



"Justice for All Without Discrimination"



A TRAINING MANUAL FOR UGANDA POLICE FORCE

FAMILY AND CHILDREN DEPARTMENT IN REGARD TO
MUSLIM PERSONAL AFFAIRS SUCH AS MARRIAGE, DIVORCE,
INHERITANCE OF PROPERTY AND GUARDIANSHIP

Foreword

The police is obliged by the constitution to maintain law and order as well as protect and promote human rights. As such, it aids in resolving citizens including Muslims with social, domestic, financial and any other issues. By recognizing Muslim marriage as one of the acceptable types of marriages in Uganda, the constitution is also cognizant of the Muslim personal Law which encompasses family issues such as marriage, divorce, inheritance and guardianship a part of the Ugandan legal system. Therefore, it is our responsibility as police training institutions to equip trainees, regardless of their religious affiliations, with sufficient knowledge about the **Muslim Family regulations**.

Muslim family issues related to marriage, divorce, inheritance, custody and guardianship occur daily in the Ugandan community. Such issues are sometimes solved within the family. Although Article 129(1) (d) of the 1995 Constitution provides for the establishment of Qadhi Courts as subordinate courts for Muslim family issues, this has not yet been implemented. In a few instances however, individual Muslims forward /present their issues to the village Imam, then to the Local Councilor and finally to the Qadhi's courts at the Uganda Muslim Supreme Council for arbitration or Islamic ruling. Still, majority of the Muslims are ignorant about the Qadhi courts and present their cases to the Family Protection Unit of the police and later to the civil courts.

This Module has been developed as a resource to provide and clarify knowledge about the **Muslim Family Regulations** and guide the police on the application of law on the issues of gender equality in marriage and divorce and child custody. Although Uganda is not an Islamic country, Muslims are an integral part of the population and citizens worthy of fair legal aid, guidance and support. This resource aims to highlight the legal issues that may arise, and the challenges of conflict of laws between Uganda civil laws and Islamic *Shariah* law.

Abbreviations and Acronyms

MCJL	Muslim Centre for Justice and Law
PBUH	Peace and Blessings (of Allah) be Upon Him
UMSC	Uganda Muslim Supreme Council

Introduction

This Module provides an overview of the Muslim Family regulations regarding gender equality in marriage and divorce, child custody and inheritance for the Uganda Police. It can also be used as guidance by judges, lawyers, advocates, social service providers, imams, community leaders and community members.

We explore the Muslim Family regulations on the basis of the general **Shari’ah** law of Islam. The term *Shari’ah*, literally defined as the “path to water,” provides the premise upon which Muslims are meant to base their lives, in accordance with Allah’s will. There are **only two sources of Shari’ah law**; the **Qur’an and Hadith** (teachings of Prophet Muhammad PBUH). However, *Shar’iah* law, as it is referred to today, is somewhat of a misnomer, as there is a distinction between God’s words and human interpretation, just as there is between Islam as divinely revealed and the Muslims who put it into practice.

Shar’iah law is divine in origin as it is the word of God as written in the Qur’an, while human beings undertake scriptural exegesis to interpret the Qur’an. Thus this Module has been developed bearing in mind the two major religious sects in Uganda; *Sunnis* and *Shias*. While both sects base their religious beliefs upon the Qur’an, there are some distinctions in their sources of jurisprudence on the basis of their interpretation of the Qur’an and *Hadith* (Sunnah).

The outcome of the human understanding of *Shar’iah* is known as *fiqh*, or jurisprudence, and the experts of *fiqh* are known as *fuqaha*, or jurists. In Islamic jurisprudence the consensus of jurists (*ijma’*) and analogical deduction (*qiyas*) is used to analyze and respond to questions regarding how the Qur’an should be understood and practiced.

We specifically highlight: Islamic marriage, dowry (*Mahr*) issues, rights and duties

of spouses in marriage; the various forms of divorce and the divorce procedure at the UMSC; child custody; inheritance and the Islamic will; challenges to applying the Muslim succession law in Uganda and the problem of conflict of laws. All Muslim personal issues are discussed with reference to the teachings of the Qur'an and the Prophet (PBUH). With such knowledge, the police will be able to exercise justice regarding Muslim personal issues from an informed point of view. Not only will this strengthen trust Muslims and the entire community have for the police, but also its effectiveness and integrity.

Nevertheless, we do not give the implication that this resource encompasses the full theological and legal scope of the Muslim Family Regulations and the Ugandan Muslim experience. We greatly look forward to contributions to the field by Islamic theology and law scholars and revisions of this resource will be necessary to address future emerging dilemmas, and new issues arising from discussion among stakeholders and beneficiaries.

INTRODUCTION TO MARRIAGE

Introduction

This unit discusses the overall concept of marriage as perceived universally. Although this may seem like common knowledge, we need to remind ourselves so that we relate it to Islamic marriage and appreciate it as one of the recognized marriages in the Ugandan society.

Duration: 2hrs

Unit outcome(s):

Upon reading and discussing about the unit, the participant: Exhibits an understanding of the concept of marriage by describing the meaning of marriage and the various types of marriage recognized under the Ugandan laws.

Competence(s):

The participant:

- a. Describes the concept of marriage.
- b. Explains the various types of marriage recognized by the laws of Uganda in relation to the specific articles of the constitution.

Content outline:

Unit	Content
1. Introduction to Marriage	<ul style="list-style-type: none">• Defining marriage• Types of marriage in Uganda<ul style="list-style-type: none">- Civil marriage- Church marriage- Customary/traditional marriage- Hindu marriage- Muslim marriage

Instructional materials:

- The constitution of Uganda
- Acts of Parliament providing for the different types of marriages
- Module unit notes

Methodology:

- Guided discovery
- Think-pair share
- Group discussions

Learning Task 1.

Define the term marriage as you understand it and the various types of marriage you're aware about.

While getting the answer, participants are expected to think individually, then get into pairs and share with your partner. Agree on one definition with your pair and share your answer with the rest of the participants.

Now crosscheck with these unit notes, enjoy your reading!

UNIT NOTES

DEFINING MARRIAGE

- Marriage is the voluntary union between a man and a woman for life under any of the existing legally recognized forms of marriage. Does this mean that a man and a woman who are living together should be assumed to be married? A marriage exists if they formalize their relationship under any of the recognized types of marriage. Therefore staying together without undergoing any of the legally recognized forms of marriage is not marriage but cohabitation.
- All marriages in Uganda should be construed according to the constitution of Uganda 1995 and any other law created with the force of the constitution. In this analysis, the following provisions of the constitution and other laws should be considered:
 - i. **Article 2(1)** the constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda; **Article 2(2)** states that if any other law or any custom is

inconsistent with any of the provisions of the constitution, the constitution shall prevail, and that other law or custom shall, be void. **Article 7** is to the effect that Uganda shall not adopt a state religion. **Article 29(1) (c)** gives every person the right to practice any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organization in a manner consistent with the constitution.

- ii. **Article 129(1)** the judicial power of Uganda shall be exercised by the courts of Judicature which shall consist of such subordinate courts as Parliament may by law establish, including qadhis courts for marriage, divorce, inheritance of property and guardianship, as may be prescribed by Parliament.

TYPES OF MARRIAGE RECOGNISED UNDER THE LAWS OF UGANDA

The Ugandan constitution recognises four types of marriages in Uganda that is Marriages in accordance with the marriage Act, Customary marriage, Hindu marriage, and Muslim marriage.

1. Marriages in accordance with the Marriage Act are civil and church marriages.

- **Civil marriage:**

This is a marriage celebrated before the Registrar of marriages, who is the Registrar General or his appointees at the district level. This function is presided over by the Chief Administrative Officer (CAO). It is a monogamous marriage and during its subsistence, neither party is allowed to marry again.

- **Church marriage:**

This is a marriage celebrated in a licensed place of worship by recognized

minister. It is also a monogamous marriage and it is celebrated in accordance with the Christian faith chosen by the parties themselves. The faith must be legally recognized in Uganda.

2. Customary/Traditional Marriages:

This is a marriage celebrated according to the customs of the community/tribe to which the parties belong. This kind of marriage is potentially polygamous. This means a man can marry more than one woman. Most tribes in Uganda recognize polygamous marriages. They permit a man to take on another wife or more when the marriage to the first wife or wives is still subsisting. The culture of the woman is followed but the parties can agree otherwise. This marriage must be registered within 6 months but failure to do so is an offence and does not invalidate the marriage.

3. Hindu Marriages:

As legal citizens of Uganda, Indians can invoke and apply their various cultures and customary rites such as marriage. Indian marriage recognized as Hindu marriage is legal under the marriage system of Uganda. The requirements for a Hindu marriage are quite similar to other marriages; the parties to a marriage should be single, and adults of sound mind. Both parties to the intended marriage should be above 18 years should not be closely related unless the custom permits them. Consent is another validation of such marriages. All Hindu marriages are subject to be registered by the registrar of marriages so as to meet the legal requirements.

4. Muslim marriage:

This is a marriage celebrated according to the Islamic faith. Although the Islamic marriage allows a man to marry up to four wives when necessary, there are conditions to this provision, one of them being caring and loving all wives equally. The details of this marriage shall be discussed in the forthcoming.

However, the extent to which Islamic law is applicable in Uganda should be examined from the framework of the written law and the constitution. The ability of Muslims to exercise their right to have Islamic law applied to them depends, to a certain extent on the existence of a court system that is able to administer Islamic law. This constitutional provision has not been implemented by the parliament despite efforts made by the Muslim community and other stake holders.

REMEMBER:

- **Article 274(1)** subject to the provisions of this article, the operation of the existing law after the coming into force of this constitution shall not be affected by the coming into force of this constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this constitution.
- The aforementioned provision brings into play *The Marriage and Divorce of Mohammedans Act Cap 252*, section 2 of which provides that; all marriages between persons professing the Mohammedan religion, and all divorces from such marriages celebrated or given according to the rights and observances of the Mohammedan religion customary and usual among the tribe or sect in which the marriage or divorce takes place shall be valid and registered as provided in this Act.

With the above in mind, let's then understand what entails Islamic marriage. Enjoy your reading!

ISLAMIC MARRIAGE (NIKAH)

Introduction

This unit explores the issues regarding Marriage in Islam including the conditions, the concept of dowry, prohibitions and expected behaviour of spouses in marriage.

Duration:4hrs

Unit outcome(s):

Upon reading and discussing about the unit, the participant:

- Describes lawful Islamic marriages and has the ability to settle marital disputes and reconcile spouses for the sake of harmonizing our conflicting Muslim citizens from an informed point of view.

Competence(s):

The participant:

- Describes a valid Islamic marriage with cognisance of the prohibitions and requirements.
- Explains the various matrimonial rights, duties and responsibilities of spouses in Islam for issues of equality.

Content outline

Unit	Content
2. Islamic marriage	<ul style="list-style-type: none">• Marriage in Islam<ul style="list-style-type: none">- Prohibitions- Exceptions- Age of parties• Classes of marriage<ul style="list-style-type: none">- Compulsory marriage- Unlawful marriage- Disliked marriage- Sunnah marriage• Requirements of an Islamic Marriage<ul style="list-style-type: none">- Capacity of partners- Consent of both parties- Consent of guardians- Dowry- Publicized• Marriage through an agent• Practical procedure of an Islamic marriage • Matrimonial rights and duties<ul style="list-style-type: none">- Mutual rights and obligations- Obligations of the husband- Obligations of the wife• The issue of Equality among spouses.

