

GREAT EXPECTATIONS AND A CHRONICLE
OF A DEATH FORETOLD:
DECONSTRUCTING DIVORCE

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“Is not marriage an open question, when it is
alleged, from the beginning of the world, that
such as are in the institution wish to get out,
and such as are out wish to get in?”

– Ralph Waldo Emerson

I. INTRODUCTION

Marriage is something which Filipinos never joke about. We take it as seriously as we take the facts of life and death, because, in a sense, marriage *is* a matter of life and death. It is either considered as a beginning of a new life which should last till death or, after a few months, as the beginning of a slow but painful death and the end of a meaningful life. There comes to a point when the blissful bond of marriage, metamorphoses into the enslaving bondage of union.

For Filipinos, so much value is accorded to the sanctity of marriage that most often, the disillusioned spouse would rather sacrifice his or her self, including her/his children’s life and future just to preserve the marriage. The price to pay is high, yet some still

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believe that the rewards are worth the sacrifice. This is very much expected since the composition of the population is predominantly religious, who were taught ever since they have become aware of the world, that marriage is something that should last forever, something that only death could conquer.

Although couples who marry promised in their vows that only death could end their marriage, this is not the case in real life. Marriage is much vulnerable than we ever would like to believe or accept. And when bond becomes bondage, staying together would be hell¹ on earth, for both the couple and their children, with all the psychological, physical and emotional effects, of living in hell would entail. And in fact, many countries have found a way out of this torment, and that is by enacting a law on divorce. Through such law on divorce, the severance of the bond of marriage is systematically and legally done, so that the interest of both parties whose marriage they decided to put an end into will be protected, and at the same time, striving to protect the children who are products of such marriage.

But closer to home, legal separation in our law is as good as it gets if we are to have a law that would end the marriage. Although strictly speaking, in the eyes of the law, they are still married, since the bonds of marriage still exists even after the petition for legal separation has been granted. Annulment based on psychological incapacity cannot be a substitute to divorce, rules regarding it are much stricter. So people are forced to malign their spouse just to be able to get out of the bondage of marriage by imputing that the spouse is psychologically incapacitated to perform the essential marital obligations and even backing up this claim with the testimony of a competent psychologist or physician. Still, statistics² show that

¹ Jean Paul Sartre in his book *Being and Nothingness* (1966) has said that "hell is other people."

² Divorce Statistics, http://lists.his.com/smart_marriages/html. (last accessed date January 9, 2006).

petitions for legal separation is soaring high. The rate or number of marriages being ended is not surprising considering that the rate of dissatisfaction after several years of marriage also increases. But for some, the reasons are not as petty or as shallow as a simple misunderstanding or irreconcilable differences. Many cases of separation stem from physical and emotional abuse suffered by a spouse during cohabitation.

The institution of marriage has been for several years in constant battering and beating, but the institution of marriage backed up by several powerful religious groups remains resilient here in the Philippines. However, this policy on marriage by the Philippine Government is not without critics. Many sectors of the society are clamoring for a review by the government of the politics of marriage especially that which pertains to the possibility of enacting a divorce law.

Indeed efforts have been made to introduce the possibility of having a divorce law in this country. But these efforts have been strongly objected to by several of the biggest and most powerful religious groups in the country, including conservatives who have anchored virtue and morality to the idea of sacrificing one's self to preserve marriage, with the breakdown of family values and the destruction of the concept of family itself, the degradation of the sanctity of marriage by it being viewed as something that could be over and done and forgotten in three to five years, as the reasons why divorce should not be legalized in the Philippines.

This article aims to discuss and analyze the feasibility of enacting and effectively implementing a divorce law in the Philippines. Although there has already been efforts and in fact a pending bill in the House of Representatives regarding divorce, recent political turmoil in the country has buried the discussion about it. The interest and controversy it has stirred on the people and the country faded as soon as a new political intrigue invaded the news headlines. But this subject of divorce would still have to be faced and be addressed not only by the legislators most importantly by the public who would ultimately have to face the consequences of such legislation.

II. MARRIAGE AND THE HAPPILY EVER AFTER

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 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 the code.³

The term marriage has two distinct meanings. In one sense it is limited to the procedure by which a man and a woman become husband and wife. In the second sense it is a status involving duties and responsibilities which are no longer matter for private regulations, but the concern of the State.⁴

As a contract, it is generally required that both parties must consent to its terms and have legal capacity. Marriage, because of the personal relationships of those involved, goes well beyond a normal business contract in that it creates a unique legal relationship. Marriage contract are not revocable at the will of the parties, but only upon court order. In addition marriage contracts are not assignable or transferable. It has been observed that marriage depends to a great extent on sentiment, attachment, and affection that persons with weaker as well as stronger intellects feel and that it does not depend much as ordinary contracts on the exercise of clear reason, discernment, and sound judgment.⁵

Common Law held that marriage was a spiritual matter rather than a secular matter and therefore, lay outside the jurisdiction of secular courts, however in England, as early as 1963, the Court of Common Pleas decided in the case of *Mary Holcroft v. Dickensen*, that

³ FAMILY CODE, ART. 1.

⁴ A. TOLENTINO, CIVIL CODE VOLUME I, 220 (2002).

⁵ R. ROTHENBERG & S. BLUMNKRAZ, PERSONAL LAW 347 (1984).

the marriage was not only a spiritual or ecclesiastical matter but was also a legal matter.⁶ This matter, no doubt is clear in our jurisdiction since we adhere to the separation of the church and state, that is – legally speaking. Because much as we honor and recognize legally a marriage that has been celebrated by a religious sect to whom the parties getting married belong, in the eyes of the law, a marriage that has been contracted or severed merely through the pronouncement of the religious sect in contravention of the law will not be considered as valid act. It would still require the legal process as mandated by the governing law to be followed for the sect pronouncement to have a legal effect.

