CONCERNS AND EMERGING TRENDS ON LAWS RELATING TO FAMILY AND CHILDREN*

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INTRODUCTION

Some people might be familiar with "The Family of Man", the most successful photographic exhibition ever assembled consisting of 508 photographs depicting the universality of human experience with vivid shots of birth, love and joy, as well as war, privation, illness and death. Curated by Edward Steichen, it was first shown in 1955 at the Museum of Modern Art in New York, travelled in 38 countries viewed by nine million people, turned into a book with introduction by Carl Sandburg. Steichen's brother-in-law, and was added to UNESCO's "Memory of the World Register"[1]

Evidently, this is a piece with the Universal Declaration of Human Rights, which asserts, in the very opening paragraph of its Preamble:

> "WHEREAS, recognition of the inherent dignity and of the equal inalienable rights of the members of the human family is the foundation of freedom, justice and peace in the world."

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[1] This internationally- renowned photographic exhibition, "The Family of Man", consists of 508 photographs taken by 273 photographers from 68 countries. According to Steichen, his intention was " to prove visually the universality of human experience and photography's role in its documentation." Said he: "This is a mirror of the essential oneness of mankind throughout the world." According to the New York Times, this exhibit "symbolizes the universality of human emotions."

To be sure, this is but to emphasize the links that bind members of the family of men such that the fate of one is the fate of all, idealized in Universal Brotherhood.

At the micro level, however, we are more concerned with "the family of a man", for no one is without a family – except, perhaps, Adam and Eve, although they eventually produced the "Family of Man". In our case, we are begotten of a family and, in turn, we beget a family – or, in the case of our *macho* men, several families. Recognized since time out of mind in lore and legend, in prose and poetry as the bedrock of civilization, we have not let pass any opportunity to extol the place of the family in our society.

In full accord with the policy statement of the Universal Declaration of Human Rights that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State",[2] the Constitution of the Philippines likewise incorporates as one of its State Policies that "[t]he State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution."[3] It goes further by devoting a whole Article with four paragraphs to "The Family", its opening statement stating:

> "The State recognizes the Filipino family as the foundation of the nation. Accordingly, it shall strengthen its solidarity and actively promote its total development."[4]

To Justice Cecilia Munoz Palma, President of the 1986 Constitutional Commission, we owe this dominant position of the family in our 1987 Constitution. From the very inception of the sessions of the Commission, she made known to all the Members her "magnificent obsession" to have one whole Article of the Charter devoted exclusively to this personal concern of hers. Members of the Commission recall very vividly the time when she descended from the rostrum, shedding her Presidential power and authority, to champion this advocacy of hers from the floor. To clinch the commitment from her colleagues, she approached the ladies to propose that we all walk out of the Hall in case the male Members reneged on their pledge to her.

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[2] UNIVERSAL DECLARATION OF HUMAN RIGHTS, Art. 16, ¶3.

[3] CONST., Art. II, §12.

[4] CONST., Art. XV, §1.

In this context, it is not difficult to understand why there is such a hue and cry over the controversial Reproductive Health (RH) Bill now pending in the halls of Congress. Perceived by some as a population measure and by others, including theologians, as a travesty on the handiwork of God, it is, Sisyphus-like, undergoing an excruciating ascent and, in the process, is generating more heat than light. Understandably, every Juan, Pablo and Jose insists on contributing his one peso worth of opinion to any move that would seem to undermine the family.

HISTORICAL BACKDROP

Anyone who seeks to be guided on the law pertaining to a problem concerning his/her marriage or personal relations or a scholar, wishing to do research on these subjects, would be well-advised to look up the Family Code of the Philippines principally, which took effect on August 3, 1988, as well as the Civil Code of the Philippines, legislative and administrative issuances and decisions on the subject handed down by the Supreme Court. In our study of the origin of the law on family relations, quite often, we cite the references from the legal system of Spain and America, which were applied to the Philippines. Hardly does anyone venture to explore the law on these matters in pre-colonial times. One curiously asks: How did the legal system look like in this era? Or was there one? Or can we assume that it was all a *tabula rasa* during our forefathers' time?

It is a historical fact, however, that the indigenous tribes in the Philippines, upon emerging from the hunting into the agricultural stage, settled down into *barangays* composed of anywhere from thirty to one hundred families with a recognized leader or "datu" who discharged the functions of both legislator and arbitrator. With the family recognized as a basic unit of society, marriage was considered a contract between families which gave their mutual consent instead of individuals. Polygamy was tolerated and divorce or separation was relatively liberal on grounds of incompatibility, neglect, or misconduct.

In the coastal regions of southern Mindanao where by mid-13th century, the Sharia of the Muslims was being observed, not only as "law" but as a "code of life", marriage developed to be a religious institution with strict moral standards. Reproduction with religious overtones was considered the

objective of marriage such that crimes against chastity became recognized. The concept of separation of church and state was unknown.[5]

When the Spaniards conquered the Philippines towards the close of the nineteenth century with the sword in one hand and the cross in the other, their legal system was likewise transplanted here. At its core was the early Roman law intertwined with religion and the Code Napoleon of 1805. Actually, the Spanish Civil Code, which embodied the doctrines of the Church, was extended to our country by Royal Decree in 1889.

"The general structure of our Civil Code is based on the Code Napoleon whose, to use Lon Fuller's phrase, 'inner morality' is based on the tenets of the Christian religion. This can be seen from the hortatory and moralistic provisions of our Civil Code reminiscent of the Institutes of the pious Roman emperor Justinian."[6]

In this Spanish Civil Code, we see the seeds of the legal concepts, which so debased the female sex that some sixty years later, our government saw fit to obliterate them. There is the concept of *patria potestas*[7] where the authority of the highest living male ascendant prevailed within the family. Under such rule, women were under perpetual tutelage, first under the father, and after his death, under the husband. The concept was based on the belief of mental inferiority by women, such that they were regarded as no better than chattels.

At this juncture, the author resists the attempt to lead the reader on a fascinating journey to investigate the dominant influence of the Spanish legal

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[5] PACIFICO AGABIN, *MESTIZO*: THE STORY OF THE PHILIPPINE LEGAL SYSTEM 47, 52, 57 (2011).

[6] *Id.* at 94.

[7] Literally means "paternal power". Refers to the absolute authority, under Roman law, held by the male head of a family (the senior ascendant male) over his legitimate and adopted children, as well as further descendants in the male line, unless emancipated. Initially the father had extensive powers over the family, including the power over life and death. Such power had a terribly despotic character. Not only was the father entitled to all the service and all the acquisitions of his child, but he had the same absolute control over his person and can inflict upon him any punishment however severe. A wife did not fall into her husband's power but remained under her father's until she became of full age and capacity by her father's death. *See* BLACK'S LAW DICTIONARY 1287 (9th ed.). *See also* JAMES HADLEY INTRODUCTION TO ROMAN LAW 119-121 (1881) *and* WILLIAM RAMSAY A MANUAL OF ROMAN ANTIQUITIES 291-292 (15th ed. 1894)

system on ours, vestiges of which are discernible in our laws up to the present. Instead the reader could consult two informative and well-researched books edited and authored by law professors in the University of the Philippines (UP) College of Law, namely: "*Civil Code Reader*" by Prof. Carmelo V. Sison (2005) and "*Mestizo: The Story of the Philippine Legal System*", a UP Law Centennial Textbook Project by Prof. Pacifico A. Agabin, published by the UP College of Law this year. Worthy of special mention is the J.B.L. Reyes Professorial Lecture delivered on January 5, 1979 by Prof. Ruben F. Balane entitled "*The Spanish Antecedents of the Philippine Civil Code*" which is one of the articles in the Civil Code Reader cited above.

A bird's eye-view of the laws governing family relations and marriage in the Philippines will reveal that the Spanish Civil Code of 1889 has been the underlying legal foundation in this sphere of our national life.

With the advent of the American regime, major amendments in such field of law emerged, namely: the Marriage Law[8] and The Act to Establish Divorce.[9] The implication was, however, that we, the conquered people, have had to adapt ourselves to the culture, mores, and tradition of our conquerors.

Happily, with the achievement of Philippine Independence after World War II, then President Manuel A. Roxas created a Commission headed by Dr. Jorge C. Bocobo in view of the "need for immediate revision of all existing substantive laws of the Philippines and of codifying them in conformity with the customs, traditions, and idiosyncrasies of the Filipino people and with modern trends in legislation and the progressive principles of law."[10] When it took effect as Republic Act No. 386 on August 30, 1950, fifty-seven percent (57%) of the 2270 articles were still derived from the Spanish Civil Code although quite a number of new provisions were taken from other Civil Law countries. The new Code likewise restated doctrines laid down by the Supreme Court and amendments and innovations were incorporated to rectify unjust or unwise provisions heretofore in force. Quite a boost for the women were reforms liberalizing the rules concerning women's rights and consolidating the family.