Instructional materials

- Module notes
- References given at the end of the module
- Flip Charts
- Computers/laptops
- Projector
- Any other suitable material from the facilitator's creativity

Methodology

- Group discussion
- Story telling
- KWL
- Gallery walk
- Guided discovery

Learning Activities

- Before reading unit notes, participants are grouped into small groups with one Muslim participant in each group if possible.
- Participants discuss about the aspects in the unit outline and make notes.
- Participants display their work and groups take a gallery walk.
- Participants tell stories of their experiences of Islamic marriages
- Participants read session notes and compare with the knowledge that they had before.

Learning Task 2

A married couple reports their issues to you for assistance: The wife (about 18 years) has refused to be intimate with her husband because according to her, she has been forced her to marry the man by her father. The man insists that he paid for her and she must fulfill her obligation of sexual gratification towards him. Write an essay of not more than two pages, explaining how you would assist the couple.

Here are some notes for guidance. Enjoy your reading!

MARRIAGE IN ISLAM

Marriage is a key component of the Muslim Personal law and a very important institution in Islam which is taken as an act of worship. In fact marriage is so important in the religion of Islam that it is declared to be one half of one's total faith.

Consider the following *Shari'a* teachings:

- **Prophet Muhammad (PBUH), the mentor of Islam married and encouraged others to marry.**
- It has been reported that the Prophet (PBUH) said;
“A person who possesses the means (i.e. he is able to work, to support a wife and children) and does not marry is not from amongst us (the believers).”
- He also says,
“No house has been built in Islam more beloved in the sight of Allah than through marriage.”

- On another occasion the Prophet (PBUH) said,

“The best people of my nation (Ummat) are those who get married and have chosen their wives, and the worst people of my nation are those who have kept away from marriage and are passing their lives as bachelors.”
- Further, Imam ‘Ali (A.S.) exhorts, *“Marry, because marriage is the tradition of the Prophet (PBUH)*
- The Prophet (PBUH) also said,

“Whosoever likes to follow my tradition, then he should know that marriage is from my tradition.”

The Holy Quran says;

“And marry those among you who are single and those who are fit among your male slaves and your female slaves; if they are needy, Allah will make them free from want out of His grace; and Allah is Ample-giving, Knowing.” (Surah an-Nur,24:32)

- Therefore, according to the teachings of Islam, marriage is one of the recognized and indisputable commandments of Islam- the sacred union that takes place only between a man and a woman (Bhimji). It is a contract by which a man and a woman agree to live as husband and wife in accordance with the guidance contained in the two primary sources of the Sharia; the Qur`an and the Sunnah of the prophet (PBUH).
- It is a pure and simple contract that needs neither writing nor sacred rites. All that is necessary is a proposal (Ijab) and acceptance (Qubul) and in the presence and hearing of two male or female witnesses. As a legal requirement however, recording the factum of marriage is done in the “Marriage” register maintained in every mosque. The certificate is signed by the couple and attested by their witnesses and the Imam/Kadhi

Prohibitions

The Quran forbids Muslim men from marrying certain persons:

“And marry not those women whom your fathers married, except what has already happened (of that nature) in the past. Lo! It was ever lewdness and abomination, and an evil way. Forbidden unto you are your mothers and your daughters, and your sisters and your father’s sisters and your mother’s sisters, and your brother’s daughters and your sister’s daughters, and your foster-mothers and your foster-sisters, and your mothers-in-law and your step-daughters who are under your mother-in-law and your step-daughters who are under your protection (born) of your women unto whom you have gone into -- but if you have not gone into them, then it is no sin for you (to marry their daughters) -- and the wives of your sons from your own loins, and that you should have two sisters together, except what has already happened (of that nature) in the past. Allah is ever-Forgiving, Merciful.”(Quran 4:22-24)

From the above verses, it is clear that a Muslim man must never marry the following:

- His; mother, Step-mother, grandmother (including father’s and mother’s mothers and all preceding mothers’ e.g. great grandmothers), daughter (including granddaughters and beyond), sister (whether full, consanguine or uterine), father’s sisters (including paternal grandfather’s sisters), mother’s sisters (including maternal grandmother’s sisters), brother’s daughters, foster mother, foster mother’s sister, sister’s daughter, foster sister, wife’s mother, step-daughter (i.e. a daughter by a former husband of a woman he has married if the marriage has been consummated. However, if such a marriage was not consummated, there is no prohibition), his real son’s wife and wife’s sister.
- It is also prohibited for a Muslim woman to marry a non Muslim man and more than one husband (polyandry), when the first marriage is still surviving. Further, when the marriage is dissolved by three pronouncements of divorce, reunion is prohibited except after the woman lawfully marries and divorces another man after consummation. Marriage with a sick man/

woman; marriage with a person suffering from an incurable or fatal disease is invalid. If however, he recovers and the marriage is consummated, it is valid.

Exceptions

There are however, a few exceptions to the general rule of prohibition on the ground of fosterage and a valid marriage maybe contracted with; a sister's foster mother, or foster sister's mother, or a foster son's sister, or a foster brother's sister.

Age of the parties

The Islamic law does not set a specific age for marriage; rather attainment of Puberty is the major consideration of age in determining the ability to marry. However, the age at which people attain puberty varies on the basis of different factors such as genes and the environment. Some boys reach puberty at 14 or 15years, while girls can attain it as early as 9, 10, 11or 12 years.

NOTE:

The above Islamic law on age notwithstanding, **Article 31(1)** of Uganda's 1995 constitution provides that; a person who is capable of contracting a marriage is that one at the age of 18years. Therefore, the Islamic position on puberty as a consideration for age should be reconciled with the constitution and other laws since Uganda is not purely an Islamic country. For the Islamic position to apply, it should pass the test put in place by **Article 2(2)** of the 1995 Uganda constitution which states that if any other law or any custom is inconsistent with any of the provisions of the constitution, the constitution shall prevail, and that other law or custom shall, be void. Therefore age for marriage is 18 years of age.

CLASSES OF MARRIAGE CONTRACT

Islamic jurists (fuqaha) describe five classes of marriage contract:

1. Compulsory (Fardh) marriage contract:

Marriage becomes fardh when a person is unable to control their carnal desires and there is a fear that they may commit a major sin (fornication/zina) (Al-Qasmi, A. Y). This is where a person has all such resources that are generally necessary for a family life and is certain that along with the possession of these resources if he remains unmarried he will indulge in, then it is, compulsory for him to contract a marriage. If he does not contract marriage he will be sinful.

2. Unlawful (haram) marriage contract:

The contract of marriage is considered unlawful if it occurs under the two circumstances: when the necessary requirements of marital life do not exist and where an individual is certain that after marriage, he shall commit major sin. For example, a person is inclined (has deep secret interest) in a particular woman but he cannot marry her and if he contracts the marriage with someone else his inclination in the former remains, and he is certain that he would commit major sin(adultery) with the admired woman. In such a circumstance his contracting a marriage with this second woman is unlawful.

3. Disliked (Makruh) marriage contract;

This occurs where a person has a probability that after his marriage he shall not do justice to his wife or he has the probability that he would commit adultery after such marriage.

4. Sunnah (acting in accordance to Prophet Muhammad's (PBUH) practice).

This occurs when all the requirements of a marital life are available, for example a man is adult, of sound mind, and there is no element of any injustice with the wife. There is a saying of the Prophet Muhammad (PBUH); "To contract a marriage is my way."

What are the requirements For an Islamic Marriage?

The solemnization of a marriage requires adherence to certain conditions. They are called the essentials of a valid marriage. If any of these requirements is not fulfilled the marriage becomes either void or irregular, as the case maybe. The essentials are as follows;

1. Capacity of the prospective husband and wife.

The parties to a marriage must have the capacity and competence of entering into a contract. A Muslim who is of sound mind and who has attained puberty may enter into a contract of marriage; the parties must be able to understand the nature of their act.

2. Consent of both parties (bride and groom)

- The consent of both the man and woman is an essential element of marriage, on the basis of the definition of marriage as ‘the voluntary union of two people. The Holy Quran lays down expressly that both man and woman must agree.
- Usually, there is an offer of marriage (proposal) from the man (sometimes a woman) and acceptance by the other party (Nasir, J, 1990). A marriage can only be contracted with the free consent of the two parties. No woman whether virgin or previously married can be forced to marry a particular man without her consent.
- In case of a virgin it is the duty of the father or the guardian to consult her and seek her consent even if it is indicated by her silence. In case of a woman previously married whether widow or divorcee she is given more right to express her consent than that of her guardian. She must express her consent in words. Verily, the prophet (PBUH) did revoke the marriage of a girl who complained to him that her father had married her against her wishes (Islam Awareness).

3. Consent of Guardian (Wali/Vakil)

The Holy Quran (4:25) commands;

“so marry them with their guardian’s permission.....”

A Guardian is a person from the side of the female who performs the functions of offer on behalf of the female. It is the bride’s father, or brother in the absence of the father. Indeed, Aisha, the wife of the prophet (PBUH) quotes him saying,

“There can be no marriage without a guardian, and two honest witnesses. If there is any dispute between them, the ruler is the guardian of the person who has no guardian.” (Nasir, 1990)

4. Dowry /Mahr

This is an obligatory gift given by the groom to the bride on the occasion of the marriage (Quran 4:4). It may be given on the day of the marriage, before or even after, depending on the mutual consent between both parties. Although there is no specification in the Qur’an as to what or how much the Mahr has to be, the bride determines how much and in which form it takes but is urged to be considerate.

- From practice of precedent marriages, Mahr varies on the basis of the social status of the parties, their wealth, their personal qualification and the condition of the human society. To this end, the Quran(2:236) provides:

“the rich according to his means and the strained according to his means.”

- The Quran (4:4) elaborates further;

“You shall give the women their due dowries as a free gift equitably, but if they themselves be pleased to give up to you a portion of it, then eat it with enjoyment and with wholesome result.” (Surah an-Nisaa’, 4:4)

- However, anything which cannot be owned, bought or sold by a Muslim cannot be Mahr in Islam. Islam recommends moderation and not setting a rate that is too high or too low. Prophet Muhammad (P.B.U.H)

encourages the Muslims to simplify the giving of the dowry and said that;

“The best woman is the one whose dowry is the easiest to pay.”

- Nevertheless, the husband is allowed to give the wife a dowry of high value provided that he is willing and can afford it.

NOTE

- Critiques have misinterpreted Islamic dowry for bride price as practiced in African tradition. The two are however totally different since bride price is paid to the bride’s parents or relatives for consent of her hand in marriage. The type and quantum of bride price is usually determined by the bride’s parents on the basis of cultural norms and varies from place to place. On the other hand, dowry is paid to the wife and it is her own personal property to make her content on the right of her husband’s guardianship over her (At-Tuwaijiry, 2000).
- Dowry reflects the love and willingness of the husband to live with the wife, and to sacrifice for the welfare of his family. It is also a sign of respect from the husband to the wife.
- If the parties agree that dowry is to be paid after a certain time after entering into a marriage contract, and a husband forfeits to clear the dowry within that time and the wife does not extend the time, she is advised to voluntarily (without coercion) reduce on the value/ amount of dowry or forgive the husband from paying the dowry. She however has the right not to do any of the above in which case the marriage becomes void on that ground at the request of the wife.
- In the event that the groom dies after the contract of marriage has been entered but before paying the full dowry, the dowry should be included as a debt to be recovered by the wife.

