

ISLAMIC LAWS OF MARRIAGE AND DIVORCE AS AFFECTED BY PHILIPPINE LEGISLATION

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According to Muslim concepts, the closest ties exist between religion and law. While Western law is essentially secular, Islamic law is regarded fundamentally as divine law.¹ In the Philippines, there are approximately two million² followers of Islam divided principally into the following ethno-linguistic groups: (1) the Tau Sug of the Sulu Archipelago, Palawan, Zamboanga, and Davao; (2) the Maranao of the Lanao provinces, Cotobato, Zamboanga, and Bukidnon; (3) the Maguindanao of Cotobato; (4) the Samals of the Sulu Archipelago and Zamboanga; (5) the Yakans of Basilan Island and Zamboanga; (6) the Badjao of the Sulu Archipelago; (7) the Sangils of Davao and Cotobato; (8) the Melebugnons of Balabak Island; (9) the Jawa Mapun of Cagayan de Sulu; (10) a percentage of the Palawani of Palawan.³

This study focuses on the Islamic laws of marriage and divorce as it is the family law that has always represented the very heart of the *Sharia* (Islamic law) and has been basic to Islamic society down the centuries.⁴ While Western-derived commercial or land registration law have been accepted by the Muslims, the full imposition of the Civil Code has met strong opposition. For while the Civil Code prohibits polygamy and divorce, Islamic law permits both. This paper analyzes the efforts of the Philippine legislature to cope with the diversities presented by the Islamic laws of marriage and divorce.

I. ISLAMIC MARRIAGE

A. *Its Concept and Form*

In Islamic law, marriage is not considered to be a sacrament but rests entirely on a contractual basis. Its essential constituents are declaration and acceptance, and no religious ceremony, however customary, is legally necessary.⁵ While marriage rites may vary from one group

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¹ANDERSON, ISLAMIC LAW IN THE MODERN WORLD, 2 (1959).

²PHILIPPINE ALMANAC AND HANDBOOK OF FACTS, 14 (1973).

³GOWING, MOSQUE AND MORO: A STUDY OF MUSLIMS: IN THE PHILIPPINES 1 (1964).

⁴ANDERSON, *op cit. supra*, note 1 at 39.

⁵*Ibid.*, at 42.

to another, yet the basic conditions as to form are the following: (1) declaration or offer; (2) acceptance; (3) before sufficient witnesses; (4) the words must indicate with reasonable certainty that a marriage has been contracted.⁶ Every Muslim of sound mind who has attained majority can enter into a contract of marriage. As to what is the age of "majority", there has been no agreement among Muslim scholars. The continuum for choice has ranged from nine years to fifteen years.

B. *Classification of Marriages*

(1) *Valid marriage* — A marriage which conforms in all respects with the law in regard to legal requirements. For a marriage to be valid, it is necessary that there should be no prohibition affecting the parties. Prohibitions may be either perpetual or temporary. If the prohibition is perpetual, the marriage is void; if temporary, the marriage is irregular.⁷

(2) *Irregular marriage* — The irregular marriage of Islam is a relationship between a man and a woman, which, though not amounting to a lawful marriage, confers the status of legitimacy on the children. Here no rights of inheritance are created between husband and wife, but the issues being considered legitimate are entitled to share in the inheritance.⁸ The following marriages are considered irregular:

(a) A marriage without witnesses;

(b) A marriage with a woman undergoing *iddat*. *Iddat* is the prescribed period within which a woman whose marriage is dissolved by death or divorce is prohibited from contracting a new marriage.⁹

(c) A marriage with two sisters. It is unlawful to marry two sisters at the same time or to marry the sister of the wife during the wife's lifetime.

(d) A marriage with a fifth wife.

(3) *Void marriage* — The void marriage of Islam is one which is forbidden by the rules of consanguinity, affinity, or fosterage. Such a marriage is considered as totally non-existing in fact as well as in law. No mutual rights and obligations are created between the parties and the issue of such a union are illegitimate.¹⁰

⁶FYZEE, *OUTLINES OF MOHAMMEDAN LAW* (1949).