The next major effort to introduce radical amendments was the Civil Code Revision Project of the UP Law Center launched in 1979. The Project

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[8] Act No. 3613 enacted on December 4, 1929.

[9] Act No. 2710 which took effect on March 11, 1917.

[10] Executive Order No. 87 (Mar. 20, 1947).

aimed to strengthen the family, clearly define the rights of women in society as equal to that of the men, provide additional safeguards for the protection of children, and bring our law on paternity and filiation in step with the latest scientific discoveries. As Director of the UP Law Center at the time, the author was privileged to be designated Chair of the Committee tasked to prepare a draft of the revision of Book I of the Civil Code jointly with the Integrated Bar of the Philippines (IBP). When the resources of the IBP ran low, the project was turned over to the Law Center with the renowned civilist Justice J.B.L. Reyes as Chairman and Justice Ricardo C. Puno as Co-Chairman.

Why was there a felt need to drastically revise Book I of the Civil Code at this time? The stated reasons are to be found in the explanatory statement submitted by the Revision Committee to President Corazon C. Aquino along with the draft of the Family Code, thus:

> Close to forty years of experience under the Civil Code adopted in 1949 and changes and developments in all aspects of Filipino life since then have revealed the unsuitability of certain provisions of that Code, implanted from foreign sources, to Philippine culture; the unfairness, unjustness, and gaps or inadequacies of others; and the need to attune them to contemporary developments and trends.[11]

Among the Civil Code provisions repealed were those pertaining to Marriage, Legal Separation, Rights and Obligations between Husband and Wife, Property Relations between Husband and Wife, The Family, Paternity and Filiation, Support, and Parental Authority.

When the formidable task was finished after seven years and eight months, it was signed into law as Executive Order No. 209 on July 6, 1987 by President Corazon C. Aquino in her capacity as Legislator under the Freedom Constitution of 1986. The resultant Family Code, enacted separately from the Civil Code, took effect on August 3, 1988.

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[11] *Cited in* Romualdez-Marcos v. COMELEC, 248 SCRA 301, 355 n.22 (Puno, J *concurring*) (1995).

STRENGTHENING THE INSTITUTION OF MARRIAGE

In consonance with the concept of the family as "the foundation of the nation",[12] it is but logical for marriage to be recognized, not merely as a contract or agreement between a man and a woman, but as an institution which once founded, gives rise to far-reaching consequences, implications – and complications unforeseen.

This is the rationale behind the revised definition of "marriage" in the Family Code whose opening line states:

> "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."[13]

This union envisions "permanence", for in Catholic Philippines, marriage is regarded as a sacrament flowing from the Biblical injunction: "What God hath put together, let no man put asunder." God has always been accepted as an unseen but ever-present partner in this union. To be sure there is never any lack of skeptics like Zsa Zsa Gabor who will be remembered as having quipped: "A man in love is incomplete until he has married. Then he's finished". Or Helen Rowland who said: "Love is the quest; marriage, the conquest; divorce, the inquest."

When the Code Commission of 1950 was confronted with a proposal to legalize absolute divorce, it was turned down by the members. Even under the present Family Code, absolute divorce is not recognized, no matter that some witty legal scholars claim that there is indeed a remedy available through the side door. We shall discuss this topic later in more detail.

A Man and a Woman: Partners in Marriage

Who are the parties to a marriage? By legal definition, a man and a woman. Moreover, a major essential requisite for a marriage to be valid is: "Legal capacity of the contracting parties who must be a **male** and a

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[12] 1987 CONST., art. XV, §1.

[13] FAMILY CODE, art. 1.

female".[14] In the past, codifiers felt no need to spell this out as it was presumed or taken for granted, for isn't procreation the unstated primary and primal purpose of the union between a male and a female? When the Committee on the revision of the Civil Code initially met on this basic provision and a member suggested the inclusion of the words "man and woman". Everybody burst out in laughter. In chorus, they exclaimed, "But that's understood!" Someone interjected, "Ah, but you never can tell..." In the end, he won the day. Prophetic words indeed! For now we are entering "the era of same-sex marriages".

To an increasing extent, national and state laws are enacting legislation recognizing the validity of "gay unions". In New York where same sex marriages were legalized in June 2011 under the New York State Law, there is a Filipino male who got married to an American male. Subsequently, Archbishop Timothy M. Dolan issued an official statement declaring: "No Catholic facility or property, including but not limited to parishes, missions, chapels, meeting halls, Catholic educational, health, or charitable institutions or benevolent orders, or any place consecrated, or used for Catholic worship may be used for the solemnization or consecration of same-sex marriages."[15] Even items dedicated, consecrated, or used for the celebration of Catholic liturgy or sacred worship may not be similarly used; otherwise sanctions may be imposed on the Church personnel that participates in such ceremonies.[16]

The Archbishop reaffirmed: "The intimate partnership of life and love that constitutes the married state was established by God and endowed by Him with its own proper nature and laws. Consequently, the Church has the authority and the serious obligation to affirm the authentic teaching on marriage, and to preserve and foster the supremely sacred value of the married state."[17] Conservative elders now shake their heads and mumble, "I never thought I'd live to see the day..." Children are suddenly thrust into a bizarre situation beyond their comprehension, for unforewarned and unannounced, their families are transformed from being Dad, Mom and kids, into two Dads or two Moms and bewildered kids.

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[14] FAMILY CODE, art. 2 (1).

[15] Decree of Timothy M. Dolan, Archbishop of New York dated Oct. 18, 2011 *available at*: http://www.archny.org/media/files/Archbishop%27s%20Decree%20%20Diocesan%20Policy%20Regarding%20Same-Sex%20Civil%20Marriages.pdf (accessed on Jan. 22, 2012).

[16] *Id.*

[17] *Id.*

Imagine the legal problems this unusual kind of familial arrangement spawns! Nowhere is this mentioned in the books and so it comes as a rude shock when property has to be settled upon the death of one of the partners, or death benefits have to be given by employers to lawful heirs! Some textbooks are even in the process of being revised to redefine the meaning of "family" to include two men or two women as parents.

A friend of mine called me up simply to blurt out her feelings as she bewailed, "Can you see how our society will look like in a few years' time?" I calmed her down, "Don't worry. Our lawmakers have foreseen that things may come to a head in just this manner. That's why in anticipation, they have included, as an essential requisite for a valid marriage, that it be between 'a man and a woman'."

Sex Change for a Change?

"But suppose", she asked, "in a last-ditch attempt to evade the law, one decides to undergo surgery for a sex change?" The Supreme Court was once confronted with such a dilemma: "When is a man a man and when is a woman a woman? Does the law recognize the changes made by a physician using scalpel, drugs and counseling with regard to a person's sex? May a person successfully petition for a change of name and sex appearing in the birth certificate to reflect the result of a sex reassignment surgery?"[18]

In turning down this petition for change of name after successfully undergoing sex reassignment surgery in Bangkok for the reason that he was "anatomically male but feels, thinks and acts as a female", the Supreme Court declared that:

> "[I]t cannot be argued that the term 'sex' as used (in the Civil Register Law which was enacted in the early 1900s) is something alterable through surgery or something that allows a post-operative male-to-female transsexual to be included in the category 'female'....
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> Considering that there is no law legally recognizing sex reassignment, the determination of a person's sex made at the time of his or her birth, if not attended by error, is immutable. The changes

[18] Silverio v. Republic, G. R. No. 174689, October 22, 2007, 537 SCRA 373.

> sought by petitioner will have serious and wide-ranging legal and public policy consequences."[19]

The Supreme Court has yet to solve its initial dilemma: "When is a man a man and when is a woman a woman?" In the above-cited case, the decision not to recognize the sex change as valid was limited only to the petition for a change of name. In a subsequent case, however, *Republic v. Cagandahan,*[20], the Supreme Court allowed, not only the change in the name of the respondent from Jennifer Cagandahan to Jeff Cagandahan, but also the gender from female to male in his birth certificate.

In the earlier *Silverio* case, the respondent sought a change of gender in his birth certificate from male to female as a result of a sex reassignment surgery. The Supreme Court declared: 'Considering that there is no law legally recognizing sex reassignment, the determination of a person's sex made at the time of his or her birth, if not attended by error, is immutable.'[21]

In *Cagandahan*, however, respondent was regarded at birth as a female but while growing up naturally, developed secondary male characteristics unaided by surgery or medical treatment due to a rare condition called Congenital Adrenal Hyperplasia (CAH) where persons thus afflicted possess both male and female characteristics or intersex anatomy. Statistics showed that about 1 in 10,000 to 18,000 children are born with CAH. The Supreme Court expressed a liberal view in entertaining actions of this character as can be gleaned from the following:

> CAH is one of many conditions that involve intersex anatomy. During the twentieth century, medicine adopted the term "intersexuality" to apply to human beings who cannot be classified as either male or female. The term is now of widespread use. According to Wikipedia, intersexuality "is the state of a living thing of a gonochoristic species whose sex chromosomes, genitalia, and/or secondary sex characteristics are determined to be neither exclusively male nor female. An organism with intersex may have biological characteristics of both male and female sexes."
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> Intersex individuals are treated in different ways by different cultures. In most societies, intersex individuals have been expected

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[19] *Id.*

[20] G.R. No. 166676, 12 September 2008.

