"All Truth is in itself certain. But as received by men, and understood with reference to men’s psychology, certainty may have certain degrees. There is the probability or certainty resulting from the application of man’s power of judgment and his appraisement of evidence" — Quran

Hindus and Muslims are the two leading communities of India. Except the special status which are of general application, each of these communities is governed by its own personal laws regarding family matters and religious institutions, but in other matters both are governed by the common laws passed by the Indian Legislature. The personal laws of both these communities are based on their respective religions giving effect as Divine Laws.

Muslim personal laws have its origin from Quran. One of the important reason is that the word Islam itself relates to submission. In its religious sense it denotes ‘submission to the will of God’ and in its secular sense, the establishment of peace. Muslims believe in divine origin of their holy book which according to their belief was revealed to the prophet by Gabriel.

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"The *Quran* is *Al Furquan* ie. one showing truth from falsehood and right from wrong".² The Quran contains about 6000 verses but not more than 200 verses deal with the legal principles. If we leave out of account those which concern the state as such there are about 80 verses, more or less, which deal with the law of personal status. Most of them are concerned with inheritance, marriage, divorce and such like matters.

The Quran does not even set them out as a code in one place. They are found in the portion of the Quran revealed to the prophet at Medina. The portion which was revealed at Mecca is singularly free of legal matters and contains the philosophy of life and religion. The legal verses embody broad principles but do not explain or expound them. According to the classical belief of the Muslims the word of God is law and law is the command of God. This law is known as Sharia. ‘Fiqh’ which is jurisprudential in character is the ascertainment of the right principle. These two sources, namely the Koran and Sunna may be said to form the fundamental roots of Islamic law.

Ijmaa is another important source of Mohammedan Law. Ijmaa means a kind of communal legislation by great scholars. It was equally binding on the people to act on a principle (not contrary to the Koran or Hadis) which had been established by agreement among highly qualified legal scholars of any generation. This was supported by the Hanafi doctrine that the provisions

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of law must change with the changing times and of the Malikis that new facts require new decisions. The validity of ijmaa as containing a binding precedent is based upon a Hadis of the prophet which says that god will not allow his people to agree on an error. Ijmaa thus become a source of law. Ijmaa is however to be distinguished from mere heresy for which the name is Bidah. Ijmaa was a feature of all schools of Sunni law and the rules deducted by ijmaa are equally valid and binding in each school. Some western writers have described Ijmaa as means of “Muslims shaping Islam, instead of Islam shaping Muslims” Authority for Ijmaa is said to emanate from a verse of the Koran “Amrahum shura bay nahum” (The way is by counsel in their affairs). So it was said that the writ of the Koran runs by Ijmaa.

In developing Islamic law by consensus the doctrine of Ijtihad was employed. Ijtihad means one’s own exertions and it denotes the exercise of one’s reason to deduce a rule of sharia law. Although it can be stated as a general rule that the principles laid down by the Koran and the Hadis must always be followed.

In deducing a new principle the text of the Koran and the Hadis were not lost sight of but extigency of the time and public interest were also borne in mind. It is not wrong to say that the development and advance in legal principles was the result of compelling necessity when the Koran and the

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3 Hidayathullaa, p.XXIV.
Hadis did not disclose the precise line to follow. Where a principle was silent to cover an individual case an independent effort had to be made and this is what is meant by ijtihad.

The doctrine of Ijtihad was itself based on the application of some distinct principles:

Abu Hanifa applied the principle of Istihan (equity), Malikis applied 'Istislah'. (Consideration of public interest), Maslaha (discovery of sound precedent).4

Quiyas is the last source of Islamic law it has lesser significance. This is reasoning by analogy

Mohammedan Law in India

The Indian legal system is based in part on the English common law system. With respect to Muslim personal law as applied in India, the sources of law are Hanafi fiqh along with some resort to other schools, legislation, precedent, certain juridical texts (both classical and modern) that are considered authoritative, and custom. During the British Raj, the colonial courts were directed to apply "indigenous legal norms" in matters relating to family law and religion, with "native law officers" advising the courts on the determination of those norms. A number of Hanafi sources (notably al-Hidaya and the Fatawa Alamgiri) were translated into English. The advisory

