the Constitution remain firm and stable," his rejection of the "exercise (of) power that can be identified merely with a revolutionary government" that makes its own law[42] and his exhortation to "remain steadfast on the rule of law and the Constitution," which is but to say that no one should be above or below the law. So let me conclude, as I began, with the President's call uttered on the first anniversary of the proclamation of the 1973 Constitution, thus:

> "xxx xxx Whoever he may be and whatever position he may happen to have, whether in government or outside government, it is absolutely necessary now that we look solemnly and perceptively into the Constitution and try to discover for ourselves what our role is in the successful implementation of that Constitution. With this thought, therefore, we can agree on one thing and that is: Let all of us age, let all of us then pass away as a pace in the development of our country, but let the Constitution remain firm and stable and let institutions grow in strength from day to day, from achievement to achievement, and so long as that Constitution stands, whoever may the man in power be, whatever may his purpose be, that Constitution will guide the people and no man, however, powerful he may be, will dare to destroy and wreck the foundation of such a Constitution.
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> "These are the reasons why I personally, having proclaimed martial law, having been often induced to exercise power that can be identified merely with a revolutionary government, have remained steadfast on the rule of law and the Constitution."[43]

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[42] Pres. Marcos at satellite world press conference of Sept. 20, 1974: "(I) insisted that not only individuals but also we ourselves in government and the military be guided by a Constitution and that Constitution be respected. This was one of the agreements with those with whom I met before we agreed to proclaim martial law, and that is, that we would follow the Constitution and not establish a revolutionary form of government and start fighting all over the countryside again." (Phil. Daily Express issue of September 23, 1974).

[43] Pres. Marcos' address on observance of the first anniversary of the 1973 Constitution on Jan. 17, 1974; Phil. Labor Relations Journal, Vol. VII, Jan. 1974, p. 6.

THE HISTORY OF MARRIAGE LEGISLATION IN THE PHILIPPINES

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Law is one of the most enduring and significant records of a people's history. But law also follows and mirrors the changing life of a people, its gradual growth and sometimes its cataclysmic changes. Social and attitudinal changes affect the law and while legal enactions yield more slowly to such influences, inevitably they are forced to do so. One of the most significant factors in the development of modern society has been the changed status of woman in society. Their legal struggle has been capsulized in the Women's Rights Movement and today women are moving on all fronts to rectify the legal discriminations against them which are still contained in many juridical formulations of the past. Quite naturally therefore the Civil Code of the Philippines, originally promulgated in 1950 but in reality containing much that was based on the past, is being closely scrutinized with a view to change in this respect. Before looking to the future however, it is always useful to review the past. Hence it is the purpose of this study to attempt to give a history of the development of marriage legislation in the Philippines from pre-colonial days until the promulgation of the Civil Code of the Republic.

It may come as a surprise to some to realize that into this mold has been poured a mixture of the two great legal systems of the western world. But it should not be forgotten that these systems were built on the foundation of ancient Malay customs and laws as well as on the precepts of Moslem law in the areas of southern Mindanao and the Sulu archipelago. Through the Conquistadores and missionaries of Catholic Spain the great principles of Roman law which had formed the Spanish legal tradition entered into the lifestream of the simple barangay system of the pre-colonial Philippines and their effect on the ultimate formation of the Filipino nation cannot be underestimated. This legal tradition was embodied in the Spanish Civil Code of 1889 and was firmly implanted in the legal soil of the Philippines when the American occu-

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piers of the twentieth century added to this already rich store, the principles and flexibility of the Common Law of England as it had developed in the United States of America. The two systems converged in the Civil Code of 1950 and elements of both traditions can be found in the legislation now in force. As the only Christian nation of the Far East, with a population predominantly Catholic, it is not surprising that any civil legislation touching the institution of marriage was of supreme interest to the Catholic clergy and laity. As initiatives are under way to change some of the provisions of the present Civil Code on marriage, a glance backward on the development of marriage legislation in the Philippines may be helpful to an understanding of our present problems.

THE COLONIAL PERIOD

Pre-Spanish Marriage Law

It might appear at first glance that the importance of pre-Spanish customary law is merely academic. Actually many of the principles of native Malay law and custom have survived the invasions of both Latin and Anglo-Saxon institutions, and are deeply woven into the social fabric of the Filipino people. In the new Civil Code of the Philippines, customs have a definite juridical value.[1]

Although the natives of the Philippines had developed their own alphabet before the coming of the Spanish Conquistadores, very few of these writings have come down to us due to the fragile character of the leaves and bark strips which served as writing material. Our knowledge is gleaned chiefly from the writings of the

[1] CIVIL CODE OF THE PHILIPPINES, Art. 7. "Laws are repealed only by subsequent ones, and their violation or non-observance shall not be excused by disuse, or *custom* or practice to the contrary..."

Art. 11. — "*Customs* which are contrary to law, public order or public policy shall not be countenanced."

Art. 12. — "*A custom* must be proved as a fact, according to the rules of evidence."

Commenting on the above articles together with Art. 8, which provides for the application or interpretation of law by judicial decision Padilla affirms: "The sources of *derecho* are: (1) law; (2) jurisprudence; and (3) *customs* (Art. 11). In the case of Chu Jan vs. Bernas, 34 Phil. 631, 632 (1916) the dispute was over the settlement of a decision in a cockfight held on June 16, 1913. The referee of the fight had settled for the defendant, and the plaintiff brought suit. The Justice of the Peace declared it was a draw. Then the Court of First Instance dismissed it as it knew of no laws governing cockfights. Upon appeal, it was held, "Such an excuse is the less acceptable because... the Civil Code, in the second paragraph of article 6, provides "that the *customs* of the place shall be observed, and, in the absence thereof, the general principles of law."

In commenting on the growth of a Philippine Common Law the Supreme Court declared in part that: "The past twenty years have developed a Philippine Common Law or case law based almost exclusively, except where conflicting with local customs and institutions, upon Anglo-American Common Law...

There has been developed, and will continue, a common law in the jurisprudence of this jurisdiction... which common law is effective in all of the subjects of law in this jurisdiction in so far as it does not conflict with the express language of the written law or with *local customs* and *institutions*." In re Shoop, 41 Phil. 213, 252-253 (1920).

early missionaries and modern studies of present-day primitives by ethnologists and anthropologists.

Among the early Visayans, the members of the chief's family disdained to marry below their station. In accord with almost universal custom in the Orient, the parents or even the grandparents of the prospective spouses arranged the union. Sometimes this was effected before birth. A frequent condition of the marriage was that the groom should serve the parents of the bride in their home for months and even years before the marriage. The enduring character of this custom has been such that as late as 1909 the Fathers of the First Provincial Council of Manila saw fit to single it out for comment.[2] A dowry was also demanded of the groom or his family. A breach of promise to marry required that damages be paid in the form of property loss. Should a slave marry a freeman, then half of the children were slave and half were free.

While monogamy was the general rule, it was considered quite lawful to have concubines in addition to the legitimate wife. Divorce was relatively easy since the woman could obtain it together with the right to remarry by returning the dowry to the man or his parents plus an additional amount equal to the dowry. If she did not remarry, then only the dowry had to be forfeited. A husband asking for separation lost half the dowry; if there were children at the time of this separation then the entire dowry was held in trust for them by the grandparents. Gamboa in his introduction to Philippine law offers the following interesting description of the three different classes of marriage ceremonies among the early Filipinos.[3]

> The chiefs send as go-between some of their *timaguas*, to negotiate the marriage. One of these men takes the young man's lance from his father and when he reaches the house of the girl's father he thrusts the spear into the staircase of the house; and while he holds the lance thus, they invoke their gods and ancestors, requesting them to be propitious to the marriage.
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> After the marriage is agreed upon — that is to say — after fixing the amount of the dowry which the husband pays to the wife (which among the chiefs of these islands is generally the sum of 100 pesos) — they go to bring the bride from the house of her parents. One of the Indians takes her on his shoulders; and on arriving at the foot of the stairway of the bridegroom's house, she affects coyness, and says that she will not enter. When many entreaties have proved useless, the father-in-law comes out and promises to give her a slave; she will go up. She mounts the staircase, for the slave; but when

[2] "El Sinodo de Manila reprueba la practica de algunos pueblos de aqui de tener al pretendiente en casa de los padres de la prometida, prestando sus servicios dia y noche por tiempo ilimitado antes del matrimonio; por los muchos abusos e inmoralidades que trae consigo esa practica." Cf. SINODO DE MANILA, No. 91; TAMAYO, AMIGO DEL PARROCO FILIPINO 296.