[21] *Supra* note 18.

> to conform to either a male or female gender role. Since the rise of modern medical science in Western societies, some intersex people with ambiguous external genitalia have had their genitalia surgically modified to resemble either male or female genitals. More commonly, an intersex individual is considered as suffering from a "disorder" which is almost always recommended to be treated, whether by surgery and/or by taking lifetime medication in order to mold the individual as neatly as possible into the category of either male or female.
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> In deciding this case, we consider the compassionate calls for recognition of the various degrees of intersex as variations which should not be subject to outright denial. "It has been suggested that there is some middle ground between the sexes, a 'no-man's land' for those individuals who are neither truly 'male' nor truly 'female'." The current state of Philippine statutes apparently compels that a person be classified either as a male or as a female, but this Court is not controlled by mere appearances when nature itself fundamentally negates such rigid classification.[23]

The Supreme Court noted that Cagandahan's case is exceptional considering her rare condition has endowed her with predominantly male characteristics which ultimately justified her petition for change of name and gender. In toeing the line, the Court held:

> Respondent here thinks of himself as a male and considering that his body produces high levels of male hormones (androgen) there is preponderant biological support for considering him as being male. Sexual development in cases of intersex persons makes the gender classification at birth inconclusive. It is at maturity that the gender of such persons, like respondent, is fixed.
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> Respondent here has simply let nature take its course and has not taken unnatural steps to arrest or interfere with what he was born with. And accordingly, he has already ordered his life to that of a male. Respondent could have undergone treatment and taken steps, like taking lifelong medication, to force his body into the categorical mold of a female but he did not. He chose not to do so.

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[23] *Id.*

> Nature has instead taken its due course in respondent's development to reveal more fully his male characteristics.
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> In the absence of a law on the matter, the Court will not dictate on respondent concerning a matter so innately private as one's sexuality and lifestyle preferences, much less on whether or not to undergo medical treatment to reverse the male tendency due to CAH. The Court will not consider respondent as having erred in not choosing to undergo treatment in order to become or remain as a female. Neither will the Court force respondent to undergo treatment and to take medication in order to fit the mold of a female, as society commonly currently knows this gender of the human species. Respondent is the one who has to live with his intersex anatomy. To him belongs the human right to the pursuit of happiness and of health. Thus, to him should belong the primordial choice of what courses of action to take along the path of his sexual development and maturation. In the absence of evidence that respondent is an "incompetent" and in the absence of evidence to show that classifying respondent as a male will harm other members of society who are equally entitled to protection under the law, the Court affirms as valid and justified the respondent's position and his personal judgment of being a male.
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> In so ruling we do no more than give respect to (1) the diversity of nature; and (2) how an individual deals with what nature has handed out. In other words, we respect respondent's congenital condition and his mature decision to be a male. Life is already difficult for the ordinary person. We cannot but respect how respondent deals with his unordinary state and thus help make his life easier, considering the unique circumstances in this case.[24]

The following words of the Court in *Cagandahan* are indicative of the times on this matter:

> Ultimately, we are of the view that where the person is biologically or naturally intersex the determining factor in his gender classification would be what the individual, like respondent, having reached the age of majority, with good reason thinks of his/her sex.[25]

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[24] *Id.*

[25] *Id.*

Regardless, of the seemingly categorical statement by the Supreme Court, it nonetheless concedes that there is no law on the matter that governs these cosmetic and medical procedures that were designed to "alter" the gender of a person. Moreover, the *Cagandahan* case can hardly be considered a precedent to support the voluntary change of gender considering that the Court took pains highlighting the involuntary character of CAH. Indeed, the question of gender may hardly be one for courts to resolve which theretofore gave rise to the doctrines expressed in *Silverio* and *Cagandahan*. We may have to turn to Congress to resolve this quandary being faced by a seemingly growing sector of our society, which is now emboldened to 'come out of the closet'. Until then, the fact remains that nowhere on the horizon of family law is there a definitive ruling on the effects of surgery or hormonal treatments on the gender of a person. Do they merely result in a cosmetic change or do they bestow reproductive powers upon the transformed woman?

Proxy Marriages

In other jurisdictions, proxy marriages are allowed where there can be a "stand-in" for an absent contracting party, especially during wartime. Under the Family Code, however, one of the essential requisites of a valid marriage is "consent freely given in the presence of the solemnizing officer."[26] Likewise, although no prescribed form or religious rite for the solemnization of the marriage is required, the very minimum requirement laid down is "for the contracting parties to **appear personally** before the solemnizing officer..."[27] Clearly, marriage cannot be contracted by proxy nowadays or *in absentia* of one of the contracting parties.

However, under the old Marriage Law of 1929, proxy marriages were explicitly allowed. Article 87 of the said law states:

> Marriage may be celebrated in person, or by a proxy to whom a special power has been given; but the presence of the contracting party who is domiciled or resides in the district of the judge who is to perform the marriage ceremony shall always be required. (underscoring supplied)

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26 FAMILY CODE, art. 2 (2).

27 FAMILY CODE, art. 6.

Again, in connection with the marriage ceremony to be performed, Article 100 of the old Marriage Law provides:

> "The marriage ceremony shall be performed as follows: The contracting parties, or one of them and the person authorized by special power of attorney to represent the absentee, shall appear before the municipal judge accompanied by two lawfully qualified adult witnesses." (underscoring supplied)

Proxy marriages of foreign/mixed marriages frequently pose conflict of law issues. For example, in California, because many military servicemen were deployed to the Afghanistan and Iraq conflict zones, the State of California allowed proxy marriages. In case the man dies in the war zone, the wife whom he married by proxy would receive the benefits accruing to her by law. A Filipina went to California under a fiancée visa and married a U.S. military serviceman based in Afghanistan via a proxy marriage. How would such a marriage be characterized under our laws?

Under the doctrine of *lex loci celebrationis*[28], a marriage valid where contracted is valid everywhere. Does that mean, therefore, that said proxy marriage is valid in the Philippines and binding on the Filipina wife? But Philippine laws pertaining to "the status, condition and legal capacity of persons "are binding upon Filipino citizens even though living abroad under the nationality doctrine enunciated in Article 15 of the Civil Code which provides:

> "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."

To an increasing extent, similar problems arise as a result of mixed marriages, thereby raising conflict of law issues.

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[28] Literally means "law of the place of the ceremony". It refers to the law of the place where a contract, usually of marriage, is made. BLACK'S LAW DICTIONARY 995 (9th ed.).

Common-Law Marriages

How about common-law marriages where a man and a woman merely agree to cohabit with each other without undergoing any marriage ceremony? This practice is very common among the less privileged in our society or among formerly married couples living separately from each other for a fact, where either or both decide to live in with somebody other than their estranged partners. Again, this informal arrangement is not considered valid under our jurisdiction where one of the essential requisites of a valid marriage is "consent freely given **in the presence of the solemnizing officer**"[29] and a formal requisite is "a **marriage ceremony** which takes place with the appearance of the contracting parties before a government functionary or a duly authorized religious person.[30] However, if a man and a woman who have been living together for at least five years without benefit of marriage decide to get married and there is no legal impediment at said time to marry each other, they are exempted from procuring a license. Such "legalized concubinage" is authorized under the Family Code[31] to encourage those who have merely agreed informally to live together as husband and wife to formally contract a valid marriage recognized under our laws, thereby giving legitimacy to children born thereafter.

Legal Capacity to Contract Marriage

One of the ways by which the law has sought to strengthen and stabilize the institution of marriage from its commencement is to adjust the marriageable ages of the man and the woman to meet the following standards: they must have the capacity to procreate; they must show their capacity to exercise mature judgment and discretion and be able to support the family. To be sure, age and consent of the contracting parties go to the very essence of their capacity to get married and confront the challenges of their new status in life.

Hence, for the past century, the legal age for contracting marriage has varied in this wise: under the Spanish Civil Code till the so-called New Civil Code (1889-1950): fourteen (14) years of age for the male and twelve (12) years

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[29] FAMILY CODE, art. 2(2).

[30] FAMILY CODE, art. 3(3).