Whether under the common law or under the civil law, upon marriage, the husband and the wife become one single moral, spiritual and social being not only for the purpose of procreation but also for the purpose of mutual help and protection physically morally and materially.⁷

The State through the 1987 Constitution⁸ recognizes the inviolability of marriage as a social institution. The Constitutional provision on marriage, however do not imply that the legislature cannot enact a law allowing absolute divorce. While it is fundamental that marriage must be protected, it is likewise acknowledged that there may be certain cases where the parties might have undergone a marriage ceremony to bind themselves together, but subsequently no functional marital life would exist. Hence there is no marriage to preserve at all. The legislature has the plenary power to decide what sort of situations allowing absolute divorce may be recognized within the limits allowed by the Constitution.⁹

⁶ *Id.* at 342.

⁷ *Saclolo v. CAR*, 106 PHIL 1038.

⁸ CONST. art. Xv, § 2.

⁹ *M. STA. MARIA, JR., PERSONS AND FAMILY RELATIONS LAW* 102 (2004).

III. THE LABYRINTH OF DIVORCE

Definition and Anatomy of Divorce

There is no other way of understanding the concept of divorce unless one understands the mechanism under which the elements and essential ingredients that bring about the situation leading to the inevitable break down of marriage. All too often a marital breakup is the end of a dream began as a joyful partnership. In the dissolution process, both the husband and the wife tend to look at the past through different windows. At best the affair is a public confession of a failure in a private, highly personal relationship.¹⁰ Though consequences are mainly legal, the implications are transcending. Concerns regarding divorces are not exclusive to the legal realm; it is also a delicate private matter that concerns personal values.

A divorce is a judicial dissolution of marriage. Legally a divorce action is a civil court proceeding, or lawsuit based on a claimed matrimonial wrong.¹¹ Just as the bases of the marriage relationship are controlled by statute, the bases for divorce are also controlled by statute. The reason for divorce is an act of marital misconduct as defined by statute arising after the marriage ceremony.¹²

The state recognizes the sanctity of marriage and is vigilant in protecting such institution so that divorce is allowed only in a situation where the state feels that the marital relationship of the parties can no longer be sustained, that is where the relationship between the husband and the wife is no longer consistent with the marriage relationship.¹³ Necessity is the mother of invention, and so divorce was created as a result of necessity of disentangling the marriage bond. While other foreign jurisdictions' realization of its

¹⁰ G. MORTON, *WOMAN LAW: A GUIDE TO LEGAL MATTERS VITAL TO WOMEN* 94 (1981).

¹¹ *Id.* at 101.

¹² *Supra* note 5, at 374.

¹³ *Id.*

necessity came early, it is only now that the Philippine government opted to discuss the possibility of implementing an absolute divorce statute.

There are two types of divorce – absolute and limited. An absolute divorce, also called a “*divorce a vinculo matrimonii*” is a judicial termination of a marriage based on marital misconduct or other statutory cause arising after the marriage ceremony. As a result of an absolute divorce both parties’ status becomes single again.¹⁴

The second type of divorce is limited divorces or “*divorce a mensa et thoro*.” The consequences of limited divorces vary from state to state. Typically a limited divorce is commonly referred to as a separation decree; the right to cohabitation is terminated but the marriage is undissolved and the status of the parties is not altered.¹⁵ This kind of divorce is in fact effective in the Philippines in the form of legal separation. However it is the first type of divorce that is being proposed in the recent bill¹⁶ by Representative Liza Zaragoza-Maza and the one that several sectors of the society have been clamoring for.

The second type of divorce is subdivided further into two types. First is the traditional *fault* statutes, which is divorce based on grounds provided by the divorce statute. Second is the *no fault* divorce statute which only requires proof of irreconcilability of the couple or the irretrievable breakdown of marriage. The proposed bill is actually a fusion of the *fault* and *no-fault* divorce statute.

The traditional grounds for divorce establish one party as guilty and the other as innocent. Frequently, this will have an effect on the

¹⁴ Divorce, <http://straylight.law.cornell.edu/topics/divorce.html> (last accessed date Aug. 16, 2005).

¹⁵ *Id.*

¹⁶ An Act Introducing in the Philippines, Amending for the Purpose Title II, Articles 55-66 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 Purpose, House Bill No. 4016, 13th Congress, 1st Regular Session 1 (2005).

issues of alimony and custody. This often leads to protracted and acrimonious proceedings¹⁷ that is why many states have enacted what is called *no-fault* divorce statutes. This is a response to outdated common law divorce which required proof in a court of law by the divorcing party that the divorcee had done one of several enumerated things as sufficient grounds for the divorce. This entailed proving that the spouse had committed adultery, or some other unsavory act. No-fault divorce eliminates this potentially embarrassing and undesirable requirement by providing for the dissolution of a marriage on a finding that the relationship is no longer viable.¹⁸ Many of the no-fault statutes refer to “irretrievable breakdown” of the marriage or to the “irreconcilable differences” of the parties.¹⁹

The term ‘divorce’ may be understood in a number of different ways – most obviously, as an event which entails massive disruption and reorganization for individual families. But divorce may also be conceived as an area of substantive law destroying the status of marriage, or as a legal process involving visits to solicitors, court appearances and so on. As far as these latter aspects are concerned, there is a growing tendency to view divorce in administrative terms, with courts seeking to respond as quickly and efficiently as possible to the parties’ private decision to end their marriage. But whilst obtaining a decree may be for most couples, a relatively straightforward and uncontentious matter, there are relatively few divorces which do not involve, in at least some aspect conflicts of interest or perception. Fulfillment of the parties’ hopes for the future may also to some extent, depend on the cooperation of their former spouse. So divorce, far from being purely administrative is also a time of conflict or negotiation.²⁰

¹⁷ *Supra* note 5, at 378.

