthens the family

The proposition proceeds from the view that family, as a fundamental social unit, takes many forms. Thus, when both the Philippine Constitution and international law mandate that it be accorded protection by the state, they do so in full recognition of the various types it consists of. No existing legal provision or principle limits the meaning of family to one composed merely of “a male head, the instrumental father, the breadwinner, and the dependent wife, mother, and housekeeper and their children.”²⁷⁴

In the case of the Philippines, the drafters of the Constitution chose to adopt a broad definition of the Filipino family. During deliberations, they came to agree that it shall be composed of the relations between husband and wife, parent and child, among other ascendants and their descendants, as well as that between siblings.²⁷⁵ There was never an intention to limit the concept to the bond between a husband, his wife, and their children. Similarly, the Human Rights Committee, also expressed the thought that “in giving effect to recognition of the family in the context of [protecting the family], it is important to accept the concept of the various forms of

²⁷⁴ Kari Moxnes, “What are Families After Divorce?” (1999) 28 (3/4) *Marriage and Family* 105 at 107 (citation omitted) [*Moxnes*].

²⁷⁵ *Record of Proceedings and Debate of the Constitutional Commission* (1986), v 1, at 39; *See Family Code, supra* note 22, a 50 (defining family relations as including those between husband and wife; between parents and children; and among brothers and sisters, whether of the full or half-blood).

family, including married couples and their children and single parents and their children.”²⁷⁶
The term even implies to include stepfamilies and adoptive families.

From this standpoint, divorce is not seen as going against the State’s mandate to protect and strengthen the family, since the latter continues to exist long after the marriage has formally terminated.²⁷⁷ The only affected relationship is that between husband and wife (which is permanently severed); the other existing relations remain intact.

A different approach requires looking at divorce as merely changing and/or rearranging the typical nuclear family.²⁷⁸ According to Ahrons, the divorce process makes changes in a family system’s characteristics (i.e., the rules by which family members relate), but it does not necessarily take away the parent-child unit.²⁷⁹ It is but a “crisis of family transition” which leads to structural changes.²⁸⁰ Specifically, a nuclear family becomes “binuclear,” composed of two interrelated households (maternal and paternal),²⁸¹ which normally starts to stabilize after the year of separation.²⁸² The post-divorce family is referred to as a “continuing family system.”²⁸³

²⁷⁶ Human Rights Committee, *General Comment 28: Equality of rights between men and women*, UN Doc CCPR/C/21/Rev.1/Add.10 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 at 179 (2003), at para 27.

²⁷⁷ See *ICCPR*, *supra* note 270, a 23.

²⁷⁸ See Constance Ahrons, *We’re Still Family: What Grown Children Have to Say About Their Parents’ Divorce* (New York, US: HarperCollins Publishers Inc, 2005) [*Ahrons (2005)*] (discussing the positive effects of divorce based on interviews of 173 grown children whose parents divorced two decades ago); and *Moxnes*, *supra* note 274, at 105-120.

²⁷⁹ Constance Ahrons, “Divorce: A Crisis of Family Transition and Change” (1980) 29 (4) *Family Relations* 533 at 534 [*Ahrons (1980)*].

²⁸⁰ *Ibid*, at 533 (identifying a series of five transitions marking the change from married to divorced status).

²⁸¹ Constance Ahrons, “The Binuclear Family: Two households - one family” (1979) 2 *Alternative Lifestyles* 499 [*Ahrons (1979)*].

²⁸² Constance Ahrons & Richard Miller, “The effect of the postdivorce relationship on paternal involvement: A longitudinal analysis” (1993) 63 (3) *American Journal of Orthopsychiatry* 441 at 442 (citations omitted). See also Judith Wallerstein & Joan Kelly, *Surviving the breakup: How children and parents cope with divorce* (New York, USA: Basic Books, 1980) [*Wallerstein & Kelly*]; and Eileen Hetherington et al, “The aftermath of divorce” in Joseph Stevens Jr & Marilyn Matthews, eds, *Mother/child, father/child relationship* (Washington, DC: The National Association for the Education of Young Children, 1978) 149 at 149-176.

²⁸³ *Ahrons (1980)*, *supra* note 279, at 539.

Nevertheless, even within the narrow view of family taken by those opposed to divorce, the argument may still be made that termination could well be – in the long run – the best possible recourse for families confronted by a broken marriage. Consider, for instance, a scenario where a marriage is afflicted by discord that is beyond repair, but where the attendant circumstances do not justify the resort to any of the existing legal remedies. In such a case, the family continues to suffer and deteriorate as the spouses are forced to stay within what is often a conflict-laden relationship, with innocent children possibly trapped in the middle. Divorce provides a way to avoid such a quandary.

There is also a growing amount of literature supporting the thesis that divorce actually yields positive consequences benefitting an affected family. The coping process of children has figured prominently in this aspect during recent discussions,²⁸⁴ especially since early research on this subject tended to show more negative effects of divorce on children.²⁸⁵

In one study, no long-term negative effects were observed on the psychological well-being of children borne to divorced parents. Recovery from the divorce process usually lasts three

²⁸⁴ See Ahrons (2005), *supra* note 278; Paul Amato, “The consequences of divorce for adults and children” (2000) 62 *Journal of Marriage and the Family* 1269 [*Amato (2000)*]; Ronald Simons et al, “Explaining the higher incidence of adjustment problems among children of divorce compared with those in two-parent families” (1999) 61 *Journal of Marriage and the Family* 1021; Gill Gorell Barnes, “Divorce transitions: Identifying risk and promoting resilience for children and their parental relationships” (1999) 25 *Journal of Marital and Family Therapy* 425; Robert Emery, “Postdivorce family life for children. An overview of research and some implications for policy” in Ross Thompson & Paul Amato eds, *The postdivorce family: Children, parenting, and society* (Thousand Oaks, CA: Sage, 1999) 3 at 3-48; Danielle Bussell, “A pilot study of African American children’s cognitive and emotional reactions to parental separation” (1995) 25 *Journal of Divorce & Remarriage* 3; Robert Emery & Rex Forehand, “Parental divorce and children’s well-being: A focus on resilience” in Robert Haggerty et al, eds, *Stress, risk and resilience in children and adolescents: Processes, mechanisms, and interventions* (London: Cambridge University Press, 1994) 64 at 64-99; Joseph Guttman & Marc Broudo, “The effect of children’s family type on teachers’ stereotypes” (1988-1989) 12 *Journal of Divorce (Children of divorce: Developmental and clinical issues)* 315; Paul Amato, “The ‘Child of Divorce’ as a person stereotype: Bias in the recall of information about children in divorced families” (1991) 53 *Journal of Marriage and the Family* 59; and Paul Amato & Bruce Keith, “Parental divorce and the well-being of children: A meta-analysis” (1991) 110 *Psychological Bulletin* 26.

²⁸⁵ See Kathleen Camara & Gary Resnick, “Styles of conflict resolution and cooperation between divorce parents: Effects on child behavior and adjustment” (1989) 59 *American Journal of Orthopsychiatry* 560 [*Camara & Resnick (1989)*]; Richard Warshak & John Santrock, “The impact of divorce in father-custody and mother-custody homes: The child’s perspective” (1983) 19 *New Directions for Child Development* 29; Nicholas Zill, *Happy, healthy, and insecure: The state of the American child as described by the children themselves, their parents, and their teachers* (New York, US: Doubleday, 1982); and Wallerstein & Kelly (1980), *supra* note 282.

years.²⁸⁶ This is supported by another study which revealed that children are more likely to consider divorce as a challenge for self-development and an opportunity for personal growth;²⁸⁷ many of the respondents believed that they had ‘successfully’ coped with the ordeal and that their coping process actually resulted in more positive outcomes than negative ones.²⁸⁸ To be exact, children of divorce were noted to have such characteristics as empowerment, empathy, and relationship-savviness.²⁸⁹ In another study, maturity, self-esteem, and empathy for others were identified as the positive traits honed by the experience.²⁹⁰ Two other studies allege that children from divorced families grow up to be “resilient, reasonably happy and competent individuals,”²⁹¹ and are also more likely to be stronger and wiser (than their peers).²⁹² Majority of the children from divorced families felt their parents made a good decision to divorce and they are better off after the divorce.²⁹³

Pragmatically speaking, not only does divorce provide positive effects for the children of divorce but even for a child conceived or born during the second union, his or her interests will be served for he or she will be considered a legitimate child of his or her biological parents instead of the estranged spouses. If there is no divorce, the child from the second union will be legally considered a child from the first union unless lawfully impugned. Therefore, divorce eliminates any confusion on paternity and filiation and removes any threat on the child that his or her legitimate status may be impugned.²⁹⁴ When divorce is legalized and accepted, the stigma of

²⁸⁶ Yongmin Sun & Yuanzhang Li, “Children’s well-being during parents’ marital disruption process: A pooled time-series analysis” (2002) 64 (2) *Journal of Marriage and Family* 472.