[31] FAMILY CODE, art. 34.

for the female; from the 1950 Civil Code to the Family Code, sixteen (16) years of age for the male and fourteen (14) years for the female and from the 1988 Family Code to the present, the uniform age of eighteen (18) years for both males and females. Here is one area where the females have finally caught up and gained equality with the males, unlike in the previous laws where the difference in marriageable ages seemed to imply that females were not on par with the males in emotional and mental maturity and judgment. The previous age difference could also imply that men still have opportunities to attain higher levels of education and enter the workforce, as opposed to women whose traditional role are homemakers and ultimately destined to marriage, hence, the younger age requirement for women. There are likewise variants in the imposition of the parents' or guardians' consent and advice relative to the ages of the contracting parties.

One of the essential requisites for a valid marriage is "legal capacity of the contracting parties..." referring primarily to the age and "consent freely given..."[32] The consent referred to here is the consent by the parties to the marriage. However, even if they are already emancipated, having reached the age of eighteen (18), the law still requires the consent of the parents when they are between the ages of eighteen (18) and twenty-one (21). Thus, the local civil registrar shall require the contracting parties to exhibit, among others, "the consent to their marriage of their father, mother, surviving parent or guardian or persons having legal charge of them..."[33] One of the grounds for the annulment of marriage is when "the party in whose behalf it is sought to have the marriage annulled was eighteen years of age or over but below twenty-one and the marriage was solemnized without the consent of the parents, guardian or person having substitute parental authority over the party[34]. Finally, Republic Act No. 6809,[35] amending Article 236 of the Family Code, provides: "contracting marriage shall require parental consent until the age of twenty-one." However, provisions still requiring parental consent when the contracting parties are below twenty-one have become meaningless with the enactment of Republic Act No. 6809 which states:

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[32] FAMILY CODE, art. 2(2).

[33] FAMILY CODE, art. 14.

[34] FAMILY CODE, art. 45(1).

[35] Entitled "AN ACT LOWERING THE AGE OF MAJORITY FROM TWENTY-ONE TO EIGHTEEN YEARS, AMENDING FOR THE PURPOSE EXECUTIVE ORDER NUMBERED TWO HUNDRED NINE, AND FOR OTHER PURPOSES", enacted on Dec. 13, 1989.

> "Emancipation takes place by the attainment of majority. Unless otherwise provided, majority commences at the age of eighteen years."

Upon reaching the age of majority, which is eighteen years old now, a person becomes capacitated to exercise fully his civil rights, which includes the act of getting married. Viewed in this light, the requirement of parental consent when a person decides to get married when he/she is already eighteen (18) years of age, as well as the requirement of parental advice when either or both of the contracting parties are between the ages of twenty-one (21) and twenty-five (25) is obviously in deference to our traditions and customs.

One of the strongest presumptions of law is the validity of a marriage once contracted with the observance of the essential and formal requisites. Under Article 69 of the Spanish Civil Code, however, "a marriage contracted in good faith produces civil effects, although it be declared void" and that "good faith is presumed if the contrary is not shown." However, the Civil Code of 1950 considered such good faith of the parties immaterial. For instance, the authority of the solemnizing officer was made an absolute condition for the validity of the marriage. Under the Family Code, though, the good faith of one or both of the contracting parties saves such a putative marriage from being void. Thus, under Article 35 (2):

> "Art. 35. The following marriages shall be void from the beginning:
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> ...
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> 2) Those solemnized by any person not legally authorized to perform marriages unless such marriages were contracted with either or both parties believing in good faith that the solemnizing officer had the legal authority to do so." ...

LIBERALIZING TRENDS AFFECTING MARRIAGE

It has been often said that marriages are not made in heaven – at least, not all marriages. For all individuals have their idiosyncrasies, their foibles and peculiarities which may not be that all evident at the courtship stage but may manifest full-blown after marriage due to the stresses and strains of responsibilities unforeseen.

These may exhibit themselves even before the so-called "seven-year itch". Should the couple therefore, buckle down to the pressure of a marriage that has turned sour? On the one hand, there is the interest of the State to preserve inviolate a marriage to protect this fundamental institution, which is the cornerstone of society. On the other hand, are not the individual parties to a marriage entitled to happiness and the freedom to procreate as their basic human rights? Thus, the State, through the official guardians of the morals, stability and harmony of the home and family, finds itself endlessly impaled between the twin horns of this dilemma.

State policies have tried to resolve this seemingly endless problem by laying down different options from time to time for the embattled parties to choose from. Our forefathers, even before the coming of the Spaniards, observed relatively lax moral standards, compared to those of our modern age. They observed both polygamy and divorce, as if divorce were not superfluous or irrelevant enough, with polygamy existing side by side with it.

But when the Spaniards landed on our shores bringing with them the stringent moral standards of the Catholic Church which prevailed over the legal system of the so-called "natives", the era of the unity between Church and State commenced. This included the ban on absolute divorce, for the union of a man and a woman was a sacrament to be sedulously protected and upheld for "What God hath put together, let no man put asunder."

Expanded Legal Separation

With the advent of the American regime, absolute divorce was recognized and regarded as a liberalization of the laws regulating family relations.[36] However, when the Civil Code was revised in 1950 into Republic Act No. 386, the framers opted to abolish absolute divorce. Instead the "New Civil Code" introduced "relative divorce" or *"a mensa et thoro"* which literally means "from bed and board". It was actually legal separation on the very limited grounds of adultery of the wife and concubinage on the part of the husband, as well as an attempt by one spouse against the life of the other.

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[36] *See* Act No. 2710 entitled "THE ACT TO ESTABLISH DIVORCE" which took effect on Mar. 11, 1917.

After the proper legal proceedings in court, the couple was merely entitled to live separately from each other but the marriage bonds were not severed.

With the promulgation of the Family Code in 1988, legal separation continued to be recognized up to the present, but on very much expanded grounds, such as physical violence, final judgment of imprisonment on the part of a spouse, drug addiction or habitual alcoholism, lesbianism or homosexuality, bigamy, sexual infidelity or perversion, abandonment, and the former ground of attempt by one spouse on the life of the other. From this catalog of new grounds for petitioning for legal separation, one can discern how the urbanization, increased industrialization and modernization of our society have exerted much pressure on young people. One phenomenon in our economy is the proliferation of call centers in our major cities and statistics show that our country has surpassed India in this respect.[37] What is abhorrent is that the young profesionals who have been assigned to night shifts suffer physically and emotionally and worse, have evolved their own lax moral standards. Quirky and perverse ways of life have come out in the open. The influence of the elders on the present generation has waned as more young people leave sheltered family homes to live solo or with partners of questionable gender.

Psychological Incapacity: A Canon Law Adaptation

Under the Family Code, absolute divorce continued to be prohibited in line with State policy. However, the members of the Civil Code Revision Committee, in an attempt at liberalizing the grounds of terminating marriage while protecting its integrity, took a leaf from the Canon Law of the Catholic Church. Parenthetically, this is not to say that annulment decrees granted by the matrimonial Tribunals of the Church to desperate Filipino couples who could afford the costly process as long as they could obtain relief from an oppressive marriage, were automatically recognized.

The Revision Committee decided to adopt paragraph 3 of Canon 1095 of the Code of Canon Law which became effective in 1983, since the

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[37] *See* Mehul Srivastava, *Philippine Call Centers Overtake India*, Bloomberg Businessweek, Dec. 2, 2010, *available at*: http://www.businessweek.com/magazine/content/10_50/b4207017538393.htm (accessed on Jan. 22, 2012).

Philippines was, and still is, a predominantly Catholic country, thus giving a novel and socially acceptable option to those Catholics who desired to break their marriage bonds without unduly doing violence to their religious scruples. Moreover, it was perceived as a substitute for the more controversial divorce rapidly being adopted even in Catholic countries.

It is of general knowledge that showbiz personalities and public figures are often quoted in media as announcing that they are just awaiting the annulment decree to be handed down by the court so that they could wed somebody else. Unknowingly, they use the term "annulment" loosely as signifying the breaking of their marriage ties to their spouse. Marriage is considered annullable or voidable due to certain specific grounds listed in Article 45 of the Family Code and nothing more. Existing at the time of the marriage, the defect is often caused by vitiated consent on the part of one of the parties due to insanity, fraud, force, intimidation or undue influence; lack of parental consent when either party is between eighteen years of age or over but below twenty-one; physical incapacity or affliction with a sexually transmissible disease. The marriage subsists until terminated due to its annulment by the court.

