
THE IMPACT OF THE DOMESTIC RELATIONS BILL 2003 ON THE ISLAMIC INSTITUTION OF MARRIAGE

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ABSTRACT

The whole of Uganda sometime in 2005 reacted to the Domestic Relations Bill 2003 on the basis that it lacks both religious and cultural morals; the same Bill is to be retable before the parliament,³ despite all protests. In view of this work is examining the provisions of the Bill, in seeing its impacts on the Islamic Marital Laws, looking into the concept of marriage, the nature of Islamic Law, and its application, in trying to examine the relationships, obligations and rights of marital couples under Islamic Law, all with an attempt to have a background of finding and highlighting the provisions of the Bill that do not conform with the provisions of Islamic Law.

1.0. INTRODUCTION

Marriage is a primary social aspect of the family and is widely recognized as well as practiced among nations. It is closely associated with, among others, courtship, marital rights and duties, divorce, property rights, children and inheritance. Uganda has a plural legal system with various laws regulating the marriage institution, these laws includes; the Customary Marriage (Registration) Act,⁴ regulating customary marriages, the Hindu Marriage

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3 Al- Mahdi Ssenkabirwa, "Muslim renew fight against DRB" Daily Monitor, Friday, August 10th 2007, p6

4 Laws of the Republic Uganda Revised Edition, 2000, Volume10, Cap.248

and Divorce Act,¹ regulating Hindu marriages and divorce, the Marriage Act,² regulating civil and church marriages, the Marriage and Divorce of Mohammedans Act,³ regulating marriage and divorce of Muslims and the Divorce Act,⁴ regulating Divorce of civil and church marriages. These laws contain provisions that are contradictory, which has made the applicability of these laws difficult and thus causing more confusion.

With such multiple laws governing the same institution, it necessitated for an enactment of a law consolidating all these laws to avoid such confusion and contradictions. The Uganda Law Reform Commission conducted a study between 1994 and 1997, which gave birth to the draft law on domestic relations. This study also took into consideration of earlier recommendations on the Domestic Relations Bill made by the Kalema Commission in 1965 and FIDA-U (Association of Uganda Women Lawyers) in 1990.

The Law Reform Commission made several recommendations that form the basis of the current Domestic Relations Bill 2003.

The Domestic Relations Bill 2003 addresses several issues including marital rights and duties, divorce, property rights, domestic violence, among others. Most of the provisions therein provide for equality of sexes through according equal rights to men and women at, during and after marriage. It should be noted that the Bill has incorporated some provisions of Islamic law pertaining to marriage but not in their totality, thus some aspect of the Bill have been contested by Muslims as being in contravention with the Islamic law. This work intends to address the law regulating the Islamic institution of marriage so as to make people understand and appreciate Islamic law, and the research will also analyse the impact of the Domestic Relations Bill 2003 on the Islamic institution of marriage.

1.1 **Marriage in Islam**

The Domestic Relations Bill did not define the term "marriage," but according

1 Ibid, Cap.250

2 Ibid, Cap 251

3 Ibid, Cap 252

4 Ibid, Cap 249

to Bromley¹, the word "marriage," 'has two distinct meanings; the ceremony by which a man and a woman become husband and wife or the act of marrying, and the relationship existing between a husband and his wife or the state of being married.'

Another definition given to the term marriage was that by Lord Penzance in the case of *Hyde V Hyde*², which is to mean the voluntary union for life of one man and one woman to the exclusion of all others.

This definition reflects the Christian conception of marriage as that between one man and one woman, totally excluding customary and Islamic marriages owing to their polygamous nature.

However, in the case of *Alai V Uganda*³ Sir Udo Udoma defined a married woman as a woman who is married under any form of marriage recognised in Uganda irrespective of whether it is a polygamous marriage or not.

By the provision of Section 2 Marriage and Divorce of Mohammedans Act⁴ it is provided that 'all marriages between persons professing the Mohammedan religion and all divorces from such marriages celebrated or given according to the rites 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.'

This provision recognizes the validity of marriages celebrated in accordance with the rites and observances of the Mohammedan religion (Islamic law). Considering the aforesaid, there is the need to establish the nature and source of Islamic law in order to understand the principles embedded therein.

1.2. 1 Meaning of Islamic Law:

Islamic law is commonly referred to as Shariah; according to Doi,⁵ 'Shariah'

1 P.M. Bromley, Family Law, 6th Edition (London; Butterworth, 1981), p.16.

2 (1866) L.R 1 P & D p.130, 133.

3 [1967] EA

4 Cap. 252. This is also stated in Section 29(a) of the Domestic Relations Bill 2003.

5 A. I. Doi, Shariah, The Islamic Law, (London, United Kingdom: Ta Ha Publishers, 1984, Reprint 1997) p.2

is an Arabic word meaning the path to be followed. Literally it means 'the way to a watering place.' It is a path not only leading to Allah, the Most High but the path believed by all Muslims to be the path shown by Allah, through His messenger, Holy Prophet Muhammad (S.A.W). Ajjola¹ defines Sharia as 'the expressed or implied provision of the Holy Qur'an and the accepted Sunnah.' Generally, Shariah can be defined as the total sum of laws revealed by Allah through Holy Prophet Muhammad (S.A.W) for the guidance of mankind in his relationship with Allah, his fellow Muslims and the rest of the universe.

1.2.2 Nature and Source of Islamic Laws

Islamic law is of divine origin, it is Allah Who is the Law giver, His commands were revealed to mankind through the Holy Prophet Muhammad (S.A.W) in the Holy Qur'an. This differs from secular law, which is made by sovereign authority who may be the Ruler in power; or the parliament, in democratic states, where the Parliament is entrusted with legislative powers.

