# The Application of Islamic Family Law and Human Rights

## *A Case Study of Tanzania Mainland*

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*In Tanzania an ongoing discussion regarding the institution of kadhi courts is taking place, which is getting more intense in times of elections and the process towards a new Constitution. Discussions on the normative role of religious family law in national legal systems are also taking place in Western countries such as the Netherlands as a result of growing differences within society. It is assumed that the application of Islamic family law is at odds with the principles of human rights. For this master thesis I conducted research on the application of Islamic family law in Tanzania from a human rights perspective. Giving minorities the possibility to maintain their own culture and make the application of different family law systems possible in one society can as well threaten as contribute to individual autonomy, equality and unity of society, depending on the circumstances. When minorities get the opportunity to apply their own family laws, the state must however be aware of the rights of minorities within the minority. If their rights are violated at least a realistic opt-out option should be a possibility and the state should make people aware of the different options regarding family law to guarantee their personal autonomy and legal equality. Tanzania has a system of state law legal pluralism in the field of family law. State courts are applying Islamic marriage and inheritance law in the case of Muslims, although because of the lack of access to the courts deep legal pluralism also exists. The Islamic community is given the collective right to maintain its own laws. Although different groups are given different rights regarding family law in Tanzania, this has not caused disunity of society so far and the several religious communities live peacefully together in general. However, I argue that the lack of minimum age and consent of the bride for a marriage are a denial of the personal autonomy itself and therefore unacceptable. People should have a realistic choice regarding the adoption of a dowry, potential to polygamy and unequal rights to get a divorce in the marriage contract and full freedom of contract regarding their inheritance.*

## Introduction

As you will read below, the discussion on the application of Islamic family law appears to occur in different multicultural societies around the world and is therefore relevant worldwide. Within these societies, different rights and interests relating the application of Islamic family law exist. These rights and interests are often framed within the discourse of human rights. This thesis covers the potential problems and clashes that could occur when applying Islamic family law in a legal system which is based on the principles of human rights. To put the theory into practice this research also covers a case study into Tanzania. This thesis will look into the way that a multicultural and multireligious country like Tanzania deals with potential tensions between human rights and the application of Islamic family law and what we can learn from that.

*Tanzania's new Constitution*

The year of 2015 is an important year for the Tanzanians, as elections will be held for a new president and parliament. The people will vote either in favour of or against the new Constitution by means of a referendum. The Constitutional Review Commission (CRC) was set up in 2012 in order to review the national Constitution. In June 2013 the CRC presented its first Draft Constitution in the Government Gazette. After this, the draft was discussed by the people in constitutional fora's.[1] The CRC took the people's views into account and produced a second draft, which was presented to the President of Tanzania in December 2013. In February 2014, the Constitutional Assembly (CA), which was formed by 201 members appointed by the President, was convened and in March the CRC presented the Draft Constitution to the CA. During discussions on the proposed Draft Constitution among the CA-members in April 2014, the CA members of the key opposition political parties under the umbrella of '*Ukawa'* decided to boycott the proceedings of the assembly, as they opined that the ruling party, Chama Cha Mapinduzi (CCM), was using its majority membership to overhaul the draft Constitution, which was the product of people through the CR, and to put their own provisions instead.[2] Many individuals and organisations requested the President to dissolve the CA, because a constitution produced by this process would not enjoy legitimacy or political acceptability. However, the process continued and the CA amended the proposal of the CRC.

[1] http://sabahionline.com/en_GB/articles/hoa/articles/newsbriefs/2012/10/10/newsbrief-06
[2] http://www.theeastafrican.co.ke/news/Party-interests-stand-in-the-way-of-progress/-/2558/2294192/-/a93k7kz/-/index.html

The final Draft Constitution was eventually presented to the people in October 2014.[3] The country was preparing itself for a referendum to adopt or reject the Draft Constitution in April 2015, but the referendum was postponed indefinitely. Until today the preparations for the referendum are not yet completed. Currently it is unclear whether the referendum will take place before the presidential elections in autumn of 2015. It is even still a question whether the referendum will take place at all after the new president is chosen. The *Ukawa* sees the postponement or annulment of the referendum as a chance to start the review of the Constitution all over again under the new president after the elections.[4]

*Kadhi Courts*

One of the major controversies during the discussions on the Constitution, in Tanzania also known as the *Katiba*, has been the recognition of the so called *kadhi* courts in Tanzania mainland for family law cases. During the general elections of 2005 and 2010, the establishment of *kadhi* courts in Tanzania mainland was also a widely debated issue.[5] Eventually, the current Draft Constitution was passed without constitutional recognition of special *kadhi* courts on mainland. Some Muslims addressed the media and declared to boycott the referendum on the proposed Constitution, as the government failed to include *kadhi* courts in the proposal. In January 2015, the government proposed the establishment of self-financed *kadhi* courts within the Tanzanian legal system. These *kadhi* courts would get the ability to give binding judgements in family law cases between Muslims who wish so voluntarily.[6] The proposal received criticism from the Muslim leaders, as the Bill wouldn't give the *kadhi*'s enough legal power. Not much later, in February 2015 the Government withdrew the proposal for the establishment of *kadhi* courts 'to allow more consultations'.[7] However, the Bill on the introduction of *kadhi* courts keeps being a prominent issue in parliament. The leaders of the mainstream churches in Tanzania appealed to President Kikwete to use his powers to prevail on his statement that the government will not get involved in financing or the re-establishment

[3] http://www.thecitizen.co.tz/News/Proposed-basic-law-has-ignored-people-s-wishes/-/1840340/2475902/-/r8tdmg/-/index.html (24-07-2015).
[4] http://www.thecitizen.co.tz/magazine/political-reforms/Katiba-process-in-limbo/-/1843776/2686650/-/9awvjz/-/index.html (24-07-2015).
[5] C.S.L. Gähnstrom, 'Ethnicity, Religion and Politics in Tanzania: The 2010 General Elections and Mwanza Region', Master Thesis: Helsinki University (2012), pp. 133-136.
[6] http://www.thecitizen.co.tz/News/Kadhi-s-court-debate-back-in-Parliament-next-week--Pinda/-/1840340/2651812/-/iwsc43z/-/index.html (24-07-2015).
[7] http://www.thecitizen.co.tz/News/national/We-re-seeking-more-views-on-Kadhi-s-court-Bill--PM/-/1840392/2616982/-/bm5l0e/-/index.html (24-07-2015).

of *kadhi* courts. According to them, the introduction of the courts would create religious tensions and divide the country.[8]

*Religion and law in Tanzania*

Tanzanian society is very religious. In a Pew Foundation Survey of 2010, 93 percent of the 1540 people interviewed countrywide, said religion was a very important part of their life.[9] Approximately 36 million people live in Tanzania, of which 35 million live on mainland and 1 million on the islands of Zanzibar. It is estimated that 30 to 40 percent is Christian, 30 to 40 percent in Muslim and the remainder consisting of atheists and indigenous religions. However, Zanzibar is estimated to be 99 percent Islamic.[10] On the mainland Muslim communities are concentrated in coastal areas. The Christian believers are divided into Roman Catholic, Protestant, Anglican, Seventh Day Adventist and Pentecostal churches. The vast majority of the Muslims is Sunni and the Shia groups are mainly limited to Aga Khan Ismailis. Although there are increasing tensions between Muslims and Christians, especially on Zanzibar, in the form of violent attacks, relations between the two faiths have remained cordial in general.[11]

The indigenous beliefs were joined by Islam between the 9th and 14th century because of the advent of Arab (slave) traders.[12] In 1884, the Germans began the colonization of Tanganyika and made the region part of German East Africa. After the end of the First World War the British acquired the colony as a British Mandate. Although there had been Christian missionaries in Tanzania even before German rule, Christianity grew phenomenally under British rule.[13] During their colonial period, the Germans heavily relied on Swahili and Arab notables and judicial officials, such as *liwali*'s in towns and *akida*'s at the countryside, who were tax collector, policeman and judge in one person. These local leaders were appointed by the Germans to decide on cases using their local law.[14] The British colonizers officially

[8] http://www.thecitizen.co.tz/News/Clerics-to-JK--Prevail-on-kadhi-courts/-/1840340/2672410/-/t215syz/-/index.html (24-07-2015).
[9] Pew Research Centre, *Tolerance and tension: Islam and Christianity in Sub-Saharan Africa* (2010), p. 29: http://www.pewforum.org/2010/04/15/executive-summary-islam-and-christianity-in-sub-saharan-africa/ (24-07-2015).
[10] R.V. Makaramba, 'The Secular State and the State of Islamic Law in Tanzania', in: S. Jeppie, E. Moosa & R.L. Roberts, *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-colonial Challenges*, Amsterdam: Amsterdam University Press (2010), p. 274
[11] C.S.L. Gähnstrom, 'Ethnicity, Religion and Politics in Tanzania: The 2010 General Elections and Mwanza Region', Master Thesis: Helsinki University (2012), p. 5.
[12] http://whc.unesco.org/en/tentativelists/2095/ (24-07-2015) and A. Liviga & Z. Tumbo-Masabo, 'Muslims in Tanzania: Quest for an Equal Footing', in: R. Mukandala a.o., *Justice, Rights and Worship. Religion and Politics in Tanzania*, Dar es Salaam: REDET (2006), pp. 136-137.
[13] S. Mesaki, 'Religion and the State in Tanzania', *Cross Cultural Communication*, vol. 7, no. 2 (2011), pp. 252.
[14] M.J. Calaguas, C.M. Drost, & E.R. Fluet, 'Legal Pluralism & Women's Rights: A Study in Post-Colonial Tanzania', *Columbia Journal of Gender & Law*, vol. 16, no. 2 (2007), p. 15.

imported and imposed an alien legal system on the territory of Tanganyika: the common law of England and doctrines of equity through the 'reception clause' in the 1920 Tanganyika Order in Council. Furthermore, a well-organized system of justice was established, in which a distinction was made between rural and urban areas and between native and European inhabitants. In 1929 native courts were officially recognised by the Native Courts Ordinance. These native courts included *liwali's*, *kadhi's*, *akida's* and chiefs. The courts were to exercise jurisdiction within an area prescribed by the governor. Traditional African tribes had their own native courts, Muslims had their *kadhi* courts and Europeans and Asians appeared in the High Court. Native courts were to apply 'native law' subject to English 'notions of justice and morality' and were subordinate to the High Court. In this court system no distinction was made between native courts and *kadhi* courts or between customary law and Islamic law. Muslim family law was applied in the colony under the title of 'native law'.[15] So, during the colonial period, a dual legal system existed. As a result, conflicts between customary and English common law, stayed unresolved.[16] In 1962 Tanganyika became an independent democratic republic and after a history of Arab and British rule, Zanzibar also became independent in 1963. Tanganyika and Zanzibar merged into the United Republic of Tanzania in 1964.

As a result of the colonial history, the legal system of Tanzania is characterized by the 'triple heritage' of common law, customary law and Islamic law.[17] There is no uniform legal system in the Union; every unit (Tanganyika and Zanzibar) has its own separate legal and court system. In Zanzibar a distinct system of *kadhi* courts, which solve cases in personal status matters involving Muslim parties who claim to follow Islamic personal law, do exist. On mainland, all matters are handled by the state courts. Acknowledged religious or native courts do not exist anymore. After the independence the court system on Tanzania mainland was merged into a single tier. However, section 9(1) of the Judicature and Application of Laws Ordinance (JALO) continued the application of customary and Islamic law in matters of a civil nature. According to provision (ii) of Section 9(1) of the JALO, courts were not to be precluded from applying rules of Islamic law. According to the JALO, civil customary law was to apply 'between members of community in which rules of customary law relevant to the matter are established

[15] R.V. Makaramba, 'The Secular State and the State of Islamic Law in Tanzania', in: S. Jeppie, E. Moosa & R.L. Roberts, *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-colonial Challenges*, Amsterdam: Amsterdam University Press (2010), pp. 275-277.
[16] M.J. Calaguas, C.M. Drost, & E.R. Fluet, 'Legal Pluralism & Women's Rights: A Study in Post-Colonial Tanzania', *Columbia Journal of Gender & Law,* vol. 16, no. 2 (2007), p. 17.
[17] R.V. Makaramba, 'The Secular State and the State of Islamic Law in Tanzania', in: S. Jeppie, E. Moosa & R.L. Roberts, *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-colonial Challenges*, Amsterdam: Amsterdam University Press (2010), p. 273.

and accepted' and Islamic Law was applied between 'members of a community which follows that law' in matters of marriage, divorce, guardianship, inheritance, *waqf*, and similar matters. This means that state courts were entrusted to apply customary and Islamic family law. The Tanzanian state authorized the application of Islamic family law by state courts, thus amounting to what one may call 'secular authorization' of Muslim law.[18]

Civil cases on family law must be initiated at the level of Primary Courts. District Courts are found throughout all the districts of Tanzania mainland and receive appeals from the Primary Courts. The High Court of Tanzania was established under Article 107 of the Constitution and has unlimited original jurisdiction to hear all types of appeals from the District Courts. The Court of Appeal of Tanzania, established under Article 108 of the Constitution, is the highest Court in the hierarchy of judiciary and consists of the Chief Justice and other Justices of Appeal. The Court of Appeal of Tanzania is the court of final appeal at the apex of the judiciary in Tanzania mainland and Zanzibar.[19] The fact that state courts are entrusted to apply Islamic family law has been ground for discontent among the Tanzanian Muslim community, since it is considered that state courts do not interpret Islamic issues correctly and therefore Islamic courts and judges are needed.[20]

*The discussion on sharia in the West*

The discussion on the establishment of *kadhi* courts in Tanzania reminded me of the debate I encountered in the Netherlands and other Western countries on the question whether there should be a possibility to apply religious law in family law cases between parties who agree on that application. The possible existence of sharia courts, which would cause a parallel legal system besides the national legal system, is in a lot of European countries a big concern.[21] European countries are worried that sharia courts and the application of Islamic family law are incompatible with human (especially women's) rights and will cause legal uncertainty.

[18] R.V. Makaramba, 'The Secular State and the State of Islamic Law in Tanzania', in: S. Jeppie, E. Moosa & R.L. Roberts, *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-colonial Challenges*, Amsterdam: Amsterdam University Press (2010, p. 278.
[19] B.T. Nyanduga and C. Manning, 'Guide to Tanzanian Legal System and Legal Research' (2006): http://www.nyulawglobal.org/globalex/tanzania.htm#_Judicial_System_of_Mainland%20Tanzani (24-07-2015).
[20] R.V. Makaramba, 'The Secular State and the State of Islamic Law in Tanzania', in: S. Jeppie, E. Moosa & R.L. Roberts, *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-colonial Challenges*, Amsterdam: Amsterdam University Press (2010), pp. 278-280.
[21] For example:
Der Tagesspiegel (21 March 2007, 1 November 2008, 12 June 2009), Le Monde (1 November 2007 and 20November 2009), The Times (5 July 2008, 31 October 2008, 30 June 2009, 17 January 2010), Gazet van Antwerpen (24 September 2009, 5 January 2010).

In Canada Islamic arbitration on a voluntary basis was introduced for family law cases in 2004, as such Jewish and Christian arbitration already existed. After heavy criticism, religious arbitration was completely prohibited in 2006.[22] In the Netherlands, national family law is mandatory law and religious arbitration is therefore not possible in family cases. Some forms of Islamic family law, like inheritance law, are applicable through contractual freedom, within the borders of Dutch law.[23] On behalf of the Ministry of Justice, in 2010 a research was conducted by the Radboud University on the existence of informal sharia courts in the Netherlands after the majority of the Lower House expressed its concerns on this issue. These concerns were related to the possible existence of a parallel legal system, which would be in conflict with the rule of law. The research showed that in the Netherlands sharia courts do not exist. However, according to the research report, dispute settlement, mediation and counselling based on sharia by imams, family or friends based on sharia does occur according to the research report.[24] In November 2014 three members of the Dutch Lower House requested the cabinet to take measures in order to prohibit groups which inevitably lead to disregard of the democracy and rule of law. This situation could particularly take place in case of groups which summon for the application of sharia.[25] The assumption that Islamic family law and human rights are incongruous, create a fear for the formal and informal application of Islamic family law by state courts or non-state sharia courts in these Western countries. However, as differences within Western societies have proliferated, the meaning of the unified family law has diminished and the demand for the application of alternative family law systems has grown.[26] The question is how countries must cope with this development and the interests and rights of the different groups and individuals within the society.

*Islamic family law and human rights in Tanzania*

Tanzania is party to the core international treaties that protect human and women's rights and the basic human rights are incorporated in the Constitution. Although Tanzania is religiously neutral, the state recognises religious law in personal matters such as marriage, divorce and inheritance. The earlier mentioned fear for the application of Islamic family law in the

[22] M. S. Berger,'Sharia in Nederland is vaak keurig Nederlands', *Ars Acqui* 56 (2007), pp 507.
[23] Idem, p. 508.
[24] L.G.H. Bakker, a.o., *Sharia in Nederland. Een studie naar islamitische advisering en geschilbeslechting bij moslims in Nederland*, Radboud Universiteit Nijmegen in opdracht van het Wetenschappelijk Onderzoek- en Documentatiecentrum van het ministerie van Justitie (2010).
[25] *Kamerstukken II* 2014/15, 34 000 XV, nr. 21 of the Dutch Lower House.
[26] A. Büchler, *Islamic Law in Europe? Legal Pluralism and its Limits in European Family Law*, Surrey: Ashgate (2011), p. 19.