²⁸⁷ Joseph Guttman, *Divorce in psychosocial perspective: theory and research* (Hillsdale, NJ: LEA, 1993); Harold Hackney & Janine Bernard, “Dyadic adjustment processes in divorce counseling” (1990) 69 *Journal of Counseling and Development* 134; Constance Ahrons & Roy Rodgers, *Divorced families: A multidisciplinary developmental view*, (New York, USA: Norton, 1987).

²⁸⁸ Ilana Sever et al, “Positive consequences of parental divorce among Israeli young adults: A long-term effect model” (2007) 42(2) *Marriage & Family Review* 7 at 20.

²⁸⁹ *Ibid*, at 22-23.

²⁹⁰ David Gately & Andrew Schwebel, “Favorable outcomes in children after parental divorce” (1992) 18 *Journal of Divorce and Remarriage* 57.

²⁹¹ Eileen Hetherington & John Kelly, *For better or for worse: Divorce reconsidered* (New York, USA: W.W. Norton, 2002) at 274.

²⁹² Ahrons (2005), *supra* note 278.

²⁹³ Constance Ahrons, “What grown children say about their parents’ divorces” (2004) 24 (3) *Children’s Legal Rights Journal* 2 at 52.

²⁹⁴ *Family Code*, *supra* note 22, as 164 & 166.

being the ‘second’ family or ‘*anak as labas*’ is eliminated.²⁹⁵ The child from the subsequent union will be “free to develop the natural bonds of normal family life.”²⁹⁶ This is unlike the case of children from void or voidable marriages where the child, after nullity or annulment of the marriage, is considered illegitimate save for some exceptions.²⁹⁷

Studies show that it is not divorce *per se* rather parental conflict that cause or worsen the negative effects of divorce.²⁹⁸ The effects of divorce on a child and the redefinition of the relationship in the divorced family depend on the relationship between parents and the parental relationship especially between the non-custodial parent and child.²⁹⁹ The “level of conflict and support between the former spouses” after the divorce highly influences the reorganization of the family and ultimately distinguishes a good from a bad divorce.³⁰⁰ Young adult children of divorce perceive divorce depending on the parental conflict and parent’s marital quality before the divorce.³⁰¹ Those who observed their parents in high conflict situations (intense and frequent fighting) positively viewed divorce. On the other hand, those who observed their parents in low

²⁹⁵ ‘*Anak sa labas*’ is a local term to refer to a bastard or a child born out of an illegitimate union, e.g. relationship with one while being legally married to another.

²⁹⁶ Kathleen Dillon, “Divorce and remarriage as human rights: The Irish Constitution and the European Convention on Human Rights at odds on *Johnston v. Johnston*” (1989) 22 *Cornell International Law Journal* 63 at 84 [Dillon].

²⁹⁷ See discussion, *supra* pages 24-25 (on consequences of nullity and annulment).

²⁹⁸ Shortage of resources, disruption in routines, and even strong belief in religion were also shown to cause or worsen the negative effects of divorce. In contrast, family support, healthy parent-child relationship, and stability help ease the effects of divorce. See Yongmin Sun & Yuanzhang Li, “Parental divorce, sibship size, family resources, and children’s academic performance” (2009) 38 *Social Science Research* 622 at 632; Jay Fagan, “Effect of Divorce and Cohabitation on Preschoolers’ Literacy” (2012) 34(4) *Journal of Family Issues* 460 at 477-478; and Matthijs Kalmijn, “Country differences in the effects of divorce on well-being: The role of norms, support, and selectivity” (2010) 26 (4) *European Sociological Review* 475 at 487.

²⁹⁹ Zuzana Tomcikova, “Parental divorce, adolescents’ feelings towards parents and drunkenness in adolescents” (2011) 17 *European Addiction Research* 113; Constance Ahrons, “Family ties after divorce: Long-term implications for children” (2007) 46 (1) *Family Process* 53 at 60 [Ahrons (2007)]; Amato (2000), *supra* note 284; Camara & Resnick (1989), *supra* note 285; Solly Dreman & Hagar Ronen-Eliav, “The relation of divorced mothers’ perception of family cohesion and adaptability to behavior problems in children” (1997) 59 *Journal of Marriage and the Family* 324; Ahrons (1980), *supra* note 279, at 537; and Constance Ahrons & Lynn Wallisch, “Parenting in the binuclear family: relationships between biological and stepparents” in Kay Pasley & Marilyn Ihinger-Tallman, eds, *Remarriage and stepparenting: current research and therapy* (London, New York: Guilford, 1987) 225 at 225-256 (identifying five typologies of divorced parenting relationships - perfect pals, dissolved duos, cooperative colleagues, angry associates, and fiery foes.).

³⁰⁰ Constance Ahrons & Richard Miller, “The effect of the postdivorce relationship on paternal involvement: A longitudinal analysis” (1993) 63 (3) *American Journal of Orthopsychiatry* 441 at 447 [Ahrons & Miller (1993)]. See Constance Ahrons, *The Good Divorce* (New York, USA: HarperCollins Publishers, Inc, 1994).

³⁰¹ Ming Cui, Frank Fincham, & Jared Durtschi, “The effect of parental divorce on young adults’ romantic relationship dissolution: What makes a difference?” (2011) 18 *Parental Relationships* 410 at 410-426.

conflict situations were “relatively disapproving” of divorce.³⁰² Research findings support that children who experience high levels of conflict before and during the divorce process have lower levels of post-divorce adjustment. Less parental conflict means better parental relationship which leads to more positive child adjustment.³⁰³ After divorce, relationships with parents have improved as majority of children even became closer to their parents after separation particularly in those families in which the spouses did not have serious ongoing conflicts.³⁰⁴ For the children, what mattered most was “reliability, consistency, and a genuine interest in them.”³⁰⁵ Remarriage was not even a major issue for most of the children as they felt connected to the new families of their parents and even spoke well about their half siblings.³⁰⁶

In the end, one may do well to adopt Ahrons’s view of divorce as a mere “unscheduled life transition” which, like most other family crises, naturally causes stress and requires adjustment from all parties involved.³⁰⁷ Määttä noted that, “divorce produces emotional baggage with plenty of insecurity and uncertainty, but it also provides promises, challenges, and options.”³⁰⁸ Thus, instead of simply turning a blind eye on failed marriages and maintaining a sweeping prohibition on divorce in the guise of protecting the interest of the family, measures to attenuate the negative consequences of separation and divorce must be undertaken because “often after a torturous marriage, divorce is the only reasonable solution” for the spouses and their children.³⁰⁹

³⁰² *Ibid*, at 422.

³⁰³ Nicole Bing, WM Nelson, Kelly Wesolowski, “Comparing the effects of amount of conflict on children’s adjustment following parental divorce” (2009) 50 *Journal of Divorce and Remarriage* 159 at 167.

³⁰⁴ See Constance Ahrons, “Family ties after divorce: Long-term implications for children” (2007) 46 (1) *Family Process* 53 at 59; Constance Ahrons & Jennifer Tanner, “Adult children and their relationship changes 20 years after parental divorce” (2003) 52 *Family Relations* 340; Ahrons (2005), *supra* note 278; and Ahrons & Miller (1993), *supra* note 300.

³⁰⁵ Ahrons (2007), *supra* note 299, at 53.

³⁰⁶ *Ibid*, at 60-61; Ahrons (2005), *supra* note 278.

³⁰⁷ Ahrons (1980), *supra* note 279, at 534.

³⁰⁸ Kaarina Määttä, “The throes and relief of divorce” (2011) 52 *Journal of Divorce and Remarriage* 415 at 429.

³⁰⁹ *Ibid*, at 432.

Reintroducing divorce is in compliance with international human rights obligations

As a member of the international community, Philippines has, in its Constitution, expressly “adopt[ed] the generally accepted principles of international law as part of the law of the land.”³¹⁰ The country has also signed and ratified numerous international human rights treaties.³¹¹ Pursuant to the country’s legally binding international obligations, a law on divorce is mandated.