¹⁸ *Supra* note 14.

¹⁹ *Supra* note 5, at 378.

²⁰ D. GWYNN, PARTISAN AND MEDIATORS: THE RESOLUTION OF DIVORCE DISPUTES 1 (1988).

Evidence for the persistently conflictual nature of divorce is found in the growing numbers of contested applications to the courts over so called 'ancillary matters,' – that is to say, money, property and children. Furthermore it would appear that the number of contested applications understates the extent of the conflict over these issues. The majority of divorcing couples, even though they may not contest these matters through the courts, find themselves in dispute over one, if not all three. Some do indeed resolve their differences without outside assistance, although such settlements may reflect fatigue or domination as much as genuine agreement. But the great majority of divorcing couples will seek help in negotiating or as it might appear, in battling with one another.²¹

The plots of the stories are more often than not a rehash of the first story. A man meets a woman, man falls in love with the woman, man marries the woman, expectations run high, and eventually disappointment and discontentment sets in and the marital relationship becomes conducive ground for breeding bitterness. The cycle of the story is such, and will remain as such as long as the church bells are ringing for the newlyweds and as long as bridal bouquets are being tossed in the air for the hopeful maidens.

What may have started as a genuine promise of blissful marriage may end into a bitterly tedious process of separation. Archetypical marriages which transform to divorces are those where expectations are too great but where actuality or realization are much unsatisfactory. This is because the marriage vow was to a large degree based the other person meeting personal needs and expectations.²² In this sense continuity of marriage becomes conditional on whether what has been projected by each spouse from the other would eventually be realized or not.

²¹ *Id.*

²² Divorce, <http://theinternetcollege.com/55.html> (last accessed date Aug. 16, 2005).

Emotions sometimes run very high when a marriage begins to break apart. The stakes involved for both man and woman may be particularly important. Children are sometimes reduced to having one effective parent, and they may be torn between the individual parents' demand for custody. Financial security that has been planned for years may be put in jeopardy. Divorces almost invariably lead to bitterness, a stifling of love and a loss of community prestige.²³ There is so much at stake yet many choose to gamble it all, in a hope for a better and more peaceful life. What is the use of a complete family if the husband and wife are living in a marital hell that has to be witnessed by their children? What is the use of a secured financial future if one has to fear for his or her own life constantly? These are but few justifications used by couples who seek divorce. And whether they truly find a more fulfilling life after the divorce decree has been given by the court, only time can tell and only they can be truthful witness to their own bliss or misery.

The Legends of the Fall: History and Implementation of Divorce

Divorce in Foreign Countries

It is unavoidable to discuss the subject of divorce without presenting it based on how it is implemented in foreign jurisdiction since only Philippines and Malta are the two remaining countries without a divorce law.

In Canada, there was no divorce law until the 1960s. Before that the only way to get divorced was to apply to the Canadian Senate where a special committee would undertake an investigation of a request for a divorce and if they found that the request had merit, the marriage would be dissolved by an Act of Parliament.²⁴ Constitution of Canada specifically made marriage and divorce the realm

²³ *Supra* note 10, at 94.

²⁴ Divorce, <http://en.wikipedia.org/wiki/divorce> (last accessed date Aug. 16, 2005).

of the federal government. Essentially this means that Canada's divorce law is uniform throughout Canada.²⁵

The Canada Divorce Act recognizes divorce only on the ground of breakdown of the marriage established if one of three grounds hold: adultery, cruelty, and being separated for one year. Most divorces proceed on the basis of the spouses being separated for one year, even if there has been cruelty or adultery. This is because proving cruelty or adultery is expensive and time consuming. The one-year period of separation starts from the time at least one spouse intends to live separate and apart from the other and acts on it. A couple does not need a court order to be separated, since there is no such thing as a legal separation" in Canada. A couple can even be considered to be "separated" even if they are living in the same dwelling. Either spouse can apply for a divorce in the province in which either the husband or wife has lived for at least one year.²⁶

On September 13, 2004, the Ontario Court of Appeal declared the Divorce Act also unconstitutional for excluding same-sex marriages, which at the time of the decision were recognized in three provinces and one territory. It ordered same-sex marriages read into that act, permitting the plaintiffs, a lesbian couple, to divorce.²⁷ This is an indication that the concept of divorce is being moved to a higher level of applicability in Canada – that of same sex marriages.

In Scotland, until 1560, when papal authority was abolished by Act of Parliament, the law on marriage was the canon law. This did not recognize divorce. With the Reformation, the common law recognize divorce for adultery and, by statute in 1573, desertion was also recognized as a ground for divorce. Thereafter, until 1830, the law was judicially developed by the Commissary of Edinburgh.

²⁵ Even in Quebec, that differs from the other provinces in its use of the civil law as codified in the Civil Code of Quebec as opposed to the common law that is in force in the other provinces and generally interpreted in similar ways throughout the Anglo-Canadian provinces.

²⁶ *Supra* note 24.

