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LAW AND RELIGION: THE DIVORCE SYSTEMS OF INDIA

*Sampak P. Garg**

I. INTRODUCTION

The separation of church and state is a fundamental principle of American society. Representatives of the state may consider prevailing religious beliefs for insight as to what laws should be enacted, but such beliefs have no bearing upon the actual application of those laws to the people. Laws in the United States apply, ideally, to all persons equally.

The same is not true for India. The Muslim Personal Law (Shariat) Application Act of 1937 subjects Muslims in India to Islamic rules concerning inheritance, marriage, divorce, and other matters of personal law.¹ The Dissolution of Muslim Marriages Act of 1939 outlines the grounds upon which a Muslim wife may file for divorce.² The divorce law for Hindus is the Hindu Marriage Act of 1955.³

It would be expected that the allowance of two systems of divorce would result in the existence of two entirely different sets of rules. As will be shown, however, the laws are not that different. The cultures share a history in India that has trickled down to the system of governance that regulates divorce. This paper discusses the laws of these two integrated, yet separate, jurisdictions in India. Part II discusses the sources of

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1. Muslim Personal Law (Shariat) Application Act, No. 26, § 2 (1937)(India)(amended 1943). For discussion of this statute, see *infra* part III.A.

2. Dissolution of Muslim Marriages Act, No. 8 (1939)(India). For discussion of this statute, see *infra* part III.A.3.b.

3. Hindu Marriage Act, No. 25 (1955)(India)(amended 1976). For discussion of this statute, see *infra* part III.B.

Islamic⁴ and Hindu⁵ law. Part III explains the divorce laws applicable to Hindus and Muslims in India. It should be noted that Part III will not delve into the rights and obligations arising pursuant to either system of divorce in India.⁶ Part IV concludes the discussion.

II. SOURCES OF LAW

A. Islamic Law

Because there are several delineations of the sources of Islamic law,⁷ this section will discuss only the most basic sources that apply to Muslims in India. The essence of Islamic law is *Shari'a* doctrine.⁸ *Shari'a* consists of commentaries and scholarship on justice, welfare, and how Muslims should live.⁹

The most important text in Islamic law is the Qur'an.¹⁰ Muslims regard the Qur'an as the Prophet Muhammad's seventh century A.D. writings of the word of God.¹¹ The Qur'an is not a compilation of laws per sé; it contains religious and ethical standards to which Muslims must adhere.¹² The importance of the Qur'an to this paper lies in its guidance for divorce.¹³

A second source of Islamic law, answering what the Qur'an does not,

4. The two branches of Islamic thought are the Shi'a and Sunni. See JAMES S.E. OPOLOT, *WORLD LEGAL TRADITIONS AND INSTITUTIONS* 144 (rev. ed. 1981). Most Muslims follow the Sunni branch of Islam. See JOHN L. ESPOSITO, *WOMEN IN MUSLIM FAMILY LAW* 135 n.2 (1982). The Sunni branch, itself, is divided into four schools of thought. See *id.* at 2. These schools are the: Hanafi, Maliki, Shafii, and Hanbali. See *id.* The majority of Muslims in India are Hanafite. See Paras Diwan, *Family Law, in THE INDIAN LEGAL SYSTEM* 633, 635 (Joseph Minattur ed., 1978); ASAF A.A. FYZEE, *OUTLINES OF MUHAMMADAN LAW* 77 (4th ed. 1974); OPOLOT, *supra*, at 145 (Muslims in Pakistan are also Hanafites); ARCHANA PARASHAR, *WOMEN AND FAMILY LAW REFORM IN INDIA* 151 (1992). The part of this paper that discusses Islam in India will address Hanafite law.

5. Like Islamic law, Hindu law also has many schools of thought, each of which governs its own community. See Diwan, *supra* note 4, at 634. The philosophies of these schools are still relevant today to uncodified Hindu law, but codified law unifies Hindus under one system of law. See *id.* at 635. One such codification is the Hindu Marriage Act. See *id.* The HMA is discussed more fully in Part III.B.

6. For discussions of the rights and obligations arising pursuant to divorce, such as spousal and custodial support, see, e.g., the Hindu Minority and Guardianship Act (1956)(India), the Hindu Adoptions and Maintenance Act (1956)(India), and the Hindu Succession Act (1956)(India).