⁷*Ibid.*, at 94.

⁸*Ibid.*, at 94-95.

⁹For divorced women — 3 months. For widows — 4 months and 10 days. (II:347-349 Koran). *Holy Koran*. As translated by N.J. Dawood, (Great Britain: C. Nicholls and Co. Ltd., 1968). Also see Art. 351, Revised Penal Code.

¹⁰FYZEE, *op. cit. supra*, note 6 at 94-95.

The Koran provides that marriages with the following are void from the very beginning: (1) women whom one's father has married; (2) one's mother; (3) one's sisters; (4) one's paternal and maternal aunts; (5) the daughters of one's brothers and sisters; (6) one's foster mothers; (7) one's foster sisters; (8) the mothers of one's wives; (9) one's step-daughter who is in one's charge born of the wives with whom one have lain (it is not an offense to marry a step-daughter if one have not consummated his marriage with their mothers); and (10) the wives of one's begotten sons.¹¹

C. *Polygamy*

It is to be observed that the Islamic law classification of marriages is basically similar to the Philippine Civil Code classification of marriages, that is, into valid, voidable, and void marriages. One big difference, however, is that while the Civil Code limits a person to one spouse, Islamic law permits a Muslim to have up to four wives. A verse in the Holy Koran runs thus: "Then marry what seems good to you of women, two, three or four wives; but if ye fear that ye shall not act equitably, then one wife is enough."¹²

This Koranic provision is intended to limit rather than give license to polygamy. During the pre-Islamic period, there was no limit as to the number of wives a man took to himself. Among the Jews, Solomon, David and Moses were polygamous. Since Prophet Mohammed could not abruptly stop the practice of mass polygamy rampant at that time, he tried to minimize the matrimonial abuse by reducing the number of wives for a man to four with the thought of limiting it to one in the future.¹³ In addition, indulgence in polygamy is made conditional on a man's confidence that he could treat a plurality of wives impartially and on his ability to support existing dependents. Thus, for a Muslim to be polygamous, he must first seek permission from his first wife and her family; he must likewise show that he can support more wives and children comfortably (a huge bride's price is exacted as prima facie evidence of such ability) and finally, he must be prepared to treat all his wives equitably and with justice.¹⁴ Reflecting a strong male superiority complex, the Koran while permitting a man to have a maximum of four wives binds a Muslim woman to monogamy. If a Muslim woman takes another husband, she exposes herself to a charge of bigamy.¹⁵

¹¹Holy Koran II:359.

¹²Holy Koran IV:357.

¹³Ibrahim Jubaira, *The Prophet Mohammed on Marriage*, PHIL. FREE PRESS, 145 (December 12, 1959).

¹⁴GOWING, *op. cit. supra*, note 3 at 53.

¹⁵INDIAN PENAL CODE, sec. 496 as cited in FYZEE, *op. cit. supra*, note 6 at 79.

II. ISLAMIC DIVORCE

A. *Forms of Divorce*

The Philippine Civil Code allows only relative divorce. On the other hand, Islamic law permits absolute dissolution of the marital bond. But under both legal systems, the intendment of the law is the preservation of marriage as divorce is resorted to only if reconciliation between the spouses can never be effected. According to Islamic law, divorce may be acquired either through the mere will of the parties, without the necessity of citing any valid ground for divorce or by giving some valid causes. The first type consists of three forms, depending on the moving party behind it. Divorce may be initiated by the husband, by the wife, or by mutual consent.

The most frequent form of divorce in Islamic law is the *talaq* or unilateral repudiation of a wife by her husband. It is either revocable or definite. If a normal, regular expression is used, it is revocable; otherwise, it is definite.¹⁶ Thus, if a husband pronounces "I divorce you" three times before witnesses, then the divorce becomes irrevocable. No provision for appeal is available to the wife.¹⁷ A revocable repudiation is more favored as during the *iddat* period, the husband is given an opportunity to reconsider any hasty action and revoke the divorce at any time before the *iddat* ends.¹⁸ A revocable repudiation, unlike the definite repudiation, does not dissolve the conjugal community.¹⁹