Netherlands and other Western countries seems to suggest that human rights and the application of Islamic family law cannot go together, as there are frictions between Islamic family law and human rights and a model of different family law systems is undesirable. Therefore, this thesis will look into the different rights and interests regarding the application of Islamic family, the way Tanzania deals with these and what we can learn from that. The research of this thesis is;

**Is Tanzania an example of a model or an example of a warning for the integration of Islamic family law in a national legal system which is based on the principles of human rights?**

In order to answer the research question, some sub questions have to be answered first. What is the content of Islamic family and what are potential frictions with human rights? What are the pros and cons regarding legal pluralism from a human rights perspective? How does the Tanzanian legal system deal with the different rights and interests regarding the application of Islamic family law?

In the first part of this thesis I will shortly evaluate what the content of classical Islamic family law is. The sources of sharia, different legal schools, Islamic legal procedures and different subtopics of Islamic family law will be addressed. As the main school of law in Tanzania is the Sunni Shafi'i school, the focus will be on this interpretation of Islamic family law. After this, I will shortly discuss the potential tensions between the debated content of Islamic family law and international human rights in the second chapter. The third chapter will focus on different theories in favour of and against legal pluralism from a human rights perspective. In the fourth chapter I will present the case study of Tanzania and discuss which role human rights and Islamic family law have within the Tanzanian legislation and case law. In the conclusion I will come back to the different sub questions and the main research question whether the integration of Islamic family law in Tanzania concurs with human rights or causes certain problems. For this research I will use primary and secondary literature on Islamic law, Tanzanian law and human rights. For the last chapter I will also use Tanzanian case law in the field of marriage, divorce and inheritance.

## Chapter 1: Islamic Family Law

In this chapter the sources, legal system and content of Islamic family law will be discussed. One cannot speak of 'the sharia'. There is not one code that explains what the content of sharia is, like it is the case with state law. During the history of Islam different currents, scholars and states have developed different perspectives on the rules of sharia. Muslims have had to learn to live with the disagreement on and variety in the contents of the law. So, it appears there are a lot of different 'sharia's', but these differing opinions have one thing in common: the law should be the expression of God's will for mankind and based on His Revelation.[27] As God has not given an indisputable law code, humans must make the step to clarify the law for use, which is originally the task of the legal scholar.

It is a well-known assumption that in the tenth century a broad consensus on the content of Islamic law had become established and the 'gates to *ijtihad* (independent interpretation) were closed'. The formulation of Islamic law had reached such a stage of completeness and finality that future generations were bound to the interpretation of their predecessors, who were the only legitimate interpreters and could not be equalled. This demanded for *taqlid*, the acceptance and following of the doctrines of established schools and authorities. According to Vikør this view made Islamic scholars less creative in their legal interpretation and Islamic law a rigid set of norms.[28] When other cultures and societies began to infiltrate the Islamic world, new and reform-orientated interpretations of the religious texts occurred in the nineteenth century. However, others argue that the gates of *ijtihad* were never closed and that Islamic law developed continuously as the sharia was always used in practice.[29] Both way, today Islamic scholars and other individuals are rereading the foundational Islamic texts for new perspectives under new circumstances. Nowadays the interpretation of sharia is not reserved for scholars, but through modern media, all individuals can give their interpretation of the Islamic rules. Some Islamic scholars expressed that the disagreement among Muslims is a gift from God. This means that when people come to different views by using proper methods there is no absolute right or wrong and that the activities to find the best way are praiseworthy whether the end result is one or the other.[30]

[27] K.S. Vikør., *Between God and the Sultan. A History of Islamic Law,* London: Foundation Books (2005), p. V.
[28] J. Schacht, *An Introduction to Islamic Law,* Oxford: Clarendon Press (1964): 69-71.
[29] K.S. Vikør., *Between God and the Sultan. A History of Islamic Law,* London: Foundation Books (2005), pp. 15-16.
[30] Idem, p. 73.

### *1.1. Sources of sharia*

The primary source of sharia is the Revelation of God, expressed in the Koran and the Sunna. These sources must go through a process of understanding. Human effort must be applied in order to read the sources correctly. On basis of the text, legal scholars must formulate actual legal rules and this process is called *ijtihad*. The most well-known and widespread method of *ijtihad* is the process of *qiyas*, which means analogical deduction, but there are many other methods. By these methods many different rules come in existence, but order to become actual law, the rule must be confirmed by consensus (*ijma*) within a legal school.

According to Muslims, the Koran is the word of God Himself, revealed to Muhammad during his life in Medina and Mecca. But during the life of Muhammad the Koran was not a complete and written book yet. At the first stage, all transmission of knowledge was oral. Many early scholars disapproved writing down what they knew, as they considered this as demeaning of the message. During the reign of Mohammad's successor Abu Bakr the first collection of revelations was constructed by Zaid ibn Thabit, who also worked as writer for the Prophet himself. The first official codification of the text of the Koran was established during the reign of the third caliph Uthman. Uthman also ordered all the alternative collections of revelations to be destroyed. This is the Koran that is still believed as Gods word today and there is little disagreement among Muslims over its actual words. The text of the Koran is divided into 114 sura's and the sura's are composed of verses. As the text of the Koran is rather poetic and most issues are pointed out shortly and incompletely, elucidating the Holy text soon became an important job. These commentaries explain the Koran grammatically, philological and historical and are a significant component of the sources of sharia.[31]

The second element of Gods Revelation is the Sunna, Muhammad's normative sayings and doings expressed in the hadith, the stories about his life and community. Although everything in the sharia is linked to the Koran, not each rule can be derived directly from a verse, as too few of them have a direct legal content. The commentaries on the Koran often contain general commands like 'follow the example of the Prophet', which makes the Sunna more helpful in justifying concrete rules. A hadith is divided in two parts. The *isnad* contains the name of the man who is the source of the story and the chain of the transmitters to the time that it was written down. After the header, the actual text of the story, the *matn*, tells of an event and what

[31] T.W. Juynboll, *Handleiding tot de kennis van de Mohammedaansche Wet. Volgens de leer der sjafi'itische school*, New York: Querido (1943), pp. 1-9.

the Prophet said or did. A mass of hadith with contradictory statements appeared after the death of Muhammad and the validity of the different hadith had to be determined. In determining whether a hadith was true or false, the specialist looked at the credibility of the *isnad.* Hadith could in this way be categorized from certainly true to very weak. A lot of different hadith specialists made collections of the hadith which they believed to be authoritative, but there are six collections considered to be the most influential. Especially the collection by Bukhari (d. 870) and Muslim (d. 875) are highly regarded. These collections are organized according to legal themes.[32]

Through hadith and Koran studies, an authoritative revelatory text (*nass*) was developed. However, some parts of the *nass* still express equivocal commands, for example rules for specific circumstances. Then it is not clear what the rules are in different circumstances. Further human thought processes are needed to develop legal implications for each situation. The most important method to formulate legal rules is *qiyas*, which is mentioned in the Koran and also used by the early companions of Muhammad. A famous example of the process of *qiyas* has its basis in the ban on drinking wine in the Koran. The jurists decided that the reason behind this ban is that it makes people drunk, so that the ban actually refers to all substances that have the same effect. Other methods of creating rules for circumstances and situations the Revelation does not provide a rule for, are *istihsan*, *maslaha mursuala* and *siyasa sharia,* which justify the creation of new rules by the common good, necessity and political need.[33]

By human interpretation of the text and reasoning, many different rules are developed based on the Revelation and the rule of one jurist can be rejected by another. As the Sunni Islam never established a unified religious authority, legal rules had to be authorized in another way. So, the practice of *ijma* or consensus was established, which means that the community of believers determines which rule should be the guideline. The idea is that if agreement is reached among Muslims, that itself is a proof of God's intention and the correctness of the rule. Mostly, by agreement among Muslims is agreement among legal scholars is meant, although some feel that every Muslim should be involved. According to Shafi'i, who will be also mentioned in the next paragraph, *ijma* is only possible for general knowledge. These are obvious things that every person knows, because it is mentioned in the Koran or because everyone just knows.

[32] K.S. Vikør., *Between God and the Sultan. A History of Islamic Law,* London: Foundation Books (2005), pp. 38-45 and T.W. Juynboll, *Handleiding tot de kennis van de Mohammedaansche Wet. Volgens de leer der sjafi'itische school,* New York: Querido (1943), pp. 9-16.
[33] K.S. Vikør., *Between God and the Sultan. A History of Islamic Law,* London: Foundation Books (2005), pp. 53-72.

Examples of obvious knowledge is the duty to pray that the Koran is the word of God, that rain is made of water and apples fall downwards. Other knowledge, like how one should pray, are matter that normal people need not to concern themselves with. It is the scholars' job to find the correct rules and inform the community.[34]

### *1.2. Schools of Sharia*

In Sunni Islam, four doctrinal legal schools, *madhhabs*, exist; the Hanafi, the Maliki, the Shafi'i and the Hanbali school, named after the master-jurists who are assumed to be their founder or source of inspiration. In the early years of Islam, the interest in law and legal studies evolved within the environment of study circles, where men studied and discussed the Koran and general principles of Islam. During the eighth century the law became more systematic and jurists began to develop their own legal assumptions and methodologies. Prominent teachers attracted students who they taught their interpretations. Groups of students, legists and jurists who adopted the doctrine of a particular leading jurist eventually developed into the legal schools and during this development people became more loyal to their school. Schools differ from each other in substantive principles, doctrines and methodologies.[35]

In this chapter, we will discuss the classical Sunni Shafi'i interpretation of Islamic family law, as in Tanzania the most Muslims belong to this school. The Shafi'i school is named after Muhammed b. Idris al-Shafi'I (d. 820), who died long before the founding of the school. His book the *Risala* introduced a revolution in Islamic legal science by uniting the two counterpoints *hadith* and *ra'y*, the first focussing only on the practices laid down in the Koran and by Muhammad en the second emphasizing the need for logical thinking besides these sources. The use of the *qiyas* method to develop rules for new circumstances not established in the Revelation, as described in the previous paragraph, was the way to achieve a compromise between the two counterpoints. It allows jurists to create new laws by reasoning, while all the new legislation keeps its foundation in the Revelation. [36] Shafi'i himself was not so much concerned with the collection and discussion of specific rules of law. A coherent and structured group of scholars who referred to Shafi'i grew up about a century after his death and the first clear leader was Abu al-Abbas Ibn Surayj, who died in 918. He was also the first to write an abbreviated collection of rules of law practised by the school, a *mukhtasar*. The group used the

[34] K.S. Vikør., *Between God and the Sultan. A History of Islamic Law,* London: Foundation Books (2005), pp. 74-75, 87-88.
[35] W.B. Hallaq, *An Introduction to Islamic Law,* Cambridge: Cambridge University Press (2009), pp. 31-37.
[36] K.S. Vikør., *Between God and the Sultan. A History of Islamic Law,* London: Foundation Books (2005), pp. 64-65.

methodological principles laid down by Shafi'i himself and based much of their legal material on jurists who had studied with Shafi'i, in particular Ismail al-Muzani.[37] One of the most important sources for the content of Shafi'i law is the *'Umdat al-salik*, the Reliance of the Traveller, written by Ahmad Ibn Naqib al-Misri (d. 1368).

### *1.3. Areas of Law*

Within sharia a distinction between *mu'amalat* and *ibadat* exists. Rules of *ibadat* are the rules between men and God and would in the most states be considered as not appropriate to law, such as rules on praying, eating and clothing. *Mu'amalat* contains rules on affairs between men.[38] Sunni Muslims believe that the Islam is built on 5 pillars, which are part of *ibadat*; the creed (*shahadah*), praying (*salat*), alms (*zakat*), pilgrimage to Mecca (*haddj*) and fasting in the month *Ramadhan*. Next to these, many more prescriptions in the field of *ibadat* or *mu'amalat* exist. In many cases prescriptions do not just forbid or oblige something, but acts or omissions are put in one of 5 categories; required, recommended, neutral, disapproved or forbidden. The category an act or omission is placed in, can also differ depending on the circumstances.[39] Within state law, a distinction between private and public law is made, whereas public law contains the law concerning relations between individuals and the state like criminal and administrative law, private law is concerned with relations between individuals. As the sharia is not the product of the state, but of God, in Islamic law a distinction between private en public law does not exist. This also means that Islamic law does not recognize public prosecution and the state's responsibility to initiate legal proceedings against criminals. In Islamic law, also all criminal cases, are initiated by a plaintiff, who makes a claim against another individual, the defendant. However, a distinction between private and penal law can still be made to a certain extent, as in private law the judge acts as an arbitrator, while the court imposes sanctions in the case of penal law.[40] In spite of the attention it has received, criminal law is not the most widely used part of Islamic law and definitely not in the modern period. Family and personal law is clearly the most widely applied area of law, directly or through national codifications.[41]

[37] K.S. Vikør., *Between God and the Sultan. A History of Islamic Law,* London: Foundation Books (2005), pp. 27, 100-101.
[38] Idem, pp. 3-4.
[39] T.W. Juynboll, *Handleiding tot de kennis van de Mohammedaansche Wet. Volgens de leer der sjafi'itische school*, New York: Querido (1943), pp. 44-49.
[40] K.S. Vikør., *Between God and the Sultan. A History of Islamic Law,* London: Foundation Books (2005), p. 282.
[41] Idem, p. 299.

### *1.4. The legal system and procedure*

Whereas sharia and its courts are nowadays mostly lodged within the structures of the state, the most striking fact about traditional Islamic courts and legal personnel is that they were not subject to the authority of the state, as the state as we know it, did not exist yet. Pre-modern Muslim rule was limited in that it did not possess the pervasive powers of the modern state. State administration was thin and often limited to tax collection and land tenure. Borders and nationalities did not exist and rulers did not regulate internal affairs. Without the institution of the state, people managed their internal affairs by self-rule. Muslim rulers might appoint the *kadhi* (judge), but could not influence what law the judge should apply. The *mufti* was a legal specialist who was legally and morally responsible for the society in which he lived and was not responsible for the interests of the ruler. He issued *fatwa*'s, which are legal answers to questions he was asked to address. This questions came from members of the community as well as from judges. His opinion, rendered in a *fatwa* was non-binding, but often used in the disputes before the *kadhi*. Where the *mufti* interpreted God's law, the *kadhi* applied the law in actual cases. But the task of the *kadhi* was also to supervise much of the life of the community. He oversaw the building of mosques and hospitals, audited the charitable endowments and looked into the care for the orphans and the poor. Furthermore, the *kadhi* mediated in informal disputes between community members. Also in formal disputes before the court, the judge tried to mediate between parties and wherever possible, to prevent the collapse of relationships. The court process was never remote from the social reality of the disputants and judges cared less for the application of consistent legal doctrine than for the creation of a compromise that left the disputants able to resume their previous relationship in the community.[42]

As mentioned before, a procedure before the court was not possible without a claimant and there is no office of the public prosecutor. However, the *kadhi*, was in charge of the public welfare, the 'guardian of those who have no other guardian' and competent to take action in matter of public welfare. After a claim the first question was whether the procedure was admissible and whether the defendant was capable of being sued. If this was the case, the procedure took place in public. The *kadhi* questioned the defendant and asked the plaintiff to produce evidence. The onus of proof was laid on the plaintiff and the defendant held good, in other words the presumption operated in the favour of the defendant. It was therefore important to decide who the defendant and who the plaintiff was in a lawsuit. The most important kind

[42] W.B. Hallaq, *An Introduction to Islamic Law*, Cambridge: Cambridge University Press (2009), pp. 8-12, 60.

of evidence was the testimony of the witness. Two male witnesses or one male and two female witnesses were needed as valid evidence. If a party contested the competence of a witness, it must be proven why the witness was not competent to testify. The testimony of all witnesses had to be identical to be valid. The *kadhi* could not give a judgement against an absent party who was not represented by a deputy. It was the duty of the *kadhi* to treat parties equally, not to distort their statements, not to suggest answers to witnesses and give a just judgement. The judgement was given according to the doctrine of the school of law to which the *kadhi* belonged and could not be revoked once is has been given.[43]

### *1.5. Marriage*

According to Ibn al-Naqib a man is recommended to marry a woman if he has desires for sexual intercourse and enough money for the payment of the dowry. Desirable characteristics in a bride are (in the order of preference) religiousness, intelligence, a good character, fertility, a good family, virginity and beauty. It is unlawful to propose to a woman who is still in the waiting period after a divorce or death of her husband. It is recommended for the guardian of a marriageable female to offer her to a righteous man. A marriage agreement has the following integrals; the spoken form, two witnesses, the bride's guardian, the groom and the bride. A third person who concludes the marriage, like a judge or another authority, is not a requirement for a valid marriage, as a marriage is seen as a civil contract between the two parties.[44] The spoken agreement entails the offer by the bride's guardian and the acceptance of the groom. The witnesses must be male, sound of hearing and eyesight, familiar with the spoken language, Muslim and upright. The guardian of the bride must be male, legally responsible, Muslim, upright and sound of judgement. The guardian is, in order of preference, the father, the father of the father, the brother, the brother's son, the father's brother, the father's brother's son or the *kadhi*. Whenever a woman asks to marry a suitor who is a suitable match, the guardian must marry her to him. The guardian does not need the consent of the bride if he is her father or grandfather and the bride is a virgin. Otherwise he does need her consent.[45]

It is unlawful to marry one's ancestors, descendants, parent's descendants of the first generation of one's grandparent's offspring. Another impediment for a marriage is inequality, as a man is