7. See OPOLOT, *supra* note 4, at 143-44.

8. See N.J. Coulson, *Islamic Law, in AN INTRODUCTION TO LEGAL SYSTEMS* 54, 54 (J. Duncan M. Derrett ed., 1968).

9. See *id.*

10. See *id.* at 55.

11. See *id.*

12. See *id.* at 56.

13. See discussion *infra* part III.A.; Coulson, *supra* note 8, at 56.

is the *Sunnah* of the Prophet Muhammad.¹⁴ The Qur'an gives rise to the *Sunnah* by saying, "[o] you who believe, obey God and the Prophet . . . and if you are at variance over something, refer it to God and the Messenger."¹⁵ The *Sunnah*, in essence, is a record of the Prophet's sayings, deeds, and silent approval of deeds.¹⁶ Muslim scholars interpreted the *Sunnah* and transmitted it through narrative records known as *hadiths*.¹⁷ The most accurate *hadiths* come from approximately the middle of the ninth century A.D.¹⁸ By following the *Sunnah*, Muslims hope to achieve Muhammad's perception of God.¹⁹

A third source of Hanafite law is *istihsan*, or juristic preference.²⁰ Pursuant to *istihsan*, if analogic reasoning leads to a harsh outcome in a situation, then equitable principles can be applied to lessen the severity of the result.²¹

At this point, Islamic law in India takes a path different from Islamic law in other countries.²² These differences arose because foreign states influenced, through invasion and colonization, the various Islamic regions in different ways.²³ While the Middle East has codified *Shari'a* doctrine, India has implemented a case law system, resulting from its colonization by Great Britain, that allows Indian courts to decide cases of Islamic law based upon legal precedent.²⁴

B. Hindu Law

The main source of Hindu law is the Constitution of India, which the Indian Parliament drafted in 1950 as the supreme law of the land.²⁵ The drafters designed the Constitution to entrench fundamental values,²⁶ such

14. See Coulson, *supra* note 8, at 61; ESPOSITO, *supra* note 4, at 5.

15. AL-QUR'AN 4:59 (Ahmed Ali trans., 1984).

16. See ESPOSITO, *supra* note 4, at 5-6.

17. See Coulson, *supra* note 8, at 61.

18. See ESPOSITO, *supra* note 4, at 6. Muhammad ibn Ismail al-Bukhari (d. 870) and Muslim ibn al-Hijjaj al-Qushayri (d. 875) are among the scholars whose *hadiths* are highly reputed. See KAREN ARMSTRONG, A HISTORY OF GOD 187 (1993); Coulson, *supra* note 8, at 62.

19. See ARMSTRONG, *supra* note 18, at 187.

20. See *id.* at 8.

21. See *id.*

22. See Coulson, *supra* note 8, at 78.

23. See *id.* One authority classifies the development of Islamic law into a hybrid, Anglo-Muhammadian system in India as the classic case of foreign influence over legal codes. See MAJID KHADDURI, THE ISLAMIC CONCEPTION OF JUSTICE 206 n.13 (1984) (citing H.J. LIEBESNY, THE LAW OF THE NEAR EAST AND THE MIDDLE EAST 118-25 (1975)).

24. See Coulson, *supra* note 8, at 78.

25. See V.S. Deshpande, *Nature of the Indian Legal System*, in THE INDIAN LEGAL SYSTEM 1, 7 (Joseph Minattur ed., 1978).

26. See *id.*

as the civil and political rights of Indian citizens.²⁷ The purpose of government became the creation and furtherance of an egalitarian order, not merely the prevention of social inequality.²⁸

The Constitution of India delegates legislative powers. List I of the Constitution grants the Central Government the exclusive right to legislate in areas of foreign relations, national security, military affairs, citizenship, commerce, and other national affairs.²⁹ List II grants the state governments the exclusive right to legislate in the areas of police administration, public order, education, public health, agriculture, and other local matters.³⁰ List III is the Concurrent List; it enumerates areas in which both the Central Government and the states may legislate.³¹ Union, or federal, legislation in any of these areas, however, supersedes concurrent state legislation.³² List III includes family law, criminal law, and economic planning.³³ Because the Government of India (the Central Government) has legislated in the area of divorce, any state legislation is inapplicable and only the Union legislation is controlling for this paper's discussion of Hindu divorce law.