The basic source of Islamic law is the Qur'an as revealed to Holy Prophet Muhammad (S.A.W) and the other source is the Sunnah and Hadith of the Holy Prophet Muhammad (S.A.W). The Sunnah 'literally, means a way, practice, rule of life; and refers to the exemplary conduct or the model behaviour of the prophet in what he said, did or approved.'²

The Qur'an says; "And we have also sent down to you (O Muhammad), the Dhikr (remainder and advice i.e. the Quran) that you may explain clearly to men what is sent down to them, and that they may give thought."³

We can therefore deduce that the two primary sources of Islamic law are the Qur'an and the Sunnah. The tenets and principles contained therein are comprehensive, unchangeable, everlasting and are applicable for all times, if interpreted in light of the changing conditions of society. However these two primary sources do not contain detailed provisions of the law, thus to obtain clear understanding of these laws and apply them to the various situations that arise, other sources are resorted to and these are known as secondary sources of Islamic law. It should be noted that these sources do

1 A. A. D. Ajjola, What is Sharia, (India: Adam Publishers and Distributors, 2002) p.13

2 A.I. Doi Op Cit, p7.

3 Qur'an Chapter 16, Verse 44

not create law but are used to deduce the law as provided for in the primary sources of law. Islamic Jurists are those entrusted with the duty of deducing law from the primary sources to solve new problems and issues that arise.

The third sources of Islamic law is Ijma which has been defined as *'the consensus of opinion of the companions of the prophet (Shahabah) and agreement reached on the decisions taken by the learned 'Muftis' or the Jurists on various Islamic matters.'*¹ This means that where an issue arises which is not clearly stated in the Qur'an or Sunnah, the learned jurists who are well versed in Shariah matters will elaborate upon that law to provide solutions applicable in a modern society. The authority for the permissibility of Ijma may be deduced from the Holy Prophet Muhammad's Sunnah which states, *'Verily my Ummah, or the Ummah of Muhammad, will not agree on error and the hand of Allah is upon the community; he who sets himself apart from it will be set apart in Hell Fire.'*²

The fourth source of Islamic law is Qiyas, which may be referred as *'the legal principle introduced in order to derive at a logical conclusion of a certain law on a certain issue that has to do with the welfare of the Muslims.'*³ It means analogical deduction from the Qur'an, Sunnah and Ijma, a process of deduction analogically on matters of law from the first three sources of Sharia by which the law of the text is applied to cases though not provided for in the Qur'an and the Sunnah. Like it is at common law, where the doctrine of precedent is used to determine a latter case, under Islamic law, the Shariah Judge (Qadi) can use the legal precedent to decide a new case but must apply a precedent similar to the case at hand.

However, before Qiyas is resorted to, the following conditions must be adhered to; the Qur'an or Hadith must be devoid of any solution to the case, the legal principle must be applied in accordance with the principles of Islam, the legal principle must not contradict with the contents of the Qur'an or Hadith and that it must be strict Qiyas based on the Qur'an and Hadith.⁴

1 A.I. Doi Op Cit, p.64. And this definition also gave birth to what was considered as the classification of Ijma into Ijma of the Sahaba and Ijma of Scholars not considered Sahaba. But that of the Sahaba is more authoritative, more reliable, and more authentic. Ijma by this is a kind of collective Ijtihad.

2 Hadith narrated by Abdullahi Ibn Umar, in Al- Tirmidhi, Hadith 173

3 A.I. Doi Op Cit, p.70

4 Ibid, p.77

The fifth source of Islamic law is Ijtihad, this is the independent judgment applied by the Judge when there is no specific provision in the Qur'an, Sunnah or where the religious scholars have reached the consensus. Ijtihad is therefore 'an effort or an exercise to arrive at one's own judgment'.¹ The Holy Prophet Muhammad (S.A.W) is reported to have said to Amir bin Al-As; "If a judge gives a verdict according to the best of his knowledge and his verdict is correct (i.e. agrees with Allah and His Apostle's verdict) he will receive a double reward, and if he gives a verdict according to the best of his knowledge and his verdict is wrong, (i.e. against that of Allah and His Apostle) even then he will get a reward."²

1.2.3 Applicability of Islamic Law

Islamic law is applied in Uganda, in respect of Islamic marriages and divorces. This law is enforceable against a Muslim husband and a Muslim wife, or a Muslim husband and a non-Muslim wife, since Islamic law allows marriage of a Muslim man to a non-Muslim woman of the people of the Book (Jewess or a Christian).

Abd al Ati³ summarises the position regarding the applicability of Islamic law thus: *The mutual expectations prescribed by Islam apply whether one or both parties are Muslims. If both parties are non-Muslims, Islam does not interfere in their family affairs unless they seek the help of the Muslim authorities and agree to abide by the provisions of Islamic law. If both parties are Muslims, then the law applies to them, even as it is addressed to both of them. But if one of the parties believes in Islam while the other does not, Islam addresses its provisions first of all to the Muslim. If the Muslim party is to fulfill his Islamic obligations to the non-Muslim, he must in turn be empowered to exercise the corresponding rights*".

There is therefore the need to analyse the mutual rights and obligations that are created in a marriage relationship which will be the basis of the analysis of the impact of the Domestic Relations Bill 2003 on the Islamic institution OF marriage.

1 Ibid, p.78

2 Sahih Al- Bukhari, Hadith 9.450, narrated by Amr Ibn Al- As

3 H.A. Ati, The Family Structure in Islam, (New York: American Trust Publications, 1977) p.35.

2.1 RIGHTS OF THE WIFE; OBLIGATION OF THE HUSBAND.

According to Islamic law, a woman, married or not has a right to hold property in her own right and disposes of it as she wishes, she has a right to inherit property of the deceased husband. The Qur'an says; "... in that which you leave their (your wives) share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts."¹ This verse grants the right to a woman to inherit from her husband's estate, a practice which in some culture is unacceptable because women are treated as part of the property to be inherited.

Islamic law requires a husband to treat his wife in an equitable and kind manner. The Qur'an provides "And among His signs is that He created for you wives from among yourselves, that you may repose in them, and He has put between you affection and mercy."² The Holy Prophet Muhammad (S.A.W) said; "Treat your wives nicely because they are under your custody,"³ the Holy Prophet (S.A.W) further said; "How does anyone of you beat his wife as he beats the stallion camel and then he may embrace (sleep with) her?" And Hisham said, "As he beats his slave."⁴

All these teachings of the Qur'an and Hadith shows that Islamic Law forbids mistreatment of the wife, and in effect it outlaws domestic violence, for marriage is considered a firm bond in the society where in peace and harmony are enjoined between the husband and the wife.