[3] Filipino society at the time of the conquest was divided into three classes; the chiefs or ruling class, the freemen (timaguas), and the slaves. The political structure rested on the family as a unit.

The barangay, a communal organization, was composed of the head of a family, his relatives and dependents, and their slaves... A number of barangays, each of which had its own chief, might be located in the same town and might be subordinate to a still higher chief. GAMBOA, PHILIPPINE ELEMENTARY LAW 37ff.

she reaches the top of the stairway and looks into her father-in-law's house and sees the people assembled within, she again pretends to be bashful and the father-in-law must give her another slave. After she has entered, the same thing takes place, and he must give her a jewel to make her sit down, another to make her begin to eat, and another before she will drink. While the betrothed pair are drinking together, an old man rises, and in a loud voice calls all to silence as he wishes to speak. He says: "So-and-so marries so-and-so, but on the condition that if a man should through dissolute conduct fail to support his wife she will leave him, and shall not be obliged to return anything of the dowry that he has given her, and she shall have freedom and permission to marry another man. And therefore, should the woman betray her husband, he can take away the dowry that he gave her, leave her, and marry another woman. Be all of you witnesses for me to this compact." When the old man has ended his speech, they take a dish filled with clean, uncooked rice; and an old woman comes and joins the hands of the pair and lays them upon the rice. Then, holding their hands thus joined, she throws rice over all those who are present at the banquet. Then the old woman gives a loud shout, and all answer her with a similar shout, and the marriage contract or ceremony is complete.

The *timaguas* do not follow these usages, because they have no property of their own. They do not observe the ceremony of joining hands over the dish of rice, through respect for the chief, for that ceremony is for chiefs only. Their marriage is accomplished when the pair unite in drinking *pitarillo* from the same cup. Then they give a shout, and all the guests depart, and they are considered as married, for they are not allowed to drink together until late at night. The same ceremony is observed by rich and respectable slaves.

But the poor slaves, who serve in the houses, marry each other without drinking and without any go-between. They observe no ceremony, but simply say to each other, "Let us marry."[4]

Spanish Law

With the definitive conquest of the Philippine by the energetic action of Miguel Lopez de Legaspi, and the expeditions of his equally successful grandson, Salcedo, there began a gradual implantation of the laws of the conquerors. This was accomplished either by the express declaration of a Royal Decree, or by implication. As a consequence there were three distinct fonts of law during the colonial period: 1) The laws of the Peninsula itself, which were extended without change to the colonies; 2) laws decreed explicitly for the Philippines either by the sovereign or the Royal Audiencia or the Consejo de las Indias; and finally 3) the great mass of legislation promulgated by Rome for the newly discovered mission territories, and applied either through the bishops or the religious orders, usually always through the medium of the Spanish crown.[5] A survey of this law, brief though it be, is necessary to a full understanding of the development of law in the Philippines.

[4] *Id.* at 39-40.

[5] "Un matiz interesante de la competencia del gobierno central se relaciona con la materia eclesiastica. Como España asumio la tarea de evangelizar las Indias tuvo desde el primer momento un derecho de patronato (Bulas de Alejandro VI, 1501, y de Julio II, 1508) por virtud del cual percibia los diezmos y presentaba los aspirantes a beneficios de la Iglesia. De este modo, los Reyes ejercieron una actividad extra-ordinaria que les aseguraba la mas resuelta adhesion del clero. Los Reyes se consideraron Vicarios generales del Pontifice y de modo alguno admitieron que el Papa crease una Nunciatura para America". BENEYTO, MANUAL DE HISTORIA DEL DERECHO ESPAÑOL 182.

The fundamental law of Spain was explicitly extended to the colonies for purposes of interpretation and application as early as 1530. The Royal Decree issued in that year provided as follows:

> That in all cases, suits and proceedings in which laws of this compilation do not provide for the manner of their decision, and no such provision is found in special enactments passed for the Indies and still unrepealed, or those which may here-after be so enacted, then the laws of our Kingdom of Castile shall be followed, in conformity with the law of Toro, both with respect to the procedure to be followed in such cases, suits, and proceedings and with respect to the decision of the same on the merits.[6]

To fully understand the effect of this decree, some notion of the development of law in the Iberian peninsula is required. The fusion of the Romanized Spaniards and their Germanic conquerors, the Goths, created the Spanish nation and law. As a consequence two strong tendencies struggled for mastery in the legal field, the Roman and the Gothic.[7] Undoubtedly the Roman element, established long before the Gothic invasion, and revived under the influence of Bologna in the Middle Ages, constitutes the most powerful single factor in Spanish Legal history.[8] We can distinguish four well-defined periods in the history of Spanish law: a) from the 6th Century to the reign of Alfonso the Wise in the mid-13th Century; b) from the mid-13th century until the end of the reign of Ferdinand and Isabela, early in the 16th century; c) from the time of Charles V to the codification of Spanish law in 1889, and finally d) the modern period.

During the first two periods there were collections and compilations of diverse laws of the various states. Of these the following are the most important: 1) *The Breviary or Code of Alaric.*— Promulgated by Alaric II in the year 506, this is one of the earliest collections of medieval Spanish law. It was in reality a conservation of imperial Roman Law with modifications for the Visigothic kingdom, the *"lex Romana Visigothorum".*[9] 2) *The Fuerro Juzgo.*— Superseding the Breviary was this second great Visigothic code, which is more accurately called the "Liber Judiciorum".[10] It was the first great combination of Roman and Teutonic Law, binding for all Spain at that time; as such it is the foundation of the modern Spanish code and was not entirely annulled until its formation.[11] 3) *The Fuero Real.*— The first great compilation of Alfonso the

[6] Las Leyes de las Indias, 1530; of GAMBOA, *supra*, note 3, at 53.

[7] Cf. SABADIE, HENRI, LES SOURCES DU DROIT CIVIL ESPAÑOL 15.

[8] "La importancia del elemento romano es fundamental y persistente, constituvendo el mas poderoso de los factores juridicos que influyen en nuestra vida historica y encontrando en su favor, a partir de la Glosa y de los Glosadores, esfuerzos interesados de juristas y de reyes." BENEYTO, *supra*, note 5 at 16, n. 7.

[9] Cf. GAMBOA, *supra*, note 3, at 51; BENEYTO, *id.* at p. 65-5.

[10] Beneyto considers it inexact to call the *Liberiudiciorum*, the Fuero Juzgo. The latter was really a later romanization of the former territorial visigothic code. Cf. BENEYTO, *id.* at 97 for his complete explanations.

[11] *Id.*; GAMBOA, *id.* at 51. The principles of the Fuero Juzgo were actually applied in the decisions of the Supreme Court of the Philippines, when in the case of Legarda vs. Valdez, 1 Phil. 146, 148 (1902) the Fuero Juzgo was referred to in showing that the penalty of banishment was not a cruel or unusual punishment.

Wise, it was promulgated in 1255. In it the Gothic influence was more pronounced.[12] 4) *Las Siete Partidas.*— This second work of the greatest Spanish legislator of the Middle Ages, represents more clearly the reacceptance of the Roman law, then being revived by the School of Bologna. Ten years of labor went into its formation prior to publication in 1265, and it was a Digest of Spanish-Castilian law divided into seven parts. However it was supplementary in character and did not annul the Fuero Real.[13] 5) *Leyes de Toro.*— Formulated at the request of the Cortes of Toledo to settle contradictory interpretations of previous laws, they were promulgated in 1505 by Doña Juana, and show an even greater introduction of the principles of Roman law. 6) *Nueva Recopilacion.*— This compilation was promulgated in 1567 and contained all the laws in force since the Fuero Real and the Partidas. Although in itself, it was far from a perfect solution, it marked the beginning of modern codification in Spain. 7) *Novisima Recopilacion.*— Charles IV published this compilation in 1805; it contained all the laws from the 15th century to the date of publication. It was at best anachronistic, but it continued to be the body of general legislation until the enactment of the modern codes.[14]

With the discovery of the new world and the vast expansion that followed thereon, situations arose which found no corresponding norm of judgment in the existing laws of Spain. Consequently an entire group of laws developed either through the direct intervention of the King or in the ordinary administration of the colonies by the Consejo de Indias, the Audiencias, and the Viceroys.[15] The growth of this extra-peninsular legislation, created more by necessity than desire, finally resulted in the *Recopilacion general de las Leyes de Indias.* This veritable mass of colonial law was edited in 1680 in the reign of Charles II, and it was ordered that no other cedula or decree would have force unless it were contained therein.