A second source of law is the Hindu Code.³⁴ The Hindu Code is a compilation of statutes that was created in the mid-1950's.³⁵ All such legislation must comply with the Constitution.³⁶ Working in conjunction with the Code is judicial authority, a creation of the British empire.³⁷ Great Britain colonized India until 1947, infusing into India British concepts of law and jurisprudence that have remained.³⁸ Great Britain created a legal system dependent upon judicial authority, often called Anglo-Hindu law, to model a common-law system.³⁹ To this day, India follows that system;⁴⁰ lawyers in India, therefore, must follow case precedent.

27. *See id.*

28. *See* SHIV SAHAI SINGH, UNIFICATION OF DIVORCE LAWS IN INDIA 257-58 (1993)(discussing post-independence goals of the Indian government); Deshpande, *supra* note 25, at 8 (discussing rule of law in early India).

29. INDIA CONST., art. 246, seventh schedule, list I.

30. *See id.*, list II.

31. *See id.*, list III.

32. *See id.*

33. *See id.*

34. *See id.* art. 44 ("The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India"); *see also* J. Duncan M. Derrett, *Hindu Law*, in AN INTRODUCTION TO LEGAL SYSTEMS 80, 83 (J. Duncan M. Derrett ed., 1968).

35. *See* Derrett, *supra* note 34, at 83. For more information on the development of the Hindu Code, *see* SINGH, *supra* note 28, at 306-07.

36. *See* Deshpande, *supra* note 25, at 7.

37. *See* Derrett, *supra* note 34, at 83.

38. *See id.*

39. *See id.* at 82.

40. *See* Deshpande, *supra* note 25, at 1.

A final source of law is *dharmasastra*, a system the Brahmin class⁴¹ founded upon religious perceptions of righteousness.⁴² *Dharmasastra* dates back to the sixth century B.C. and is very important for questions concerning Hindu law "because the Hindu law from its commencement took religion . . . [as an ally] of jurisprudence."⁴³ At its inception, *dharmasastra* was applicable to only the higher castes; in modern times all lawyers consider such principles.⁴⁴ As such, contemporary Indian lawyers may consult the works of jurists who wrote thousands of years ago for moral commentaries on the law in the event that neither the Code nor judicial authority touches upon the points under consideration.⁴⁵

III. DIVORCE LAWS

As stated, India has two major legal systems. Hindu law governs Hindus in all aspects of life,⁴⁶ and Islamic law governs Muslims in the areas of divorce, marriage, and inheritance.⁴⁷ While this separate system of governing in the family law context is still intact, it has faced opposition in recent years.⁴⁸

The opponents of the dual system are the Hindus,⁴⁹ who comprise a clear majority of India's population.⁵⁰ Muslims, the second largest religious group in India, total approximately ten percent of the population.⁵¹ Several years ago, the Indian Supreme Court took an unprecedented step and requested that the Central Government enact one civil code applica-

41. The "Brahmin class" is considered the intellectual elite of India. See Derrett, *supra* note 34, at 81.

42. See *id.* at 81-83.

43. *Id.* at 81, 102-103.

44. See *id.* at 81-83.

45. See *id.* at 83. Some of the more significant jurists include Manu, Yajnavalkya, Narada, Brihaspati, and Katyayana. See *id.* at 83.

46. See discussion *infra* part III.B.1.

47. See discussion *infra* part III.B.2.

48. See Tahir Mahmood, *Islamic Family Law: Latest Developments in India*, in ISLAMIC FAMILY LAW 295, 297 (Chibli Mallat & Jane Connors eds., 1990); Basu Rekha, *Threat to India's Secular Life*, DES MOINES REG., May 26, 1996, at 3. For a brief period following the 1996 elections in India, the Bharatiya Janata Party ("BJP"), a political party comprised of Hindu nationalists, was in power. See *id.* The BJP promised to create a uniform civil code, subjecting Hindus and Muslims to the same laws. See *id.* This pledge has been viewed as a drive for persecution of religious minorities rather than a quest for uniformity. See *id.*; see also M.R. Narayan Swamy, *Indian Supreme Court Orders Universal Law for Hindus, Moslems*, AGENCE FRANCE-PRESSE, May 11, 1995, at A1.

