

CHAPTER V

MARRIAGE

A. Nature of marriage

Marriage is defined under the Muslim Code as not only a civil contract but also a social institution. Its nature, consequences and incidents are governed by the Muslim Code and the Shari'ah and not subject to stipulation, except that the marriage settlements may to a certain extent fix the property relations of the spouses.¹

It is viewed as a civil contract because it requires for its validity the legal capacity and mutual consent of both contracting parties.² However, the rules of ordinary contract are not applicable to marriage. They differ in the following matters:³

(1) As to nature, marriage is a permanent contract which can be dissolved only by the death of either party, unless annulled or declared null and void by the court for legal causes; while ordinary contracts are essentially temporary in the sense that their duration is limited either by law, stipulation or the nature of the contract;

(2) As to parties involved, in marriage, only a man and a woman of at least fifteen (15) years of age may be parties; while in ordinary contracts, two or more persons regardless of sex at least of majority age, (or 21 years old) and even juridical persons may be parties;

(3) As to what governs the relations of the parties in marriage, the rights and obligations of the spouses are fixed by Shari'ah; while in ordinary contracts, the rights and duties of the contracting parties are usually determined by the parties;

(4) As to susceptibility to condition, term or period, marriage cannot be subject to condition, term or period; while ordinary contracts may be conditional, or with a term or period;

(5) As to effects, marriage changes the status of the parties; while ordinary contracts do not change the status of the parties;

(6) As to effect of breach, in marriage, breach of conjugal obligations may give rise to penal or civil sanctions like criminal actions for adultery or concubinage, civil actions for legal separation, support and other relief; while in ordinary contracts, breach of contractual obligations gives rise to an action for damages;

(7) As to termination, marriage cannot be terminated by mutual agreement of the parties; while ordinary contracts may be so extinguished.

It is also viewed as social institution⁴ because its nature, consequences and incidents are governed by the Muslim Code and the Shari'ah and its benefits redound not only to the contracting parties but also to the whole family as well as the whole society or nation.⁵

The consequences and incidents of marriage are the following:⁶

(1) It legalizes the matrimonial or marital relationship between man and woman who are parties thereof;

(2) It establishes the paternity of their progeny;

(3) It changes the status of both parties;

(4) It creates property relations between them; and

(5) It creates corresponding rights and obligations between the spouses.

The foregoing consequences and incidents of marriage are governed not only by the Muslim Code but also by the Shari'ah. The provisions of the Muslim Code regarding the above subject matters must be consistent with the spirit of the principles of Shari'ah, otherwise it runs counter to the spirit of the Muslim Code and the Shari'ah.

It is not subject to stipulation, except that the marriage settlement may to a certain extent fix the property relations of the spouses.

Its benefits redound not only to the contracting parties but also to the whole family as well as the whole society or nation because it is the most excellent method adopted for regulating the relations between sexes. Without the institution of marriage, there would have been no family which is composed of the spouses and their offsprings. It may enlarge to include ascendants and descendants of far degrees. Without family which is the basic foundation of the society, there would have been no nation. In other words, nation is composed of families, and family is composed of husband and wife and their offsprings which came together through the institution of marriage.⁷

1. Nature of marriage from the islamic point of view

Marriage or *Nikkah* is an institution which is as old as the human race itself. Thus, it is viewed in a wide range of perspectives from its primitive sense or literal meaning to the modern notion by defining it scientifically through describing all its known attributes.

In its primitive sense, marriage means carnal conjunction.⁸ In its literal meaning, marriage or nikkah means joining together.⁹

To distinguish it with the Hindu and Christian marriage which is viewed as sacrament, marriage in Islam is not a sacrament. The concept of sacramental marriage implies among other things that it is monogamous and indissoluble.¹⁰ Islam allows as an exception to the monogamous marriage a limited polygyny. It also allows divorce as last recourse to the irreconcilable marriage problem. Thus, in the case *Abdulkadir v. Salima Bibi*,¹¹ Justice Syed Mahmud, an eminent judge of the then undivided India, subscribed to the view that marriage among Muslims is not a sacrament but a purely civil contract.

In Hidayah, nikkah is described to be a contract which has for its object begetting and legalizing of children.¹² In *Kanz al-Daqai'q*, nikkah is said to be a contract that is entered into by a man with a woman for

the enjoyment of the beneficiary rights over her (i.e., the enjoyment of the proprietary sex rights) as an "owner."¹³ In Fatwa 'Alamgiri and in *Siarh al-Waqayah*, both subscribed to the view that nikkah is a contract.¹⁴

Under the Syrian Family Law, nikkah is defined as a contract between a man and a woman on account of which the woman becomes legalized to the man. It serves the purpose of creating among them a life of co-relationship and of begetting children.¹⁵

Marriage was viewed as a contract because some of its characters resembled some of the attributes of contract, such as: legal capacity of the contracting parties: consent is freely given, and the contract can be terminated with or without cause through divorce, and is governed by law and the stipulation of the contracting parties. However, it differs from the ordinary contract in the following manners:¹⁶

(1) As to parties, in a civil contract, the parties may not be Muslim individuals alone, but may even be firms, companies or corporations or governments; while in a Muslim marriage contract, the parties must be Muslims or a Muslim male and a kitabiyyah female, where no legal prohibition exists.

(2) As to the governing laws, in a civil contract, its constitution and performance as well as the rights and obligations of the parties concerned are governed by the civil law of contract; while in a Muslim marriage contract, its constitution and performance as well as the rights and obligations of the spouses are governed by Shari'ah.

(3) As to witnesses, in a civil contract, the presence of witnesses is not essential; while in a Muslim marriage contract, the presence of witnesses at the time of nikkah is an essential, according to all Sunni schools of law. The Maliki school of law lays much stress on the publicity of nikkah which is equally distinct from a civil contract.

(4) As to termination, in ordinary civil contract, it is terminable by either party subject to liability of paying compensation; while in a Muslim marriage contract, there are checks on its termination or dissolution, specially on the part of the wife.

Marriage may also be described with its divine characters: It is a great boon of Allah (S.W.T.) for this world and the next.¹⁷ It is something solemn, something sacred to which Allah (S.W.T.) is the first witness and concluded in His Name in obedience to Him and according to His ordinances. It is a decent human companionship authorized and supervised by Allah (S.W.T.). It is a sign of His blessings and abundant mercy.¹⁸

The foregoing statements have their bases in the Holy Qur'an as well as in the Sunnah of the Holy Prophet Muhammad (S.A.W.). To cite a few among them:

The Holy Qur'an states to the effect:

*O mankind! reverence your Guardian-Lord, Who created you from a single person, created of like nature, his spouse, and from them twain scattered (like seeds) countless men and women; Reverence Allah, through Whom you demand your mutual (rights), and (reverence) the wombs (that bore you): for Allah ever watches over you.*¹⁹

*And among His signs is this, that He created for you spouses from among yourselves, that you may dwell in tranquility with them, and He has put love and mercy between your (hearts): Verily in that are Signs for those who reflect.*²⁰

The Holy Prophet (S.A.W.) is reported to have said:

*Oh people! you have certain rights over your wives and so have your wives over you...They are the trust of Allah in your hands. So you must treat them with all kindness.*²¹

The Code of Muslim Personal law by Dr. Tanzil ur-Rahman has defined marriage as a religious legal contract that regularizes the sexual relationship between man and woman, establishes the lineage of their progeny and creates civil rights and obligations between them.²²

In the Karachi case of *Muhammad v. Khushnuma Khatoon*,²³ Justice Qadir al-Din Ahmad, observed that “if religious ritual is not an essential part of the transaction, it does not mean that it has no sacred and no higher religious purpose enjoying the sanctity of religion and pleasure of Allah. There is a sanctity attached to it from the beginning to the end by conceptions of rights and obligations which if treated without the holiness which they possess in their nature, would be profane and cease to be Islamic in character.”

Therefore, Islam views marriage in a wider context. It embraces all social, legal and religious and divine aspects.

B. Essential requisites of marriage

The Muslim Code provides that, no marriage contract shall be perfected unless the following essential requisites are complied with:²⁴

- (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.

Let us explain these requisites one after the other:

1. Legal capacity of the contracting parties

This deals with two points:²⁵ first, the minimum age of contracting parties; and second, both parties are not suffering from any legal impediments under the provisions of the Muslim Code.

(a) Minimum age of the contracting parties

Generally, any Muslim male at least fifteen years of age and any Muslim female of the age of puberty which is presumed upon reaching the age of fifteen may contract marriage.²⁶

However, the following are exceptions to the foregoing general rule:²⁷

(1) The Shari'ah 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.

(2) Marriage through the father or paternal grandfather by a minor below the prescribed age.

(3) Marriage through a wali other than the father or paternal grandfather by a minor below the prescribed age who did not exercise the option of puberty (Khiyar al-bulugh) by petitioning the court to annul the said marriage upon reaching the age of puberty. The right of the option of puberty may be lost on the following grounds: (a) voluntary cohabitation has taken place, and (b) failure to exercise such right within four years after attaining the age of puberty.

(b) Minimum age of marriage under Islamic law

Under the original Islamic law, there is no minimum age of marriage. A minor of either sex can enter into a valid contract of marriage through a guardian. Under the Shafi'i school of law, only a father or paternal grandfather can give away a minor girl in marriage. Under the Hanafi school of law, although a guardian can give away a minor girl in marriage,

she has the option of repudiating the marriage on attaining puberty.²⁸

The reasons behind Islamic Law's allowing a marriage of parties though relatively young is to safeguard the values and objectives that Islam attaches to marriage. This may be explained in the following paragraphs:²⁹

(a) The desire for progeny is a human instinct. Hence, marriage at an early age, which is conducive to procreation is not only permitted but encouraged in Islam. The rationale for this becomes even more apparent when viewed in the light of Islam's proscription of all forms of adoptive relationship.

(b) Due to its uncommon concern for morality, Islam has prohibited all forms of extramarital intimacy between a man and a woman. Such practices as "trial marriages," "live-in" relationships and the like, which are in vogue in some countries, are taboo in an Islamic society. Hence, since in Islam, marriage is the only access to sexual intimacy, the Shari'ah gives the Muslims the chance to marry at the earliest possible opportunity, so that they may be able to guard against immorality.

(c) In Islam filiation is either legitimate or illegitimate. The process known in Civil Law as "legitimation," which converts illegitimate to legitimate filiation by legal fiction is unknown in Islamic law. Early marriage, therefore, ensures the legitimacy of children since they would be born during wedlock.

(d) Above all, marriage in Islam is regarded as an "act of piety," which every Muslim is required to enter into, unless there are valid grounds for not doing so. In Islam, responsibility for personal acts and obligatory duties commences at puberty. An early fulfillment of a religious duty is, therefore, desirable.

In the modern context of Islamic Law, it has been argued that where the parties of marriage are too young, they may be an irresponsible couple. In conformity with the well established principle in Islamic Law that through laws the state may suspend or restrict permissible acts,³⁰ we find in the modern legislation of Muslim countries that they fix the minimum age for marriage, subject however to certain exceptions.