The novel way of terminating a marriage indicated in the new Article 36 of the Family Code is based on the sole ground of psychological incapacity to comply with the essential marital obligations of marriage of one of the contracting parties existing at the time of the celebration of the marriage. The liberating court order is not annulment but a declaration of nullity of a marriage which is void from the beginning. The "essential marital obligations of marriage" are: "... to live together, observe mutual love, respect and fidelity, and render mutual help and support."[38]Article 36 of the Family Code provides:

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

From the above formulation, it is evident that the Revision Committee studiously skirted the enumeration of acts or conditions constituting "psychological incapacity". It even avoided giving examples which could serve as templates to the judges who would bear the onerous burden of having to exercise wide discretion and latitude in resolving cases under this novel

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[38] FAMILY CODE, art. 68.

provision, even as they gingerly tread on the unfamiliar terrain of psychological disorders. To have given specific cases would have limited the applicability of said provision under the principle of *ejusdem generis* which is a canon of construction that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed. To my mind, the more cogent reason for refraining from citing specific instances of psychological incapacity is, that this may be interpreted to mean that those not included are thereby excluded under the principle of *inclusio unius est exclusio alterius.* The intendment of the Revision Committee was precisely to give a judge leeway to decide on a case-to-case basis in light of its particular facts, there being no case that is "on all fours" with another case.

Obviously, it was the intention to have the judge decide each case before him "on a case-to-case basis; guided by experience, the findings of experts and researchers in psychological disciplines, and by decisions of church tribunals.... The definition of psychological incapacity... was not cast in intractable specifics. Judicial understanding of psychological incapacity may be informed by evolving standards, taking into account the particulars of each case, current trends in psychological and even canonical thought and experience...."[39]

An acquaintance of the author was so happy when she heard that Art. 36 was finally enacted into law in the Family Code. Dancing the Indian war dance, she whooped: "At last, I can divorce my husband, the beast!" This is the misimpression of other wives who have suffered in silence the indignities of their brute of a husband. When the provision was fully explain to her, she asked, "But this will end my marriage to him! Right?" "Yes, but..." The author tried to explain to her patiently but decided to wait another time when her euphoria had subsided.

It is only "divorce" in the sense that if the evidence presented in court warrants the granting of relief, the marriage bonds will be cut. Divorce indeed cuts the marital bond but at the time the causes therefore manifest themselves. This, despite the tongue-in-cheek description of Art. 36 by the Office of the Solicitor General as "the most liberal divorce procedure in the world."[40] Under Art. 36, it is not every misconduct, perverse act, inattention or neglect or sexual

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[39] Antonio v. Reyes, G.R. No. 155800, 484 SCRA 353, Mar. 10, 2006.

[40] Republic v. Court of Appeals, G.R. No. 108763, 335 Phil. 664, 668, Feb. 13, 1997.

infidelity that is a ground for its application. The only acceptable ground is, to quote the law, "psychological incapacity to comply with the essential marital obligations of marriage". Moreover, this incapacity must be present at the time of the celebration of the marriage. A more perceptive and sober lady asked me, " If this is supposed to be present at the time we were married, I would not have married him! Hindi pa sana ako nagkaroon ng sakit ng ulo!" Definitely, our laws do not recognize absolute divorce – not on any ground, unlike in other jurisdictions where they list down certain grounds for filing a divorce or for "no fault"[41] at all. Besides, the grounds which give rise to divorce should have occurred or taken place after the celebration of the marriage.

The looming crucial question on the horizon which every judge must perforce answer is: "Does this act or acts complained of constitute psychological incapacity?" With no law to guide him, he is constrained to turn to decisions decided in other jurisdictions, but the laws in those countries do not correspond to ours. Or he may look to judicial precedents, that is, decisions of similar cases already rendered by his colleagues on the Bench. Absent such guidelines, he has no choice but to strike out on his own, with invaluable scientific assistance from psychiatric experts.

Because thousands of desperate married couples had been waiting for such a rare opportunity to end their marriages, many walked through this wide open and inviting door. A veritable Pandora's box was opened! Jurisprudence started evolving with each pronouncement by the judges. To be sure, they knew better than to declare each psychological psychoses or disorder actionable. Not accepted as examples of psychological incapacity were: marital infidelity,[42] sexual promiscuity and perversion,[43] habitual alcoholism,[44] drug addiction,[45] homosexuality or lesbianism,[46] abandonment,[47] non-cohabitation,[48]

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[41] Refers to a divorce in which the parties are not required to prove fault or grounds beyond a showing of the irretrievable breakdown of the marriage or irreconcilable differences. The system of no-fault divorce has been adopted throughout the United States. By 1974, 45 states had adopted no-fault divorce. By 1985, only the state of New York has yet to adopt some form of no-fault divorce. BLACK'S LAW DICTIONARY 551 (9th ed.).

[42] Dedel v. Court of Appeals, G.R. No. 151867, 421 SCRA 461 Jan. 29, 2004; Villalon v. Villalon, G.R. No. 167206, 475 SCRA 572, 582, Nov. 18, 2005; Marable v. Marable, G.R. No. 178741, 639 SCRA 557, Jan. 17, 2011.

[43] Dedel v. Court of Appeals, G.R. No. 151867, 421 SCRA 461, Jan. 29, 2004; Navales v. Navales, G.R. No. 167523, 556 SCRA 272, Jun. 27, 2008.

[44] Republic v. Cuison-Melgar, G.R. No. 139676, 486 SCRA 177, Mar. 31, 2006; Suazo v. Suazo, G.R. No. 164493, Mar. 10, 2010, 615 SCRA 154.

[45] Hernandez v. Court of Appeals, G.R. No. 126010, 377 Phil. 919, Dec. 8, 1999.

immaturity,[49] irreconcilable differences on such matters as family finances, discipline of children[50] or problems vis-à-vis the in-laws,[51] emotional immaturity,[52] and irresponsibility,[53] refusal to look for a job,[54] physical violence with nothing else, [55] living an adulterous life,[56] frequent squabbles,[57] unfitness to remain a member of the Bar,[58] difficulty, refusal, or neglect in the performance of marital obligations,[59] unbearable jealousy,[60] *ad infinitum.*

What have been considered, therefore, as evidence of psychological incapacity? Here are some: inveterate pathological liar, manifestations of psychopathic personality, infliction of physical violence, constitutional laziness or indolence, drug addiction, psychosexual anomaly and others that are grist for the judicial mills.

Absent specific instances of psychological incapacity in the law itself, the courts/judges have taken it upon themselves to clarify, concretize and interpret Art. 36 with every case brought before them, such that we now see evolving through jurisprudence a body of case law pertaining to this novel way of terminating a marriage. The next part shall try to encapsulate the *ratio decidendi* of the significant cases that have been building up brick-by-brick, as it

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[46] *Id.*

[47] Perez-Ferraris v. Ferraris, G.R. No. 162368, Jul. 17, 2006.

[48] Santos v. Bedia-Santos, G.R. No. 112019, January 4, 1995, 240 SCRA 20. *Contra* Tsoi v. Court of Appeals, 334 Phil. 294, 300-304 (1997).

[49] Hernandez v. Court of Appeals, G.R. No. 126010, 377 Phil. 919, Dec. 8, 1999.

[50] Republic v. Galang, G.R. No. 168335, Jun. 6, 2011; Marable v. Marable, G.R. No. 178741, 639 SCRA 557, Jan. 17, 2011; Kalaw v. Fernandez, G.R. No. 166357, Sept. 19, 2011. *See also* Choa v. Choa, G.R. No. 143376, 392 SCRA 641 Nov. 26, 2002.

[51] Tongol v. Tongol, G.R. No. 157610, 537 SCRA 135, Oct. 19, 2007.

[52] Pesca v. Pesca, G.R. No. 136921, 356 SCRA 588, Apr. 17, 2001; Republic v. Cuison-Melgar, G.R. No. 139676, 486 SCRA 177, Mar. 31, 2006.

[53] Republic v. Cuison-Melgar, G.R. No. 139676, 486 SCRA 177, Mar. 31, 2006; Paras v. Paras, 529 81; Yambao v. Republic, G.R. No. 184063, Jan. 24, 2011.

[54] Republic v. Cuison-Melgar, G.R. No. 139676, 486 SCRA 177, Mar. 31, 2006; Suazo v. Suazo, G.R. No. 164493, 615 SCRA 154, Mar. 10, 2010.

[55] Republic v. Cuison-Melgar, G.R. No. 139676, 486 SCRA 177, Mar. 31, 2006; Suazo v. Suazo, G.R. No. 164493, 615 SCRA 154, Mar. 10, 2010.

[56] Toring v. Toring, G.R. No. 165321, 626 SCRA 389, Aug. 3, 2010; Ochosa v. Alano, G.R. No. 167459, Jan. 26, 2011.

[57] Navarro, Jr. v. Cecilio-Navarro, G.R. No. 162049, 521 SCRA 121, Apr. 13, 2007.

[58] Paras v. Paras, G.R. No. 147824, 529 SCRA 81, Aug. 2, 2007.

[59] Padilla-Rumbaua v. Rumbaua, G.R. No. 166738, 596 SCRA 157, Aug. 14, 2009.