5. Marriage should be publicised.

- According to Islam, marriage should never be kept secret as it leads to suspicion and troubles within the community (Jannah.org). Secret marriages whilst recognised are severely disliked in Islam and even Haram when it goes against the will of the parents.
- Islam encourages the intending couple to invite other people to witness the celebration of their marriage. This however does not suggest making the marriage too expensive and unaffordable but just declaring to the public, that the two souls have united. Dinner (*Valima*) is highly recommended on the groom.
- The relatives, neighbours and friends must be invited for the dinner but lavish spending is not advisable especially when the samemoney can be used effectively by the couple (Sayyid A. H).

Marriage through an Agent

- Islam also allows to contract marriage through an agent. All the formalities are almost the same except that the agent cannot consummate the marriage. The agent must perform his duties according to the principles of agency and must be a person of good characters.
- There must be sufficient reasons for the non appearance of any of the spouse and there must be proper communication to the other party and those witnessing the marriage. Proper identities of the couple should be established at the time of marriage.

THE PRACTICAL PROCEDURE OF AN ISLAMIC MARRIAGE

This part provides participants with some practical and legal guidance for Islamic marriage and dowry.

- Consider the historical precedent of Prophet Adam (PBUH):

After his creation, he felt lonely and complained to the Almighty about his solitude. Allah put Adam (PBUH) to sleep and then created Hawwah (peace be upon her) with the utmost beauty, covered her with the robes of Paradise and brought her forth with other ornaments of beautification and instructed her (Hawwah) to sit near the head of Prophet Adam (PBUH). When Adam awakened from his sleep and his eyes fell on Hawwah (peace be upon her), he was so obsessed and captivated by her charm that he wanted to reach out and touch her. At this point, the Angels forbid him from doing so and he asked them, “*did Allah not create her for me?*” The Angels replied,

“Yes, but you have to approach her in the appropriate manner. First you must propose to her (by asking her guardian for permission to marry her), then you must grant her the Mahr (gift), followed by the recitation of the Aqd (marriage contract).” (Arifa Hudda p.1)

In order to offer guidance beyond the purely theoretical jurisprudence, we now describe particularly the practice at Uganda Muslim Supreme Council (UMSC), the umbrella organization of Sunni Muslims in Uganda. The practice is conducted as follows:

1. The first step of marriage in Islam is Engagement/Khitbah; A Man has to discover a woman he loves first, and the woman has to reciprocate the love. Sometimes, parents or relatives take the trouble to identify suitable partners for their sons and daughters but the final decision rests with those to be married. As explained earlier, not even parents

have the right to force their children especially daughters into marrying someone they do not love. The role of parents is to give parental advice and suggestions to what they think is best for their daughters. It's highly recommended for sons and daughters to take the advice of their parents.

“There is no love greater than the love of the parents.”

2. After selecting the proper partner, there is an appointment scheduled for the two of them to meet (under chaperoned supervision) to discuss their possible future together.
3. After the initial meeting, they (couple) both pray to Allah a prayer/*Salat* known as “*Salatul Istakharah*” for guidance. Though highly recommended as something that would really help them in their future, failure to perform the *salat* however does not invalidate the marriage.
4. If they both recognize positive signs from the “*Salatul Istakharah*” then they would proceed to make the “*Nikah*” (marriage contract). This, as earlier discussed is done under supervision with two witnesses. It is usually attended by an Imam or knowledgeable person in Islam, just so that there will be no mistakes in taking care of the details.
5. The wife to be is then asked to name her dowry which the husband is supposed to pay. Although the details of dowry have been explained in the previous section, it is important to emphasise that dowry is one of the essential elements of a *nikah* contract. The terms of the dowry are included in the *nikah* contract.
 - In the due course, the *Mahr* (dowry) is presented and the lady is asked if she is prepared to accept it and be married to the man. According to *Shariah*, the wife-to-be says,
‘AnKah’tunafsakaa’lalmah’rilma’loom’, meaning “I have given away myself in marriage to you, on the agreed dowry”. Immediately, the man (bridegroom) says,
‘Qabiltun Nikaha’; “I have accepted the marriage.” With these

pronouncements, they become husband and wife.

- In the event that the marrying partners are unable to recite the formula in Arabic, one or two persons or Imams are appointed and authorized to officiate. One who represents the bride would first seek her explicit consent to officiate on her behalf, and so would the other who acts on behalf of the groom. Naturally, there would be a slight variation in the pronouncements, because the persons reciting them are appointees. A person who represents the bride would initiate by saying; “*Ankah’tumu wakkilatimu wakkilakaa’lalmah’rilma’loom*”. “I give away in *Nikah* the woman who has thus appointed and authorized me, to the man who has authorized you, on an agreed *Mahr*.”

The groom’s representative would respond, “*Qabiltunnikaah alimu wakkilia’lalmah’rilma’loom*.”, “I accept the *Nikah* on behalf of the one who has appointed me, on the agreed *Mahr*.”

6. The parties then sign the *Nikah* document in front of the witnesses. It is highly recommended to recite a brief discourse or *Khutba* before the *Nikah* formula is enunciated. In this *Khutba*, Allah is praised for His Wisdom in regulating the lawful process of procreation, and then the traditions from the Prophet (PBUH) are also recited. (Sayyid Arthur).
 - a. The two witnesses also sign and attest that they have been present witnessed lady’s acceptance of the man’s offer of marriage. The Imam also signs. Any two adult Muslims may witness the document. In the case of women witnesses, it is correct to have two in place of one man. If there were to be two witnesses, but one is a woman, then it would be correct to have a man and two women sign the document.
7. After the lady’s acceptance, the signing of the *Nikah* (document) witnessing of the two witnesses and exchange of *Mahr*, the man and the woman are considered legal in Islam to live together and be together as man and wife and to have sex. However, until they actually consummate the marriage (i.e.

have intercourse) they may cancel the marriage, and the Mahr would be returned to the man.

- After signing the marriage document, and the acceptance of the bride of the 'Mahr' (dowry), and the signing of the two witnesses, the groom is free to take his bride at anytime he chooses. As regards any kind of a deadline, this would be according to the contract. If the lady or the gentleman has specified that for whatever reasons, if they are not able to be living together by such and such a date, then the Mahr could be returned to the man and the couple would be considered unmarried (unless of course, they had consummated the marriage by having sex).
- Due to the contemporary demands, a marriage certificate is provided to the couple (see Appendix I)

NOTE

If the groom is unable or unwilling to take the bride after an extended period of time and she or he would like to annul the marriage, they would simply let the other person know the cause and the Mahr is returned to the groom.

MATRIMONIAL RIGHTS AND DUTIES

As per the teachings of the Quran and Hadith, a married couple bears rights and obligations towards upholding the marriage and subsequent family. The Shari'ah prescribes rules to regulate the functioning of the family so that both spouses can live together in love, security, and tranquility. Some of the rights and duties are bound to both parties while others are by one party towards the other as discussed below.

■ Mutual rights and obligations

These include:

- i. Preservation of chastity and security of gaze. Both husband and wife should be faithful towards each other and have mutual respect for each other.
- ii. Love, care, and companionship inside and outside the home. By signing the Islamic marriage contract, couples commit to nurturing an environment of love and mercy that is conducive to Islamic growth (Al khateeb 2004).
- iii. Procreation and raising children by mutual consultation.
- iv. Working collectively towards the social economic welfare of the family.
- v. Mainstreaming social contacts with the family, meaning their individual roles inside the family.
- vi. Emotional and sexual gratification. Both husband and wife are duty bound to satisfy each other's sexual desires. This is such a serious obligation of marriage that prolonged refusal/denial without sound justification is a recognised ground for divorce by either partner.
- vii. It is important for both the husband and the wife to make themselves physically attractive for each other. Islamic teachings instruct husband

and wife to maintain cleanliness and beauty for the spouse. The prophet (PBUH) said;

“Certainly Allah is Beauty and He (only) loves beauty and He loves to see the effects of (His) blessings and bounties on His servants” (Hudda A)

■ Obligations of the husband

In addition to the mutual obligations above, the husband:

- i. Is the head of the family and should make the final decision upon consulting and listening to other family members especially his wife (Quran 4:34). While Islam gives the husband leadership role in the marriage relationship, this does not mean that he can run the family life like a dictator. Allah instructs in the Quran that:

Men are the maintainers of women because Allah has made some of them to excel others and because they spend out of their property; the good women are therefore obedient, guarding the unseen as Allah has guarded. (4:34)

NOTE

- You might have realized that a major cause of many marital problems is the issue of ‘who is in control in the relationship.’ This has led to a stalemate in disagreements, as well as bitter feelings. Many couples today are refusing to compromise within moderation when differences arise.
- It should be noted that in Islam, a leader is one who serves, manages, provides and nourishes. A leader must also have humbleness and humility and deal with all of those under his care and protection with justice and equality. Thus a husband exercises the right kind of leadership by listening to and consulting with his wife. He is bound to follow the rules of the Quran and Sunnah of the Prophet (PBUH), instead of becoming a source of tension and problems in the home. Thus, as a leader and protector, the husband should never: abuse his spouse and children verbally, emotionally, physically or sexually.

- ii. The husband should sustain his family by providing all the basic needs such as food, shelter and clothing. If he fails to provide such for her, the wife has the right to complain to the Qadhi or Imam. Certainly, the Quran highlights this duty in Suratul (chapter) Baqarah (2:233):

“... The duty of feeding, clothing and the nursing of the mother in a seemly manner is upon the father of the child.”

- iii. It is also the duty of the husband to protect himself and his family from the hell fire by guiding them into righteousness as Allah emphasizes in the Quran (66: 6):

O you who have true faith! Save yourselves and your families from the fire which is fueled by people and stones and is guarded by stern angels who do not disobey Allah’s commands and do whatever they are ordered to do

Therefore, as the head of the house the husband is duty bound to get the proper Islamic knowledge to keep himself away from the hell and more importantly, guide his wife and children to the straight path and keep them on this road. In this regard, the husband has four important duties:

- a. To invite his wife and children and any others under his care to obey Allah. The husband should call his family to follow the religion and encourage them in this regard.
- b. Teach those under his care their religious duties and obligations. This means that the husband must have knowledge of his own religion and beliefs. If he is not well acquainted with his religion, then he must employ the services of the local mosque and the scholars and either invite them to his house or go to the mosque for Islamic classes.
- c. Encourage the family members to perform good deeds. If they know their responsibilities and are continuously guided to them, then peace, harmony and tranquility will rule throughout the house.
- d. The father must also make sure and remind other members of his family

to stay away from evil and sin. A home in which people are not plagued with committing sins and evil acts is one in which Allah looks favourable upon and blesses its inhabitants.

■ Obligations of the wife

The prophet (PBUH) said,

If bowing (sajdah) before anyone besides Allah was permissible, the wife would have been commanded to make sajdah to her husband (Tirmidhi).

The above words of the prophet portray the level of respect and love a wife should have and express for her husband. In the same direction, the Quran emphasises in chapter 30, verse 21 (30:21) that a wife should obey, respect and serve her husband all the time. Islam recommends thus, a wife;

- i. Should never leave her husband's house without his permission.
- ii. Must look after her husband's possessions during his absence from home. In his Farewell Sermon, Prophet Muhammad (PBUH) discouraged misappropriation of husband's property. He said:

No woman shall spend anything from the house of her husband without her husband's permission,

He was asked: *oh Messenger of Allah! Nor food?*

He replied: *That is the best of our properties.*

Thus, it is unlawful for wives to spend anything from their husband's house without permission. But if they are sure that the husband will not be displeased with what is spent or given in alms or their implied permission can be gathered, it can be spent lawfully.

