Humanizing the Family Law †

By GERARDO FLORENDO *

I. LAW OF THE ILLEGITIMATE FAMILY

THE Family Law centers around the institution of marriage. It is intended to safeguard the family, promote its welfare and provide for those measures which will enhance the fullest development of the personality and happiness of its members—the parents and their children.

When a man and woman unite together as husband and wife without the benefit of a marriage celebrated in accordance with law, they establish an illegitimate family. When they unite together as husband and wife with the benefit of legal marriage, the legitimate family is formed. The only difference is that the law does not consider the first existing, while it provides consequences, rights and obligations in the second. In legal contemplation the parties in the illegitimate marriage are not husband and wife, but just man and woman, free to marry any time. As the law is at present, neither of them has any enforceable or actionable right against the other. By interpretation of the law, it has been held in several cases, that the woman has no right against the man, not even for the recovery of damages for the violation of her honor upon a promise of marriage. Taking the circumstances of the man and woman into account, this, to my mind, is unfair. A more humane law, a more spiritualistic, less materialistic, and more socialized law, will dictate the contrary of this doctrine. When the law imposes upon the woman the duty of absolute sexual abstinence, but leaves without liability whatever the man who has dragged her into the violation of this duty, and who, in most cases, is more experienced and endowed with greater pecuniary means and facilities, there is something in it which offends against our sense of right and wrong. The law should be changed.

Now, on the children of the illegitimate family. These are called illegitimate children. These children from their birth are stigmatized and proscribed by society. Their position in law in their relation with their parents may be summarized as follows:

When the illegitimate child is a natural child, that is, when at the time of its conception, the mother and father had absolute capacity to marry each other, and is acknowledged by either or both parents, he has the partial rights of a legitimate child, that is, he has the right to bear the surname of the acknowledging parent, support and limited inheritance. Otherwise, the most an illegitimate child is entitled to is support. But, if not recognized, the illegitimate child has no right whatsoever against the mother or father, by whom, without his fault, he has been brought into the world.

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The mother may always be compelled to recognize the child, and so give him a name, support and inheritance. But, the father, never, except when he has already voluntarily done so in the manner provided for by law, or in criminal prosecution for rape, seduction or abduction. The logic of the law is that maternity is a fact, but paternity is only a presumption, and therefore it is immoral to investigate paternity. The effect of the law is to place the child at the mercy of the father. If he decides to give support well and good, if he does not, the law by its silence, protects him. Such law, it seems to me, is inhuman, basely materialistic and anti-social. It was made for the protection of the strong against the weak, tends to increase immorality, irresponsibility and death rather than morality, responsibility and life.

Here, I wish to make reference to one of the recommendations contained in the Memorial. The Memorial recommends:

> "(c) Removal of the classification of individuals as legitimate, natural, or illegitimate, for identification purposes, for the Biblical injunction to the contrary notwithstanding, the sins of the parents should not be vested upon their children."

The implications of this recommendation are far-reaching. Is it desired to place the illegitimate child on the same footing as the legitimate child, or only to change the nomenclature without changing the substance? Change the frame without changing the picture? If it is the latter, then the recommendation, of course, changes nothing in substance; but if the first is meant, then I wish to congratulate the Association for its courage. There are not a few who believe that such a solution would not only ameliorate the deplorable condition in which such helpless children find themselves today, but will also express the standard of morality of men and women and increase their sense of responsibility. This is the solution of the Chinese Civil Code, promulgated in 1939, which provides:

> "Article 1065.—A child born out of wedlock who has been acknowledged by the natural father is deemed to be legitimate; where he has been maintained by the natural father, acknowledgment is deemed to have been established.
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> "In the relation to his mother, a child born out of wedlock is deemed to be legitimate and no acknowledgment is necessary."
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> "Article 1067.—The mother or other statutory agent of a child born out of wedlock may claim acknowledgment from his natural father in one of the following cases:
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> "1. Where there is the fact that the natural father and mother cohabited during the period of conception;
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> "2. Where paternity can be proved from documents by the natural father;
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> "3. Where the mother became conceived through rape or seduction by the natural father;
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> "4. Where the mother had sexual intercourse with the natural father due to his abuse of power.
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> "The right of claim provided in the preceding paragraph is extinguished if not exercised within five years from the time of the birth of the child."

So much for the natural fam-

ily. The problems of the legitimate family are no less far-reaching and vexing. We shall not dwell on the celebration of the marriage, although it would be tempting to go into the legal value of an engagement or promise to marry. We shall discuss only the consequences of marriage.