The second form of divorce is a delegation by the husband of his own right of pronouncing divorce to the wife. A stipulation that, under certain conditions, the wife can pronounce divorce upon herself has been held to be valid, provided: *first*, that the option is not absolute and unconditional; and *secondly*, that the conditions are reasonable and not opposed to public policy.²⁰ If a Muslim woman procures a divorce, she must pay back double the sum that was bestowed upon her at marriage and she may not marry again within three months.²¹

The last form of divorce is based on mutual consent and consists of two types. The first is *khul* which is a dissolution of marriage granted by the husband at the instance of the wife. The second, *mubara'a* represents a type of divorce based on the mutual release of the spouses from

¹⁶SCHACHT, AN INTRODUCTION TO ISLAMIC LAW, 161 (1964).

¹⁷OROSA, SULU ARCHIPELAGO AND ITS PEOPLE, 77 (1970).

¹⁸ANDERSON, *op. cit. supra*, note 1 at 42.

¹⁹SCHACHT, *op. cit. supra*, note 16 at 164.

²⁰FYZEE, *op. cit. supra*, note 6 at 136.

²¹OROSA, *op. cit. supra*, at 77.

any outstanding financial commitments arising from the marriage relationship.²²

B. *Grounds for Divorce*

Some of the grounds for divorce under Islamic law are the following: (1) Adultery on the part of the wife; (2) Abandonment and/or long absence of either spouse; (3) An attempt by one spouse against the life of the other; (4) Impotence of the husband; (5) Non-fertility of the wife; (6) Insanity; (7) Affliction with a grave chronic disease; (8) Incapacity to support the wife; (9) Cruelty; (10) Incompatibility.

The foregoing enumeration is not exclusive as the causes for divorce under Islamic law are elastic and flexible. Each case for divorce will be decided according to the merits of the facts presented.

C. *Procedure for Granting Divorce*

The aggrieved party who wants to obtain a divorce may file his complaint orally or in writing with the *Agama Court*.²³ After a preliminary examination, the *kadi*²⁴ sets the date and time for the hearing of the complaint. In the hearing, the *kadi* tries to effect a compromise between the husband and wife. If no amicable settlement is arrived at, the *kadi* proceeds with the divorce suit and hears the evidence of the parties on both sides. If the *kadi* finds no sufficient cause of action, he merely advises and admonishes both parties and no divorce will be granted. But if a sufficient cause is established, then the *kadi* courses the divorce proceedings through the rules on *iddat*. During the *iddat* period, the judge and the relatives try to effectuate the re-establishment of harmony within the family. Should the parties reconcile, then the divorce proceedings are terminated. However, if the parties show a disposition to continue with the divorce, then the *kadi*, at the end of the *iddat* period, will decree the final dissolution of the matrimonial bond.²⁵

D. *Legal Effects of Divorce*

(1) Where the divorce has become irrevocable, marital intercourse becomes unlawful between the couple; but they may remarry unless there have been more than two pronouncements.

(2) Where there has been a triple divorce, remarriage can take place

²²ANDERSON, *op. cit. supra*, note 7 at 52.

²³Religious Court.

²⁴A magistrate or judge who has an extensive knowledge of Islamic law, customs and practices.

²⁵Pañgato, *Muslim Divorce Customs And Practices As Recognized By Law*, 8 FAR EAST LAW REV. 496-501 (1960).

only if the wife marries another man and is subsequently divorced from the latter husband.

(3) If the husband or the wife dies during the period of *iddat* following a revocable pronouncement of divorce, each is entitled to inherit from the other.

(4) If the pronouncement of divorce was irrevocable, neither of them can inherit from the other.²⁶

Having discussed the Islamic laws from the formation of marriage to its dissolution, we now proceed to examine the effect of Philippine laws on such Islamic domestic laws.