Not constituting a temporal epoch as did the Roman and Gothic laws, but rather running like a thread through the entire history of Spanish law is the canonical element. The Church from the earliest times held an important position in the social life of the Iberian peninsula. Consequently the influence of her laws on many points was decisive, and due to the competence of her tribunals and the diffusion of canonical principles in the late Mid-

[12] BENEYTO, *id.* at 99 ff; GAMBOA, *id.* at 52.
[13] GAMBOA, *id.;* BENEYTO, *id.* at 102; SABADIE, supra, note 7, at 16
[14] BENEYTO, *id.* at 152 ff; GAMBOA, *id.*
[15] The native population of the newly discovered territories were considered subjects of the Spanish crown, and vassals thereof, equal in this respect to born Spaniards. The Crown and public opinion at home resisted strongly the attempt on the part of the Conquistadores to submit the natives to a regime a slavery. The supreme organ of colonial government, joined to the monarch in its jurisdiction, was the Consejo de Indias, founded in 1524 as a separate body. It had supreme authority in all branches of the government of American Hispaniola and the Philippines. The first discoverers were styled Governadores, or Adelantados, and as such exercised full civil power. As Captain-generals they also absorbed supreme military command in their areas of discovery. Later were founded the Audiencias, which were consultative councils of the local Viceroys and Governors and at the same time high courts of justice in each colony. One was established in Manila. BENEYTO, *id.* at 181 ff.

dle Ages not a few norms of canon law passed into the civil law, while numerous social institutions conformed to the wishes of the Catholic faith in their form and organization. Especially during the period of revival of the Roman law, canon law took its place along-side the former and was cited with the same respect. At this point, it is well to recall that the most eminent of the Decretalists was a Spaniard, St. Raymond of Peñafort.[16]

Marriage Law

Prior to the Council of Trent there were two forms of marriage in Spain recognized during the entire course of the Middle Ages, both by the Church and by the civil power. The first form was that in which the spouses presented themselves to the priest for his blessing, and consequently it was celebrated "in facie ecclesiae".[17] The second form, which coexisted with the first was originally called a marriage *"a yuras"*, i.e. made with an oath, but without the external ceremony and blessing of the priest. For this latter reason, it was also called clandestine. However in all cases this was considered a legitimate and sacramental marriage and produced the same obligation as that which was celebrated with all due solemnity. Therefore these clandestine marriages were never civil marriages in the modern sense of that term, for the Church always admitted their validity and recognized the canonical effects which they produced.[18]

As a matter of fact long before the enactments of Trent, the state opposed clandestine marriages. The civil power tolerated them for the sole reason that it did not wish to contest the rights of the Church in a matter so fundamental and delicate. However from the end of the 11th Century we find evidence of the displeasure of the civil power with these clandestine unions. The whole object of the civil law was to have the marriage publicly witnessed. The *Fuero Real* laid down penalties for them. The *Partidas* prohibited them as secret (ascondidos) marriages. Still more severe were the *Leyes de Toro,* which failed to recognize the rights of heredity if the marriage was not blessed.[19] Thus the tendency to publicity plus the influence of the Church led naturally to the reforms of the Council of Trent.

Commentators on the Civil Code usually state that from the time of the celebration of this Council, there was in Spanish national law no recognized law of marriage other than that of Trent, until the enactment of the first Provisional Law of Civil Marriage in 1870. This statement is not entirely accurate and needs some qualification. As Puig Peña observes, some requirements of a civil character were set down in the *Novisima Recopilacion,* such as those stipulating the paternal consent and the so-called special permissions for certain officials before they could marry.[20]

[16] *Id.* at 19-20.
[17] II PUIG PEÑA, TRATADO DE DERECHO CIVIL ESPAÑOL 1, 59.
[18] *Id.* at 60; BENEYTO, *id.* at 236-8.
[19] COLECCION LEGISLATIVA DE ESPAÑA, Leyes de Toro, ley 49.
[20] Cf. Novisima Recopilacion, lib. X, tit. 2, ley 9.

Colonial Marriage Law

Not long after the discovery of the Philippines, the Church met and solved some of the principal difficulties connected with the marriages of the newly converted Indios. Special faculties were granted to missionaries of the various religious orders and the bishops of the Indies such as the Constitutions of Paul III, *Altitudo*, on June 1, 1537; that of Pius V, *Romani Pontifices*, on August 2, 1571; and that of Gregory XIII, *Populis* on January 25, 1885.[21] The latter Pontiff in the same year clarified the concept of the "*Neo fitos*" (newly converted Indios), and "*Mestizos*" (children of mixed Indio-European blood), who were to enjoy these privileges and dispensations.[22] These and many other decrees of the Holy See at that time formed the basis of modern mission law. The missionaries arriving in the Philippines had behind them the accumulated experience of their predecessors in Mexico and South America, so that both the marriage law of Trent and the procedure in vogue in the Peninsula underwent some modifications when applied to the neophytes of the Indies.

Among the faculties enjoyed by the missionaries were those of dispensing from the various matrimonial impediments. The first concessions of this type was given in favor of the missionaries of the Society of Jesus, and later it was communicated by Gregory XIII to all the bishops of the Indies.[23] These special faculties were known as the *Vicennial* faculties because they were renewed every twenty years.[24] The literature that has grown up around these faculties and their subsequent history would take us far beyond the scope of this brief summary. Suffice it to say that in any history of matrimonial law in the Philippines the influence of the Church's law as applied and interpreted by her missionaries was paramount.[25]

[21] These Papal Constitutions in virtue of can. 1125 of the Codex Juris Canonici, have been made part of the current canon law of marriage. Cf. CIC, Documents and Calcem, VI, VII, VIII; HERNAEZ, COLECCION DE BULAS, BREVES Y OTROS DOCUMENTOS RELATIVOS A LA IGLESIA DE AMERICA Y FILIPINAS, I 55-78; CAPPELLO, DE MATRIMONIO, n. 787 ff.

[22] "...Segun el derecho comun, dice Marquez, se reputa por neofito el que es nuevo en la fe hasta los diez años, cuyo decenio ya pasado, deja de ser neofito el convertido a la fe. Mas segun el derecho de Indias llamanse Neofitos todos los oriundos de la India Oriental y occidental, asi como tambien los oriundos de la Africa y de todas las regiones transmarinas, *imo etiamsi Aethiopes, Angulani vel quarumvis aliarum transmarinarum regionum.* Favorece tambien esta declaracion a todos los indigenas dichos aunque sean hijos de padres cristianos y hayan sido bautizados desde la infancia... La declaracion sobre los Mestizos viene tambien del mismo Papa Gregorio XIII y dice asi: Quin etiam quia de mixtim progenitis, quos Mestizos, vocant, majus dubium esse accepimus; cum eisdem Mestizos, quos similiter ad hunc effectum Neophytos censendos esse decernimus, in gradibus et matrimoniis contractis et contrahendis praedictis, gratis tamen, dummodo ne ita facile id fiat, dispensare." Esta declaracion sirvio de norma para las dispensas matrimoniales hasta el pontificado de Inocencio XII, esto es, hasta 1698, mas de cien años despues del Pontificado de Gregorio XIII..." HERNAEZ, *id.* at 51.

[23] For the text of the first communication of the vicennial faculties of the missionaries of the Society of Jesus to the bishops of the Indies, *id.* at 121-2.

[24] *Id.* Notas de los fastos 122-3.

[25] For an exhaustive bibliography on this subject, cf. STREIT, BIBLIOTECA MISSIONUM, vol. V, VI, IX, under *Philippines*.

It is chiefly toward the end of the 19th Century that we see the rise of the civil power in matrimonial law. True it is that in those early days, even strictly ecclesiastical matters such as Papal Bulls and Constitutions had to pass through the King's hands; in fact they could not be promulgated either in Spain or the Indies without the royal "*Pase*" or permission. But in the early stage of colonial development, the law was ecclesiastical in content, although frequently shunted through channels that were purely civil.