Divorce, similar to other forms of dissolution of marriage, is implied in the right to non-discrimination,³¹² equality of men and women,³¹³ against torture and cruel, inhuman or degrading treatment or punishment,³¹⁴ and to marriage and family.³¹⁵ For an unmarried person to marry his or her married partner, dissolution of the existing marriage bonds is necessary. While the lack of divorce does not directly prohibit any person from marrying and founding a family, a couple with one person married to another is prevented from remarrying under pain of criminal sanction.³¹⁶

International treaty monitoring bodies have continuously voiced their concerns on the lack of divorce in the Philippines. In 2006, the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) expressed as a principal area of concern the absence of divorce in the country and urged the government to “introduce and support vigorously legislation which permits divorce, allows women to remarry after divorce, and grants women and men the same rights to administer property during marriage and equal rights to property on

³¹⁰ *Philippine Constitution*, 1987, a II, s 2.

³¹¹ *See iHumanRights*, *supra* note 7.

³¹² *ICCPR*, *supra* note 270, a 2.

³¹³ *Ibid*, a 3.

³¹⁴ *Ibid*, a. 7.

³¹⁵ *Ibid*, a 23; *See Dillon*, *supra* note 296.

³¹⁶ *Penal Code*, *supra* note 13, as 333-334.

divorce.”³¹⁷ The same concern was echoed by the Committee on Economic, Social and Cultural Rights in 2008 when it noted with concern the lack of a Philippine law on divorce and recommended a “legislation recognizing the right of men and women to divorce, to obtain the legal severance of marital ties and to remarry after divorce.”³¹⁸ The observations were made pursuant to the obligation of the government to protect the family.³¹⁹ In 2012, for still failing to enact a law on divorce, the Human Rights Committee reiterated the concern for “providing for the dissolution of marriages, which might have the effect of compelling victims of sexual and gender based violence to remain in violent relationships.”³²⁰ The Human Rights Committee recommended that the government should enact legislation that would provide for the “dissolution of marriages and ensure that it protects the rights of children, and the rights of spouses to custody of children, and equality in the devolution of matrimonial property.” The observations were made by the Human Rights Committee pursuant to the obligations of the government to respect, protect, and fulfill the rights to non-discrimination,³²¹ equality of men and women,³²² against torture and cruel, inhuman or degrading treatment or punishment,³²³ and to marriage and family.³²⁴ Clearly, if the government is serious in complying with its international obligations, it must heed the observations of the treaty monitoring bodies and act on their concerns by exerting efforts to ensure that divorce is reinstated in the country.

Divorce is legal and constitutional

The fundamental law of the Philippines is replete with provisions that place a premium on the family as the most basic of society’s human collectives. It recognizes the “sanctity of family

³¹⁷ Committee on the Elimination of All Forms of Discrimination Against Women, *Concluding Comments: Philippines*, UN Doc CEDAW/C/PHI/CO/6 (2006) at paras 31 & 32.

³¹⁸ Committee on Economic, Social and Cultural Rights, *Concluding Observations: Philippines*, UN Doc E/C.12/PHL/CO/4 (2008) at para 24.

³¹⁹ *ICESCR*, *supra* note 270, a 10.

³²⁰ Human Rights Committee (HRC), *Concluding Observations: Philippines*, UN Doc CCPR/C/PHL/CO/4 (2012) at para 12.

³²¹ *ICCPR*, *supra* note 270, a 2.

³²² *Ibid*, a 3.

³²³ *Ibid*, a 7.

³²⁴ *Ibid*, a 23.

life,” and protects and strengthens the family as a “basic autonomous social institution.”³²⁵ The family is seen as the “foundation of the nation,” while marriage is recognized as the foundation of the family.³²⁶ The State also defends the “right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood” and the “right of children to assistance and special protection from conditions prejudicial to their development.”³²⁷ Yet for all the protection these principles and doctrines offer towards upholding the institution of marriage and the family, none of them actually prohibit or curtail the right of the people to enact a State-recognized divorce law. As can be gleaned from the deliberations on Article XV (on Family) of the Constitution, the intent of the framers was never to prohibit divorce:

FR. BERNAS: Just one question, and I am not sure if it has been categorically answered. I refer specifically to the proposal of Commissioner Gascon. Is this to be understood as a prohibition of a general law on divorce? His intention is to make this a prohibition so that the legislature cannot pass a divorce law.

MR. GASCON: Mr. Presiding Officer, that was not primarily my intention. My intention was primarily to encourage the social institution of marriage, but not necessarily discourage divorce. But now that he mentioned the issue of divorce, my personal opinion is to discourage it, Mr. Presiding Officer.

FR. BERNAS: No. My question is more categorical. *Does this carry the meaning of prohibiting a divorce law?*

MR. GASCON: *No*, Mr. Presiding Officer.

FR. BERNAS: Thank you.³²⁸

Comparing the Constitution of the Philippines with other Catholic countries, similarities abound with regard to provisions on family. Predominantly Catholic countries such as Malta, Timor-Leste, Honduras, Venezuela, Dominican Republic, Ecuador, Spain, Argentina, Colombia, Ireland, and Italy recognize divorce.³²⁹ These countries have higher rates of Catholicism as the

³²⁵ *Philippine Constitution*, 1987, a II, s 12.

³²⁶ *Ibid*, at a XV, ss 1-2.

³²⁷ *Ibid*, at a XV, s 3.

³²⁸ *Record of Proceedings and Debate of the Constitutional Commission* (1986), v 1, at 41 (emphasis supplied).

³²⁹ See *Civil Code (Malta)*, *supra* note 242; *Italian divorce law*, *supra* note 244; *Civil Code (Spain)*, *supra* note 243, t IV, c 8-11, as 85-107; *Civil Code (Venezuela)*, N 2.990, 1982, c XII, s 1; *Civil Code (Timor-Leste)*, Law No

religion of the population compared to the Philippines³³⁰ but clearly religion has not prevented these countries from enacting a divorce law.³³¹

Almost all the constitutions of Catholic countries have, similar to that of the Philippines, recognized the family as an institution. Under the different constitutions, the family has been comparably described as the “foundation of society”³³² “basic nucleus of society,”³³³ “natural association in society,”³³⁴ “society’s basic unit,”³³⁵ “natural society founded on marriage,”³³⁶ “fundamental core of society,”³³⁷ “natural primary and fundamental unit group of Society and a “moral institution.”³³⁸ These are similar to the provisions under the Philippine Constitution recognizing the family as a “basic autonomous social institution”³³⁹ and the “foundation of the nation,”³⁴⁰ and marriage as an “inviolable social institution” and “foundation of the family.”³⁴¹

Spain, Venezuela, Timor-Leste, Honduras, Dominican Republic, Colombia, Ecuador, Ireland, and Italy have, like the Philippines, expressly declared the family and marriage as entitled to state protection.³⁴² The Philippines aims to “protect and strengthen the family”³⁴³ and

10/2011, 2011, c XII, s 1; *Civil Code (Honduras)*, Decree No 76-1906, 2009, c XII; *Divorce law (Dominican Republic)*, Law No 1306-Bis, 1937; *Civil Code (Colombia)*, Law No. 84 of 1873, t VII, c 2, as. 153-168; *Civil Code (Argentina)*, Law No 340, 1869, t I, c XII, a 214-216 & c XIII, a 217-218; *Civil Code (Ecuador)*, Law No 000 RO/Sup 104, 1860, t III, a 105; and *Constitution of Ireland*, 1937, a 41 (3) (2).

³³⁰ The following countries have higher rates of Catholicism compared to the Philippines (81%): Malta (98%); Timor-Leste (98%), Honduras (97%), Venezuela (96%), Dominican Republic (95%), Ecuador (95%), Spain (94%), Argentina (92%), Colombia (90%), Ireland (87.4%), and Italy (80%). See *CIA*, *supra* note 3.

³³¹ Even in Malta where its Constitution specifically recognized the Roman Catholic Apostolic Religion as the country’s religion, divorce is legal. See *Constitution of Malta*, 1964, c I, a 2 (1).

³³² *Constitution of the Dominican Republic*, 2010, a 55.

³³³ *The Political Constitution of Colombia*, 1991, t I, c 2, a 42.

³³⁴ *Constitution of the Bolivian Republic of Venezuela*, 1990, c V, a 75.

³³⁵ *Constitution of the Democratic Republic of Timor-Leste*, 2002, p II, t II, s 39.

³³⁶ *Constitution of the Italian Republic*, 1947, t II, a 29.