In cases where the husband is '**a miser fellow**', the *Shar'iah* permits wives to spend on food and cloth as are necessary for them and their children according

to means. Women cannot however, waste things or sell them privately without knowledge of the husband.

In *Hadith* narrated by Abdollah bin Abbas, the Holy prophet said that a woman who steals and acts dishonestly towards her husband's property is cursed by seventy thousand angels.

One would ask what would happen to man who steals and acts dishonestly towards his wife. Islam also prohibits strongly a man who acts dishonestly towards his wife's property.

- iii. Should neither speak to any man who is not forbidden to her unnecessarily, nor should she let any such a man into her house in the absence of her husband.
- iv. Ought to understand her husband's nature and try to accommodate his temperament. Thus she should keep her marriage affairs a secret between her and her husband.

In addition to the mutual obligations, the wife must not;

- i. Abuse her husband and children verbally, emotionally, physically or sexually
- ii. Desert her husband for 60 days unless with consent
- iii. Sexually transmit diseases to her husband
- iv. Etc.

The Issue of Equality (Al-Kafa'at) among spouses

- Equality and rights of spouses in marriage is one of the driving forces behind domestic violence (Ahmed B. M. D, 2009). Fortunately, the Qur'an represents a comprehensive model to protect the human family from any type of oppression. According to Islam, God created human beings, men and women, as equal with the sole purpose of worshipping and serving Him. This

aspect is clearly highlighted in the Qur'an;

“Behold. Thy Lord said to the angels. ‘I will create a vicegerent (trustee) on earth.” (Qur’an 2:30).

- The only aspect by which one person is deemed better than another in the sight of God is that of piety:

“O mankind! We created you from a single pair of a male and a female, and made you into nations and tribes, that you may know each other (not that you may despise each other). Verily, the most honoured of you in the sight of God is the most righteous of you...” (Qur’an 49:13).

- That Islam demands much respect and obedience from a wife towards her husband notwithstanding, it is necessary that in certain matters there must be equality among the spouses. The reason for the existence of such likeness is that individuals living in a like environment become acquainted with each other within no time: Their problems are common; their needs and difficulties are similar; if there is a difference of way of living and of the belief there is apprehension of dislike and detachment as against love and attachment. In such a situation the engagements of the husband are often totally different from the wife's. Requirements of a wife may be beyond her husband's capacity. Hence, to hope to lead a good and pure life in such a non-resembling wedlock is the most difficult thing.
- This nonexistence of likeness even adversely affects the children born of such wedlock. Hence, Muslim jurists are of the view that there must exist likeness among the spouses in certain matters and hence advocate for marriages of the people of the same social status. Some countries have included in their Islamic family law legislation, provisions encouraging people to marry people of the same social status. However, this practice has been criticized as promoting discrimination on the basis of social class and promoting a caste system that might violate the constitutional rights.

DIVORCE/TALAQ IN ISLAM

Introduction

In this unit we discuss the Islamic stand on divorce, the conditions upon which it is granted and the various forms it may take.

Duration: 4Hrs

Unit Outcome(s):

After completing this unit, the participant;

- Explains the concept of divorce in Islam; its various forms, conditions, and remedies of parties after divorce.

Competence(s):

The participant;

- Explains how they may resolve extreme Muslim marital issues that may lead to divorce.

Content Outline

Unit	Content
3. Divorce/talaq in Islam	<ul style="list-style-type: none">• What Islam Says About Divorce• Forms of Divorce<ul style="list-style-type: none">- <i>Unilateral/Talaq</i>- <i>Khul'a</i>- Faskh (Judicial Annulment)- Lian (Divorce on Oath)- Tafreeq• Practical Procedure of an Islamic Divorce<ul style="list-style-type: none">- Islamic Divorce process at the National Mosque.• Remedies of the parties Upon <i>Divorce</i><ul style="list-style-type: none">- Mahr/Dowry- Maintenance of the wife- Right to Accommodation- Consolatory <i>Gift</i> (<i>Muta'ah</i>)- Matrimonial Property- Jointly Acquired Property

Instructional Materials

- Module notes
- References given at the end of the module
- Flip Charts
- Computers/laptops
- Projector
- Any other suitable material from the facilitator's creativity

Methodology

- Group discussion
- Story telling
- KWL
- Gallery walk
- Guided discovery
- Brainstorming

Learning Activities

- Before reading the Unit notes, in groups, participants discuss and share information, opinions, feelings, and attitudes towards divorce in general.
- Participants read and discuss unit notes in groups.
- In their respective groups, participants dramatize the various forms of divorce
- Participants visit the national mosque and enquire into the procedure of divorce in Islam. May take photos, recordings, etc as artefacts of their learning and findings.

Task 3

Write a reflective paper of not more than two pages describing your dramatisation of a particular form of divorce. Also include how the knowledge about divorce in Islam has impacted on your opinions about divorce in general.

WHAT ISLAM SAYS ABOUT DIVORCE

- As we have learnt already, marriage is one of Allah's graces. Islam greatly emphasises the stability of matrimonial life and the strength of ties between spouses. While divorce should be the last resort to an unsuccessful marriage called for only when harmony between the spouses become impossible. Out of all of the things that Allah has made *halal* (permissible), divorce is the one He hates the most. Thus, couples are urged to look at several other alternatives before turning to this drastic measure.
- Indeed, the Prophet of Islam (PBUH) said:
Allah has not created on the face of this Earth anything more beloved by Him than freeing a slave, and He has not create anything on the face of this Earth more despised than divorce (Huddah, A)

Further, Allah Tells us in the Qur'an that:

If there appears to be discord between a wife and her husband and if they desire reconciliation, then choose arbiters from the families of both sides. Allah will bring them together; Allah is All-Knowing and All-Aware. (Qur'an 4: 35)

- In the event that conflict occurs within marriage, the Qur'an requires that it is resolved through mutual consultation and open discussion. All efforts should be made for reconciliation between the two disputants.
- Generally, the couple needs to make sincere and concerted efforts to try

and work things out before divorce is even considered (At-Tuwaijiry, 2000). In extreme cases, for instance when a wife is insolent and has adamantly refused to reform, a multi-step process as outlined in the Qur'an (4:34) must be followed to prevent the marriage from becoming a battle field for perpetrating any other form of insubordination. However, this verse requires clarification as men often misinterpret it as a license for them to engage in some form of physical abuse against their wives.

- Nonetheless, if some harmony between husband and wife is no longer possible, any one of them has the right to seek for divorce. Divorce confers on a Muslim husband or wife the right to terminate the marriage contract for reasons good, bad or indifferent. Many people especially ignorant Muslims and non-Muslims believe that a married Muslim man can dissolve his marriage at any time by saying to his wife; “Talaq (I divorce you) Talaq, Talaq” at one occasion of his own free will and desire.

Islam outlines the procedure and categories divorce on the basis of who initiates it (husband/wife) and the conditions upon which it is initiated, as the proceeding section expounds.

A. FORMS OF DIVORCE

I. UNILATERAL /TALAQ

- This is initiated by a man and can be oral or written but the wife is entitled to a reasonable gift. Under traditional Islamic law, as the husband is financially responsible, and therefore at dissolution of the marriage would implicate financially, the law provides him with the unilateral, at will, and without cause right to dissolve the marriage (Al khateeb, M. 2012)
- However, the divorce should be after the wife has experienced her menstruations and before having sex with her husband. On his part, the

husband should be sane, and exercising own discretion among others.

The procedure for *Talaq*

- According to Qur'an (4:34), the husband is instructed thus;
“...But those (wives) from whom you fear arrogance- (first) advise them; then (if they persist), forsake them in bed; and finally beat them lightly. But if they obey you again, seek no means against them. Indeed Allah is ever Exalted and Grand.”
- If after the light beating the woman does not reform, Qur'an (4:35) advises the husband to call for arbiters (a family council) especially those who witnessed the marriage. If reconciliation fails even after intervention of the arbiters, then *Talaq* should commence.
- The husband initiates divorce proceedings by pronouncing, “I divorce you,” followed by ‘a cooling down and waiting period’ (*Iddah*) of 3 up to months. Divorce is pronounced three separate times, one after a menstruation period to provide opportunities for reconciliation and to confirm that the wife is not pregnant (Qur'an 2:228; Mwesige, A. H. 2010).
- During the *Iddah* period, the wife should not be expelled from the marital home (Qur'an 65: 1) but the couple may sleep in separate bedrooms. If, at the conclusion of the waiting period the couple decides to reunite, a new marriage contract must be signed. Otherwise the divorce is finalized after 3 months, and the husband is required to give his wife her deferred *mahr*.
- Couples can divorce and remarry up to two times, as the first and second divorces are revocable, but the third divorce is irrevocable (and the man and woman cannot remarry or have sex unless after the woman has remarried another man and divorced). Further, consecutive divorces should not occur within the same waiting period. If the wife is pregnant,

the husband is financially responsible for her and their child for the duration of the pregnancy. Finalization of the divorce can be judicial, by registering the divorce with the court, or non-judicial, through the presence of two witnesses (Al khateeb, M. 2012).

NOTE:

Sometimes, instead of pronouncing “I divorce you” to his wife, the husband may opt to compare her with his mother or any other female within the prohibited category. Such an act still constitutes in similar regards as the pronouncement of *talaq*. Divorce under such circumstances is *Talaq* known as *Zihar*.

Statutory provisions of Talaq

- As per the laws of Uganda, **Section 5(1) (a)** of the Marriage and Divorce of the Mohammedan Act, requires the registration of divorce by the husband within one month from the date of divorce. The method of divorce to be carried out has to be in conformity with “rites and observance of the Mohammedan religion” as considered under **Section 2** of the Marriage and Divorce of the Mohammedan Act.
- However, the Act does not provide details of the procedure of divorce. This implies that a Muslim should refer to the Quran and the traditions of the prophet Muhammad (PBUH) as the procedure discussed in the foregoing section.

- **Section 5(1) (b) (i)** considers the divorce other than Khula, by the man who has effected it to register the divorce. Form B of the schedule to the Act provides the format for the registration of divorce. The Form provides the details of the divorce, the manner in which it has to be implemented, names of the witnesses to the divorce, among other details.

II. KHUL'A

- This is divorce initiated by the wife and is invoked where the wife considers that it is extremely difficult for her to pull on with the marital tie with her husband. *Khul'a* divorce is enforced by means of appropriate words spoken or written by the two parties or their respective agent by whom the wife requests and the husband accepts in return for a mutually agreed amount as compensation out of her property (dowry) for the release of her marital rights. Allah says in the Qur'an:

"Hence if you have cause to fear that the two may not be able to keep within the bounds set by Allah, there shall be no sin upon either of them for what the wife may give up(to her husband) in order to free herself" (2:229)

- As the case with *Talaq*, a waiting period of 3 menstrual cycles is observed within separate quarters of the marital residence to provide an opportunity for reconciliation, and to ascertain that the wife is not pregnant. However, the divorce is pronounced once but it is irrevocable and the husband is not allowed to take the wife back without her consent or fresh marriage. If the wife is pregnant, the husband supports her until birth, and the child until adulthood. If not pregnant, the divorce is finalized and the wife returns her *mahr* to her husband.
- *Khul'a* may be effected by the spouses when they are sure that it is difficult to keep the limits of Allah during the wedlock and consequently they part from each other. Alternatively, by a person vested with authority among the

Muslims like a judge (Khadi) who considers the limits of Allah will be broken if separation is not ordered. In such an apprehension the judge may order dissolution of marriage (nikah) on payment of some compensation by the women to the husband.