One natural and perennial problem that arose very shortly after the occupation of the New World was the matter of intermarriage with the native peoples by their conquerors. Policy on this matter vaccillated frequently, as can readily be seen from a perusal of the numerous royal cedulas that were issued thereon. Fabie in his study of Spanish overseas legislation mentions an instruction of the King, charging the Governor of the Indies (South America) to make sure that the Indios married with the blessing of the Church, "*en haz de la Santa Iglesia*", and also that some Christians should marry native women, and Christian women native men.[26] This general benediction of the Crown on the principle of racial intermarriage was subsequently restricted in the case of certain officials. Thus the Council of the Indies prohibited the marriage of the governors-general, the viceroys, the presidents of the audiencias, and the various other officials of the Crown, and their children, without the permission of the Council itself.[27] In 1773 this prohibition was extended to the lieutenant-governors, and the assesors of the viceroys when they wished to marry a woman from the district of their assignment.[28] However difficulties in transportation and the time needed to obtain permission from the mother country necessitated a delegation of this power to permit officials to marry natives. The power to permit such marriages was usually given to the governor-general.[29] Restrictions were also placed on persons of known nobility. Originally only the King could permit such marriages, but later this power was also granted to the viceroys. In this connection it is most interesting to note the discussion of basic policy which arose. There were not a few cases of Spaniards of noble blood in the colonies, who had native concubines of long standing and wanted to regularize their situation. Quite naturally this met with the strong disapproval of some of their fellows. The matter had occasioned diverse decisions, but in 1805, a Royal Cedula was issued which settled the

[26] FABIE, LEGISLACION ESPAÑOLA EN SUS ESTADOS DE ULTRAMAR 52, Instruccion dada 29 de Marzo de 1503 en Zaragoza.

[27] ZAMORA Y CORONADO, LEGISLACION ULTRAMARINA IV 251; cf. Consejo de Indias, ley 15, tit. 3 lib. 2; leyes 82 a 87, tit. 16, ib: Presidentes y Ministros; ley 40, tit. 3, lib. 3, Vireyes; y ley 44, tit. 2, lib. 5, Gobernadores, Corregidores.

[28] *Id.* Real cedula de 16 de Agosto de 1773; Real cedula de 21 de Marzo de 1804; Real orden de 9 de Agosto 1779 y de 19 de Noviembre de 1783.

[29] A petition had been made to the King by one Don Bonifacio Saenz de Vismanas, contador real de cajas de Manila, to marry one of the natives of those Islands. The reply delegating the governor-general to grant permission in such cases according to his discretion was given in a Real orden de 13 de julio de 1798. Those of the title of Castile, however, had to consult the Real Camara. (Real Cedula de 8 de Marzo de 1787). ZAMORA, *id.*

issue in favor of permitting such marriages.[30] The reasons proferred by the ministers of State who were consulted offer an interesting insight into motives that determine policy. The strongest argument in favor of such intermariage was that it could only benefit the state, resulting in the augment of the population, which is the first and greatest object of policy. Secondly, the majority of the ministers were against restricting the liberty to marry.[31] In those cases where the Royal permission was still needed, information was to be sent on the case along with the consultative vote of the respective *audiencia*.[32] Besides officials and nobles, restrictions were placed on the marriages of students and members of the universities, seminaries, and colleges for the Indios which were subject to the royal patronage and protection.[33] The interest of the civil power in marriage legislation in the Philippines is shown by the large number of cedulas and decrees dispatched on this topic. For the relatively brief period from 1770 until 1817, Streit in his monumental work, *Biblioteca Missionum*, cites no less than seventeen royal cedulas. These dealt with every possible aspect of matrimonial law, dispensation, faculties for military chaplains, separation, proclamation of the banns, etc.[34]

Although it was considered the province of the ecclesiastical authority to decide the qualifications of age necessary for a valid and licit marriage, yet the pastors and missionaries could not authorize a marriage unless the parties were capable according to the civil laws as outlined above. Failure to conform thereto would subject the delinquent priest or pastor to expatriation, and deprivation of all temporalities.[35] Even a cursory examination of the vast amount of material available convinces one that gradually there was growing up in Spain and her colonies a definite civil law of marriage. This tendency was confirmed by a Royal Order of October 21, 1867 which in lieu of the Civil Register already

[30] *Cedula* — originally this was a slip of parchment, a scroll. In the administrative terminology of this period of history, a *Real Cedula* was the equivalent of a royal letter patent. Spanish colonial history abounds with them, and they are the source of much of our knowledge of the legislation for the Indies.

[31] Real cedula de 15 de Octubre de 1805, to the Real Audiencia de Cuba given in Zamora, *loc. cit.*

[32] ZAMORA, BIBLIOTECA DE LEGISLACION ULTRAMARINA VII, 174 — Real Orden Circular, 3 de abril de 1848 por Gracia y Justicia. Cf. also COLECCION LEGISLATIVA DE ESPAÑA, tom. 49, p. 756: "Disponiendo que se guarde y cumple como regla general la circular de 3 de abril de 1848 sobre el modo de instruir los espedientes para contraer matrimonio los Majistrados de la Audiencia de Manila, y autorizando al Presidente de la misma a fin que pueda conceder licencias en nombre de S.M. para los matrimonios de conscientia *in articulo mortis*. (22 de Marzo de 1850, Secretaria del despacho de Gracia Justicia).

[33] Cf. BLAIR-ROBERTSON, THE PHILIPPINE ISLANDS, XLV 218-220; MATRAYA Y RICCI, EL MORALISTA FILALETHICO AMERICANO, I, n. 1722; STREIT, BIBLIOTECA MISSIONUM, VI, n. 1260; NOVISIMA RECOPULACION, ley 13, tit. 2, lib. 10.

[34] Cf. STREIT, *id.*, VI, IX, for the years mentioned, e.g. Real Cedula — 8 de julio de 1770; 8 de septiembre de 1776; 24 de abril 1781, etc.; also MATRAYA, *id.* nn. 936, 1181, 1282, 1309.

[35] For the rights of the ecclesiastical authorities, cf. Real Cedula of 25 de octubre de 1785, ZAMORA, *id.* V, pp. 235-6; also the Real orden circular de julio de 1805, *id.*

introduced in the Peninsula, asked the bishops of the Philippines through the civil governor, to reorder the parochial books so as satisfy the requirements of the government.[36]

Civil Code of 1889

The peculiar fate which was accorded to the marriage provisions of the Civil Code of Spain in the Philippines makes it necessary to investigate more closely the preliminary steps taken in Spain itself, prior to the promulgation of the New Civil Code. The revolutionary movement of 1868, as a consequence of its liberal tendencies inaugurated the famous Provisional Law of Civil Marriage of June 18, 1870. Contrary to all Spanish tradition and in spite of the vigorous protests of the clergy, this law made civil marriage obligatory on all Spaniards, while leaving them free at the same time to contract a canonical marriage if they so wished.[37] The reactions of the majority of Spaniards could have been predicted. Parish priests stopped Mass at the entrance into the Church of those who were civilly married; passive resistance on the part of many citizens became the accepted custom; those who were canonically married, refused to appear before the municipal judge. Further fuel was added to the fire when still others, canonically married, remarried civilly with a different spouse.[38]

The Government, attempting to ameliorate conditions, sent out a circular on June 20th, 1874, to the effect that municipal judges were not to proceed to the celebration of a civil marriage if the parties were already joined to someone else by a former canonical marriage.[39] The return to normal conditions came with the Regency. In a decree, dated February 9, 1875, a new matrimonial system was inaugurated wherein the canonical marriage was reestablished and all its civil effects recognized. The decree had retroactive force as regards all the canonical marriages celebrated after the law of 1870 and never ratified civilly. From this date onward there were two forms of marriage in Spain, the canonical for those pertaining to the Catholic religion, and the civil for those not of the Catholic faith.