[60] Tongol v. Tongol, G.R. No. 157610, 537 SCRA 135, Oct. 19, 2007.

were, the full significance of Art. 36 in consonance with the intention of the Revision Committee.

The first significant principle in interpreting Art. 36 was enunciated in *Santos v. Court of Appeals*.[61] The Supreme Court declared:

> "There is hardly any doubt that the intendment of the law has been to confine the meaning of 'psychological incapacity' to the most serious cases of personality disorders clearly demonstrative of an utter insensitivity or inability to give meaning and significance to the marriage. [It should refer to] no less than a mental (not physical) incapacity that causes a party to be truly incognitive of the basic marital covenants that concomitantly must be assumed and discharged by the parties to the marriage... It must be characterized by (a) gravity (b) juridical antecedence, and (c) incurability. The incapacity must be grave or serious such that the party would be incapable of carrying out the ordinary duties required in marriage; it must be rooted in the history of the party antedating the marriage, although the overt manifestations may emerge only after the marriage; and it must be incurable or, even if it were otherwise, the cure would be beyond the means of the party involved." [62]

The *Santos* case was followed by the much-quoted *Republic v. Court of Appeals and Molina*[63] which reiterated the characteristics cited in *Santos* but additionally laid down eight guidelines for the guidance of the Bench and Bar. After opening by affirming that the burden of proof to show the nullity of the marriage belongs to the plaintiff, it emphasized the importance of the root cause which must be medically or clinically identified; alleged in the complaint; sufficiently proven by experts and clearly explained in the decision. The sore point in the guidelines was the injunction that:

> "No decision shall be handed down unless the Solicitor General issues a certification which shall be quoted in the decision, briefly stating therein his reasons for his agreement or opposition, as the case may be, to the petition."[64]

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[61] *Supra* note 49.

[62] *Id.*

[63] *Supra* note 41.

[64] *Id.*

This role of the Solicitor General raised much hue and cry among the members of the Bar as it was foreseen to cause much delay in the proceedings, that it may give an opportunity for underhanded practices and open the door to corruption and that this intervention was actually superfluous as the prosecuting attorney or fiscal were required to appear as counsel on behalf of the State to ward off any collusion between the parties and to take care that the evidence is not suppressed or fabricated, as required by Article 48 of the Family Code. Recognizing the merits of the clamor of practicing lawyers for reform along this line, the Supreme Court issued Administrative Matter No. 02-11-10 which dispensed with the certification of the Solicitor General required in the *Molina* case.

A later case, *Marcos v. Marcos*[65] clarified that there is no requirement that the defendant/respondent spouse should be personally examined by a physician or psychologist as a condition *sine qua non*. Accordingly, it is no longer necessary to allege expert opinion in a petition under Article 36. The psychological incapacity, however, must be established by the totality of the evidence presented during the trial.

Analyzing dispassionately the past decisions that had been interpreting Article 36, the Supreme Court, in *Ngo-Te v. Yu-Te*[66], criticized the stringent application of the *Molina* guidelines:

> "The resiliency with which the concept should be applied and the case-to-case basis by which the provision should be interpreted, as so intended by the framers, had, somehow, been rendered ineffectual by the imposition of a set of strict standards in *Molina*....[T]he Court has applied the aforesaid standards, without too much regard for the law's clear intention that each case is to be treated differently....*Molina* has become a strait-jacket, forcing all sizes to fit into and be bound by it. Wittingly or unwittingly, the Court... has allowed diagnosed sociopaths, schizophrenics, nymphomaniacs, narcissists and the like, to continuously debase and pervert the sanctity of marriage."

A cautionary note, though. *Ngo-Te* did not intend to abandon the guidelines set forth in *Molina*. Thus, the Supreme Court concluded with the following caveat:

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[65] G.R. No. 136490, 343 SCRA 755, Oct. 19, 2000.

[66] G.R. No. 161793, 579 SCRA 193 Feb. 13, 2009.

> "Lest it be misunderstood, we are not suggesting the abandonment of *Molina* in this case. We simply declare that... there is need to emphasize other perspectives as well which should govern the disposition of petitions for declaration of nullity, under Art. 36. [T]he presentation of expert proof presupposes a thorough and in-depth assessment of the parties by the psychologist or expert, for a conclusive diagnosis of a grave, severe and incurable presence of psychological incapacity. The Court finds it fitting to suggest the inclusion in the Rule on Declaration of Absolute Nullity of Void Marriages and Annulment of Voidable Marriages, an option for the trial judge to refer the case to a court-appointed psychologist/expert for an independent assessment and evaluation of the psychological state of the parties.... The rule, however, does not dispense with the parties' prerogative to present their own expert witnesses."

A further relaxation of the stringent rules in the *Molina* case is found in the case of *Suazo v. Suazo*.[67] The Court declared that the requirement for the petitioner to allege the particular root cause of the psychological incapacity and to attach thereto the verified written report of an accredited psychologist or psychiatrist has proven to be too expensive for the parties, thus adversely affecting access to justice of poor litigants. Moreover, the Court recognized there are provinces where these experts are not available. These matters shall, henceforth, be determined by the court during the pre-trial conference.

The expenses incident to applying for a declaration of nullity under Article 36 is cause for concern among members of the Bar and the judges themselves. It is estimated by a judge that the cost is staggering; it can range from PhP 100,000 to millions. The money goes to the attorney (PhP 50,000), the psychiatrist (PhP 30,000 plus traveling expenses and allegedly, another PhP 50,000 or PhP 100,000 for the judge as well as another amount for the prosecutor/solicitor). What a rich source of corruption!

"Indirect Divorce"

As stated earlier, divorce as a way of severing the marital bonds at the time the causes manifest themselves, is not recognized in the Philippines, yet the same effect is achieved indirectly in a marriage between a Filipino citizen

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[67] G.R. No.164493, 615 SCRA 154, Mar. 10, 2010.

and an alien spouse in order to place on an equal footing the Filipino spouse, usually the wife, in the event that the alien spouse obtains a divorce abroad.

The second paragraph of Art. 26 of the Family Code provides: "Where a marriage between a Filipino citizen and a foreigner is validly celebrated and a divorce is thereafter validly obtained abroad by the alien spouse capacitating him or her to remarry, the Filipino spouse shall likewise have capacity to remarry under Philippine law."[68]

The elements that must be satisfied for the application of this paragraph are:

1) There is a valid marriage that has been celebrated between a Filipino citizen and a foreigner; and
2) A valid divorce is obtained abroad by the alien spouse capacitating him or her to remarry."[69]

The reckoning point is not the citizenship of the parties at the time of the celebration of the marriage but their citizenship at the time a valid divorce is obtained abroad by an alien spouse capacitating the latter to remarry.[70]

The rationale and legislative intent behind Paragraph 2 of Article 26 was elucidated in *Orbecido*, as follows:

> Thus, taking into consideration the legislative intent and applying the rule of reason, [this paragraph] should be interpreted to include cases involving parties who, at the time of the celebration of the marriage were Filipino citizens, but later on, one of them becomes naturalized as a foreign citizen and obtains a divorce decree. The Filipino spouse should likewise be allowed to remarry as if the other party were a foreigner at the time of the solemnization of the marriage. To rule otherwise would be to sanction absurdity and injustice."[71]

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[68] This paragraph is an amendment to Article 26 of the Family Code by Executive Order No. 227, dated July 17, 1987. The said E.O. codified the ruling of the Supreme Court in the case of *Van Dorn v. Romillo, Jr.* (G.R. No. L-68470, 139 SCRA 139, Oct. 8, 1985).

[69] Republic v. Orbecido, G.R. No. 154380, 472 SCRA 114, 122, Oct. 5, 2005.

[70] *Id.* Llorente v. Court of Appeals, G.R. No. 124371, 345 SCRA 592, 600, Nov. 23, 2000.

[71] *Id.*

More importantly, the law seeks to avoid the situation where the Filipino spouse, usually the woman, would be discriminated against in her own country. Without the second paragraph of Article 26 of the Family Code, the judicial recognition of the foreign decree of divorce, whether in a proceeding instituted precisely for that purpose or as a related issue in another proceeding, would be of no significance to the Filipino spouse since our laws do not recognize divorce as a mode of severing the marital bond.[72] We would have the ludicrous spectacle of the Filipino wife still being married to an alien spouse who is no longer married to her.[73]

PATERNITY AND FILIATION

"In every child who is born, under no matter what circumstances, and of no matter what parents, the potentiality of the human race is born again; and in him, too, once more, and of each of us, our terrific responsibility towards human life; towards the utmost idea of goodness, of the horror of error, and of God." – James Agee

As pointed out earlier, international documents like the Universal Declaration of Human Rights and statements of national policy as those in our Constitution, underscore the importance of the family as the natural and fundamental group unit of society or as the foundation of the nation; thus the need to protect it, strengthen its solidarity and actively promote its total development. While the nuclear family is composed of the parents and their children, in many societies like ours, the "family" embraces its extensions, like the relatives and the clan. The status of the children vis-à-vis their parents goes to the very essence of the stability and integrity of the family. Thus, it is to the interest of the State to uphold the legitimacy of children inasmuch as this status spawns such rights as those to bear the surname of the father and mother, the right to receive support and to be entitled to the legitimate and other successional rights under the law. Beyond this, the "tentacles" that attach themselves to the nuclear family cannot claim similar rights. Under recent laws, there is a discernible trend in law to favor and uphold the legitimacy of children.