²⁷ *Id.*

Jurisdiction in divorce actions passed to the Court of Session. The grounds however remained the same until the development of the concept of matrimonial offense resulted in the Divorce Act of 1938. In addition of cruelty, sodomy, and bestiality as grounds; the concept of no fault divorce was introduced in the same Act with the addition of 'incurable insanity' as a ground.²⁸

Growing recognition that 'fault' was not necessarily at the root of marriage breakdown led to the passage of the Divorce Act of 1976, which provided that 'irretrievable breakdown' was the sole ground of divorce; but contradictorily went on to provide that this could only be evidenced by one of five sets of facts: adultery, desertion, unreasonable behavior, two years separation plus the defenders consent to divorce, or five years separation. The third of these came to be so generously interpreted by the courts as to form the most popular ground for divorce for a time. Subsequently the Sheriff Court acquired a concurrent jurisdiction in divorce actions and the introduction of 'do-it-yourself' divorce has led to a situation in which the vast majority of divorces in Scotland are uncontentious; the very few exceptions mostly being those in which there is financial argument.²⁹ Financial consequences of divorce are dealt with by the Family Law (Scotland) Act 1985. This provides for a division of matrimonial property³⁰ on divorce.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Matrimonial property is generally all the property acquired by the spouses during the marriage but before their separation, as well as housing and furnishings acquired for use as a home before the marriage, but excludes property gifted or inherited. Either party to the marriage can apply to the court for an order under the 1985 Act. The court can make orders for the payment of a capital sum, the transfer of property, the payment of periodical sums, and other incidental orders. In making an order, the court is, under the Act, guided by the following principles: (1) The net value of the matrimonial property should be shared fairly, and the starting point is that it should be shared equally; but (2) fair account should be taken of economic advantage derived by either party from contributions by the other, and of economic disadvantage suffered by either party in the interests of the other party or of the family; and (3) The

The general approach of the Scottish courts is to settle financial issues by the award of a capital sum if at all possible, allowing for a 'clean break' settlement, but in some cases periodical allowances may be paid, usually for a limited period. Fault is not normally taken into account.³¹ Decisions as to parental responsibilities, such as residence and contact orders, are dealt with under the Children (Scotland) Act 1995. The guiding principle is the best interests of the child, although the starting assumption is in practice that it is in a child's best interests to maintain contact with the non-custodial parent.³²

The legal recognition of divorce in England lagged far behind. Prior to 1670 a marriage could only be ended by the church courts if it could be shown to have never existed in the first place, either through inability to consent or by want of capacity to marry. A marriage could also be ended if one of the parties was impotent or frigid when the marriage was contracted. It was also possible to get a legal separation from the church known as divorce a *mensa et thoro*. Grounds for separation included adultery, cruelty and heresy, and it meant that any offspring were not rendered illegitimate. However, neither spouse could remarry until the other had died.³³

In 1530's, Henry VIII decided that he wished to divorce his first wife, Catherine of Aragon on the grounds of affinity; he argued that, since Catherine was his brother Arthur's widow, the marriage had never really existed Catherine claimed that her marriage to Arthur had never been properly consummated. In 1533, Thomas Cranmer

economic burden of caring for a child of the marriage under 16 years should be shared fairly between the parties (but child support is not normally awarded by the court, as this is in most cases a matter for the Child Support Agency).

³¹ *Supra* note 24.

³² *Id.*

³³ In his 1990 work on the subject, *Road to Divorce: England 1530-1987*, the late historian Lawrence Stone was one of the first to point out that the legal barriers to divorce were not an absolute bar against remarriage, since the short life expectancy of the time guaranteed that one spouse would certainly outlive other and would soon be free to marry again.

was appointed Archbishop of Canterbury and he declared that Henry's marriage to Catherine was void effectively bastardizing their daughter Mary later Mary I. In 1536, Cranmer similarly declared Henry's marriage to Anne Boleyn void, most probably due to Henry's previous relationship with Anne's sister Mary Boleyn. Cranmer tried to reform The Church of England's Canon law so that it allowed divorce for adultery, cruelty and desertion, but these changes were not implemented.³⁴ This is perhaps the most famous of all feats taken with regards to divorce and the most influential move premised on divorce which changed significantly a history of a state.

The procedure for divorce in English law went as follows: first the husband brought an action for "Criminal Conversation" to establish the adultery, then he obtained a divorce a *mensa et thoro* from the church and then finally he petitioned the House of Lords to grant the divorce.³⁵

In 1857, the Court for Divorce and Matrimonial Causes, based in London, was established, taking over the divorce duties of the church courts. Men could obtain divorce for adultery but women had to prove cruelty or desertion, in addition to their husband's adultery. In 1923 women were allowed to use the same grounds for divorce as men. In 1969, after much debate, 'irretrievable breakdown', on the basis of one of five grounds became the test of divorce.³⁶

The French Civil code modified on January 1, 2005, permits divorce for four (4) different reasons: mutual consent; acceptance; separation of two (2) years; and due to the 'fault' of one partner.³⁷

Recently a Malaysian court sustained the validity to divorce by a man who served divorce on his wife via a text message.³⁸ This is

³⁴ *Supra* note 24.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Divorce, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/asia-pacific/3100143.stm> (last accessed date, Jan. 10, 2006).

taking the process of divorce into a different level – technologically oriented and responsive to ever changing society.

In Japan, there are four types of divorce. Divorce By Mutual Consent (*kyogi rikon*)³⁹, Divorce By Family Court Mediation (*chotei rikon*), Divorce By Family court Judgement (*shimpan rikon*), and Divorce by District Court Judgment (*saiban rikon*).⁴⁰

Divorce by mutual consent is a simple process of submitting a “Green Form,”⁴¹ a declaration to the relevant government office that says both spouses agree to divorce. If both parties fail to reach agreement on conditions of a Divorce By Mutual Consent, such as child custody which must be specified on the divorce form, then they must use one of the other three types of divorce. It should also be noted that another type may also be necessary in the case of an international divorce, as Japan’s Divorce By Mutual Consent is not recognized by all countries.⁴²

Divorce in the United State is a matter of state law, not federal law. The country court’s family division judge on petitions for dissolution of marriages. National Association of Women Lawyers convinced the American Bar Association to create the Family Law section in the courts, then introduced no-fault divorce law in 1960. Each

³⁹ Divorce By Mutual Consent in Japan differs from divorce in many other countries in that it is not always possible to verify the identity of the non Japanese spouse in the case of an international divorce. This is due to two facts. First, both spouses do not have to be present when submitting the divorce form to the government office. Second, a Japanese citizen must authorize the divorce form using a personal stamp (*hanko*), and Japan has a legal mechanism for registration of personal stamps. On the other hand, a non-Japanese citizen can authorize the divorce form with a signature. But there is no such legal registry for signatures, making forgery of the signature of a non-Japanese spouse difficult to prevent at best, and impossible to prevent without foresight. The only defense against such forgery is, before the forgery occurs, to submit yet another form to prevent a divorce form from being legally accepted by the government office at all. This form must be renewed every six months.

