INTRODUCTION TO ISLAMIC LAW

What is Islamic law?

Is the code of law derived from the Koran and from the teachings and example of Mohammed; or

The law according to the Muslim faith and as interpreted from the Koran, also known as Sharia law, sometimes referred to as Muslim law or even *Muhammadan law.*

Sources of Islamic Law

1. **Qur'an**

The Qur'an is the first and most important source of Islamic law. Believed to be the direct word of God as revealed to Muhammad through angel Gabriel in Mecca and Medina, the scripture specifies the moral, philosophical, social, political and economic basis on which a society should be constructed. The verses revealed in Mecca deal with philosophical and theological issues, whereas those revealed in Medina are concerned with socio-economic laws. The Qur'an was written and preserved during the life of Muhammad, and compiled soon after his death.

2. **Sunnah**

The Sunnah is the next important source, and is commonly defined as "the traditions and customs of Muhammad" or "the words, actions and silent assertions of him". It includes the everyday sayings and utterances of Muhammad, his acts, his tacit consent, and acknowledgments of statements and activities.

According to Shi'ite jurists, the sunnah also includes the words, deeds and acknowledgments of the twelve Imams and Fatimah, Muhammad's daughter, who are believed to be infallible.

Justification for using the Sunnah as a source of law can be found in the Qur'an.

The Qur'an commands Muslims to follow Muhammad. During his lifetime, Muhammad made it clear that his traditions (along with the Qur'an) should be followed after his death. The overwhelming majority of Muslims consider the sunnah to be essential supplements to and clarifications of the Qur'an.

In Islamic jurisprudence, the Qur'an contains many rules for the behavior expected of Muslims but there are no specific Qur'anic rules on many religious and practical matters. Muslims believe that they can look at the way of life, or *sunnah*, of Muhammad and his companions to discover what to imitate and what to avoid.

3. Consensus (ijma) also called analogy

The *ijma'* or consensus amongst Muslim jurists on a particular legal issue, constitutes the third source of Islamic law. Muslim jurists provide many verses of the Qur'an that legitimize *ijma'* as a source of legislation. Muhammad himself said:

- "My followers will never agree upon an error or what is wrong",
- "God's hand is with the entire community".

In history, it has been the most important factor in defining the meaning of the other sources and thus in formulating the doctrine and practice of the Muslim community. This is so because *ijma'* represents the unanimous agreement of Muslims on a regulation or law at any given time.

4. Analogical deduction (Qiyas)

Qiyas is the process of legal deduction according to which the jurist, confronted with an unprecedented case, bases his or her argument on the

logic used in the Qur'an and Sunnah. *Qiyas* must not be based on arbitrary judgment, but rather be firmly rooted in the primary sources.

According to Hadith, Muhammad said: "Where there is no revealed injunction, I will judge amongst you according to reason." Further, he extended the right to reason to others.

Distinction between Islamic Law and other laws

The Constitution of the United Republic of Tanzania article 19(1) provides for right to freedom of religion in the following words *"every person has the right to the freedom to have conscience, or faith, and choice in matters of religion, including the freedom to change his religion or faith".*

Therefore the Constitution of United Republic of Tanzania[1] respects and recognizes freedom of religion not only Islamic but also other religions, to that effect all religions in Tanzania are of the same status.

Also the above provision is to effect that Tanzania is a Secular state in which there is no state religion and the government does not have any religion but it respects and protects the religions of its citizens.

All religious institutions and activities are separated from government institutions and affairs.

According to the Magistrate Court Act[2], section 18 and section 11 of the Judicature and Application of Laws Act[3] and other written laws provide that Islamic laws are applicable in matters of marriage, divorce, guardianship,

[1] Cap 2 of laws of Tanzania as amended from time to time
[2] [Cap 11 R.E 2002]
[3] [Cap 358 RE 2002].

inheritance, wakf and similar matters in relation to members of a community which follows that law (muslims).

Therefore Islamic law regulates some specific aspects among members of Islamic faith only while other laws are applicable to all people regardless of their religious affiliation.