At the outset, it is to be pointed out that before the Family Code was enacted which means, under the Civil Code, while the legitimate children

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[72] Corpuz v. Sto. Tomas, G.R. No. 186571, 628 SCRA 266, Aug. 11, 2010.

[73] Republic v. Orbecido, *supra* note 70 at 121.

occupied the highest category, there were several classes of illegitimate children namely, natural children,[74] natural children by legal fiction,[75] acknowledged natural children[76] and illegitimate children other than natural such as spurious and adulterous children.[77] Under Art. 163 of the Family Code, there are now only legitimate or illegitimate children, depending on whether the child was conceived or born during the marriage of the parents.

If there is a discernible trend in law to favor and uphold the legitimacy of children, especially in case of doubt, there is a similar trend to bestow more rights to the illegitimate children on the modern theory that there are no illegitimate children, only illegitimate parents. Under the Family Code, the illegitimate children now enjoy these rights: to use only the surname and be under the parental authority of the mother and to be entitled to support and to receive legitime but only one-half of that of the legitimate child.[78] Now, thanks to a new law sponsored by Sen. Ramon Revilla Sr. in 2004 called the Revilla Law (Republic Act No. 9255), illegitimate children, if expressly acknowledged by their fathers may use his surname, not merely that of their mothers. so long as "their filiation has been expressly recognized by the father through the record of birth appearing in the civil register, or when an admission in a public document or private handwritten instrument is made by the father."[79] Such recognition will expectedly pave the way for support and increased successional or inheritance rights.

Artificial Insemination

The gigantic strides made by science and high technology have made possible the manipulation of the procreative process in a manner that has astounded people, opened up incredible possibilities to childless couples and thrown the legal profession with its cherished presumptions pertaining to paternity and filiation all awry. To infertile and impotent couples, artificial insemination has come as a boon that has raised high expectations and, for some, fulfilled their hitherto unrealized dreams of having a child.

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[74] CIVIL CODE, art. 269.
[75] CIVIL CODE, art. 89.
[76] CIVIL CODE, art. 276.
[77] CIVIL CODE, arts. 287-289.
[78] FAMILY CODE, art. 176.
[79] Rep. Act No. 9255, §1.

Artificial insemination (AI) is the medical process by which a woman is impregnated with semen from her husband or a third-party donor without sexual intercourse. Depending on whose semen is used, AI may be classified into AIH or homologous AI using the husband's semen or AID or heterologous AI with a donor's semen, whether "consensual", i.e., with the consent of the husband or nonconsensual, i.e. without his consent or AIC, meaning confused or combined artificial insemination using the husband's and donor's semen. AIC is resorted to in order that the husband may still entertain a hope that it was his seed that successfully brought a child.

First introduced in the 1940s, the cases of artificial insemination, whether abroad or here, has grown by leaps and bounds and correspondingly raised vexing legal, ethical and medical problems. Not only is it perceived as the most feasible solution for childless couples, but it is increasingly resorted to by single women who desire, for reasons of their own, to have children without having to go to bed with men or by single lesbians. Exclaimed an incredulous bachelorette, "You mean we can now have children without having to have sex with men? And I can even choose the man whom I want to father my child? Why, that's virgin birth!" That's one way of looking at what some hail as a God-given "surprise gift". Not unexpectedly, the theologians and men of the cloth vehemently object to what they describe as an unnatural, unethical and artificial way of having children.

The Philippines, in the Family Code, timely introduced an amendment to determine the status of an offspring born of artificial insemination. Article 164 provides:

> "Children conceived as a result of artificial insemination of the wife with the sperm of the husband or that of a donor or both are likewise legitimate children of the husband and his wife, provided that both of them authorized or ratified such insemination in a written instrument executed and signed by them before the birth of the child. The instrument shall be recorded in the civil registry together with the birth certificate of the child."

Aided by the science of cryo-preservation, couples may now have children at their convenience, even in the absence of the husband, or long after the termination of the marriage or, incredibly, long after his death, simply by freezing the husband's semen during his lifetime, then thawing and using it for AI purposes when the need arises. In such a case, Article 169 of the Family Code becomes applicable, which states:

> "The legitimacy or illegitimacy of a child born after three hundred days following the termination of the marriage shall be proved by whoever alleges such legitimacy or illegitimacy."

In fact there was a case where the wife decided to unfreeze the semen of her living husband for purposes of AI without his knowledge and consent! In such instances, there is the legal remedy of impugning the legitimacy of the child by the husband or, in a proper case, by his heirs. [80]

Law is replete with presumptions where there is a paucity of evidentiary facts. In the Civil Code before, Articles 255 and 258 provided for *prima facie* and conclusive presumptions of legitimacy. In light of hithereto unheard of possibilities in the matter of filiation brought about by artificial insemination, such presumptions have become irrelevant. Article 166 of the Family Code has now provided grounds whereby the legitimacy of a child may be impugned.

Often shrouded in secrecy, there are not enough laws or rules to protect those who are only too eager to resort to artificial insemination. For instance, while donor centers abroad purport to claim that each donor can only be used a certain number of times, who is to control and monitor actual distribution and use? How do you sanction a doctor who singlehandedly provided the semen that impregnated all the women who had come to his clinic, thus making all the children born in that town related to one another. Under such a setup, how can the authorities prosecute those entering into incestuous marriages? What about the infamous fertility clinics where poor administration and mismanagement resulted in the mixing up of deposits. Consequently, it resulted in the wrong assumption of parenthood of resulting offspring. So rampant has AI become that donations are now being exported and imported among countries. In the Philippines, it is the prohibitive cost of resorting to artificial insemination that has prevented more infertile couples from availing of the medical procedure.

Bizarre cases are brought to court to indict the doctors for negligence or medical malpractice. In the United States, a white woman sued a fertility clinic and a sperm bank precisely for those illegal acts on the ground that they mistakenly substituted another man's sperm for that of her late husband,

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[80] FAMILY CODE, arts. 170-171.

resulting in her giving birth to a child with African American features.[81] DNA analysis confirmed that her husband, who was also white, could not have been the child's father. It is not far-fetched to imagine how such a situation could throw the family into a state of chaos! In another case, a man sued his ex-wife to prevent her from using or donating fertilized embryos which the couple had frozen for later use. The Court held that individuals have "procreational autonomy" and have the right to choose whether to have a child.

In the United States, donors are often recruited from medical students, residents and interns because of their availability and knowledge on the matter. Most prefer to remain anonymous so as not to be saddled later with the burden of having to support the child or so as not to exact unwanted emotional toll from him. Problems similarly arise when another woman is used as a surrogate receptacle for an embryo, in the practice commonly called "womb for rent". It is plausible that once the child is born the woman may become emotionally attached to "her" child and refuse to give him up to the married couple who contracted with her to use her as their instrument.

One can imagine the endless cases that may result in litigations to hold any of these parties legally accountable: the doctor, the donor, the couple that resorts to artificial insemination, the surrogate mother, etc. What may likewise spawn litigable issues and wreak emotional havoc on the offspring of such AI cases is the search by such an AI child for his biological father, such as one sees in movies and *telenovelas* in an effort at establishing his real identity or in trying to determine if he may have any predisposition to a disease or an allergy or for more materialistic considerations such as a desire to claim support or successional rights.