⁴⁰ *Supra* note 24.

⁴¹ This form is often called the due to the wide green band across the top.

⁴² *Supra* note 24.

state's legislature has enacted divorce laws that set forth the requirements for obtaining a divorce. These requirements vary from state to state. Some states maintain forms of fault-based divorce. Some states have covenant marriage which makes the divorce more difficult to obtain than in the typical no-fault divorce action.⁴³

Divorce in the Philippines

Historically, absolute divorce has existed in Philippine laws. In pre-colonial Philippines, a woman could obtain divorce in order that she might re-marry by simply returning the dowry to the man or his parents with an additional amount equal to the dowry. If she did not remarry, only the dowry was returned. If the couple had children, both the dowry and fine went to the children, which was held in trust for them by the grandparents or responsible relatives.⁴⁴

During the Spanish Regime, only relative divorce was allowed under law called *Siete Partidas*⁴⁵, whose six grounds for divorce included maltreatment by deed or serious insults; or proposal of the husband to prostitute his wife or attempt to corrupt their sons or prostitute their daughters.⁴⁶

On March 11, 1917, Commonwealth Act No. 2710 of the American colonial period provided for absolute divorce with only two grounds: (1) adultery on the part of the wife; and (b) concubinage on the part of the husband. It implicitly ruled out relative divorce.⁴⁷

During the Japanese occupation of the Philippines, Executive Order No. 141 provided nine other grounds for divorce aside from adultery and concubinage, such as, attempt by one spouse against the

⁴³ *Id.*

⁴⁴ M. FELICIANO, *THE FILIPINA: A HISTORICAL PERSPECTIVE* 255 (1994).

⁴⁵ The provisions of the Civil Code on the subject were among those suspended by the Governor General Wyler on Dec. 29, 1889. See TOLENTINO, *supra* note 4, 312.

⁴⁶ Divorce, http://www.fes.org.ph/papers_pilipina.htm (last accessed date Aug. 16, 2005).

⁴⁷ *Id.*

life of the other; or “*slander by deed or gross insult by one spouse against the other to such an extent as to make further living impracticable.*” Upon reinstating American rule in the Philippines in 1944, the American government re-established the Commonwealth of the Philippines and with it, Act No. 2710 was revived.⁴⁸

In 1950, the Civil Code of the Philippines was enacted and provided only for legal separation. And finally, in 1988, the Family Code of the Philippines (E.O. No. 209) took effect and replaced the Civil Code’s provisions on marriage and family.⁴⁹

In the draft of the New Civil Code, as formulated by the Code Commission, it was provided that “divorce may be absolute or relative as the petitioner may choose.” As to the grounds, it was provided: “A petition for absolute divorce can be filed only for adultery on the part of the wife or concubinage on the part of the husband, both offenses as defined in the Penal Code. A petition for relative divorce may be filed for adultery on the part of either spouse. For the purposes of this Code, adultery by the husband is committed when he has carnal knowledge with a woman other than his wife.”⁵⁰

During the discussion of the Code in the Congress, absolute divorce was eliminated, leaving only relative divorce. Following the suggestion of women leaders, the phrase “relative divorce” was changed to “legal separation” in order to avoid the implication which the word *divorce* carries. As approved by the Congress, therefore, the Code provides for “legal separation” which is in reality “relative divorce” as far as legal effects are concerned. This terminology has been adopted by the Family Code.

Tell Me Not in Mournful Numbers of Divorce...

Facts when reduced to numbers become more obvious and comprehensible. Statics are usually indicators of the values and senti-

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ A. TOLENTINO, *supra* note 4, at 313.

ments of the society so that surveys have become important tools for providing a concise and comprehensive information of significant events in our country. Statistics with regards to divorce are necessary factors to be considered in determining the reaction of people about it and the feasibility of its possible implementation.

An annual study in the United Kingdom by management consultants, shows the main causes of divorce based on surveys of matrimonial lawyers.⁵¹ The main causes in 2004 (2003) were:

Extra-marital affairs	– 27% (29%)
Family strains	– 18% (11%)
Emotional/physical abuse	– 17% (10%)
Mid-life crisis	– 13% (<i>not in 2003 survey</i>)
Addictions (e.g. alcoholism and gambling)	– 6% (5%)
Workaholism	– 6% (5%)

Regarding extra-marital affairs, men engaged in them in 75% of cases; women in 25%. In cases of family strain, it was women's families in 78% of cases who were the cause, compared to 22% of men's. Emotional/physical abuse was more evenly split with women affected in 60% and men in 40% of cases. In 70% of workaholism-related divorces it was men who were the cause, and 30% women. The 2004 survey found that in 93% of cases divorces were petitioned by women, very few of which were contested. 53% of divorces tended to occur in marriages which had lasted between 10 and 15 years, with 40% ending between 5 and 10 years. The first 5 years tend to be divorce-free, and if a marriage survives more than 20 years it is unlikely to end in divorce. Regarding divorce settlements, women obtained a better or considerably better settlement than men in 60% of cases. In 30% of cases the assets were split 50-50, and in only 10% of cases did men achieve better settlements (down from 24% the previous year).⁵²

⁵¹ *Supra* note 24.