[43] J. Schacht, *An Introduction to Islamic Law,* Oxford: Clarendon Press (1964), pp. 188-198.
[44] T.W. Juynboll, *Handleiding tot de kennis van de Mohammedaansche Wet. Volgens de leer der sjafi'itische school*, New York: Querido (1943), pp. 194 en J. Schacht, *An Introduction to Islamic Law,* Oxford: Clarendon Press (1964), p. 161.
[45] Ahmad ibn Naqib al-Misri, *Reliance of the Traveller*, edited and translated by N.H.M Keller, Beltsville: Amana Publications (2011), pp. 517-522.

not allowed to marry a woman who is in a higher position than he is, taken into account their clan and profession. There is however no objection against marrying a woman of a lower position. Furthermore, a man cannot marry a women who is not Muslim, Christian or Jewish, where a Muslim woman is obliged to marry a Muslim man. The husband is allowed to marry up to four wives, but according to the Shafi'i law it is more fit to confine oneself to just one wife. Having reached is certain age is not a requirement for a valid marriage and also Muhammad himself married the daughter of Abu Bakr, who was allegedly six years old.[46] Marriages which are intended to be temporary (*mut'a*) and marriages with the receiving of the dowry and thus the trading of the woman as only purpose, are invalid.[47]

It is a formal requirement for the validity of a marriage that the man pays a dowry (*mahr*) to the bride, which remains in the property of the bride during the marriage.[48] In contrast to pre-Islamic Arabic practices, the Muslim dowry is paid to the wife herself rather than her family.[49] If the dowry is mentioned in the marriage contract, the mentioned amount must be paid to the woman. If a dowry is not mentioned in the agreement, this does not hurt the validity of the marriage. In this case the amount of the dowry is considered to be the amount typically received as payments for similar brides. This is dependent on the social position, intelligence, beauty and other characteristics of the bride. The dowry can be paid immediately or deferred and can in principle consists anything.[50] It is customary to pay part of the dowry immediately and to postpone payment of the rest. The unpaid part becomes due on the death of one of the spouses or in the case of repudiation if the marriage has been consummated.[51]

Within the marriage, the wife and husband have marital rights and obligations. Firstly, it is obligatory for both to treat each other well and to give the other what they must. Furthermore, it is obligatory for the woman to let her husband have sexual intercourse with her whenever he asks her at their home and she can physically endure it. However, the wife also has the right to sexual intercourse every four nights. It is not lawful for the woman to leave the house except

[46] T.W. Juynboll, *Handleiding tot de kennis van de Mohammedaansche Wet. Volgens de leer der sjafi'itische school*, New York: Querido (1943), pp.184-189.
[47] Ahmad ibn Naqib al-Misri, *Reliance of the Traveller,* edited and translated by N.H.M Keller, Beltsville: Amana Publications (2011), p. 530.
[48] K.S. Vikør., *Between God and the Sultan. A History of Islamic Law,* London: Foundation Books (2005), p. 301.
[49] K. Ali, *Sexual Ethics and Islam. Feminist Reflections on Qur'an, Hadith and Jurisprudence,* London: OneWorld (2006), p. 3.
[50] T.W. Juynboll, *Handleiding tot de kennis van de Mohammedaansche Wet. Volgens de leer der sjafi'itische school*, New York: Querido (1943), pp. 179-183 and Ahmad ibn Naqib al-Misri, *Reliance of the Traveller,* edited and translated by N.H.M Keller, Beltsville: Amana Publications (2011), pp. 533-536.
[51] J. Schacht, *An Introduction to Islamic Law*, Oxford: Clarendon Press (1964), p. 167.

with the permission of her husband. The husband is obliged to provide his wife sustenance, clothes and what she needs for her hygiene if she allows him full enjoyment of her person and does not refuse him sex and does not travel without his permission.[52] However, the wife keeps full ability to have goods in ownership and enter into agreements without the permission of her husband. Also, a marriage does not have community property as effect. Both the husband and wife keep ownership of the money and goods they achieved by labour, donation or inheritance before or during the marriage.[53]

### *1.6. Divorce*

According to the Koran and Sunna, divorce is permissible, but detested by Allah. A divorce by a husband is valid when he is sane, has reached puberty and voluntary effects it.[54] A marriage can be dissolved by the husband by unilateral repudiation of his wife (*talaq*). He is allowed to do this at all times and does not have to give a reason for the repudiation. Unilateral repudiation takes place by pronouncing that he wants to divorce her or other words which makes this clear. After the pronouncement of the *talaq* a waiting period of about three months, the *'idda*, in which the husband must maintain his wife and is not allowed to have sexual intercourse with her. During this period the repudiation is still reversible and the woman is not allowed to marry another man. The man is not allowed to marry another woman, if he already has three other wives besides the wife he has repudiated. This period is meant to prevent uncertainty about a potential pregnancy and counteract hasty repudiations. If the husband does not take his wife back during the *idda,* the divorce becomes final and irreversible and the husband loses his obligation to maintain the wife. The only option to get his wife back after the *idda* is to remarry her. However, when the man pronounced the *talaq* three times to his wife, he is not allowed to take her back unless she marries and divorces another man. After the third *talaq* a waiting period follows, in which the woman is not allowed to marry again, but the former husband cannot take her back.[55]

Another form of dissolving the marriage is the process of the release payment, or *khul*, in which the wife pays a remuneration to her husband in return for a separation. The wife and husband

[52] Ahmad ibn Naqib al-Misri, *Reliance of the Traveller*, edited and translated by N.H.M Keller, Beltsville: Amana Publications (2011), pp. 525, 538-545.
[53] T.W. Juynboll, *Handleiding tot de kennis van de Mohammedaansche Wet. Volgens de leer der sjafi'itische school*, New York: Querido (1943), pp. 202-203.
[54] Ahmad ibn Naqib al-Misri, *Reliance of the Traveller*, edited and translated by N.H.M Keller, Beltsville: Amana Publications (2011), pp. 556.
[55] T.W. Juynboll, *Handleiding tot de kennis van de Mohammedaansche Wet. Volgens de leer der sjafi'itische school*, New York: Querido (1943), pp. 203-210.

have to agree on the amount the wife has to pay to her husband. After a *khul*, the above described waiting period follows in the same way as it does after a *talaq*. The third form of divorce is the *faskh*, or the annulment of the marriage contract pronounced by the *kadhi* at the instance of one of the spouses. The most important valid grounds for a *faskh* are the inability of the husband to provide the woman sustenance, to pay the agreed amount of dowry in the marriage contract, the impotence or long absence of the husband. If the wife wants an annulment of the marriage contract on these grounds, a high burden of proof rests on her though. Other grounds for a *faskh* are some severe chronic diseases or body flaws, lunacy and not meeting certain requirements of the marriage contract on virginity or lineage. The *kadhi* can also pronounce a *faskh* on his own initiative in the case of serious impediments to the marriage, for example if two family members have married each other or if a man has married two sisters. Marriage is also dissolved by *li'an*, which belongs to penal law. The husband affirms under oath that the wife has committed unchastity or that the child born of her is not his and she affirms under oath the contrary.[56]

As there is no matrimonial community of property, after a divorce, both husband and wife maintain their own property. The wife's claim for maintenance continues during the waiting period if the marriage was not dissolved through a fault of hers, but not after the divorce. Children have a claim to maintenance only if they are poor and in principle only against their father. The maintenance of an illegitimate child or a child whose paternity has been contested by *li'an* is the responsibility of the mother.[57] Besides the full economic responsibility for the children, the father is also the legal guardian of the children and acts on their behalf. This must be distinguished from the right and duty to keep the children after the divorce. The mother has the first right to child custody, her mother or grandmother are second and third in line and after that comes the father and his mother or grandmother. Necessary conditions for a person to have custody of child are uprightness, sanity and if the child is Muslim, so has the person with custody has to be. A women has no right to custody of her child if she remarries another man. When a child reaches the proper age, normally seven years old for boys and nine years old for

[56] T. W. Juynboll, *Handleiding tot de kennis van de Mohammedaansche Wet. Volgens de leer der sjafi'itische school*, New York: Querido (1943), pp. 210-213 and J. Schacht, *An Introduction to Islamic Law*, Oxford: Clarendon Press (1964), p. 165.
[57] J. Schacht, *An Introduction to Islamic Law*, Oxford: Clarendon Press (1964), pp. 167-168.

girls, and both parents meet the necessary conditions for child custody, he is given the choice as to which of his parents he wants to stay with.[58]

### *1.7 Inheritance*

The Islamic rules on inheritance are incredibly complex, so only the main points regarding this subject will be discussed here. First, the bequest must be distinguished from the estate division. A bequest is an act by a living person disposing his property, which is implemented after death, while estate division occurs after the death according to Koranic rules of inheritance. A Muslim may bequeath up to one-third of his property to whoever he wants, even when this person is an apostate, a non-Muslim, or the person who killed the one who bequeaths. However, he may not give it to someone who inherits according to the Koranic rules, as the bequest would change the relative division between his kinsfolk. If the heirs are not poor, it is recommended to devote the full one-third to bequests, if the heirs are not well off it is not. A bequest can consist the right to utilize something, particular things, something that does not yet exist, something not determinately known, something undeliverable or something not currently owned. Charitable expenditures are also considered as part of the bequest. When gifts are given by a person just before he or she dies, for example during the final illness, military combat, travelling on rough seas in a storm, giving birth or the moment before being killed, the gifts are also considered as part of the bequest. If a person makes a bequest he can later take this back by annulling the bequest, sell or give away the bequeathed article or making a newer bequest.[59]

After having carried out the bequest and having paid the debts of the deceased, the remaining part of the estate is divided among the relatives. There are four preventatives of inheriting an estate division share; having caused the death of the deceased, being an apostate or a non-Muslim, or being in slavery. The heirs fall into two groups; the Koranic heirs and the rest. The Koranic heirs receive a fixed share of the estate and the rest shares the remainder after that. As the Koranic heirs get fixed shares and the rest share the remainder, it may often be profitable to belong to the latter group. The Koranic heirs are the deceased's spouse(s), parents, daughters and sisters. Sons and brothers are residual heirs. Daughters are only Koranic heirs if there are no sons and sisters are only Koranic heirs if there are no brothers. Otherwise, the daughters or

[58] Ahmad ibn Naqib al-Misri, *Reliance of the Traveller,* edited and translated by N.H.M Keller, Beltsville: Amana Publications (2011), pp. 550-553.
[59] Ahmad ibn Naqib al-Misri, *Reliance of the Traveller,* edited and translated by N.H.M Keller, Beltsville: Amana Publications (2011), pp. 462-469.

sisters fall under the residual heirs and receive half of what their male counterparts receive. The rules for the Koranic heirs are as follows;

- Spouses: The widower gets 1/2 from his wife's estate or 1/4 if there are any children. A widow gets ¼ and 1/8 if there are any children. If there are more widows, they share the fraction equally.
- The mother receives 1/6 if she has other (grand)children who can inherit, otherwise she receives 1/3. The father receives 1/6, but falls also under the residual heirs if there are no male inheriting descendants.
- If there are no sons, one daughter receives 1/2 of the estate and in the case of more daughters they receive 2/3 of the estate together.
- A sister receives ½ if she has no other brothers and sisters. If there are more sisters, but no brothers, the sisters receive 2/3 of the estate together. The share of the sister(s) is eliminated if the deceased has a father or son(s).[60]

It is possible that the total amount of shares transcends one. If, for example, the daughters receive 2/3 (16/24) together, the father receives 1/6 (4/24), the mother receives 1/6 (4/24) and the widow receives 1/8 (3/24) of the estate, than the total amount of shares is 27/24, which is more than one. In that case, the estate is not divided in 24 shares, but in 27 equal shares. Of that, the daughters obtain 16 shares together, the father and mother both receive 4 shares and the widow gets 3 shares. The residual heirs do not receive any share in this case.[61]

If the total amount of shares of the Koranic heirs is less than one, the residual heirs get the rest of the estate. The residual heirs can be distinguished in groups again. The first group consists of the male residual heirs and these are, in order of priority; male relatives descending, male relatives ascending, brothers and brother's sons, father's brothers' sons. These males cannot be related to the deceased through a female, so the deceased's daughter's sons do not fall under the residual heirs. This is because the inheritance rules try as far as possible to keep property within the family of the deceased and daughters and sisters are expected to marry with a man from another family. The second group consists of the female residual heirs; daughters, son's

[60] Ahmad ibn Naqib al-Misri, *Reliance of the Traveller,* edited and translated by N.H.M Keller, Beltsville: Amana Publications (2011), pp. 467-505 and K.S. Vikør., *Between God and the Sultan. A History of Islamic Law,* London: Foundation Books (2005), pp. 318-321.
[61] T.W. Juynboll, *Handleiding tot de kennis van de Mohammedaansche Wet. Volgens de leer der sjafi'itische school*, New York: Querido (1943), pp. 210-213 and J. Schacht, *An Introduction to Islamic Law,* Oxford: Clarendon Press (1964), pp. 257-258.

daughters, brother's daughters and sisters. They receive half of the entitlement of their male counterparts.[62]

[62] Ahmad ibn Naqib al-Misri, *Reliance of the Traveller*, edited and translated by N.H.M Keller, Beltsville: Amana Publications (2011), pp. 467-505 and K.S. Vikør., *Between God and the Sultan. A History of Islamic Law*, London: Foundation Books (2005), pp. 318-321.

# Chapter 2: Islamic family law and Human Rights

On 13 February 2003 the European Court of Human Rights (ECtHR) sitting as a Grand Chamber gave one of its most historic judgments. *Refah Partisi (The Welfare Party) and Others v. Turkey* concerned a complaint about the decision of the Constitutional Court of Turkey in 1998, which ordered the dissolution of the Turkish political party. The ECtHR unanimously upheld the dissolution of the *Refah* Party as compatible with the freedom of association guaranteed under article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[63] According to the ECtHR political parties have the freedom to propagate social and legal differences. However, this freedom is limited by the requirements that the goals and resources must be compatible with fundamental democratic principles. If a political party has a policy which does not respect democracy or fundamental rights and freedoms, the political party is not protected by the Convention and can be prohibited. As the goal of the *Refah Partisi* was the introduction of the rules of sharia, which are unchangeable according to the Court, the goal of the party cannot be united with pluralism, freedoms and democracy. Especially punishments according to Islamic criminal law and the legal status of women in the sharia are problematic, the Court states.[64] The verdict of the ECtHR is criticized because it describes the sharia as an unchangeable and rigid system which cannot adjust to democracy and human rights, while even Islamic theologians do not agree on the content and interpretation of sharia.[65] Also, a lot of notions of sharia, like praying or fasting, are easily compatible with the liberal democracy. Below, I will elaborate on the possible frictions between certain concepts of Islamic family law and women's and other human rights. I do not indicate that every Muslim agrees on the interpretation and application of these concepts, but I try to describe where Islamic family law could clash with human rights. But first I will discuss human rights and their universal validity.

## *2.1. Human Rights, Universalism and Cultural Relativism*

In this chapter different International and African Human Rights treaties and institutions to which Tanzania has obligations will be used. These treaties are part of the idea of the existence of universal human rights, which is largely a creation of the late twentieth century. Not until

[63] K. Boyle, 'Human Rights, Religion and Democracy: The Refah Party Case', *Essex Human Rights Review*, no. 1 (2004), p. 1.
[64] M.S. Berger, 'Tien jaar later: kritische beschouwingen bij de visie van het Europees Hof op de sharia', *Tijdschrift voor Recht, Religie en Beleid*, no. 3 (2013), pp. 70-71.
[65] Idem.

after World War II, the Western World came to accept equal and inalienable human rights for all human beings, simply because they are human and that they may act against their own state or society.[66] Influential Human Rights treaties are the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Gender equality is part of this ideology and is also a modern ideal, which has become generally accepted as an element of justice since the expansion of human rights and feminism. The Convention on Elimination of all forms of Discrimination Against Women (CEDAW) is the most prominent treaty in the acknowledgment of women's rights.