The consequences of marriage may be grouped into two:

(1) The general effects, or those affecting the persons of the spouses, and

(2) Those affecting their property.

Here are two fields into which the different recommendations contained in your memorial may be brought. I shall take the liberty of sifting them to avoid repetition. Of the first effects are some positive duties and obligations, namely, the duty of cohabitation or joint life; of faithfulness and mutual support; and some negative duties such as those contained in Nos. 7 and 9 of the Memorial. These numbers provide:

> "7. Repeal of the following articles for being obsolete and contrary to the common practice in the Philippines:
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> "Art. 995, which prohibits a married woman from accepting or repudiating an inheritance; Art. 1053, which forbids a wife to ask for the partition of the property; Art. 1716 which forbids her to accept an agency; Art. 1263 which does not allow her to give consent; the Article which prevents her from publishing articles or books, without her husband's consent."
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> "9. Amendment of Articles 6 to 11, inclusive (Code of Commerce) so as to allow a wife to engage in commerce without having to get her husband's consent."

There seems to be no quarrel about these recommendations. I have been wondering why Article 157 which provides: "The husband must protect the wife and the latter obey the husband" has not been included among those to be repealed. It has been repealed in the marriage rituals of the Church of England and of the Evangelical churches. This and the other provisions of the Civil Code in this matter are predicated upon the marital power of the husband, borrowed from the Roman law, which made woman a perpetual subject—subject to the power of the pater-familias to which she belongs; if married, to her husband if he is the pater-familias, and if dead, to her eldest male child. This institution might have been useful in its own day and age, but certainly it finds no place in these times. The Mexican Civil Code of 1880 embodied it; but the revised Civil Code of 1928, starts on the basic principle of the equality of the sexes and provides:

> "ART. 2o. La capacidad juridica es igual para el hombre y la mujer; en consecuencia, la mujer no queda sometida, por razón de su sexo, a restricción alguna en la adquisición y ejercicio de sus derechos civiles."

Here is an ideal worthy of striving for.

To this ideal even the Chinese women have already attained. There is no incapacity found in the Civil Code of China today based upon sex. The following provisions of the Chinese Civil Code place the married Chinese woman far in advance of her Filipino Christian sister:

"Art. 1000.—Unless otherwise agreed upon by the parties, a wife shall prefix to surname that of the husband, and a 'Chui-fu' shall prefix to his surname that of the wife."

"Art. 1001.—Husband and wife are under mutual obligation to live together, unless for good reason they cannot live together."

"Art. 1002.—A wife takes the domicile of the husband as her domicile; a 'chui-fu' takes the domicile of the wife as his domicile."

"Art. 1003.—In daily household matters, the husband and the wife act as agents for each other.

"Where one of the parties abuses the aforesaid right of agency, the other party may restrict it, but such restriction cannot be set up against bona fide third parties."

We shall leave the personal effects of the marriage and take up its effects on the property of the spouses. Here is a very interesting field for practical and constructive thinking—one in which the women of this country can make a distinctive contribution.

The Civil Code now in force gives the parties freedom to stipulate in a contract the rules and regulations governing the properties they hold at the celebration of the marriage and those they require during its existence. But this contract can be entered into only before the marriage, and once the marriage is celebrated it can no longer be changed or amended. So that "Lo que esta escrito, escrito esta." If the parties had made a mistake in their original contract, they can no longer rectify it. I shall leave to your imagination the *fiat accompli* of such a legal principle, if there is any principle in it.

In the absence of a matrimonial contract (in the American law, called marriage settlement), the spouses are presumed to have adopted the legal partnership system. It is called legal, because the rules and regulations governing the rights and obligations of the spouses in relation to their property are provided for by the Code itself. There are, of course, several systems from which the Code could have chosen. For instance, the system of community of property, the system of separation, and a number of other mixed systems, which may be called, the simple system of community of profits; of profits and personal property, and the system of community of acquisitions. The system of separation of property has its advantage in its simplicity of accounting and is the one generally in force in common law countries. Here, the spouses own and manage their own properties and business, without the right of interference by the other. It is the legal system in force as a penalty by the Spanish Code to a minor that marries without the consent of his or her guardian, a guardian who marries his or her ward before the final approval of the account of guardianship, or to a widow who does not wait to have 200 days expire before marrying again. It is no longer in force in this country, except by contract.