In Malaysia, the Islamic Family Law (Federal Territory) Act, 1984, provides that no marriage may be solemnized or registered under the Act if the man is under eighteen of age and the woman is under sixteen except where the Shari'ah Judge grants a written permission in certain circumstances for the solemnization of such marriage.³¹ A similar provision is provided for in the laws in other states for example, the Kelantan Islamic Family Law Enactment.³²

In Singapore, it is enacted that no marriage shall be solemnized under the Administration of Muslim Law Act, if at the date of the marriage either party is under the age of sixteen years, but a Kathi may in special circumstances solemnize the marriage of a girl who is under the age of sixteen years but who has attained puberty.³³

Article 2 of the United Nations Convention in 1962 on the consent to marriage, the minimum age of marriage and the registration of marriage states that:³⁴

States parties to the present Convention shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.

Moreover, Principle II of the recommendations adopted by the United Nations in 1965 states that:³⁵

Member States shall take legislative action to specify a minimum age for marriage, which in any case shall not be less than fifteen years of age; no marriage shall legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.

From the foregoing provisions of laws, it is crystal clear that fixing the age of marriage to the age of majority is the general rule, and the marriage of minors is the exception.

Therefore, it is humbly submitted that with regard to the age requirement for marriage, the provision of the Muslim Code is in conformity with the original as well as the modern concept of age of marriage under Islamic Law. It is also consistent with the principle adopted by the United Nations Convention on the consent to marriage, the minimum age of marriage and the registration of marriage.

(c) Legal impediments of marriage under the Muslim Code

Legal impediments may either be permanent or temporary. The former includes those prohibitions based on consanguinity, affinity, fosterage, unlawful conjunction, and when one or both of whom have been found guilty of having killed the spouse of either of them. The latter comprises those prohibitions caused by 'idda, three talaq, vitiated consent, condition of death-illness, state of ihram, and mixed marriages not allowed under Islamic Law.

Violation of the permanent disability renders the marriage void (batil); violation of a temporary disability renders the marriage irregular (fasid). These impediments shall be discussed in detail in the chapter on prohibited marriages, subsequent marriages, and void and irregular marriages infra.

2. Mutual consent of the parties freely given

Mutual consent of the parties freely given as one of the essential requisites for the validity of marriage is a general rule. This is however subject to the exception when a minor girl is given by her guardian in marriage.

Consent of the bridegroom shall be expressed both by oral declaration as well as in writing in an instrument. He has to declare it publicly during the offer (ijab) and acceptance (qabul) ceremony. Besides, this declaration shall be set forth in an instrument in triplicate, signed or marked by the contracting parties and the witnesses, and attested to by the person solemnizing the marriage.³⁶

The Muslim Code, however, is silent on the form of consent of the bride. But applying the rules enunciated under the Muslim law³⁷ a woman previously married (widow or divorced) must express her consent. The reason is quite obvious. She is mature and can easily look into the pros and cons of her marriage contract. However, in the case of a virgin who is naturally modest, shy and feels hesitant in expressing her opinion, her silence means yes.³⁸

3. Offer (ijab) and acceptance (qabul) duly witnessed by at least two competent persons after the proper guardian in marriage (wali) has given his consent

This provision of the Code deals with three subject matters: (a) offer and acceptance; (b) two competent witnesses; and (c) consent of the proper guardian in marriage. Let us explain them one after another.

(a) Offer and acceptance

Marriage shall be solemnized publicly in any mosque, office of the Shari'ah Judge, office of the District or Circuit Registrar, residence of the bride or her wali, or at any other suitable place agreed upon by the

parties.³⁹

No particular form of marriage ceremony is required but the offer and the acceptance in marriage shall be declared publicly in the presence of the person solemnizing the marriage and the competent witnesses. This declaration shall be set forth in an instrument in triplicate, signed or marked by the contracting parties and the witnesses, and attested to by the person solemnizing the marriage. One copy shall be given to the contracting parties and another sent to the Circuit Registrar by the solemnizing officer who shall keep the third.⁴⁰

The Circuit Registrar shall file such certificate of marriage (which shall specify the nature and amount of the dower⁴¹ agreed upon) and such other documents presented to him for registration.⁴² The books making up the registry of marriage and other documents relating thereto shall be considered public documents and shall be prima facie evidence of the facts therein contained.⁴³

The offer may be presented by anyone of the contracting parties and the acceptance by the party to whom the offer is made.⁴⁴ Traditionally, the offer is given by the side of the bride and the acceptance is presented by the bridegroom. According to the Hanafi and Shafi'i school of law, the offer is one presented by a party who has the right of ownership of the thing to be offered even if it is presented after the acceptance. The acceptance is one that comes from the party to whom the thing is offered even if it is given ahead of the offer.

The terms offer and acceptance shall be expressed in a language that both the contracting parties and the witnesses may understand to show that the consent of the parties are freely given. It may be in Arabic or in any other languages. The scholars are unanimous in requiring to make it in a language expressive of *Al-tazwij* or *Al-nikkah*. Both terms signifying marriage.⁴⁶

The offer may be expressed either in past tense or present tense but imperative mode. The acceptance must always be in past tense.⁴⁷ Examples of both offer and acceptance in past tense: offer: "I have married myself to you" or "I have married my daughter to you"; acceptance: "I have

consented” or “I have accepted.” Examples of the offer in present tense but imperative mode and the acceptance is in past tense: offer: “marry me” or “marry your daughter to me”; acceptance; “I have married” or “I have consented” or “I have accepted.”

It is also required that the acceptance must be consistent with the offer.⁴⁸

(b) Two competent witnesses of the offer and acceptance

The Muslim Code does not provide for the qualifications of a competent witness. However, applying the Muslim law, a witness must be:⁴⁹ (1) sound mind and sound hearing; (2) legal age; (3) free; (4) two males or one male and two females; and (5) Muslims. However, Imam Shafi'i asserts that the two witnesses must be male Muslims.⁵⁰ Imam Abu Hanifa and Abu Yusuf hold the view that if the marriage is contracted with a woman who belongs to the people of scripture (kitabiyah), witnesses to the marriage may not necessarily be Muslims but may belong to the bride's own religion.⁵¹

In order that this requirement of the law must be complied with the witnesses must duly witness and hear the declaration of both offer and acceptance by the contracting parties or their representatives.⁵²

The legal requirement of two competent witnesses of the offer and acceptance is in conformity with the saying of the Holy Prophet (S.A.W.) to the effect: “No marriage except with the participation of a guardian and two competent witnesses.”⁵³

(c) Consent of the proper guardian in marriage must be given before the offer and acceptance is made

Let us identify first the proper guardian in marriage. The Muslim Code provides that the following persons shall have authority to act as guardian for marriage (wali) in the order of precedence:⁵⁴ (a) father; (b) paternal grandfather; (c) brother and other paternal relatives; (d) paternal

grandfather's executor or nominee; or (e) the court.

Under the Muslim Code, the above-mentioned persons in the order of precedence are the proper guardians in marriage. It is extended from father, paternal grandfather, brother and other paternal relatives, paternal grandfather's executor or nominee; and to the court.

Consent of the proper guardian in marriage seems redundant because under the Muslim Code, it is only the guardian as mentioned above, or any person qualified under the Muslim law designated by him who shall have the authority to solemnize the marriage.⁵⁵

The Muslim Code provides that marriage may be solemnized:⁵⁶ (a) by the proper wali of the woman to be wedded: (b) upon authority of the proper wali, by any person who is competent under Muslim law to solemnize marriage; or (c) by the Judge of the Shari'ah District Court or Shari'ah Circuit Court or any person designated by the Judge, should the proper wali refuse without justifiable reason, to authorize the solemnization.

Paragraph (c) of the foregoing provision of the Muslim Code runs counter to the earlier mentioned provision which is provided under Article 79. Article 18 paragraph (c) gives more right to the judge of the court over the proper wali while Article 79 places the judge of the court as in the last precedence of all the guardians in marriage.

In accordance with the principle of statutory construction that should the provisions of law be in conflict, the latter shall prevail over the former, then Article 79 shall prevail over Article 18. Therefore, Article 18 paragraph (c) shall not be given effect.

In the final analysis, under the Muslim Code, it is only the guardian in marriage or any person qualified under the Muslim law designated by him who can solemnize the marriage. It may also be implied that there can be no marriage under the Muslim Code without the consent of the guardian in marriage.

This provision of law is in conformity with the tradition when the Holy Prophet (S.A.W.) has said to the effect: "No marriage except with the participation of a guardian (wali) and two competent witnesses."⁵⁷

4. Stipulation of customary dower (mahr) duly witnessed by two competent persons

Dower or mahr is a gift given by the bridegroom to the bride on account of marriage. It is different from dowry which is a gift given by the bride to the bridegroom.

The foregoing requirement of law is impliedly avoided by Article 20 of the Muslim Code when it states that the amount or value of dower may be fixed by the contracting parties (mahr-musamma) before, during, or after the celebration of the marriage. If the amount or the value thereof has not been so fixed, a proper dower (mahr-mithl) shall, upon petition of the wife, be determined by the court according to the social standing of the parties.

The Muslim Code further provides that subject to the stipulation of the parties, the dower may be fully or partially paid before, during, or after the marriage. The property or estate of the husband shall be liable for the unpaid dower, or any part thereof.⁵⁸

From the foregoing provisions of law, it may be inferred that stipulation of customary dower is not an essential requisite for the perfection or validity of marriage, because it can be perfected even without it.

However, as soon as a valid marriage is entered into, dower (mahr) becomes an inalienable and imprescriptible right of the wife. It is inalienable because even without the stipulation of mahr before, during, or after the solemnization of marriage, mahr is still demandable which is called mahr-mithl or customary dower.⁵⁹ It is imprescriptible because prescription does not lie. If the period for the payment of mahr as stipulated shall lapse, still mahr is demandable.

In a nutshell, the only essential requisites for the validity of marriage under the Muslim Code are the following:⁶⁰

- (a) Legal capacity of the contracting parties:
- (b) Mutual consent of the parties freely given; and
- (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.

C. Prohibited marriage

At the outset, it is of importance to explain the following two points:

First, to minimize lengthy discussion, the explanation of the prohibited marriages is expressed in one way only, i.e., the prohibition is explained only with regard to the man on the assumption that he is the one proposing for marriage. In essence, this includes the prohibition for the woman by putting her in the possession of the man.

Second, to have a clear idea of the phrase “a degree of relationship” and the terms such as germane, consanguine, and uterine, we shall explain them as briefly as possible.

A degree is one generation.⁶¹ This may refer to direct line or collateral line. A direct line may be ascending or descending. An example of ascending direct line is the relationship of a child to his parents, to his grandparents, to his great grandparents, however high. An example of descending direct line is the relationship of a parent to his child, to his grandchild, to his great grandchild, however low.

The relationship of a child to his parents is one degree or one generation, to his grandparents is two degree, to his great grandparents is three degree, to his great-great grandparents is fourth degree and so on.

The relationship of a parent to his child is one degree or one generation, to his grandchild is two degree, to his great grandchild is three degree, and to his great-great grandchild is fourth degree, and so-on.

However, the rule is different when it comes to collateral degree. Collateral degree relationship refers to the so-called "side way relationship" like brothers, sisters, nephews, nieces, uncles, aunts and their descendants.⁶²

To determine the collateral degree relationship, take their common ancestor as the origin of relationship, then count the degree of relationship of one side, and count the degree of relationship of the other side, the sum of these two sides degree is their degree of relationship.