Under Islamic law, a woman has a right to give free consent in marriage for the marriage to be valid. This is irrespective of whether the woman is a virgin, a widow or a divorcee. In effect, Islam outlaws widow inheritance as practiced by some tribes in Uganda. The Qur'an states that; "O you

1 Qur'an Chapter 4, Verse 12

2 Qur'an Chapter 30, Verse 21

3 Al- Tirimidhi, Hadith 276, narrated by Amr Ibn Ahwas Al- Jushami

4 Sahih Al- Bukhari, Hadith 8.68, narrated by Abdullahi Ibn Zama. In another Hadith the Prophet was asked, how should we approach our wives and how should we leave them? He replied: Approach your tilth when or how you will, give her (your wife) food when you take food, clothe when you clothe yourself, do not revile her face, and do not beat her. Narrated by Mu'awiyah ibn Haydah, Hadith 2138 of the Sunan Abu Dawood

*who believe! You are forbidden to inherit women against their will.*¹ The Holy Qur'an also says; *"And when you have divorced women and they have fulfilled the term of their prescribed period, do not prevent them from marrying their husbands, if they mutually agree on reasonable basis."*²

On the other hand, the Holy Prophet Muhammad (S.A.W) said, *'The widow and the divorced woman shall not be married until her order is obtained and a virgin shall not be married until her consent is obtained.'*³

However, like at common law, Islamic law requires the guardian to give his consent to the prospective marriage especially where the woman is a minor or a virgin; for a widow and a divorced woman, there is no such a requirement. The Qur'an says; *"Wed them with the permission of their folk (guardians), and give them their mahr (dowry) according to what is reasonable".*⁴

The Holy Prophet Muhammad (S.A.W) said; *'A marriage is not valid without a guardian.'*⁵ He also said, *'Any woman who marries herself without the consent of her guardian, her marriage is void.'*⁶ He also said; *'the previously married woman (widow or divorced) has more right on herself than her guardian and the virgin is asked for her permission and her permission is her silence.'*⁷

The requirement for the consent of the guardian with minors or virgins is intended to protect the woman from unscrupulous men; however, the guardian must exercise this duty in the interest of the woman. If the choice is not in the woman's interest then it can be rejected by the woman; for a minor, she can reject the choice of the guardian when she becomes of age; and for a major, the woman may request the authorities concerned to annul the contract which is contracted contrary to her best interests. Ultimately, the woman's choice overrides that of her guardian if she can prove that the marriage is not in her best interest.

1 Qur'an Chapter 4, Verse 19

2 Qur'an Chapter 2, Verse 232

3 Sahih Al- Bukhari, Hadith 9.101, narrated by Aisha

4 Qur'an Chapter 4, Verse 25

5 Sunan of Abu- Dawood, Hadith 2078, narrated by Aisha, and Hadith 2080, narrated by Abu Musa

6 Ibid

7 Sahih Al- Bukhari, Hadith 9.79, narrated by Aisha

When the wife feels she can no longer continue with the marriage relationship, Islamic law grants her the right to seek for divorce through lawful means at her own instance. The Qur'an says; "*If a woman fears cruelty or desertion on her husband's part, there is no sin on them both if they make terms of peace between themselves; and making peace is better.*"¹ However, if the peace could not workout a better relationship between the couples, then the woman can enforce her right, and seek for khul (divorce at the instance of the wife).

Suffice to note that few women are aware of this right and the men who are knowledgeable in this area of law are reluctant to inform the women for fear that it will bring about marital disharmony.

The wife has a right to maintenance by her husband, this may include, the right to food, clothing, a residence, medicine and other essential services. The Qur'an says; "*Men are the protectors and maintainers of women, because Allah has made one of them to excel the other and because they spend from their means.*"²

From the above verse we can deduce that Allah made the man to excel over the woman because he spends on the woman in marriage, and this is his sole responsibility, irrespective of the financial status of the woman. However, it is not disputable that there are women who can excel better than the men, especially where they are the care-takers and bread winners in the home. It is also argued that it is because of the gender socialization within families, which moulds the man to acquire masculine traits and the woman to acquire feminine traits. Thus where a woman is the care-taker and at the same time the bread winner in the family, she is doubly rewarded because Islamic law does not require the woman to go out of her way to maintain the family.

The right to maintenance of the wife by husband extends even after divorce, including the period of 'iddah' (a period, of three months or on completion of pregnancy where a woman is discovered pregnant after divorce has been pronounced). The Qur'an says; "*Lodge them (the divorced women)*

1 Qur'an Chapter 4, Verse 128

2 Qur'an Chapter 4, Verse 34

where you dwell, according to your means, and not harm them so as to straiten them (that they be obliged to leave your house). And if they are pregnant, then spend on them till they lay down their burden. Then if they give suck to the children for you, give them their due payment, and let each of you accept the advice of the other in a just way, ...Let the rich man spend according to his means and the man whose resources are restricted, let him spend according to what Allah has given him."¹

With regard to the widows, they are entitled to maintenance for one year after the death of the husband. The Quran says; "And those of you who die and leave behind wives should bequeath for their wives a year's maintenance and residence without turning them out, but if they (wives) leave, there is no sin on you for what they do of themselves, provided it is honourable."²

Islamic law accords the woman a right to work; a woman can own, invest, save and conduct business in her own names. Since the responsibility of maintaining the family falls on the husband, she is not under a duty to work in order to maintain the family. Her place, according to Islamic law, is in the house. The Holy Prophet Muhammad (S.A.W) said, "Woman is to be kept in privacy, therefore, keep her confined to the house."³ However, where necessary she can work with the permission of her husband and the work must be within the limits of Sharia (she is not allowed to mix freely with men). All these restrictions are intended to keep off evil and maintain harmony in the conjugal life.