49. See Rekha, *supra* note 48, at 1; see also Mahmood, *supra* note 48, at 297.

50. See WORLD ALMANAC BOOKS, THE WORLD ALMANAC AND BOOK OF FACTS 773 (Robert Famighetti ed., 1997).

51. See *id.*

ble to all residents of India.⁵² The legal basis for the appeal is Article 44 of the Indian Constitution, which directs the states to “endeavor to secure for the citizens a *uniform civil code* throughout the territory of India.”⁵³ To date, there is no uniform civil code.

A. *Islamic Law*

The Muslim Personal Law (Shariat) Application Act of 1937 subjects Muslims in India to Islamic personal laws.⁵⁴ This Act states, in relevant part:

Application of Personal Law to Muslims.— Notwithstanding any custom or usage to the contrary, in all questions . . . regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *talaq*,⁵⁵ *ila*,⁵⁶ *zihar*,⁵⁷ *lian*,⁵⁸ *khula*⁵⁹ and *mubaraat*,⁶⁰ . . . the rule of decision in cases

52. See Swamy, *supra* note 48, at A1. The Supreme Court stated that a uniform code was necessary “for [both] the protection of the oppressed and the promotion of national unity and solidarity.” *Id.* This view is shared by other scholars, as well. See, e.g., SINGH, *supra* note 28, at 1 (“A society with stable norms is simply inconceivable without some kind of uniformity of the rules of conduct governing multiple relationship [sic] of members so united.”); Deshpande, *supra* note 25, at 17.

53. INDIA CONST. art. 44 (emphasis added).

54. Shariat Act, No. 26, § 2 (1937)(India)(amended 1943).

55. See *id.*; discussion *infra*, part III.A.1.

56. See *id.* This form of divorce is extremely rare, if not obsolete, in India. See ESPOSITO, *supra* note 4, at 136 n.15; FYZEE, *supra* note 4, at 162. It occurs when a husband vows not to engage in marital relations with his wife and abides by the vow for four months; the divorce is final, without legal proceedings, after four such months. See ESPOSITO, *supra* note 4, at 136 n.15; FYZEE, *supra* note 4, at 162. The husband can revoke the vow by engaging in marital relations with his wife during the four months. See ESPOSITO, *supra* note 4, at 136 n.15; FYZEE, *supra* note 4, at 162.

57. See *id.* Like *ila*, *zihar* is also obsolete in India. See ESPOSITO, *supra* note 4, at 136 n.15; FYZEE, *supra* note 4, at 162. Pursuant to *zihar*, a husband compares his wife to one of his female relatives, typically his mother. See ESPOSITO, *supra* note 4, at 136 n.15. If he does not revoke by either paying her money as atonement or fasting, the wife can go to court for either restitution of conjugal rights as atonement or a divorce. See FYZEE, *supra* note 4, at 162.

58. See *id.*; discussion *infra* part III.A.3.a.

59. See *id.* Indian courts do not accept *khula* despite the fact that the courts can dissolve an Islamic marriage on any ground that Islamic law accepts. See TAHIR MAHMOOD, PERSONAL LAWS IN CRISIS 78 (1986). *Khula* is a form of divorce that occurs when the wife requests the separation. See FYZEE, *supra* note 4, at 163; JAMAL J. NASIR, THE STATUS OF WOMEN UNDER ISLAMIC LAW 78 (1990). When the divorce occurs via *khula*, the wife must return, as consideration, some agreed upon portion of the *mahr* to her husband. See FYZEE, *supra* note 4, at 163-65. The *mahr* is the dower the husband paid the wife in order to marry her. See *id.* at 132-136. When the wife pays the consideration, the marriage is irrevocable and a second mar-

where the parties are Muslims shall be the Muslim Personal Law (Shariat).⁶¹

According to Islamic law, there are several methods by which one spouse may divorce another. Because marriage is considered a contract between husband and wife, divorce or repudiation can terminate only a *valid* marriage contract; if the contract was not valid, either the couple or a court must annul the marriage.⁶² The methods of terminating a marriage are: repudiation of the marriage contract, divorce by mutual agreement, divorce by court order, or divorce by law.⁶³ Each of these methods is examined in sequence below.