⁵² *Id.*

The divorce rate is low among Muslims compared to other groups; some think that the rate is slowly rising. For example: in 2004 in Singapore (which has an 18% muslim minority) many feared that the divorce rate among muslims had risen too high: 9 out of every 1000 marriages, a ratio three times higher than Malaysia and five times higher than Indonesia.⁵³

In the United States, in 2003 there were 7.5 marriages per 1000 people and 3.8 divorces per 1000 according to the U.S. Department of Health and Human Services. In other words, there were half as many divorces as marriages that year. Statistics like these are frequently interpreted to mean that half of all marriages end in divorce. That conclusion, strictly speaking, does not follow from those data, but other government surveys of marriages over time have found similar percentages of marriages ultimately ending in divorce. A record released in 2001, based on a 1995 survey, found that 43 percent of first marriages ended in separation or divorce within 15 years, with 1 in 3 ending within 10 years and 1 and 5 ending within 5 years.⁵⁴ US handle billions of dollars in alimony and child support arrangements, which commonly result from divorces.⁵⁵

IV. DIVORCE AS A PROPOSED AMENDMENT TO THE FAMILY CODE

For many years various non-governmental organizations especially those representing the women's sector have been lobbying for

⁵³ *Supra* note 24.

⁵⁴ *Id.*

⁵⁵ According to a 2003 US census report, 43.7 percent of custodial mothers, and 56.2 percent of custodial fathers are divorced or separated. A 2005 Census Bureau Report found that in 2002, \$40 billion had been paid in support arrangements by 7.8 million payers, 84% of whom were men. States also collected federal incentives to collect support payments, with a potential incentive pool of up to 54 million in fiscal 2004. A media kit for the National Child Support Enforcement Association, a child support advocacy group, claims that 60,000 professionals work to administer and enforce child support arrangements.

the passage of a law allowing absolute divorce in the Philippines. House Bill Number 6993⁵⁶ by Representative Ortega was an attempt to put into legislation the sentiments and outcry of many who have suffered enough in the bondage of marriage. However with events that shook the Political-Richter Scale of the country during the Estrada Administration, House Bill No. 6993 was overshadowed.

But just like a phoenix resurrected from its ashes, the Divorce Bill had its rebirth through House Bill No.4016⁵⁷ by Representative Liza Zaragoza-Maza. Among the salient features of the Bill⁵⁸ are the changes in the grounds for obtaining a divorce, and the effects of divorce.

The grounds for divorce are the following:

First, is when 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. The proposed bill recognizes the fact that the long duration of separation of the spouses brought about by the decree of legal separation rendered by the court or merely by *separation de facto* would inevitably result to irreconcilability of the spouses and the impossibility of mending the broken pieces of the marriage bond. It is a fact that people separated by space and emotions not to mention animosity and bitterness become more than stranger to each other as time goes by. This cannot be avoided as it is in fact the reason why couples often decide to separate, that is – coexistence is no longer feasible.

Second, is 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.

⁵⁶ An Act Legalizing Absolute Divorce, Amending for the Purpose Title II, and Certain Provisions Thereunder, of Executive Order No. 209, as amended by Executive Order No. 227, Otherwise Known as the Family Code of the Philippines, House Bill No. 6993, Committee on Revisions of Law, 11th Congress, 1st Regular Session 1 (2002).

⁵⁷ *Supra* note 16.

⁵⁸ *Id.*

Third, is when any of the grounds for legal separation has caused the irreparable breakdown of the marriage. To forgive is to forget, but oftentimes to be forgiving is not a virtue that most people have. Once hurt, the wounds would heal but the scar would always remain as constant reminder of the blunder committed. The ghost of the past would constantly be haunting. This is what usually happens to marriages that have been despoiled by the presence of any of the grounds for legal separation.⁵⁹ Although reconciliation may seem to be an optimistic view, the truth remains that even if couple would endeavor on making their marriage work, their previous wrongdoing would always be a nagging reason not to resolve their differences.

Fourth, is when one or both spouses are psychologically incapacitated to comply with the essential marital obligation. Psychological incapacity as a ground for divorce is actually a lifting of the provision of the Family Code⁶⁰ regarding annulment of marriage on the basis of incapacity to perform the essential marital obligation. The proposed amendment to the law deleted the phrases on the original law, to wit: “who was at the time of the celebration” and “even if such incapacity becomes manifest only after its solemnization.” The difference in the proposed law and the original law, is that while Art. 36 of the Family Code requires juridical antecedence⁶¹, meaning the incapacity must be existing at the time of the celebration of the marriage, although manifesting much later, the proposed amendment, the proposed amendment seem to imply that no such requirement is necessary in case of divorce.

Fifth, is when the spouses suffer from irreconcilable differences that have caused the irreparable breakdown of the marriage. The true innovation that has been proposed by the bill is the one that provides for “irreconcilable differences which result to irreparable

⁵⁹ FAMILY CODE, art. 55.

⁶⁰ FAMILY CODE, art. 36.