The Civil Code of Spain was promulgated by a royal decree of the Queen Regent, Maria Cristina, on October 6. 1888, but due to various causes, did not come into force in the Peninsula until May 1st of the following year. It was founded on the law of the 11th of May, 1888 known as *La Ley de bases*, because it set down the general norms whcih were to govern the formation of the

[36] The pertinent legislation gave seven provisions relative to the keeping of the parochial books, the fifth having to do with the registration of marriages. It read: "Que en las partidas de matrimonio, se expresse, ademas de los nombres, naturaleza y profesion de los contrayentes, de sus padres y padrinos, la edad de los primeros, y si han cumplido en la celebracion de aquel sacramento los requisitos establecidos por la Iglesia y las leyes civiles." RODRIGUEZ, LEGISLACION ULTRAMARINA, tom. 15, 674 ff.

[37] I MANRESA Y NAVARRO, COMENTARIOS AL CODIGO CIVIL ESPAÑOL 250 ff.

[38] II PUIG PEÑA 61.

[39] Orden circular de 20 de junio de 1874 in the *Gaceta de Madrid* for the following day, June 21, 1874; also MANRESA, *id.*

future code. According to Base 3 of this law, the system of the two forms of marriage was to be incorporated in the new civil code.[40] This was actually effected in Art. 42 of the Civil Code and it settled the bitter controversy of the previous two decades.[41]

Meantime in the Philippines, the law of marriage continued to be as it had been in the past, that of the *Partidas* and the *Novisima Recopilacion.* The law of Civil Marriage of 1870 was never extended to the Islands with the exception of Articles 44 to 78 thereof. These were promulgated in the Archipelago in 1883. However they relate merely to the rights and obligations of husband and wife, and do not touch either the forms of marriage or the subject of divorce.[42] On July 1, 1889, the new Civil Code of Spain was extended to the overseas colonies of Cuba, Puerto Rico and the Philippines. According to the terms of the decree, the code was to take effect twenty-days after its promulgation, the latter being the date of its insertion in the official publications of the Islands.[43] The extension of the law of the Peninsula to the colonies was in full accord with previous policy which had always favored the closest possible similarity between the two.[44] The order affecting this transfer of law was sent by Becerra, the Minister of Ultramar, from Madrid on August 6, and was approved by the Governor-General of the Philippines, Weyler, on September 12, 1889. However the decree and the code itself were not published in the Official Gazette, until November 17th. According to the norms laid down in the royal decree, the Civil Code went into effect in the Philippines on December 7, since twenty days had to elpase after the date of publication.[45]

What followed then as regards the law of marriage contained in the Civil Code has been the source of much speculation as to dates and documents, but one fact is clear. Certain classes in the Philippines persuaded the Governor-General that the new law could not be applied to this region. The Governor-General, Weyler, either on the recommendation of Madrid, or on his own authority, suspended titles 4 and 12 of the Civil Code, Book I, containing the

[40] Base 3ª — "Se estableceran en el Codigo dos formas de matrimonio: el canonico, que deberan contraer todos los que profesen la religion catolica, y el civil, que se celebrara del modo que determine el mismo Codigo, en armonia con lo prescrito en la Constitucion del Estado.

El matrimonio canonico producira todos los efectos civiles respecto de las personas y bienes de los conyuges y sus descendientes, cuando se celebre en conformidad con las disposiciones de la Iglesia catolica, admitidas en el Reino por la ley 13, tit. 1°, libro 1°, de la Novisima Recopilacion. Al acto de su celebracion asistira el Juez municipal u otro funcionario del Estado, con el solo fin de verificar la inmediata inscripcion del matrimonio en el Registro civil." MANRESA 22 ff.

[41] Civil Code, Art. 42: La ley reconoce dos formas de matrimonio; el canonico que deben contraer todos los que profesen la Religion catolica; y el civil, que se celebrara del modo que determina este Codigo.

[42] Benedicto vs. de la Rama, 3 Phil. 34, 38 (1903).

[43] Real decreto de 1 de julio de 1889 of the Queen Regent, Maria Cristina. Cf. CODOGO CIVIL DE ESPAÑA, edicion oficial, Introduction.

[44] *Id.*, Esposition of the reasons for the extension by the Minister of Ultramar, Manuel Becerra.

[45] GACETA DE MANILA, Domingo, 17 de noviembre de 1889, Año XXIX Num. 317, p. 1892.

innovations relating to marriage, divorce, and the civil registry.[46] Mr. Justice Willard, writing the opinion of the Supreme Court of the Philippines in the case of *Benedicto vs. de la Rama* says of this order of the Governor-General:

> This order purports to have been issued by the governor-general by order of the government at Madrid, and although it is stated in the Compilacion Legislativa de Ultramar (vol. 14, p. 2740) that no decree of this kind was ever published in the Gaceta of Madrid and that a copy thereof could not be obtained in any governmental office, yet we cannot assume that none was ever issued.
>
> Sanchez Roman says: 'By reason of the lack of that preparation which was proper in a matter of such great importance, it seems, according to reports which merit a certain amount of credit (for no order has been published that reveals it), that the Government of the Philippines after taking the opinion of the Audiencia of Manila consulted the colonial office concernings the suspension of titles 4 and 12 of Book I. This opinion was asked in respect to title 4 on account of certain class influences which were strongly opposed to the application of the formula of marriage which gave some slight intervention to the authorities of the State through the municipal judge or his substitute in the celebration of the canonical marriage. As to title 12, the opinion was asked by reason of the fact that there was no such officer as municipal judge who could take charge of the civil registry.' (2 Derecho Civil, p. 64)
>
> Moreover, the power of the governor-general, without such order to suspend the operation of the code, was well settled. A royal order so stating was issued at Madrid on September 19, 1876, and with the cum plase of the governor-general published in the Gaceta de Manila on November 15, 1876.
>
> It was suggested at the argument that this order of suspension was inoperative because it did not mention the book of the Code in which the suspended titles 4 and 12 were to be found. The Civil Code contains four books. All of them except the third contain a title numbered 4, and the first and fourth contain a title numbered 12. Title 4 of book 2 deals with rights of property in water and mines and with intellectual property. Title 4 of book 4 relates to the contract of purchase and sale, and title 12 to insurance and other contracts of that class. There is no such intimate relation between these two titles of this book as between titles 4 and 12 of book 1, the one relating as it does to marriage and divorce and the other to the civil registry. The history of the Law of Civil Marriage of 1870 is well known. As a consequence of the religious liberty proclaimed in the constitution of 1869, the whole basis was wanting in these Islands, and prior to the promulgation of the Civil Code in 1889, no part of the law was in force here, except articles 44 to 78, which were promulgated in 1883. Of these articles those numbered 44 to 55 are found in title 4, but they relate merely to the rights and obligations of husband and wife and do not touch the forms of marriage nor the subject of divorce. If these provisions of the Civil Code on these subjects could be suspended by the certain class influences mentioned by Sanchez Roman, the only marriages in the Islands would be canonical and the only courts competent to declare a divorce would be ecclesiastical. There can be

[46] Cf. GACETA DE MANILA — Martes 31 de diciembre de 1889, Año XXIX, Num. 361 tomo II, p. 2180. The text reads: Gobierno General de Filipinas. Secretaria, Negociado 2°, Manila, 29 de diciembre de 1889.

"Por disposicion del Gobierno de S.M. quedan en suspenso en el Archipielago, hasta nuevo orden, los titulos 4° y 12° del Codigo Civil hecho extensivo a estas Islas por Real Decreto de 31 de julio ultimo publicado en la "Gaceta" de esta capital del 17 de noviembre pasado.

Las Autoridades a quienes corresponda dictaran los ordenes necesarios que in sustitucion de los titulos que quedan en suspenso, continue rigiendo la anterior legislacion. Comuniquese y publiquese." Weyler.

> no doubt but that the order of suspension refers to title 4 and 12 of book 1, and it has always been so understood. It follows that articles 42 to 107 of the Civil Code were not in force here as law on August 13, 1898, and therefore are not now.[47]

This opinion of Justice Willard sums up very well the state of the law of marriage in the Philippine Islands during the last decade of the Spanish regime. The principal change in Insular Law as regards marriage, which was found in title 4 of the Civil Code of Spain, had force in the Philippines for a scant twenty-three days, namely from December 8th, until December 31st of 1889. From that date until the termination of Spanish rule, lawful marriage in the Philippines continued to be what it was prior to the introduction of the new civil code.[48]

Revolutionary Marriage Law

For a very brief period in 1898, and over a limited locality, the Filipino insurgents enacted and put in force their own civil law of marriage. The law was contained in a series of rules entitled *"Regimen de las Provincias y Pueblos"*, which had been drawn up by Apolinario Mabini, one of the leaders of the revolutionary movement. There is no mention of the ecclesiastical marriage in the document which was fully in keeping wtih the anti-clerical spirit of those tumultous times. The law, as drawn up by Mabini, was promulgated by the revolutionary general, Emilio Aguinaldo, at Cavite, on June 20, 1898.