³³⁷ *Constitution of the Republic of Ecuador*, 2008, c 6, a 67.

³³⁸ *Constitution of Ireland*, 1937, a 41 (1).

³³⁹ *Philippine Constitution*, 1987, a II, s 12.

³⁴⁰ *Ibid*, 1987, a XV, s 1.

³⁴¹ *Ibid*, 1987, a XV, s 2.

³⁴² *Constitution of Spain*, 1978, c III, a 39 (1); *Constitution of the Bolivian Republic of Venezuela*, 1990, c V, a 75; *Constitution of the Democratic Republic of Timor-Leste*, 2002, p II, t II, s 39; *Constitution of Honduras*, 1982, c III, a 111; *Constitution of the Dominican Republic*, 2010, a 55; *The Political Constitution of Colombia*, 1991, t I, c 2, a 42; *Constitution of the Republic of Ecuador*, 2008, c 6, a 67; *Constitution of Ireland*, 1937, a 41 (1).

³⁴³ *Philippine Constitution*, 1987, a II, s 12.

“strengthen its solidarity and actively promote its development.”³⁴⁴ Spanish authorities undertake to “ensure the social, economic, and legal protection of the family.”³⁴⁵ Venezuela seeks to “protect families [...] as the fundamental space for the overall development of persons.”³⁴⁶ The government of Timor-Leste endeavors to “protect the family as [...] a condition for the harmonious development of the individual.”³⁴⁷ Honduras declared that family and marriage are “under the protection of the state.”³⁴⁸ Dominican Republic “protect[s] and promote[s] the organization of the family on the basis of the institution of marriage.”³⁴⁹ The Colombian government and society “guarantee[s] the integral protection of the family.”³⁵⁰ Ecuador “guarantees conditions that integrally favor the achievement of [family’s] goals.”³⁵¹ Ireland recognizes the family as “possessing inalienable and imprescriptible rights, antecedent and superior to all positive law” and ensures to “protect the family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the nation and the state.”³⁵² With all the similarities in the constitutional provisions on family of these countries and the Philippines, the difference lies only on the fact that the Philippines remained as the sole country which failed to legalize divorce.

Notwithstanding the religion of these countries and their constitutional provisions on the protection of families and marriages, these Catholic countries have recognized and legalized divorce. Colombia and Honduras have even recognized divorce in their constitutions.³⁵³ The Philippines, likewise a Catholic country, cannot legally claim that the absence of divorce is mandated by the need to protect the family. The laws of these other Catholic countries have shown that divorce does not violate the state’s duty to respect, strengthen and protect the family as a basic unit of society. Neither religion nor the constitution of these Catholic countries

³⁴⁴ *Ibid*, a XV, s 1.

³⁴⁵ *Constitution of Spain*, 1978, c III, a 39 (1).

³⁴⁶ *Constitution of the Bolivian Republic of Venezuela*, 1990, c V, a 75.

³⁴⁷ *Constitution of the Democratic Republic of Timor-Leste*, 2002, p II, t II, s 39.

³⁴⁸ *Constitution of Honduras*, 1982, c III, a 111.

³⁴⁹ *Constitution of the Dominican Republic*, 2010, a 55 (2) & (3).

³⁵⁰ *The Political Constitution of Colombia*, 1991, t I, c 2, a 42.

³⁵¹ *Constitution of the Republic of Ecuador*, 2008, c 6, a 67.

³⁵² *Constitution of Ireland*, 1937, a 41 (1). Under the Fifteenth Amendment of the Constitution Act (1995) the entirety of Article 41.3.2 of the Constitution prohibiting laws providing for the dissolution of marriage was deleted thereby allowing divorce in the country.

³⁵³ *The Political Constitution of Colombia*, 1991, t I, c 2, a 42 and *Constitution of Honduras*, 1982, c III, a 113.

prevented the enactment of a divorce law; neither religion nor the constitution should prevent the Philippines from reintroducing divorce. Indeed, the right to family and marriage must not be interpreted in absolute terms by those who oppose divorce such that all terminations of marriage are seen as violations of a constitutional right.

Divorce reduces the incidence of domestic violence

The right against violence relates closely to the protection and promotion of several other contiguous rights previously discussed.³⁵⁴ While the right against violence is enjoyed by men and women alike, domestic violence is “gender-specific violence directed against women, occurring within the family and within interpersonal relationships.”³⁵⁵

The International Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)³⁵⁶ considers family violence as one of the more insidious form of violence committed against women.³⁵⁷ Aggravating this difficult situation for women is the “permanent character of a marriage which ensures that women remain in the institution of marriage regardless of the problems, and make it their lifelong commitment to make it work.”³⁵⁸ Ultimately, violence not only “puts women’s health at risk [but also] impairs their ability to participate in both family and public life on a basis of equality.”³⁵⁹

³⁵⁴ See discussion, *supra* pages 49-50.

³⁵⁵ Special Rapporteur on Violence Against Women, its Causes and Consequences, “A Framework for Model Legislation on Domestic Violence”, UN Doc E/CN.4/1996/53/Add2 (1996), at para 2 (b). See also United Nations General Assembly, *United Nations Declaration on the Elimination of All Forms of Violence Against Women*, UN Doc A/RES/48/104 (1993) [DEVAW].

³⁵⁶ United Nations General Assembly, *International Convention on Elimination of All Forms of Discrimination Against Women*, GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc A/34/46; 1249 UNTS 13; 19 ILM 33 (1980) [CEDAW]. Philippines signed CEDAW on 15 July 1980 and ratified it on 5 August 1981.

³⁵⁷ Committee on the Elimination of All Forms of Discrimination Against Women, *General Recommendation No 19: Violence against women*, UN Doc A/47/38 (1992) at para 23 [CEDAW, *General Recommendation 19*].

³⁵⁸ *WLBI*, *supra* note 24, at 6.

³⁵⁹ *CEDAW, General Recommendation 19*, *supra* note 357, at para 23.

Separation or the threat of separation decreases the incidence of domestic violence.³⁶⁰ By decreasing the physical contact between the spouses, the opportunity to inflict violence is attenuated.³⁶¹ In Canada, violence in 60% of cases of violence against women ceased after separation.³⁶² Threatening to leave is an effective strategy for ending battering.³⁶³ For Brassiolo, “making divorce easier can affect the incidence of domestic violence, either by facilitating the dissolution of abusive relationships or by making the threat of leaving more credible which is shown to be a strong deterrent of spousal violence.”³⁶⁴

According to Gillis, divorce acts as a “safety valve” to limit domestic violence.³⁶⁵ Pagelow explains that “if the relationship is not terminated by death (suicide, homicide, or natural causes),

³⁶⁰ See also Jennifer Hardesty, “Separation assault in the context of postdivorce parenting” (2002) 8(5) *Violence Against Women* 597 at 621; Demie Kurz, “Separation, divorce, and woman abuse” (1996) 2 *Violence Against Women* 63 at 63-81 [Kurz] (discussing that in some cases, violence begins or ends after separation and refuting the myth that separation ends violence.); Douglas Brownridge, “Violence against women post-separation” (2006) 11 *Aggression and Violent Behavior* 514; Holly Johnson & Tina Hotton, “Losing control: Homicide risk in estranged and intact intimate relationships” (2003) 7(1) *Homicide Studies* 58 at 58-84; Holly Johnson & Vincent Sacco, “Researching violence against women: Statistics Canada's national survey” (1995) 37(3) *Canadian Journal of Criminology* 281-304; Desmond Ellis & Walter DeKeseredy, “Marital status and woman abuse: The DAD model” (1989) 19 *International Journal of Sociology of the Family* 67 at 67-87 [Ellis & DeKeseredy] (discussing that there are also cases of post-separation violence which may either be the first time that violence is inflicted or a continuation and escalation of the violence experienced during the relationship); and Barbara Hart, “Gentle jeopardy: The further endangerment of battered women and children in custody mediation” (1990) 7(4) *Mediation Quarterly* 317 at 324 (discussing that while divorce or separation cause or escalate violence, this “does not mean that the battered woman should stay. Cohabiting with the batterer is also dangerous since violence usually increases in frequency and severity over time and since a batterer may engage in pre-emptive strikes, fearing abandonment or anticipating separation even before the battered woman reaches such a decision.”).