- Such separation demands that the wife gives something in return and with pronouncement of the word ‘divorce’ It can be achieved through mutual agreement of the parties or through the order of the court, where the amount of payment is agreed upon by the parties, the Khadi may assess in accordance with Sharia, the amount having regard to the status and the means of the parties.

Grounds for Khula Divorce

- Just as the husband, the wife should not decide on divorce without justifiable reasons. If the wife wants to divorce just because she wants to change men but was not abused in any way by her husband, it may be granted but will never enter paradise, as the prophet emphasized:

“If any woman asks her husband for divorce without some strong reason, the fragrance of the garden will be forbidden to her.” (Abu Dauda)

The Grounds for *Khul’a* may include:

- Husband’s failure to provide the wife with sustenance and housing.
- Cruelty or habitual maltreatment such as quitting conjugal domicile without making provision for wife (desertion)
- Inability of the husband to satisfy her sexual needs for instance if he becomes impotent.
- If the husband denounces Islam.
- If both husband and wife were non-believers and the wife accepts Islam.

- If the wife was just forced into the marriage.
- Insanity of the husband.
- Non – fulfillment of the terms of the marriage contracts which they had agreed upon before Nikkah and any other related causes which in the opinion of the court, Khadi justifies a divorce.

Statutory provision of Khula

- **Section 5(1)(b)(ii)** of The Marriage and Divorce of the Mohammedans Act provides for registering the *Khul'a* divorce by the man and woman jointly or by her guardian (*Vakil/Wali*)
- **Section 5(2)** provides that nothing shall prevent a woman to register the divorce if the man fails. This means that a woman can proceed to register her divorce even though the husband is not willing to do so.
- **Section 8(1) (b) (ii)** provides that the register for the Khula divorce shall be signed by man and woman, or by her guardian and by the person identifying the man and woman (witness). If the man belongs to the *Shiah* sect, then two witnesses are required for to the divorce to be effected.
- Particulars for the *Khul'a* divorce if effected; especially the amount of dowry, whether was acknowledged by the wife in person before the registrar and other details are contained in the Divorce Register under form B of the schedule to the Act under item 12.

REMEMBER:

Khul'a is equal to a single irrevocable divorce. A man has no right to revoke it. It's according to the will of the woman. However, if the woman agrees to remarry the same man she can with the consent of the man.

III. FASKH (JUDICIAL ANNULMENT OR ABROGATION OF MARRIAGE)

- *Faskh* is a decree by the *Khadh* (Judge) after the careful consideration of an application by the wife. This brings an end to marriage. The juristic basis for *Faskh* has been deduced from the Holy Quran 2:229 which provide that;

“The parties should either hold together on equitable terms (*bi-ma’aruf*) or separate with kindness (*bil-ihsan*)”

- As is the case with the *Talaq* and *Khul’a*, a waiting period of 3 months is observed to confirm whether the wife is pregnant. If the wife is pregnant, the husband supports her until birth, and the child until adulthood. If not pregnant, the divorce is finalized and the husband gives his wife her deferred *mahr*.

Muslim jurists identify the grounds for *Faskh* as follows;

a. Defect in the husband

According to the *Malik*, *Shafii* and *Hanbali* schools of thought as against *Hanafi* school view (which gives the right only to the wife) each of the married couple is entitled to get the marriage contract dissolved due to disease and physical defect. There is right of separation on defects of leprosy, madness, leucocythaemia and impotency. The *Shafii* School argues that the basis on which the right of separation is the infectiousness of the disease that is passed from the husband to the wife.

b. Non providing maintenance:

Muslim Jurists differ in opinion among regarding the right of a wife to seek *Faskh* on the basis of lack of maintenance from her husband: The *Malik* argue that the wife is entitled to claim divorce of her marriage through *Faskh* if the husband is unable to provide for her maintenance at the time of the claim, regardless of whether he provided for her previously, unless the wife was aware at the time of

marriage that the husband was indigent.

If the husband's poverty is not legally established, the *Khadh* will order him to provide for her maintenance or to divorce her. The dissolution of the marriage takes the form of *Talaq* pronounced by the Court if the husband fails to pronounce it.

On the other hand, the dominant *Shafii* view is that, if the husband is present but unable to maintain his wife, the wife is entitled to a judicial dissolution of her marriage.

c. Separation on account of cruelty

The wife is entitled to ask the Court for the decree of divorce, if she fears that the husband will injure her person to such an extent that she is unable to live with him as husband and wife. Examples are where the husband habitually assaults her or injures her in such a way that is unbearable, abusing her or forcing her to stay or do something which is wrong, among others.

Other reasons for *Faskh* include:

- d. Permanent emigration of the husband to another country.
- e. Life imprisonment of the husband or when turns an fugitive
- f. Impotence of the husband.

IV. LIAN/ DIVORCE ON OATH

- If a husband puts forward slanderous accusation against his wife or a wife against her husband, the Holy Quran lays down the procedures under (24:6-7) and 24:8-9). If a husband accuses his wife of adultery, he has to bring four witnesses to prove his case. Without the four witnesses, the husband must swear upon Allah that he speaks the truth, four times and at the fifth time

that the curse of God be on him if he is a liar. Against this if the wife also swears by Allah four times that her husband is being deceitful, if she invokes Allah's Wrath on her if her husband is telling the truth, then a deadlock ensues.

- Consequently, the husband is absolved from the charge of slander and falsely accusing his wife and the wife is also absolved from the false charge of infidelity. When things come to such extreme, it is no longer fit that they should continue to be husband and wife and the marriage is held by the *Khadh* to be dissolved. Whatever happens, once the Oaths are taken, the marriage will be dissolved since it is quite impossible that the spouses would ever be able to live in peace and harmony after such an experience.
- Still, the *Iddah* period of 3 months is observed with the husband maintaining the wife, without having sex to ensure that she is not pregnant. If she is pregnant, he is to look after her until the child is delivered.

V. TAFREEQ

This is granted when after consummation of the marriage, the wife wants a divorce but the husband refuses to give it. Once the arbitrators agree that *Tafreeq* should be pronounced the marriage is dissolved after the end of the *iddah* period.

The foregoing categories and procedure for divorce in Islam notwithstanding, we may still wonder how in reality a husband and wife divorce each other. Here, is a practical procedure of dissolution of marriage on the basis of Islamic jurisprudence in Uganda.

PRACTICAL PROCEDURE OF AN ISLAMIC DIVORCE

This section is intended to provide the family and children department of the Uganda police with some practical and legal guidance on divorce. In order to offer guidance beyond the purely theoretical or jurisprudential, we have described in particular the practice at the Uganda Muslim Supreme Council (UMSC), the umbrella organization of Sunni Muslims in Uganda.

In the event of the divorce, Muslims believe that an Islamic divorce is necessary to terminate the marriage contract, for complete assurance that they are divorced. Since the civil court cannot pronounce Islamic divorces, a Muslim must apply to the *qadhi* court to obtain a *Sharia* based divorce.

Divorce in Qadhi courts

- The *Qadhi* is an informal court system in Uganda with limited mandate to handle marriage and divorce, inheritance, succession and guardianship cases in line with the Islamic law. It only applies to Muslims who chose to seek family justice through Islamic law.
- There is a Qadhi court at every *Juma* (special Friday prayer) mosque in Uganda. All Qadhi courts operating in Uganda belong to one of the four recognized Islamic schools of thought; Hanafi, Shafi'i, Maliki and Hanbali. We have however described the practice at the National Mosque located at the UMSC headquarters Old Kampala.

Islamic divorce process at the national mosque

a. **Petitioner: Husband**

Men can divorce their wives unilaterally by pronouncing *talaq* three times either consecutively or on three separate occasions on the basis of the Islamic school

of thought by which the married couple abide. Once *talaq* has been pronounced, the wife enters the *Idda* period which lasts for three menstrual cycles (three months). If the husband and wife reconcile within the *Idda* period, the marriage continues. In the event that they have not reconciled within the *Idda* period, the marriage comes to an end. If the wife is pregnant, she will have to wait until the child is born before the *Idda* period commences. Although the husband is able to divorce his wife unilaterally without involving a *Qadhi* Court, the husband and/or the wife may apply to the *Qadhi* Court for an Islamic *talaq* certificate, which can be used as evidence that the couple is now divorced.

b. Petitioner: Wife

Unlike men, women cannot unilaterally divorce their husbands. As a result, majority of Islamic divorce petitioners at the National Mosque *Qadhi* Court are women. When a wife approaches the *Qadhi* Court to obtain a divorce she is asked to complete an application form, provide a valid identification card, together with a copy of her marriage contract and pays a minimal fee to the court when issued with a divorce certificate. If the petitioner does not have a copy of the marriage contract, she will be required to provide the *Qadhi* Court with a sworn statement along with evidence such as wedding photographs that the marriage took place.

At the application stage, the wife is required to justify the ground(s) for the divorce. The National Mosque applies grounds of Islamic divorce: for example; desertion, intolerance of a husband, consumption of alcohol and/or drugs among others. However, the petitioner must provide as much evidence as possible to substantiate her case. For example, if the petitioner alleges domestic violence, she will be asked to provide copies of court orders, medical reports and police records. Upon completion of the application process, the petitioner is invited to meet with the *Qadhi* Court's unit to discuss the marriage breakdown.

Following the reconciliation meeting, the Qadhi Court sends the Respondent up to three letters/notices, putting the Respondent on notice of the Petitioner's divorce application and requesting an immediate response. If the Respondent replies to the Qadhi Court's letter, a joint reconciliation meeting between the parties is arranged, providing both parties agree.

If the Respondent does not reply to any of the Qadhi Court's letters or the joint reconciliation meeting is unsuccessful, the next stage involves the parties presenting their case before the panel of arbitrators. Usually, three National Mosque Qadhi court arbitrators sit once in a month during which they rule on over five divorces.

At the final hearing the petitioner presents her case orally before the judges. Although respondents rarely attend, if they do they are also given the opportunity to present their case in the presence of the petitioner or separately. Both the petitioner and Respondent are asked to bring to the final hearing two witnesses to the events surrounding the marital breakdown. If they are unable to produce two witnesses they must provide reasons for their failure. In such circumstances, it is usual practice for the arbitrators to continue to arbitrate without the required witnesses. If the petitioner and respondent have children of the family, the petitioner is asked about current contact arrangements.

On the basis of the case presented, the arbitrators decide whether the petitioner should be granted a *Sharia* divorce and if yes, what 'type' of divorce should be granted. This usually depends on the petitioner's and respondent's circumstances. The UMSC recognizes three types of *Sharia* divorce following a wife's petition:

- i. ***Khul'a***, which is given when after the marriage has been consummated, the wife asks her husband for a divorce and he agrees. Once a *khul'a* has been pronounced and the *Idda* period ends, husband and wife are divorced.

- ii. **Tafreeq** (dissolution) is granted when after the marriage has been consummated, the wife asks for a divorce but the husband refuses to give it. Once the arbitrators agree that a *tafreeq* should be pronounced and the Idda period ends, the marriage is dissolved.
- iii. **Faskh** (annulment) is pronounced by the *Qadhi* Court when a marriage is fundamentally flawed (e.g. forced marriage) and the marriage has not been consummated. Once the divorce is finalized, the petitioner and respondent are issued with an Islamic divorce certificate.