The human rights discourse is nowadays extremely influential and not only international and European, but also African human rights treaties have come into power. In 1981 the African Charter on Human and Peoples' Rights (the African Charter) was adopted by the Heads of State and the Government of the Organization of African Unity. The aspiration of the creators was to produce a response to specific African needs. The preamble states that the Charter lies upon the historical tradition and values of the African civilization and that colonialism, neo-colonialism, apartheid and Zionism must be eliminated by the African states. Principles as self-determination, non-discrimination and equality before the law are guaranteed by the African Charter in a similar way they are guaranteed in European and international Conventions. A big difference with similar European and international treaties is the sixth clause of the preamble which states that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone.[67] In 2003 the Protocol the African Charter on the Rights of Women in Africa, better known as the Maputo Protocol, was adopted by the African Union. The Protocol was created to guarantee gender equality, to address discrimination against women and to control women's reproductive health and end female genital mutilation. The duty of states to help women achieve their rights is also emphasized in the Protocol.[68]

Human rights as an international political project are closely tied to claims of universality. The Human Rights Committee (HRC) which monitors compliance with the ICCPR stated that 'traditional values' cannot justify violations of human rights. Governments should ensure that

[66] J. Donnelly, *Universal Human Rights in Theory and Practice* New York: Cornell University Press (2013), pp. 75-92.
[67] R. Gittleman., 'The African Charter on Human and Peoples' Rights: A Legal Analysis', *Virginia Journal of International Law*, no. 4 (1981/1982).
[68] M.S. Nsibirwa, 'A Brief Analysis of the Draft Protocol to the African Charter on Human and People's Rights on the Rights of Women', *African Human Rights Law Journal,* no. 1 (2001), pp. 42-44.

traditional, historical, religious or cultural attitudes are not used to justify violations of equality before the law an equal enjoyment of Covenant Rights.[69] These statements represent the human rights' claim of universality and supremacy over other ideologies and cultures. However, some states do directly challenge international human rights and contend that (parts of) the Universal Declaration do not apply to them. This shows the limits of the universalism of human rights. Cultural relativity is a fact: cultures and values differ often dramatically across time and space.[70] Relativists claim that substantive human rights standards vary among different cultural and moral systems. What may be regarded as a human rights violation in one society may properly be considered lawful in the other. An example of this is the fact that a lot of Muslim countries have made reservations to this treaty, because there would be unresolved tensions between full gender equality and Islam.[71] One particular conception of human rights, for instance the Western concept, should not be imposed on the entire world.[72] In 2010 Kinzer wrote in The Guardian that the human rights movement handles a narrow and egocentric definition of what human rights are. In his opinion the people in the West are not to the best-equipped to decide what human rights should be in non-Western countries.[73] Others argue that regardless of its historical origins, the international law of human rights embodies the response of the international community to a growing awareness of the uniqueness of the human being and unity of human race. The practice of human rights endeavours to specify human interests of such importance that they should be guaranteed by all political and social systems. [74] When comparing Islamic practices or laws to international human rights treaties, it is in my view important to keep in mind that human rights should be seen in their political and social context. The Western concept of human rights should not be imposed in another context, as laws only work in practice if they are legitimate and if the people feel like they are theirs. If certain clashes of rights and interests appear, the people concerned should be involved in the discussion on the question whether there is problem and what an effective solution for the problem would be in

[69] Human Rights Committee, *General Comment 28, Equality of rights between men and women*, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).
[70] J. Donnelly, *Universal Human Rights in Theory and Practice* New York: Cornell University Press (2013), p. 400.
[71] Z. Mir-Housseini, 'Justice, Equality and Muslim Family Law. New Ideas, New Prospects', in: L. Larsen a.o. (ed.), *Gender and Equality in Muslim Family* Law, London: I.B.Tauris & Co (2013), p. 1.
[72] A.D. Renteln, 'Relativism and the Search for Human Rights', *American Anthropologist,* vol. 90, no 1 (1988).
[73] http://www.theguardian.com/commentisfree/cifamerica/2010/dec/31/human-rights-imperialism-james-hoge (24-07-2015).
[74] F.R. Tesón, 'International Human Rights and Cultural Relativism', *Virginia Journal of International Law* no. 4 (1984), pp. 869-898.

the specific context. However, I believe people and especially women should be aware of the existence of human rights and potential alternatives to the practices they are used to.

### *2.2. Human Rights and Islamic Marriage and Divorce*

The ICCPR calls for the equal right of men and women to the enjoyment of all civil and political rights, including the right to birth registration, free and full consent to marriage, equality of rights and responsibilities of spouses during marriage and it's dissolution, to life, to liberty and security of the person and freedom of expression.[75] The ICESCR includes similar provisions in article 2. Also the CEDAW and Maputo Protocol call for the equality between men and women in general and in the conclusion and dissolution of a marriage. Consent of the woman must be a requirement for a valid marriage and a wife must obtain the same rights as her husband regarding to getting a divorce or separation.[76]

For a valid Islamic marriage, the presence of a guardian for the bride is a formal requirement. Masud states that this requirement is not compatible with gender equality and not applicable any more to the social systems of today.[77] The bride's consent for the marriage is even not needed in case she is a virgin and the guardian is her father or grandfather. The practice of a guardian, the lack of the bride's consent to the marriage and the impediments for a woman to get married are at odds with the above mentioned women's rights and equality. Some countries, such as Algeria, have disposed the right of the father or grandfather to make a marriage contract without the consent of the (grand) daughter. They also accepted the Hanafi rule that a woman may be her own guardian.[78]

Furthermore, dowry payment is believed by some communities to give the husband and his family property rights over his wife. By this practice the wife can be decreased to a commodity, which is a violation of the personal dignity of this person. The dower would constitute compensation paid by the husband for exclusive dominion over the wife's sexual and reproductive capacity, which also conveys his sole right to dissolve the marriage by unilateral divorce.[79] The dignity of all human beings is laid down in the first article of the UDHR. The necessity to respect and ensure respect for women is especially emphasized in the Maputo

[75] ICCPR, arts. 3, 6, 9, 19, 23, 24.
[76] Article 16 CEDAW and Article 6 and 7 Maputo Protocol.
[77] M.K. Masud, 'Gender Equality and the doctrine of Wilaya', *Gender and Equality in Muslim Family Law* (2013), pp. 144-146.
[78] Vikør, K.S., *Between God and the Sultan. A History of Islamic Law* (2005), pp. 322-323.
[79] K. Ali, *Sexual Ethics and Islam. Feminist Reflections on Qur'an, Hadith and Jurisprudence,* London: OneWorld (2006), pp. 4-5.

Protocol. In the same article, the usage of women for sex trade is also prohibited.[80] If a woman is turned into a commodity, this indicates a sort of slave trade. The Convention on the Abolition of Slavery also covers the prohibition of sale of women into marriage. The idea that the wife is the husband's property means that the woman has less voice and power in the family and increases the likelihood of physical, sexual, verbal and emotional violence against the wife. This would all violate women's freedom to move, personal dignity and health rights.[81] Ali writes that the dower often takes on a merely symbolic form, which differentiates Muslim marriage. In such a context it is often also recognized that the dowry does not compensate for the wife's household contribution and the husband's sexual access.[82]

According to the classical Islamic marital obligations, in exchange for maintenance and protection, the wife raises the children, keeps the house and gives the husband obedience and sexual access.[83] The wife loses her right to maintenance if she is in a state of disobedience.[84] This classical approach of the wife's and husband's tasks in the marriage is not in line with the principle of equality between husband and wife within marriage. However, some Islamic scholars have argued that an equal relationship between a wife and a husband is more consistent with the spirit of the Koran than different rights for women and men.[85] Ali also states that the presumptions about male supremacy and classical task division in the Islamic marriage no longer holds and are not broadly acceptable anymore.[86]

A woman is, in contrary to a man, not allowed to marry a person in a lower position or a non-Muslim man. As wives are subordinate to their husbands, such a marriage would challenge this authority structure. The marriage of a Muslim woman to an infidel husband would result in incongruity between the superiority which the wife should enjoy by virtue of being Muslim and her unavoidable wifely subjection. On the other side, the marriage of a Muslim man to a wife in a lower position or a non-Muslim woman poses no conceptual problems. These assumptions and different rights for Muslim men and women are not in line with the concept

[80] Article 3 Maputo Protocol.
[81] Human Rights Watch Report, *No Way Out. Child Marriage and Human Rights Abuses in Tanzania* (2014), pp. 58 and E. Gable, & E. Simpson, *The Equality in Marriage Act: A Balanced Solution to the Harms of Brideprice*, Dar es Salaam: Women Legal Aid Centre (2005), pp. 22-49.
[82] K. Ali, *Sexual Ethics and Islam. Feminist Reflections on Qur'an, Hadith and Jurisprudence,* London: OneWorld (2006), p. 22.
[83] Idem, pp. 5-6.
[84] Z. Mir-Housseini, 'Justice, Equality and Muslim Family Law. New Ideas, New Prospects', in: L. Larsen a.o. (ed.), *Gender and Equality in Muslim Family* Law, London: I.B.Tauris & Co (2013), p. 10.
[85] M. Kadiver, 'Revisiting Women's Rights in Islam. Egalitarian Justice in Lieu of Desert-Based Justice', in: L. Larsen a.o. (ed.), *Gender and Equality in Muslim Family Law*, London: I.B.Tauris & Co (2013), pp. 225-232.
[86] K. Ali, *Sexual Ethics and Islam. Feminist Reflections on Qur'an, Hadith and Jurisprudence,* London: OneWorld (2006), p. 21.

of equality between men and women. Ali argues that the prohibition to marry non-Muslim men has a very weak argumentation nowadays, as the assumption about male dominance behind the prohibition no longer holds.[87]

Muslim women do not have the same unilateral right to pronounce a divorce as a Muslim man and can only seek divorce with the consent of her husband or the *kadhi* court. In the practice of *talaq*, a valid reason and the wife's consent (and in some interpretations her notification) are not required for a valid *talaq*. In dominant interpretations, a woman needs her husband's consent and has to waive all her financial rights like alimony and dowry, if she want to get a divorce (*khul*). Judicial divorce by the woman is only possible when she has a good cause, which is hard to prove.[88] This means that women do not have the same rights as men in the dissolution of a marriage and these Islamic family law regulations are not compatible with international regulations on equality between men and women. Some Islamic countries, like Egypt and Morocco, eased women's rights to get a divorce and restricted the right to extrajudicial divorce for men by reinterpreting the Koran and the Sunna in the context of modern times.[89]

### *2.3. Human Rights and Polygamy*

The CEDAW obligates its member states to take all measures, including legislation, to modify and abolish existing laws, regulations, customs and practices which constitutes discriminations against women.[90] The CEDAW Committee stated that polygamous marriage contravenes a woman's right to equality with men and can have serious emotional and financial consequences for her and her dependants and ought to be discouraged and prohibited.[91] The Maputo Protocol also requires polygamy to be prohibited.[92]

In countries where men have the right to marry more than one woman, women often do not have the right to marry more than one man. The discriminatory treatment of women under these laws is apparent. Furthermore, polygamous marriages cause inequality within the marriage, as the wife contributes all her attention and resources to the husband, while the husband is only

[87] K. Ali, *Sexual Ethics and Islam. Feminist Reflections on Qur'an, Hadith and Jurisprudence,* London: OneWorld (2006), pp. 14-21.
[88] Idem, pp. 26-27.
[89] J. Rehman, 'The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq', *International Journal of Law, Policy and the Family* 21 (2007), pp. 120.
[90] CEDAW, art 2 (f).
[91] CEDAW Committee, *General Recommendation no. 21, Equality in Marriage and Family Relations*, UN CEDAWOR, 13th session, UN Doc. A/47/38 (1994), par. 14.
[92] Article 7 Maputo Protocol.

contributing a part of his to the wife. In the case of divorce or inheritance the division of property is inherently unequal. The husband increases his possessions with every extra wife, while the wife's access to her husband resources decreases. Many other harms to women occur because of their involvement in polygamous marriages, such as the husband's lack of financial resources to take care of more than one wife, unequal distribution of economic support and material goods and food among wives and children, increased risk of contracting HIV/AIDS, lack of sexual access to the husband and tensions between different wives and children. These problems also affect the children of the wives, so that women's and children's rights to clothing, food, education and health are violated.[93]

Tunisia prohibited polygamy by reinterpreting the sources of sharia. The rationale behind the legal prohibition is that the present social, economic and political conditions place a presumption of monogamous Muslim marriages: the condition of justice and equity amongst wives is perceived not only in an economic and financial sense, but also from the perspective of love, affection and emotional attachment which cannot be distributed equally in a polygamous relationship. This reasoning of this prohibition is comparable to the sentiment of an active and interventionist High Court in Bangladesh, which demanded the repeal of section 6 of the Muslim Family Laws Ordinance 1961 and the imposition of provisions banning polygamy in the case of *Jesmin Sultana vs. Mohammad Elias*.[94]

### *2.4. Human Rights and Child Marriage*

Classical Islamic law on marriage does not set a minimum age for marriage. Child marriage violates a range of human rights recognized under international law. The Universal Declaration of Human Rights states that individuals must enter marriage freely with full consent and must be at full age. In 1979, the CEDAW Committee stated that child marriage is illegal. The Maputo Protocol, the African Charter, the Convention on the Rights of the Child (CRC), the Committee and World Health Organization (WHO) also addressed the need for countries to establish the minimum age of marriage of eighteen years, regardless the parental consent.[95] Education is essential to acquire skills for employment and thus generate new opportunities beyond the role of mother.[96] One of the main reasons against child marriage is the limited access to education

[93] A.H. Scheinfeldt & R.K. Tyndall., 'Marriage Matters: The Plight of Women in Polygamous Unions in Tanzania', *International Women's Human Rights Clinic Georgetown University Law Centre* (2005), pp. 30-54.
[94] J. Rehman, 'The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq', *International Journal of Law, Policy and the Family* 21 (2007), pp. 117.
[95] Maputo Protocol art. 6 (b), ACRWC art. 21 (2), CRC Committee, *General Comment No. 4, Adolescent Health and Development in the Context of the CRC*, 33rd session (2003), par. 20.
[96] UNICEF, 'Early Marriages and Child Spouses', *Innocenti Digest*, no. 7 (2001), p. 11.

for these girls, as marriage usually ends the education of the girl. Empirical evidence shows that where child marriage is a significant phenomenon, girls' education is shortened. Also, young girls in marriages often experience physical, sexual, verbal and emotional violence. A wider age difference between husband and wife reinforces gender stereotypes of wifely dependency and powerlessness.[97] Furthermore, young mothers and their children risk serious health issues associated with early pregnancy. A women's risk of reproductive ill-health and death associated with pregnancy increases dramatically under the age of eighteen. Their health is effected because their bodies are not mature enough to give birth.[98] This all together also cause psychological problems for the young wives. So, child marriage is considered a form of gender-based discrimination as the practice disproportionally affects girls mentally and physically and negatively impacts the realization of the freedom to develop personal abilities and pursue a career.[99]

Many Islamic countries have set a minimum age for marriage in order to prevent marriages at low age and the above mentioned problems as a result. Algeria has put the minimum age for men on 21 years and for women on 18 years, the family law in Iraq requires both the husband and wife to be 18 years and in Libya the minimum age for both spouses is 20 years.[100]

### *2.5. Human Rights and Islamic Inheritance*

The Human Rights Committee explained that the principle of equality entails that women should have equal inheritance rights to those of men when the dissolution of the marriage is caused by the death of one of the spouses.[101] The CEDAW requires in article 16 that women have the same rights in respect of ownership, acquisition, management, administration, enjoyment and disposition of property. If women are denied inheritance or allocated restricted and unequal shares based solely on their gender, this violates the right to equality and property. Disadvantaging women in inheritance enforces women's dependence of men. Due to women's unclear rights to inheritance and property, they are denied access to bank loans, mortgages and other financial and credit facilities, which counteracts the empowerment of women. So, if women are deprived from inheritance they are pushed into poverty, which also denies her right

[97] UNFPA, *State of World's Population 1997. The Right to Choose: Reproductive Health,* http:www.unfpa.org/swp/1997/swpmain.htm (24-07-2015)
[98] Z.L. Schwab, & K. Kirangy, 'The Health Consequences of Adolescent Sexual and Fertility Behaviour in Sub-Saharan Africa', *Studies in Family Planning* 2 (1998).
[99] Human Rights Watch Report, *No Way Out. Child Marriage and Human Rights Abuses in Tanzania* (2014), pp. 48-62, 75.
[100] Vikør, K.S., *Between God and the Sultan. A History of Islamic Law* (2005), p. 322.
[101] HRC General Comment 28, supra note 182, at 184, para 26.

to an adequate standard of living. As the CEDAW Committee stated; the right to own, manage, enjoy and dispose property is critical to a women's ability to earn a livelihood and to provide adequate housing and nutrition to herself and her family.[102]

[102] T. Ezer, 'Inheritance Law in Tanzania: The Impoverishment of Widows and Daughters', *Georgetown Journal of Gender and the Law* vol. VII (2006), p. 627-636.

## Chapter 3: Legal pluralism and Human Rights

In this chapter different arguments in favour of or against a model of legal pluralism from a human rights perspective will be discussed. Legal pluralism allows different communities within a multicultural society to self-regulate certain legal matters. Woodman distinguishes two types of legal pluralism. In the first type, which is called 'deep legal pluralism', state law coexists with other legal systems, which aren't part of the state law. Deep legal pluralism can occur if the enforcement of the state law is relatively weak because of secluded areas or weakness of the state itself. The second type, which is called 'state law pluralism', recognizes and incorporates parts of the bodies of the alternative legal systems in the state legal system. In this type, the alternative legal systems are often also applied by state organs.[103] Claims for state legal pluralism emanate from minorities' desires for their own identity and legal autonomy. Having the right to one's own law represents an extreme form of recognition of cultural differences within a society. Although not only religious, claims for the application of one's own law are heard particularly loudly from religious communities, who view adherence to their spiritual laws as essential. Family law is the area of law that the state is most likely to outsource to communities and the one communities are most likely to claim, but claims to the right to apply one's own criminal law are not unheard of. According to Matthias Rohe it is unthinkable that different penal laws would be applied to different groups of people in Europe.[104] Legal pluralism in the field of penal law is indeed problematic in view of legal certainty and legal equality. People could join a group of people for which the punishments are milder than for their own group of people and in case of involvement of different groups of people it would be unclear which criminal justice system would applicable. Furthermore, in national criminal law important values are warranted, like the value that people shouldn't kill, steal or rape. The punishment of the infringement of such values concerns the whole society and should therefore be consistent. However, family law only affects the parties of the case. So, if all these parties agree on the application of a specific legal system, legal pluralism in the field of family law would be at least thinkable.