4 Mulla, p. XXVI.
positions of legal experts on Hindu and Muslim law were abolished in 1864. Legal commentators on the development of the indigenous system of "Anglo-Muhammadan" law (now more commonly referred to as Indo-Muslim law) attach varying degrees of significance to the subsequently authoritative position of these works (and the quality of the translations), the absence of judicial expertise in Muslim law, the introduction of principles of English law and procedure through judges trained in the English legal tradition and through interpretation of the residual formula of justice and right or justice, equity and good conscience to imply mainly English law, and to the position taken on customary law.

The status of the personal laws of minority communities, and the plurality of religious laws in general, is much debated in India. Article 44 of the Constitution legislates a commitment to the gradual establishment of legal uniformity in India, the aim being that the state "shall endeavor to secure for the citizens a uniform civil code throughout the territory of India. This directive is considered a threat by elements of religious minority communities, who continue to be governed by their own personal laws in family matters, as applied within the superstructure of the Indian legal system.

Constitutional Status of Islamic Law

The Indian Constitution was adopted on 26th November 1949 and has been amended many times. The preamble of the Constitution affirms that
India is a "sovereign socialist secular democratic republic". India's secularity is framed in terms of neither favoring nor officially adopting any particular religion, and Article 26 guarantees the freedom to manage religious affairs (subject to constraints imposed by the requirements of public order, morality and health) for every recognized religious denomination or sect. The aforementioned Article 44 of the Constitution contains the Directive Provision stating that Indian legislators shall aim to establish a uniform civil code throughout India. For the time-being, religious communities continue to be governed by their own personal laws (apart from Muslims, this applies to Christians, Zoroastrians, Jews and Hindus, as well as Buddhists and Sikhs who, for legal purposes, are classified as Hindus). Although the option of civil marriage exists, it is not often the only regime under which Indians marry. The difficulty of reconciling the secularity of the Republic and the objective of establishing legal uniformity with the protection of minority rights (also enshrined in the Constitution) has meant that, almost fifty years since the adoption of the Constitution, the goal of the directive principle in Article 44 is still far from being realised.

Notable Features

With the exception of some enactments, most of the personal law applicable to Indian Muslims is uncodified and administered by state courts on the basis of Indo-Muslim judicial precedents. With one exception, the
legislation regulating Islamic family law dates from the period of British colonial rule. The Muslim Personal Law (Shariat) Application Act 1937 directs the application of Muslim Personal Law to Muslims in a number of different areas mainly related to family law. The Act also directs the application of Muslim personal law in matters relating to interstate succession among Muslims. On the matter of Islamic inheritance law, as the Quran provides a systematic scheme for intestate succession, there has been no particular legislation in that area. The courts generally apply the classical rules relating to intestate succession.

The Child Marriage Restraint Act 1929 introduced under the British provided penal sanctions for contracting marriages below the specified minimum age, originally established at 18 and 15 years. As the Act currently stands in India (amended by Act 2 of 1978), the minimum marriage age is 21 for men and 18 for women. However, as registration is not compulsory in India, and as the Act does not instruct the dissolution of under-age marriages, such unions are not rendered invalid. The Registration of Mohammedan Marriages and Divorces Act 1876 is still in operation in Bihar and West Bengal. Other states of the federation also have similar Acts, and there are facilities for voluntary registration. However, registration is not a requirement in India. The option of registering a marriage under the Special Marriage Act 1954 (under which all inter-religious marriages must be registered) also exists, in which case a different set of secular marriage and divorce laws
would apply; it does not, however, appear to be very common to do so in practice. Registration may prove useful if recourse is had to the courts, but because it is not compulsory, other evidence may be used to prove the existence of an unregistered marriage. India submitted a declaration affirming the government’s commitment to the principle of obligatory registration of marriage, but stating that, for the present, the diversity and size of India’s population make strict adherence to this principle impractical.