NOTE:

There is a need to make a distinction between **divorce** and **separation** in Islam: If a husband and wife separate without undergoing any of the aforementioned forms of divorce, this does not amount to divorce in Islam. This is because if any of the aggrieved party contends that the other has separated from them, they can bring it as a substantial ground for the dissolution of a marriage contract.

REMEDIES OF THE PARTIES UPON DIVORCE

Court granting relief

Although the Marriage and Divorce of the Mohammedans Act, does not prescribe the remedies of the parties upon divorce, the court gives this relief. For instance, **Article 31(1)** of the 1995 Uganda constitution grants men and women of the age of 18 eighteen and above the right to marry and found a family and are entitled to equal rights in marriage during marriage and its dissolution. **Section 19** of the Act specifically provides that the Divorce Act shall not be applicable to parties who are married under Muslim Law.

Thus, the Divorce Act cannot be applied to Muslims who have contracted their marriage under Marriage and Divorce of Mohammedans Act. However, any competent court empowered to grant relief as provided for under Islamic law to the aggrieved party. Also, the High Court may exercise its inherent powers and grant appropriate remedies in accordance with Muslim law.

Islam grants various ancillary orders to the wife upon divorce as shown below;

i. Mahr:

Where the dowry has not been paid and has not been remitted to the wife, upon divorce, the wife is entitled to payment of the unpaid mahr and it is a debt against the husband. This is a woman's right on the basis of **Quran (4:4)** as discussed already.

ii. Maintenance of wife

Quran (65:6) provides the wife with the right to maintenance by the husband after dissolution of marriage, Allah Says:

Let the woman in Iddah in the same style as you live according to your means, annoy them not so as to restrict them. And if they carry life in their wombs then spend your substance on them until they deliver their burden.

Thus besides the obligation of maintenance, the man is also expected not do anything that may annoy the woman. If the woman is pregnant at the time of divorce, the husband is expected to support her until she delivers.

Although *Sharia* does not specify how much the husband can spend on the woman, it gives guidance that it should depend on one's financial ability: the rich according to his means and the poor according to his means **Quran (65:6-7)**.

iii. Right to Accommodation

Islam entitles a divorced woman to a suitable accommodation during the *Iddah* period. This right is considered in Quran (65:1);

When you divorce a woman, turn them not out of their houses nor should they themselves leave except in case they are guilty of some open lewdness.

According to *Shafi* School, such rights to accommodation cease at the expiry of the *Iddah* period; when the woman remarries or when she is proven guilty of open lewdness.

After the *Iddah* period a woman should find her own accommodation. In situations where the woman has custody of children, the husband is expected to provide a suitable accommodation to the divorced wife and her children until she remarries.

iv. Consolatory Gift (*Muta'ah*)

This is a gift which is paid to a woman when the divorce has not been caused by any defect on her part or by an application for *fask* for a defect or fault of the husband. In addition to their right to apply for maintenance, the Sharia provides that a woman who has been divorced without just cause by her husband may apply to the *Qadhi* for the consolatory gift, and the *Qadhi* after hearing the parties and being satisfied that the woman has been unfairly divorced, may order the husband to pay such sum as may be fair and just according to *Sharia*. The husband not only pays *Muta'ah* in the case of *Talaq* but also in case of *Khul'a*.

The purpose of this gift is to lessen the burden and difficulties caused by the divorce as well as to alleviate the suffering about hatred which may have been caused by the divorce.

In this regard the Quran (2:241) says:

“For divorced women Muta'ah should be provided on a reasonable scale. This

is a duty on the righteous.”

Also Quran (33:49):

“So give them a present and set them free in a handsome manner.”

And:

There is no blame on you if you divorce women before consummation or the fixation of their dower but bestow on them a suitable gift the wealthy according to his means and the poor according to his means – a gift of a reasonable amount is due from those who wish to do the right thing.(Quran 2:236)

The amount of *Muta’ah* normally depends on the agreement of both parties. Where parties fail to reach an agreement, it is fixed by the *Qadhi*. As the Islamic law stipulates, the amount of *Muta’ah* is fixed on the basis of the financial position of the parties, the status of family in the society and the position and circumstances of the wife.

v. Matrimonial Property

Upon divorce, Islam considers one’s personal property and jointly acquired property separately when providing guidelines to distribution of property between spouses. The Quran (4:32) says:

Unto men a fortune from that which they have earned, and unto women a fortune from which they have earned (envy not one another) but ask Allah of His bounty. Surely! Allah is Ever All-knower of all things.

Thus both men and women possess an earned fortune each; they each have the capacity to earn a living through their respective efforts. The guidelines on distribution of property between husband and wife also apply in case of death of either party and each has respective shares as provided under Quran (4:12)

The concept of matrimonial property in Islam is slightly different from that of

common law. Different factors have to be established as discussed below.

a. **Woman as an independent personality**

In Islam, a woman is an independent personality: She can enter into business; make contract or testament in her own name; own, sell, gift or manage her property including her *Mahr*:

But if you decide to take one wife in place of another, even if you had given the later a whole treasure for dower, take not the least bit it back.(Quran 4:20)

Further, the woman is entitled to inherit as mother, wife, sister and daughter. The Quran was clear and did not leave it to the discretion of woman's relatives to decide her share of property. Not only were her rights to inheritance defined, but also her share specified:

"From what is left by the parent and those nearest related, there is a share for men and a share for women, a determinate share, be the property large or small." (Quran 4:7)

Similarly, **Article 26(2)** of the Constitution of Uganda 1995 provides that "Every person has a right to own property either individually or in association with others". Also **Article 31(1) (b)** accords spouses equal rights in marriage and upon its dissolution.

b. **Jointly acquired property**

There seems to be no explicit injunction in Qur'an or *Sunnah* regarding the distribution of matrimonial property upon divorce. Most authorities suggest that when property has been acquired with joint efforts or contribution, then it can be distributed between the spouses. While jurists suggest that a written

agreement be made in case of any joint ventures between husband and wife, to avoid problems that may arise in future.

Uganda's judicial position on the sharing of matrimonial property was recently considered in the Supreme Court's decision in **Julius Rwabinumi vs Hope Bahimbisomwe**. The couple had been married under the Marriage Act. This decision provides the state of affair before the legislature comes out with a proper law on the division of property upon divorce. Although it was not an Islamic marriage, the above decision brings up issues which are similar to matrimonial property concepts under Islamic law concept of partnership. In particular, the justices concluded that marriage vows alone do not entitle one to share matrimonial property.

The 50% sharing of matrimonial property upon divorce is not automatic and it is dependent on many factors: The property acquired before marriage does not form part of matrimonial property unless otherwise intended. In addition, a person is entitled if he/she contributed to the acquisition of the property and not by virtue of marriage contract. Each spouse is free to individually acquire property without the other and if parties wish the property to be jointly owned should document it.

CHILD CUSTODY AFTER DIVORCE

Introduction

Children are usually the forgotten victims of divorce of their parents but they usually suffer the bitter consequences of deprivation of needs and an opportunity to be raised in a normal family with their mother and father. Most often, divorced couples fight over the custody of children and end up in court. Fortunately, the *Shariah* is very clear as it highlights the people suitable to have custody in order of priority.

Duration: 2Hrs

Unit Outcome(s):

After completing this unit, the participant:

- Explains with justification how to handle child custody issues for cases presented by the Muslim citizens.

Competence(s):

The participant:

- Explains how and who to grant custody of children according to Islam.
- Explains how children's interests are protected after divorce.

Content Outline

Unit	Content
4. Child Custody after Divorce	<ul style="list-style-type: none">• Custody of Children• The Issue of Age• Order of Priority of Child Custody Under <i>Shariah</i>• Provision for Children after Divorce

Instructional Materials:

- Module notes
- References given at the end of the module
- Flip Charts
- Computers/laptops
- Projector
- Any other suitable material from the facilitator's creativity

Methodology:

- Group discussion
- Question and answer
- Guided discovery

Learning Activities:

- Reading notes about Child custody in Islam and discussing in groups.
- Asking and answering questions about Child custody in Islam.

Learning Task 4:

In your groups, describe the issue of child custody in Islam.

CUSTODY OF CHILDREN

- Reference is made to a precedent of how the prophet (PBUH) handled cases about child custody. Amru b. Shuaib, Musnad Ahmad, Sunan Abi Dawud, and Mustadrak al-Hakim reported that a woman went to the Prophet (PBUH) and said:

“Truly my belly served as a container for my son here, and my breast served as a skin bag for him (to drink out Of) and my bosom served as a refuge for him: and now his father has divorced me and he (also) desires to take him away from me”

The Prophet (PBUH) said:

“You have a better right to have him as long as you do not marry again”

- Thus a mother is recognized as the fittest person to take care of the child due to the close relationship, love and tenderness mothers usually and naturally have for their children. Nonetheless, this right ceases when the mother remarries. Then custody is passed on to the next female relative on the basis of eligibility in the child’s interests. This does not imply that the father has no right or obligation towards his child; he still is still responsible for maintenance and monitoring the Islamic and general welfare of the child.

The issue of Age

- When the boy reaches the age of seven, he chooses which parent he would like to stay with. However, if he chooses a parent who would not take good

care of him, his choice would not be approved. Once the boy reaches the age of puberty he may stay with whoever he wishes.

- The girl’s father has the right to her custody once she is seven years old, only if this arrangement is in her best interest. The girl stays with her father from the age of seven until she moves out to her husband’s. Al-Tuwaiji (2000).
- Thus, child custody lasts until marriage consummation for a girl child and up to puberty for a boy child. After that time, the boy child is free to choose to stay with whosoever of their parents or relatives they want. Once a woman came to the prophet (PBUH) and said;

“My husband wants to take my son away from me”

The prophet (PBUH) said to the child;

“This is your father and this is your mother, so take the hand of whom you like.”

The boy took the hand of the father and they went together (Sunan al-Tirimidhi).

Order of priority of child custody under Sharia

The *Malik* School of jurisprudence lists the people suitable for custody of children after divorce or death as follows.

- i. The children’s mother
- ii. Mother’s mother
- iii. Mother’s grandmother (first maternal then paternal in absence of the former)

- iv. Mother's sister (full, then maternal, then paternal)
- v. Grandmother's sister
- vi. Mother's aunt
- vii. Father's mother or grandmother
- viii. Father
- ix. Child's sister
- x. Father's sister

Provision for children after divorce

However, the child's wellbeing and best interests are considered first before anything. Islamic Law takes into account the needs of children after divorce in a way that protects their best interests:

- a. The financial support for children both during marriage and after divorce rests solely on the father. The amount is open for negotiation and should be in proportion with the husband's financial means. However, the constitution of Uganda provides that it is a duty of both parents to look after their children. To this extent, both parents are equally responsible.
- b. Fairness: the Quran advises the husband and wife to consult each other in a fair manner regarding their children's future after divorce (2:233). This verse specifically holds that infants who are still nursing may continue to breast feed until both parents agree on the period of weaning through "mutual consent and counsel." This spirit defines a co-parenting relationship.
- c. Best interests of a child; Islamic law stipulates that physical custody of children must go to a Muslim who is in good physical and mental health, and is in best position to meet the children's needs. Some have ruled that custody is awarded to the mother if the child is under a certain age and to the father if the child is older. Others would allow the older children express a preference.