III. THE IMPACT OF PHILIPPINE LAWS

A. *History and Application of Articles 78-79 of the Civil Code*

Marriages between Muslims have always presented a practical difficulty to any uniform Marriage Law in the Philippines. General Orders No. 68, the marriage law in force in the Islands before the passage of Act No. 3613, accorded no recognition to tribal marriages. With the passage of the Marriage Law,²⁷ marriages between Muslims were exempted from compliance with the requirements laid down by law for a period of twenty years. This privilege was extended for another twenty years by Republic Act No. 241,²⁸ which amendment is substantially preserved in Article 78 of the New Civil Code which reads:

ART. 78. Marriages between Mohammedans or pagans who live in the non-Christian provinces may be performed in accordance with their customs, rites or practices. No marriage license or formal requisites shall be necessary. Nor shall the persons solemnizing these marriages be obliged to comply with article 92.

However, twenty years after the approval of this Code, all marriages performed between Mohammedans or pagans shall be solemnized in accordance with the provisions of this Code. But the President of the Philippines, upon recommendation of the Secretary of the Interior, may at any time before the expiration of said period, by proclamation, make any of said provisions applicable to the Mohammedans and non-Christians inhabitants of the non-Christian provinces.

This article recognizes the validity of Muslim marriages performed in accordance with their customs, rites or practices.²⁹ The Civil Code classifies such a marriage as one of exceptional character. It is considered exceptional because it does not require, for instance, a marriage license

²⁶FYZEE, *op. cit. supra*, note 6 at 133.

²⁷Act No. 3613 (1929).

²⁸Approved June 12, 1948.

²⁹*Adong v. Cheong Seng Gee*, 43 Phil. 43 (1922).

or the authority of the person performing the marriage before said marriage may be solemnized. Such "special treatment" offends no constitutional prohibition. The classification into Christian and non-Christian is well founded because there is a substantial distinction between the two groups. The great gap between Muslim and Christian laws and traditions affords a reasonable basis for making such classification. As *Rubi v. Provincial Board of Mindoro*³⁰ pointed out, classification is constitutional if: (1) it is predicated on a reasonable basis and is not arbitrary; (2) it is germane to the purposes of the law; (3) it is not limited to existing conditions only; and (4) it applies equally to all members of the same class.

For Article 78 to apply, it is necessary that the Muslims reside in non-Christian provinces. The non-Christian provinces are those provinces formerly placed under the defunct Department of Mindanao and Sulu. These provinces are, more particularly; Lanao del Norte, Lanao del Sur, Cotabato, Davao, Zamboanga del Norte, Zamboanga del Sur, Palawan, Sulu, and some parts of the provinces of Bukidnon, Occidental Misamis and Agusan.³¹ With this geographical limitation, Muslims residing say in Manila, would not be able to take advantage of Article 78.

In case of a mixed marriage between a Christian and a non-Christian, the law of the male governs.³² If he is Christian, the general provisions of Chapter I, Articles 52-96 of the Civil Code apply. If he is Muslim, the parties are given the option to choose either the juridical form provided in the Civil Code or to follow the marriage customs and rites of his non-Christian province under the privilege given by Article 78.

The twenty year period provided for under Article 78 lapsed last August 30, 1970 but Republic Act 6268³³ extended the period for ten more years by amending Article 78 as follows:

SEC. 1. The second paragraph of Article seventy-eight of Republic Act Numbered three hundred eighty six is amended to read as follows:

"However, thirty years after the approval of this Code, all marriages between Muslims or other non-Christians shall be solemnized in accordance with the provisions of this Code. But the President of the Philippines, upon recommendation of the Commissioner of National Integration, may at any time before the expiration of said period, by proclamation, make any of said provisions applicable to the Muslims and non-Christian inhabitants of any of the non-Christian provinces."

Thus, compliance with the civil form of marriage will not be required

³⁰39 Phil. 660 (1919).

³¹Pañgato, *supra*, note 25 at 484.

³²CIVIL CODE, Art. 79.

³³Approved June 19, 1971.

of Muslims residing in the non-Christian provinces till after August 30, 1980, subject however, to the discretionary power given to the President of the Philippines to terminate such privilege at an earlier date.