Also Islamic law is applicable to disputes of civil nature only and wherever a conflict arises between Islamic laws and state laws the latter shall prevail.

Current Basis for the Application of Islamic Law

The applicability of Islamic law is based on the is based on the followings;

1) Constitution[4]

There is no express provision in our constitution which declare applicability of Islamic law. However Article 64(5) of United Republic of Tanzania of 1977 is given purposive meaning to include Islamic law, as it allows applicability of any law which is not repugnant to the constitution.

The mother of all laws is the Constitution, it therefore follows that any law of the land must be in conformity with the constitution; otherwise, such a law would be declared unconstitutional or ultravires the constitution and would be of no legal effect.

Also article 19(1) provides for right to freedom of religion in the following words *"every person has the right to the freedom to have conscience, or faith, and choice in matters of religion, including the freedom to change his religion or faith".* Therefore the Constitution of United Republic of Tanzania respects and recognizes freedom of religion not only Islamic but also other religions in Tanzania.

[4] ibid

2) Magistrate Court Act[5]

Section 18 provides that the law applicable to primary court is customary law and Islamic law on civil cases in relation to administration of estate, guardianship, maintenance and matrimonial causes.

3) The Judicature and Application of Laws Act[6]

Section 11(1)(c)(ii) allows the courts to apply rules of Islamic law in matters of marriage, divorce, guardianship, inheritance, wakf and similar matters in relation to members of a community which follows that law.

4) Law of Marriage Act of 1971

Section 10(2) and 25(1)d recognize Islamic marriage to be contracted according to Islamic rites of the parties.

5. Islamic Law (Restatement) Act[7]

This Act requires the Minister responsible for legal affairs to codify and regularly publish statements of Islamic law in the Government Gazette. This, however, did not materialize then and nothing has been done to date.

6. Probate and Administration of Estates Act[8]. S. 88

The provisions of this law provide that the estate of a deceased Muslim shall be governed in accordance with Islamic law where the deceased intended his estate to be determined according to such law.

ISLAMIC FAMILY LAW

[5] ibid
[6] ibid
[7] Act No. 56 of 1964.
[8] Cap. 352 [R.E. 2002]

A. Meaning and formation of Marriage

According to Islamic law, marriage means a contract concluded between a man and a woman who is free from any legal constraint which legalizes their sexual relationship. Legally a Muslim marriage is considered as a contract, because the elements which constitute a marriage and manner in which it is completed is almost similar to that of a civil contract.

This concept of marriage is contrary to the Law of Marriage Act, section 9, which defines marriage as the voluntary union of a man and a woman, intended to last for their joint life.

In Tanzania, Islamic marriage is recognized by the Law of Marriage Act of 1971, under section 10(2) (a).

However, the LMA is silent on how Islamic marriage should be conducted in Islamic form hence the need to study Islamic family law comes in place.

ESSENTIAL ELEMENTS OF ISLAMIC MARRIAGE

1. Marriage formula
2. Contracting parties
3. Witnesses
4. Marriage guardianship
5. Dower

MARRIAGE FORMULA

As other contract Islamic marriage should presided over by offer and acceptance. The offer is a declaration of one party to create a marital relationship, while acceptance is a mutual assent given by other party to whom the offer is communicated to show acceptance to that offer. Offer and acceptance are made by parties themselves or by guardian or agent. When the consent has been given to the proposal of marriage, it becomes an engagement, and usually certain time is allowed to pass before the marriage *(Nikah)* is performed.

This period allows the parties to study each other further, so that if there be anything undesirable in the union, the engagement may be broken off by either party; it is only after the Nikah has been performed that the two parties are bound to each other.

CONTRACTING PARTIES

A marriage must be contracted with competent parties. By competent parties it means and includes the following;

1. Maturity of age

The parties who want to enter into Islamic marriage must be above the age of majority. According to Islamic law, age of majority is not determined by reaching the age of 18 years, but it is considered by reaching the age of puberty.

