ration received by him as a fiduciary is not entirely clear. In principle, he should be liable as a constructive trustee in respect of the renumeration so obtained and where the remuneration is still identifiable (as in the case of shares of stock), such a trust can and should be imposed. However, if the renumeration has already passed into the general funds of the director, then he will be liable for the value of the remuneration (and interest thereon) as damages for breach of fiduciary duty.

In adjudicating cases involving a director's breach of his fiduciary duty to a corporation, it is hoped that courts will be less concerned with penalizing the fiduciary who has entered into a profitable transaction than with ascertaining whether or not there has been a conflict between his duty of loyalty to the corporation and his own self-interest. Our primary concern is to obtain justice *inter partes*. Thus, a director should be held liable as constructive trustee for benefits obtained as a result of his fiduciary position only when there is proof that he had actually abused that position. Whether or not such an abuse has occurred would be determined by an examination of all the circumstances which led to the acquisition of the benefit in question.

INSIGHTS ON MARRIAGE & DIVORCE UNDER THE MUSLIM CODE

Christopher L. Lim*

The sacred law of Islam is an all embracing body of religious duties, the totality of Allah's command that regulates the entire gamut of every Muslim's life.

The most important and comprehensive concept for describing Islam as a function is the concept of Shariah. The word originally means "the path or the road leading to the water" i.e., a way to the very source of life. In all its religious usage from the earliest period it has meant "the highway of good life," that is, the religious values, expressed functionally and in concrete terms, to direct man's life. Shariah is the word for the whole system of law of Islam that envisages a complete scheme of life and an all embracing social order.

From a strictly juridical viewpoint, the term "Islamic Law" or "Muslim Law" may be applied more appropriately to the legal aspect of Shariah that requires the sanction of the State and the judiciary for its operation.[1] It is to this aspect of Shariah that the Code of Muslim Personal Laws (PD No. 1083) addresses itself.

The Code is the triumphant culmination of a long struggle on the part of Muslim Filipinos to have their system of laws enforced in their communities. Our brothers in the South have long since been annoyed that the laws of the Republic have compelled them to adhere to a way of life repugnant to their culture as well as punished them for acts perfectly permitted or sanctioned by the most sacred book by which they live, the Koran.

Polygamy and divorce which is allowed under Islamic Law was an exception to the general rule of monogamy granted to Muslim Filipinos. "Special" and "temporary" provisions have had to be enacted to allow polygamy and divorce among the cultural communities which traditionally practice them. Implicit in such provisions was the belief that Christian Filipinos were morally superior to the cultural communities, the Muslims, who were expected to eventually abide and assimilate with the Christian standards of life. Muslim Filipinos now have the freedom to engage in their cultural, religious

*Senior Articles Editor, Ateneo Law Journal

[1] Muslims in the Philippines, Cesar Alib Majul, UP Press, Q.C., 1973.

and traditional practices as a matter of right rather than a special privilege granted in a condescending manner.

The Code covers only administration of the "personal law" system of the Filipino Muslims as distinguished from the general "law of the land". Its rationale is the immutable principles of the Shariah that Muslims are guided by public as well as personal law in the administration of justice.

The constitutional provisions which serve as bases for the codification are the due process clause and the free exercise of religion clause. Of paramount consideration is Art. XV, Sec. 11 which provides that "The State shall consider the customs, beliefs, and interest of national cultural communities in the formulation and implementation of state policies."

I. Sources of Islamic Law

A brief incursion into the sources of Islamic Law will be necessary to know the four madzhabs or orthodox schools of Muslim Law considered by the Code.

The word "Islam" is Arabic and means "surrender" or "resignation." Muslims have adopted the word as the name for their religion, and for them it connotes surrender or resignation to the will of God. The word "Muslim" itself comes from the same root word in Arabic and means "surrenderer" or "resignee" i.e., one who does Islam, one who surrenders himself to doing the will of God.[2]

Shariah, the sacred law of Islam, comprises the sum total of God's command which regulate a Muslim's way of life. It includes both ordinances relating to worship as well as legal rules governing the relationship between man and his fellowmen.

The four sources of Islamic Law are: (1) the Koran; (2) Sunna or Traditions of the Prophet; (3) Ijmaa or Consensus of Opinion; and (4) Qiyas or Analogical Deduction.