An example is the degree of relationship between the brother and his sister. Their common ancestor is their parent or parents. The degree relationship of the parent to his son (brother) is one degree; the degree relationship of the parent to his daughter (sister) is one degree; sum them up, they equal to two degree. Thus, the degree relationship between the brother and his sister is two degree. The relationship of a man to his nephews and nieces is third degree, to his grand nephews and grand nieces is fourth degree, to his uncles and aunts is third degree, and to his first cousin is fourth degree.

The term *germane* refers to full blood relationship by the same father and mother.

The term *consanguine* refers to half blood relationship on the father side by the same father but not the same mother.

The term *uterine* refers to half blood relationship on the mother side by the same mother but not the same father.

The bases of prohibited marriages under the Muslim Code are by consanguinity, affinity and fosterage.⁶³

1. Prohibition by consanguinity (tahrinbinnasab)

Article 24 of the Muslim Code provides that, no marriage shall be contracted between:

- (a) Ascendants and descendants of any degree;
- (b) Brothers and sisters, whether germane, consanguine or uterine;
and
- (c) Brothers or sisters and their descendants within the third civil degree.

The first prohibition by consanguinity deals with the ascendants and descendants of any degree. It is the direct ascending and descending relationship, i.e. mother, grandmother, however high, and daughter, granddaughter, however low.

The second prohibition by consanguinity deals with the brothers and sisters, whether full blood, half blood on the father side, or half blood on the mother side relationship.

The third prohibition by consanguinity deals with the brothers and sisters and their descendants within the third civil degree. This means up to the nephews and nieces only. They are the descendants within the third civil degree. It may be inferred also that uncles and aunts are within the prohibited degree of marriage because they are within the third degree relationship. However, grandnephews and grandnieces cannot be inferred because they are not within the third degree relationship but within the fourth degree relationship.

We shall cite the basis of this law from the Holy Qur'an. Allah (S.W.T.) says to the effect:

*Prohibited to you (for marriage) are: your mothers, daughters, sisters, father's sisters, mother's sisters, brother's daughters, sister's daughters....*⁶⁴

“Mother” includes the grandmother through the father’s or the mother’s line, however high. “Daughter” includes granddaughter through the son’s or daughter’s line, however low. “Sister” includes the full sister or half sister, whether germane or uterine. “Father’s sister” includes the grandfather’s sister, etc. And “mother’s sister” includes the grandmother’s sisters, etc.⁶⁵

This is further expanded by the Muslim scholars when they include brother’s daughters and sister’s daughters however low.⁶⁶

To sum up, under Islamic Law, prohibited marriages by consanguinity include: ascendants and descendants however high and however low; sisters and nieces however low; and aunts, however high.

The Muslim Code does not include among those prohibited marriages by consanguinity the grandaunts and the grandnieces. To be in conformity with Muslim law, it is humbly submitted that the Muslim Code in this regard should be construed in a liberal context to include the grandaunts and grandnieces however high or low among the prohibited marriages by consanguinity.

2. Prohibition by affinity (tahrīm-bil-musahara)

Article 25 of the Muslim Code provides that 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) Stepson⁶⁷ or stepdaughter⁶⁸ and the widow, widower or divorcee of their respective ascendants.

The prohibition under this article applies even after the dissolution of the marriage creating the affinal relationship.⁶⁹

We shall explain each of these provisions one after another.

Paragraph (a), deals with two points: first, the affinal relatives in the ascending line; and second, the affinal relatives in the collateral line within the third degree.

The affinal relatives in the ascending line refer to the wife's mother, wife's grandmother however high.

The basis of this law is the qur'anic ayyah to the effect that: "Prohibited to you (for marriage) are your wife's mothers."⁷⁰ This prohibition was construed by the Muslim scholars to include wives' grandmothers, wives' great grandmothers however high.⁷¹

The affinal relatives in the collateral line within the third degree refer to the wife's sister, the wife's aunt, and the wife's niece. The wife's sister is within the second degree, the wife's aunt is within the third degree, and the wife's niece is within the third degree.

The bases of this law are the following:

(1) With regard to the prohibition of marriage to a wife's sister, there is a qur'anic ayyah to the effect: "Prohibited to you (for marriage) are... and two sisters in wedlock at one and the same time."⁷²

If a man contracted a marriage with two sisters one after the other, the first marriage will be valid and the second marriage will be void.⁷³

If a man contracted a marriage with two sisters separately but it cannot be determined as to who was married first, separation of both of them from their husband shall be effected.⁷⁴

If a man contracted a marriage with two sisters in one and the same marriage contract, the said marriage contract shall be void.⁷⁵

(2) With regard to the prohibition of marriage to a wife's aunt, and wife's niece: according to Yusuf Ali, the qur'anic injunction prohibiting marriage to two sisters at the same time applies to aunt and niece together.⁷⁶

Based on the foregoing qur'anic ayyah was established the principle of law in islamic jurisprudence of the so-called "unlawful conjunction." Unlawful conjunction means that if two women are related on account of consanguinity or fosterage, then, their conjunction in being married to the same man shall be invalid.⁷⁷

The definition of unlawful conjunction as a principle of law in islamic jurisprudence, broadens the relationship of women who are prohibited to be conjoined in one man's marriage. It includes the grandaunt however high, as well as the grandniece however low.

With regard to paragraph (b), (c) and (d), they are one but expressed in three ways.

Paragraph (b) refers to stepfather and stepdaughter. The daughter of one's wife by her earlier marriage is called stepdaughter and he is her stepfather.⁷⁸

Paragraph (c) refers to stepmother and stepson. The son of one's husband by his earlier marriage is called stepson and she is his stepmother.⁷⁹

In paragraph (d), however, the term stepson or stepdaughter should be read as son or daughter.⁸⁰ Then, these refer also to the stepson or stepdaughter of the widow or widower or divorcee.

To summarize, the foregoing three paragraphs refer to the relationship between the stepchild and the stepparent.

These are best summarized in their original source, the Holy Qur'an. Allah (S.W.T.) says to the effect:

*Prohibited to you (for marriage) are ... your stepdaughters under your guardianship, born of your wives to whom you have gone in, - no prohibition if you have not gone in.*⁸¹

The phrase “under your guardianship” is generally but not unanimously held that it is a description and not a condition. Therefore, a stepdaughter not “under your guardianship” is still within the prohibition if the other condition (about her mother) is fulfilled.⁸²

The marriage with the wife must have been actually consummated in order to bar the marriage between stepfather and stepdaughter. Mere implied consummation (valid retirement) will not create such prohibition.⁸³

The last paragraph of the foregoing provisions of law which provides that “the prohibition under this article applies even after the dissolution of the marriage creating the affinal relationship” has been subjected to objection and criticism by scholars and lawyers among Muslim Filipinos.⁸⁴ However, they are unanimous in the view that the prohibition by affinity in the collateral line (unlawful conjunction) should be made an exception to the foregoing provision of law.⁸⁵

3. Prohibition due to fosterage (tahrim-birrada'a)

Article 26 of the Muslim Code provides:

(a) No person may validly contract marriage with any woman who breastfed him for at least five times within two years after his birth.

(b) The prohibition on marriage by reason of consanguinity shall likewise apply to persons related by fosterage within the same degree, subject to exceptions recognized by Muslim law.

It may be inferred from paragraph (a) that fosterage may be established between the woman (foster-mother) and the child (foster-child) upon fulfillment of the condition that “the woman must have breastfed

the child for at least five times within two years from the birth of the child." Upon fulfillment of such condition, fosterage is also established to all the relatives of the foster-mother by consanguinity as well as her husband who become the foster-father.

Paragraph (a) also prohibits the foster-son to marry his foster-mother.

Paragraph (b) prohibits the man (i.e., both foster-son and foster-father) from marrying all his relatives by fosterage as a man is prohibited to marry all his relatives by consanguinity within the same degree, subject, however, to exceptions recognized by Muslim law.

This means that the foster-son is prohibited from marrying his foster-mother, foster-grandmother however high. Likewise, the foster-father is prohibited to marry his foster-daughter, foster-granddaughter however low.

In addition, the foster-son is prohibited from marrying his foster-sister whether germane, consanguine or uterine; his foster-aunt and foster-niece. But the foster-father is not prohibited to marry the sister of his foster-daughter, the descendants of the brothers and sisters of his foster-daughter, the mother of his foster-daughter (should she is widow or divorcee). Likewise, the foster-brother of the foster-son is not prohibited to marry the sister, her descendants and the mother (should she be a widow or divorcee) of the foster-son. The reason is that they have no relationship that bar their legal marriage.

We shall explain the bases of this law.

The Holy Qur'an provides to the effect:

Prohibited to you (for marriage) are ... your foster-mothers (who gave you suck), foster-sisters....⁸⁵ (a)

Fosterage which means milk-relationship plays an important part in Muslim law. It is treated almost like blood-relationship. Thus, it seems that not only foster-mothers and foster-sisters, but also foster-mother's

sister, etc., all come within the prohibited degree.⁸⁶

Fosterage establishes only a foster-relationship between the foster-child and his descendants and his foster-mother including her relatives by consanguinity as well as her husband. It does not establish relationship between the foster-relatives and the relatives by consanguinity of the foster-child except his descendants.

The Holy Prophet (S.A.W) is reported to have said to the effect: "fosterage makes unlawful what consanguinity makes unlawful."⁸⁷

Thus, jurists are unanimous in the view that a woman who breastfed a child should be treated like a mother by consanguinity and her husband as like a father by consanguinity with regard to marriage prohibition.⁸⁸ However, they differ as to minimum quantity of milk that the child has sucked as well as the age of the child at the time of breastfeeding to establish foster-relationship.

With regard to the minimum quantity of milk, according to Imam Abu Hanifa and Imam Malik, if the child is breastfed milk equal to the minimum quantity that break fast, fosterage is established. According to Imam Ahmad this "quantity" (or frequency) is at least three times and according to Imam Shafi'i, at least five times.⁸⁹ The Muslim Code adopts the view of Imam Shafi'i.

With regard to the age of the child, Imam Abu Hanifa is of the opinion that breastfeeding must be within two years and a half. Imam Shafi'i, Imam Ahmad, Imam Abu Yusuf, Imam Muhammad and Sufyan Thauri are of the opinion that breastfeeding must be within two years.⁹⁰ The Muslim Code adopts the majority view.

D. Subsequent marriages

The laws for subsequent marriages are provided under Articles 27, 28, 29 and 30 of the Muslim Code. They prescribe the necessary conditions for the validity of a subsequent marriage of a husband, widow, divorced woman, and a thrice repudiated woman. We shall explain these

laws one after another.

1. Subsequent marriage by a husband

Article 27 of the Muslim Code provides that notwithstanding 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.

From the foregoing provision of law, it may be inferred that marriage under the Muslim Code, in a general sense, inclines to monogamy. Polygyny is allowed only in exceptional cases. It further provides for the conditions of the validity of a subsequent marriage. They are the following: (1) the marriage should not be in excess of the four wives at a time, (2) the husband can deal with his wives with equal companionship, and (3) he can deal with them with just treatment as enjoined by Islamic Law.