The woman who intends to get married has a right to dowry (Mahr). Dower is the sum of money or property given by the husband to the wife in consideration of the marriage. The Quran says, "And give to the women their Mahr with a good heart; but if they of their own good pleasure remit any part of it to you, take it and enjoy it without fear of any harm."⁴ This dower is not returnable on divorce of the woman, except where it is the woman who is divorcing the husband, and then she can return the dower he gave her.⁵

1 Qur'an Chapter 65, Verses 6 – 7

2 Qur'an Chapter 2, Verse 240

3 Hadith Al- Tirmidhi

4 Qur'an Chapter 4, Verse 4, See also 5:5, 4:24.

5 Qur'an Chapter 2, Verse 229

The marriage gift is given to the wife but not the wife's family, as is done in some traditional societies. For dowry, the bride requests for anything as dower, be it money or property or any other inanimate thing she desires; and thus it is different from bride price which is regarded as a form of wife purchase, where by money and property are paid to the bride's family.¹

Islamic law grants the woman a right to the custody of her child and she is regarded as the most suitable person for nursing and bringing up her child. Once a divorced woman complained to the Holy Prophet Muhammad (S.A.W) in matters regarding her child, the Holy Prophet Muhammad (S.A.W) said, "*Your right (of custody of the child) is superior until you re-marry.*"² The rationale for granting custody of the child to the woman is because the woman has the natural love and affection for the child and since Sharia requires the woman to be the care-taker of the home and the man as the maintainer of the family, it is in the best interest of the child that the woman is given custody.

2.2 OBLIGATIONS OF THE WIFE; RIGHTS OF THE HUSBAND.

The wife can not enjoy the rights as enumerated above without having corresponding duties to her husband and family. She is required to look after the home, do the house chores and is the care-taker of all the members of the home. Regarding this duty, the Holy Prophet Muhammad (S.A.W) said, '*Woman is the care-taker of all the members of her husband's family and his children. And for this she will be questioned on the Day of Judgment.*'³

Similarly to the duty to take-care of the husband, a wife is entrusted with the property of the husband which she is required to keep safely as well as guard her chastity. The wife, being the care-taker of the home, is required to keep safely the husband's property when he is away and also she should be faithful to him by not engaging in extra marital affairs.

The other duty the wife has to exercise to her husband is of obedience in

1 The Holy Prophet Muhammad (S.A.W) is reported, by Bukhari, to have got a woman married to a very poor man and the man was asked to teach the Surah of the Qur'an that he knew to his wife as dower.

2 See also the Sunan -Abu Dawood

3 Sahih Al- Bukhari, Hadith 3. 592, narrated by Abdullah ibn Umar

what is not sinful. Regarding the good qualities of a virtuous wife, the Holy Prophet Muhammad (S.A.W) said, '*If the (husband) orders, she will obey.*'¹ He also emphasized the duty of obedience of the wife by saying of a virtuous wife as, '*One who pleases her husband when he sees her and obeys when he orders. And she must not oppose him by an act which he does not like.*'²

Thus the position of a woman in Islam is higher than that of a man since she is accorded more rights over her husband, with fewer obligations towards the husband. With such a background, we are in position to discuss the provisions of the Domestic Relations Bill and analyse their impacts on the Islamic institution of marriage.

3.1 THE DOMESTIC RELATIONS BILL 2003.

The Domestic Relations Bill 2003 addresses a range of issues, which inter alia include the conditions for the validity of all types of marriages, property rights, marital rights and duties, divorce, domestic violence, among others. This Bill consolidates all laws regulating domestic relations including Islamic law, but not in its totality. This partial incorporation of Islamic law into the Bill has brought about contradictions between certain provisions embedded in both laws and this has led to opposition from the Muslim populace to the enactment of the Bill.

This part seeks to establish the provisions of the Domestic Relations Bill 2003 that are partially in line with Islamic law, those provisions which contradicts the tenets of Islamic law, and it will finally analyse the impact of the Bill to the Islamic institution of marriage.

3.2. PROVISIONS OF THE DOMESTIC RELATIONS BILL 2003 THAT PARTIALLY CONFORM TO ISLAMIC LAW.

The Bill sets down the essential requirements for the validity of a marriage; one of these requirements is age. Under section 13 a person shall not have

1 Hadith ibn Ibn Majah. See also Sunan Abu- Dawood, Hadith 142, narrated by Laqit Ibn Sabira

2 Ibid. See also Hadith An- Nasa'i

the capacity to marry unless he or she has attained eighteen years of age. This is in consonance with Article 31(1) of the 1995 Constitution which provides for a right to marry for persons above 18 years of age. Islamic law does not clearly specify the age at which a person is allowed to marry, but according to Nyazee¹ *'complete capacity is established for a human being when he or she attains full mental development and acquires the ability to discriminate. This stage is associated with the external standards of puberty. The physical signs indicating the attainment of puberty are the commencement of ejaculation in a male and menstruation in a female. In the absence of these signs, puberty is presumed at the age of fifteen in both males and females according to the majority of the jurists, and at the age of eighteen for males and seventeen for females according to Abu Hanifah.'*

Since there is less disparity between the ages as set out in the Bill and the tenets of Islamic law, it is pertinent that we go by the age as stated in Article 31(1) 1995 Constitution, which is the ground norm, because early marriages are a disaster to the institution of marriage. Young people below 18 years of age should not be exposed to the strain of marriage life, thus by specifying the age limit for all types of marriages as 18 years; it lessens the uncertainty created by the divergent opinions of the Islamic law Schools of thought.

Section 15(1) of the Bill provides that the marriage shall not be solemnized or contracted in Uganda without the free consent of either party to the intended marriage. This is in line with 1995 Constitution of Uganda which enjoins free and full consent of the two parties.² Similarly, Islamic law requires the consent of the woman before her hand is taken in marriage otherwise the marriage is set aside for lack of consent. It is reported that the Holy Prophet Muhammad (S.A.W) told a young lady who had complained to him of her father's actions of marrying her to a rich man without her consent; he said, *'if you do not like this marriage, then you are free'* at which the lady replied; *'I uphold my father's decision. By this complaint I intend to tell my fellow women that their fathers have no right to marry them against their will.'*³

1 I.A.K. Nyazee, *Theories of Islamic Law; The Methodology of Ijthad*, First Edition, (Delhi, India: Adam Publishers & Distributors 1996), p. 88.