The age of puberty means a sound mind and acquire sexual competency. According to Hedaya, the earliest possible age of puberty with respect to boys is 12years and with a girl 9 years. But this cannot be as absolute rule regarding the age of marriage because sexual competence is varied.

However, the LMA differs with Islamic law position as parties to marriage should attain the age of 18 years for boys and 15 years for girls. But they can contract marriage below than age by the order of the court.

The requirement of the age of puberty is essential not only for the competence for consummation, but also to enable the parties to give their consent freely.

2. A woman should not be in a class of woman not to be married

A woman who intended to enter into marriage contract should not be the one who is under those woman that one cannot marry as well as we shall see later.

WITNESSES

According to Islamic law marriage must be witnessed by a competent witness and if not, the marriage is void. Those who witness the marriage contract must be competent to enter into a valid marriage, which means they should have attained the age of puberty and sound mind. The number of witnesses should be two, male or one male and two females.

The witnesses should hear both contracting parties their statements (offer and acceptance) The LMA recognizes the presence of witnesses as per section 27(1). It provides for the competence of witnesses as they must be above 18 years and be able to understand the nature of the ceremony.

MARRIAGE GUARDIANSHIP

According to Islamic law marriage must be consented by a guardian of a girl, since it is presumed that she has no capacity to give consent for marriage. Therefore a marriage of a girl without the consent of her guardian is void. Section 7 of LMA require the same

Who should act as a guardian?

According to Shaffei, the guardian of a girl must be from paternal male relations. This means that from father side of the girl. In case if it appears that a guardian refuse to give his consent to the marriage without justification then other guardian will take the chance and if all refuse then the court will give the consent.

DOWER (AL MAHR)

Dower (al mahr) is a money worth which is payable by husband to his intended wife in consideration of their union. Dower not necessarily be money, it can be anything which has a value.

According to Holy Quran, the dower is given as free gift by the husband to the wife at the time of contracting marriage.

Amount of Dower: No hard and fast rule has been specified by the Holy Quran about the amount of dower.

It has to be adjudged according to the social status of the parties, their wealth, their personnel qualifications, and the condition of human society.

Dowry is the free gift by the parents to their daughter at the time of their marriage. Dowry is quite different from dower which is a payment made by the bridegroom to her bride in terms of contracting marriage.

Dowry may be given in form of cash, utensils, furniture, ornaments, or clothes. The idea behind dowry is to help the newly formed family to set up a home of their own. Dowry has no legal requirements in Islam.

IMPEDIMENTS TO MARRIAGE/Prohibited relations

a) Consanguinity
b) Affinity
c) Fosterage/suckling

A. CONSANGUINITY

Means persons with close blood relationships or relationship by birth

According to Quran 4:23; someone is prohibited to marry the following:

a) Mother,
b) Daughter
c) Sister
d) Maternal aunts
e) Paternal aunts
f) Brother’s daughter
g) Sister’s daughter

B. AFFINITY

Means a relationship resulted from marriage

a) Father in law
b) Mother in law
c) Step grand mother
d) Daughter in law

C. FOSTERAGE/SUCKLING

Marriage with a woman to whom a man is related by fosterage is forbidden. Foster mother includes her mother, her foster mother, and the foster mothers of one's parents. Foster sisters include foster brothers. The rationale is that woman who sucked a boy or a girl should be treated as the real mother and her husband as the real father with regard this prohibition.

The LMA also provides the provisions for prohibited relationship which means those that one cannot marry as per section 14

Rights and Obligations in the Spousal Relationship

1. Conjugal sex relations

Sexual intercourse becomes lawful after marriage but it is not permissible under the following circumstances

a) A man is not allowed to have sexual intercourse with his wife during menstrual period.
b) It is not permissible to have a sexual intercourse after birth of a child till the stoppage of blood.
c) It is unlawful to have sexual intercourse during the hours of fasting. It is not prohibited during the nights in the month of Ramadan.
d) It is strictly prohibited to have sexual intercourse with the wife through her anus.

e) Homosexuality is strictly prohibited

2. Maintenance

The husband is responsible for the maintenance of his wife, no matter rich she may be. He should bear the responsibility of supplying her clothes to wear, food to eat and an abode to reside.