The other legal systems under the Code are the dowry system and the partnership of profits. The dowry system is in force by law if the spouses have entered into a contract before their marriage expressly rejecting the community or partnership of profits, without, however, fixing the rules which should govern them. This being the case, the dowry as a legal system is, as far as I know, never in force.

The Code, however, regulates dowry not only as a system but also as a specific property which may exist in the system of separation of property as well as in

the system of community of property. As such, it is found in many marriages in the Philippines. Your Memorial contains a recommendation to the effect that Articles 1336-1380 all referring to the dowry be eliminated, and the reason given is that "the daughter's dowry is contrary to Filipino practice and the law on this point has never been in force."

In essence, the dowry is property owned by the wife, but held in usufruct by the husband, that is, the ownership belongs to the wife, but the fruits belong to the husband. I would like to preface my remarks on this subject by saying that the idea of the dowry was the starting point in the long and painful struggle of the women for their emancipation. Before its introduction in the Roman law, the married woman had no right whatever to hold and acquire property. All the properties she holds at the time of the marriage and those she acquires during the subsistence of the marriage became properties of the husband, because she had no capacity to hold any. This was also the sad plight of the American and English women in the common law, until the enactment of the Married Women's Property Act in 1882, which emancipated them. But when the dowry was introduced in the Roman law long before the Christian Era, the right of women to own property was recognized. Then it was defined, as it is now defined in the Civil Code, as "property and rights brought as such by the wife to the marriage at the time of contracting it and those she acquires during the marriage by donation, inheritance or legacy as dowry property." Notice: "property brought by the wife." This provision of the Civil Code is not exact, because Art. 1338 of the same also provides that the dowry may be constituted by the husband himself or by the parents or other persons. This is the situation of the dowry today as practised by our people in many parts of the country. The husband or his parents constitute the dowry, called *sab-ong* in Ilocano, *bugay* in Visayan, *bigaykaya* in Tagalog. The ownership of the dowry is transferred to the wife, but the usufruct is held by the husband. What seems lacking to make the institution up to date is to impress it with the idea that the holding of the property by the husband is for the benefit of the family, and that therefore the fruits therefor should be held in trust for this purpose, and cannot be disposed of without the consent of the wife, except in the ordinary and proper management of the conjugal interests.

Of course, the most important system or regime governing the property rights of the spouses is the legal community of property of profits. In Spanish it is called "sociedad legal de gananciales." It is unfortunate that these terms are translated "legal conjugal partnership" by the early translators of the Civil Code, because the translation fails to give the essence of the system, which is that the community is limited to profits. It is safe to say that practically all the marriages entered into in the Philippines today by our own people are governed by this system. This undoubtedly justifies an extensive treatment of the subject, but we can only barely outline its most important features and even then I hope that in so doing I shall not trespass unduly upon your indulgence.

Roughly, the characteristic features of this system are the following:

The system allows the existence of separate properties of the spouses, the dowry property and the community property. All the properties held by the spouses at the time of the celebration of the marriage are their own separate independent properties, which do not form any part of the community property. All those which they acquire during the subsistence of the marriage by donation, legacy or inheritance also from their own separate independent property. Then all properties acquired in exchange of all or any of these separate properties remain separate properties.

But all properties obtained in any manner whatever as fruits of those properties from the time of the celebration of the marriage to the time of its dissolution belong to the conjugal community. This constitutes the first of its resources. The second is, that all properties or values produced or acquired by the work of the spouses, physical or mental, jointly or individually, whether as wages, salaries, royalties, etc., from the time of the celebration of the marriage to its dissolution belong to the community.

As to the management of the community, the community is managed exclusively by the husband as long as the marriage lasts. His powers as manager are so extensive that in legal effect he practically embodies the partnership. He can dispose of all or any of the properties of the community for valuable consideration, that is by sale, exchange, mortgage, etc., without any limitation. While his powers to make donations are in general limited, yet any donation he makes cannot be impugned by the wife while the community lasts. While fraud is severely dealt with by law, and even by the Civil Code itself in certain instances, yet any disposition by the husband in fraud of the rights of the wife may not be impugned by her, except after the dissolution of the community when it is found that her share in the net remainder has been impaired. She can only make known her intention to impugn the fraudulent disposition during the marriage, but cannot prevent its taking effect.