⁶¹ *Republic v. CA*, 268 SCRA 211, G.R. No. 108763, Feb. 13, 1997.

breakdown of the marriage” as a ground for absolute divorce. This ground has its origin from western countries that have been implementing divorce law for many years. This is actually what is known as the “no-fault divorce”. Many of the no-fault statutes refer to “irretrievable breakdown” of the marriage or to the “irreconcilable differences” of the parties.⁶²

The effects of the divorce bill to a marriage are the following:

First, the spouses’ are entitled to live separately from each other after filing the petition for divorce. *Second*, the divorce decree shall sever the marriage bond. *Third*, the divorce decree shall have the effect of dissolving and liquidating the absolute community or the conjugal partnership of gains and dividing equally between the spouses, the delivery of the presumptive legitime. *Fourth*, the entitlement of the spouse not gainfully employed to support from the other spouse until he or she finds adequate employment which shall only be for one year from the finality of the decree of divorce. *Fifth*, the aggrieved spouse shall be entitled to actual, moral, and exemplary damages. *Sixth*, the custody of any minor child shall be given to the fit parent in the best interest of the child. *Seventh*, the children shall be entitled to support. *Eighth*, children conceived or born before the decree of divorce has become final and executory shall be considered legitimate. *Ninth*, the parties shall be disqualified from inheriting from each other by intestate succession and provisions in favor of one spouse made in the will of the other spouse shall be revoked by operation of law. *Tenth*, a decree of divorce validly obtained by a Filipino citizen abroad shall be valid in this country only after a determination by the Philippine court that the same is based on a ground falling under Art. 55 of the Family Code.

The more significant effects of the change in the law is with regard to entitlement to actual, moral, and exemplary damages of the offended spouse and the validity of divorce obtained by a Filipino citizen abroad. The Supreme Court held in the recent case of *Republic*

⁶² *Supra* note 4, at 378.

*v. Orbecido*⁶³ that when two Filipino citizens are validly married, and where one party is later naturalized as a foreign citizen and obtains a valid divorce decree capacitating him or her to marry, the Filipino spouse could likewise remarry under the Philippine Law.

V. CRUCIFIXION OF VALUES: DIVORCE AND THE RELIGION-ORIENTED SOCIETY

Whether or not the government admits it, the view espoused by the religious sectors largely influence all the policy that the government seeks to implement may it be of concern to religion or not, their influence is boundless and unlimited. There simply is no limit as to what the church may dictate to the government on what to implement or not. The government or more appropriately the officials who make up government are well aware of the fact that religion plays an important role in dictating to its followers who are to be considered as fit to lead or govern. So they have no choice but to follow the dictates of these religious sectors or they would have to pay a high price for going against them.

Before, many countries in Europe, such as France prohibited divorce as it was not condoned by the Catholic Church. Sometimes citizens would have to travel to other jurisdictions to obtain a divorce.⁶⁴ The church has remained strong in its grip in using its influence and power to serve as forcesshields of the institution of marriage.

In Islam, divorce is allowed but discouraged. A “no-fault” divorce is allowed in Islam, albeit said religion discourages the same. Only the husband can decide to have a no-fault divorce. Under Sharia law, a husband may repeat a declaration of divorce three times. Also, for husbands, plural marriage is allowed under Sharia, but in Sharia, the custody of the children would always go to the father. Islam,

⁶³ G.R. No. 154380, October 5, 2005.

⁶⁴ *Supra* note 24.

unlike Christianity, considers marriage to be a legal contract; and the act of obtaining a divorce is essentially the act of legally dissolving the contract. If a man pronounces three divorces against a free woman, or two against a slave, he can lawfully wed neither of them again, unless they have been espoused by another, and this second husband dies, or divorce them. If the man seeks divorce he has to cover the expenses of his ex-wife feeding his child and expenses of the child until the child is two years old (that is if the child is under two years old). After the second birthday the child returns to the father. A wife may also file for divorce on the grounds of fasakh, which since 1974 invokes the very same list of offenses that give the husband grounds for divorce.⁶⁵ If it is the wife who seeks divorce, she must go to a court. She must provide evidence of ill treatment, inability to sustain her financially or sexual impotence on the part of the husband, the husband may be given time to fix the problem, if he fails, the judge will divorce the couple.⁶⁶

Historically the laws governing marriage were based upon the traditional, Judeo-Christian belief that marriage was for life. Marriage was intended to be a permanent institution. Thus the desire for divorce was not held to be self-justifying.⁶⁷ Christian usually acquiesces to divorce in cases of marital infidelity by the other spouse or in cases of desertion by an unbelieving spouse.⁶⁸ Divorce was allowed in certain instances because of human sinfulness.⁶⁹ Judaism recognized the concept of “no-fault” divorce thousands of years ago. Judaism has always accepted divorce as a fact of life, albeit an unfortunate one. Judaism generally maintains that it is better for a couple

⁶⁵ J.R. BOWEN, ISLAM, LAWS AND EQUALITY IN INDONESIA, AN ANTHROPOLOGY OF PUBLIC REASONING 205 (2003).

⁶⁶ *Supra* note 24.

⁶⁷ Divorce, <http://leaderu.com/org/probe/docs/divorce/html> (last accessed date Aug. 16, 2005).

⁶⁸ *Id.*

⁶⁹ Divorce, http://nvbar.org/publication_pamphlets/divorce.html (last accessed date Aug. 16, 2005).

to divorce than to remain together in a state of constant bitterness and strife.⁷⁰

Formerly it was held that a divorce according to Mohammedan practices cannot be recognized, because only courts can grant divorces. However, Republic Act No. 394, approved on June 17, 1949 provides: "For a period of twenty years from the date of approval of this Act, divorce among Moslems residing in non-Christian provinces shall be recognized and be governed by the Moslem customs and practices."⁷¹

On February 4, 1977, Presidential Decree No. 1083 was issued, codifying the Muslim system of personal law, in which divorce is recognized dissolving the marriage bond, numerous grounds, among them being repudiation of the wife by the husband, vow of continence by the husband, redemption by the wife, neglect or failure of the husband to provide support for the family for at least six consecutive months, conviction of the husband to a penalty of at least one year of imprisonment, failure of the husband to perform his marital obligations for six months, unusual cruelty of the husband, impotence or insanity of the husband.⁷²

The Catholic Church in the Philippines has been firm and consistent with its stand against the passage of a divorce law. The church has declared that, "divorce breaks the contract to which the spouses freely consented to live with each other till death."⁷³

Marriage in the Philippines has been revered because of the population's predominantly Roman Catholic composition. Thus, in this country, any intimate relationship between two adult persons

⁷⁰ *Supra* note 24.