2 Article 31(3), see also chapter two on the issue of consent in Islam.

3 Musnad Imam Ahmad. In *Muwatta Imam Malik, Hadith 28. 4*, Malik related to me from Abdullah ibn al-Fadl from Nafi ibn Jubayr ibn Mutim from Abdullah ibn Abbas that the Messenger of Allah,

In addition to the consent of the woman, Islamic law requires that if the woman to be married is a virgin or a minor, she must seek the consent of the guardian. *'Marriage guardianship is the legal authority invested in a person who is lawfully qualified and competent to safe guard the interests and rights of another who is incapable of doing so independently. It is the authority of a father or nearest relative over minors, insane or inexperienced persons who need protection and guardianship.'*¹ The Holy Prophet Muhammad (S.A.W) said, *'A marriage is not valid without a guardian.'*² He also said, *'Any woman who marries herself without the consent of her guardian, her marriage is void.'*³

However, the Bill dispenses with the requirement for a guardian by providing that, the consent of the parents, relatives, clan leaders or any other person other than the respective parties to the marriage shall not be a requisite for the validity of any marriage.⁴ This outrightly disregards the role of the guardian in the choice of the future husband for a woman who is a minor and a virgin of majority age, as required by Islamic law. The effect of this provision is that it grants the woman the freedom to choose her partner without any interference irrespective of the religious denomination. It should be noted that the requirement for a guardian in Islamic law does not totally erode the rights of the woman to choose her partner because where a marriage is contracted with the consent of the guardian, and it is not in her best interests, she has the freedom to opt out of the marriage by seeking for annulment.⁵

Section 16 of the Bill prohibits marriage through the custom and practice of widow inheritance, and makes it a criminal offence for a man to inherit a widow,⁶ irrespective of whether the widow consents or not. The rationale for criminalizing the practice of widow inheritance is to outlaw the practice, which

1 H. A. Ati, *The Family Structure in Islam*, Op Cit, p.70.

2 Sunan Abu Dawood, Hadith 2078, narrated by Aisha Ummul Mu'minin.

3 Ibid, See also Sunan Abu Dawood Hadith 2080 and Muwatta Imam Malik, Hadith 28.5

4 Section 15(2).

5 Most importantly the saying that what an elder can see while sitting the young one can't see it even if he clamps a mountain, by this it more appropriate to involve the parents and guardians.

6 Section 16(3)(4).

has been predominant time immemorial in Ugandan traditional societies. However, under Islamic law the practice is prohibited except if it is done with the consent of the widow. This implies that where the widow consents to the inheritance, then there is no bar against it. The Quran says, "O you who believe! You are forbidden to inherit women against their will; and you should not treat them with harshness, that you may take away part of their Mahr you have given them"¹ This is done to enable the widow receive maintenance, which can only be provided when she is legally married. Thus the Bill should make proviso that where the widow freely consents to be inherited, then the act becomes lawful.

The Bill provides that a person shall not be a party to a marriage where the other party is related to him or her within the degrees of relationship set out in the schedule 1.² The relationship arises whether it is biological or by adoption; on the issue of prohibited degrees, Bromley³ states;

"...The prohibited relationship may arise from consanguinity (that is, blood relationship) or from affinity (that is, relationship by marriage). In case of consanguinity the prohibition is based on moral and eugenic grounds. Most people view the idea of sexual intercourse (and therefore of marriage) between say, father and daughter or brother and sister with abhorrence; at the same time, the more closely the parties are related, the greater will be the risk of their children inheriting undesirable genetic characteristics. In case of affinity, the prohibition was originally, based on the logical concept that husband and wife were one flesh; so that marriage with one's sister-in-law was as incestuous as marriage with one's own sister..."

This reflects the moral aspect enjoined in marriage as emphasized in Islamic law where sexual relations with close blood relatives is forbidden. The names of such relations are provided for in the Quran,⁴ it should be noted that under Islamic law, the prohibited degrees constitute three broad categories; Consanguinal (blood relatives), Affinal (in-laws) and Lactational (relatives in milk fosterage and through wet nursing). This excludes relationship by adoption

1 Qur'an Chapter 4, Verse 19

2 Section 17

3 P.M Bromley, Bromley's Family Law, Op Cit, p. 33

4 Qur'an Chapter 4, Verses 22-24

(meaning that, a man can legally marry the adopted daughter or relative).

Furthermore, a man can legally marry his wife's daughter (step daughter) if he has not engaged in sexual relations with the wife.¹ Unlike at common law where the act of marriage suffices to bar a husband from marrying the daughter of his wife, under Islamic law the act of marriage alone is not sufficient except where that marriage has been consummated by engagement into sexual intercourse with the husband. Thus the difference with Islamic law in this regard is that it permits marriage to an adopted relative and to a step-daughter whose mother the man did not engage in sexual intercourse, though he has a subsisting marriage with the mother. The Bill contradicts Islamic law by prohibiting marriage between two Muslim parties who are related through adoption, as well as between the man and a step daughter, whose mother, did not engage in sexual intercourse with the man. This of course goes against the traditional cultures of indigenous communities, but where it occurs in an Islamic marriage, the marriage should not be invalidated as falling under the prohibited degrees.

The Bill provides for the right and obligations in marriage, including the right to consortium,² however, a spouse may deny the other spouse the right to sexual intercourse on reasonable grounds which may include poor health, after child birth, after surgery, during medical treatment or upon reasonable fear that engaging in sexual intercourse is likely to cause physical or psychological injury or harm. According to Bromley³ '*consortium...connotes as far as possible the sharing of a common home and a common domestic life.*' It also includes the right to sexual intercourse and companionship. The old common law position on the right to consortium is that 'by marriage the wife consents to intercourse with her husband and thus confers on him a privilege which she is not entitled to withdraw when ever she pleases. From this it must follow that as a general rule; a husband cannot be guilty as a principal of rape of his own wife.'⁴ Ugandan law still recognizes this position because no where in its legislation is it mentioned that the husband can be guilty of raping his wife.

Islamic law enjoins the satisfaction of sexual desire through marriage, the

1 Quran 4:23

2 Section 60.

3 P.M. Bromley, Bromley's Family Law, Op Cit, p. 112.

4 Ibid p.114.

Holy Prophet Muhammad (S.A.W) is said to have said of men who pray at night, *'Do not get yourself lost in prayers so much that you forget your duties towards your wife, children, guests and yourself.'*¹ He also said. *'To have sex with wife is also sadaqah (charity).'*² Similarly, the wife is under a duty to submit to her husband's demands to sexual intercourse, of this the Holy Prophet Muhammad said, *'When a husband calls upon his wife for sexual intercourse and if she refuses and the husband remains angry the whole night, then the Angels curse her until the morning.'*³ This implies that under Islamic law, spouses are entitled to equal rights to consortium, but in comparison with the Bill, the wife can withdraw her consent on reasonable grounds.