DNA: A Tool To Determine Filiation

The determination of the filiation or parentage of a legitimate or an illegitimate child is of utmost importance, not only to the parties involved, but also to the State, which seeks to uphold the stability of relationships within the family. Legitimacy is a status to be devoutly wished for, not merely for the rights attached to it by law, such as the right to bear the names of the parents,

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[81] Ronald Sullivan, *Mother Accuses Sperm Bank of Mixup*, THE NEW YORK TIMES, Mar. 9, 1990, *available at*: http://www.nytimes.com/1990/03/09/nyregion/mother-accuses-sperm-bank-of-a-mixup.html (accessed on Jan. 22, 2012).

the right to support, successional rights and citizenship, and more importantly for many, is to avoid being stigmatized as a bastard or a child born outside of wedlock. While a child born to a husband and wife during a valid marriage is presumed legitimate, the same may be challenged, but only under the strict standards laid down by law as regards the person/persons who can bring the action to impugn the filiation of the child, the period within which this may be brought and the proof or evidence acceptable to the courts to succeed in one's claim.[82] Illegitimate children may establish their illegitimate filiation in the same way and on the same evidence as legitimate children.[83]

Until relatively recently, questions regarding parentage have been resolved using conventional methods, mostly incriminating evidence where the putative father may show incapability of sexual relations with the mother, because of either physical absence or impotency, or that the mother had sexual relations with other men at the time of conception. However, these are, at best, indirect methods of determining paternity since they focus merely on the relationship of a man and a woman with high emotional content. Then too, parties may invoke the matter of physical resemblance between the putative father and the child, resemblance, being a trial technique unique to a paternity proceeding. "However, although likeness is a function of heredity, there is no mathematical formula that could quantify how much a child must or must not look like his biological father."[84]

But now, law is starting to realize that it has neglected the potentiality of the findings of science in furthering the ends of law and justice. In the area of family relations, among others, DNA is a very powerful tool for human identification because of its chemical stability, the uniqueness of the DNA profile of an individual, the identity of the DNA profile of any biological sample originating from one person and the inheritability of DNA that makes possible the tracing of the relationship between parents and child or amongst kins. Besides, DNA is objective evidence that may not be influenced by social or psychological factors.

"DNA (deoxyribonucleic acid) is the fundamental building block of a person's entire genetic make-up. Being a component of every cell in the human body, the DNA of an individual's blood is the very DNA in his or her skin cells, hair follicles, muscles, semen, samples from buccal swabs, saliva or other

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82 FAMILY CODE, arts. 170-173.

83 FAMILY CODE, art. 175.

84 Herrera v. Alba, G.R. No. 148220, 460 SCRA 197, Jun. 15, 2005.

body parts. DNA analysis is a procedure in which DNA extracted from a biological sample obtained from an individual is examined. The DNA is processed to generate a pattern or a DNA profile, of the individual from whom the sample is taken.

In a paternity test, the forensic scientist looks at a number of the variable regions in an individual to produce a DNA profile. Comparing next the DNA profiles of the mother and child, it is possible to determine which half of the child's DNA was inherited from the mother. The other half must have been inherited from the biological father. The alleged father's profile is then examined to ascertain whether he has the DNA types in his profile, which match the paternal types in the child. If the man's DNA types do not match that of the child, the man is excluded as the father. If the DNA types match, then he is not excluded as the father.

Since it is the policy of the Family Code to liberalize the rule on the investigation of the paternity and filiation of children, especially of illegitimate children, where the evidence to aid this investigation is obtainable through the facilities of modern science and technology, such evidence should be considered subject to the limits established by the law, rules and jurisprudence."[85]

The action to impugn the legitimacy of a child has varying prescriptive periods due to the possibility that the records may be lost over time. In the case of DNA, said prescriptive periods may even be dispensed with since the child's DNA is a permanent record of his parents' DNA too.

The DNA laboratories of NBI and PNP handle all DNA testing in criminal cases that are being investigated by their respective agencies. On the other hand, the DNA Analysis Laboratory of the Natural Sciences Research Institute of U.P performs DNA tests as requested by parties of a civil case or as ordered by a court of law – all for a fee.

CHILDREN IN THE CLUTCHES OF THE LAW

The Juvenile and Justice Welfare Act (Republic Act No. 9344)

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[85] *Id.*

In making the family a target of special concern and attention in the Constitution, the 1986 Constitutional Commission corollarily focused on the youth as an equal pillar in nation-building.[86] Its Section 13 provides:

> "The State recognizes the vital role of the youth in nation-building and shall promote and protect their physical, moral, spiritual, intellectual, and social well-being. It shall inculcate in the youth patriotism and nationalism, and encourage their involvement in public and civic affairs."

Complementing the above provision is the affirmation in Article XV, Section 3 (2) of the 1987 Constitution which provides that:

> "The State shall defend: (2) The right of the 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;"

Conformably to this declaration, several laws were subsequently passed in succession, seemingly to make up for the desert that in times past characterized the legislative landscape pertaining to the protection of children.

"Mankind owes to the child the best it has to give." With this "battlecry", The League of Nations, in 1924, adopted the Geneva Declaration of the Rights of the Child. It took 24 years for the world to follow this up when in 1948, the Universal Declaration of Human Rights was adopted by the United Nations Assembly with two articles that specifically referred to children's rights, namely: Art. 25 referring to childhood special care and assistance and Art. 26 dealing with the right of children to education.

With the heightened awareness on the international front of the needs of children, the UN General Assembly adopted the Declaration on the Rights of the Child on October 19, 1959. Finally, the monumental UN Convention on the Rights of the Child (CRC) was adopted by the United Nations General Assembly on November 20, 1989. Eager to demonstrate its whole-hearted support, the Philippines became the 31st State to ratify the treaty.

Children were acknowledged to be possessed of human rights and that by reason of their physical and mental immaturity, were entitled to special

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[86] Now embodied in Article II, Section 13 of the 1987 Constitution.

protection, care and assistance within the family and community environment before and after birth. For the first time, "children in conflict with the law" was mentioned, citing the UN Standard Minimum Rules for the Administration of Juvenile Justice, otherwise known as "The Beijing Rules".

Now committed to setting up a juvenile justice system in line with the CRC's doctrine of the "best interests of the child", Congress soon passed certain laws incorporating cherished principles like: the child should not be labeled a criminal and thus be stigmatized for life; he is entitled to fair and humane treatment to attain the two-fold end of juvenile justice, namely, the promotion of the well-being of the juvenile and a proportionate reaction by the justice system to the age of the offender, as well as to the nature of the offense, illustrative of the "proportionality principle"; recognition of restorative justice which adopts a wholistic approach by actively involving the victim, the offender and the community in promoting reparation, reconciliation and reassurance through preventive measures and appropriate sanctions; definition of the diversion system under which the juvenile is removed from formal criminal justice processing to appropriate programs like victim restitution, community service and counseling, all made imperative as a therapeutic adjunct to the principle of restorative justice.[87]

Against this backdrop, Republic Act No. 9344 was passed, otherwise known as "The Juvenile and Justice Welfare Act" Among the issues it confronted were:

1) Determination of the age of the child at the time of the commission of the offense;
2) Determination of presence of discernment by police officers, prosecutors, judges and social workers, often causing delay in the disposition of cases;
3) Lack of the required intervention for those children exempted from criminal responsibility; and
4) "Detention" of children in conflict with the law and those exempted from criminal responsibility which have posed problems due to the lack of equipped detention cells and rehabilitation centers all over the country.

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[87] Notes from the " Rationale of the Proposed Rule on Juveniles in Conflict With the Law".

With the proliferation of petty offenses and high crimes being committed by the so-called "batang hamog" and "bukas kotse gang" consisting of boys in their early teens, there is a move in Congress to amend the Act by lowering the age of criminal liability from fifteen (15) but below eighteen (18) at the time of the commission of the offense to nine (9) years of age.[88] Under the present law, only those above fifteen (15) at the time of the commission of the crime are brought before the courts and are able to benefit from the programs provided for them. Those below fifteen (15) are no longer hailed before the courts because they are exempted from criminal liability. Although the law provides for intervention programs by the local social development units, these agencies lack the necessary logistics, the skilled personnel, the facilities and the authority to implement the same. Such intervention programs at rehabilitation centers are necessary as the minors can be taught proper values which can reform them, and give them another chance to turn a new leaf. Since these interventions cannot be implemented, the boys are released immediately and soon "graduate" into hardened criminals, continuing their criminal acts with impunity.

Will amending the law by lowering the age of criminal liability solve the problem of increased incidence of crimes by these teenagers? As with many government programs, an increased budget allocation would go a long way in increasing the number of facilities and improving existing ones, as well as augmenting the salaries of social workers and other personnel. There should be planned and systematic training programs for the law enforcers on arrest, investigation, diversion, appearance in court, community involvement and a change in attitude in handling the offenders. It would likewise help to put up more women and children's desks manned by skilled and sensitive police officers familiar with the applicable laws. The children's respect for the law and its enforcers will be enhanced with the latter's sympathetic interaction with them through sports and socio-civic programs. All these reforms need planning on a comprehensive and not on an *ad hoc* basis.

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[88] Senate Bill No. 43, 15th Cong., sponsored by Senator Vicente C. Sotto III entitled "An Act to Lower the Age of Exemption from Criminal Responsibility Amending Sections 6, 20, 22, 23, 58, and 64 of R.A. 9344 otherwise known as the 'Juvenile Justice and Welfare Act of 2006' and for other purposes. Filed on Jun. 1, 2010.

CONCLUSION

Emerging trends in family laws brought about by modernization, increased urbanization and the impact of high-tech devices render imperative the need for the law to keep abreast with global developments and being sensitive to shifting winds of change if we are not to be laggards in the family of nations.

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