

# Islamic family law

Family



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## **Abstract**

This paper is a comparison between the laws governing the Muslim marriage and Divorce through Presidential Decree No. 1083, otherwise known as the Code of Muslim Personal Laws and marriage and legal separation under the Family Code. It also compares the rights and obligations of spouses between the two codes. It analyzes the similarities and differences of the provisions on the requisites in contracting marriages between the two laws and the effects of legal separation as far as the Family Code is concerned and the same with Islamic divorce as provided by law.

## **Introduction**

The 1987 Philippine Constitution, in Article XV, Section 2, states that “ Marriage, as an inviolable social institution, is the foundation of the family and shall be protected by the State. The same constitution admits that “ no law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof” 1 and it respects the protection and conservation by the State of the customs, traditions, practices and beliefs of the Filipinos. Presidential Decree 1083 also known as the Code of Muslim Personal Laws took effect on February 14, 1977 and the governing constitution then was the 1973 Constitution. According to Andres H. Hagad in his work “ Comments on the Muslim Code: A Paper on PD. No. 038”, the code refers to Article XV, section 11 of the 1973 Constitution as the legal basis for its existence which states that “ the State shall consider the customs, traditions, beliefs and interests of national cultural communities in the formulation and implementation of State policies. ” The 1987 Philippine Constitution, Article

III, Section 5 Andres H. Hagad, Comments on the Muslim Code: A Paper on P. D. No. 1083, Philippine Law Journal [1977] Vol. 52

## **Rationale**

The Constitution, the laws and even Supreme Court's decisions pertaining to issues involving marriage have been reflective of how the State wanted to protect the sanctity and value of marriage in the Philippines. The law even so provides that it shall not be governed by stipulations but by the Government and the latter must intervene in order to protect it. In line with this, the researcher seeks to be enlightened of the similarities and difference of marriages contracted in accordance with the Family Code in comparison to those contracted by Muslims provided by the Code of Muslim Personal Laws.

Both codes give right to spouses to separate from each other on certain grounds, hence, comparison of the two would likely pave way to the idea of adopting one not only to protect the sanctity of marriage per se but also not to prejudice the constitutional and human rights of the parties involved.

## **The Family Code and the Code of Muslim Personal Laws**

### **What is Marriage?**

The Family Code of the Philippines defines marriage as a special contract of permanent union between a man and a woman entered into in accordance with law for the establishment of conjugal and family life.

It is the foundation of the family and an inviolable social institution whose nature, consequences, and incidents are governed by law and not subject to stipulation, except that marriage settlements may fix the property relations during the marriage within the limits provided by the said code. On the other

hand, the Code of Muslim Personal Laws defines marriage as not only a civil contract but a social institution. Its nature, consequences and incidents are governed by this Code and the Shari'a and not subject to stipulation, except that 3 Family Code of the Philippines, Article I.

In the Philippines the marriage settlements may to a certain extent fix the property relations of the spouses. The two laws have a definition of marriage which is more or less akin to each other. Requisites of Marriage Family Code of the Philippines Code of Muslim Personal Laws Art. 2. No marriage shall be valid, unless these essential requisites are present:

- Legal capacity of the contracting parties who must be a male and a female;
- Consent freely given in the presence of the solemnizing officer Art.

### **Essential requisites**

No marriage shall be perfected unless the following essential requisites are complied with: (a) Legal capacity of the contracting parties; (b) Mutual consent of the parties freely given; (c) Offer (ijab) 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 dower (mahr) duly witnessed by two competent persons. Art. The formal requisites of marriage are: Authority of the solemnizing officer; A valid marriage license except in the cases provided for in Chapter 2 of this Title; and a marriage ceremony which takes place with the appearance of the contracting parties before the solemnizing officers and their personal Art. 16. Capacity to contract marriage. declaration that they take each other (1) Any Muslim male at least fifteen years as husband and wife in the presence of of <https://assignbuster.com/islamic-family-law/>

age and any Muslim female of the not less than two witnesses of legal age puberty or upwards and not age. suffering from any impediment under the provisions of this Code may contract marriage.

A female is presumed to have attained puberty upon reaching the age of fifteen. (2) However, the Shari'a District Court may, upon petition of a proper wali, order the solemnization of the marriage of a female who though less than fifteen but not below twelve years of age, has attained puberty. (3) Marriage through a waliby a minor below the prescribed ages shall be regarded as betrothal and may be annulled upon the petition of either party within four years after attaining the age of puberty, provided no 4 Code of Muslim Personal Laws, Chapter II, Section I, Article 14.