In the section devoted to trials, the civil register and the census, Rule 27 provided for a marriage register. Before a marriage could be entered into this book, the following had to be fulfilled:

1) The contracting parties had to sign a paper declaring to the barrio chief that by mutual consent they wished to marry, and asking to have the contract noted in the public register. If the parties were less than 23 years of age, the paper had to be signed by their respective fathers, or in defect of these, by their mothers, and if both were wanting, by their elder brothers who had completed 23 years of age.

2) In the absence of all the above mentioned persons, authorization had to be obtained from the barrio council, and the authorization had to accompany the petition.

3) Those who had completed their twenty-third year must each have a witness who would sign the petition with them; a minor authorized to marry by the council of the barrio must also be accompanied by a witness.

[47] Benedicto vs. de la Rama, 3 Phil. 34, 37-38 (1903).

[48] Both Willard in his learned opinion and Fisher in his introduction to the Revised Penal Code Annotated, seem to be in error on their dates. The former declares that the royal order was published on November 15th, whereas it was actually the 17th. The latter declares that the Code was published in the Manila Gazette on December 8th, but that was rather the day on which the Code took effect, twenty days after publication. Cf. FISHER, THE CIVIL CODE OF SPAIN WITH PHILIPPINE NOTES, Preface to the First Edition, vi, vii.

4) Upon receipt of the petition duly signed by all concerned, the barrio chief was to proclaim the forthcoming marriage by affixing the petition itself to the main door of the council hall, and by reading the same aloud three times on a feast day or market day.

5) Upon the lapse of three weeks, and no objection having been made by anyone, the parties in the presence of the barrio chief and of those who had signed the petition, are to express their free and spontaneous desire to enter a conjugal society and to bind themselves to an indissoluble common life as long as they shall live. To this effect they are to make a formal promise of mutual fidelity and of educating their children in the love of God, neighbor and country. The contract was to be signed by all those present.[49]

THE AMERICAN REGIME

With the entrance of the American forces into the city of Manila on August 13, 1898, a new element was injected into the social and legal history of the Philippines. Through the medium of the Civil Code of Spain, the fundamental principles of Roman law had become part of the legal heritage of the Filipinos; now they were to receive the concepts of the Common Law of England, as it had developed in the legal tradition of the United States.

The change in sovereignty and the new policy of treating all religions as equal before the law, necessitated a modification of the marriage law. In so doing, the new legislators were not completely unmindful of existing law and custom; indeed the instructions later issued to the Philippine Commission by President McKinley urged them to change the substantive law of the country as little as possible, but to modernize the procedure.[50] At the time the United States acquired the Philippines, the only laws on marriage in force in the Islands were Articles 44 to 78 of the Law of Civil Marriage in 1870, which merely referred to the rights and duties of the spounses, and as regards the form of marriage, the decrees of the Council of Trent as contained in the Novisima Recopulacion. This was the only form of marriage that could be validly celebrated in the Philippines at that time.[51] It remained in force until December 18, 1899, when the Military Governor in virtue of the powers vested in him promulgated the law of marriage known as General Orders No. 68.[52] This law, as amended by General Orders No. 70 remained in force until 1929.[53]

[49] MABINI, LA REVOLUCION FILIPINA, I, 178-9; Regla 27a, De la formacion de juicios, registro civil y censo.

[50] FISHER, *supra*, note 48, at vii, ix.

[51] TOLENTINO, JURISPRUDENCE ON THE CIVIL CODE. I, 35; RAMIREZ CABRERA, PERSONS AND FAMILY RELATIONS, 133.

[52] Aguilar vs. Lazaro, 4 Phil. 735, 736 (1905). The proclamation was issued by General Merritt, then commander of the Army of Occupation, 1 O.G. 3.

[53] Laws enacted during the early years of the American military occupation were designated as *General Orders No. ...*; after the establishment of the Philippine Commission they were called *Acts* and numbered in the chronological order of their enactment, e.g. Act No. 2179, Act No. 3613, etc.

With the establishment of the Commonwealth Government in 1936, the system remained the same except that teh bills were known as Commonwealth

The new law of marriage, known hereafter as Act No. 3613 was approved by the legislature on December 4, 1929, and took effect six months after its approval.[54] While following the lines of General Orders No. 68, it went more into detail and attempted to resolve some of the particular problems that had arisen in connection with the administration of the previous law.

In outward form it was divided into six chapters comprising forty-seven sections. The first chapter dealt with the requisites of marriage, of which two — the legal capacity of the parties and their consent, freely given, — were considered essential for validity. The parties were free to choose either a civil or religious form, provided that the solemnizing official was authorized to witness the marriage. While a license was prescribed, it was not considered a condition for the validity of the marriage. In deference to Catholics, the requirement for civil proclamations was waived if the Church required her own proclamations, and the license could be issued to them immediately upon application therefor. The second Chapter dealt with marriages of an exceptional character that did not require a marriage license. These included marriages celebrated *in articulo mortis*, at a great distance from the municipality, at the time of religious revivals and missions, and those celebrated between Mohammedans and pagans. Chapter III stated the causes for annulment and the provisions for legitimacy, while Chapter IV concerned itself with the authority needed to celebrate marriages and the regulations and fee pertaining thereto. Penal Provisions for infringement of these laws formed the subject of the fifth chapter and the sixth and final chapter contained a repealing clause and the date for effecting the new law.

The importance of Act No. 3613 for the future of marriage legislation in the Philippines would be difficult to exaggerate. It represented a sincere effort on the part of the legislators to take cognizance of the divergent attitudes then prevalent in the Islands and reach a solution that would be both workable and agreeable to all concerned. The influence of this legislation on the marriage provisions of the new Civil Code is unmistakably predominant.

The divorce law of any nation is linked essentially to the law of marriage and is necessary to its full understanding. During the Spanish regime there was no other law of divorce in the Philippines than that of the *Siete Partidas*.[55] This followed quite logically from the suspension of the pertinent provisions of the Spanish Civil Code by Governor-General Weyler, and such continued to be

Act No. ..., etc. Under the new independent Philippines, laws after passing the legislature and receiving the President's signature are known as Republic Acts, and are numbered in the order of their passage.

[54] Cf. Act No. 3753 amending Act No. 3613.

[55] Francisco and Marcelo vs. Jason, 60 Phil. 442, 449 (1934), in which the Supreme Court declared that: "1) A decree of absolute divorce granted in 1904 does not produce the effect of dissolving the marriage bond of the divorced spouses but only that of separating them from bed and board, on the ground that the court entered it without jurisdiction, it not being sanctioned by the law then in force." Cf. also, Benedicto vs. de la Rama, 3 Phil. 34; De Jesus vs. Palma, 34 Phil. 483.

the law of divorce during the early years of American occupation.[56] In the law of the *Siete Partidas*, the only divorce permissible was relative divorce, i.e. legal separation of the spouses *a mensa et thoro*. Absolute divorce *quoad vinculum* with the permission to contract another marriage during the lifetime of the first spouse was unknown.[57]

On March 11, 1917, the divorce law of Act No. 2710 was passed by the Philippine legislature. The new law provided for absolute divorce on two grounds, adultery on the part of the wife, and concubinage on the part of the husband.[58] Needless to say this innovation brought a strong reaction from Catholics throughout the Philippines, but the most they were able to do during the years that followed was to prevent any liberalization of the grounds for an absolute divorce. In two decisions of the Supreme Court, it was also affirmed that the new legislation had repealed entirely the relative divorce of the *Siete Partidas*, although strong dissensions were voiced in both cases.[59] Moreover the courts of the Philippines refused to recognize foreign divorces in the case of Filipino citi-

[56] Again in still another case the Supreme Court repeated its ruling: "The application and observance of articles 42 to 107 and 325 to 332 contained in titles 4 and 12, Book I, of the Civil Code having been suspended in these Islands, this court has repeatedly held that the laws of titles 2, 9, and 10 of the Fourth Partida are the only ones applicable in these Islands to divorce suits, for the reason that twenty-four days after the present Civil Code was put in force a decree of the general government of December 29, 1889, by virtue of a telegraphic order of the sovereign government, published in the Official Gazette of the 31th of the same month and year, ordered such suspension." Del Prado vs. de la Fuente, 28 Phil. 23, 27 (1914).