Besides the foregoing requirements, Article 162 of the Muslim Code provides that any Muslim husband desiring to contract a subsequent marriage shall, before so doing, file a written notice thereof with the clerk of court of the Shari'ah Circuit Court of the place where his family resides. Upon receipt of said notice, the Clerk shall serve a copy thereof to the wife or wives. Should any of them object, an Agama Arbitration Council shall be constituted in accordance with the provisions of paragraph (2) of Article 161. If the Agama Arbitration Council fails to obtain the wife's consent to the proposed marriage, the Court shall, subject to Article 27, decide whether or not to sustain her objection.

An Agama Arbitration Council mentioned above shall be composed of the Clerk of Court as Chairman and one representative for each party, who shall be appointed by the Court as members upon nomination of the parties.⁹¹

If Article 162 is violated, the husband and the solemnizing officer are liable for punishment under the Code.⁹² However, it is humbly

submitted that the marriage would still be valid, provided that it was solemnized in accordance with Muslim law.⁹³

Article 162 is part of modern legislation to ensure that justice and equity shall prevail.

The basis of this law is the qur'anic ayyah to the effect:

*If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; but if you fear that you shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess. That will be more suitable, to prevent you from doing injustice.*⁹⁴

Yusuf Ali has noted in connection with the above ayyah that:

*The unrestricted number of wives of "the time of ignorance" was now strictly limited to a maximum of four, provided you could treat them with perfect equality, in material things as well as in affection and immaterial things. As this condition is most difficult to fulfill, I understand the recommendation to be towards monogamy.*⁹⁵

No doubt that justice in absolute sense is impossible to attain. Allah (S.W.T.) says in the Holy Qur'an to the effect:

You are never able to be fair and just as between women, even if it is your ardent desire: but turn not away (from a woman) altogether, so as to leave her (as it were hanging in the air). If you come to a friendly understanding, and practise self-restraint Allah is Oft-

*forgiving, Most Merciful.*⁹⁶

Yusuf Ali has noted in connection with the above ayyah that:

*Legally more than one wife (up to four) are permissible on the condition that the man can be perfectly fair and just to all. But this is a condition almost impossible to fulfill. If, in the hope he might be able to fulfil it, a man puts himself in that impossible position, it is only right to insist that he should not discard one but at least fulfil all the outward duties that are incumbent on him in respect of her.*⁹⁷

From the foregoing qur'anic ayyah, the Muslim scholars have deduced in islamic jurisprudence that marriage in Islam is generally monogamous. However, polygyny is permitted as an exception to meet the social ill in case it arises.⁹⁸ Polygyny is further subjected to the condition that the man can do justice to his wives. However, such justice is not the absolute one, not the perfect justice - justice in material as well as immaterial things which includes love and feelings. This is beyond the ambit of human capability. On no soul doth Allah (S.W.T.) place a burden greater than it can bear.⁹⁹ The justice required is only material which is within the control of man.¹⁰⁰ That refers to companionship as well as support.

But how can we determine that the man can do justice? With regard to his inner feelings, it is only his conscience between him and Allah (S.W.T.): it is beyond the legal ambit. But, if there is a manifested sign or concrete evidence that he cannot do justice, the court is enjoined to take an action to ensure justice and equity.¹⁰¹ If the man is physically weak or financially incapable, no matter how he shouted on top of his voice that he can do perfect justice, the concrete sign should prevail over his false claim.

Therefore, it is humbly submitted that the conditions set forth in the Muslim Code are within the principles led down by Islamic Law.

2. Subsequent marriage by a widow

Article 28 of the Muslim Code provides that: no widow shall contract a subsequent marriage unless she has observed an 'idda of four months and ten days counted from the date of the death of her husband. If at that time the widow is pregnant, she may remarry within a reasonable time after delivery. In such case, she shall produce the corresponding death certificate.

In accordance with statutory construction, the second sentence of the above provision of law is impliedly amended by Article 57 paragraph (c) when it provides that: every wife shall be obliged to observe 'idda as follows: In case of a pregnant woman, for a period until her delivery.

'Idda is defined as the period of waiting prescribed for a woman whose marriage has been dissolved by death or by divorce the completion of which shall enable her to contract a new marriage.¹⁰²

For violation of the foregoing provision of law, both the widow and the solemnizing officer shall be penalized under the Muslim Code.¹⁰³

The basis of the foregoing provision of law is the qur'anic ayyah to the effect:

If any of you die and leave widows behind, they shall wait concerning themselves four months and ten days: when they have fulfilled their terms, there is no blame on you if they dispose of themselves in a just and reasonable manner.¹⁰⁴

Yusuf Ali has noted in connection with the above ayyah that:

The 'idda of widowhood (four months and ten days) is longer than the 'idda of divorce (three monthly courses, ii:228). In the latter the only consideration is to ascertain if there is any unborn issue of the marriage dissolved. This is clear from xxxii:49 where it is laid down that there is no 'idda for virgin divorcees. In the former there is in addition the consideration of mourning and respect for the deceased husband. In either case, if it is proved that there is unborn issue, there is of course no question of remarriage for the woman until it is born and for a reasonable time afterwards.¹⁰⁵

There are two situations here: whether or not the widow is pregnant. If she is not pregnant, jurists are unanimous that her 'idda is four months and ten days. However, if she is pregnant, there are two views, viz:

First, according to Ibn Mas'ud and supported by the four Orthodox Schools, the 'idda is until delivery. They based their opinion in the ayyah of the Holy Qur'an to the effect: "for those who carry (life within their wombs), their period is until they deliver their burdens."¹⁰⁶

Second, according to Ali and Ibn 'Abbas and those who supported them, the 'idda depends upon in the following situations:¹⁰⁷

(1) If she delivered her burden before the expiration of four months and ten days counted from the date of the death of her husband, the 'idda is not upon delivery but upon the expiration of the period of four months and ten days.

(2) If, on the other hand, the said period of four months and ten days has expired before delivery, then the 'idda is until delivery.

In short, under the second view, the 'idda is four months and ten days or until delivery whichever is longer.

The Muslim Code adopted the first view. The 'idda of a pregnant widow is until delivery.¹⁰⁸

3. Subsequent marriage by a divorcee

Article 29 of the Muslim Code provides that:

(a) No woman shall contract a subsequent marriage unless she has observed an 'idda of three monthly courses counted from the date of divorce. However, if she is pregnant at the time of the divorce, she may remarry only after delivery.

(b) Should a repudiated woman and her husband reconcile during her 'idda, he shall have a better right to take her back without need of a new marriage contract.

(c) Where it is indubitable that the marriage has not been consummated when the divorce was effected, no 'idda shall be required.

From the foregoing provisions of law, the following rules may be inferred:

1. If the subsequent marriage is between the previous husband and the divorcee, the following rules shall apply:

(a) Should a husband and his divorcee reconcile during her 'idda, he shall have better right to take her back without need of a new marriage contract.

(b) If no reconciliation between them until the period of 'idda has been prescribed, and the husband wishes to take her back, a new marriage contract is necessary.

2. If the subsequent marriage is between the divorcee and another man, the following rules shall apply:

(a) If the previous marriage by a divorcee has not been consummated neither by carnal relationship nor valid retirement, she may enter into subsequent marriage without observing 'idda.

(b) If the previous marriage by a divorcee has been consummated either by carnal relationship or valid retirement, the divorcee shall not be permitted to enter into subsequent marriage without observing either of the following 'idda:

(i) If she is not pregnant, three monthly courses counted from the date of divorce.

(ii) If she is pregnant, for a period extending until her delivery.

The foregoing law found its bases in the following Qur'anic ayyat to the effect:

O you who believe! when you marry believing women, and then divorce them before you have touch them, no period of 'idda have you to count in respect of them.¹⁰⁹

Divorced women shall wait concerning themselves for three monthly periods.¹¹⁰

Such of your women as have passed the age of monthly courses, for them the prescribed period, if you have any doubts, is three months, and for those who have no courses (it is the same): for those who carry (life within their wombs), their period is until they deliver their burdens.¹¹¹

From the foregoing ayyat of the Holy Qur'an, the following rules may be inferred as an 'idda of a divorcee;

1. If the previous marriage has not been consummated, neither by carnal relationship nor valid retirement, no 'idda is required.

2. If the previous marriage has been consummated, the following rules of 'idda shall apply:¹¹²

(a) For normal woman, the 'idda is three monthly courses after separation;

(b) If there is no courses or if the courses are in doubt, it is three calendar month. By that time it is clear whether or not there is pregnancy; and

(c) If there is (life within her womb), the 'idda is until delivery.

4. Subsequent marriage by a husband to his thrice repudiated wife

Article 30 of the Muslim Code provides that:

(a) Where a wife has been thrice repudiated (talaq bain kubra) on three different occasions by her husband, he cannot remarry her unless she shall have married another person who divorces her after consummation of the intervening marriage and the expiration of the 'idda.

(b) No solemnizing officer shall perform the subsequent marriage mentioned in the preceding paragraph unless he has ascertained that there was no collusion among the parties.

In the event that the husband repudiated his wife for the third time in a separate and distinct occasion, the repudiation become immediately final and absolute. He is prohibited to take her back during 'idda. Even after the end of her 'idda, he cannot remarry her unless the following conditions shall be fulfilled:

(1) The wife shall be subsequently married to another man which is permanent in nature, not a collusion to circumvent the law;

(2) The marriage must be consummated by sexual intercourse (dokhul);

(3) The marriage is dissolved either by divorce or death of the husband; and

(4) After the lapse of the prescribed period of 'idda, the wife may marry her former husband.

The foregoing provisions of law found their bases in the following Qur'anic ayyat to the effect:

*A divorce is only permissible twice: After that, the parties should either hold together on equitable terms, or separate with kindness.*¹¹³

*So if a husband divorces his wife (irrevocably), he cannot, after that, remarry her until after she has married another husband and he has divorced her. In that case there is no blame on either of them if they re-unite, provided they feel that they can keep the limits ordained by Allah.*¹¹⁴

The underlying reasons why the third divorce is irrevocable of the higher degree is grounded on the fact that Islam gives the husband and wife two chances of revocable divorce. If he divorces her for the third time, the implication is that they cannot live together any more.¹¹⁵ Thus, the conditions imposed for them to remarry is almost impossible to meet.¹¹⁶

Furthermore, marriage in Islam is something solemn and sacred. It is a contract to which Allah (S.W.T.) is the first witness: it is concluded in His Name, in obedience to Him and according to His divine law. It is the most decent human companionship, authorized and supervised by Allah (S.W.T.). It is a Sign of His blessings and abundant mercy.¹¹⁷ Therefore, it should not be taken as a joke: it should be sanctified and revered.

Finally, divorce is described by the Holy Prophet (S.A.W.) as the most detestable to Allah (S.W.T.) among the lawful acts.¹¹⁸

E. Batil and fasid marriages

We shall explain this topic in two subject matters: (1) Batil marriage, and (2) Fasid marriage.

1. Batil marriage

Batil marriage means void marriage from the beginning. Article 31 of the Muslim Code provides that, the following marriages shall be void (batil) from the beginning:

(a) Those contracted contrary to Article 23, 24, 25 and 26 of the Muslim Code;

(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.

Paragraph (a) which deals on Article 23, 24, 25 and 26 of the Muslim Code refers to prohibited marriages by reason of consanguinity, affinity, fosterage and unlawful conjunction which we have already explained *supra*.

Paragraph (b) which deals on unlawful conjunction is provided under Article 25 of the Muslim Code which we have already explained also *supra*.