1. Repudiation

a. By the husband

The most well-known form of divorce in Islam is that of repudiation, known formally as *talaq*.⁶⁴ Before a couple can be divorced by repudiation, the couple must allow two judges, one representing each spouse, to attempt a reconciliation; if reconciliation is impossible, repudiation can occur.⁶⁵ Repudiation is a right, with some qualifications, for husbands under Islam.⁶⁶ The repudiating husband must be of majority age and sane.⁶⁷ Furthermore, the husband must not be in a state of heightened emotion, namely rage or shock.⁶⁸ Interestingly, the husband does not have to be free of coercion or intoxication to repudiate,⁶⁹ and pronouncements of *talaq* as threats, oaths, or in jest are binding.⁷⁰ With these mandates

riage is required if the couple wishes to be reunited. *See id.* at 166; NASIR, *supra* note 59, at 80. If the husband waives the consideration, then the separation is not *khula* but a revocable divorce. *See id.* at 79. It is important to note that the husband's consent is not needed for *khula*. *See* MAHMOOD, *supra* note 59, at 79. Perhaps that is why Indian courts do not recognize it as a valid form of divorce.

60. *See id.*; discussion *infra* part III.A.2.

61. Shariat Act, No. 26, § 2 (1937)(India)(amended 1943).

62. *See* NASIR, *supra* note 59, at 70.

63. *See* Kimberly Y. Schooley, Comment, *Cultural Sovereignty, Islam, and Human Rights: Toward a Communitarian Revision*, 25 CUMB. L. REV. 651, 672-75 (1995).

64. It has been noted that customary law is the source of the right of repudiation; the Qur'an's function is to tell husbands not to abuse the power. *See* Coulson, *supra* note 8, at 56.

65. *See* S. JAFFER HUSSAIN, MARRIAGE BREAKDOWN AND DIVORCE LAW REFORM IN CONTEMPORARY SOCIETY 197 (1983).

66. *See* AL-QUR'AN, *supra* note 15, at 2:228; NASIR, *supra* note 59, at 71.

67. *See* NASIR, *supra* note 59, at 71-2.

68. *See id.*

69. *See* ESPOSITO, *supra* note 4, at 30. This policy allowing *talaq* to be valid despite coercion or intoxication is unique to Hanafites and is contrary to the Hanbali, Maliki, and Shaffii rules. *See* NASIR, *supra* note 59, at 71-2.

70. *See* HUSSAIN, *supra* note 65, at 183.

fulfilled, a husband can divorce his wife if he follows the formal requirements.⁷¹

The formal requirements are minimal.⁷² Words of repudiation, whether written or spoken, must be clear and unequivocal.⁷³ The words must proclaim a divorce, or *talaq*.⁷⁴ If the words are not explicit, the husband must prove that his words show an intent to divorce.⁷⁵ It has been held that the wife need not be present during, nor given notice of, the divorce for it to be effective.⁷⁶ In fact, "[i]f a man says to his wife that she had been divorced yesterday or earlier, it leads to a divorce between them, even if there be no proof of a divorce on the previous day or earlier."⁷⁷ Finally, the pronouncement can be either absolute, effecting a divorce immediately, or conditional, effecting a divorce upon the occurrence of some event or conduct.⁷⁸

Upon fulfillment of the above conditions, the Qur'an provides for three forms of approved repudiation, known as *talaq-us-sunnat*. The first two forms consist of a single pronouncement of divorce and both are called *talaq-ul-ahsan*.⁷⁹ The Qur'an establishes the first *talaq-ul-ahsan* with the following phrase: "O you who believe, when you marry believing women then divorce them before having (sexual) contact with them, you have no right to demand observance of the 'waiting period' of them."⁸⁰ This portion of the Qur'an states that if a husband repudiates the marriage before it is consummated, the repudiation is effective immediately.⁸¹ This is the only form of repudiation that occurs prior to consummation of the marriage.