The wife has no right to the management of the community, nor need she be consulted in any disposition or deprivation made by the husband. The only time when she may manage the community is when she is guardian of her husband, because of insanity, absence or civil interdiction, and in these cases, only when granted to her by the court. When so granted her powers of disposition are limited both by the law and by orders of the court. When the husband is managing the community, she can not bind the same in any way, not even for the expenses necessary for the support of the family. For these she can bind only her own exclusive property, except when her husband has given her his express or tacit consent.

The community is liable for the support and maintenance of the family. The ordinary maintenance expenses of the separate property of the spouses by reason of the fact that their fruits belong to the community, and all the ordinary or extraordinary expenses incurred by the community properties, are also charged against the community. The community is bound for these expenses, provided they are incurred by the husband. But, so long as the administration

of the community is in the hands of the husband, the wife can never bind the community, except for the usual daily expenses of the family, that is, for support, and even then, only when incurred with the tacit consent of the husband.

The community is dissolved by death or divorce. But so long as the marriage subsists, the wife can not have the community dissolved except by order of the court, and only on the following grounds:

First. When the husband is guilty of concubinage.

Second. When the husband has disappeared and his fate is unknown for a period of at least two years, or if he has left a manager, five years; and

Third. When he has been sentenced to civil interdiction, which is an accessory penalty to an imprisonment of more than six years. Except on those grounds, the wife, no matter how badly the husband may be mismanaging the property to the serious prejudice and detriment of the community, or of his family, cannot ask for dissolution of the community and obtain separation of property. Voluntary separation of property or by contract between the spouses is ineffective.

When the community is dissolved by death, the surviving spouse gets one-half of the residue after all the obligations of the community have been paid, while the other half goes to the heirs of the deceased spouse.

These are the main features of the legal conjugal partnership of profits. One redeeming feature of this set-up is that the wife is free from any responsibility for losses. All losses are born: first, by the property of the community; next, by the property of the husband. But the system contains fundamental flaws. Predicated on the theory of the incapacity of the wife to act, the husband has absorbed her personality; and while theoretically the community belongs in common to the spouses as joint owners, the husband is the It, the wife, nothing. The fruits of her property become part of the community property, but she has absolutely no say in its disposition, and an irresponsible husband may bestow them to whomever his fancy may please. The suggestions contained in your Memorial to remedy the situation are as follows:

(1) Depriving the husband the right to bind the conjugal partnership without the consent of the wife.

(2) Depriving the husband the right to alienate or encumber the property of the conjugal partnership without the consent of the wife.

These are very wise suggestions. They amply protest the interests of the wife, but when carried without qualifications or exceptions, they would bind the husband, and, in proper cases, also the wife, and make him or her helpless to meet the needs of the family. No one, of course, will attempt to deprive the husband of his authority as head of the family. Nor, I suppose, would there be any serious objection to his managing the community, as a general principle. What is needed it seems to me, is to impress the rules of law granting him his powers with the high and noble purpose that they are to be exercised only for the welfare, benefit and happiness of the family and children, never against their interest and welfare. Therefore, the wife, in the same measure as the husband, should be

able to bind the conjugal partnership for the support and maintenance of the family; (2) the husband should be able to dispose of properties of the community without the consent of the wife only when proper for the just and fair management of the community, reserving to the wife an effective objection, subject to the final arbitration or decision of the court; (3) the wife should be entitled to accounting of the partnership when she asks for it; and (4) each of the spouses should be entitled to have the community dissolved whenever the interests of one or of the family are prejudiced by its continuance. These are principles embodied in the progressive Civil Codes of Germany, Switzerland, and China.

I notice that there was no mention of divorce in your Memorial. I am mindful that this is a delicate field, and one who treads on it does so on his own peril. When I was a boy, I knew how it was to poke a hornet's nest. But these are days that call for courage, and the Philippine Association of University Women are called upon to lead their less fortunate sisters who have not had the benefit of advanced education and culture. In the spirit of a truth-seeking student, I wish we would fling prejudice aside and, with an eye to the best welfare of the home, family and children, give to the problem of divorce the intelligent, broadminded, tolerant solutions that it deserves.

These laws that we have been discussing were all made by men. Longfellow, the poet of the home, has said that man is incomplete without a woman. If he is, then his work must also be so, without the refining and perfecting touch of her hand. The wisdom of the laws passed without the benefit of her counsel and delicate feelings are in question today. They have been found wanting in humanity, spirituality and the sense of social solidarity. To supply those needs the women of this country, especially the distinguished members of this Association can make an invaluable contribution.

"EQUITY is the life of a legal fiction."—*11 Rep. 51.*