³⁶¹ See Laura Dugan et al, “Exposure reduction or retaliation? The effects of domestic violence resources on intimate-partner homicide” (2003) 37 *Law and Society Review* 169; Laura Dugan et al, “Explaining the decline in intimate partner homicide: The effects of changing domesticity, women’s status, and domestic violence resources” (1999) 3(3) *Homicide Studies* 187; Richard Rosenfeld, “Charging relationships between men and women: A note on the decline in intimate partner homicide” (1999) 1 *Homicide Studies* 72.

³⁶² See Tina Hotton, “Spousal violence after marital separation” (2001) 21(7) *Juristat* 1. *But see* Shannan Catalano, *Intimate Partner Violence in the United States* (Washington, DC: Bureau of Justice Statistics, 2007) (finding separated and divorced males and females are at a greater risk of nonfatal intimate partner violence. This does not however mean that separation or divorce should not be provided as a solution because, in the same study, it was found that on average, more than three women and one man are murdered by their intimate partners every day.).

³⁶³ See Lee Bowker, *Beating wife-beating* (Lexington, Massachusetts: DC Heath & Co, 1983).

³⁶⁴ Pablo Brassiolo, “Domestic Violence and Divorce Law: When Divorce Threats Become Credible”, Universitat Pompeu Fabra, (draft: October 2011) online: Universitat Pompeu Fabra <<http://www.econ.upf.edu>>.

³⁶⁵ AR Gillis, “So long as they both shall live: Marital dissolution and the decline of domestic homicide in France, 1852-1909” (1996) 101 *American Journal of Sociology* 1273. See also Kurz, *supra* note 360 (reported that 19% of the women who were divorced with children in a Philadelphia sample left their marriage as a direct result of domestic violence); Desmond Ellis & Noreen Stuckless, *Mediating and negotiating marital conflicts* (Thousand Oaks, CA: Sage, 1996) (found that 57% of the women in their sample who were separating cited domestic violence as a major reason for dissolving their marriage); Ellis & DeKeseredy, *supra* note 360; and Judith Wallerstein & Joan

the only alternative to resignation is permanent dissolution.”³⁶⁶ The Philippines should not limit the options available for abused spouses. Instead, it must guarantee that all possible remedies are made available and easily accessible. The government, in the guise of a constitutional mandate, cannot force spouses to remain in an abusive relationship. As Fleury et. al. points out, “ultimately, the survivors themselves are in the best position to determine whether staying or ending the relationship is the best decision for their lives. We as a community need to ensure that women [and men] have the resources and support they need to make that decision.”³⁶⁷

While “separation is usually the last resort of many Filipino couples whose marriages have failed,”³⁶⁸ the existing remedies do not sufficiently provide for the other plausible causes of separation. With divorce, women victims of domestic violence are accorded a sound option out of an abusive relationship.³⁶⁹ More importantly, divorce will complement other efforts the Philippine government is undertaking to ensure that laws against family violence and other gender-based violence give adequate protection to all women.

Kelly, *Surviving the breakup: How children and parents cope with divorce* (New York, US: Basic Books, 1980) (estimated that between 50% and 70% of women who were separated left their marriage because of spousal abuse.).

³⁶⁶ Mildred Pagelow, “Justice for Victims of Spouse Abuse in Divorce and Child Custody Cases” (1993) 8 *Violence and Victims* 69 at 69-70.

³⁶⁷ Ruth Fleury et al, “When ending the relationship does not end the violence: Women's experiences of violence by former partners” (2000) 6 (12) *Violence Against Women* 1363 at 1381.

³⁶⁸ *House Bill 1799*, *supra* note 31, explanatory note.

³⁶⁹ See Ben Rosario, “Solon revives divorce bill”, *Manila Bulletin* (18 March 2005) online: Manila Bulletin <<http://www.mb.com.ph>>.

Divorce terminates a valid marriage on grounds occurring during the marriage

One of the issues with the existing remedies of nullity and annulment is their insufficiency to cover grounds existing at the time of the marriage.³⁷⁰ Divorce will address this issue by including acts, events, or circumstances occurring after the marriage as grounds for terminating a valid marriage. At present, marital infidelity, incompatibility, alcohol or substance abuse, personality problems, loss of love, failure to comply with marital obligations, personal growth, and emotional immaturity cannot sever marital bonds. Spouses are limited to grounds existing at the time of the marriage that may render the marriage void or defective. If a marriage broke down for reasons occurring during the marriage, then spouses are left either with an ineffective remedy (legal separation) or without any remedy at all. With divorce available, spouses, persons who are in the best position to determine whether to continue or end the relationship, are given a sound, effective, and reasonable option.

Muslim and non-Muslim Filipinos and foreigners deserve equal treatment in terms of divorce

There is a need to reintroduce divorce that can be availed of by any Filipino because the first two recognized exceptions to the ‘no divorce policy’ (divorce obtained by a foreigner under Article 26 of the Family Code and divorce by Muslim Filipinos) constitute violations of the equal protection clause under the Constitution and the right against discrimination based on social class, nationality, and religion,³⁷¹ as recognized under international human rights law.

When costs for pursuing an action for nullity, annulment, or legal separation is more than the annual family income of an average Filipino family, the action becomes discriminatory, onerous,

³⁷⁰ See discussion, *supra* pages 33-35.

³⁷¹ *UDHR*, *supra* note 80, a 7; *DEVAW*, *supra* note 355, a 3b-e; and *ICEDAW*, *supra* note 356, a 16.

ineffective, and unreasonable.³⁷² Going through the entire judicial process becomes an entitlement of only those who can afford to spare more than an ordinary Filipino's annual income. In divorce, adversarial proceedings and litigation as a sweeping prerequisite for spouses to nullify or annul their marriage or legally separate may be dispensed with. The need for a full-blown trial with the participation of the state may also be made to depend on the circumstances of each marriage as divorce may or may not involve fault-based grounds. In divorce proceedings, there is the likely possibility that costs are attenuated and inequality among social classes reduced.

To give effect to the constitutional guarantees of equal protection of law, Muslim and non-Muslim Filipinos alike must be allowed to divorce their spouses.³⁷³ The teachings of the Church should not be made to influence the availability of divorce for majority of Filipinos. Religion cannot be invoked as a ground for Muslims to benefit from divorce while, at the same time, used to burden non-Muslims with the absence of divorce. Even international law has recognized that “any discriminatory treatment in regard to the grounds and procedures for separation or divorce, child custody, maintenance or alimony, visiting rights, or the loss or recovery of parental authority must be prohibited.”³⁷⁴ Also, when the Philippines signed and ratified the ICCPR and ICESCR, it undertook to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”³⁷⁵ Further, the Philippines also undertook to “prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, in the enjoyment of the right to marriage and choice of spouse.”³⁷⁶ To promote equality, the exceptions in favor of Muslims and foreigners must be eliminated.

³⁷² See discussion, *supra* pages 38-39.

³⁷³ See discussion, *supra* pages 39-41.

³⁷⁴ *HRC, General Comment No 19, supra* note 271, at para 9.

³⁷⁵ *ICCPR, supra* note 270, a 2. See *ICESCR, supra* note 270, a 2.

³⁷⁶ *ICERD, supra* note 90, a. 5.

In declaring the policy of protecting and strengthening the family, the Constitution did not make any distinction whether or not the family is composed of Muslims, non-Muslims, Filipinos, and foreigners. If the State is committed to upholding the constitutional mandates of equal protection for all Filipinos and protection of the family, as well as fulfilling international human rights obligations, divorce, which can be enjoyed by all Filipinos, must be reintroduced into Philippine law.

Filipinos favor divorce

In the face of staunch resistance posed by some sectors, it is important to note that Filipinos, in general, have slowly embraced divorce as a valid solution to marital woes. Since 2001, when 61% of Filipinos disagreed and 29% agreed with divorce while the remaining 10% were neutral on the issue, popular opinion has gradually changed, steadily shifting towards acceptance rather than opposition. In 2003, only 50% disagreed while 36% agreed with the statement “Divorce is usually the best solution when a couple can’t seem to work out their marriage problems.”³⁷⁷ By 2011,³⁷⁸ 50% of adult Filipinos already agree that, “married couples who have already separated and cannot reconcile anymore should be allowed to divorce so that they can get legally married again,” while only 33% disagreed and 16% remained undecided. Thus far, this paradigm shift has had greater impact among the D and E segments of the social strata which make up the majority of Philippine society.³⁷⁹ Meanwhile, support for divorce has constantly risen for both

³⁷⁷ Social Weather Stations, *Media Release* (22 January 2003) online: Social Weather Stations <<http://www.sws.org.ph>>. The remaining 14% remained undecided.