The second type of *talaq-ul-ahsan* occurs after consummation of the marriage.⁸² By virtue of the procedures for the two, the first form is the most favored.⁸³ In order to repudiate pursuant to the second form of *talaq-ul-ahsan*, a husband should proclaim *talaq* during a period when his wife is not menstruating and abstain from marital relations with her for a certain amount of time after the proclamation, a period known as the *iddat*.⁸⁴ Prior to completion of the *iddat*, the husband can revoke the repu-

71. See FYZEE, *supra* note 4, at 150-51.

72. See *id.* at 150.

73. See NASIR, *supra* note 59, at 73.

74. See *id.*; FYZEE, *supra* note 4, at 150.

75. See FYZEE, *supra* note 4, at 151.

76. See *id.* at 150 (citing Mohd. Shamsuddin v. Noor Jahan, 1955 A.L.R. (Hyd.) 144).

77. M.A. MANNAN, MULLA: PRINCIPLES OF MAHOMEDAN LAW 327 (Pak. ed., 1984).

78. See NASIR, *supra* note 59, at 73.

79. See SINGH, *supra* note 28, at 44.

80. AL-QUR'AN, *supra* note 15, at 33:49.

81. *Id.*

82. See *id.* at 2:228-32, 65:1-5.

83. See *id.* at 2:228-32.

84. See *id.* at 2:228, 65:4; see also FYZEE, *supra* note 4, at 152. If the wife is not pregnant

diation, even without his wife's consent,⁸⁵ by either words of revocation or resuming marital relations with his wife.⁸⁶ If the husband does not revoke the repudiation in that time, the repudiation is effectuated and the couple can be rejoined only by remarriage.⁸⁷ According to the Qur'an, a husband can repudiate twice and revoke each time without problem.⁸⁸

Repudiating a third time yields the second kind of *talaq-us-sunnat*, *talaq-ul-hasan*.⁸⁹ The third pronouncement of *talaq* finalizes the repudiation immediately.⁹⁰ The husband can no longer revoke because the repudiation is final.⁹¹ The *iddat* is considered over and the former couple can no longer engage in marital relations.⁹² The only way for the couple to be reunited is for the wife to marry another and for that second husband to divorce her after consummation of the marriage.⁹³ After that divorce, the first husband may remarry the wife.⁹⁴ Islamic law favors repudiations that can be revoked, namely the first and second pronouncements of *talaq*.⁹⁵ This is probably because such repudiations allow for resumption of the marriage.

In providing for revocable *talaq*, however, the Qur'an does not treat repudiation lightly. The Qur'an calls for the husband to "keep [women] honourably (by revoking the divorce) or let them go with honour."⁹⁶ For this reason, repetitive repudiations are considered mockeries of God's will and are looked upon with contempt by the Qur'an.⁹⁷

There are also two methods of irrevocable repudiation, otherwise known as *talaq-ul-biddat*, that the Islamic community disapproves of because the procedures do not follow the Qur'an's mandates as explained above.⁹⁸ The first can be called "triple *talaq*" and occurs when the husband proclaims *talaq* three times by saying either (1) "I divorce thee three times" or (2) "I divorce thee" three times in succession.⁹⁹ The second dis-

the *iddat* is three months; if the wife is pregnant, the *iddat* lasts until the child is delivered. See AL-QUR'AN, *supra* note 15, at 65:4.

85. The wife's consent would clearly not be required if she were never aware of the declaration of *talaq*.

86. See AL-QUR'AN, *supra* note 15, at 2:228; NASIR, *supra* note 59, at 76.

87. See AL-QUR'AN, *supra* note 15, at 2:228-32; FYZEE, *supra* note 4, at 157.

88. AL-QUR'AN, *supra* note 15, at 2:229.

89. See *id.* at 2:229-32; see also SINGH, *supra* note 28, at 44.

90. See AL-QUR'AN, *supra* note 15, at 2:230.

91. See *id.* at 2:229-30.

92. See FYZEE, *supra* note 4, at 153.

93. See AL-QUR'AN, *supra* note 15, at 2:230.

94. See *id.*

95. See FYZEE, *supra* note 4, at 151.

96. AL-QUR'AN, *supra* note 15, at 2:231.

97. *Id.*

98. See FYZEE, *supra* note 4, at 154.

99. See *id.*; ANGELES J. ALMENAS-LIPOWSKY, THE POSITION OF WOMEN IN LIGHT OF LEGAL REFORM 57 (1975).

approved form of repudiation occurs when the husband makes one, irrevocable pronouncement.¹⁰⁰ If either form of *talaq-ul-biddat* occurs, the repudiation is final at pronouncement and a remarriage is required if the couple wishes to be reunited.¹⁰¹