The Ottomans had a famous distinctive system of ensuring a certain degree of cultural and religious autonomy. The so-called *millet* system gave each religious community the authority

[103] G.R. Woodman, 'Legal Pluralism and the Search for Justice', *Journal of African Law*, vol. 40, no. 2 (1996), pp. 156-159.
[104] M. Rohe, 'The Formation of a European Shari'a', in: J. Malik (ed.), *Muslims in Europe. From the Margin to the Centre*, Münster: LIT Verslag (2004), p. 162.

to regulate matters like personal status, inheritance and intra-communal relationships.[105] Another proposed model is that of Religious Alternative Dispute Resolution (RADR), in which arbitration, mediation or conciliation conducted according to religious norms, agreed to by the parties in a contract and recognized and enforced by the state.[106] For example, in England the Muslim Arbitration Tribunal is set up in 2007 under the Arbitration Act, which permits civil matters to be resolved according to Muslim law within the ambit of state law.[107] In other systems, religious family norms are applicable within the national family law system through contractual freedom and applied by state courts, with certain limitations by the national law. So, there are different levels of recognition and incorporation of religious family law systems into the national legal system and different levels of involvement of the state in applying these norms. In my view, there is not just a distinction between 'deep legal pluralism' and 'state legal pluralism', but a sliding scale in the degree of recognition of religious family law systems and the involvement of the state in the application of these systems. The undermentioned arguments in favour of and against legal pluralism apply in greater or lesser extent to all these levels of legal pluralism.

### *3.1. The Right to One's own Law*

International human right treaties do not recognize a general right to legal pluralism and the freedom of religion has never been described as entailing a right to the application of religious personal law. Nonetheless, there are a few instances where international human rights sources have evidenced an interest for legal pluralism. For example, the High Commissioner for Human Rights noted in one of its Guatemala activity reports that the effective implementation of legal pluralism is necessary.[108] The UN Report on Human Development and Cultural Diversity indicated that policies which promote multiculturalism and legal pluralism are essential for human development.[109] Article 27 of the UN Covenant on Civil and Political Rights (UNCCPR) states that persons belonging to ethnic, religious and linguistic minorities shall not be denied the right to enjoy their own culture, to profess and practice their own religion and

[105] H. Hunnum, *Autonomy, Sovereignty and Self-Determination. The Accommodation of Conflicting Rights,* Philadelphia: University of Pennsylvania Press (1990), pp. 51-57.
[106] F. Ahmed., 'Religious Norms in Family Law: Implications for Group and Personal Autonomy', in: M. Maclean & J. Eekelaar, *Managing Family Justice in Diverse Societies,* Oxford: Hart Publishing (2013), pp. 33-34.
[107] Bano, S., 'Muslim Dispute Resolution in Britain: Towards a New Framework of Family Law Governance', in: M. Maclean & J. Eekelaar, *Managing Family Justice in Diverse Societies,* Oxford: Hart Publishing (2013), pp. 69.
[108] Human Rights Council, *Report of the Office of the High Commissioner for Human Rights on the work of its office in Guatemala*, A/HRC/4/49/add.1 (2001): para. 39.
[109] UNDP Report, *Cultural Liberty in Today's Divers World*, New York (2004), pp. 8 and 57-59.

use their own language. Woodman argues that this article includes a collective right to be governed by one's own law. However, according to Woodman, there are also restrictions to this right if these laws infringe other people's rights.[110] The UN Secretary General has taken a stance in favour of legal pluralism, although he also insisted this had to be in conformity with international standards.[111] Another example of the same approach is the ILO Agreement 169 on Indigenous and Tribal Peoples, which anticipates that people have rights to their own customs and institutions as long as these are not incompatible with the national legal system and international recognized fundamental rights.[112]

The freedom to the application of religious law can be considered as an element of the freedom of religion, as this is a manifestation of one's beliefs. The freedom of religion is subject to the limits of what can be tolerated in the name of cultural and religious diversity. For example, Article 9 of the European Convention of Human Rights (ECHR) guarantees religious freedom, but this freedom can be restricted if the restriction has a basis in law, pursues a legitimate objective and is proportionate.[113] Legitimate aims can be the public safety, the protection of the public order, health or morals and the protection of rights and freedoms of others. A restriction to the freedom of religion, as the prohibition of the application of religious family law, must be proportionate, which means that the restriction is suitable and necessary to reach the legitimate aim. Also, the interest to reach the aim must be bigger than the interest of the freedom of religion.[114] The Human Rights Committee of the ICCPR emphasized that freedom of religion and conscience cannot be used to justify the infringement of women's rights.[115] The guarantee of freedom of worship can therefore not be interpreted to mean that religious laws are automatically allowed to operate.[116]

[110] G.R. Woodman, 'Legal Pluralism and the Search for Justice', *Journal of African Law*, vol. 40, no. 2 (1996), p. 165.
[111] Security Council, *Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616 (2004), para. 5.
[112] Article 8.2 and Article 9.1 of the ILO Agreement 169 on Indigenous and Tribal Peoples.
[113] A. Büchler, *Islamic Law in Europe? Legal Pluralism and its Limits in European Family Law*, Surrey: Ashgate (2011), pp. 12-14.
[114] G. Van der Schyff & A. Overbeeke, 'Exercising Religious Freedom in the Public Space: A Comparative and European Convention Analysis of General Burqa Bans', *European Constitutional Law Review*, no. 7 (2011), p. 437.
[115] Human Rights Committee, *General Comment* No. 28, note 112.
[116] R.V. Makaramba, 'The Secular State and the State of Islamic Law in Tanzania', in: S. Jeppie, E. Moosa & R.L. Roberts, *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-colonial Challenges*, Amsterdam: Amsterdam University Press (2010), pp. 384 and 389.

### *3.2. Personal Autonomy*

Although there is not an explicit human right to one's own law, there are arguments in favour of legal pluralism in the field of family law from a human rights perspective. Everyone has the right to freely determine, without external interference, their political status and to pursue their economic, social and cultural development. This is recognized by the first articles of ICCPR and the ICESC. The core of the concept of personal autonomy is the ideal of giving shape to one's own life and form an identity. Preconditions for such personal autonomy include familiar factors such as the absence of coercion, the absence of manipulation and the availability of an adequate range of valuable options.[117] Liberal political theories assume or argue that the good society is one which is not governed by particular common ends or goals but provides the framework of rights or liberties or duties within which people may pursue their various ends. The liberal response to the multiplicity of religious and moral traditions in modern society has thus been to advocate toleration, as far as possible.[118] Personal autonomy entails the right to choose for a cultural identity, to belong to a community and live according to its customs. The freedom of thought, conscience and religion can be seen as an element of personal autonomy. Being allowed to apply certain religious family law rules, of which one believes these are the right ones, gives individuals a great degree of personal autonomy and religious freedom. Franck writes that there is a tendency that states become more respectful of individuals' personal choices in composing their identity.[119] However, when the perception of justice and the good by certain individuals is not the same as the perception of the majority of the state and the family law regulations of the state are imposed on these individuals, the right to self-determination is infringed. [120]

There are reasons for the state to limit the personal freedom. Franck argues that in history personal autonomy has been limited by states when according to the government individual conscience is perverted and those so afflicted lack the rationality essential to freedom. When that happens, the paternal society intervenes, as it would with other delusional persons, to protect them from the consequences of their own self-destructive wilfulness.[121] The liberal

[117] J. Raz, *The Morality of Freedom* Oxford: Clarendon Press (1986), pp. 370-375.
[118] C. Kukathas, 'Are There Any Cultural Rights?' *Political Theory* 20 (1992), p. 108.
[119] T.M. Franck, 'Is Personal Freedom a Western Value?', *The American Journal of International Law* 4 (1997), p. 593.
[120] J. Eekelaar, 'Law and Community Practices', in: M. Maclean & J. Eekelaar, *Managing Family Justice in Diverse Societies*, Oxford: Hart Publishing (2013), p. 24.
[121] T.M. Franck, 'Is Personal Freedom a Western Value?', *The American Journal of International Law* 4 (1997), p. 600.

ideology of tolerating different views and identities also entails the question whether views and identities, which do not agree with the liberal ideology itself and could even be a threat to the liberal ideology, should also be tolerated and accepted. In my opinion, also in a liberal state, the personal autonomy can never be unlimited and only applies as long as this does not cross the borders of the liberal ideology.

### *3.3. Group Rights of Minorities*

Human rights are traditionally conceived as rights of individual people, even though they often have a collective dimension.[122] Although the emphasis has been on individual human rights, one can also argue that also a collective human right to autonomy exist, the right for a minority to be different and to be left alone, to preserve, protect and promote values which are beyond the legitimate reach of the rest of society. This right would protect the values of minorities against the opinion of the majority of a society. The features of personal autonomy roughly also apply to group autonomy. Group autonomy is diminished when the group is coerced or dictated to by an outside force, like the state or another group. An autonomous group has the capacity and opportunity to make choices between ranges of valuable options.[123] The 'choice' of a group is formed through a complex social process in which individuals play a part, but no one's choice is decisive. Growth and development, change or reaffirmation arises out of debate and reflection within the group about the best forms of life for the members of the group. A decision can be right for the group, because of its history and certain circumstances, which would not be right for another group.[124] In this view, the group as a whole is making decisions collectively, rather than by a small group of persons within the group for the whole group without being responsive to the views of other group members. This collective decision-making can be achieved by having representatives in power of the group or by deliberate decision-making in which people routinely relate to one another and influence each other through reasoned arguments, evidence, evaluation and persuasion. In this way decisions are based on a consensus among the community.[125]

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[122] A. Büchler, *Islamic Law in Europe? Legal Pluralism and its Limits in European Family Law,* Surrey: Ashgate (2011), p. 15.
[123] F. Ahmed, 'Religious Norms in Family Law: Implications for Group and Personal Autonomy', in: M. Maclean & J. Eekelaar, *Managing Family Justice in Diverse Societies*, Oxford: Hart Publishing (2013), pp. 35-36.
[124] D. Réaume, 'Justice between Cultures: Autonomy and the Protection of Cultural Affiliation', *University of British Columbia Law Review* 117 (1995), p. 133.
[125] F. Ahmed, 'Religious Norms in Family Law: Implications for Group and Personal Autonomy', *Managing Family Justice in Diverse Societies* (2013), pp. 36-42.

As Will Kymlicka argues, the aim of minority rights is to provide minority groups with external protections and to reduce their vulnerability to the economic and political power of the wider society, not to afford minorities the opportunity to impose internal restrictions on their members in the name of tradition and cultural integrity. According to Kymlicka, deciding how to lead our lives is, in the first instance, a matter of exploring the possibilities made available through different cultures and languages. So, without providing group rights to minorities, the personal autonomy of individuals is not fully guaranteed too, as minority cultures cannot flourish without protection from economic and political decisions of the majority culture.[126] It is also argued that cultural membership profoundly affects a person's opportunities and ability to engage in meaningful relationships. People need a sense of identity to determine and pursue their goals and cultural groups can offer this identity, because they provide the safety of effortless secure belonging.[127] In this way, without a certain extent of group autonomy, individual autonomy does not exist.

### *3.4. The Minority within the Minority*

If the state outsources family law to its different communities, the state is held responsible for breaches of human rights within these communities under the state's international obligation to protect individuals from violations of their rights by third-parties. The principal objection against 'deep legal pluralism' is that the non-state legal systems are not under the control of state and are not checked on compatibility with rule of law and human rights.[128] The more power and autonomy the group has, the more difficult it is for individuals to access fundamental rights granted by the state.

But also if the state is involved in recognizing or applying different legal systems, problems occur. If the state recognizes different legal systems for different cultural groups of people within the society, the problem occurs that these groups are seldom homogenous with regard to the normative practice. Religious communities are often characterized by diversity and diverging levels of religious observance. Therefore, the state would need to identify which norms are given recognition or which authority within the group is given recognition to formulate the norms.[129] By choosing certain norms or a certain authority within the group, the

[126] W. Kymlicka, 'The Rights of Minorities Cultures. Reply to Kukathas', *Political Theory* 20 (1992), pp. 140.
[127] S. Ehrentraut., 'The Theory of Multiculturalism and Cultural Diversity in Cambodia', *Master Thesis University of Potsdam* (2004), pp. 7-8.
[128] G.R. Woodman, 'Legal Pluralism and the Search for Justice', *Journal of African Law*, vol. 40, no. 2 (1996), p. 160.
[129] J. Eekelaar, 'Law and Community Practices', *Managing Family Justice in Diverse Societies* (2013), pp. 16-17.

state is not neutral and disadvantages the people within the group who do not agree with these norms or this authority. Cultural and religious diversity would be replaced by a juxtaposition of uniform and closed groups and would imply that fate has bound the individual to a primordial cultural identity.[130]

There is a fear that power relation within the community will disadvantage minorities within the minority. It is a prominent idea that group autonomy diminishes the personal autonomy of the weaker group or minorities within the minority. So, by granting group autonomy, a state compromises the personal autonomy of the individual. Therefore, an opt-out clause from a certain legal regime is favourable from a human rights perspective, which makes the application of community's rules mandatory. The religious or ethnical community can be such an integral part of one's identity that the disadvantaged minority chooses consciously to keep their social belonging or the disadvantaged minority just believes that the discriminating rules are the right rules.[131] One could hardly object the application of norms to persons on the basis of each person's full and informed consent.[132] On the other hand, using an 'opt-out' clause can by the community in practice be seen as betraying and leaving the community, which brings the 'minority within the minority' in a difficult and uncomfortable position. In other words; if the power relations already disadvantage a minority within the minority, it is probably not easy for the disadvantaged minority to choose not to apply the rule of their community in practice because of social pressure. Officially granting this option is only one step and measures that promote awareness of options and a realistic ability to exercise them are essential.[133]

### *3.5. Legal Equality and Legal Certainty*

A main objection against legal pluralism is that it infringes with the principles of legal equality and legal certainty. The first article of the UDHR expresses the intrinsic and abstract principle that all human-beings are equal. In a system of legal pluralism, different norms are applied to different persons in the same situation. Therefore, application of different family law systems could be considered as at odds with the conception of equality. The problem with this objection is that the law treats people differently all the time. For example, people below eighteen years

[130] A. Büchler, *Islamic Law in Europe? Legal Pluralism and its Limits in European Family Law,* Surrey: Ashgate (2011), pp. 85-86.
[131] M.J. Calaguas, C.M. Drost, & E.R. Fluet, 'Legal Pluralism & Women's Rights: A Study in Post-Colonial Tanzania', *Columbia Journal of Gender & Law,* vol. 16, no. 2 (2007), pp. 66-67.
[132] G.R. Woodman, 'Legal Pluralism and the Search for Justice', *Journal of African Law,* vol. 40, no. 2 (1996), p. 161.
[133] M.J. Calaguas, C.M. Drost, & E.R. Fluet, 'Legal Pluralism & Women's Rights: A Study in Post-Colonial Tanzania', *Columbia Journal of Gender & Law,* vol. 16, no. 2 (2007), p. 84.

old are not allowed to vote and people with a high income pay a higher percentage tax than people with a low income. These distinctions are legitimized by the intrinsic principle of equality and the actual differences between the relevant people. The argument is that because there are actual differences between people, different treatments by law are on the contrary required to do justice to the intrinsic principle of equality.[134]

The principle of legal equality does therefor not mean that every individual is treated the same way, but that equal cases are treated equally and unequal cases are treated unequally. However, the actual differences must be relevant for the distinction which is made by the legislation. For example, age is relevant for suffrage, while hair colour is not. Also, there must be a reasonable balance between distinction by law and the actual differences between the individuals or groups, in other words; the distinction must be proportional.[135] In my opinion, one's religion or ethnicity is not a relevant characteristic for the application of different family law rules. However, if people agree on the application of certain family law rules, the difference in their conception of justice can be a relevant difference for a distinction between the applications of different family law systems. Applying one family law system to all citizens, of which some consider this to be the just system and others consider other family law norms to be the just ones can therefor also be seen as unequal treatment.

Legal certainty is an important general principle in most Western legal traditions. Legal certainty contributes to one's freedom as it is clear in which cases and circumstances one will be coerced to follow certain rules.[136] This principle requires that those subject to the law must know what the law is so that they can abide by it and plan their lives accordingly. Laws and decisions must therefore be accessible, clear and definite and legitimate expectations must be protected. However, no legal system has achieved absolute certainty.[137] Legal pluralism also entails complexity and uncertainty. In a model of legal pluralism, the law contains not only different kind of norms, but also regulations on which norms are applicable to who and in which circumstances, which are also apt to become complex. The complexity of law makes justice more difficult to achieve and causes legal uncertainty. The existence of different family

[134] T. Loenen, *Gelijkheid als juridisch beginsel. Een conceptuele analyse van de norm van gelijke behandeling en non-discriminatie,* Den Haag: Boom Juridische Uitgevers (2009), chapter 1.
[135] J.H. Gerards., 'Proportionaliteit en Gelijke Behandeling', in: A.J. Nieuwenhuis, *Proportionaliteit in het publiekrecht,* Deventer: Kluwer (2005), pp. 81-85.
[136] O. Raban, 'The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism' *Public Interest Law Journal*, Vol. 19 (2009), p. 175.
[137] J.R. Maxeiner, 'Legal certainty: a European alternative to American legal indeterminacy.' *Tulane Journal of International & Comparative Law,* Vol. 15, No. 2 (2006), pp. 541-551.

law codes creates legal grey areas, which would leave citizens in doubt as to which course of legal conduct they are expected to follow.[138] On the other hand, one can also argue that a lack of legal certainty in the area of family law causes flexibility which can contribute to the freedom of individuals, as individuals can choose between different family law systems.