³⁷⁸ Social Weather Stations, *Media Release* (1 June 2011) online: Social Weather Stations <<http://www.sws.org.ph>> [SWS (2011)].

³⁷⁹ Households are classified into four groups as follows: AB (Upper Class) - the most affluent group whose home and lifestyles exude an obvious disregard for or lack of economizing; C (Middle Class) - middle class households, whose homes and lifestyles reflect comfortable living and the capacity to indulge in a few luxuries; D (Lower Class) - lower-middle class household who have some comfort and means but basically thrive on a hand-to-mouth existence; E (Extremely Lower Class) - those who evidently face great difficulties in meeting their basic survival needs. (*Email from Jeanette Ureta*, Social Weather Station Data Archivist and Librarian (7 July 2013) on file with the author)

men and women whether single or married.³⁸⁰ By 2013, more than 90% of Filipinos favored divorce.³⁸¹

The Philippines has a constitutional, democratic, and republican government.³⁸² Former Supreme Court Chief Justice Reynato Puno has opined that, “the sovereignty of [the] people is the primary postulate of the Constitution.”³⁸³ Further, then Justice Isagani Cruz has noted that –

A republic is a representative government, a government run by and for the people.... Obviously, a republican government is a responsible government whose officials hold and discharge their position as a public trust and shall, according to the Constitution, “at all times be accountable to the people” they are sworn to serve. The purpose of a republican government it is almost needless to state, is the *promotion of the common welfare according to the will of the people themselves*.³⁸⁴

The fact that majority of Filipinos are in favor of divorce shows that the will of the people is to reintroduce and legalize divorce in the country. The government, as representative of the people, must act according to the needs and demands of Filipinos.

Conclusion

The Constitution, international human rights law, and Filipino people call for the reinstatement of divorce. The urgency of having the Philippine legislature reinstate divorce at the soonest time possible is rather obvious. Even the country’s Supreme Court did not fail to appreciate the harsh

³⁸⁰ *SWS (2011)*, *supra* note 378.

³⁸¹ This is based on an unofficial online poll conducted between December 2012 to January 2013. *See* “Over 90% of poll respondents favor divorce in PH”, *Philippine Daily Inquirer* (3 January 2013) online: Inquirer News <<http://newsinfo.inquirer.net>>.

³⁸² *Philippine Constitution*, 1987, a II, s 1.

³⁸³ *See* concurring opinion of Puno, *J*, in *Frialdo v COMELEC* (1996) 174 SCRA 245.

³⁸⁴ Isagani Cruz, *Philippine Political Law* (Quezon City, Philippines: Central Book Supply, 1991) at 49 (emphasis supplied).

and unfair nature of current circumstances when it refused to declare a marriage void simply because the petition was founded on the wrong grounds (sexual infidelity and abandonment) -

We cannot deny the grief, frustration and even desperation of petitioner in his present situation. Regrettably, there are circumstances, like in this case, where neither law nor society can provide the specific answers to every individual problem. While we sympathize with petitioner's marital predicament, our first and foremost duty is to apply the law no matter how harsh it may be.³⁸⁵

The Philippines cannot deny the need to provide divorce to all Filipinos without discrimination. It must hold true to the constitutional mandate of protecting and strengthening the Filipino family by ensuring that no family is subjected to a blanket call for permanency of marriage.

Chapter 5

Towards a Philippine law on divorce

The Philippines had divorce as part of its history. Lawmakers should move towards restoring what all Filipinos once equally enjoyed. Some members of Congress made efforts to propose the reintroduction of divorce into the country. Although none of the proposals were passed as a law, these attempts show a continuing demand for divorce by the Filipino people, through their representatives, that cannot simply be brushed aside. In this concluding chapter, divorce and other marriage-related bills filed by members of Congress are identified and briefly discussed. To sum up the thesis, concluding remarks are made after the arguments supporting the reinstatement of divorce are reiterated.

³⁸⁵ *Dedel, supra* note 122 (citations omitted).

Contemporary attempts for a law on divorce

In 1999, House Bill 6993 entitled, “*An Act Legalizing Divorce, Amending for Purpose Title II and Articles 55 to 67 thereunder of Executive Order No. 209, as amended by Executive Order No. 227 otherwise known as the Family Code of the Philippines*” was filed.³⁸⁶ It sought to amend the law by stating that the grounds for legal separation will also comprise the grounds for divorce - effectively scrapping legal separation from the Family Code. In addition, a showing of the “irremediable breakdown of the marriage relationship due to irreconcilable marital differences” would constitute a ground for divorce.³⁸⁷ Insufficiency of irreconcilable marital differences and non-residence within the Philippines for at least one year prior to the filing of the petition were added as grounds to deny a petition for divorce.³⁸⁸ The petition for divorce would have to be filed within one year from knowledge of the cause of divorce.³⁸⁹ The bill has adopted the existing Family Code provisions on legal separation as applicable to divorce: efforts towards reconciliation are mandatory; there is participation of the State through the public prosecutor in the proceedings; and confession of judgment or stipulation of facts is prohibited.³⁹⁰ The bill proposed that the marital bond would be severed a year after the divorce decree attains finality.³⁹¹ The 12th Congress adjourned *sine die* without passing the bill.

In 2001, Senate Bill 782 and House Bill 878 were filed.³⁹² Their provisions were exact duplicates of those of the 1999 bill, including the titles and explanatory notes. These bills, like their predecessor, failed to receive the approval of Congress.

³⁸⁶ House Bill 6993, *An act legalizing divorce, amending for purpose Title II and Articles 55 to 67 thereunder of Executive Order No. 209, as amended by Executive Order No. 227 otherwise known as the Family Code of the Philippines*, 1st Sess, 11th Cong, 1999 [*House Bill 6993*].

³⁸⁷ *Ibid.*, s 2.

³⁸⁸ *Ibid.* (Other grounds include condonation, consent, connivance, collusion, and prescription.).

³⁸⁹ *Ibid.*

³⁹⁰ *Ibid.*

³⁹¹ *Ibid.*

³⁹² Senate Bill 782, *An act legalizing divorce, amending for the purpose Title II and Articles 55 to 67 thereunder of Executive Order No. 209, as amended by Executive Order No. 227 otherwise known as the Family Code of the Philippines*, 1st Sess, 12th Cong, 2001 [*Senate Bill 782*]; and House Bill 878, *An act legalizing divorce, amending for*

House Bill 4016 entitled, “*An Act Introducing Divorce in the Philippines, Amending for the Purpose Title II, Articles 55 to 66 inclusive and Article 26 of Executive Order of 209, as amended, otherwise known as the Family Code of the Philippines, and Repealing Article 36 of the same Code, and For Other Purposes*” was filed in 2005.³⁹³ Unlike the first two versions, this proposal provided for both legal separation and divorce, and added new grounds for the latter. The grounds for divorce are: (1) when the petitioner has been separated *de facto* from his or her spouse for at least five years at the time of the filing of the petition and reconciliation is highly improbable; (2) when the petitioner has been legally separated from his or her spouse for at least two years at the time of the filing of the petition and reconciliation is highly improbable, (3) when any of the grounds for legal separation has caused the irreparable breakdown of the marriage (4) when one or both parties are psychologically incapacitated to comply with the essential marital obligations; (5) when the spouses suffer from irreconcilable differences that have caused the irreparable breakdown of the marriage.³⁹⁴ It eliminated condonation and consent to the act constituting the ground for legal separation or divorce as bases for denying the petition. To address economic deprivation, it provided that a spouse not gainfully employed is entitled to support until he or she finds adequate employment, or until one year from finality of decree of divorce has elapsed.³⁹⁵ Again without luck, Congress did not approve the bill.

Congress latest attempt to pass a divorce law was in 2011 when House Bill 1799³⁹⁶ - which mirrors the 2005 version - was filed. It was referred to the Committee on Revision of Laws on 26

the purpose Title II and Articles 55 to 67 thereunder of Executive Order No. 209, as amended by Executive Order No. 227 otherwise known as the Family Code of the Philippines, 1st Sess, 12th Cong, 2001 [House Bill 878].

³⁹³ House Bill 4016, *An act introducing divorce in the Philippines, amending for the purpose Title II, Articles 55 to 66 inclusive and Article 26 of Executive Order No. 209, as amended, otherwise known as the Family Code of the Philippines, and repealing Article 36 of the same Code, and for other purposes, 1st Sess, 13th Cong, 2005 [House Bill 4016].*

³⁹⁴ *Ibid*, s 2.

³⁹⁵ *Ibid*.