1. *The Koran*

To the Muslims, the Koran is of divine origin. Law has been regarded as

[2]Islam and Muslims, Michael Diamond and Peter Gowing, New Day Publishers, Q.C., 1981.

flowing from or being part of the concept of Shariah (the divinely ordained pattern of human conduct). It must, therefore, have its basis in divine revelation. The Koran, the most consumate and final revelation of God to man, must be made the primary and indeed sole director of human life and the social order.

2. *Sunnah or Tradition*

The word "sunnah" means "the trodden path." It refers to the use as precedent of the practices, the pronouncements, the rulings, as well as the reported conduct of the Prophet in specific instances not covered by direct provision of the Koran.[3]

So long as Mohammed lived he governed the Muslim community. But when he died, the Muslims saw that the prescriptions of the Koran did not answer all their social needs, from that arose the necessity of adding to the prophetic revelation something which would be able to complete the Koranic prescription whenever the occasion demanded. If the solution to the problem could not be taken from the Koran, precedents taken from Mohammed's life constituted a guide. This was called the Sunnah.

3. *Ijmaa or Consensus*

As time passed, it became necessary to resolve numerous conflicts or problems on some bases other than the Koran and the traditions of the prophet. For this purpose, jurists evolved the principle of ijmaa or the general concord or agreement among the jurists of a particular age on any question on which the Koran or Sunna was silent.

The validity of ijmaa, as a binding precedent, is based on a precept of the Prophet which says that God will not allow His chosen people to agree on error. All schools of law concede that no disagreement can thereafter be allowed where there is valid consensus. Therefore, ijmaa once established cannot be repealed. It thus means a kind of "communal legislation" by recognized scholars of law.

4. *Qiyas or Analogy*

The term "Qiyas" according to the Muslim jurists means analogical reasoning, i.e., concluding from a given principle embodied in a precedent

[3]The Islamic Law of Family Relations and Successional Rights, Sen. Mamintal Tamano (Speech delivered on July 1, 1977 in the Seminar on "Civil Law Revisited").

that a new case falls under this principle, or is similar to this precedent on the strength of common essential features called the reason ('illa).[4] It therefore consists of applying some text of the Koran or Traditions if the case can be demonstrated to be covered by the reasons or spirit of the rule although the language of such text may not apply. This is reasoning by analogy.

Schools of Law

The Code considers 4 schools of law in orthodox Islam (madzhab) namely: the Hanifi, the Maliki, the Shafi'i, and the Hanbali Schools, although it stresses the Shafi'i school of law prevailing in our jurisdiction.

These schools of Muslim law make it possible for the competent jurist to make deductions merely from the broad policies of Muslim Law in the absence of any expressed positive declaration of the will of the legislature. It has for its rationale the nature of Muslim law in that the structure of Muslim law as completed during the lifetime of the Prophet in the Koran and the Sunnah. These are the two sources from which spring the unalterable mandatory provisions of Muslim Law. The four madzhab have developed the force of interpretation, deduction by analogy (giyas), disciplined judgment of jurist (ijtihad) and juristic preference (istihsan) to make the Muslim legal system as adaptable as possible to the requirement of changing times and conditions. It is also on this basis that the Muslim legal system recognizes the force of customary (adat) law if it is not repugnant to the Shariah or the principles enunciated on igmaa (consensus), and not contrary to public policy and welfare.[5]

I. Marriage

In Islam, marriage is not a sacrament but is essentially a civil contract between a man and a woman. The parties are free to provide terms and conditions in the contract of marriage which are not contrary to Islamic law or morality.

Article 14 of the Code provides that the nature, consequence and incidents of marriages are not subject to stipulation except that the marriage settlements may to a certain extent fix the property relations of the spouses. However, a perusal of the Code tells us that the marriage contract may contain provisions or terms other than property matters which may cause the termination of the contract, that is, result in a divorce between the parties.

[4] Islam, Fazler Rahman, William Clowes & Sons, Limited, 1966.

[5] Majul, Cesar Adib, Ibid.

The general rule is that the right to initiate divorce is with the husband. But the marriage contract may stipulate that this right shall also be available to the wife. This is expressly provided for under Article 51 whereby the husband may delegate to his wife the right of repudiation (talaq) at the time the marriage is celebrated, the delegation (tafwīd) being embodied in the marriage contract.