### **Comparative Analysis of the Family Code and Code of Muslim Personal Laws on Marriage, Legal Separation and Islamic Divorce**

In the Philippines voluntary cohabitation has taken place and the wali who contracted the marriage was other than the father or paternal grandfather. Apparently, the Code of Muslim Personal Laws has more requirements for contracting parties to comply before they can enter into marriage. Under the Family Code, the contracting must be at least eighteen years of age, in such case when one of the parties is below eighteen the marriage will be void which will be discussed below. On the other hand, Code of Muslim of Personal laws, the male must be at least fifteen years of age and the female must be of the age of puberty with the presumption provided in the Code that females attain their puberty at the age of fifteen. Also, the female must

not be below twelve years of age, in such case the marriage may be annulable.

**Void and Voidable Marriages under Family Code and Prohibited Marriages under Code of Muslim Personal Laws Family Code of the Philippines Art. 35.**

The following marriages shall be void from the beginning: (1) Those contracted by any party below eighteen years of age even with the consent of parents or guardians; (2) Those solemnized by any person not legally authorized to perform marriages unless such marriages were contracted with either or both parties believing in good faith that the solemnizing officer had the legal authority to do so; (3) Those solemnized without a license, except those covered by the preceding Chapter; Code of Muslim Personal Laws Section 2.

**Prohibited Marriages Article 23. Bases of prohibition.**

No marriage may be contracted by parties within the prohibited degrees: (a) Of consanguinity; (b) Of affinity; and (c) Of fosterage. Article 24. Prohibition by consanguinity (tahrimjbin-nasab). No marriage shall be contracted between: (a) Ascendants and descendants of any degree; 5 Family Code of the Philippines [1988], Art. 3 (1). Those bigamous or polygamous marriages not falling under Article 41; (5) Those contracted through mistake of one contracting party as to the identity of the other; and (6) Those subsequent marriages that are void under Article 53. Art. 36. A marriage contracted by any party who, at the time of the celebration, was psychologically incapacitated to comply with the essential marital obligations of marriage, shall likewise be void even if such incapacity becomes manifest only after its solemnization.

Art. 37. Marriages between the following are incestuous and void from the beginning, whether the relationship between the parties be legitimate or illegitimate: (1) Between ascendants and descendants of any degree; and (2) Between brothers and sisters, whether of the full or half-blood. Art. 38. The following marriages shall be void from the beginning for reasons of public policy: (1) Between collateral blood relatives, whether legitimate or illegitimate, up to the fourth civil degree; (2) Between step-parents and stepchildren; (3) Between parents-in-law and children-in-law; (4) Between the adopting parent and the adopted child; (5) Between the surviving spouse of the adopting parent and the adopted child; (6) Between the surviving spouse of the adopted child and the adopter; (b) Brothers and sisters, whether germane, consanguine or uterine; and (c) Brothers or sisters and their descendants within the third civil degree. Article 25. Prohibition by affinity (tahrīm-billmusahara). 1) No marriage shall be contracted between: (a) Any of the spouses and their respective affinal relatives in the ascending line and in the collateral line within the third degree; (b) Stepfather and stepdaughter when the marriage between the former and the mother of the latter has been consummated; (c) Stepmother and stepson when the marriage between the former and the father of the latter has been consummated; and (d) Stepson or stepdaughter and the widow, widower or divorcee of their respective ascendants. 2) The prohibition under this article applies even after the dissolution of the marriage creating the affinal relationship. Article 26. Prohibition due to fosterage (tahrīm-bir-rada'a). (1) No person may validly contract marriage with any woman who breastfed him for at least five times within two years after his birth. (2) The prohibition on marriage by reason of consanguinity shall likewise apply to persons related by fosterage

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within the same degrees, subject to exception recognized by Muslim law. Section 4. Batil and Fasi Marriages Article 31. Batil marriages. The following marriages shall be void (batil) from the beginning: Page 6 Comparative Analysis of the Family Code and Code of Muslim Personal Laws on Marriage, Legal Separation and Islamic Divorce in the Philippines (7) Between an adopted child and a legitimate child of the adopter; (8) Between adopted children of the same adopter; and (9) Between parties where one, with the intention to marry the other, killed that other person's spouse, or his or her own spouse.

Art. 41. A marriage contracted by any person during the subsistence of a previous marriage shall be null and void unless before the celebration of the subsequent marriage, the prior spouse had been absent for four consecutive years and the spouse present had a well-founded belief that the absent spouse was already dead. In case of disappearance where there is danger of death under the circumstances set forth in the provisions of Article 391 of the Civil Code, and absence of only two years shall be sufficient. xx Art. 53. Either of the former spouses may marry again after complying with the requirements of the immediately preceding Article; otherwise, the subsequent marriage shall be null and void. (a) Those contracted contrary to Articles 23, 24, 25 and 26; (b) Those contracted in contravention of the prohibition against unlawful conjunction; and (c) Those contracted by parties one or both of whom have been found guilty of having killed the spouse of either of them. Article 32. Fasi marriages.