B. *Interpretation of Article 78*

Much controversy has centered upon the construction of Article 78. Should it be interpreted to exempt Muslims from formal requisites only or from both formal and substantial requirements? The resolution of this question is of utmost consequence as it would determine whether the practices of polygamy and divorce are sanctioned under Philippine law. One view holds the belief that under Article 78 what are dispensed with in marriages among non-Christians living in non-Christian territory are the matters relative to the marriage license and other formal requisites only. As to legal capacity and impediments to marriage, the other provisions of the Civil Code shall apply. A contrary view, however, would be to read into Article 78 a general exemption from both formal and substantial requirements with the logical result of recognition of Muslim polygamy and divorce.

C. *May a Muslim be liable for bigamy?*

Article 349 of the Revised Penal Code provides:

"The penalty of *prision mayor* shall be imposed upon any person who shall contract a second or subsequent marriage before the former marriage has been legally dissolved . . ."

A cursory examination of the aforequoted penal provision discloses that a person who shall contract a second or subsequent marriage before the former marriage has been legally dissolved is guilty of bigamy. In the light of Article 349 of the Revised Penal Code and Article 78 of the Civil Code, may a bigamy case against a polygamous Muslim prosper?

Two different views are presented to answer this question:

(a) *Negative side.* Justice Jorge Bocobo, Chairman of the Code Commission, held the belief that polygamous marriages among Muslims residing in Mindanao and Sulu are valid and the children born of such marriages are legitimate inasmuch as Article 78 provides that: "Marriages between Muslims who live in non-Christian provinces may be performed *in accordance* with their customs, rites or practices."³⁴ The phrase "in accordance" is construed to cover not only the formal exemptions but also all the incidents of a valid Muslim marriage, including polygamy and

³⁴Memorandum on *Miscellaneous Proposals for Amendment to the New Civil Code*, 20 LAWYERS J. 624 (1955).

divorce. Accordingly, once a Muslim gets married before his own minister, then all the customs and practices incident to that marriage would be recognized and respected pursuant to Article 78. This view would not limit Article 78 to a mere one-day privilege which ends with the solemnization of the wedding. Instead, the beneficial effect of the law is extended to the marital relationship and all its consequences.

Although provided in a general law, Article 78 may be considered as a special law insofar as Muslims are concerned. Being such, it may have the effect of modifying a general provision (Art. 349) of the Revised Penal Code. To the extent of any necessary repugnancy between a general law and a special law, the latter will control the former. The special law is to be taken as an exception to the general law in the absence of special circumstances forcing a contrary conclusion.³⁵

And even if Article 78 is not viewed as a special law, the result would be the same; for the Revised Penal Code was passed on January 1, 1932 while the Civil Code took effect on August 30, 1950. When two statutes of different dates and contrary tenor are of equal theoretical application to a particular case and there is no way of reconciling them, the statute of later date, being presumed to be the latest expression of legislative will on the subject, prevails.³⁶

(b) *Affirmative Side.* On the other hand, the proponents of the opposing view argue that Article 78 only permits a Muslim to get married in accordance with Mohammedan ceremonies without the need of fulfilling the formal requisites in the Civil Code. Article 78 specifically provides: "No marriage license or formal requisites shall be necessary. . . ." Article 78 must be strictly construed and limited to the solemnization of the marriage ritual for which non-Christian ministers have been directly authorized by law. What are dispensed with in marriages among non-Christians refer only to matters relative to formal requisites and not to the essential requisites. All the legal impediments in the Civil Code³⁷ pertaining to marriage one of which is the impediment of a valid and subsisting marriage, are not done away with and apply equally to both marriages or ordinary and exceptional character.³⁸

Article 78 cannot be unduly stretched to give Muslims full freedom to enter into a bigamous or polygamous marriage since such a marriage is punishable under the Penal Code and there is no exempting clause in

³⁵ALCANTARA, STATUTES, 93 (1971).

³⁶Herman v. Radio Corp. of the Phil., 50 Phil. (1927).

³⁷CIVIL CODE, Art. 80-81.