With regard to polygamy, the Criminal Procedure Code establishes that a woman who refuses to live with her husband on just grounds will still be entitled to maintenance and those just grounds, as defined in the Code, include the contracting of a polygamous marriage by the husband, even if the personal law applicable to the parties permits polygamy. This proviso only actually applies to Muslims as polygamy has been abolished for all other communities. In *Itwari v. Asghari*\(^5\), a suit for the restitution of conjugal rights by a Muslim husband against his first wife, the Allahabad Court stated that the onus was on the husband to prove that his second marriage did not constitute any insult or cruelty to the first wife. Although the Muslim husband has the right to contract a polygamous marriage, the Court held that it does not necessarily follow that the first wife should be forced to live with him under threat of severe penalties after the husband has taken a second wife. Even in the absence of proof of cruelty, the Court would not pass a decree for

\(^5\) AIR 1960 All 684
restitution of conjugal rights if it appeared that it would be unjust and inequitable to compel her to return to her husband under the circumstances of the case.

The Dissolution of Muslim Marriages Act 1939 introduced changes to the extremely restricted Hanafi rules on judicial divorce at the petition of the wife by the adoption and adaptation of certain Maliki principles. The nine grounds upon which a woman is entitled to obtain a decree of dissolution of her marriage under the Act are as follows: if the husband’s whereabouts have not been known for four years; if the husband neglects to maintain the wife for two years; if the husband has been sentenced to seven or more years imprisonment; if the husband has failed to perform his marital obligations for three years; if the husband was impotent at the time of marriage and continues to be so; if the husband has been insane for a period of two years or suffers from a serious illness harmful to the wife; if the wife was contracted into marriage by her father or other guardian before the age of 15 and repudiates the marriage before she becomes 18 (provided the marriage has not been consummated); if the husband treats her with cruelty (including physical or other ill-treatment or unequal treatment of co-wives); and any other ground which is recognised as valid for the dissolution of marriage under Muslim law. On the other hand, apostasy by the Muslim wife, including conversion to another religion, does not in and of itself dissolve her marriage. The Act

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expressly extends the option of puberty to women who were contracted into marriage as minors by their fathers or paternal grandfathers, broadening the classical Hanafi rules. There has, however, been no substantial reform of the classical law relating to *talaq*. The Muslim husband retains the right to repudiate his wife extra-judicially, and from the available sources it appears that the most common form of divorce is the triple *talaq*. The stance of the pre- and post-independence courts has generally been to accept extra-judicial repudiation as "good in law, bad in theology". A major issue of concern is the determination of the time from which maintenance becomes due in cases where the *talaq* has not been communicated to the wife, but the validity of such repudiations has not been called into serious question. Pearl and Menski also note that the scarcity of case law reflects the fact that, in actual practice, the exercise of *talaq* doesn't often involve the courts.\(^7\)

With regard to maintenance upon divorce, classical Hanafi law has been modified in India by the Muslim Women (Protection of Rights on Divorce) Act 1986, passed following fierce protest by sectors of the Muslim community that viewed the Supreme Court's ruling in the Shah Bano case as a gross interference in matters of Muslim personal status.

Shah bano Case

Shah bano, 62 year old Muslim women and mother of five from Indore, Madhya Pradesh, was divorced by her husband in 1978. The muslim personal law allows the husband to do this without his wife’s agreement. She tried to get maintenance (similar to alimony) through the Indian court system, and seven years later her case reached the supreme court. Maintenance is an area of law that falls under the personal codes, and Muslim law does not entitle women to ongoing maintenance. A divorced Muslim woman is entitled to her mehr, which is a payment to her from her husband at the time of marriage, and three months of maintenance. Following that, her family and community may help to support her.

When shah Bano’s case reached the Supreme Court in 1985, the court turned to the criminal code, which applies to everyone, specifically Article 125. This Article was from the British colonial criminal procedure code of 1898 as revised in 1973. This Criminal code entitles divorced, destitute women to some maintenance. The Supreme Court used this Article to grant ongoing maintenance to shah Bano, in spite of Muslim personal law. Moreover, the court went on to argue in their decision that “a common civil code will help the cause of national integration by removing disparate loyalties in laws which have conflicting ideologies”.