The following marriages shall be irregular (fasi) from their performance: (a) Those contracted with a female observing 'idda; (b) Those contracted

contrary to Article 30; (c) Those wherein the consent of either party is vitiated by violence, intimidation, fraud, deceit or misrepresentation; (d) Those contracted by a party in a condition of death-illness (marad-ul-mault) without the same being consummated; (e) Those contracted by a party in a state of ihram; and (f) Mixed marriages not allowed under Islamic law.

The Family Code provides for marriages that are void and voidable due to the fact that these marriages are contracted with either the absence of both essential and formal requisites and defect or irregularity in the essential or formal requisites. The Code of Muslim Personal Laws, on the other hand provides for several instances where a marriage is prohibited, void and irregular.

### **Legal Separation and Divorce Family Code of the Philippines Art. 55.**

A petition for legal separation may be filed on any of the following grounds:

(1) Repeated physical violence or grossly abusive conduct directed against the petitioner, a common child, or a child of the petitioner; (2) Physical violence or moral pressure to compel the petitioner to change religious or political affiliation; (3) Attempt of respondent to corrupt or induce the petitioner, a common child, or a child of the petitioner, to engage in prostitution, or connivance in such corruption or inducement; (4) Final judgment sentencing the respondent to imprisonment or more than six years, even if pardoned; (5) Drug addiction or habitual alcoholism of the respondent; (6) Lesbianism or homosexuality of the respondent; (7) Contracting by the respondent of a subsequent bigamous marriage, whether in the Philippines or abroad; bigamous marriage, whether in the Philippines

or abroad; (8) Sexual infidelity or perversion; (9) Attempt by the respondent against the life of the petitioner; or (10) Abandonment of petitioner by respondent without justifiable cause for more than one year. Code of Muslim Personal Laws Chapter Three DIVORCE (TALAQ) Section 1. Nature and Form Article 45. Definition and forms. Divorce is the formal dissolution of the marriage bond in accordance with this Code to be granted only after the exhaustion of all possible means of reconciliation between the spouses.

It may be effected by: (a) Repudiation of the wife by the husband (talaq); (b) Vow of continence by the husband (ila); (c) Injurious assanilation of the wife by the husband (zihar); (d) Acts of imprecation (li'an); (e) Redemption by the wife (khul'); (f) Exercise by the wife of the delegated right to repudiate (tafwld); or (g) Judicial decree (faskh). There is a big difference between legal separation and divorce because the former only covers separation of bed and board while the latter is an absolute separation. Any divorce proceeding undertaken before the Shari'a Court is valid, recognized, binding and sufficient divorce proceedings. Article 13 of PD No. 1083 does not provide for a situation where the parties were married both in civil and Muslim rites. Consequently, the shari'a courts are not vested with original and exclusive jurisdiction when it comes to marriages celebrated under both civil and Muslim laws. Specifically, divorce in Islam is classified into different types in relation to the grounds that may be used by either the husband or the wife in separating from each other. A divorce by talaq may be affected by the husband in a single repudiation of his wife during her nonmenstrual period within which he has totally abstained from carnal relation with her. A wife in a Muslim marriage may be granted a decree of divorce where her husband

makes a vow to abstain from any carnal relations with his wife and keeps such for a period of not less than four (4) months. Another is the divorce by zihar, where a husband has injuriously assimilated his wife to any of his relatives within the prohibited degrees of marriage, in such case they shall mutually refrain from having carnal relation until he shall have performed the prescribed expiation. Where the husband accuses his wife of adultery, a decree of perpetual divorce may be granted by the court. The wife could also, after having offered to return or renounce her dower or to pay any other lawful consideration for her release from the marriage bond, petition the court for divorce. If the husband has delegated to the wife the right to effect a talaq at the time of the celebration of the marriage or thereafter, she may repudiate the marriage and the repudiation would have the same effect as if it were pronounced by the husband himself. Lastly, the wife may petition a decree of divorce by faskh (judicial decree) subject to some grounds. A decree of faskh on the ground of unusual cruelty may be granted by the court upon petition of the wife. 14 Muslim spouses, because of divorce granted by P. D. No. 083 for Islamic marriages have many ways in order to separate themselves from each other. Grounds for divorce decree are even classified as to whom it may apply, either to the wife or the husband taking into account the different situations that they may experience in their married life. On the other hand, the Family Code also provides spouses to separate from each other but only limited, however legitimate the grounds are. The grounds for legal separation provided by the Family Code are more specific and relatively of the same weight with the grounds for divorce provided by P. D. No. 1083. However, the Family Code does not at all give the spouses the right to be divorced.