³⁸Garcia, *Does the New Civil Code Legalize Polygamous Marriages Among Non-Christians?*, 21 LAWYERS J. 7, 45 (1956).

the case of Muslims. Article 349 of the Penal Code must then bind everybody within the territorial jurisdiction of the Philippines, Christian or non-Christian. The argument that Article 349 of the Penal Code is impliedly modified by Article 78 of the Civil Code loses its potency when it is considered that Article 78 is not a new provision. It is noted that Article 78 is a substantial reproduction of Section 25 of Act No. 3613 which law was passed approximately two years earlier than the Revised Penal Code. There being no substantial difference between Section 25 of the Marriage Law and Article 78 of the Civil Code, the former being merely incorporated into the latter by way of codification, it may reasonably be presumed that the law-making body intended that the same construction and interpretation should continue to be applied to Article 78 of the Civil Code as that given by the Supreme Court to Section 25 of the Marriage Law.

In the case of *People v. Mora Dumpono*,⁴⁰ the defendant was accused of bigamy for allegedly contracting a second marriage while her first marriage was still subsisting. The defense was that the alleged second marriage was null and void according to Mohammedan rites on the ground that the father had not given his consent thereto. The Supreme Court in dismissing the case said: "It appearing that the marriage alleged to have been contracted by the accused with Sabdapal, her former marriage with Hassan being undissolved, cannot be considered as such, there is no justification to hold her guilty of the crime charged . . ." The clear implication of the Court's decision was that if the second marriage had been valid, she could have been liable for bigamy. In *People v. Subano*⁴¹ the Supreme Court had the occasion to say: "Although the practice of polygamy is approved by custom among these non-Christians, polygamy, however, is not sanctioned by the Marriage Law which merely recognizes tribal marriage rituals." These two cases, although decided before the passage of the New Civil Code, are of strong persuasive effect due to the fact that Article 78 is substantially similar to Section 25 of Act No. 3613 which was the law in point in these cases.

Furthermore, customs cannot have the force of law if violative of public policy. Article 11 of the Civil Code provides: "Customs which are contrary to law, public order or public policy shall not be countenanced." The habits and customs of a people, the dogmas or doctrines of a religion, cannot be superior to nor can they have precedence over laws relating to public policy because laws relating to marriage and its incidents are moral

³⁹*Ibid.*, p. 7.

⁴⁰62 Phil. 246 (1935).

⁴¹73 Phil. 692 (1942).

in nature and as such they affect public policy.⁴² The government's policy against the practice of polygamy is vigorously enunciated in the legal provisions disqualifying polygamists or believers in polygamy to be naturalized as Philippine citizens⁴³ and the non-recognition of bigamous or polygamous foreign marriages.⁴⁴

D. *Is a Muslim Divorce Valid?*

During the Spanish regime, the law on divorce in the Philippines was found in the *Siete Partidas* which allowed only relative divorce. Act No. 2710, passed on March 11, 1917, established a regime of absolute divorce. During the Japanese occupation of the Philippines, Executive Order No. 141 repealed Act No. 2710 and increased the grounds for absolute divorce. Act No. 2710, however, was revived when World War II ended — with the resultant effect of abrogating all laws passed by the Japanese invaders in the Philippines. Subsequently, the new Civil Code abolished absolute divorce under Act No. 2710 and replaced it with a lesser form of freedom from marital bondage. Article 97 of the Civil Code provides that a petition for legal separation may be filed: (1) for adultery on the part of the wife and for concubinage on the part of the husband as defined in the Penal Code; or (2) an attempt by one spouse against the life of the other.

The Civil Code thus recognizes only a system of relative divorce. However, Congress enacted a special legislation, Republic Act No. 394, entitled, "An Act Authorizing For a Period of Twenty Years Divorce among Moslems residing in Non-Christian Provinces in Accordance with Moslem Customs and Practices." Said Republic Act 394 provides in full:

SEC. 1. For a period of twenty years from the date of approval of this Act, divorce among Moslems residing in non-Christian provinces shall be recognized and be governed by Moslem customs and practices.

SEC. 2. This Act shall take effect upon its approval. Approved, June 18, 1949.