The Islam law obliges the husband to fulfil all the necessities of her wife as long as she remains his wedded wife.

In the matter of maintenance the position and status of both the parties shall be taken into account. If both husband and wife are rich then food and clothing of the wife shall be of the same standard and if both are poor then it should be of that standard. If one of them is rich while the other is poor, then the food and clothing should be of average standard.

POLYGAMY IN ISLAM

The Holy Quran grants permission of taking more than one wife under the proviso of justice. The verse which permits up to four wives also contains a clear order that if you cannot do justice, you should keep one wife only.

In short polygamy in Islam came into practice to serve the interests of the weaker sex; this is the spirit of Islamic law of polygamy.

The LMA recognizes Islamic marriages as polygamous as per section 10(2)(a)
A marriage contracted in Tanganyika, whether contracted before or after the commencement of this Act, shall- if contracted in Islamic form or according to rites recognized by customary law in Tanganyika, be presumed, unless the contrary is proved, to be polygamous or potentially polygamous

DISSOLUTION OF MARRIAGE AND ITS AFTERMATH

Talaq/Divorce

Is the act of bringing the marriage contract to an end, therefore freeing the parties from the marriage bond/ wedlock.

Marriage with all its sacredness is a civil contract in Islam and can be subjected to any reasonably and lawful stipulation.

Divorce according to Islam, being a preventive measure against breach of peace, advice for securing an amicable settlement, and after all a salutary safeguard to protect the weaker sex from continuous ill treatment, due to disagreement or any other reason, has justly been provided as a dissolution of an unhappy marriage which may turn out to be a burden rather than an asset and, contrary to all expectations of happiness and help, may happen to be a horror and hindrance.

GROUNDS FOR DIVORCE

The grounds for divorce in Islam include the following;

- Impotence
- Cruelty
- Adultery
- Misconduct
- If the husband or wife had a permanent disease unfit for sexual intercourse.

PRINCIPLES OF DIVORCE

The principle of divorce is, therefore, described in the Holy Quran thus,

“And if you fear a breach between them (husband and wife) appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment Allah will make them of one mind” (4:35)

In this verse, a plan has been put forward for settling disputes between husband and wife. An effort should be made to effect reconciliation before resorting to a court of law or making the final breach.

PROCEDURE OF DIVORCE

- Divorce may be pronounced orally, or in writing, but it must take place in the presence of witnesses;

- Divorce, if given at all, should be pronounced when the woman is in state of purity. The Holy Quran says;
  "When you divorce women, divorce them at their prescribed periods. And fear Allah, your Lord" (65:1)

According to the above verse, the principle is that a divorce should not be pronounced during menstruation period.

- The pronouncement of divorce should be spread over three periods (three monthly courses) and then the final decision should be made whether one is prepared to take her back or one has decided to separate forever.

  The Holy Quran says *"And the divorced woman shall keep themselves in* ***waiting for three courses****"* (2:228)

This is a period of temporary separation during which conjugal relationship may be re-established. Thus, the period of waiting is only a chance given to the couple for re union and to make divorce revocable before the prescribed time reached. This period is known as IDDAT

In *Bibie Mauridi V Mohamed Ibrahimu*[9] the court held as follows;

Since the parties were married in Islamic form section 107(3) of the Law of Marriage Act is applicable. It states as follows:

> Where it is proved to the satisfaction of the court that:
>
> (a) the parties were married in Islamic form, and
>
> (b) a Board has certified that it had failed to reconcile the parties, and
>
> (c) subsequent to the granting by the Board of a certificate that it had failed to reconcile the parties, either of them has done any act or thing which would, but for the provisions of this Act, have dissolved the marriage in accordance with Islamic Law, the court shall make a finding that the marriage has irreparably broken down, and proceed to issue a decree of divorce.