ISLAMIC TEACHINGS ON INHERITANCE

Introduction

This unit provides an overview of the Islamic teachings on inheritance with the aim of increasing the awareness of the family and children department of Uganda police about the rules and the procedures regarding inheritance among the people professing the Islamic faith. Specifically, we have explained the duties performed upon the death of a Muslim before wealth distribution, who should inherit from a Muslim, how much they should inherit and the rules of construction in the distribution.

Duration: 2Hrs

Unit Outcome(s): Upon completing this unit, the participant;

- Explains the issue of inheritance in Islam including who should and who should not inherit and how much they should inherit.

Competences(s): The participant;

- Explains the issue of inheritance in Islam including who should and who should not inherit and how much they should inherit.

Content Outline

Unit	Content
5. Islamic Laws on Inheritance	<ul style="list-style-type: none">• Inheritance in Islam• Duties performed Upon death of a Muslim• Who has the right to inherit?• What proportions should they inherit?• Rules of construction in the distribution• Who cannot inherit?

Instructional Materials

- Module notes
- References given at the end of the module
- Flip Charts
- Computers/laptops
- Projector

Methodology

- Think pair share
- Group discussion
- KWL

- Guided discovery
- Role play
- Reflection

Learning Activities

- Brainstorming about inheritance; who should inherit, how much they should inherit.
- Reading unit notes
- Role playing an inheritance case

Task 5

- Create different incidents of distributing property among relatives of:
 - a. A deceased Muslim husband who has left behind; one legal wife with two sons and three daughters, one of whom is married to a non-Muslim husband, a mistress with two sons, a mother, two sisters, one brother,
 - b. A deceased Muslim wife who has left behind; a husband, a mother, a father, one son, two sisters and five brothers.
- Write a reflective paper on the activity you carried out. Analyse how fair inheritance in Islam is.

INHERITANCE IN ISLAM

Unlike African tradition in which women should not expect to inherit anything from their deceased relatives including their parents and husbands, Islam liberated women and they are entitled to a defined share of inheritance. This is emphasized in the Qur'an:

“For men is a share of what the parents and near relatives leave. And for women a share of what the parents and near relatives leave, whether it be little or much an appointed share” (4:7-12)

With regard to widows, the Qur'an says:

“And to your wives belongs the fourth of what you leave if you have no child, their share is the eighth of what you leave after payment of a bequest you may have made or a debt”(4:12)

The Quran also says,

“And if any of you die and leave behind wives, they bequeath thereby to their widows (the right to) one year's maintenance without their being obliged to leave (their husband's home), but if they leave (the residence) of their own accord, there is no blame on you for what they do with themselves in a lawful manner.” (2:234)

Thus widows are entitled to inherit from their husbands and one year's maintenance. They are also at liberty to re-marry, even within the period mentioned above; and if they do so they must forgo their claim to traditional maintenance during the remainder of the year.

Inheritance can only be considered after a person's death. However, before we think of inheritance in Islam, certain duties have to be performed regarding the deceased's property as soon as they die.

Duties performed instantly upon death of a Muslim

- Payment of funeral expenses
- Payment of his/her debts. It may be remembered that the Mahr of the wife, if it had not been paid, is included in the debt.
- Execution of his/her will
- Distribution of remaining estate amongst the heirs according to *Sharia* Law.

Who has the right to inherit?

- Children
- Parents
- Wife/husband
- Grandparents
- Grandchildren

What proportions should they inherit?

NB: Before distribution, all debts and specific bequests have to be deducted.

- A male child gets twice that of a female, i.e. $\frac{2}{3}$
- If there are only daughters; of the inheritance
- If only one daughter her share is

- Parents, if the deceased left children
- If there are no children, the parents are the only heirs: the mother and the father $\frac{2}{3}$
- If the deceased left no children) but left brothers the mother has

From what wife or husband leaves;

- A man's share is if the woman left no child
- A man's share is of the wife's share after deducting the children's share.
- A wife's share is if the husband leaves no child
- A wife's share is if the man left children
- If a man has neither ascendant or descendants (parents and children) but has a brother or sister, each gets but if they are more than two each gets

Rules of construction in the distribution

- The word child has been construed to mean grand children (agnatic)
- The word parent/father/mother has also been construed to include grandparents.
- References to brother/sister have been construed to mean uterine brother/sister.

- If the wife dies leaving her parents and a husband the other half; goes to the wife’s father and the to the wife’s mother.
- Siblings referred to in the Qur’an are uterine siblings (those with the same mother even if fathers are different)
- The uterine siblings only inherit in the absence of any descendants or ascendants.
- Under Islamic law some of the heirs, namely the father, paternal grandfather, daughter, agnatic granddaughters, full sister, consanguine sister and the mother, can also inherit as residuary under certain circumstances.
- A person (e.g. brother) who is related to the deceased through another (i.e. father) is excluded by the presence of the latter.
- An individual nearer in degree (proximity) to the deceased excludes the one who is remoter without the same class of heirs (son excludes all grandsons).
- Full blood excludes half blood through father (so a full brother will exclude a consanguine brother but not a uterine brother)
- The majority view is at a full consanguine brother is not excluded by the paternal grandfather. However, the *Hanafi fiqh* allows the paternal grandfather to totally exclude the agnatic siblings.
- Heirs may also be prevented from inheriting by disqualification. The only two practical situations which are causes of disqualification are difference of religion and homicide.

Who cannot inherit?

- A murderer cannot inherit from the person they murdered. Allah’s Messenger (PBUH) said “*One who kills a man cannot inherit from him*” (Tirimidhi & IbnMajah). All the jurists agree that intentional or

unjustifiable killing according to Sharia is a bar to inheritance.

- A child born out of wedlock does not inherit from their deceased father, nor does the alleged father inherit from such a child. In fact, no one inherits from illegitimate children (Tirmidhi). Only relatives with legitimate blood relations to the deceased are entitled to inherit from the deceased under Islamic law. Incidentally legal adoption as practiced in the west is for bidden in Islam.
- People from different religions do not inherit from each other. A Muslim does not inherit from an infidel, nor does the infidel inherit from a Muslim (Bukhari and Muslim). The Prophet Muhammad (PBUH) said, “*A Muslim cannot be the heir of a disbeliever, nor a disbeliever be the heir of a Muslim*” (Sahih al – Bukhari). However, the *Hanifi fiqh* allows a Muslim to inherit from an apostate.

THE WILL OF A MUSLIM (*Al-wasiyya*)

Introduction

When a Muslim dies, execution of his/her will is one of the four duties which need to be performed. This unit therefore provides an overview of the **Islamic law** pertaining to the **Islamic will**. It is intended to arouse awareness to the family and child department of the Uganda police force regarding this important aspect of Islamic law. In particular, we have highlighted; the key principles of an Islamic will, the Legatee, how the will should be executed, the commonly asked questions about the Islamic will and the challenges to the application of the Muslim succession law in Uganda.

Duration: 2Hrs

Unit Outcome(s): Upon completing this unit, the participant;

- Expresses understanding of the nature of an Islamic will and its execution.
- Recognizes the various challenges to the application of the Muslim succession law in Uganda.

Competence(s): The participant;

- Describes the nature of an Islamic will and how it is executed.
- Discusses the various challenges to the application of the Muslim succession law in Uganda.

Content Outline

Unit	Content
6. The Will of a <i>Muslim</i> (<i>Al-wasiyya</i>)	<ul style="list-style-type: none">• Key Principles of an Islamic will• The <i>testator</i> (<i>Al-Musi</i>)• The <i>Legatee</i> (<i>Al-musalahu</i>)• Execution of the Will<ul style="list-style-type: none">- Duties of the Executor• Commonly asked questions about the will.• Challenges to the Application of the Muslim Succession Law in Uganda<ul style="list-style-type: none">- Effect of the Succession Act Cap 162- <i>Abbasi Magunda & Anor V Sulaiman Senoga & Others</i> (1995)1V KALR 172- Other Legislations and Institutions affecting Muslim inheritance- Department of Administrator General- Judicial attitude of Ugandan courts to Muslim succession- Problems of distributing a Muslim Estate- The problem of conflict of laws.

Instructional Materials:

- Module notes
- References given at the end of the module
- Flip Charts
- Computers/laptops

- Projector
- Any other suitable material from the facilitator’s creativity

Learning Activities

Task 6

Analyze the case of **Abbasi Magunda & Anor V Sulaiman Senoga & Others (1995) IV KALR 172:**

- a. As a police officer listening to this case as presented by one of the complainants, how would you advise them?

KEY PRINCIPLES OF AN ISLAMIC WILL

Muslims are urged to consult an Islamic scholar and legal expert when writing a will, to ensure that the will complies with the Islamic law as well as the national laws. The Islamic will is called *al-wasiyya*. It is a transaction which comes into operation after the testator’s death. The will is executed after payment of funeral expenses and any outstanding debts. The one who makes a will (*wasiyya*) is called a testator (*al-musi*). The one on whose behalf the will is made is generally referred to as a legatee (*al-musalahu*). Technically speaking the term “testatee” is perhaps a more accurate translation of *al-musalahu*. Below are the key principles of an Islamic will:

- The Islamic will includes bequests and & legacies, instructions and admonishments, and assignments of rights.
- The will should comply with the law of the land so that it can be executed

after a person's death without any unnecessary legal problems. Needless to say nothing in the will should contradict *Sharia* law.

- *Sharia* places two restrictions on the testator: first, to whom he can bequeath his estate and secondly, the amount he can bequeath. The majority view is that a bequest in excess of one-third of the net estate is invalid unless consented to by the legal heirs as is bequest in favour of a legal heir.
- No specific wording is necessary for making a will. The will can be oral or written, and the intention of the testator must be clear that it is to be executed after his death. Any expression which signifies the intention of the testator is sufficient for the purpose of constituting a bequest.
- However, **Section 50** of the Succession Act prescribes that a will must be in writing. To that extent, oral wills are inadmissible under the laws of Uganda.
- There should be two witnesses to the declaration of the written will.
- Where there are no witnesses the will is still valid if it is written in the known handwriting/signature of the testator (*Maliki* and *Hanbali* schools of thought).
- The will is executed after payment of debts and funeral expenses. The majority view is that all debts of Allah such as *Zakah*, obligatory expiation etc. Should be paid whether mentioned in the will or not.
- Legal heir in this context is one who is a legal heir at the time of death of the testator.

The testator (Al-musi)

- Every adult Muslim with reasoning ability has the legal capacity to make a will
- The testator has the right to revoke his will by a subsequent will, actually or by implication.

In traditional Islamic Sunni law, the power of a testator is limited in two ways;

a) He cannot bequest more than unless the other heirs consent to the bequest, or there are no legal heirs at all, or the only legal heir is the spouse who gets his/her legal share and the residue can be bequeathed.

b) The testator cannot make a bequest in favour of a legal heir under traditional Muslim *Sunni* law. However, some Islamic countries, do allow a bequest in favour of a legal heir provided the bequest does not exceed the acceptable

- Legal heir in this context is one who is a legal heir at the time of death of the testator.

The Legatee (*Al-Musalahu*)

- Generally, for a bequest to be valid a legatee must be in existence at a time of death of the testator except in the case of a general and continuing legatee such as the poor, orphans etc.
- The legatee must be capable of owning the bequest and the bequest made in favour of any legal heir already entitled to a share is invalid under traditional *Sunni* Muslim law unless consented to by the other legal heirs.
- Acceptance or rejection of a bequest by the legatee is only relevant after the death of the testator and not before and once the legatee accepts or rejects a bequest he cannot change his mind subsequently.
- If the legatee dies without accepting or rejecting the bequest the bequest becomes part of the legatee's estate (*Hanifi fiqh*), because non-rejection is regarded as acceptance.
- All the *Sunni* jurists agree that if the legatee dies before the testator, the bequest is invalid since a bequest can only be accepted after the death

of the testator.