b. By the wife

The Qur'an states that "[w]omen also have recognized rights as men have, though men have an edge over them."¹⁰² The right of husbands to repudiate is also a right of wives, but in limited form.¹⁰³ A wife's power to repudiate is limited because a wife can have the right of *talaq* only if her husband expressly delegates his power to repudiate to her.¹⁰⁴ For that reason, this form of repudiation is called "delegated divorce."¹⁰⁵ The husband can delegate the power for any length of time and with any restrictions or conditions he chooses.¹⁰⁶ For the wife's *talaq* to be valid, she must prove that any conditions allowing her to exercise her power have occurred and that she did exercise her power.¹⁰⁷

2. Divorce by Mutual Agreement

The Qur'an says, "[i]f you fear you cannot maintain the bounds fixed by God, there will be no blame on either if the woman redeems herself."¹⁰⁸ This method is called *mubaraat*.¹⁰⁹ When the parties agree to a divorce, the marriage is irrevocably dissolved and the wife gets to keep the original *mahr*.¹¹⁰

3. Divorce by the Court

There are two methods a court can use to grant a divorce.¹¹¹ The first is called *lian* and means "mutual oath swearing."¹¹² The second is called *faskh* and is a judicial rescission of the marriage contract.¹¹³

100. See FYZEE, *supra* note 4, at 154-55.

101. See MANNAN, *supra* note 77, at 332; DAVID PEARL, A TEXTBOOK ON MUSLIM LAW 90-91 (1979).

102. AL-QUR'AN, *supra* note 15, at 2:228.

103. See *id.* at 2:228; ESPOSITO, *supra* note 4, at 33.

104. See ESPOSITO, *supra* note 4, at 33; PEARL, *supra* note 101, at 101-02.

105. See ESPOSITO, *supra* note 4, at 33; PEARL, *supra* note 101, at 102.

106. See MANNAN, *supra* note 77, at 333.

107. See FYZEE, *supra* note 4, at 159 (citing *Buffatan Bibi v. Abdul Salim* 1950 A.I.R. (Cal.) 304).

108. AL-QUR'AN, *supra* note 15, at 2:229.

109. See FYZEE, *supra* note 4, at 163; MANNAN, *supra* note 77, at 338.

110. See FYZEE, *supra* note 4, at 163-65.

111. See ESPOSITO, *supra* note 4, at 34.

112. See *id.*

113. See *id.* at 35.

a. *Lian*

The Qur'an regulates the *lian* manner of divorce.¹¹⁴ The Qur'an states:

[6] Those who accuse their wives and do not have any witnesses except themselves, should swear four times in the name of God, the testimony of each such person being that he is speaking the truth, [7] [a]nd (swear) a fifth time that if he tell a lie the curse of God be on him. [8] The woman's punishment can be averted if she swears four times by God as testimony that her husband is a liar, [9] [h]er fifth oath being that the curse of God be on her if her husband should be speaking the truth.¹¹⁵

Upon being accused of adultery, a wife can file suit to compel her husband to retract the accusation or swear the oath that the Qur'an requires.¹¹⁶ During this time, when the suit is filed, the couple cannot engage in marital relations.¹¹⁷ If the husband retracts his accusation, the wife is not entitled to a divorce and the couple can resume normal relations.¹¹⁸ If the husband does not retract his statement, the wife can file for divorce and must swear her own oath of innocence;¹¹⁹ a hearing is then held on the charge of adultery.¹²⁰ Note that *lian* applies only when a husband accuses his wife of adultery,¹²¹ not when the wife accuses the husband.¹²²

b. *Faskh*

While the Qur'an does not promote divorce, it states, "[i]f you fear a breach between [the couple] appoint one arbiter from the people of the man and one from the people of the woman. If they wish to have a settlement then God will reconcile them"¹²³ This provision is interpreted to mean that the Qur'an permits Muslims to divorce pursuant to

114. AL-QUR'AN, *supra* note 15, at 24:6-9; *see also* ESPOSITO, *supra* note 4, at 34.

115. AL-QUR'AN, *supra* note 15, at 24:6-9.

116. *Id.*

117. *See* ESPOSITO, *supra* note 4, at 34.