In Islam, marriage is purely a civil matter, and no particular form or religious ceremony is required (Art. 17). For the marriage to be valid, the following requisites laid out in Article 15 must be present:

a) legal capacity of the contracting parties;
b) mutual consent of the parties freely given;
c) offer (ijāb) and acceptance (qabul) duly witnessed by at least two competent persons after the proper guardian in marriage (wali) has given his consent; and
d) stipulation of customary dowry (mahr) duly witnessed by two competent persons.

For one to possess legal capacity to contract marriage, Article 16 provides that one must be at least 15 years of age if a male and of the age of puberty if a female, which is presumed once she reaches the age of 15. However, the Sharia District Court may, upon petition of a proper wali or guardian, order the solemnization of the marriage of a female who, thought less than 15 but not below 12 years of age, has attained puberty. However a marriage through a wali may be annulled upon petition of either party within four years after the female reaches 15 years of age provided no voluntary cohabitation has taken place and the wali who contracted the marriage was other than the father or paternal grandfather.

No particular form of marriage ceremony is required but Article 17 assumes the presence of a person solemnizing the marriage in addition to two competent witnesses. But it will be noted that a violation of Article 17 in this respect does not make the marriage void (batil) or irregular (fasid).[6]

The requirement of at least two witnesses, which is indispensable, emphasizes that publicity of the marriage is desirable. Clandestine or secret marriages are void.

[6] See Tamano. note 3

Another essential requisite for a valid marriage is the bestowal of a dowry or nuptial gift to the wife. This is known as the mahr, the amount of which may be fixed before, during or after the celebration of the marriage. If it is not so fixed, Article 20 states that the wife may petition the court to fix it in accordance with the couple's social standing.

It is customary to pay part of the mahr immediately and to postpone payment of the rest. However it is possible to stipulate full payment at once or partial payments of the mahr. The unpaid part becomes due: 1) on the death of one of the spouses in every case or 2) in the case of repudiation if the marriage has been consummated at least by a true and undisturbed privacy between husband and wife.[7] Non-payment of the dowry will justify the wife in refusing her favors to her husband and can also be a ground for divorce.

If the husband should divorce his wife before the consummation of the marriage, the wife has a right to half the stipulated mahr (Art. 54) or if no mahr was stipulated, then to an indemnity which is called mut'a and usually consist of a set of clothing.

II. Prohibited Marriage

Every legal system imposes certain restrictions on the right of a man to marry certain relations. Our Muslim Code forbids marriage within the prohibited degrees of consanguinity, affinity and fosterage (Art. 23).

In Islamic law, fosterage has been introduced as an additional ground of prohibition. It is the relationship through nursing and suckling. Article 26 states that no person may contract marriage with a woman who breastfed him at least five times within two years after his birth. When the relationship of fosterage exists, the prohibition under Article 24 relating to consanguinity applies. In other words, those relations that are prohibited on account of consanguinity are prohibited on account of fosterage.

The exceptions spoken of in Article 26 which is recognized by Islamic law refers to certain foster-relations, such as one's sister's foster mother, or foster sister's mother, or foster son's sisters or foster brother's sisters. With any of those, a valid marriage may be contracted.

But marriage between first cousins is not prohibited. Marriage with the widows of brothers is also allowed. Also, there is no prohibition against a man marrying a woman and his son marrying her daughter or mother.

[7] An Introduction to Islamic Law, Joseph Schacht, Oxford University Press, 1964.

III. Subsequent Marriages

Article 27 provides that "not withstanding the rule of Islamic law permitting a Muslim to have more than one wife but not more than four at a time, no Muslim male can have more than one wife unless he can deal with them with equal companionship and just treatment as enjoined by Islamic law and only in exceptional cases."

Although in Islam monogamy is the general rule, polygamy is permitted under certain exceptional cases. If a man can be content with one wife, Islam does not require him or encourage him to take another. However, should one opt to practice polygamy he is obliged to observe strict equity and justice towards all his wives. The injunction in the Koran refers not only to material comfort but to matters of love and sentiment as well. It is perhaps much easier to provide equal material comfort to several women at the same time, but it is very difficult to divide one's affection equally among several persons.

Every dissolution of a marriage which has been consummated entails a waiting period known as idda of the wife before she can marry another husband. Dissolution may be caused by the death of the husband or because of divorce. Article 28 requires a widow to observe an idda of four months and ten days from the date of the death of her husband before she can remarry. In the case of a divorcee, an idda of three monthly courses counted from the date of divorce is required before she can get married again (Art. 29). If she is pregnant at the time she becomes a widow or divorcee, she has to wait until her delivery before getting married again.