### *3.6. Disunity of Society*

Another objection against the application of different legal systems to different groups of people in family law cases is associated with the integration of minorities and the unity of the state's population. If all different groups of the population apply their own legal system, they will become more and more estranged from each other.[139] One of the core elements of the modern state is a centralist concept of law and a unity of legal power. In this idea, the state has exclusive legislative competence and everyone is subject to the same law. A legal unity means a shared awareness and understanding of the law and contributes to a shared identity, in other words, to a 'we'. One system of common values forms the basis on which people live together and unite the society. Pluralistic family law structures pose a threat to social coherence and cohesion.[140] There is a fundamental fear that the recognition of minority rights will encourage fragmentation and separatism and undermine national unity.[141] On the other side, it can also be argued that minorities feel more accepted and 'at home' if they are not forced to use an alien family law system, but are allowed to apply the family rules which they see as the right rules.[142] Recognizing and respecting cultural differences in a society contributes to the feeling of self-esteem and acceptance of minority society members.[143] The feeling of acceptance by minority communities can in my opinion also lead to the feeling of belonging and less tensions within a multicultural society.

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[138] A. Büchler, *Islamic Law in Europe? Legal Pluralism and its Limits in European Family Law,* Surrey: Ashgate (2011), p. 88.
[139] M. S. Berger,'Sharia in Nederland is vaak keurig Nederlands', *Ars Acqui* 56 (2007), pp. 508-509.
[140] A. Büchler, *Islamic Law in Europe? Legal Pluralism and its Limits in European Family Law,* Surrey: Ashgate (2011), pp. 86-87 and T.M. Franck, 'Is Personal Freedom a Western Value?', *The American Journal of International Law* 4 (1997), pp. 600-601.
[141] H. Hunnum, *Autonomy, Sovereignty and Self-Determination. The Accommodation of Conflicting Rights,* Philadelphia: University of Pennsylvania Press (1990), p. 71.
[142] M. Rohe, 'Reasons for the Application of Sharia in the West', in: M. S. Berger (ed.), *Applying Sharia in the West. Facts, Fears and the Future of Islamic Rules on Family Law Relations in the West,* Leiden: Leiden University Press (2013), pp. 35-39 and A.C.M. Vestdijk- van der Hoeven *Religieus Recht en Minderheden,* Gouda: Quint (1991), pp. 297-301.
[143] B. Parekh, *Rethinking multiculturalism: Cultural diversity and political theory,* Cambridge: Harvard University Press (2000), p. 8.

# Chapter 4: Islamic Family Law in the National Legal System of Tanzania

Despite the big religious population of Tanzania, the Constitution states that the country is a secular state. The Constitution does not state that religious law is a source of the national law and the sovereignty resides not in a God, but in the people. There is an official separation of state and religion and no religion is supposed to be more privileged than others. However, religious groups act as pressure groups and try to influence the law and national policy.[144] An example of this is the request of a group of Muslims to establish *kadhi* courts for family law matters on Tanzania mainland. To a certain extent Islamic law is already recognized in Tanzanian family law, although it is applied by state courts. In practice the state courts consult *shayks* of the Muslim Council BAKWATA over cases involving Islamic law too.[145] In this chapter we will see in what way Islamic family law has a place in or influence on Tanzanian law. Marriage, divorce and inheritance legislation and case law will be discussed to see which place sharia has in these fields of Tanzanian family law. Also, to see in how far Tanzania has established a system of enforceable human rights, the presence of Human Rights Law in the national Constitution and International and regional Conventions of which Tanzania is a party, will be discussed. In other words, in this chapter I will investigate in what way Tanzania deals with the demand of some Muslims to apply Islamic family on one side and with certain human rights obligations on the other side.

## *4.1. Human Rights Law*

Before we will discuss the role of Islamic family law in the Tanzanian legal system, we will first elaborate on the status of human rights in Tanzania. Tanzania's commitment to abide by human rights is underlined by the fact that it has ratified human rights treaties and has enshrined the Bill of Rights in the Constitution. Tanzania is party to the core international treaties that protect human and women's rights. Tanzania has ratified the UDHR, ICCPR, ICESCR, CEDAW and CRC. Furthermore, Tanzania is party to Regional Treaties as the African Charter and Maputo Protocol.[146] The human rights guaranteed in these treaties must be respected by the national government, but member states can also be responsible for private acts if they fail

[144] M.A. Bakari. & L.J. Ndumbaro, 'Religion and Governance in Tanzania: the Post-Liberalisation Era', in: R. Mukandala a.o., *Justice, Rights and Worship. Religion and Politics in Tanzania*, Dar es Salaam: REDET (2006), pp. 334-338.
[145] R.V. Makaramba, 'The Secular State and the State of Islamic Law in Tanzania', in: S. Jeppie, E. Moosa & R.L. Roberts, *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-colonial Challenges*, Amsterdam: Amsterdam University Press (2010), p. 280.
[146] Human Rights Watch Report, *No Way Out. Child Marriage and Human Rights Abuses in Tanzania* (2014), p. 73.

to act with due diligence to prevent violations of rights or to investigate and punish acts of violence. So the government of Tanzania can also be held responsible for human rights breaches by non-state actors.

In 1984, the Bill of Rights was included to the Tanzanian national Constitution as an amendment, making the basic human rights enforceable in Tanzanian courts. Existing laws, which were inconsistent with the new Bill of Rights, were to be regarded as modified by the Bill of Rights. Articles 9, 12 and 13 support the equal treatment of men and women. These provisions assert that all human being are born free, and are equal. Discrimination based on nationality, tribe, place of origin, political opinion, colour, race, gender, religion or station in life is prohibited in Article 13. The Constitution demands the state organs and all persons and bodies with executive, legislative and judicial powers to take cognisance of, to observe and to apply the Bill of Rights.[147] As discussed in the introduction, currently a draft Constitution is pending in Tanzania. Although the proposal is criticised for a lot of other reasons, in this proposal a new provision is introduced in which is stated that women have the same rights as men in acquiring, owning, using and developing land.[148]

Freedom of thought, conscience and religion are guaranteed by section 19 of the Constitution of Tanzania.[149] This section states that every person has the right to the freedom of thought, conscience, belief or faith and choice in matter of religion, including the freedom to change this religion or faith. Furthermore, the profession, worship and propagation of religion shall be free and a private affair. The affairs and management of religious bodies shall not be part of the activities of the state authority.[150]

According to Article 30 (2) of the Tanzanian Constitution the Parliament may promulgate laws that abridge or abrogate guaranteed human rights and freedoms if this legislation is in the public interest. Furthermore, the powers of courts of law to pronounce laws and actions violating the basic rights as void is also limited by Article 30 (5). If the public interest requires so, the High Court must decide to afford the Government an opportunity to rectify the defect found in the law within a period determined by the Court. In that case, the law or action stays valid until

[147] M.E. Magoke-Mhoja, *Child-Widows Silenced and Unheard: Human Rights Sufferers in Tanzania* Dar es Salaam: Children Dignity Forum (2006), pp. 138-140.
[148] Proposed Constitution for Tanzania, article 23 (d) (2).
[149] Human Rights Comittee, *Second Periodic Report of State Parties: United Republic of Tanzania*, U.N. Doc. CCPR/C/42/Add. 12 (1991).
[150] R.V. Makaramba., 'Religion, Rule of Law and Justice in Tanzania', in: R. Mukandala a.o., *Justice, Rights and Worship. Religion and Politics in Tanzania*, Dar es Salaam: REDET (2006), pp. 377-378.

that period lapses or until the defect is rectified.[151] In the case *Pumbun and Another vs. Attorney-General and Another* (1992) the Court of Appeal decided that any law that restricts or abridges basic human rights must fulfil two conditions to be in public interest and therefore still lawful. Firstly, the limitation imposed on the basic right must be proportional and not more than reasonably necessary to achieve the legitimate object of the law. Secondly, the law should make adequate safeguards against arbitrary decisions and provide effective controls against abuse of the law.[152] For instance, the death penalty is regarded as offending the prohibition of torture and inhuman and degrading punishment in the Constitution. However, according to the Court of Appeal of Tanzania, the death penalty is necessary to achieve the legitimate goal of protecting the society from murderers. Secondly, the death penalty is not arbitrary, as it is solely applicable to persons convicted of murder. Consequently, the death penalty is not unconstitutional.[153]

In the past, some judges have been progressive in declaring discriminatory customary inheritance laws inconsistent with the Constitution and International Treaties and therefore void. In *Ephraim vs. Pastory Holaria & Gervas* (1989) a woman inherited clan land from her father by a valid will and sold this clan land. The woman's nephew had the opinion this sale was void, as under Haya customary law females have no power to sell clan land. The High Court of Mwanza decided that this provision in the Haya customary law was discriminatory, unconstitutional and void. Therefore, the sale by the widow was considered valid.[154] Some scholars also expressed the opinion that courts in Tanzania can modify discriminatory customary law to bring in conformity with the provisions of the Constitution.[155]

In other cases, judges have been more cautious in the development of customary law. While agreeing that the customary laws of inheritance of clan land were discriminatory for women, the courts decided to wait for the legislature to effect needed changes in the law, as the legislature is chosen democratically and the judge is not. These judges also stated that effecting customary change by judicial pronouncements would be dangerous and could create chaos.[156] The Court of Appeal, the highest court of Tanzania, did not speak out on the question whether

[151] Idem, pp. 375-377.
[152] Court of Appeal Arusha, Civil Appeal no. 32/1992.
[153] *Mbushuu and Another vs. Republic*, Court of Appeal of Tanzania no. 142/1994.
[154] *Ephrahim vs. Pastory Holaria & Gervas*, High Court of Tanzania, Mwanza 1989.
[155] B.A. Rwezaura, 'Reflections on the Relationship between State Law and Customary Law in Contemporary Tanzania: Need for Legislative Action?' *Tanzania Law Reform Bulletin* no. 1 (1988), pp. 19.
[156] *Verdiana vs. Gregory* (1968), *Deocras vs. Deus* (1981) and *Stephen and Another vs. Attorney General*, no. 85/2005.

courts can bring discriminatory customary laws in conformity with basic human rights, so there is no binding opinion for the lower courts on this matter yet.[157]

### *4.2. Marriage and Divorce*

A proposal for a new Marriage Act was presented in 1967 and the implementation of the law in 1971 was preceded by two years of intense discussion on the position of sharia in the system. Before 1971 Muslims, Christians, Hindus and different ethnic traditional groups followed their own marriage and divorce law systems before their own courts and later before the state courts, as already described in paragraph the previous paragraph. Additionally, one could get a monogamous civil marriage for the national law. Different regulations, like the Local Customary Laws, the Marriage, Divorce and Succession Ordinance and the Statement of Islamic Law, were in place and applied by the state courts. This legal plurality in marriage and divorce law tended to reinforce the autonomy and exclusiveness of various communities and prevented or hindered the emergence and establishment of a national ethic and values pertaining to marriage. In this area no reform was undertaken except at request of the specific community, so communities stayed in their orthodox and rigid customs.[158] The various systems of law provided different remedies for comparable relationships. A woman married under customary or Islamic law could be divorced extra-judicially, thus blocking the state courts from determining on matters as division of property and custody of the children. Thus, the pluralistic legal system was discriminatory, because it tolerated the existence of double standards in family law relations.[159]

Therefore, the Law of Marriage Act 1971 replaced the different regulations and aimed to create a uniform family law system and the improve human rights in Tanzania. The Law of Marriage Act 1971 harmonises rules on customary, religious and civil marriages.[160] Although the codifications of Islamic and customary laws are still in place, the Law of Marriage Act supersedes these codifications in case of contradictions. Courts have asserted the supremacy of the Law of Marriage Act in several cases, where its provisions conflicted with the rule of

[157] M.E. Magoke-Mhoja, *Child-Widows Silenced and Unheard: Human Rights Sufferers in Tanzania* Dar es Salaam: Children Dignity Forum (2006), pp. 145-146.
[158] J.S. Read, 'A Milestone in the Integration of Personal Laws: The New Law of Marriage and Divorce in Tanzania', *Journal of Africa Law*, vol. 16, no 1 (1972), p. 20.
[159] B.A. Rwezaura, 'Tanzania: Building a New Family Law out of a Plural Legal System', *University of Louisville Journal of Family Law*, vol. 33 (1995), p. 525.
[160] A.Liviga,, 'Religion and Governance in Tanzania: The Pre-Liberalisation Period', in: R. Mukandala a.o., *Justice, Rights and Worship. Religion and Politics in Tanzania*, Dar es Salaam: REDET (2006), p. 331.

customary or religious authority. For example, the High Court held in *Jonathan vs. Republic (*2001) that a customary marriage without the women's consent cannot be valid.[161]

Some basic standard provisions as a minimum age, a single system of registration and the abolition of extra-judicial divorce were introduced. Although now there is one code of law applying to all marriages in most of their aspects, the Law of Marriage Act still recognizes different communal and religious marriages and condones 'disunity' regarding several topics. Perhaps to avoid too sudden a break with the past, the Law of Marriage Act requires courts in some matters to respect the customs and religious beliefs of the parties where these are not in conflict with statutory provisions.[162]

*4.2.1. Contracting and Registration of Marriage*

For the contracting of a marriage there are a number of common rules. One of these is the minimum age, which is eighteen for males and fifteen for females. Section 14 of the Act defines prohibited relationships, embracing persons in direct line of ascent or descent of any degree and sisters, brothers, aunts, uncles, nieces, nephews, including relationships of full and half blood and legitimate and illegitimate and parenthood by adoption. Also, a marriage is a union between two persons of opposite sexes, so a man and a woman.[163] Furthermore, the free and voluntary consent of each party and in the case of a female under eighteen years old also the consent of her father, is essential.

According to section 25 of the Law of Marriage Act, a marriage can always be registered by a district registrar in civil form. If both parties belong to a specified religion, parties can also choose to marry according to the rites of their religion by a licensed minister of religion instead of concluding a civil marriage. In case of a marriage in Islamic form, it is only required that the intended husband is a Muslim. If parties belong to a community or communities following customary law, the marriage can also be concluded by customary law rites instead of concluding a civil marriage. Christian marriages must be celebrated in a church in the manner recognized by Christian faith. An Islamic marriage must be celebrated according to Islamic rites by a *kadhi* or a registration officer who is a Muslim. Two witnesses must be present at the time of contracting.[164] Differently from other forms of marriages, Islamic marriages can be

[161] High Court Criminal Appeal, no. 53/2001.
[162] B.A. Rwezaura, 'Tanzania: Building a New Family Law out of a Plural Legal System', *University of Louisville Journal of Family Law*, vol. 33 (1995), p. 526.
[163] Section 9 (1) of the Law of Marriage Act 1971.
[164] M.J. Calaguas, C.M. Drost, & E.R. Fluet, 'Legal Pluralism & Women's Rights: A Study in Post-Colonial Tanzania', *Columbia Journal of Gender & Law*, vol. 16, no. 2 (2007), p. 29.

carried out without the presence of the bride and/or the groom. They can be represented by others.[165] Under the Law of Marriage Act a single system of registration is created under the control of the Registrar-General. Previously, some marriage were registered centrally, others only within certain communities or locally. Now, marriages must be registered by registration officers, as district registrars, ministers of religion, *kadhi*'s and other registrars appointed at the lower level. If no registration officer attends at a marriage, the duty to register within thirty days is imposed upon the parties themselves. [166]

Whatever form of marriage is chosen, common provisions in section 38-41 specify the grounds for the defectiveness of a marriage. Reasons for void marriages are; non-age, prohibited relationships, impediment of an existing marriage (in case of a monogamous marriage), a valid objection having been sustained by the Marriage Conciliatory Board, absence of free consent, absence of parties of witnesses and knowing and wilful acquiescence of the person officiating, who is not lawfully entitled to. A marriage is also void if it is concluded while the woman was still in the *iddat* period of a previous Islamic marriage. *Mut'aa* marriages for fixed terms, which were officially recognised in the Tanzanian Statements of Islamic Law before 1971, are excluded in the Law of Marriage Act by section 38. In this section is stated that all marriages expressed to be of a temporary nature or for a limited period, are void.[167]

By applying the Law of Marriage Act to all marriages in Tanzania mainland, reform in the area of property rights and liabilities of the wife is achieved. The Act adopts a system of separation of property. The wife has an equal and separate right to hold and dispose property, without the consent of the husband. She is also able to make contracts, to sue and be sued in contract or tort. In general, marriage will have no effect upon the existing property rights.[168]

### *4.2.2. Minimum Age*

Tanzanian law recognizes the age of eighteen as the dividing line between children and adults in the Age of Majority Decree and the Citizenship Act. Also, the Law of Marriage Act prohibits men to marry before their eighteenth birthday. However, the Tanzanian National Bureau of Statistics stated in a Demographic Report of 2010 that 40 % of the Tanzanian girls are married

[165] M.S. Hussain & M.M. Khartoum,'Matrimonial Disputes Litigation under Common and Islamic Law: Tanzania Perspective' *unpublished,* Dar es Salaam University (2013), pp. 6-7.
[166] J.S. Read, 'A Milestone in the Integration of Personal Laws: The New Law of Marriage and Divorce in Tanzania', *Journal of Africa Law*, vol. 16, no 1 (1972), p. 28-31.
[167] J.S. Read, 'A Milestone in the Integration of Personal Laws: The New Law of Marriage and Divorce in Tanzania', *Journal of Africa Law*, vol. 16, no 1 (1972), p. 29.
[168] J.S. Read, 'A Milestone in the Integration of Personal Laws: The New Law of Marriage and Divorce in Tanzania', *Journal of Africa Law*, vol. 16, no 1 (1972), p. 32.

before their eighteenth birthday.[169] According to the Human Rights Watch Report on Child Marriage in Tanzania, child marriages are driven by poverty and payment of dowry, child labour, adolescent pregnancy, child abuse and neglect and limited access to education and employment opportunities for girls. Young girls get married in the hope of finding a better life.[170]

The Law of Marriage Act provides that girls can marry as young as fifteen years old with the consent of the parents or guardians. The court also has discretion to allow the marriages of fourteen year old years if the court is satisfied that there are special circumstances which make the proposed marriage desirable.[171] However the Law of Marriage Act supersedes any law conflicting its provisions, the existence of law specifying other acceptable ages of marriage diminishes the effectiveness of the Law of Marriage Act's minimum age of fifteen. The Sexual Offences Special Provisions Act permits girls to be married younger as long as the husband promises not to consummate the marriage until the girl reached the age of fifteen. Also, codified customary law and the Islamic Restatement Act permits marriage when a girl reaches puberty.[172]

### *4.2.3. Free consent and Guardianship*

The Law of Marriage Act states that the free and voluntary consent of each party is needed for a valid marriage in section 16 (1). For a bride under eighteen, the consent of her father, mother or guardian is also needed. However, all these requirements are toned down in section 16 (2), which gives the judge discretionary power to give the consent instead of the bride, groom or family of the bride;

*Where the court is satisfied that the consent of any person to a proposed marriage is being withheld unreasonably or that it is impracticable to obtain such consent, the court may, on application, give consent and such consent shall have the same effect as if it had been given by the person whose consent is required by subsection (1).*

Section 16 (3) gives *kadhi*'s the possibility to require the consent of additional people before concluding an Islamic marriage;

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[169] Tanzanian National Bureau of Statistics and ICF Macro, 'Tanzania Demographic and Health Survey Key Findings 2010', http://www.measuredhs.com/pubs/pdf/SR183/SR183.pdf (24-07-2014), p. 4.
[170] Human Rights Watch Report, *No Way Out. Child Marriage and Human Rights Abuses in Tanzania* (2014), pp. 38-47.
[171] U.S. Department of State, *Tanzania 2013 Human Rights Report* (2014): 29.
[172] Women Legal Aid Centre, *Child Marriage and Guardenship: Tanzania's Need for Reform* (2005), p. 10.