Paragraph (c) is adopted from the Civil Code of the Philippines.¹¹⁹ To apply the said disqualification, the following rules shall be observed:¹²⁰

(1) If a person kills his own spouse intentionally, he is no longer qualified to marry again, whether the purpose of the killing be to marry again or for some other reason. However, if the killing is accidental or through negligence or justified as when the victim had been caught in *flagrante delicto* - in carnal conversation with a lover, this disqualification

does not apply.

(2) If a person kills another's spouse intentionally for the purpose of removing the husband as an obstacle to the marriage, he cannot marry the widow. If for any other reason, the disqualification does not apply.

This disqualification is a civil liability to be imposed only after the spouse has been convicted for a crime of either parricide, murder or homicide.¹²¹

The imposition of such disqualification does not contravene any principle of Shari'ah. This may be classified under the "ta'zir" punishment which the sovereign authority is empowered to promulgate.¹²²

Void marriage under the Muslim Code awards no right and impose no obligation.

We shall discuss the islamic view on the above matter.

Imam Muhammad Al-Shaybani has said that void marriage created no right nor imposed any obligation.¹²³ The existence of which is like its non-existence. Therefore, it neither establishes paternity (nasab) nor obliges 'idda.¹²⁴

From the foregoing discussion, therefore, it is clear that the provision of the Muslim Code on void marriage is in conformity with Islamic Law or the Shari'ah.

2. Fasid marriage

Article 32 of the Muslim Code provides that the following marriages shall be irregular (fasid) from their performance:

- (a) Those contracted with a female observing 'idda;
- (b) Those contracted contrary to Article 30 (marriage after three talaq);

(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-maut) without the same being consummated;

(e) Those contracted by a party in a state of ihram; and

(f) Mixed marriage not allowed under Islamic Law.

Irregular or fasid marriage is a kind of marriage adopted from Islamic Law because there is no such kind of marriage under the Civil Code of the Philippines. However, some of the grounds of irregular marriage are influenced by the Civil Code like the vitiated consent, fraud or misrepresentation.

(a) Irregular marriage under Islamic Law

Islamic jurisprudence has classified marriages into valid (sahih), irregular (fasid), and void (batil).¹²⁵ Under the classical Islamic jurisprudence, irregular and void marriages have been used indiscriminately. For instance unlawful conjunction was classified in one book of fiqh as irregular, and in another book, as void.¹²⁶

Tanzil ur-Rahman's view is in conformity with the classical Islamic jurisprudence. According to him, the distinction does not appear in the Qur'an and hadith.¹²⁷ He further argued that: the word muharramat, the prohibited women has been used in almost all the classical textbooks of fiqh to denote women with whom the marriage is unlawful, whether permanently or temporarily.¹²⁸

However, in the later period, some jurists made a categorical and a clear-cut distinction: if the impediment is of a permanent nature, the marriage contract would be void and unlawful intrinsically; if the impediment is of a temporary nature, i.e. if it can be removed at any time, the marriage contract would be irregular.¹²⁹

(b) Effects of irregular marriage contracted under Islamic Law

If separation or mutual relinquishment¹³⁰ between the couple is effected before the consummation of marriage, such irregular marriage is like void marriage. It affords no right nor establishes obligation.¹³¹

However, if consummation took place, the marriage shall have the following effects:¹³²

(1) Dower - the man shall have to pay the specified dower or the proper dower whichever is less. If the dower has not been specified, the woman shall get the proper dower.

(2) Child's legitimacy - children born out of irregular marriage are considered legitimate from both parents.

(3) Sanctity of affinity - prohibition of marriage to the affinal relatives is established.

(4) Maintenance - maintenance for the children shall be incumbent upon the father. However, for the maintenance of the wife, it shall be incumbent upon the husband until the irregular marriage shall be dissolved.

(5) Children's inheritance - as the children are legitimate and legal heirs of both parents, they are entitled to their respective shares in the legacy from both parents.

(6) Inheritance between the couple - all jurists are unanimous in the view that they cannot inherit from each other.

(7) 'Idda - In case of separation or death of the husband, observance of the prescribed 'idda shall be incumbent upon the woman.

(8) Separation - as soon as the irregularity of the marriage become known, the couple is obliged to be separated, either by mutual giving up or the court will separate them.

(9) Tazir punishment - for violation of a religious prohibition, they are liable to be corrected by Ta'zir punishment or discretionary punishment.

The Muslim Code adopts the view of some jurists in the later period. It provides for the distinction between void marriage and irregular marriage. However, it classifies "unlawful conjunction" under the permanent prohibition.

(c) Irregular marriage under the Muslim Code

The provisions of law regarding irregular marriage under the Muslim Code one after the other are explained below:

(1) Those contracted with a female observing 'idda

This pertains to a marriage contracted by a widow or divorcee who is required to observe 'idda before the subsequent marriage is contracted. Already explained are the definition and the rules of the different 'idda under the subject of subsequent marriages supra. In addition to such explanation, a marriage entered into with a woman observing 'idda is irregular. As such, the couple is subject to the laws of irregular marriage under Islamic Law which has just been explained supra.

(2) Those contracted contrary to Article 30 (marriage after three talaq)

The nature as well as the legalization of the subsequent marriage of a husband to his thrice-repudiated wife has already been explained under the subject on subsequent marriage supra. In addition to such explanation, a marriage contracted contrary to the prescribed rules under Article 30 of the Muslim Code shall be irregular. As such, the couple are subjected to the laws of irregular marriage under Islamic Law which have just been explained supra.

(3) Those wherein the consent of either party is vitiated by violence, intimidation, fraud, deceit or misrepresentation

These are concepts under the Civil Code of the Philippines which are grounds for the annulment of voidable marriage.¹³³ They are now incorporated in the Muslim Code as the grounds for making the marriage irregular. We shall explain them one after another.

a - Violence and intimidation

Violence refers to physical coercion while intimidation refers to moral coercion.¹³⁴

Under Islamic Law, marriage is a covenant, a civil contract whereby mutual consent of both parties is essential. This mutual consent is technically called *ijab* (offer) and *qabul* (acceptance).¹³⁵ Therefore, when the marriage is contracted without *ijab* and *qabul*, it is not only irregular but void ab initio.

In view thereof, it is the opinion of this author that if the marriage is contracted in such a manner that the consent of the bridegroom is vitiated either by violence or intimidation, it is more fair and just if the marriage is considered void in which case, the bridegroom being the innocent party shall not be subjected to the liability imposed for irregular marriage. On the other hand, if the bride's consent is vitiated either by violence or intimidation, it is more fair and just if the marriage is considered irregular, in which case, the bride being the innocent party is placed in an advantageous position. She acquires rights under irregular marriage.

b - Fraud, deceit or misrepresentation

The Civil Code speaks of three (3) circumstances, any of which constitutes fraud, deceit or misrepresentation. They are the following:¹³⁶

(a) Misrepresentation as to the identity of one of the contracting parties.

(b) Non-disclosure of the previous conviction of the other party of a crime involving moral turpitude, with the penalty imposed was imprisonment for two years or more.

(c) Concealment by the wife of the fact that at the time of the marriage, she was pregnant by a man other than her husband.

With regard to paragraph (a), such marriage was contracted without *ijab* and *qabul*. Therefore, the marriage is void. However, it is this author's opinion that if the misrepresentation was made by the bride, the marriage should be considered void, in order that the bridegroom, the innocent party, would not be subjected to liability imposed for irregular marriage. But if the misrepresentation was made by the bridegroom, the marriage should be considered irregular, in order that he would be subjected to the liability imposed on irregular marriage, being the guilty party.

With regard to paragraph (b), crime involving moral turpitude refers to crime of dishonesty and immorality like adultery, fornication, rape, theft, etc. If the previous conviction of either party to the marriage is a crime like adultery, fornication and rape, there is a clear prohibition of such marriage in the Holy Qur'an:

*Let no man guilty of adultery or fornication marry any but a woman similarly guilty... to the believers such a thing is forbidden.*¹³⁷

As there is a clear cut prohibition from the foregoing ayyah of the Holy Qur'an, and it is of a permanent nature, the marriage therefore is not only irregular but void.

With regard to paragraph (c), the woman is an adulterous from the islamic point of view. Again, the prohibition is clear from the previous

cited qur'anic ayyah.¹³⁸ So the foregoing mentioned rules on adultery shall apply.

- (4) Those contracted by a party in a condition of death-illness (marad-ul-maut) without the same being consummated

Death-illness means "the disease which cause death."¹³⁹ In order to constitute a death-illness, the following conditions are necessary:¹⁴⁰

- (1) The illness must cause the death of the deceased;
- (2) The illness must cause apprehension of death in the mind of the deceased; and
- (3) There must be some external indicia of a serious illness.

Under the Muslim Code, condition of a death-illness per se is not a legal impediment to marriage. It only makes the marriage irregular when death takes place without consummation. Should there be a consummation, the marriage is valid.

This is a provision of law that "non-consummation of marriage" due to death of either of the spouses is the cause of its irregularity.

Under Islamic Law, the condition of death-illness is not a bar to contract a marriage: likewise, the "non-consummation of marriage" does not make the marriage irregular.

Under the Civil Code of the Philippines, a marriage contracted at the point of death (articulo mortis) is valid even without a marriage license.¹⁴¹

From the point of view of Islamic Law as well as the Civil Code of the Philippines, a marriage contracted by a person who is in the condition of death-illness is valid even if the marriage is not consummated.

Therefore, it is this author's opinion that the provision of the Muslim Code regarding a marriage contracted by a person who is in a condition of death-illness should be modified to conform to Islamic Law and the Civil Code of the Philippines.

(5) Those contracted by a party in a state of ihram

Ihram signifies the state of ritual consecration of a person while on pilgrimage (hajj or umra) to Mecca.¹⁴² It begins from the moment that the pilgrim assumes his or her distinctive garb with the intention of doing Hajj or Umra as the case may be until he or she lays it aside.¹⁴³

Under the Muslim Code, a marriage contracted by a person while he or she is in a state of ihram is irregular. It considers "state of ihram" as a temporary legal impediment to contract marriage.

Under Islamic Law, there are two views regarding the matter: first, the "state of ihram" is not a bar to marriage. However, the marriage cannot be consummated while either of the parties is in a state of ihram because sexual intercourse is forbidden.¹⁴⁴ If such prohibition is violated, the marriage is still valid but the ihram of such person shall become fasid and he or she is obliged to sacrifice an animal in the way of Allah (S.W.T.) as an expiation (kaffarah) for the breach of the rules of ihram.¹⁴⁵ The second view is that marriage while either of the contracting parties is in a state of ihram is abominable to the degree of unlawfulness (makruh tahrimi).¹⁴⁶

The Muslim Code adopts the latter view.

(6) Mixed marriages not allowed under Islamic Law

There are two types of mixed marriages which are not allowed under Islamic Law. They are the following: (1) marriage between a Muslim male and non-Muslim female except kitabiyyah. This includes infidels, polytheists, idolators, fireworshippers, starworshippers, pagans or atheists.

(2) marriage between a Muslim female and a non-Muslim male regardless of whether he is a kitabiyyah or not. These will be explained one after another.