Idda literally means numeration. It is the waiting period incumbent on the women after the dissolution of a valid marriage or an irregular marriage which has been consummated. It's purpose is to establish the paternity of a possible child of the union and thus avoid confusion of paternity.

In the case of divorce, the idda is intended to be a waiting period for a possible reconciliation. If the husband and wife decide to reconcile before the expiration of the period, a new marriage contract is not required.

IV. BATIL and FASID Marriages

Under Islamic law, marriages are classified for purposes of validity into three: valid, void (batil) and irregular (fasid).

The general rule is that a marriage is void in the cases where the prohibition is perpetual and absolute, while a marriage which is defective only by reason of a relative or temporary prohibition or for want of some legal formality is merely irregular.

Article 31 enumerates the void or batil marriages such as those prohibited on the grounds of consanguinity, affinity or fosterage; those contracted by parties one or both of whom have been found guilty of having killed the spouse of either of them; or those contracted in contravention of the prohibition against unlawful conjunction. Unlawful conjunction meaning that a man may not have at the same time two wives who are so related to each other by consanguinity, affinity or fosterage, that if either of them had been a male, they could not have lawfully intermarried. A man, for instance, cannot marry two sisters at one time or an aunt and neice together.

V. Property Relation Between Spouses

The property relations between husband and wife shall be governed: first by contract between the parties prior to or at the time of the celebration of the marriage, then by provisions of the Muslim Code and finally by custom (Art. 37).

A marriage does not bring about a conjugal partnership of gains under Islamic law. If the parties do not stipulate as to the type of matrimonial regine that shall govern their marriage, the same shall be governed by a complete separation of property.

Therefore, unless a conjugal partnership of gains is agreed upon in the marriage contract, each spouse shall own, possess, administer, enjoy and dispose of his or her own exclusive property even without the consent of the other. Article 42, however, provides that the court, may upon petition of either spouse, grant to the other the administration of such property. The grounds for administration by one spouse over the other's property are not provided for by the Muslim Code. Islamic law should provide for this deficiency.

However, the duty of maintenance belongs to the husband which he, as pater familias, must satify out of his own efforts and the fruits of his property.

VI. Divorce (Talaq)

Islam, although permitting divorce under exceptional circumstances, treats this as a very serious matter and the Koran gives every encouragement

for reconciliation. The Prophet is reported to have said that "of all the things which have been permitted to man, divorce is the most hateful in the sight of God." And because divorce is considered hateful in the eyes of God, it is comparatively scarce in Muslim society despite the facility with which it may be availed of.

Chapter III of P.D. 1083 is devoted to divorce. Article 45 provides for the different modes by which divorce may be effected, namely:

1. Repudiation of the wife by the husband (talaq);
2. Vow of continence by the husband (ila);
3. Injurious assimilation of the wife by the husband (zihar);
4. Acts of imprecation (li'an);
5. Redemption by the wife (khul');
6. Exercise by the wife of the delegated right to repudiate (tafwid);
7. Judicial decree (faskh).

The normal ground for divorce is repudiation, talaq, of the wife by the husband. This is accomplished by the husband in a single repudiation of his wife during her nonmenstrual period (tuhr) within which he has totally abstained from carnal relation with her. But a husband who repudiates his wife, either for the first or second time, shall have the right to take her back within the prescribed 'idda by resumption of cohabitation, without need of a new contract of marriage. Should he fail to do so, the repudiation shall become irrevocable.

This form of divorce available to the husband has been made more difficult. It used to be effected simply by his repudiation of the wife ("I divorce you, I divorce you, I divorce you") in a non-menstrual period (tuhr) of hers during which he has totally abstained from having sexual intercourse with her. The Code now requires him to file with the clerk of court of the Shari'a Circuit Court a written notice of his having made such repudiation, after serving a copy of it to the wife concerned. Within seven days from the filing, the clerk requires the parties to nominate their respective representatives who, together with him as chairman, shall be constituted by the court as an Agama Arbitration Council. On the basis of the report of this council and other evidence that may be allowed, the court will decide whether or not the husband's pronouncement of divorce shall be effective (Art. 161). This procedure has been adopted to curb abuses of the right.

Ila is a dissolution of the marriage state by the oath of the husband to abstain from marital intercourse for a period of not less than four months. If the husband keeps the oath it has the effect of a definite repudiation, but it