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In *Mohammad Ahmed Khan v. Shah Bano Begum*, the Supreme Court ruled that there was no conflict between classical Hanafi law, which only specifies the obligation to maintain a wife during her *idda* period, and the requirement to support a former wife unable to maintain herself established by state legislation. During the aftermath of the controversial judgement, the Congress government passed the Muslim Women (Protection of Rights on Divorce) Act 1986.

The Act entitles the divorced Muslim woman to "a reasonable and fair provision and maintenance to be made and paid to her within the *idda* period by her former husband." Although the Act itself provoked differing reactions as to what its effect would be, court practice allows the Muslim divorcee to appeal to the courts if her former husband has not provided her with a reasonable sum for maintenance during her *idda* period. As in classical law, the *idda* period is defined as three menstrual cycles after the divorce; three lunar months if the wife is not subject to menstruation; or until delivery of the child or termination of pregnancy if the woman is enceinte.

The Act also stipulates that the divorced wife is entitled to any outstanding dower, any property given her before or during marriage, and maintenance for children in her custody born before or after the finalisation of the divorce. There appears to be some modification to classical Hanafi law in the definition of a divorce entitled to claim such support, as the Act specifies

* AIR 1985 SC 945
that its application pertains to marriages conducted according to Muslim law where a Muslim woman has obtained a divorce from or has been divorced by her husband in accordance with Muslim law. The Act directs that if neither the former wife or husband has the means to provide for her support, the responsibility of maintenance of the divorce falls on her relations, that is, those relatives that would stand to inherit from her. If she has no close relations or they are unable to support her, liability falls to the State Waqf Board.

Section 5 of the Act also allows for a divorced Muslim woman and her former husband to declare to the Court their willingness to be governed by the provisions of sections 125 to 128 of the Code of Criminal Procedure relating to the maintenance of dependants unable to support themselves.

In the first reported case relating to the Act,\textsuperscript{10} the Kerala High Court rejected a narrow interpretation of the legislation as only requiring Muslim men to support their divorced wives during the \textit{idda} period. Rather, the Court stated that the appropriate interpretation of section 3(1)(a), "a divorced women shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the \textit{idda} period by her former husband", was that maintenance during the waiting period and reasonable and fair provision were two separate issues. Thus, the Court ruled that the Muslim divorce is

\textsuperscript{10} Ali v. Sufaira 1988 (2) KLT
entitled not only to maintenance for her waiting period, but also to a reasonable and fair provision to provide "for her future livelihood, from her former husband." This has since been confirmed by a large number of judgments.

Constitutional considerations of Shah bano case

The Shah bano dilemma also raises key constitutional issues. The Indian constitution is the longest in the world. It includes a section on Fundamental Rights, which is a bill of rights, as well as a section of Directive Principles. Which are to guide state policies and actions. Perhaps inevitably in such a lengthy document, at times it seem to contradict itself; on the other hand, the level detail can help to guide some decisions. Here one more point to note is that Preamble affirms Justice, liberty, secularism, and equality. Defining and reconciling these ideals is one important aspect of the Shah Bano dilemma. The major relevant rights and directives are as follows:

According to article 13(2)

"The State shall not make any law which takes away or abidges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void".11

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According to Article 14, the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Article 15. Prohibits discrimination on grounds of religion, race, caste, sex or place of birth—the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Considering these relevant Articles of Indian Constitution, how can we say the legislation of the Muslim Women (Protection of Rights on Divorce) Act 1986 is right. Whatever be the loopholes in constitutional law one can say it as unjustifiable. The legislation is an example of denying justice to a weaker section, i.e. women.

Directive Principles of the constitution also posses certain important Articles which is to be read with the Shah Bano issue.

"The provisions contained in this part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws".\(^12\)

Article 39 Certain principles of policy to be followed by the state—The state shall, in particular, direct it’s policy toward securing-

\(^{12}\) Bakshi, 1996, p.69.
the citizen, men and women equally, have the right to an adequate means of livelihood.\textsuperscript{13}

Article 44. Uniform Civil Code for the citizens- The state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.\textsuperscript{14}

The directives are guides for judges and policy makers. Scholars advises that the legislation enacted to implement the Directive Principles should be upheld, as far as possible. They also says that, where necessary, even constitutional provisions as to fundamental rights should be adjusted in their ambit so as to give effect to the directive principles.