(1) Marriage between a Muslim male and a non-Muslim female except kitabiyyah

The Muslim Code considers the prohibition of marriage between a Muslim male and a non-Muslim female except kitabiyyah as a temporary in nature in the sense that should the non-Muslim change her faith either to Islam or to the revealed religion like Christianity or Judaism, the prohibition ceases. Thus, a marriage contracted in violation of such prohibition is considered under the Muslim Code as an irregular marriage.

Under Islamic Law, there are two views regarding the above matter:

(a) The first view considers marriage between a Muslim male and a non-Muslim female except kitabiyyah as void. This view is based in the clear ayyah of the Holy Qur'an:

*Do not marry unbelieving women (idolators), until they believe; a slave woman who believes is better than an unbelieving woman, even though she allure you.*¹⁴⁷

It is stated in all Hanafi books of fiqh that marriage contracted with a fireworshipping woman or idolatress or starworshipping is void.¹⁴⁸

Among the modern commentators, Qadri Pasha of Egypt¹⁴⁹ and Muhammad Yusuf¹⁵⁰ are of the view that marriage with infidel woman or idolatress is void

(b) The second view considers marriage with a non-Muslim woman except kitabiyyah as not void but only irregular. Wilson, Mulla, Baillie and Syed Ameer Ali are of this view.¹⁵¹

Syed Ameer Ali cited the cases of Mughal Emperors who contracted marriages with Rajput ladies. According to him the prohibition of marriage with an infidel woman in its characteristics and effect is a relative one and does not spell out voidance. He further said: if a Muslim marries an infidel woman, the marriage will only be irregular. It will not affect the legitimacy of issues as the infidel woman may at any time accept the faith of Islam; the prohibition shall at once be removed making the marriage valid.¹⁵²

In the Indian case of *Ehsan v. Pannalal*, a Hindu woman without accepting the faith of Islam married a Muslim male. Out of their marriage, they had several issues. The Patna High Court held that the marriage contract was irregular and the children were legitimate.¹⁵³

The Muslim Code adopted the second view.

(2) Marriage between a Muslim female and a non-Muslim male regardless of whether he is a kitabiyyah or not

The Muslim Code considers the foregoing marriage as irregular on the ground that prohibition of marriage due to faith is temporary in nature. It can be changed at any time.

Under Muslim law, there are two views:

(a) The first view considers the foregoing marriage as void. This is based on the ayyah of the Holy Qur'an to the effect:

*... nor marry (your girls) to unbelievers until they believe: a man slave who believes is better than an unbeliever even though he allure you.*¹⁵⁴

It is the majority view that a marriage contracted between a Muslim female with a polytheist is void.¹⁵⁵

(b) The second view is that such marriage is only irregular. Adherents of this view used the same line of reasoning with the marriage of Muslim male with polytheist.¹⁵⁶

The Muslim Code adopts the second view.

(d) Validation of irregular marriage

Irregular marriage may be made regular by a new marriage contract in the following cases:¹⁵⁷

(1) Those referred to in Article 32(a), after the impediment has been removed;

(2) Those referred to in Article 32(b), upon compliance with the requirement of Article 30;

(3) Those referred to in Article 32(c), after the causes vitiating consent have ceased;

(4) Those referred to in Article 32(d), in case the party recovers;

(5) Those referred to in Article 32(e), when the party is no longer in a state of ihram; and

(6) Those referred to in Article 32(f), after conversion to faith that could have made the marriage valid.

The effects of the new marriage under the foregoing paragraphs shall retroact to the date of the celebration of the irregular marriage.¹⁵⁸

F. Rights and obligations between spouses

Under the Muslim Code, these rights and obligations are classified under mutual and those that are specifically pertaining to each of the spouses.

1. Mutual rights and obligations of the spouses

Article 34 of the Muslim Code provides four (4) mutual rights and obligations between the spouses, which are as follows:

(a) The husband and the wife are obliged to live together, observe mutual respect and fidelity, and render mutual help and support in accordance with this Code.¹⁵⁹

The duty to live together, presupposes the idea that they have already their own residential place or lodging house to live in. It connotes cohabitation or marital consortium: living together under one roof as husband and wife. In addition, they are obliged to live together in a atmosphere of peace and serenity. This is based on the qur'anic ayyah to the effect:

And among His Signs is this: that He created for you spouses from among yourselves, that you may dwell in tranquility with them; and He has put love and mercy between your (hearts).¹⁶⁰

The duty to observe mutual respect and fidelity connotes kindness and equity on the part of the husband and faithfulness and obedience on the part of the wife. This is based in the qur'anic ayyah to the effect:

Live with them (wives) on a footing of kindness and equity. If you take a dislike to them it may be that you dislike a thing, and Allah brings about through it a great deal of good.¹⁶¹

On the other hand, a wife is duty-bound to be faithful and obedient to her husband. She should carry out his orders with a smiling countenance. A house is just like a miniature state where the husband exercises his supreme authority and the wife acts as his assistant and

associate. In case that the head of the state is not obeyed, there will be disorder and disruption in the state. Therefore, it is the prime duty of a wife that in matters relating to the well-being and solidarity of the family or in matters affecting the happiness of its members, she must follow the instruction of her husband.¹⁶² This law finds its basis in the ayyah of the Holy Qur'an to the effect:

*Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means. Therefore the righteous women are devoutly obedient, and guard in (the husband's) absence what Allah would have them guard.*¹⁶³

The duty to render mutual help and support may be based in the following qur'anic ayyat to the effect:

*They (your wives) are as garment to you, and you as a garment to them.*¹⁶⁴

*Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means. Therefore the righteous women are devoutly obedient, and guard in the (the husband's) absence what Allah would have them guard.*¹⁶⁵

The first ayyah is the most beautiful metaphorical description of the mutual relationship between the husband and wife. Their relationship are likened to the relationship of a body and its garment. The garment stays close to the body of a person and conceals it and protects it from the ill-effects of outer environment. It also gives comfort and pleasure to the body. Thus, the husband and wife are each other's garment for mutual support, mutual comfort and mutual protection, fitting into each other as

a garment fits the body.¹⁶⁶

The second ayyah also clarifies the meaning of mutual help and support from the Islamic Law concept and not from the Civil Law concept.¹⁶⁷ Under Islamic Law, the husband, being the protector and maintainer of his wife, is duty-bound to render help and support toward his wife at all times and in all circumstances. On the other hand, the good wife is duty-bound to be obedient and harmonious in her husband's presence, and in his absence guard his reputation and property and her own virtues, as ordained by Allah (S.W.T.).¹⁶⁸

(b) When one of the spouses neglects his or her duties to the conjugal union or brings danger, dishonor or material injury upon the other, the injured party may petition the court for relief. The court may counsel the offender to comply with his duties, and take such measures as may be proper.¹⁶⁹

The foregoing provision of law finds its basis in the qur'anic ayyah to the effect:

*In accordance with justice, the rights of the wives (with regard to their husbands) are equal to the (husbands') rights with regard to them.*¹⁷⁰

Neglect of marital duties will merit a court petition for relief. Should the wife for instance refuse to live with her husband without justifiable reason, upon petition of the husband, the court may counsel the wife to comply with her duties. Should she fail to comply with the counsel of the court, the husband may stop giving her support. On the other hand, should the husband fail to perform for six months without reasonable cause his marital obligation, the wife may petition the court for divorce by faskh (or fasakh).¹⁷¹

When the husband associates with persons of ill-repute or leads an infamous life or attempts to force the wife to live an immoral life, this will bring danger, dishonor or material injury upon the other. The wife

may petition the court for divorce by faskh (or fasakh).¹⁷²

(c) The husband and the wife shall inherit from each other in accordance with this Code.¹⁷³

The foregoing provision of law is based on the qur'anic ayyah to the effect:

And you shall inherit one-half of what your wives leave behind, provided they have left no child; but if they have left a child, then you shall have one-fourth of what they leave behind after (the deduction of) any bequest they may have made or any debt (they may have incurred). And they (i.e., your widows) shall have one-fourth of what you leave behind, provided you have left no child; but if you have left a child, then they shall have one-eighth of what you leave behind, after (the deduction of), any bequest you may have made or any debt (you may have incurred).¹⁷⁴

Though the spouses have mutual rights to inherit from each other, there are, however, impediments to its enjoyment.

Under Islamic Law, the following are causes for disinheritance:¹⁷⁵

- (1) If the heir has intentionally caused directly or indirectly the death of the decedent;
- (2) If the heir professes a different religion from that of the decedent;
- (3) If the heir is an apostate (murtad); and
- (4) If the heir and the deceased died simultaneously.

Under the Muslim Code, the following shall be disqualified to succeed:¹⁷⁶

(1) Those who have intentionally caused directly or indirectly the death of the decedent;

(2) Those who have committed any other act which constitutes a ground for disqualification to inherit under Islamic Law; and

(3) Those who are so situated that they cannot inherit under Islamic Law.

Paragraph (2) and (3) of the foregoing provision of the Muslim Code are ambiguous. Still, the scholars have different views on the subject matter. Jainal D. Rasul and Ibrahim Ghazali are of the opinion that paragraph (2) refers to "apostacy" or "difference in religion"; and paragraph (3) refers to difference of territorial jurisdiction either actual or constructive so that a subject of a non-Muslim country cannot inherit from a non-Muslim subject of a Muslim state nor from a Muslim subject of a non-Muslim state.¹⁷⁷ Hamid Barra on the other hand is of the opinion that paragraph (2) refers to "apostacy" while paragraph (3) refers to difference in religion.¹⁷⁸ He said:

In the third disqualification, it is apparent that a non-Muslim wife cannot inherit from her Muslim husband. However, the Code, possibly in anticipation of such a case to arise, provides for what it calls as "bequest by operation of law." Under this provision, a parent or a spouse who is otherwise disqualified to inherit in view of Article 93(c) shall be entitled to one-third of what he or she would have received without such disqualification.¹⁷⁹

It is humbly submitted that the latter opinion is more logical and consistent with the prevailing situation of mixed marriages between Muslim male and non-Muslim female in the Philippines.

(d) The husband and the wife shall have the right to divorce in accordance with this Code.¹⁸⁰

The foregoing provision of law is based in the ayyah of the Holy Qur'an to the effect:

And women shall have rights similar to the rights against them, according to what is equitable...¹⁸¹

Should the right to divorce is exercised by the husband, it is called *talaq*. Should the *talaq* be delegated by the husband to his wife and such right is exercised by the wife, it is called *tafwid*. Should the right to divorce is exercised by the wife, it is either *khul'* or *faskh* (or *fasakh*). It is *khul'* if she is required to renounce or to return her dower or to pay any other lawful consideration. Without such legal obligation, it is *faskh* (or *fasakh*). However, it must be based on certain specified legal grounds.

2. Rights and obligation of the husband

Article 35 of the Muslim Code provides that the husband shall fix the residence of the family. The court may except the wife from living with her husband on any of the following grounds:

- (a) Her dower is not satisfied in accordance with the stipulations; or
- (b) The conjugal dwelling is not in keeping with her social standing or is, for any reason, not safe for the members of the family or her property.