Before Republic Act No. 394 was passed, divorce among Muslims was not legally recognized. In *People v. Bitdu*,⁴⁵ the Supreme Court said:

"The Court is of the opinion that even if the divorce alleged by the defense was secured in conformity with Mohammedan doctrines, such divorce cannot prevail against Act No. 2710 prescribing the causes and conditions under which divorce may be obtained. Any divorce obtained in the Philip-

⁴²*People v. Bitdu*, 58 Phil. 817 (1933).

⁴³Com. Act. No. 473 (1939), sec. 4 (c).

⁴⁴CIVIL CODE, Art. 71.

⁴⁵*Op. cit.*, note 42.

pine Islands for causes and under conditions other than those enumerated in said law, would have no legal effect."

For Republic Act No. 394 to apply, it is necessary that: (1) the parties are Muslims; (2) that they reside in non-Christian provinces; and (3) the marriage for which a divorce is sought has been performed by a Muslim Minister. Marriages before a municipal judge or a judge of the Court of First Instance or before a Christian minister are not subject to a Muslim divorce. The first two requirements for the application of Republic Act No. 394 intend to frustrate any attempt on the part of a Christian to go to a non-Christian territory, join the Muslim religion and then take advantage of the provisions of the bill. Republic Act No. 394 cannot be used to camouflage his immoral intentions.⁴⁶

Within the twenty-year period provided under Republic Act No. 394, any divorce granted according to Muslim customs and practices is legally recognizable. However, no judicial notice may be taken of such a divorce and it must be subject to proof in every particular case. A Muslim custom or practice, like any other custom or practice, according to Article 12 of the Civil Code, "must be proved as a fact according to the rules of evidence."⁴⁷

Republic Act No. 394 expired last June 18, 1969. An effort was made in Congress to make permanent the grant of divorce to Muslims,⁴⁸ but no positive legal action has been taken on such a bill as of this date. The question which may then be presented is: After Republic Act No. 394, would a Muslim divorce be valid?

If Article 78 of the New Civil Code would be interpreted to exempt Muslims from both formal and substantial requirements regarding marriage, then the expiration of Republic Act No. 394 creates no difference at all inasmuch as Republic Act No. 6268 has extended to thirty years the period provided in Article 78. In fact, there would even be no need for Republic Act No. 394. However, logic and accumulated jurisprudence tend to reject this view.

Republic Act No. 394 was approved on the same day that the Civil Code was approved — June 18, 1949. Should Article 78 of the Civil Code be construed to cover the custom of divorce among Muslims, then Republic Act No. 394 would be a mere superfluity. It cannot be presumed that the legislature would do a futile thing by passing laws covering matters already passed upon.

⁴⁶CONG. RECORD 1630-1632, May 3, 1949.

⁴⁷People v. Omar, C.A.-G.R. No. 04237 CR December 23, 1965.

⁴⁸Sponsored by Rep. Indanan M. Annie (N-Sulu).

"Article 78 of the New Civil Code and Republic Act No. 394 are complementary to each other: Article 78 provides the mode and manner by which Mohammedan marriages may be solemnized and performed, Republic Act No. 394 provides the mode and manner to govern the dissolution of Mohammedan marriages. Republic Act No. 394 was enacted later than the New Civil Code which is numbered Republic Act No. 386; hence it stands independent of the provisions of the New Civil Code on legal separation and complements the New Civil Code provisions on Mohammedan marriages and divorces."⁴⁹

The Philippine government recognized for a limited period the custom of divorce among Muslims as a step towards their integration into the body-politic. Republic Act No. 394 has for its purpose only that of providing a transitory period of twenty years, within which, it was hoped, the Muslims could be fully assimilated to the majority of the Filipino people.⁵⁰ Inasmuch as Republic Act No. 394 only created a transitory period, its expiration would have the effect of reviving the policy of the government and the courts towards tribal divorces before the passage of Republic Act No. 384. Republic Act No. 6268 cannot be interpreted to extend the period for the granting of Muslim divorces as this law only amends Article 78 of the Civil Code and makes no mention of Republic Act No. 394.