On the other hand, they do not confer any enforceable rights and their alleged breach does not invalidate a law. How can these disparate parts of the constitution be reconciled? Rights trump directives, although even rights can be "adjusted" to fulfill directives. Even within the list of rights, the prohibition of sex discrimination and freedom of religion clash in the Shah Bano case. "Secular" in the Preamble, is perhaps the most contested single word in the Indian Constitution and a key issue in the Shah Bano dilemma. The State has no official religion, but beyond this what does secularism mean? Secularism can be taken to mean religious freedom, or noninterference in citizen's private religious practices, but this interpretation is in tension with

\textsuperscript{13} Bakshi, p. 70.  
\textsuperscript{14} Bakshi, p. 72.
another notion of secularism as equality before the law of all citizens regardless of religion.

**Shah Bano and Human Rights**

Shah bano case raises issues important to a broader understanding of Human Rights. A key aspect of the dilemma is the tension between group rights and individual rights, especially the individual rights of women. Rights scholars in the developing world have launched various critiques of a western tradition that privileges individual rights over collective or community rights and duties. Moreover, cultural relativists argue that universal human rights may be impossible in a culturally diverse world, since values vary from country and community to community.\(^{15}\)

Here the strongest players value may prevail, first world over third world at the global level, Hindus over Muslim’s fears of what will happen if a Hindu dominated polity designs a uniform civil code; yet within the Muslim community a similar dynamic occurs, as dominant male politicians reinforce a legal system which disadvantages women.

Another thing to be note is that India has signed and ratified the Convention on the Elimination of All Forms of Discrimination Against Women(CEDAW), which is hampered by weak enforcement mechanisms.

Parts of CEDAW are relevant to the personal law debates in India. Article 16 of CEDAW includes the following:

"States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women ... the same rights and responsibilities during marriage and it's dissolution."  

When considering the disparities between Muslim personal law and other family laws one might have the opinion that uniform civil code is a must. Because of the diversity of religions and customs, personal came into force in India. While observing with a pluralistic outlook one cannot say that the system is against social justice. And the provisions of personal does not affect other religion or people outside the particular religion. But a close view reveals the reality of injustice happening inside the community. Muslim personal law considers women inferior to man. Law relating to marriage, divorce etc. are the examples. The religious leadership is always protecting the interest of male community. (Unfortunately in Muslim community there is no females among religious leadership). Some of the primitive laws (which may be just at the time of Mohammed Nabi, because of special socio-

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economical situations) were encoded among the present Laws. Permitting man to have four wives is one among them. Divorcing a wife is easy while divorcing husband is not at all easy. Here the women are the only sufferers. In the matter of right relating property also male dominate.

Now the question arise, that whether religious texts and preaching of prophet or the present social reality, which will be the basis of legislation? Though there is a code which regulate all affairs of human relations, can there be any renovations according to the time. Whether the social philosophy is static or subject to change according to the passage of time? Can we deny justice to a section (may be women) in the name of religious principles? But one of the main arguments is that not the Holy Text, but the interpretations trap the weaker sections of the community. For example in the case of maintenance Quran have a positive attitude.

Verses (Aiyats) 241 and 242 of the Quran show that according to the prophet, there is an obligation on Muslim husbands to provide for their divorced wives. The English translation of the Aiyats is reproduced below:

Aiyat No.241

For divorced women

Maintenance (should be provided)

On reasonable(Scale)

This is a duty in the righteous..
The correctness of the translation of the Aiyats is not dispute except that, the contention is that the word Mata in Aiyat No.241 means 'provisions' and not maintenance. That is a distinction without a difference. Nor are we impressed by the shuffling play of All India Muslim Personal Law Board that, Aiyat 241, the exhortions is to ... the more pious and the more God-fearing. not to the general run of the Muslims.  

Considering all these facts need of a uniform civil code is not only the solution to remove injustices caused by the personal law to women, the renewal of the laws can do a lot. Social justice can be not only applied in between various religions but also inside the religion itself.

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