⁷¹ A. TOLENTINO, *supra* note 4, at 316.

⁷² *Id.*

⁷³ Catholic Bishops Conference of the Philippines, "CBCP: No to Divorce Law," a position paper presented to the Committee on Revision of Laws, House of Representatives, Congress of the Philippines, on May 19, 1999.

who are not blood related should be maintained within the sacred bond of marriage that is considered as a *permanent union* and *inviolable social institution*. Roman Catholicism upholds in its dogma, the exhortation in the Holy Bible (Matthew 19:6) that “*what God hath joined together, let no man put asunder,*” taking this to mean that only God and not any human being or institution can bring an end to the union. The Muslim religion, however, permits divorce by virtue of its tradition and as upheld in the Code of Muslim Personal Laws.⁷⁴

The values inculcated by religion versus the values implored in exercising the prerogative to choose to be free of an irreparable marriage are two competing values that will ultimately challenge the moral and legal sensibility of the society. Choosing one would mean rejection of the other. Allowing or rejecting divorce would mean the sacrificing of one valued principle in exchange of a completely opposite ideal. Principles would have to be crucified. Values would have to be killed. And this is without any assurance that one day this values and principles would again be resurrected.

VI. CONCLUSION

Filipino culture has always viewed marriage as the most natural part in the course of a person’s life just like menarche or circumcision. Most find it an embarrassment to be writing the word “SINGLE” in a blank asking for one’s civil status. People see it, not as a mere civil status but more of a trophy, a lifetime achievement award that sums up all the things that one has to say about how successfully one is living his or her life. However not all marriages are prelude to a happy ending story, and this is why many countries have a divorce law as a bail out to couple who consider marriage not as a union of two people in love but more of a prison or worse a death sentence. Many times it is too late that couples realize that they intend to navigate on different terrains of life.

⁷⁴ *Supra* note 46.

Marriage and divorce invoke a different temporality, that of the life-cycle stretching from marriage through divorce and death. They raise issues of equality of agency between men and women as much as they invoke distributional issues. They also raise basic questions of sociability across community lines.⁷⁵ To compel people to continue to live together in conflict may be a doubtful strategy for society and of no benefit to the people involved.⁷⁶

A reading of the proposed divorce bill introduced by BAYAN-MUNA Party Representative Liza Maza would reveal that the ultimate purpose of the bill is to fill in the gaps of the present available law on legal separation and annulment of marriages which is believed to be inadequate to serve the purpose it aims to achieve. More significantly it aims to provide an alternative remedy for couples to get out of a marriage which has proved to be destructive of both the family and the very person of a spouse or a child inside an abusive marriage. What has been initially an assertion of women's right to choose whether or not she opts to remain inside a marital relationship has turned out to be an endeavor towards uplifting not only the quality of marital relationship existing but also providing for the children who are product of such union, the best possible family life they could have.

The explanatory note in House Bill No. 4016 provides that the sanctity of marriage is not based on the number of marriages existing but on the quality of marital relationships. So that when the marriage is no longer viable, divorce should be an option. It is a bitter pill to swallow, yet it has to be done sooner or later. This is not just a bandwagon result, but more of the fact of it is inevitability.

The reason why so many are against the proposed divorce law is because of the fear of the unknown. It is a fear that we might be opening a Pandora's Box, that would be a catalyst in the metamor-

⁷⁵ J.R. BOWEN, *supra* note 65, at 173.

⁷⁶ G. MORTON, *supra* note 10, at 94.

phosing of the family and the society into an institution which is uglier than what we have today. Admittedly, divorce law is not the panacea to the social ill that plagues the country, it is however as viewed by the people who supports it as the first step towards gradually healing the society by healing members of a family and giving them a new lease on life, a chance to begin anew.

Whether or not the bill will reach its full potential as a law remains to be a question which will be addressed only after the current political war ends. But perhaps it is this that should be addressed first by the government since the family is the most basic institution in the society, its building block, as it may, it is there that the government should start reforming itself, if indeed it wants to achieve a stronger republic. A symptomatic approach of curing our country by addressing isolated reforms in certain parts of the society without really curing the root cause of the society's malady is like employing a "shotgun-method" hoping and taking chances that at the very least we will be able to strike a good shot.

The government would address the political disunity and civil unrest by eliminating the political leaders and the civil society groups who are anti-administration, without addressing the root cause of such unrest – poverty and societal discontent. The government would address the problem on poverty by providing newly built houses for the homeless for free, without addressing the unemployment rate. The government would address the unemployment problem by providing jobs unsuitable for the professions and expertise of the workers, without addressing the problem in education which is what will adequately prepare them for jobs available. The government would address the problem in education by revising academic curriculums without reinforcing the moral character of the child. But this is a most basic truth: that every child is a part of a family, and the family is where the moral fiber of a person either degenerates or flourish. The success of a family life is in turn determined by the success of a couple's marriage. An irreparable marriage destroys the family. And the problem regarding the degeneration of Filipino family is something that cannot be ignored.

The proposed bill is far from pronouncing its victory; it has not yet fought the battle it is suppose to combat. It is pessimistic yet realistic to assume that the proposed bill will not reach its passage, however given the strong antagonism that it has received from many sectors of the society, it has achieve its purpose of bringing the issue to the interest of the public.

Great is expected of the Divorce Bill. But sadly, its death is fore-told. This is not what matters. The truth remains that in the attempt to deconstruct divorce, we have deconstructed society itself, and by looking at the pieces, we will rediscover the ideals of what a family really is, in all its beauty and sadness. And start rebuilding our lives again.