- If there is uncertainty as to whether or not the legatee survived the testator, such as a missing legatee, the bequest is invalid because the legatee must be alive at the time of death of the testator for the will to be valid.
- If the testator and legatee die at the same time such as in an air crash and it is not certain who died first, the bequest is invalid (*Hanifi, Malik & Shafii fiqh*). While to the *Hanbali fiqh*, the bequest devolves upon the legatee's heir who may accept or reject it.

EXECUTION OF THE WILL (Al – Wasi Al – Mukhtar)

NOTE: The executor (al –Wasi) of the will is the manager of the estate appointed by the testator.

Duties of the executor

- Work towards the good interests of the beneficiaries
- Be just in the distribution
- Be trustworthy
- If one starts acting as an executor, one will be regarded as having accepted the appointment, both in Islamic and in English law.

COMMONLY ASKED QUESTIONS ABOUT THE WILL:

People usually ask:

Qn.1. What is the difference between a Muslim who distributes his property in his life time and that who gives them away in a Will?

Answer: *The Shariah allows a Muslim to use his property in any way he/she likes provided it is not prohibited (haram). This includes giving away his property to anyone. But the Shariah does not permit us to distribute our property in a Will in any manner we may wish because the effect of the Will is usually to surprise the beneficiaries with gifts and this is after the death of the testator. Therefore the effect of the distribution in a Will is after death. The Shariah has given limited opportunity to a Muslim to distribute only a few of his property in a Will to the extent of a third of all his/her property. Therefore the distribution during one's life is not the same as that made in a will.*

Qn.2. Is it proper for me to help those who will distribute my property after death to guide them so as to give such property to such a person or to give such a person in such a place or give more property to youngest kid because others are mature and can work for themselves?

Answer: *A Muslim making a Will has no legal status that allows him to give instructions of how the distributors would perform their duty.*

Qn. 3. Can a Muslim make a request in a Will for the delay of distribution of certain property for the sole purpose of helping his children who are still school going to pay for their school fees and thereafter be distributed as the Shariah instructs?

Answer: *It is possible if we are certain that after the distribution of the*

estate the children who are school going may not be able to continue with their education. But this must be done within a reasonable time.

Qn. 4. Can a Muslim make a Will that all the property in the house should belong to his beloved wife?

Answer: *The Sharia does not allow him to do so. But it allows her to take things commonly used by her such as bed, mattress, bed sheets and her clothes.*

Qn. 5. A Muslim makes a will in which he declares his only wife to be the sole guardian to their three infant children born out of their marriage. Hence all the property belongs to the wife and the children.

Answer: *this is not possible in Islam. The Islamic principles are clear regarding inheritance. No one can change them. Each one is entitled to a share unless one rejects his or her entitlement. Therefore the property should be distributed notwithstanding that all the children are minor and being looked after by their mother.*

Although the aspect of inheritance and other related matters also form part of worship in Islam, there are challenges that impede the Muslim succession law from its proper application in Uganda. These include but are not limited to;

EFFECT OF SUCCESSION Act Cap 162

Muslims in Uganda find it difficult to reconcile the provisions on interstate succession in the Succession Act with the *Sharia* law governing interstate succession.

The law relating to wills is covered by **Succession Act, Section 1** which provides that: *except as provided by this Act or by any other law for the time being in force, the provisions in this Act shall constitute the law of Uganda applicable to all cases of intestate or testamentary succession.*

The Succession Act does not have specific provisions for Muslim succession; the current position is that a Muslim may apply for **exemption from the provisions of the Succession Act** under **Section 334(1)**. The section provides that;

The Minister shall have power from time to time, by statutory order, either retrospectively from the passing of this Act, or prospectively, to exempt from the operation of the whole or any part of this Act, any class or classes of persons, in Uganda or any part or parts of such class or classes to whom he or she may consider it impossible or inexpedient to apply the provisions of this Act, or of the part of the Act mentioned in the order.

The effect of the Succession Act is that there is a conflict of law between Islamic law and the Succession Act. The application of the Succession Act on Muslims has led civil courts to construe provisions of Islamic law through the lenses of civil law, as portrayed in the case below;

Abbasi Magunda & Anor V Sulaiman Senoga & Others (1995) IV KALR 172

The case arose from a contentious application for grant of probate of the will of the late Hajji Amisi Magunda. The plaintiff alleged that the deceased had died testate leaving an executed will in which the plaintiff were appointed executors. The defendants unlawfully lodged a caveat on the plaintiff's application alleging that the will was invalidly made because the testator was of unsound mind

and that the two witnesses were not aware of the contents of the will. The defendant pleaded that even if the will was properly and validly made which they denied, it contravened the tenets of *Sharia* law under which the deceased had lived throughout his life. The late Byamugisha J held that the law governing the capacity to make a will is to be found in the Succession Act. The court held that the deceased died testate; in particular the late Byamugisha J said:

*Our laws of succession have been codified. They are to be found in Succession Act **Cap 139** (now **Cap 162**), The Administration of Estate (small Estate special provisions Decree 13 of 1972) and the Administrator General Act **Cap 140** (now **Cap 157**). There is thus no such thing as clan or customary or religious succession law... ..even if there was a succession law under *Sharia* for a Muslim that would not be applicable in this case because the deceased had opted out of that by making a will. In making a will, the deceased opted to dispose of this property in a manner other than under *Sharia*,*

The implication of this decision is that the court may uphold a will made by a Muslim even that decision contradicts rules of Islamic inheritance. So far no statutory order has been issued by the minister to exempt the Muslims from the application of the Act. This means that Muslims will continue to be governed by this law until a proper legislation that recognizes their personal law has been enacted.

Other Legislations and Institutions Affecting Muslim Inheritance

Among the legislations is the **Administrator General's Act Cap 157**, that underlines the procedural rules with regard to the administration of non-small estate matters, provided that the deceased died testate and the value of the estate is more than 50 million. The obtaining of grant of probate or a letter of administration from the High Court is the first requirement for such estates to be administered. The appointed executor or administrator by a will is entitled to apply for a grant of probate by way of a petition filled in the High Court. In the absence of any executor appointed by will, letters of administration with the will annexed may be granted to the person or persons that the High Court deems

fittest to administer the estate; this could be a lawful beneficiary or creditor of the deceased.

Secondly, **Section 10 (2)** of the Administration of Estate (small estate) special provisions Act **Cap 156**, provides that this Act shall apply to small estates specified in **section 2** of the person dying before or after the coming into force of this Act. This implies that the estate of a deceased Muslim is also administered in the same Act as there is no exemption given for it. Total application of this law may not take into account the key issues of Islamic inheritance.

Department of Administrator General:

The Department of Administrator General is governed by the Administrator General's Act. Cap 157. It is mandated to ensure that all estates of deceased persons brought to the attention of the department are administered in accordance with the succession laws in Uganda. The Department handles proper management of estates of deceased persons, missing persons, properties of minors and people of unsound mind in conformity with the relevant laws. It issues the certificates of no objection, giving legal advice, counseling and mediation services in a bid to resolve succession wrangles, sensitization of the public on matters of succession, among other services.

The challenge faced by Muslims is that *in* arranging for the disposition of a Muslim's estate, legal representatives often have to deal with both the Department of Sharia at UMSC and the Civil Courts. Albeit for different purposes Grants for probate or letters of administration are issued either by the High Court or Magistrate Court, depending on the value of the deceased estate. If the deceased Muslim made a will, the High Court or the Magistrate Court, as the case may be, is to enforce it to the extent that it is consistent with the laws of Uganda and not Islamic law.

It should be noted that the Sharia Court at UMSC has neither absolute jurisdiction to determine validity or disputes pertaining to wills purportedly made under Muslim law, nor does it have any power to enforce them. At the moment, their role is advisory and they also act as mediation Centre for matters concerning Muslim personal law.

Judicial attitude of Ugandan courts to Muslim succession

The application of the Succession Act on Muslims has led civil courts to construe provisions of Islamic law through the lens of civil law. Some judicial decisions on Muslim inheritance remain controversial and civil courts have maintained the correctness of their decisions on the basis of the doctrines of judicial precedent and common law principles. Consequently, the courts have failed or remain reluctant to refer to Islamic law on such matters.

Uganda has a uniform law of succession. This therefore means that Muslims who would wish to be governed by the Islamic law of inheritance do not get justice in the regular civil courts of law. Under the Succession Act, Islamic law of inheritance will apply where the deceased professed Islam and made a written or oral declaration that he intended his estate to be administered according to Islam. While civil law recognizes any will that conforms to the Succession Act, a Sheikh in charge in Islam may reject a will if he deems it un-Islamic. The situation becomes even worse when a Muslim dies without making a will and is subjected to the interstate provisions of Succession Act

More so, the jurisdiction power of the High Court related to Muslim estate matters is greater than the *Sharia* court of UMSC on the grounds that the procedural aspects of the administration of Muslim estates, either testate or intestate, and the authority to issue probate and letters of administration, regardless of the types and the values of the estates come within the jurisdiction of the High Court.

The role of the *Sharia* Court at UMSC is only limited to observing the distribution in accordance with Islamic law and issuance of the distribution list which shows the beneficiaries and their respective shares in the estate of a deceased Muslim. Any complaint arising out of the distribution of the deceased property is handled by the High Court.

Problems of distributing a Muslim Estate

Under its constitution, the UMSC established the department of *Sharia* responsible for the distribution of the estate of a deceased Muslim. Property of a Muslim is distributed to the beneficiaries by a Sheik experienced in property distribution who is appointed by the Department of *Sharia*. However, the decisions of this department lack enforcement as it is usually regarded as a religious court rather than a civil court under the judiciary.

While arranging for the disposition of a Muslim estate, a legal representative often has to face both the religious law through the Department of *Sharia* and the civil courts. This involves obtaining letters of administration/probate from the court and sorting out matters within the Administrators General Office, which can be costly and hectic.

Moreover, even when a deceased Muslim left a will, the High Court or Magistrate Court, as the case may be, is to enforce it to the extent that it is consistent with the Succession Act. The civil courts are not obliged to request for a ruling from UMSC to determine whether the will is valid under Muslim law. Yet UMSC and its organs have neither jurisdiction to determine validity or disputes pertaining to wills purportedly made under Muslim law, nor do they have any power to enforce them. Their role has been advisory but not enforcement.

The problem of conflict of laws

One of the legacies of the colonial rule is that Islamic law was tagged as a customary law. As aforementioned, the single tier of courts in Uganda has jurisdiction over both Islamic and customary law. However, in case of controversy as to the law applicable between customary and Islamic law the matter is to be referred to the High Court. On several occasions, Muslim law is termed as customary law and this has led to controversies. Thus, where there is a conflict between customary law and Islamic law, the High Court is empowered to decide the law applicable.

Conclusion

Muslim personal law regarding marriage, divorce, inheritance and child custody is recognized by the constitution as we have discussed throughout this module. However, its application is limited by several challenges including lack of awareness by the law enforcement officers especially the Police to which is the first recipient of conflicts in society. Having highlighted the various aspects of Muslim personal law and the challenges to its enforcement, we are hopeful that personal issues of Muslim citizens will be dealt with from an informed point of view.

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