The Bill prohibits the exercise of the right to consortium by force, that is, without the consent of the other spouse, thus the Bill⁴ has made it a criminal or civil offence where a person has sex with his or her spouse against the consent of the spouse. If it is a criminal act, the person is liable to a fine not exceeding 24 currency points or to imprisonment not exceeding one year or both. For civil liability, the remedy is a restricting order, suspension of conjugal rights or compensation. A currency point is equivalent to Ushs. 20,000/= (Uganda Shillings Twenty Thousand only).⁵ The spirit of this section was to combat marital rape which is rampant in the homes, yet its magnitude can not be established because traditionally, marital affairs are kept secret.

Islamic law does not sanction violence in marriages and enjoins peace and harmony therein. The Qur'an says, *"And among His Signs is that He created for you wives from among yourselves, that you may find repose in them, and He has put between you affection and mercy."*⁶ Also the Holy Prophet Muhammad (S.A.W) said *'Their right (i.e. women) is that you should treat them well.'*⁷ This implies that marital rape is frowned upon in Islam since it emphasizes the creation of peace, tranquility and harmony in marriage, thus it can be argued that this provision of the Bill is in line with the Islamic

1 Sahih Al- Bukhari

2 Sahih Al- Muslim

3 Sahih Al- Bukhari, Hadith 4. 460, narrated by Abu Huraira

4 Section 61.

5 Third schedule to the Bill.

6 Qur'an Chapter 30, Verse 21

7 Al- Tirimidhi, Hadith 276, narrated by Amr ibn Al- Ahwas Al- Jushami

law.

Section 62 of the Bill prohibits adultery, it provides that where a party to a marriage has sex with a person other than his or her spouse, both parties commit an offence of adultery and each is, on conviction, liable to a fine not exceeding 48 currency points or imprisonment not exceeding two (2) years or both. In addition to that the guilty party is liable to pay compensation to his or her own spouse (if any) and to the spouse of the other party to the offence. It should be noted that the law on adultery¹ was declared unconstitutional² and currently, adultery is said not be a criminal offence because the Parliament has not yet enacted a new provision to replace the old provision (declared unconstitutional).

Adultery has been defined as the voluntary act of sexual intercourse between a married person and the person other than his or her spouse.³ Simply stated, adultery means the voluntary 'sexual intercourse between two persons of whom one or both are married but who are not married to each other.'⁴

Similarly, Islamic law prohibits adultery and the Qur'an lays down several injunctions regarding adultery. It says, "*And come not near to unlawful sex. Verily, it is a Fahishah (i.e. anything that transgresses its limits: a great sin), and an evil way.*"⁵ Adultery under Islamic law is a capital offence attracting Hadd punishment of stoning to death,⁶ thus should be curbed through legislation. The provision prohibiting adultery in the Bill is welcome to the Muslim community since it echoes teachings of the Qur'an and Sunnah.

3.3 PROVISIONS OF THE DOMESTIC RELATIONS BILL 2003

1 Section 154 of the Penal Code Act Cap 120

2 The New Vision, Vol. 22, No. 083, of Friday the April 6th 2007, at page 1, carried the news that "adultery is no longer a criminal offence in Uganda. The Constitutional Court scrapped it from the Penal Code yesterday. In a landmark ruling, the court unanimously said Section 154 of the Penal Code Act, which criminalized adultery, was unconstitutional because it treated men and women differently."

3 Section 3 of the Bill

4 P.M Bromley, Bromley's Family Law, Op Cit, p.195.

5 Qur'an Chapter 7, Verse 32, see also Qur'an (4:24) and (70:29-31)

6 Qur'an Chapter 24, Verse 2

THAT DO NOT CONFORM TO ISLAMIC LAW.

Section 10(b) of the Bill recognizes Islamic marriages as potentially polygamous because Islamic law permits multiple marriages. The Qur'an says, "...marry women of your choice, two or three, or four; but if you fear that you shall not be able to deal justly (with them), then only one..."¹ The Holy Prophet Muhammad (S.A.W) said, 'When a man has two wives and he does not observe equality and deal unjustly with them, he will come before the Throne of Justice of Allah with only half of his body.'²

What needs to be emphasized at the outset is that the above mentioned verse does not give a license to the man to marry up to four women, rather there is a condition attached that if the man fears that he can not exercise justice, then he should marry one. The condition of doing justice between the wives must be fulfilled at all costs before the man can rightly claim for this right to marry a subsequent wife. In order to incorporate the aforesaid provision in the Ugandan domestic law, the Bill³ provided that the man who intends to marry a subsequent wife, his application of notice of intention to marry to the District Registrar of Marriages must be supported by an affidavit showing that the man is economically capable of maintaining the wives and the children at the same level, that provision has been made for a separate homes for the wives and that they will be accorded equal treatment.

This provision reflects the import of the Qur'an chapter 4, verse 3, which requires the exercise of justice between the wives, only that section 31 of the Bill requires physical proof of the man's capability to maintain multiple homes and an assurance of according equal treatment to the wives, before a subsequent marriage is undertaken. This implies that section 31 of the Bill intends to accord protection to the first spouse and her children, given the fact that the subsequent marriage may prove a burden to the existing marriage in terms of finance and may cause disharmony in the family, owing to the competition between the wives for the attention of the husband.

Such matrimonial disharmony totally goes against the purpose of marriage

1 Qur'an Chapter 4, Verse 3

2 Sunan of Abu- Dawood, Hadith 2128, narrated by Abu Huraira

3 Section 31

in Islam and in a bid to avoid such disharmony; Islamic law emphasizes that the man who wishes to contract a subsequent marriage should only do so if he will be able to exercise justice between the wives. However, it does not require the man to prove his capability of exercising justice; it is a matter between that man and Allah. From the reading of Section 31, it implies that where a man fails to prove the above requirements, he will be barred by law from marrying a subsequent wife, yet Islamic law, does not require proof of capability of doing justice between the wives or sound financial status.