From the foregoing provision of law, the husband is obliged to provide a suitable matrimonial home for his wife and his family according to his means so that they may reside therein freely. It may be inferred also that the wife is obliged to live with him in the matrimonial home. She can only refuse to do so upon concrete and valid reasons among which are those stated in the above provisions of the Muslim Code. Thus, if the family home so established by the husband does not befit the wife's social standing or is not safe for the members of the family, she can refuse to live with her husband.¹⁸²

This law is based on the qur'anic ayyah to the effect: "Lodge them where you dwell, according to your means."¹⁸³

3. Rights and obligations of the wife

Article 36 of the Muslim Code provides six (6) rights and obligations of the wife. They are as follows:

(1) The wife shall dutifully manage the affairs of the household. She may purchase things necessary for the maintenance of the family, and the husband shall be bound to reimburse the expenses, if he has not delivered the proper sum.¹⁸⁴

The foregoing provision of law is a specific legal sanction of the popular idea that the wife is the queen of the home.¹⁸⁵ The queen is the supreme authority over her jurisdiction. As such, she is obliged to administer her domestic affairs wisely. She should keep all the things in her home in a proper order and use them in a proper care and skill.¹⁸⁶ She should protect the rights of her husband during his absence. She should guard everything belonging to her husband like his properties, his honor and his secrets.

Parts of her duties in protecting the rights of her husband is that she should guard her chastity and forbid any other person to have access to what is exclusively her husband's right, i.e., sexual intimacy. Thus, she must not entertain strange men in her home without his consent and knowledge.¹⁸⁷

In her exercise of such rights and obligations, she is allowed by law to purchase things necessary for the maintenance of the family. The husband shall be bound to reimburse the same, if he has not delivered the proper sum. However, this must be strictly interpreted. It is only allowed in case of necessity and after she has obtained permission from her husband.¹⁸⁸ Besides, she has to take good care of her dress so as to cover her *aurat* and to walk in the street with restrained eyes.¹⁸⁹

To sum up, she is obliged to contribute in making their home a pleasant and peaceful family home.

The bases of this law in Shari'ah are the following: Allah (S.W.T.) says to the effect:

*The good women in the absence of their husbands guard their rights as Allah has enjoined upon them to be guarded.*¹⁹⁰

The Holy Prophet (S.A.W.) is reported to have said:

*The best wife is the one who pleases you when you see her; who obeys your orders and who guards your property and her own honor when you are not at home.*¹⁹¹

(2) The wife cannot, without the husband's consent, acquire any property by gratuitous title, except from her relatives who are within the prohibited degrees in marriage.¹⁹²

The foregoing provision of the Muslim Code is part of the wife's obligation in safeguarding the rights of her husband.¹⁹³ Its purpose is to prevent the alienation of the affection of the wife.¹⁹⁴ It is also to avoid jealousy and suspicion, and to maintain the integrity of the spouses and the solidarity of the matrimonial relationship.¹⁹⁵

"Gratuitous title" here refers to property acquired by donation, remission, or succession.¹⁹⁶

(3) The wife may, with her husband's consent, exercise any profession or occupation or engage in lawful business which is in keeping with islamic modesty and virtue. However, if the husband refuses to give his consent on the ground that his income is sufficient for the family according to its social standing or his opposition is based on serious and

valid grounds, the matter shall be referred to the Agama Arbitration Council.¹⁹⁷

The foregoing provision of the Muslim Code merely permits the wife to exercise any profession or occupation or engage in lawful business subject to the husband's consent. Without such consent, she cannot proceed in that exercise. Violating the lawful order of the husband will make the wife disobedient or rebellious.

Another effect of a wife's going out to work without the permission of her husband is the loss of the right to maintenance.¹⁹⁸

(4) The wife shall have the right to demand the satisfaction of her mahr or dower.¹⁹⁹

Mahr or dower is a gift on account of marriage from the bridegroom to the bride. It is different from dowry which is a gift from the bride to the bridegroom.

Mahr or dower is an inalienable and imprescriptible right of a woman. It is inalienable because even without the stipulation of mahr during or before the solemnization of marriage, mahr is still demandable which is called *mahr-mithl* or customary dower. It is imprescriptible because prescription does not lie. If the period for the payment of mahr as stipulated shall lapse, mahr is still demandable.

The wife shall have the right to demand the satisfaction of her full dower if the marriage has been consummated, and one-half of it if there is no consummation.²⁰⁰

The Muslim Code also provides that the property or estate of the husband shall be liable for the unpaid dower or any part thereof.²⁰¹

This provision of law is based on the following qur'anic ayyat:

*And give unto women their marriage portions in the spirit of a gift...*²⁰²

*But lawful to you are (all) women beyond these, provided you seek (them in marriage) with gift from your property, taking them in honest wedlock and not in fornication.*²⁰³

(5) Unless otherwise stipulated in the marriage settlements, the wife retains ownership and administration of her exclusive property.²⁰⁴

The foregoing provision of law recognizes the independent economic status of woman and gives her the right to own, use and enjoy her own exclusive property without any intermediary trustee.

This law is based on the qur'anic ayyah to the effect:

*And unto men a fortune from that which they have earned, and unto women a fortune from that which they have earned.*²⁰⁵

(6) The wife shall be entitled to an equal and just treatment by the husband.²⁰⁶

In case the man has several wives at the same time, he should deal with equal and just treatment to all of them. This refers to material aspects like the giving of support to all his wives as well as the day of companionship. Allah (S.W.T.) says to the effect:

*And if you fear that you cannot do justice (to so many women) then (confine yourself to) only one.*²⁰⁷

The Holy Prophet (S.A.W) also laid great stress on the believers to treat their wives with equity and justice. He said:

*When a man has two wives and does not deal equitably between them, he will come on the day of resurrection with one side bagging down.*²⁰⁸

G. Property relations between spouses

Generally, at the precise moment of the celebration of marriage, property relations between the spouses shall be governed by the regime of complete separation of property.²⁰⁹

The regime of complete separation of property under the Muslim Code may be defined as a matrimonial property regime, whereby each spouse shall own, possess, administer, enjoy and dispose of his or her own exclusive estate even without the consent of the other. However, the court may, upon petition of either spouse, grant to the other the administration of such property.²¹⁰

The exclusive property of each spouse shall consist of the following:²¹¹

- (1) Properties brought to the marriage by the husband or the wife;
- (2) All income derived by either spouse from any employment, occupation or trade;
- (3) Any money or property acquired by either spouse during marriage by lucrative title;
- (4) The dower (mahr) of the wife and nuptial gifts to each spouse;
- (5) Properties acquired by right of redemption, purchase or exchange of the exclusive property of either; and
- (6) All fruits of properties mentioned in the foregoing paragraphs.

Household property which customarily pertains to or is used by either spouse shall be *prima facie* presumed to be the property of said spouse.²¹²

This regime of property relations between spouses is consistent or in conformity with the general principle of Islamic Law. This law is based on the qur'anic ayyah to the effect: "to men is allotted what they earn, and to women what they earn."²¹³ This qur'anic ayyah clearly recognizes the separation of properties between Muslim spouses.

The majority view among the Muslim jurists is that woman, whether she is married or not, is as fully competent as a man and may dispose of her property as she wishes without let or hindrance. However, Imam Malik is of the view that marriage should be considered as a partial restriction on a woman's capacity, particularly in contract of gifts, which must require the husband's permission for their validity.²¹⁴

As an exception to the general rule, the future spouses may adopt other forms of property relations through marriage settlement executed before the marriage.²¹⁵

The Muslim Code is silent on the form of property regime that may be provided in the marriage settlement. However, under the Civil Code of the Philippines which is applicable in suppletory manner, it may be either absolute community property, conjugal partnership of gain, or partial separation of property.²¹⁶

Should the future spouses enter into a valid contract of marriage settlement fixing their property regime following either of the above mentioned forms of property regime, the law that should govern their property relations is shifted to the Family Code which is an amendment of the Civil Code of the Philippines.

It is clear from the above discussion that by entering into a marriage settlement, fixing the property relations other than the regime of property provided under the Muslim Code, will lead the property relations between the spouses to be governed not by the Muslim Code nor the Muslim Law but by the Family Code of the Philippines.

In view thereof, it is humbly suggested that the Muslims should stick to the property regime as provided for in the Muslim Code and be cautious to the exception as provided therein.

Notes

1. Code of Muslim Personal Laws of the Philippines (otherwise known as Presidential Decree No. 1083 which took effect on February 4, 1977), Art. 4 (to shorten the citation, this Code shall be cited in this dissertation as M.C.).
2. Pama L. Muti, "The Family Code and the Muslim Code: Confluence and divergence," Mindanao Law Journal 29 (1989).
3. Ibid.
4. Muhammad Iqbal Siddiqi, The Family Laws of Islam, 1 (1986).
5. Saaduddin A. Alauya, The Quizzer in Muslim Personal Law, 4 (1984).
6. See Hamid Aminoddin Barra, The Code of Muslim Personal Laws: Study: Study of Islamic Laws in the Philippines, 71 (1988); See Asaf A.A. Fyzee, Outline of Muhàmmadan Law, 106-107 (1949); See Muti, Supra Note 2 at 29.
7. Supra Note 5 at 4-5; Supra Note 4.
8. The Hidayah: Commentary on Islamic Laws, (Translated by Charles Hamilton), vol. 1, 71 (1985).
9. Tanzil ur-Rahman, Code of Muslim Personal Law, 17 (1978).
10. Hammuda 'Abd al 'Ati, The Family Structure in Islam, 56-59 (1977).
11. ILR 1886 8-Allahabad.
12. Charles Hamilton, Hedaya, (strictly Hidayah) (trans.), 25 (1960) cited by Tanzil ur-Rahman, Supra Note 9.
13. Mahmud Al-Nasafi, Al-Kanz al-Daqa'iq, Kitab al Nikah, 97 cited by Tanzil ur-Rahman, Supra Note 9.
14. Tanzil ur-Rahman, Supra Note 9.
15. Qanun al-Ahwal al-Shakhsiyyah, Syria, 1953 quoted by Tanzil ur-Rahman, Supra Note 9.

16. Supra Note 9 at 19.
17. Maulana Ashraf Ali Thanvi, Bahisti Zewar, (translated by Muhammed Masroor Khan Saroha) 287 (1982).
18. Hammuda 'Abd at 'Ati, Islam in Focus, 202 (1986).
19. The Holy Qur'an, Surah al-Nisaa (4):1. (to shorten the citation, the Holy Qur'an shall be cited in this dissertation as (Q.).
20. Q., Surah al-Rum (30):21.
21. Sunan ibn Majah, (commentator: Muhammad Mustafa al 'Azami), vol. 1, 341 (1984).
22. Supra Note 9, Sec. 4.
23. Karachi Weekly Law Reporter, 29 (1960), cited by Tanzil ur-Rahman, Supra Note 9 at 18.
24. M.C., Art. 15.
25. M.C., Art. 16(1).
26. Ibid.
27. M.C., Art. 16 (2 and 3).
28. Ahmad Ibrhim, Family Law in Malaysia and Singapore, 196 (1984); See Supra Note 4 at 68; Supra Note 2 at 39.
29. Supra Note 2 at 39.
30. Supra Note 9 at 187.
31. Islamic Family Law (Federal Territory) Act. 1984, Sec. 8
32. Kelantan Islamic Family Law Enactment, 1983, Sec. 14.
33. Singapore Administration of Muslim Law Act, (cap. 42), S. 90(4).