³⁹⁶ *House Bill 1799, supra* note 31.

January 2011. The 15th Congress adjourned *sine die* without the bill being passed. GABRIELA plans to refile the bill in the 16th Congress.³⁹⁷

There have been other efforts to pass laws related to remarriage and divorce. House Bill 847³⁹⁸ wanted to amend Article 63 of the Family Code and legalize remarriage after five years of separation granted that the couples have irreconcilable differences. Senate Bill 1321³⁹⁹ sought to amend Article 36 of the Family Code by enumerating indications of psychological incapacity. House Bill 798⁴⁰⁰ intended to include concubinage and adultery as grounds for dissolution of marriage. House Bill 3952⁴⁰¹ proposed to recognize spousal violence, infidelity and abandonment as presumptive psychological incapacity that would constitute a ground for marriage annulment. House Bill 1290⁴⁰² provided that whenever a marriage, duly and legally solemnized by a priest, minister, imam, rabbi, or presiding elder of an established church or religion in the Philippines is subsequently annulled or dissolved in a final judgment or decree by said church or religion, the said annulment or dissolution shall be recognized and given full force and effect in the Philippines. None of them, however, has been able to gain any real headway.⁴⁰³

³⁹⁷ RG Cruz, “Gabriela to refile divorce bill”, *ABS-CBN News* (3 July 2013) online: ABS-CBN <<http://www.abs-cbnnews.com>>.

³⁹⁸ House Bill 847, *An act amending Article 63 Title II of Executive Order No. 209, otherwise known as the Family Code of the Philippines*, 1st Sess, 12th Cong (2004).

³⁹⁹ Senate Bill 1321, *An act amending the Family Code of the Philippines, Article 36 on the definition of psychological incapacity*, 1st Sess, 14th Cong, 2007.

⁴⁰⁰ House Bill 798, *An act amending pertinent provisions of Executive Order No. 209, otherwise known as the Family Code of the Philippines, relative to the provisions on the annulment of marriages, and for other purposes*, 1st Sess, 15th Cong, 2010.

⁴⁰¹ House Bill 3952, *An act recognizing spousal violence, infidelity and abandonment as presumptive psychological incapacity constituting a ground for the annulment of marriage amending Article 36 of the Family Code for that purpose*, 1st Sess, 15th Cong, 2011.

⁴⁰² House Bill 1290, *An act legalizing Church annulment or dissolution of certain marriages and for other purposes*, 1st Sess, 15th Cong, 2010.

⁴⁰³ See Table 2 for a comparison of the bills proposing divorce.

Summary and conclusion

My thesis is that the reintroduction of divorce in the Philippines is necessary for all Filipino couples who are in hopeless and irreparable marriages. Legalization of divorce is definitely called for amid the rising number of nullity, annulment and legal separation cases which are denied by the courts for lack of legal grounds. The issues on the existing legal framework are too grave to ignore. Unlike nullity and annulment actions, divorce recognizes the existence of a valid marriage. Unlike legal separation, divorce severs marriage bonds. Divorce fills in the gaps left by the existing legal framework on marriage. If divorce is not reintroduced into domestic law, the weaknesses of nullity, annulment, and legal separation will never be addressed.

For brevity, the following justifications to reintroduce divorce into Philippine law must be kept in mind:

1. The Philippines has the constitutional mandate to protect and strengthen the family and marriage. The term ‘family’ is neither limited to a patriarchal concept nor referring only to the nuclear family.
2. Divorce protects and strengthens the family. It produces positive consequences for the spouses and children which ultimately benefits the society in general.
3. The Philippines, as signatory to international human rights treaties, has a legal and binding obligation to respect the rights against non-discrimination, equality of men and women, against torture and cruel, inhuman or degrading treatment or punishment, and to marriage and family.
4. Treaty monitoring bodies have continuously expressed their concern on the lack of divorce in the country and are consistent in recommending that a divorce law be enacted.

5. Divorce is legal and constitutional. The drafters of the Constitution had no intention to prohibit divorce. Other Catholic countries with constitutional provisions on family and marriage similar to that of the Philippines allow divorce.
6. Divorce reduces the incidence of domestic violence. At present, physical violence is only a ground for spouses to live separately from each other. Divorce provides battered spouses an effective remedy to address the abuse.
7. Divorce terminates a valid marriage based on grounds occurring during the marriage. It does not require proof that the marriage is void or defective from the beginning. Divorce gives recognition to the validity of a marriage which the existing legal framework on marriage does not make possible.
8. Divorce promotes equality among Muslim and non-Muslim Filipinos, and foreigners. The two exceptions to the 'no divorce policy' benefit only Muslim Filipinos and foreigners effectively excluding majority of Filipinos who are non-Muslims.
9. Majority of Filipinos favor the reintroduction of divorce into domestic law. As a democratic and republican government, the Philippines have the duty to defer to the will of the people.
10. The existing legal framework on marriage is onerous, unreasonable, and inaccessible for majority of Filipinos. Limited and exclusive grounds, prohibitive costs for legal and professional fees, default State participation, universal requirement of adversarial proceedings, and lengthy judicial process render the remedies of nullity, annulment, and legal separation ineffective.

While my thesis argues for the necessity of reintroducing divorce to the country, it does not particularly discuss the type of divorce that is suitable for Filipinos. However, based on the arguments provided under the second and third chapters and considering the practical effects of divorce, the following are some of the major areas that must be taken into account:

(a) Incorporation of all forms of spousal and child abuse as grounds for divorce

All forms of violence⁴⁰⁴ must constitute grounds for divorce without need to prove that it resulted in the “irreparable breakdown of the marriage” and regardless of whether it was committed against the husband, wife, or their children.⁴⁰⁵ For an abused spouse to necessarily present evidence that his or her marriage is beyond repair before divorce may be granted implies that the State, depending on the circumstances, may condone abuse within a marriage. This goes against the State’s policy to protect and strengthen the family and marriage and its international human rights obligations to end violence and discrimination.

(b) Entitlement of support for the innocent spouse and children after divorce

One of the effects of divorce is a decrease in the family’s income.⁴⁰⁶ The decrease is particularly felt by families where there is only one income-earner. The two latest divorce bills filed in Congress proposed the entitlement of support for the children and spouse who is not gainfully employed.⁴⁰⁷ A distinction must be made between an innocent and guilty spouse. Spousal support must be limited to the innocent spouse because the guilty spouse cannot be made to benefit from his or her wrongdoing whatever his or her economic status may be.

⁴⁰⁴ The forms of violence may be adopted or expanded from the definitions under the *Anti-Violence Against Women and Children Act of 2004*, Republic Act No 9262, 2004.

⁴⁰⁵ *House Bill 6993*, *supra* note 386, s 2. The latest divorce bill filed does not include spousal and child abuse as a ground for divorce and only provides that divorce may be granted when a ground for legal separation resulted in the irreparable breakdown of the marriage. A wide gap is left for the other forms of violence (psychological, economic, and sexual) not included under the existing ground for legal separation. *See* discussion, *supra* pages 32-33 & 54-56.

⁴⁰⁶ Espen Bratberg & Sigve Tjøtta, “Income effects of divorce in families with dependent children” (2008) 21 *Journal of Population Economics* 439 (concluded that both parties have an almost 50% probability of an income drop, and a more than 50% risk of moving down in the income distribution); and Jay Teachman & Kathleen Paasch, “Financial impact of divorce on children and their families” (1994) 4 (1) *Children and Divorce* 63 (found that after divorce, women and children experience substantial decrease in income while men's income remained stable or increased). *See also* Greg J Duncan & Saul D Hoffman, "Economic Consequences of Marital Instability." Pp. 427-470 in Martin David and Timothy Smeeding, eds, *Horizontal Equity, Uncertainty, and Economic Well-being* (Chicago, US: University of Chicago Press, 1985); and Lenore Weitzman, *The Divorce Revolution* (New York, US: The Free Press, 1985).

⁴⁰⁷ *See House Bill 1799*, *supra* note 31; and *House Bill 4016*, *supra* note 393.