In this case, all the conditions set out above were complied with. The act of the husband issuing "talaka" had the effect of dissolving the marriage, and as the Board had certified that it had failed to reconcile the parties. That was evidence that the marriage had irreparably broken down. The Primary Court quite properly made a finding accordingly, and issued a decree of divorce. The learned principal district magistrate apparently overlooked the provisions of section 107(3) of the Law of Marriage Act.

The decision by the District Court that the marriage still subsists is set aside, and the decision of the Primary Court issuing a decree of divorce is restored.

Also read the case of *Mwinyihamisi Kasimu Vs Zainabu Bakari*[10]

[9] (1989) TLR 162 (HC)
[10] (1985)TLR 217

The Holy Quran says; *"Divorce must be pronounced twice and then (a woman) must be retained in honor or released in kindness*. (2:229)
It means that the husband must make his decision final after the completion of the two divorces and before the completion of the third divorce, within which he should take back his wife.

FORMS OF DIVORCE

1. Divorce by Mubarat

It is a divorce which is effected by mutual consent of husband and wife. This divorce becomes irrevocable immediately after the consent takes place.

INCIDENTS FOLLOWING DIVORCE

- Within the period of awaiting (Idda) the husband is bound to maintain the wife and her children begotten by him.
- The wife is bound to suckle the children up to the completion of two years.
- Every divorce must be followed by a period of waiting called Iddat.
- In the case of women who do not menstruate as well as those whose courses have stopped, the iddat is three months and in case of pregnant women, the waiting period is till delivery.
- The wife is bound to observe iddat if the marriage is consummated.

Hussein Adam Vs. Asili Abdallah[11], among others the court held that according to the consensus of several authorities on Islamic Law consulted by the High Court, the rule is that during a woman's period of legal retirement the husband has neither the right to remain with her, nor to enter the house where she is retiring except with her consent. Defendant was ordered to pay maintenance to plaintiff for the period of her pregnancy.

[11](1968) HCD 92

2. Divorce by Khula

Khula is an agreement between the husband and wife, with a view to terminate the marriage contract in lieu of compensation paid by the wife to her husband. Or the divorce which is obtained by the wife from her husband by paying back compensation to her husband

CONDITIONS OF KHULA

The Holy Quran under 2:229 provides for the conditions of khula summarized hereinafter as follows;

- ❖ The woman should exercise the right of khula when she fears that the limits ordained by Allah are in danger of being broken.

- ❖ The woman must purchase her release from the marriage tie by paying a part or whole of the sum she received as dower from the man.

- ❖ The agreement of the husband is necessary for the khula

- ❖ When the woman offers to pay compensation and man declines the offer, the woman is entitled to go to the court.

GROUNDS FOR DEMANDING KHULA

- ✓ The Messenger of Allah (peace and blessings of Allah be upon him) held that complaint of Sehlal, that her husband is ugly and loathsome was adequate ground for granting khula.

- ✓ When it is manifested that a man hates his wife or the wife hates her husband.

- ✓ Cruelty may lead to khula

TAKE NOTE THAT;

Tahlil means legalizing. It was a pre-Islamic custom which still prevails in some Muslim societies.

It is illegal and does not find support in the Holy Quran and Hadith. It is effected in this way;-

When the wife is divorced irrevocably and the husband wants her back, he enters into a contract with a third person for marrying her and divorcing her immediately after a sexual intercourse.

The Holy Prophet (peace and blessing be upon him) cursed such contracting parties.

Tahlil is the final and most deterrent obstacle placed by Islam in the way of divorce. This means that a man has given a final divorce to woman cannot remarry her until she had entered into marriage with a second man and that second man having enjoyed sexual intercourse with her, has divorced her willingly.

Also read the following cases,

- *Abdalla Hamid Mohamed V Jasnena Zaludova*[12]
- *Hasumati Chhaganlal V Bashirhussein Gulamali & Another*[13]
- *Salum Athumani V Mwamini Hamisi*[14]
- *Mohamed Hamisi V. Salum Alli*[15]

[12] (1983)TLR 314
[13] (1983)TLR 320
[14] (1983) TLR 107
[15] (1967)HCD 169