Section 12(1) of the Bill provides that cohabitation shall not by itself, constitute a marriage or give rise to a presumption of marriage. Section 3 of the Bill defines cohabitation to mean an unmarried man and an unmarried woman living together as if they were husband and wife. The Bill grants protection to the cohabiting partners where the partners have registered the fact of cohabitation, together with the particulars of the monetary and non-monetary contributions made during the cohabitation.¹ Upon determination of that relationship, and on application of either party, the court may divide the property in accordance with the registered contributions of the parties.² However, failure to register the relationship does not affect the rights of the parties but the party alleging the existence of the relationship must prove it.³

The Bill crowns it all when it makes provision for the presumption of marriage for partners who have cohabited for ten (10) or more years,⁴ and such a marriage can be registered.⁵ This will undermine the marriage institution because the people will opt for cohabitation than marriage, since they will be assured of a share in the property, just like married couples. This provision is in contradiction with Islamic law against pre-marital sex (fornication or Zina) and it is a serious offence punishable by 100 stripes flogging.⁶ The only place for sexual relations between a man and a woman is Nikah (Marriage),

1 Section 12(2)(a).

2 Section 12(2)(b).

3 Ibid.

4 Section 13(1).

5 Section 13(2).

6 Quran 24:2 and the Holy Prophet Muhammad (S.A.W) said, 'Take from me, and accept from me, undoubtedly Allah Has now shown path for them. For unmarried persons (guilty of fornication), the punishment is one hundred lashes and an exile for one year. For married adulterers, it is one hundred lashes and stoning to death.' (Bukhari)

thus practices like adultery and fornication are illegal under Islamic law and attracts punishments. By legalizing cohabitation, it will be tantamount to violating the Islamic code of life as well as undermining the marriage bond. Section 20(1) of the Bill provides that marriage gifts shall not be an essential requirement for any marriage and where any party to a marriage has given a marriage gift, it is an offence to demand for its return.¹

A marriage gift is defined as a gift whether in cash or kind given by either party to a marriage in respect of the marriage, and includes bride price and bride wealth.² The rationale for the prohibition of marriage gifts is that they are commercialized, making the woman regarded as property by the husband and be subjected to all sorts of abuses including domestic violence since she will be regarded as the man's property to deal with as he deems fit.

However, the position in Islamic law is that dowry is a symbol for natural love and affection and is given in consideration of the marriage. It is given to the wife herself and not her parents as is customarily done. More so, dowry may take the form of Qur'anic recitation or any other thing acceptable to the wife, thus the argument that marriage gifts are commercialized for Islamic marriages is discernible. The prohibition of marriage gifts as a requirement for the validity of an Islamic marriage contradicts Islamic law and as such can not be acceptable since it is a requirement as decreed by Allah and Muslims can not derogate from the laid down rules.

The Bill³ provides for the maintenance of the family by both spouses, the contribution can be either monetary or non-monetary depending on the income of each spouse. We can imply that the import of this section is to ensure that the non-monetary contributions of the spouses are taken into consideration during the division of the matrimonial property. Thus provision provides for equal responsibility of spouses in maintaining the family irrespective of whether the contribution is monetary or not. However, the position in Islamic law is that it is the sole duty of the husband to maintain the family whether the wife is financially capable or not; to make the wife have similar responsibilities is in breach of Islamic law. The rationale for making

1 Section 20(2).

2 Section 3 of the Domestic Relations Bill 2003.

3 Section 63.

the man have the sole responsibility for the maintenance of the family is because he gets twice as much as the woman gets from inheritance of the parents' estate, hence he is presumed to be in good financial position to maintain the family.

Section 73 of the Bill provides that matrimonial causes and disputes arising out of marriage shall be heard first in the Magistrates Court, Qadi Court or the High Court. Where both parties profess the Muslim religion and are married under Islamic Law, the parties may petition a Qadi Court in a matrimonial cause which court is required to apply Shariah (Islamic law) subject to any written law. In addition to that, the Qadi court is to observe the rule of procedure and evidence as provided by law.¹ Under section 89, where an appeal arises from a marriage contracted according to Islamic law, then the court subject to any written law and principles of equity, shall apply Islamic law.

We should note that Islamic law is a complete system of law; it is not administered subject to any written law because in adjudicating the cases, the Judge (Qadi) is guided by the Qur'an and the Prophet Muhammad's Sunnah. By subjecting Islamic law to secular law is to oppose the teachings of the Qur'an and Sunnah.

The Bill provides for the breakdown of marriages, separation agreement², judicial separation³ and divorce.⁴ Divorce is the formal voluntary ending of marriage by a decree of court upon petition by either party to the marriage. The grounds for divorce, as stated in the Bill, include; irretrievable break down of marriage,⁵ which petition should be made two years from the date of marriage,⁶ or a spouse may seek leave of court to file a petition for divorce before the expiry of two years on the ground that he or she is suffering from exceptional hardships in the marriage.⁷ Notwithstanding the aforementioned Sections, a wife in a polygamous marriage may bring a petition before the expiry of two years on the ground that her husband is in

1 Section 74.

2 Section 77.

3 Section 83.

4 Section 78(2).

5 Ibid.

6 Section 79(1).

7 Section 79(2).

the process of marrying another woman against the wife's consent.¹

This means that it will be a ground for divorce where the husband is proceeding to contract a second marriage without the wife's consent. Impliedly, the above provision requires the husband to seek for the consent of the wife before contracting a second marriage. As regards seeking the consent of the wife before contracting a second marriage, the teachings of the Qur'an and Sunnah are silent on the matter, however, it is opined by the Muslim scholars that the wife may, in the marriage contract, stipulate that divorce may become effective should the husband take a second wife.² This would mean that where the wife stipulated in the marriage contract that she will divorce the husband in event that he contracts a second marriage, then the husband must seek her consent before contracting the second marriage. The requirement in the Bill for seeking the wife's consent should be qualified with a proviso that the wife must have stipulated in the marriage contract that the husband shall seek her consent before contracting a second marriage.