(c) Non-inclusion of the ground of psychological incapacity for nullity or divorce

The fact that the concept of psychological incapacity has been borrowed from canon law intensifies the issues on the prohibitive costs and abuse by the parties of such ground.⁴⁰⁸ “Great respect” is given by the courts to the interpretations of the National Matrimonial Tribunal of the Catholic Church.⁴⁰⁹ Psychological incapacity must not be included as a ground for divorce because civil and canon laws must remain independent of each other pursuant to the constitutional principle of separation of church and state.⁴¹⁰

(d) Inclusion of both fault and no-fault divorce

Both fault and no-fault divorce is essential for an effective divorce. As noted by the Women’s Legal Bureau, “a no-fault divorce is ideal given the realities of marriage and the myriad causes of failed marriages.”⁴¹¹ The State cannot anticipate all possible causes of marriage breakdown. With no-fault divorce, spouses are empowered to determine for themselves the viability of continuing or ending their marriage. Marriage is consensual in character and its continuance must be subject to the voluntary agreement of the parties with only the necessary safeguards in place to prevent abuse.

(e) Limitation of State participation

The policy of protecting and strengthening family and marriage does not require that the State also participate during the trial and appeal process of divorce. State

⁴⁰⁸ See *Santos*, *supra* note 109 (for discussion of the Family Code Revision Committee). See also discussion, *supra* pages 36, 38-39.

⁴⁰⁹ *Molina*, *supra* note 109.

⁴¹⁰ *Philippine Constitution*, 1987, a II, s 6.

⁴¹¹ *WLBI*, *supra* note 24, at 7.

participation must be limited to determining whether collusion exists or not. The State's investigation is a sufficient safeguard against abuse and fulfilment of the policy on family and marriage. Thereafter, the parties must be given an unimpeded opportunity for spouses to prove their claim and raise their defenses and the courts to rule on the matter without further State intervention.

Fundamentally, reintroducing divorce into Philippine law involves contentious debates that require weaving through the complex interplay of religion and politics. The participation of the public is essential to urge lawmakers to amend the existing and defective legal framework on marriage and come up with the appropriate substantive divorce provisions. The Philippines may still have a long way to go before divorce is finally restored in its laws; however, bringing back divorce in the country is undoubtedly called for, certain, and inevitable.

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Table 1

Grounds for nullity, annulment, and legal separation

NULLITY	ANNULMENT	LEGAL SEPARATION
<ol style="list-style-type: none"> 1. contracted by parties below eighteen years of age; 2. solemnized by a person without legal authority; 3. solemnized without a marriage license; 4. bigamous or polygamous in nature; 5. contracted through mistake of identity; 6. subsequently contracted absent prior recording with the appropriate civil registry and registry of properties of the judgment of annulment or nullity of marriage, partition and distribution of the properties of the spouses and delivery of the children’s presumptive legitimes; 7. contracted by any party who, at the time of the celebration, was psychologically incapacitated to comply with the essential martial obligations of marriage; 8. incestuous in nature; and 9. contracted against public policy. 	<ol style="list-style-type: none"> 1. any of the contracting parties was eighteen years of age or over but below twenty-one and the marriage was solemnized without parental or substitute parental consent; 2. any of the parties was of unsound mind; 3. consent of either party was obtained by fraud; 4. consent of either party was obtained by force, intimidation or undue influence; 5. continuous and incurable physical incapacity to consummate the marriage by either of the parties; and 6. either party was afflicted with a serious and incurable sexually-transmissible disease. 	<ol style="list-style-type: none"> 1. repeated physical violence or grossly abusive conduct directed against the other spouse, a common child, or a child of the spouse; 2. physical violence or moral pressure to compel the other spouse to change religious or political affiliation; 3. attempt to corrupt or induce the other spouse, a common child, or a child of the spouse, to engage in prostitution, or connivance in such corruption or inducement; 4. final judgment sentencing either of the spouses to imprisonment of more than six years, even if pardoned; 5. drug addiction or habitual alcoholism; 6. lesbianism or homosexuality; 7. contracting a subsequent bigamous marriage, whether in the Philippines or abroad; 8. sexual infidelity or perversion; 9. attempt on the life of the other; and 10. abandonment of spouse without justifiable cause for more than one year.

Table 2
Comparison of Divorce Bills

	HB 1799 (2011) HB 4016 (2005)	HB 6993 (1999) SB 782 and HB 878 (2001)
Summary	The bills recognized both divorce and legal separation.	The bills scrapped off legal separation and replaced it with divorce.
Grounds	<ol style="list-style-type: none"> 1. Separation <i>de facto</i> for at least five years at the time of the filing of the petition and reconciliation is highly improbable 2. Legally separated for at least two years at the time of the filing of the petition and reconciliation is highly improbable 3. Any of the grounds for legal separation has caused the irreparable breakdown of the marriage 4. Psychological incapacity of one or both spouses 5. Irreconcilable differences that have caused the irreparable breakdown of the marriage 	<ol style="list-style-type: none"> 1. Repeated physical violence or grossly abusive conduct directed against the other spouse, a common child, or a child of the spouse 2. Physical violence or moral pressure to compel the other spouse to change religious or political affiliation 3. Attempt to corrupt or induce the other spouse, a common child, or a child of the spouse, to engage in prostitution, or connivance in such corruption or inducement 4. Final judgment sentencing either of the spouses to imprisonment of more than six years, even if pardoned 5. Drug addiction or habitual alcoholism 6. Lesbianism or homosexuality 7. Contracting a subsequent bigamous marriage, whether in the Philippines or abroad 8. Sexual infidelity or perversion 9. Attempt on the life of the other 10. Abandonment of spouse without justifiable cause for more than one year 11. Irremediable breakdown of the marriage relationship due to irreconcilable differences
Cooling off period	6 months from filing of petition when the grounds are that of (3) and (5) except in cases involving violence against women and children under R.A. 9262	6 months from filing of petition

	<p style="text-align: center;">HB 1799 (2011) HB 4016 (2005)</p>	<p style="text-align: center;">HB 6993 (1999) SB 782 and HB 878 (2001)</p>
<p style="text-align: center;">Consequences of divorce</p>	<ol style="list-style-type: none"> 1. Marriage bonds are severed. 2. Absolute community and conjugal partnership property are equally divided between the spouses. 3. Presumptive legitimes of children are delivered. 4. Spouse who is not gainfully employed is entitled to support for one year from finality of decree or until he or she finds adequate employment, whichever comes first. 5. Actual, moral, and exemplary damages may be awarded to the aggrieved spouse. 6. Custody of minor children is determined by court. 7. Children are entitled to support. 8. Children conceived or born before the finality of the decree are legitimate. 9. Parties are disqualified to inherit from each other by intestate and testate succession. 10. Under the grounds for divorce are (3) and (5), the innocent spouse may revoke donations in favor of the other spouse as well as the irrevocable designation of the offending spouse as beneficiary in an insurance policy. 	<ol style="list-style-type: none"> 1. Marriage bonds are severed after a year the divorce decree becomes final 2. Absolute community and conjugal partnership property are equally divided between the spouses however if there is an adjudged offending spouse, said spouse does not have any share to the net profits except further if the ground for divorce is that under (3), the net profits are divided equally. 3. Presumptive legitimes of children are delivered a year after the decree become final. 4. Custody of minor children is awarded to the innocent spouse except if the ground is that under (3), the custody is awarded to the spouse more capable in ensuring moral, mental, and physical well-being. 5. Children are entitled to support. 6. Parties are disqualified to inherit from each other by intestate and testate succession. 7. Any of the spouses may revoke donations in favor of the other spouse as well as the irrevocable designation of the other as beneficiary in an insurance policy.

	HB 1799 (2011) HB 4016 (2005)	HB 6993 (1999) SB 782 and HB 878 (2001)
Prescription	None	Petition must be filed within 1 year from knowledge of cause.
Efforts to reconcile	Yes	
Effects of reconciliation	Not mentioned	<ul style="list-style-type: none"> • Reconciliation during the pendency of the proceedings terminates the petition. • Reconciliation after the issuance of the decree sets aside the divorce.
State participation	Yes	
Effects upon filing	<ol style="list-style-type: none"> 1. Spouses are entitled to live separately from each other. 2. Court designates administrator of absolute community or conjugal partnership property. 3. Court provides for support of the spouses and the custody and support of their common children. 	
Judgment based on stipulation of facts or confession of judgment	Not allowed	
Denial of petition	<ol style="list-style-type: none"> 1. Connivance 2. Collusion 	<ol style="list-style-type: none"> 3. Connivance 4. Collusion 5. Consent 6. Condonation 7. Both parties at fault 8. Prescription 9. Irreconcilable martial differences are insufficient to justify divorce 10. Petitioner has not resided in the country within one year prior to filing of the petition
Divorce abroad	A divorce obtained abroad by a Filipino, is valid in the country if based on any of the grounds provided under Philippine law.	Not mentioned