*Where a marriage is contracted in Islamic form or in accordance with the rites of any specified religion or in accordance with the customary law rites, it shall be lawful for the kadhi, minister of religion or the registrar, as the case may be, to refuse to perform the ceremony if any requirement of the relevant religion or customary law which relates to the obtaining of any consent of any person other than a person mentioned in subsection (1) has not been complied with.*

*4.2.4. Polygamy*

The Law of Marriage Act recognises as well monogamous as polygamous marriages. Sections 9 and 10 of the Law of Marriage Act 1971 state the following:

*Section 9: (1) Marriage means the voluntary union of a man and a woman, intended to last for their joint lives. (2) A monogamous marriage is a union between one man and one woman to the exclusion of all others. (3) A polygamous marriage is a union in which the husband may during the subsistence, of the marriage be married to or marry another woman or women.*

*Section 10: (1) Marriages shall be of two kinds, that is to say; (a) those that are monogamous or are intended to be monogamous; and (b) those that are polygamous or are potentially polygamous. (2) A marriage contracted in Tanganyika, whether contracted before or after the commencement of this Act, shall (a) 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; and (b) in any other case, be presumed to be monogamous, unless the contrary is proved.*

Read explains that section 9 and 10 are a legislative overkill and confusing. It looks like a difference between a polygamous and a potentially polygamous marriage is made in section 10, although a polygamous marriage is already defined to embrace this potentiality. It also looks like a difference between monogamous marriages and marriages that are intend to be monogamous is made in section 10, although a monogamous marriage has already been defined as one binding the parties to monogamy in section 9. Read concludes that section 10 (1) or section 9 (2) and (3) are superfluous.[173]

The form under which the marriage is contracted to some extent determines whether a marriage is (potentially) polygamous or not. Customary and Islamic marriages are assumed to be

[173] J.S. Read, 'A Milestone in the Integration of Personal Laws: The New Law of Marriage and Divorce in Tanzania', *Journal of Africa Law*, vol. 16, no 1 (1972), p. 24.

polygamous and others are assumed to be monogamous, unless the contrary is proved. However, it is not clear in what way the contrary can be proved. In section 18, the Act requires that a notice must be given to the registrar with a statement that the intended marriage shall be monogamous or polygamous, but nowhere is stated that this statement has in any way influence on the character of the marriage. In case of a civil marriage, the registrar must note in the register whether the marriage is monogamous or polygamous if both parties freely and voluntary request him to do so and the form prescribed for a Certificate of Marriage includes a column headed 'Monogamous or Polygamous', but again there is no indication that these statements are decisive.[174] Marriages can be converted from a monogamous to a polygamous character and vice versa by a joint declaration by the husband and wife before a judge. The Act excludes any other type of conversion, for instance the change of religion of (one of) the parties. Christian marriages are prohibited to be converted as long as both spouses profess the Christian faith. However, the Act does not state that Christians can't opt for polygamy at the outset of the marriage.[175]

A polygamous marriage is regarded as a series of bilateral relationships with one common partner and the several wives enjoy equal rights and status and are subject to equal obligations in this union of bilateral relationships.[176] Subsidiary legislation of the Islamic Restatement states that a Muslim man shall not have more than four wives at the same time.[177] In a polygamous marriage, any wife can lodge an objection when her husband gives notice of the intention to marry another wife on the ground of hardship to the existing wives and children or the unsuitability of the intended new wife is she is of notoriously bad character, suffers from a communicable disease of is likely to introduce grave discord into the household. The objection is determined by the Marriages Conciliatory Board.[178] It appeared that in practice it is hard for Muslim women to object an additional marriage, because the wife is dependent on the husband.[179]

Section 152 of the Law of Marriage Act penalizes polyandry:

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[174] Idem, p. 25.
[175] Idem, p. 25.
[176] J.S. Read, 'A Milestone in the Integration of Personal Laws: The New Law of Marriage and Divorce in Tanzania', *Journal of Africa Law*, vol. 16, no 1 (1972), p. 27.
[177] A.H. Scheinfeldt & R.K. Tyndall., 'Marriage Matters: The Plight of Women in Polygamous Unions in Tanzania', *International Women's Human Rights Clinic Georgetown University Law Centre* (2005), pp. 24.
[178] J.S. Read, 'A Milestone in the Integration of Personal Laws: The New Law of Marriage and Divorce in Tanzania', *Journal of Africa Law*, vol. 16, no 1 (1972), pp. 26-28.
[179] A.H. Scheinfeldt & R.K. Tyndall., 'Marriage Matters: The Plight of Women in Polygamous Unions in Tanzania', *International Women's Human Rights Clinic Georgetown University Law Centre* (2005), p. 34.

*(1) A married woman who is a party to a ceremony whereby she purports to marry another man shall be guilty of an offence.*

*(2) A man who is a party to a ceremony whereby he purports to marry a woman who is married to another man knowing or having reason to believe that she is so married, shall be guilty of an offence.*

*(3) Any person guilty of offence under subsection (1) and (2) shall be liable on conviction to imprisonment for a term not exceeding three years.*

Also the Islamic Restatement states that Muslim women shall not have more than one husband. According to Hussain of the Dar es Salaam University the reason behind this prohibition is to avoid confusion as to the children that may be born.[180]

### *4.2.5. Divorce*

Although the conclusion of a marriage by an imam is recognised by the Law of Marriage Act, a divorce has to be dissolved by a state court itself. Under the Law of Marriage Act, all the extra judicial divorces are not allowed, including the practice of *talaq*. Divorce is only granted by the court on the ground that the marriage is broken down irreparably and as well the husband as the wife can petition for it. Before the request to divorce can be presented to the court, first a Conciliatory Board has to try to solve the matrimonial dispute. These Boards are established by the Minister in each area and for each (religious) community. Each Board has jurisdiction over the members of the community for which they are established.[181] The Boards governing Islamic marriages are formed by the BAKWATA, but Muslims can also refer their matrimonial difficulties to any other conciliatory board, as provided for by the Law of Marriage Act in section 102(2). In *Athumani vs. Hamisi* (1991) the High Court in Dodoma also considered that the reconciliation of a Muslim marriage by a non-Muslim board does not render the reconciliation a nullity. If the Board certifies that is has failed to solve the dispute, the court has to decide whether the marriage is irreparably broken down. The absence of a certificate from the marriage conciliatory board, a petition for divorce becomes premature and incompetent. The Law of Marriage Act also provides that no petition of divorce is to be heard

[180] M.S. Hussain & M.M. Khartoum,'Matrimonial Disputes Litigation under Common and Islamic Law: Tanzania Perspective' *unpublished,* Dar es Salaam University (2013), p. 5.
[181] J.S. Read, 'A Milestone in the Integration of Personal Laws: The New Law of Marriage and Divorce in Tanzania', *Journal of Africa Law*, vol. 16, no 1 (1972), p. 35.

before a marriage has subsisted for two years, unless there is exceptional hardship which has been suffered by one of the parties.[182]

The court must consider all relevant evidence in deciding whether the marriage has broken down. Certain matters are listed as possible evidence in section 107 of the Law of Marriage Act; adultery, wilful neglect, matrimonial desertion, cruelty, separation, sexual perversion, imprisonment, mental illness and change of religion. In *Mohamed vs. Ally* (1983) the High Court in Dar es Salaam explained that 'cruelty' means 'wilful and unjustifiable conduct of such a character as to cause danger to life, limb, or health, bodily or mental, so as to give rise to a reasonable apprehension of such danger'.[183] Although the pronouncement of (a triple) *talaq* by the husband doesn't dissolve the marriage without intervention of the judge, it is evidence for the breakdown of a marriage before a judge.[184] Despite the judicial intervention, some scholars argue that this means that the Islamic law of divorce and unilateral extra-judicial divorces by the husband are still accepted by the uniform divorce system, as the judge automatically accept the divorce as valid if the divorce is obtained by *talaq*.[185]

*4.2.6. Division Matrimonial Assets, Custody and Maintenance*

Married women are granted the same rights as men in acquiring, holding and disposing property during the marriage. Any property obtained in the name of one partner during the course of the marriage creates a rebuttable presumption that the property belongs absolutely to that person to the exclusion of his or her spouse. So, the basic scheme adopted by the Law of Marriage Act is based on the separation of property. However, none of the spouses is allowed to unilaterally transfer rights in the matrimonial home without the other person's consent.[186]

After granting a decree of divorce, the court may order a division of the matrimonial assets, acquired 'by joint efforts' during the period of marriage, between the parties. This joint efforts may be direct if both spouses contributes money or work to the acquirement of the assets or indirect if one of the parties used money while the other party performed domestic works to enable the other to gain money. The housework done by the wife constitutes sufficient contribution to the matrimonial property. In the case *Bi Hawa Mohammed vs. Ally Seifu* (1983)

[182] High Court of Tanzania Dodoma, 2 December 1991.
[183] High Court of Tanzania Dar es Salaam, no. 6/1983.
[184] J.S. Read, 'A Milestone in the Integration of Personal Laws: The New Law of Marriage and Divorce in Tanzania', *Journal of Africa Law*, vol. 16, no 1 (1972), p. 33 and High Court of Tanzania Mtwara, no. 1/1997.
[185] M.J. Calaguas, C.M. Drost, & E.R. Fluet, 'Legal Pluralism & Women's Rights: A Study in Post-Colonial Tanzania', *Columbia Journal of Gender & Law,* vol. 16, no. 2 (2007), p. 32.
[186] M.J. Calaguas, C.M. Drost, & E.R. Fluet, 'Legal Pluralism & Women's Rights: A Study in Post-Colonial Tanzania', *Columbia Journal of Gender & Law,* vol. 16, no. 2 (2007), p. 30.

the Court of Appeal resolved a long running split between lower courts on the question whether women could claim housework and child care as contributions to jointly acquired marital assets. Accordingly to the Court of Appeal, the Law of Marriage Act is an instrument of liberation and equality between sexes. Thus, section 114 of the Act was read to include domestic services in determining the contribution of each party to familial wealth.[187]

Regarding the division of matrimonial assets, the Law of Marriage Act does not provide any guidelines for polygamous marriages. In cases where a polygamous married wife divorces, while here co-wife or co-wives remain married to the husband, the co-wives are not taken in consideration at all. This means that the divorcing wife has a priority right to a share of the matrimonial assets, while the remaining wife or wives suffer because of the division of assets. Thus, the first wife to divorce will obtain a much larger share of the common assets than the other wives.[188] In the case of *Maryam Mbaraka Saleh vs. Abood Saleh Abood* (1992), Maryam was awarded 40 % of the house because of her contribution to it within the meaning of section 144 of the Law of Marriage Act. The first wife of Abood Saleh Abood, Farkha Abood, was totally overlooked in this case.[189]

According to section of 115 of the Law of Marriage Act, the wife has no right to maintenance in general, unless there is a special reason. If the courts decides there is a special reason, the amount of the maintenance is based on the means and needs of the parties, the degree of responsibility which the court apportions to each party for the breakdown of the marriage and to the custom of the community to which the parties belong.If the wife remarries she is extinguished from the right to maintenance. The court may order a man to pay maintenance to his former wife, where the parties were married in Islamic form, for the period of *iddat*.[190]

Regarding judgement on the custody of the children, the welfare of the infant shall be decisive, but the court also has to regard the wishes of the parents and the infant and the customs of the community. There is the rebuttable presumption that it is for the good of the infant below the age of seven years to be with his or her mother. Courts are not bound to award custody of all children to one parent. A custody order may include conditions as to residence, education,

[187] Court of Appeal Dar es Salaam, Civil Law, no. 9/1983.
[188] A.H. Scheinfeldt & R.K. Tyndall., 'Marriage Matters: The Plight of Women in Polygamous Unions in Tanzania', *International Women's Human Rights Clinic Georgetown University Law Centre* (2005), p. 52.
[189] *Maryam Mbaraka Saleh vs. Abood Saleh Abood*, Court of Appeal Tanzania, Appeal no. 1/1992.
[190] M.S. Hussain & M.M. Khartoum,'Matrimonial Disputes Litigation under Common and Islamic Law: Tanzania Perspective' *unpublished,* Dar es Salaam University (2013), p. 7.

religious life and provide for access by a parent deprived from custody.[191] The Law of Marriage Act imposes the duty to maintain the children on fathers whether they are in his custody or the custody of another person, either by providing them with accommodation, clothing, food and education or by paying the costs thereof. Such on obligation does not apply to mothers, who are only responsible for maintenance when the father is dead, missing or unable to provide the support. Some have argued that this regulation fails to adequately consider the mother's ability to pay for the maintenance and that the regulation should therefore be amended so that the maintenance will be a shared affair.[192] In *Kibutu vs. Ngajimba* (1985), the High Court in Dar es Salaam considered that the amount of the maintenance should be decided after the court has held an enquiry as to the means of both parents in order to arrive at a just decision. The court should also take into account the customs of the parties.[193]

### *4.2.7. Dowry*

The payment of a dowry is not required to create a valid marriage in Tanzania. Section 41 (a) of the Law of Marriage Act states that non-compliance with any custom relating to dowry or the giving or exchanging of gifts before or after marriage cannot affect the validity of a marriage. The dowry however continues to play a role in Tanzanian marriages and is still mandated by custom. Tanzanian law codified the refund and payment structure of the dowry in case of dissolution of the marriage in the Local Customary Law Order. A dowry is paid by the future husband and his family to a woman's family in the form of money, cattle or livestock, or a combination of both.[194] The payee has a duty to make sure that the dowry is paid in the presence of two or more witnesses from each side of the transformation. If a woman is at fault for the breakdown of the marriage, the father has to refund the dowry to the husband (and his family). Judges have a big discretionary power in deciding to what extend the breakdown was the woman's fault and has to pay back the dowry.[195]

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[191] J.S. Read, 'A Milestone in the Integration of Personal Laws: The New Law of Marriage and Divorce in Tanzania', *Journal of Africa Law*, vol. 16, no 1 (1972), p. 36.
[192] M.J. Calaguas, C.M. Drost, & E.R. Fluet, 'Legal Pluralism & Women's Rights: A Study in Post-Colonial Tanzania', *Columbia Journal of Gender & Law*, vol. 16, no. 2 (2007), p. 40.
[193] High Court of Tanzania Dar es Salaam, no. 64/1985.

[194] Human Rights Watch Report, *No Way Out. Child Marriage and Human Rights Abuses in Tanzania* (2014), p. 38.
[195] E. Gable, & E. Simpson, *The Equality in Marriage Act: A Balanced Solution to the Harms of Brideprice*, Dar es Salaam: Women Legal Aid Centre (2005), pp. 8-9.