[57] Under the Siete Partidas, the causes for divorce were: (1) if one of the parties desires to take holy orders and the other grants permission (2) adultery by the wife or of the husband, and (3) the fact that one of the parties becomes a heretic, a Mohammedan, or a Jew. Cf. TOLENTINO, *supra*, note 51, at 80 n. 4.

[58] None the less an action for divorce is barred where it appears that the husband had personal knowledge of the adultery of his wife and did not file his complaint in time to conform with section 4 of Act No. 2710 which says: "An action for divorce can not be filed except within one year from and after the date on which the plaintiff became cognizant of the cause and within five years from and after the date when such cause occurred..." Juarez vs. Turon, 51 Phil. 736, 741 (1928).

[59] Garcia Valdez vs. Tuason, 40 Phil. 943, 945 (1920), where the court ruled: — "Act No. 2710 of the Philippine Legislature declaring that divorces shall operate to dissolve the bonds of matrimony and defining the conditions under which divorces may be granted has the effect of abrogating the limited divorce formerly recognized in these Islands..."

Dissenting: "I believe that Act No. 2710, establishing absolute divorce with the dissolution of the bonds of matrimony, has not repealed the law existing here prior to its enactment and establishing relative divorce, and that the effect of the new law is only the separation of the person and property of the spouses andthe dissolution of the community of property." *Id.* at 952.

"Although Act No. 2710 and the law prior to it refer, in general, to the same subject matter, nevertheless they have different specific purposes. The former allows absolute divorce and the latter, relative divorce. They cannot be repugnant to each other when their purposes are distinct and their effects are different. It matters not that conjugal infidelity be the cause of both kinds of divorce. Both are simply cumulative, not contradictory, remedies." *Id.* at 953.

zens, when the grounds for them ran contrary to the concepts of public order and good morals in the Philippines.[60]

During the Japanese occupation of the Philippines, a new divorce law, known as Executive Order No. 141 was promulgated. It increased the grounds of absolute divorce from two to eleven, and in effect repealed Act. 2710.[61] While divorce granted during this time were later recognized as valid, the law itself ceased with the liberation of the Philippines, when General MacArthur, as commander-in-chief of the Phil-American Army of liberation, proclaimed that all laws of any other government in the Philippines than that of the Commonwealth of the Philippines were null and void and without legal effect in areas of the Philippines free from enemy occupation. Under this proclamation, made on October 23, 1944, Executive Order No. 141 ceased to have any effect and Act No. 2710 returned and continued to be the law until the promulgation of the new Civil Code of the Philippines.[62]

THE CIVIL CODE OF THE PHILIPPINES

With the end of the second Word War in the Far East, the United States, in keeping with its promises, granted complete autonomy to the Filipino people, and on July 4th, 1946, the new Republic of the Philippines was created. For many years under the Commonwealth Government, the need for a complete revision of the Civil Code had been felt. While the basic civil law had continued to be the Civil Code of Spain, one of the hardest problems for those using it was to determine which of its provisions were still in force and which were not.[63]

[60] Cf. Barretto Gonzalez vs. Gonzalez, 58 Phil. 67, 72 (1933); "Litigants cannot compel the courts to approve of their own actions or permit the personal relations of the citizens of these Islands to be effected by decrees of divorce of foreign courts in a manner which our Government believes is contrary to public order and good morals." Sikat vs. Canson, 37 O.G., 3148.

[61] During the Japanese occupation, under Executive Order No. 141, the causes for divorce were: 1) adultery of the wife and concubinage on the part of the husband, 2) attempt by one spouse against the life of the other, 3) a second or subsequent marriage by either spouse before the former marriage has been legally dissolved, 4) loathsome contagious disease, 5) incurable insanity, 6) impotence, 7) criminal conviction of either of a crime whose penalty is not less than six years' imprisonment, 8) Repeated bodily violence so as to endanger the lives of either of them, 9) unjustified desertion for one continuous year prior to filing the action, 10) unexplained absence for three consecutive years prior to the filing of the action, 11) Slander by deed or gross insult so as to make further living together impracticable. *The Official Journal of the Japanese Military Administration*, XI, (Manila, Sinbun Sya, 1943), 33-38.

[62] Nisperos vs. Martinez, 43 O.G., 4660-62; Velasco vs. Montemayor, (Ct. App.) 430 O.G., 3218; Co Kim Cham Co Cham vs. Valdez Tan Keh, 41 O.G., 779; People of the Philippines vs. Mejica, (Ct. App.) 46 O.G. No. 10, 1950.

[63] "Shortly after transferring the legislative authority from the Governor-general to the Philippine Commission, that body enacted a Code of Civil Procedure (Act 190). While purporting and professing to be merely procedural, this Code repealed by implication an appreciable part of the Civil Code. The courts of the Islands have been engaged for the past seventeen years in determining the extent to which the Code of Civil Procedure has repealed by implication the Civil Code..." a FISHER, CIVIL CODE OF SPAIN WITH PHILIPPINE NOTES, Preface to 1st Edition, viii; TOLENTINO, JURISPRUDENCE OF THE CIVIL CODE, I, vi, where he confesses that, "we cannot place blind faith... in Willard's *Notes to the Civil Code*. because articles of the Civil Code dogmatically declared by Willard to have been repealed but which have been held still in force by the decisions of the Supreme Court..." "Thus, the civil law of the Philippines is now composed of laws of Spanish and American origin." *Id.* at 4.

The first effort to create a new civil law had been made very early in the American regime, when at its opening session, the First Philippine Assembly adopted a concurrent resolution to create a Code committee. It was not, however, until two years later, in May 1909, that Act No. 1941 was passed; this law created a code committee composed of a president and four members to revise the Civil, Commercial, Penal, and Procedure Codes, as well as the Mortgage and Land Registration Act.[64] No new civil law resulted from this legislation, and the Revised Penal Code which finally appeared, owed its existence to another committee which was appointed by the Department of Justice on October 18, 1927.[65] No further action was taken on the matter until 1940 when the late President Manuel Quezon named another commission to revise the Civil Code. Presided over by Jorge Bocobo, it was composed of eminent Philippine jurists, but its activity was brought to a halt by the Japanese attack on the Islands in December 1941.[66]

With the advent of independence, previous desires crystallized and a Code Commission of five members was created by Executive Order No. 48, dated March 20, 1947. The stated reason for this action was, "the need for immediate revision of all existing substantive laws of the Philippines and of codifying them in conformity with the customs, traditions, and idiosyncracies of the Filipino people and with modern trends in legislaton and the progressive principles of law."[67]

As chairman of the Code Commission, Dr. Jorge Bocobo preserved continuity with the former commission's work. The other members of the commission were: Guillermo B. Guevara, Pedro Y. Ylagan and Francisco R. Capistrano; the fifth member was not appointed when the Code Commission made its final report. The Commission's function was to cease on June 30, 1949, by which time it was hoped that they would have completed and submitted drafts of the new Civil, Penal and Commercial Codes.[68]

[64] In virtue of this act, the following members of the Code Committee were appointed: Pres. — Hon. Manuel Araullo; Members — Mr. Rafael del Pan, Mr. W. L. Goldsborough, Mr. W. J. Rohde, Mr. Francisco Ortigas. GAMBOA, ELEMENTARY PHILIPPINE LAW, 16.

[65] Actually del Pan had his new Correctional Code ready within five years after the appointment of the first code committee, but it was not enacted due to serious opposition within and without the legislature. Cf. ALBERT, THE REVISED PENAL CODE ANNOTATED, Preface, xi, xii.

[66] Cf. article "Codigo Civil sin ley de divorcio" in Boletin Eclesiastico, Abril, 1949, p. 277 ff.

[67] "The independence of the Philippines should pave the way for a more Filipinized civil law... Students of our law have frequently encountered positive provisions which do not conform, and are sometimes antagonistic, to our customs and traditions... (e.g. dowry)" Thus TOLENTINO, note 63, at I, 5, before the actual enactment of the new civil code.