## **Effects of Legal Separation and Divorce Family Code of the Philippines Art. 63.**

The decree of legal separation shall have the following effects: (1) The spouses shall be entitled to live separately from each other, but the marriage bonds shall not be severed; (2) The absolute community or the conjugal partnership shall be dissolved and liquidated but the offending spouse shall have no right to any share of the net profits earned by the absolute community or the conjugal partnership, which shall be forfeited in accordance with the provisions of Article 43(2); (3) The custody of the minor children shall Code of Muslim Personal Laws Article 54.

### **Effects of irrevocable talaq or faskh.**

A talaq or faskh, as soon as it becomes irrevocable, shall have the following effects: (a) The marriage bond shall be severed and the spouses may contract another marriage in accordance with this Code; (b) The spouses shall lose their mutual rights of inheritance; (c) The custody of children shall be determined in accordance with Article 78 of this code; (d) The wife shall be entitled to recover from the husband her whole dower in case the talaq be awarded to the innocent spouse, subject to the provisions of Article 213 of this Code; and (4) The offending spouse shall be disqualified from inheriting from the innocent spouse shall be revoked by operation of law. as been affected after the consummation of the marriage, or one-half thereof if effected before its consummation; (e) The husband shall not be discharged from his obligation to give support in accordance with Article 67; and (f) The conjugal partnership, if stipulated in the marriage settlements, shall be dissolved and liquidated. The huge difference between the two Codes with regard to the effects of either legal separation or divorce is that in legal <https://assignbuster.com/islamic-family-law/>

separation, the spouse are only entitled to live separately from each other and their marriage bonds shall not be severed while in Islamic divorce, marriage bonds between divorced parties shall be severed and they are entitled to contract a subsequent marriage provided they comply with the requisites to enter into another marriage. The Family does not provide that legally separated spouses can enter into another marriage.

In the Family Code, the offending spouse shall not have any right to any share of the net profits earned by the absolute community or the conjugal partnership while in P. D No. 1083, the spouses shall lose their mutual rights of inheritance. As to the custody of the children, the Family Code provides that the innocent shall be granted custody subject to conditions, while in P. D. No. 1083; custody shall be determined by Article 78 of the same code. 15 Similarly PD No. 1083 is clear that where the parents are not divorced or legally separated, the father and mother shall jointly exercise just and reasonable parental authority and fulfill their responsibility over 15 Article 78 of P.

D. No. 1083 otherwise known as Code of Muslim Personal laws states that (1) the care and custody of children below seven years of age whose parents are divorced shall belong to the mother or, in her absence, to the maternal grandmother, the paternal grandmother, the sister and aunts. In their default, it shall devolve upon the father and the nearest paternal relatives. The minor above seven years of age but below the age of puberty may choose the parent with whom he wants to stay. (2) The unmarried daughter who has reached the age of puberty shall stay with the father; the son, under the same circumstances, shall stay with the mother their legitimate children.

However, in a case where the mother was originally a Catholic woman and when she separated from her Muslim husband, converted back into Catholicism: “ The standard in the determination of sufficiency of proof, however, is not restricted to Muslim laws. The Family Code shall be taken into consideration in deciding whether a non-Muslim woman is incompetent. What determines her capacity is the standard laid down by the Family Code now that she is not a Muslim. ” The Family Code, the Code of Muslim Personal Laws and the Constitution The Constitution defines marriage, as an inviolable social institution, the foundation of the family and shall be protected by the State. 18 The State shall defend the right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood. Some scholars especially from the Catholic Church are against divorce because not only does it contravene the teachings of the Bible but according to them it is also against the Constitution which mandates the State to protect marriage as an inviolable social institution. The author would like to believe that Muslim divorce is deemed to be a kind of divorce equivalent to an absolute abrogation of marriage.

However, Muslim divorce is protected by the enactment of P. D No. 1083 which granted full autonomy and authority to Muslim’s customs and traditions the marriage relations between Muslims. The 1973 Constitution which is in effect when the Code of Muslim Personal Laws was enacted provides that “ the State shall consider the customs, traditions, beliefs and interests of national cultural communities in the formulation and implementation of State policies. It is the author’s opinion that there is

already a conflict between the two provisions arising from the enactment of P. D. No. 1083. However, it is doubtful if the question of constitutionality can be raised, considering the provision of Article XVII, section 3(2) of the same Constitution, which reads: “ All...decrees.. promulgated, issued, or done by the incumbent President shall be part of the law of the land, and shall remain valid, binding and effective even after the lifting of martial law”.

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