### *4.3. Inheritance*

In contrary to the law of marriage and divorce, there is no uniform legal system, but a multiplicity of inheritance laws in Tanzania. Three parallel systems of inheritance law operate. Firstly, the Indian Succession Act is made applicable to Tanzania under the Indian Acts (Application) Ordinance. The Indian Succession Act applies to Christian, secular African, European and Asian communities, who are not Muslim or Hindu. The Act is basically codified English common law and embodies egalitarian principles in the distribution of property, regardless of gender.[196] Widows have the same rights as widowers; when a spouse is the only survivor he or she receives the entire estate. In case there are any children or grandchildren, the spouse receives one-third and in case there are any brothers and sisters the spouse receives one-half. Remaining sons and daughters or brothers and sisters split the remaining share equally.[197]

Customary inheritance law is codified in Governance Notices 279 and 436 and is the most discriminatory system against women of the three inheritance systems. It explicitly denies widows inheritance if the deceased left relatives of his clan. Her share is to be cared for by her children. Under customary law, the deceased's property stays in his family. A childless widow may continue to live in the family home, as long as she does not remarry. A widow with children may demand to live with her children in the house of the deceased. Daughters are granted the smallest share of the inheritance as customary law divided the heirs in three degrees. The oldest son falls in the first degree and obtains the largest share, the other sons fall in the second degree and the daughters fall in the last degree, obtaining the smallest share. Also, customary law attaches limitations to the property they may inherit. A woman may not fully inherit clan land, as she is forbidden to sell it, even if she is the only child.[198]

Different statutes provide for the application of Islamic law to govern the inheritance of Muslims. These statutes include the Probate and Administration of Estates Act, the Islamic Law Restatement Act and the Judicature and Application of Laws Act. In *Hussein vs. Chongwe*, the court held that Islamic law is automatically applicable to a person if it is shown that the deceased followed Islamic rules. An Islamic person can make a bequest for 1/3 of his or her estate, but has no full freedom of contract. For the rest of the estate, the rules regarding Islamic

[196] M.E. Magoke-Mhoja, *Child-Widows Silenced and Unheard: Human Rights Sufferers in Tanzania* Dar es Salaam: Children Dignity Forum (2006), pp. 114-115.
[197] T. Ezer, 'Inheritance Law in Tanzania: The Impoverishment of Widows and Daughters', *Georgetown Journal of Gender and the Law* vol. VII (2006), pp. 616-617.
[198] T. Ezer, 'Inheritance Law in Tanzania: The Impoverishment of Widows and Daughters', *Georgetown Journal of Gender and the Law* vol. VII (2006), pp. 609-612.

inheritance law as discussed in the first chapter are followed. Women get half of what their male counterparts receive and an illegitimate child cannot inherit as there is no *nasab* relationship.[199]

In *Shemzigwa vs. Shekigenda* a deceased husband pronounced a bequest before his death, in which he allocated a piece of his land to a daughter, begotten out of wedlock with a woman he did not marry. This part of land was less than 1/3 of his estate, which made the bequest allowed. The woman he married stated that the will was invalid, as the will was not witnessed by her or either two men or a man and two women. The court stated, after consultation of the BAKWATA, that Islamic rules require no special formality in making a will, so the oral will of the deceased was valid.[200]

In the case *Mbonde vs. Mtalika* Kaisi Said Kaisi passed away and was a Muslim who professed this religion until his death and was married under Islamic rites to Amina Said, so the distribution of his estate was governed by Islamic law. Amina and Kaisi had one son, born before their marriage and therefor 'outside wedlock'. Besides his wife and the illegitimate child, others who survived the deceased were his father, brother and two sisters. In determining in what manner the estate should be distributed, the court requested BAKWATA to sort out as to who, according to Islamic law, were the rightful heirs and which percentage each of them served. According to BAKWATA, Islamic law clearly states that the illegitimate child cannot inherit anything, the father is entitled to ¾ of the estate, the (officially childless) widow to ¼ of the estate and the brothers and sister cannot inherit as their father is still alive. The High Court follows the advice from BAKWATA and the fact that the widow contributed to the estate and is taking care of his illegitimate child, did not change this distribution.[201] So, in both cases courts followed the advice of the BAKWATA regarding Islamic law and the BAKWATA followed the classical Islamic inheritance laws.

### *4.4. Lack of Access to Justice and Weak Enforcement of Law*

Above the role of Islamic family law and human rights in the Tanzanian legal system is elaborated on. However, important remarks have to be made regarding the legal system. Within this system, deficiencies exist that may constitute impediments to vulnerable groups in the process of pursuing their rights.

[199] Idem, p. 615.
[200] High Court of Tanzania Tanga, no. 26/1996.
[201] High Court of Tanzania Mtwara, no. 3/1997.

According to the Human Rights Watch Report on Child Marriage in Tanzania, people lack confidence in the police and justice system because of bribery and corruption. Various sources in their empirical research declared that bribery of judicial government officials is a major barrier to a successful lawsuit.[202] The World Bank's Governance Indicators also shows that corruption is a serious problem in Tanzania.[203] The lack of trust is also associated with the fact that there is a certain amount of formality inherent in the court system, what makes them less accessible for ordinary citizens. Even Primary Court Magistrates are seen as strangers brought by the government.[204] Furthermore, people are often uneducated and not aware of their rights, the law and court procedures. In other words, the legal system does not feel 'theirs'.[205]

Regarding the access of state courts, people face many hurdles in accessing the formal justice system. These barriers include high costs of legal fees and long distances to courts that are mainly based urban areas.[206] Also, Tanzania has an extremely small number of legal practitioners, which causes a bad quantity and quality of legal aid. Because of their monopoly position, legal practitioners overprice their legal services. This makes legal aid inaccessible for the poor in Tanzania.[207] As a consequence of the lack of trust in and knowledge of the court system and the limited access to courts and legal aid, many family law matters are instead handled by traditional leaders and informal systems.[208]

Even when it comes to litigation by an official court, other problems in the access to justice appear. The Tanzanian court system is complex and bureaucratic and courts are not properly equipped with personnel and facilities, which causes big delays in the court procedures. Another concern is the strict adherence of judges to procedural provisions, which leads to inadmissibility of cases and injustice. Furthermore, the enforcement of a court decree poses significant problems. Because of too little government resources, the execution process full of

[202] Human Rights Watch Report, *No Way Out. Child Marriage and Human Rights Abuses in Tanzania* (2014), pp. 65-66.
[203] World Bank, *Worldwide Governance Indicators Country Data Report Tanzania,* 1996-2013; www.govindicators.org (24-07-2015).
[204] F. Twaib, *Legal Empowerment of the Poor: Access to Justice and Rule of Law,* Dar es Salaam: Commission on Legal Empowerment of the Poor (2006). p. 10.
[205] Idem, pp. 21-22.
[206] Human Rights Watch Report, *No Way Out. Child Marriage and Human Rights Abuses in Tanzania* (2014), pp. 65-66.
[207] F. Twaib, *Legal Empowerment of the Poor: Access to Justice and Rule of Law,* Dar es Salaam: Commission on Legal Empowerment of the Poor (2006), pp. 13-15.
[208] Human Rights Watch Report, *No Way Out. Child Marriage and Human Rights Abuses in Tanzania* (2014), pp. 65-66.

complications, especially where the losing party is not willing to comply with the court order.[209]

Marriage registration is an important tool to combat child- and other prohibited marriages. As we saw earlier, the Law of Marriage Act 1971 requires marriage registration. However, these provisions are poorly implemented in Tanzania. Most marriages under customary law remain unregistered because of inadequate access to registration officials or the lack of knowledge on the obligation to register.[210] Customary marriages do often take place in remote areas that are not easily accessible to registration authorities. Because the obligation to register the marriage is placed on the parties is the officer is unable to attend the ceremony, customary marriages often stay unknown to the state authorities.[211]

Considering the above mentioned problems in the access to justice and enforcement of laws, it is important that people get educated about the formal legal system, courts become financially and geographically accessible, strict formal requirements in court procedures will be removed, courts become equipped with required personnel, facilities and supervisory authorities, a sufficient amount of legal practitioners will be trained and register officials will be available on the country side.

[209] F. Twaib, *Legal Empowerment of the Poor: Access to Justice and Rule of Law*, Dar es Salaam: Women Legal Aid Centre, pp. 10-13.
[210] Human Rights Watch Report, *No Way Out. Child Marriage and Human Rights Abuses in Tanzania* (2014), p. 72.
[211] M.J. Calaguas, C.M. Drost, & E.R. Fluet, 'Legal Pluralism & Women's Rights: A Study in Post-Colonial Tanzania', *Columbia Journal of Gender & Law*, vol. 16, no. 2 (2007), pp. 41-42.

## Conclusion

In Tanzania an ongoing discussion regarding the institution of *kadhi* courts is taking place, which is getting more intense in times of elections and the process towards a new Constitution. Discussions on the normative role of religious family law in national legal systems are also taking place in Western countries such as the Netherlands as a result of growing differences within society. Questions of the Dutch Lower House on the presence of informal sharia courts and the prohibition of groups that call for the introduction of sharia in the Netherlands and the verdict of the ECtHR on the *Refah Partisi* in Turkey show the existing fear about the application of (parts of) sharia law within or besides the national legal system. It is assumed that the application of Islamic family law is at odds with the principles of human rights. For this master thesis I conducted research on the application of Islamic family law in Tanzania from a human rights perspective. In this conclusion I will come back to the question whether Tanzania is a model of or a warning for the integration of Islamic family law in a legal system which is based on human rights.

*Islamic family law and human rights*

One cannot speak of 'the' Islamic rules on family law. The primary sources of sharia, the Koran and Sunna, must go through a human process of understanding and interpretation to end up with actual rules. There are several interpretations by different scholars and other individuals. In this thesis I have discussed the classical interpretation of Islamic family law by the Shafi'i *madhab,* as this is the most followed school in Tanzania. This classical interpretation is compared to the human right discourse, which is largely a creation of the late twentieth century. The human rights discourse is extremely influential in as well Western countries as the African continent, where African human rights treaties came into power besides the international human rights treaties.

There are several potential clashes between the classical Shafi'i family laws and the human rights discourse. Lack of a minimum age and consent of the bride for the marriage, the dowry, the possibility of polygamy for the husband, the obligation for the wife to have sexual intercourse with the husband in exchange for maintenance, unequal rights in getting divorce and unequal inheritance rights between women and men are all examples of clashes with the equality between man and woman. The major change regarding Islamic family law last centuries has been that the application of the family laws nowadays take place within the structures of the states which codified these laws fully or partly, whereas the most striking

fact on traditional Islamic courts is that they were not subject to such an authority. Some Islamic countries have tried to unite Islamic family law and their human rights obligations and find common grounds by reinterpreting the sources of sharia to the current social, economic and political conditions and adapting the family laws. This way, in some countries polygamy, the practice of *talaq* and child marriage became prohibited or limited and women's rights to get a divorce got eased.

When comparing Islamic laws and practices to human rights, it is important to keep in mind that human rights work in a political and social context. The Western concept of human rights cannot just be imposed in another context, as laws only work in practice if they are legitimate. However, people should be aware of the existence of human rights and potential alternatives to the practices they are used to. In that case, people can make their own choice in the question whether they want Islamic family to be applied in their marriage and divorce and inheritance. Persons are then free to adopt a dowry, a potential for polygamy, a certain task division in marriage and different rights for the husband and wife regarding getting a divorce in the marriage contract. People are under the freedom of contract also free to bequeath his or her estate according to the Islamic inheritance laws after death. However, the lack of minimum age and lack of consent of the bride for a marriage are a denial of personal autonomy and rights to make one's own choices itself and are therefore in my view unacceptable under all circumstances.

*Legal pluralism*

If, in a multicultural society like Tanzania or the Netherlands, Muslims get to apply Islamic family laws, this would mean that a system of legal pluralism would be introduced. This means that different communities within this multicultural society self-regulate family law matters. Different models of legal pluralism can be distinguished. Woodman distinguishes two models; in the model of 'deep legal pluralism' state law coexists with other legal systems and in the model of 'state law pluralism' the state law itself recognizes and incorporates parts of the alternative law systems. In my opinion there are not just two models of legal pluralism, but there is a sliding scale on the degree of recognition of alternative family law systems and the involvement of the state in the application of these systems. States should find the right place on this sliding scale depending on the different and competing interests in the relevant state regarding the recognition and application of alternative family laws.

Although one cannot speak of an international human right to one's own law, there are arguments in favour of legal pluralism in the area of family law from a human rights perspective. The concept of personal autonomy entails that persons can give shape to their own life and form their own identity. There should be as less coercion and manipulation as possible and an adequate range of valuable options available, so one can make his or her own choices. The collective right to autonomy for a minority entails the right for this community to be preserve and protect its own values. Personal autonomy can only be guaranteed if communities are provided these group rights to a certain extent, as in this case different cultures can flourish and different options are made available to the individual. A community with its own culture can provide the individual a sense of belonging and identity. The personal autonomy and the group rights of minorities get infringed when a family law system is imposed on an individual or a group which does not agree on the correctness of these rules. However, even in a liberal state, the personal and group autonomy cannot be without limits. The state is held responsible for human rights breaches by its different communities under the obligation to protect individuals from violations by third-parties. The minority within the community should not be coerced to follow certain rules and be disadvantaged as a result of certain power relations within the community. Therefore, a realistic opt-out option should be available and measures that promote awareness of different options are essential.

Major objections against the application of different legal family laws are that this would be at odds with legal equality, legal certainty and the unity of society. The intrinsic principle of legal equality does however not mean that every individual is treated the same way, but that people are treated differently, because there are actual differences. The actual difference must however be relevant for the distinction that is made. If people agree on the application of certain family law rules, the difference in their conception of justice can be a relevant actual difference for a distinction between different family laws. Applying one family law system to all citizens, of which some consider this to be the just system and others consider other family law norms to be the just ones can therefor also be seen as unequal treatment. The principle of legal certainty requires that those subject to the law must know what the law is so that they can abide by it and plan their lives accordingly. In a model of legal pluralism, the law contains not only different kind of norms, but also regulations on which norms are applicable to who and in which circumstances, which are also apt to become complex. On the other hand, one can also argue that a lack of legal certainty in the area of family law causes flexibility which can contribute to the freedom of individuals, as individuals can choose between different family

law systems. Different family law systems do not contribute to a shared identity. On the other side, recognizing and respecting cultural differences in a society can also contribute to the feeling of self-esteem and acceptance of minority society members and therefor causes fewer tensions.

So, giving minorities the possibility to maintain their own culture and make the application of different family law systems possible in one society can as well threaten as contribute to individual autonomy, equality and unity of society, depending on the circumstances. When minorities get the opportunity to apply their own family laws, the state must however be aware of the rights of minorities within the minority. If their rights are violated at least a realistic opt-out option should be a possibility and the state should make people aware of the different options regarding family law to guarantee their personal autonomy and legal equality. It should be guaranteed that people can make their own choices regarding the application of family laws.

*Human rights and Islamic Family Law in Tanzania*

Tanzania is party to the core international treaties that protect human and women's rights and the Constitution also establishes equality, rights and freedoms. The Court of Appeal has decided that any national law that restricts or abridges basic human rights can still be lawful if this law is in the public interest and proportional. The reforms by the Law of Marriage Act 1971 represent an important step in creating a uniform family law system and protecting the rights of women and children. Divorce is not possible without a judge and where codified religious family laws contradict the Law of Marriage Act, the last mentioned supersedes. In principle a valid marriage needs the bride's free consent and the property rights of women during and after marriage are modernized. However, the provisions preserve Islamic law precepts for some aspects of marriage and divorce. For example, polygamous marriages continue to be allowed for Muslim men and Muslims receive special treatment in that courts will automatically validate a divorce performed by the practice of *talaq*. The minimum age for women is fifteen years, while the minimum age for men is eighteen years and although the dowry is not required for a valid marriage, Tanzanian law codified regulations regarding the payment and refund of dowry. Furthermore, the court can give consent to the marriage instead of the bride or groom her or himself if the consent is 'being withheld unreasonably'. There is a multiplicity of inheritance laws in Tanzania. Islamic inheritance law is automatically applied if it is showed that the deceased was living according to Islamic rules. In this system women

get half of the share that her male counterpart would get. An Islamic person can make a bequest for 1/3 of his or her estate, but has no full freedom of contract.

In the current situation on Tanzania mainland, state courts have the exclusive right to give judgements in family law cases, although state courts are not easily accessible and the enforcement of law is very weak in Tanzania. When Islamic law is involved, the state courts consult the Muslims Council BAKWATA on the right application. So, the introduction of *kadhi* courts would probably not make an actual big difference, as the state courts are already applying Islamic family law and consulting the BAKWATA on this application. However, the debate on the *kadhi* courts in Tanzania shows that the introduction would have great symbolic value.

Tanzania has a system of state law legal pluralism in the field of family law. State courts are applying Islamic marriage and inheritance law in the case of Muslims, although because of the lack of access to the courts deep legal pluralism also exists. The Islamic community is given the collective right to maintain its own laws. Although different groups are given different rights regarding family law in Tanzania, this has not caused disunity of society so far and the several religious communities live peacefully together in general. However, the application of Islamic family law causes some breaches of human rights and national Constitution, as polygamy, dowry, *talaq,* child marriages and unequal inheritance rights are very common. Only in rare case, modern adaptions by reinterpreting the sources of Islam took place. As I argued before, the lack of minimum age and consent of the bride for a marriage are a denial of the personal autonomy itself and therefore unacceptable. Furthermore, people should have a realistic choice regarding the adoption of a dowry, potential to polygamy and unequal rights to get a divorce in the marriage contract. Islamic women in Tanzania do not have a realistic opt-out option in case of the application of Islamic family law. Also, people should have full freedom of contract regarding their inheritance. Islamic family law is applied automatically when Muslims are involved and the state has so far failed to educate the people properly on the rights and options they have, which weakens their personal autonomy. Just as any other countries, Tanzania is trying to balance the different needs and interests in their country regarding the application of Islamic family law. What we can learn from the Tanzanian case, is that giving different communities different rights does not necessarily lead to disunity in society. However, applying the classical Islamic family laws automatically without educating

people on their rights and alternative options, is at odds with human rights and personal autonomy.

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