34. U.N. General Assembly Resolution 1763 (XVII) of 7th November, 1962.
35. U.N. General Assembly Resolution 2018 (XX) of 1st November, 1965.
36. M.C., Art. 17.
37. M.C., Art. 13.
38. Supra Note 4 at 70.
39. M.C., Art. 19.
41. M.C., Art. 17.
41. Dower refers to “Mahr” which is a gift from the bridegroom to the bride. It is different from “Dowry” which is a gift from the bride to the bridegroom.
42. M.C., Art. 83(a).
43. M.C., Art. 86.
44. Badran Abu ‘Ainain Badran, Al Zawaj wa Al Talaq fi Al Islam, 38 (1959) cited by Alauya, Supra Note 5 at 13.
45. Mansur Bin Yunus Bin Edris, Kashaf Al Qana, vol. II, 3 cited by Alauya, Supra Note 5 at 14.
46. Badran, Supra Note 44, cited by Alauya, Supra Note 5 at 14.
47. Supra Note 9 at 61; Supra Note 2 at 45-46.
48. Supra Note 9 at 61.
49. Hussain Khalf Al-Jabburi, Al Zawaj wa Bayan Ahkamihi fi Al Shari’ah Al Islamia, 56 (1972) cited by Alauya, Supra Note 5 at 70.
50. Mahmud Muhammad al-Tantawi, Al-Ahwal al-Shakhasiyyah fi-'l-Shari’ah al-Islamiyyah, 58 (1979) cited by Barra, Supra Note 6 at 80.
51. Imam Fakhruddin Hassan ibn Mansur al-Farghani, Fatwa Qadi Kan. (trans.by Yusuf Khan Bahadur, et. al.) 28 (1984) cited by Barra, Supra Note 6 at 80.

52. M.C., Art. 15(c).
53. Sunan ibn Majah, Supra Note 21 at 347.
54. M.C., Art. 79.
55. M.C., Art. 18.
56. Ibid.
57. Sunan ibn Majah, Supra Note 21 at 347.
58. M.C., Art. 21
59. M.C., Art. 20.
60. M.C., Art. 15.
61. Jainal D. Rasul and Ibrahim Ghazali, Commentaries and Jurisprudence on Muslim Code of the Philippines, 131 (1984).
62. Ibid.
63. M.C., Art. 23.
64. Q., Surah al-Nisaa (4):23.
65. Abdullah Yusuf Ali, The Holy Qur'an: Text, Translation and Commentary, Note 532, vol. I, 186 (1946).
66. Tanzil ur-Rahman, Supra Note 9 at 136, Sec. 27.
67. It is presumed that this is typographical error as it ought to be read as "son", See Alauya, Supra Note 5 at 24.
68. It is presumed that this is typographical error as it ought to be read as "daughter," See Alauya, Supra Note 5 at 24.
69. M.C., Art. 25(2).
70. Q., Surah al-Nisaa (4):23.

71. Tanzil ur-Rahman Supra Note 9 at 140. Citing as references: Abul Hasan Al-Quduri, Al-Mukhtasar, 147; Mahmud Nasafi, Kanz al-Daqa'iq, 98.
72. Q., Surah al-Nisaa (4):23.
73. Tanzil ur-Rahman, Supra Note 9 at 143. Citing as references: Qadi Khan, Fatawa, 68; Damad Afandi, Majma' al-Anhur, vol. I, 325.
74. Ibid.
75. Id., at 144.
76. Yusuf Ali, Supra Note 65 at 186, Note 536.
77. Tanzil ur-Rahman, Supra Note 9 at 149. Citing as reference: Fatawa 'Alamgiriyyah, Kitab al Nikah, vol. II, 7.
78. Dictionary meaning.
79. Ibid.
80. Alauya, Supra Note 5 at 24.
81. Q., Surah al-Nisaa (4):23.
82. Yusuf Ali, Supra Note 65 at 186, Note 534.
83. Tanzil ur-Rahman, Supra Note 9 at 141. Citing as reference: Fatawa 'Alamgiriyyah, Kitab al Nikah, vol. II, 4.
84. Barra, Supra Note 6 at 84; Muti, Supra Note 2 at 108; Alauya, Supra Note 5 at 24.
85. Barra, Supra Note 6 at 84.
- 85(a) Q., Surah al-Nisaa (4):23.
86. Yusuf Ali, Supra Note 65 at 186, Note 533.
87. Sahih Sunan Abu Dawud, (commentator: Muhammad Nasir al-Din al-Albani) vol. II, 387 (1989).

88. Siddiqi, Supra Note 4 at 63.
89. Ibid.
90. Ibid.
91. M.C., Art. 161(2).
92. M.C., Art. 181 and 183.
93. M.C., Art. 13.
94. Q., Surah al-Nisaa (4):3.
95. Yusuf Ali, Supra Note 65 at 179, Note 509.
96. Q., Surah al-Nisaa (4):3.
97. Yusuf Ali, Supra Note 65 at 221, Note 639.
98. Siddiqi, Supra Note 4 at 184; 'Abd al 'Ati, Supra Note 18 at 117.
99. Q., Surah al-Baqara (2):286.
100. 'Abd al'Ati, Supra Note 18 at 118.
101. Ibid.
102. M.C., Art. 56.
103. M.C., Art. 181 and 182.
104. Q., Surah al-Baqara (2):234.
105. Yusuf Ali, Supra Note 65 at 94, Note 267.
106. Q., Surah al-Talaq (65):4.
107. Alauya, Supra Note 5 at 33-34.
108. M.C., Art. 57(c).

109. Q., Surah al-Ahzab (33):49.
110. Q., Surah al-Baqara (2):228.
111. Q., Surah al-Talaq (65):4.
112. Yusuf Ali, Supra Note 65 at 1564, Note 5513.
113. Q., Surah al-Baqara (2):229.
114. Q., Surah al-Baqara (2)230.
115. Muhammad Ali Alkhuli, The Light of Islam, 86 (1983).
116. Yusuf Ali, Supra Note 65 at 91, Note 260.
117. 'Abd al 'Ati, Supra Note 18 at 202.
118. Sunan ibn Majah, Supra Note 21 at 373.
119. The Civil Code of the Philippines, (otherwise known as Republic Act No. 386 which took effect on August 30, 1950), Art. 80. (to shorten the citation, this Code shall be cited in this dissertation as C.C.).
120. Edgardo L. Paras, Pre-Week Handbook in Civil Law, 39-40 (1965).
121. Muti, Supra Note 2 at 105.
122. Abdul Qadir 'Oudah Shaheed, Criminal Law of Islam, vol. I, 303 (1987).
123. Al Kasani, Bada'i al Sana'i, vol. II, 247 (1327 A.H.) cited by Tanzil ur-Rahman, Supra Note 9 at 108.
124. Tanzil ur-Rahman, Supra Note 9 at 108.
125. Id., at 109.
126. Id., at 109-110.
127. Id., at 105.

128. Ibid.

129. Syed Ameer Ali, Mohammedan Law, vol. II, 301-303 (1965).

130. Mutual relinquishment (mutarikat) is the term used by jurists for the separation of couple under irregular marriage instead of divorce (talaq); Tanzil ur-Rahman, Supra Note 9 at 108.

131. Tanzil ur-Rahman, Supra Note 9 at 112.

132. Id., at 106-112.

133. C.C., Art. 86.

134. Paras, Supra Note 120 at 265.

135. Siddiqi, Supra Note 4 at 68; Tanzil ur-Rahman, Supra Note 9 at 70.

136. CC., Art. 86; Paras, Supra Note 120 at 41.

137. Q., Surah al-Nur (24):3.

138. Ibid.

139. Fyzee, Supra Note 6 at 314.

140. Ibid.

141. C.C., Art. 72

142. M.C., Art. 7(d).

143. Tanzil ur-Rahman, Supra Note 9 at 177.

144. Ibid.

145. Id., at 177-178.

146. Id., at 177. Citing as reference: Al-Haskafi, Al-Durr Al-Mutkhar, vol. II, Chapter "Nikah al-Muharramat."

147. Q., Surah Al-Baqar (2):221.

148. Tanzil ur-Rahman, Supra Note 9 at 34. Citing as references: Abulhasan Al-Qudari, Al-Mukhtasar, 148; Mahmud Al-Nasafi, Kanz al-Daqa'iq, 98-99.

149. Id., at 35.

150. Id., at 34.

151. Id., at 34-35.

152. Id., at 35.

153. AIR 1928 Pat.

154. Q., Surah al-Baqara (2):221.

155. Tanzil ur-Rahman, Supra Note 9 at 36.

156. Ibid.

157. M.C., Art. 33.

158. M.C., Art. 33(2).

159. M.C., Art. 34(1).

160. Q., Surah al-Rum (30):20.

161. Q., Surah al-Nisaa (4):19.

162. Siddiqi, Supra Note 4 at 120.

163. Q., Surah al-Nisaa (4):34.

164. Q., Surah al-Baqara (2):187.

165. Q., Surah al-Nisaa (4):34.

166. Yusuf Ali, Supra Note 65 at 74, Note 195; Barra, Supra Note 6 at 93.

167. C.C., Art. 109.

168. Yusuf Ali, *Supra* Note 65 at 190, Note 546.

169. M.C., Art 34(2); C.C., Art. 116.

170. Q., Surah al-Baqara (2):228.

171. M.C., Art. 52(c).

172. M.C., Art. 53(b).

173. M.C., Art. 34(3).

174. Q., Surah Al-Nisaa (4):12.

175. Tanzil ur-Rahman, *Supra* Note 9 at 586.

176. M.C., Art. 93: Barra, *Supra* Note 6 at 94.

177. Rasul, *Supra* Note 61 at 260.

178. Barra, *Supra* Note 6 at 94.

179. *Ibid.*

180. M.C., Art. 34(4).

181. Q., Surah al-Baqara (2):228.

182. Barra, *Supra* Note 6 at 95.

183. Q., Surah al-Talaq (65):6.

184. M.C., Art. 36(1).

185. Edgardo L. Paras, Civil Code of the Philippines Annotated, 370 (1981).

186. Siddiqi, *Supra* Note 4 at 119.

187. Barra, *Supra* Note 6 at 98.

188. Siddiqi, Supra Note 4 at 124.
189. Ibid.
190. Q., Surah al-Nisaa (4):34.
191. Sunan ibn Majah, Supra Note 21 at 342.
192. M.C., Art. 36(2).
193. Q., Surah al-Nisaa (4):34.
194. Paras, Supra Note 185 at 369.
195. Barra, Supra Note 6 at 98.
196. Paras, Supra Note 185 at 370.
197. M.C., Art. 36(3).
198. Barra, Supra Note 6 at 98.
199. M.C., Art. 36(4).
200. Alauya, Supra Note 5 at 40.
201. M.C., Art. 21.
202. Q., Surah al-Nisaa (4):4.
203. Q., Surah al-Nisaa (4):24.
204. M.C., Art. 36(3).
205. Q., Surah al-Nisaa (4):32.
206. M.C., Art. 36(6).
207. Q., Surah al-Nisaa (4):3.
208. Sahih Sunan Abu Dawud, Supra Note 87 at 2400.

209. M.C., Art. 38.

210. M.C., Art. 42.

211. M.C., Art. 41.

212. M.C., Art. 43.

213. Q., Surah al-Nisaa (4):32.

214. See Barra, Supra Note 6 at 99.

215. M.C., Art. 14, 37 and 38.

216. Rasul, Supra Note 61 at 165.