Thus, any divorce granted according to Muslim customs and practices after June 18, 1969 would be devoid of any legal basis. A divorce cannot be had except in that court upon which the state has conferred jurisdiction and then only for those causes and with those formalities which the state has by statute prescribed.⁵¹ It is conceded in all jurisdictions that public policy, good morals, and the interests of society require that the marriage relation should be surrounded with every safeguard and its severance allowed only in the manner prescribed and for the causes specified by law. And the parties can waive nothing essential to the validity of the proceedings.⁵²

CONCLUSION

The preponderance of the principles and authorities cited veers towards the conclusion that a Muslim may be prosecuted for bigamy under Article 349 of the Revised Penal Code. After a careful study of the arguments supporting each of the two divergent views earlier indicated, the second view appears to be more in consonance with judicial authorities and is

⁴⁹People v. Omar, *supra*, note 47.

⁵⁰CONG. RECORD, *supra*, note 46 at 1630.

⁵¹19 C. J. 19 (1920).

⁵²19 C. J. 20 (1920).

supported, besides, by high considerations of policy. It has convincingly shown that Article 78 of the New Civil Code only grants a Muslim the right to follow his tribal marriage rituals, without being burdened with the necessity of a marriage license or other formal requisites. Similarly, the statutory period provided in Republic Act No. 394 having lapsed, a Muslim divorce after June 18, 1969 is null and void. Thus, although supported by Muslim laws and customs, the tradition of polygamy and divorce is not sanctioned by Philippine laws.

It is submitted that a more temperate rule should be adopted. As previously pointed out, Islamic law is essentially a divine law. It is a transcendental law that has a validity of its own quite distinct from that of any human legislature or judiciary. Considering the nature of Islamic law, the Philippine government in line with the "freedom of religion" clause⁵³ embodied in the Constitution must recognize and respect such laws.

Executive and legislative policy both under Spain and the United States espoused the policy of non-interference with the free exercise of the Islamic religion. For instance, in the treaty of April 30, 1851 entered into between the Captain-General of the Philippines and the Sultan of Sulu, the Spanish government guaranteed "with all solemnity to the Sultan and other inhabitants of Sulu, the free exercise of their religion, with which it will not interfere in the slightest way and it will also respect their customs." In the same manner, the President McKinley's Instructions to the Philippine Commission imposed on every branch of the Government of the Philippine Islands the inviolable rule "that no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. That no form of religion and no minister of religion shall be interfered with or molested in following his calling, and that the separation between state and church shall be real, entire and absolute."⁵⁴

It is observed that the Philippine government has not definitely and categorically repudiated the Islamic traditions which run counter to Philippine laws. Although the government has the sovereign power to lead a crackdown on "undesirable" Islamic practices, yet it has not actively exercised such right. Bigamy is a public offense which can be denounced not only by the person affected thereby but even by a civic-spirited citizen who may come to know the same,⁵⁵ yet no Muslim has languished in Jail

⁵³Const. Art. IV, sec. 8.

⁵⁴Cited in *Adong v. Cheong Seng Gee*, *supra*, note 29 at 54.

⁵⁵*People v. Belen*, G.R. No. 150-R-L-525, May 29, 1947, 45 O.G. Suppl. 5, 88 (May, 1949).

for the crime of bigamy. In the *Bitdu* case, the accused was immediately pardoned by the Governor-General after the affirmance of her sentence by the Supreme Court.⁵⁶ In another case,⁵⁷ the court while finding a Muslim guilty of bigamy suspended the sentence imposed upon him. These instances would strongly indicate the government's own perplexity in dealing with the vexing problem of Muslim domestic relations.

It is highly recommended that a law be passed by the National Government stating in a more definite and unequivocal language the meaning of the phrase in Article 78 of the Civil Code which states: "in accordance with their customs, rites or practices." Until and unless the Government does that, the problem of marriage and divorce in Moroland will remain a puzzling question considering the fact that authorities are not in agreement as to the application and interpretation of Article 78 of the Civil Code in relation to the penal provision of bigamy.⁵⁸

⁵⁶*Bigamy Case in Moroland*, 3 F.E.U.L.Q., 1, 9 (1955).

⁵⁷*Ibid.*, p. 10-11.

⁵⁸REV. PENAL CODE, Art. 349.