[68] *Report of the Code Commission*, 1.

The work of preparing the New Civil Code began on May 8, 1947. It was aided by the researches made by two of the members while they were members of two previous Code Commissions. The first draft was completed on October 27, 1947, the final draft was finished and was submitted to His Excellency, the President of the Philippines. A report, known as the, *"Report of the Code Commission on the Proposed Civil Code of the Philippines"*, was begun in September 1947 and was completed on January 26, 1948, and also submitted to the President. This explained briefly:

I. Nature of the Proposed Civil Code
II. Fundamental Principles, New Subjects and Principal Reforms
III. Other Important Changes Recommended
IV. Transitional Provisions, and
V. Repealing Clause

The Proposed Civil Code consisted of 2,291 articles, but when it was sent to Congress for approval, some of its provisions were eliminated, and the Code was approved as amended with 2,270 articles. The law approving the new Code was known as Republic Act No. 386, and was passed on June 18, 1949. The Code itself was to take effect one year after its publication in the Official Gazette, which took place in June, 1949. Hence the new Civil Code has been law as of July 1st, 1950.[69]

According to the commissioners themselves, the Civil Code is based on the Spanish Civil Code of 1889, which itself owes much to the Civil Code of France. However many new provisions have been emobodied from the codes, laws, and judicial decisions of other countries, among them the States of the American Union, especially California and Lousiana, France, Argentina, Germany, Mexico, Switzerland, England and Italy. Many articles merely restate doctrines laid down by the Supreme Court of the Phlippines.Lastly, not a few amendments have no precedent in foreign law, but consecrate Filipino customs or rectify unjust or unwise provisions of the former code.

Of the articles included in the new Code, approximately twenty-five per cent are taken in their entirety from the Spanish Code; about thirty-two percent are amended articles of the Code in force

[69] PADILLA, CIVIL CODE ANNOTATED, 6: The Secretary of Justice in his opinion No. 68, Series 1950, followed the official date of issue of the Official Gazette on June, 1949, and not the actual date of release for circulation on August 30, 1949.

"It appearing that the new Civil Code of the Philippines was published in the Official Gazette dated June, 1949, it must be conclusively presumed that it was published on said date. Considering Section 2, of the new Civil Code, it will therefore take effect one year after June, 1949."

[70] "The adoption of provisions and precepts from other countries is justified on several grounds: (1) The Philippines, by its contact with Western culture for the last four centuries, is a rightful beneficiary of the Roman Law... that legal system as developed in Spain has been the chief regulator of the juridical relations among Filipinos... (2) The selection of rules from the Anglo-American law is proper; (a) because of the element of American culture... incorporated into Filipino life during the nearly half a century of democratic apprenticeship under American auspices: (b) because of economic relations; and (c) because the American and English courts have developed certain equitable rules that are not recognized in the present Civil Code." *Report of the Code Commission*, 3.

at the time of adoption, and nearly forty-five per cent are new in the sense that they are not found at all in the former Code. In all twenty-four new subjects have been introduced.

The language of the Civil Code is English. The Commission translated from the original Spanish those articles or parts of articles that were preserved from the Civil Code of 1889. Some clarification has to be made on this point because in the use of some terms while the nearest equivalents in English were sought for the Spanish words, it is obvious that these English terms do not have the same meaning in Anglo-American law as their counterparts in the Spanish-Philippine law. Thus in the words of the Code Commission, ". . . the receptacle is English, but the content is Spanish-Philippine law. Therefore, these translated words should be understood, not in the light of the Anglo-American law but in that of the Spanish-Philippine law as embodied in the Project of the Civil Code."[71]

Not only in the use of its language does the Philippine Code present difficulties to the interpreter, but even linguistically, clear provisions pose problems due to the reluctance of the Code Commission to reveal their sources.[72]

Marriage Law

It is in the title devoted to marriage that one notes a great divergence from the provisions of the Spanish Code. This is due to two factors. Firstly, that title of the Civil Code of 1889 which dealt with the marriage contract, was, as we have seen already, enforced for a very short period by the Spanish regime.[73] Consequently it never became as deeply integrated into the legal system of the Archipelago, as the other portions of the Spanish Civil Code. On the advent of the American regime it became necessary to formulate a marriage law and the legislators who drew up General Orders No. 68 leaned heavily upon their own Anglo-American system. With the introduction of the principle of separation of Church and State, the canonical form was insufficient of itself to produce any civil effect without some sort of approbation from the civil government. Subsequent additions and improvements in the marriage legislation — e.g. the divorce bill of 1917 and particularly the Marriage Law of 1929 — form the background of the present title on marriage.

One of the most disputed dispositions was the abolition of absolute divorce and the introduction in its place of mere legal separation.[74] Needless to say this was not effected without much discussion and pressure. Fr. Juan Ylla, writing in the *Boletin Ecclesiastico*, gives us some of the background of this struggle. The Code Commission, presided over by Dr. Jorge Bocobo, opposed this change tenaciously. This is evident in the Commission's own

[71] *Id.* at 8.
[72] Jose L. B. Reyes in the Foreword to Padilla, *supra*, note 69 at viii
[73] *Supra*, note 48 and text.
[74] Arts. 97-107.

report, which states: "The proposed Civil Code does not increase the grounds of absolute divorce. Relative divorce is revived, so that the petitioner may choose this less radical remedy if he or she does not desire the matrimonial bonds to be dissolved."[75]

It was the influence of the Philippine Congress, moved by the outcry of Catholics which forced the expurgation of the provisions for absolute divorce from the proposed new code. Had this not been done, it is extremely doubtful whether the new code would have passed the legislature at all. Despite this fact, there was an intense campaign on the part of certain groups to restore the former divorce law. Public audiences were held in the halls of session of the legislature before a joint committee of the Senate and the Congress. The spokesman of the anti-divorce group was a Judge of the Court of Appeals, Pastor Endencia, and of the pro-divorce group, Juan Nabong. When the latter tried to confuse the issue by equivalating divorce and annulment proceedings, he was vigorously opposed by Dra. Josefa Gonzalez-Estrada, Dean of Women of the University of Santo Tomas.[76]

One modification of the marriage law of the Civil Code was effected in favor of Moslems. This was known as Republic Act No. 394 and by its provisions, divorce was permitted to Mohammedans residing in the non-Christian provinces, in accordance with Moslem customs and proctices. This act was in force for a period of twenty years from the date of its approval, June 17, 1949. This is the only exception to the inviolability of the marriage bond permitted under the present Philippine law.[77]

If we compare Title III of Book I of the new Civil Code with the Marriage Law of Act No. 3613 and the Divorce Law of Act No. 2710, we find that the new legislation contains forty-four articles on marriage and ten on legal separation, whereas the former law had forty-seven articles on marriage and eleven on absolute divorce. Of the new provisions, seven are taken unchanged from the prior legislation; another thirty of the older articles have been modified in the new code, ten of them substantially, and twenty only accidentally. Eighteen provisions are entirely different, so that in all we may say that two-thirds of the articles of the present marriage law introduced changes that are worthy of note.

CONCLUSION

There is no doubt that during the past twenty-five years, social change has characterized Philippine society. Every problem of the modern world is present and the realities of marriage and family life are often far removed from the clean-cut phrases of the law. There is no doubt that new social realities call for a re-examination of the present Civil Code's provisions for marriage.

[75] *Report of the Code Commission*, 21.

[76] Article of Juan Ylla, O.P., Seccion Informativa in the Boletin Eclesiastico, Aogsto, 1951, p. 570.

[77] Republic Act No. 394. The twenty year period expired on June 18. 1969 but was extended indefinitely by Presidential Decree No. 793 issued on May 4, 1975.

The high incidence of teen-age marriages, the unequal status of women in marriage law, the irretrievable breakdowns of so many marriages call for some legal solutions and the most obvious point to begin is to see what modifications could most profitably be introduced into the Civil Code. It is the duty of the State to provide for the welfare of all its citizens. In a pluralistic society no single religious group, even if it forms a majority of the population, has the right to impose its particular religious viewpoint on all other citizens. Hence all aspects of the law of marriage must be looked into with a view to providing a rapidly growing population with firm but realistic juridical norms which will not only protect the family but will also ensure equality of rights and the protection of the individual in his freedom to find happines in that most basic of all human relationships, the love of man and woman.