Islamic law permits divorce;³ though it is 'the most hated by Allah.'⁴ Where the marriage becomes a hardship to both parties, the law requires the parties to separate amicably since the whole essence of marriage is lost. However, before divorce is resorted to, Islamic law requires reconciliation between the parties. The Qur'an says, "*If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family and the other from hers; if they both wish for peace Allah will cause their reconciliation.*"⁵

Islamic law discourages as much as possible, the reference of family disputes to the courts of law, and it enjoins the role of the relatives or other members of the society, in the resolution of family matters. This reconciliation mechanism was omitted from the Bill yet time immemorial; the society and religious bodies had a role of adjudicating matrimonial disputes, because in most instances, the spouses had minor disagreements which do not call for the intervention of

1 Section 79(3), for more grounds for divorce see section 82 of the Bill.

2 H.A. Ati, Family Structure in Islam, Op Cit, p.119.

3 See Qur'an (4:130).

4 Al- Muwatta Imam Malik, Hadith 29. 72

5 Qur'an Chapter 4, Verse 35

the courts. This oversight will lead to dissolution of many matrimonial bonds, more so, because the judicial system in Uganda is an adversarial system, which often leaves the parties more of enemies than before.

After divorce, the Bill¹ provides that court may order one party either to continue maintaining the other party or compensation for any contribution made towards maintenance of the family; this right to maintenance ceases on remarriage of the divorced party.² Islamic law takes a contrary view in that emphasis is put on the maintenance of the divorced wife for only three months after divorce (during the period of iddah). To require the man maintain the divorced wife, even after the period of iddah has expired, is contrary to Islamic Law, and will in effect cause a burden on the man yet the responsibilities over the divorced wife have ceased.

The orders relating to maintenance and custody of the children on separation and divorce are made based on the welfare principle.³ Under Islamic law, the woman is the most suitable person for nursing and bringing up children and as such, custody is granted to her irrespective of the age of the children. However, this right ceases when the woman remarries or until when the boy attains maturity and the girl is married. A companion of the Holy Prophet Muhammad (S.A.W) divorced his wife. He had a child with her, whom he wanted to keep with him. But the woman (divorcee) complained to the Holy Prophet Muhammad (S.A.W) who said, '*Your right (of custody) is superior until you re-marry.*'⁴

Section 65(1) of the Bill provides for matrimonial property as that, which includes the matrimonial home or homes, household property therein, or any other property either movable or immovable acquired during the subsistence of the marriage, deemed to be matrimonial property by express or implied agreement through the conduct of the spouses and immovable property owned by either spouse which provides for the basic income for the family. The Bill provides further that property shall be registered in the names of both spouses⁵ and shall be owned in common in undivided shares by

1 Section 95.

2 Section 97.

3 Section 96 of the Bill.

4 Sunan of Abu Dawood

5 Section 65(2).

the spouse.¹ This provision provides for the co-ownership of matrimonial property, and hence providing for equal rights to matrimonial property. This in effect, accords security to women who have hitherto been relegated as servitudes in their homes. The non-monetary contribution of the woman in a marriage is also taken into consideration by the Bill, during the division of matrimonial property.

With regard to the division of matrimonial property after divorce under Islamic law, Doi² observed; *"In event of a final divorce, the Sharia laws are very particular in providing for the protection of the wife's property against the avarice of the husband. If the cause is due to a cause imputable to the husband, he has to make over to her all property and pay off the mahr that has been settled upon her. If however the divorce has been resorted to at the instance of the wife, without any justifiable cause, she has simply to abandon her claim to the dower."* We can therefore assert that in Islamic law, woman occupies a more advantageous position than the man regarding division of property upon divorce.

4.1 CONCLUSION AND RECOMMENDATIONS

The Domestic Relations Bill 2003 is a milestone towards the establishment of a single law amalgamating all laws relating to domestic relations in Uganda. This will not only minimize confusion that is prevalent in the applicability of the various laws on the same, but also promote and protect the interests of spouses in the marriage. However, there is a need to reform the provisions of the Bill so as to make them acceptable to the populace, and in regard to the Islamic marriages, the following recommendations should be considered;

4.2 RECOMMENDATIONS

1. The Bill should not make it a requirement for the Muslim man to furnish proof of his capability to maintain multiple homes and an assurance of

1 Section 66.

2 A. Doi, Shariah, The Islamic Law, Op Cit, p.179.

according equal treatment to the wives.

2. Cohabiting partners should not be granted rights to property obtained during the subsistence of such relationships, for this will encourage cohabitation rather than marriage. Also the presumption of marriage for couples who have been in cohabitation for more than ten (10) should be omitted from the Bill as it undermines the marriage institution.
3. The Bill should make it a legal requirement that the guardian must also consent to the proposed marriage in order for the marriage to be valid, provided the guardian acts in the best interests of the woman. Where it is proved that the guardian did not act in the best interests of the woman, then the marriage can be set aside at the option of the woman.
4. The Bill should allow the practice of widow inheritance where the widow gives her full and free consent to it. In this case, it should make provision for proof of such consent mandatory to rule out any duress, coercion or threats.
5. The Bill should make it an exception that Muslim marriages that are solemnized between persons related through adoption, or between a man and a step-daughter whose mother the man has never engaged in sexual relations, are valid marriages.
6. Marriage gifts (dower) should be made a requirement for the validity of Islamic marriages.
7. The woman should not contribute to the maintenance of the family, be it monetary or not.
8. In adjudication of matrimonial causes arising under Islamic marriages in any court, Islamic law shall not be subject to any written law or principles of equity.
9. Qadi courts must be established by Parliament as provided for under Article 129(1) of the 1995 Constitution of Uganda to adjudicate matters of domestic relations arising in Muslim marriages. Their hierarchy should

be clearly defined and they should be manned by people knowledgeable in Islamic law.

10. It should not be a ground for divorce where the husband contracts a second marriage without the wife's consent, except where the woman specifically state in the marriage contract to that effect.
11. The Bill should contain a clause providing for reconciliation between the spouses as the initial mechanism for resolving marital problems before resorting to the courts. This will recognize the role of the society and religious bodies in maintaining peace and harmony in marriages.
12. After divorce and the expiry of the period of iddah, the husband should not be required to maintain the divorced wife for at that point, the duty to maintain her ceases.

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