118. *See* FYZEE, *supra* note 4, at 167. Such husbands, who have falsely accused their wives of adultery, do not go free of punishment. *See* AL-QUR'AN, *supra* note 15, at 24:11-26. The Qur'an reminds such husbands that God, though forgiving, is omniscient and can punish them for blaspheming faithful women. *Id.*

119. *See* AL-QUR'AN, *supra* note 15, at 24:8-9.

120. *See* ESPOSITO, *supra* note 4, at 34.

121. *See* AL-QUR'AN, *supra* note 15, at 24:6.

122. When a wife suspects her husband is adulterous, her only recourse is to the Dissolution of Muslim Marriages Act, § 2(ix), which accepts grounds that Muslim law recognizes. Dissolution of Muslim Marriages Act, No. 8, § 2(ix) (1939)(India); *see also* SINGH, *supra* note 28, at 54. Traditional Hanafite law recognizes adultery as a ground for divorce. *See id.* Thus, Islamic women in India have recourse for adulterous husbands.

123. AL-QUR'AN, *supra* note 15, at 4:35; *see also* NASIR, *supra* note 59, at 82.

legal standards.¹²⁴

In 1939, British India enacted the Dissolution of Muslim Marriages Act ("DMMA").¹²⁵ The DMMA provides grounds for marriage dissolution unrecognized prior to its enactment.¹²⁶ Only a wife can file for divorce under the DMMA; a husband cannot invoke the DMMA to divorce his wife.¹²⁷ This is probably because husbands have broad *talaq* rights and do not need the rights that the DMMA gives. The most important implications of the DMMA are that it (1) raises the stature of Muslim women in the family law context and (2) does not differentiate between the Islamic schools.¹²⁸

The DMMA lists a variety of grounds upon which a woman can be entitled to a decree of divorce; only one of them need exist for a divorce to be granted.¹²⁹ Though the grounds are listed in no particular order,¹³⁰ they can be divided into four separate categories: injury or discord, defect on the part of the husband, failure to provide for maintenance, and absence or imprisonment of the husband.¹³¹

(1). Injury or discord

This first category allows a Muslim wife to file for divorce on the ground that her husband caused her injury.¹³² The DMMA lists both emotional and physical injuries.¹³³ Among the physical abuses listed are that the husband assaults his wife or treats her with cruelty.¹³⁴ A husband forcing his wife to commit immoral acts or lead an immoral life are also forms of injury.¹³⁵ Injury, however, is not a prerequisite to divorce within this category; discord within the couple will suffice.¹³⁶

Discord, as a reason for divorce, must go further than mere disagreements between husband and wife.¹³⁷ The husband must take control

124. See NASIR, *supra* note 59, at 82.

125. Dissolution of Muslim Marriages Act, No. 8 (1939)(India); see also PEARL, *supra* note 101, at 111; SINGH, *supra* note 28, at 291-93.

126. See FYZEE, *supra* note 4, at 169. Because the DMMA adopts non-traditional grounds for divorce for Muslims, it is considered a departure from *Shari'a*. See Coulson, *supra* note 8, at 73-74.

127. Dissolution of Muslim Marriages Act, No. 8 (1939)(India); see also ESPOSITO, *supra* note 4, at 35; NASIR, *supra* note 59, at 86.

128. See FYZEE, *supra* note 4, at 169.

129. Dissolution of Muslim Marriages Act, No. 8, § 2 (1939)(India).

130. See *id.*

131. See NASIR, *supra* note 59, at 81-95.

132. See Dissolution of Muslim Marriages Act, No. 8, § 2 (1939)(India).

133. *Id.*

134. See *id.* § 2(viii)(a).

135. See *id.* § 2(viii)(a),(c).

136. See *id.* § 2(viii)(d)-(f).

137. See *id.*

over his wife's property without her consent,¹³⁸ interfere with his wife's religious practices,¹³⁹ or treat her in violation of the Qur'an.¹⁴⁰

(2). Defect on the part of the husband

The second category allows a Muslim wife to file for divorce if her Muslim husband has some type of defect.¹⁴¹ By defect, it is meant that the husband either has become impotent since the marriage took place,¹⁴² has been insane for two years,¹⁴³ or has leprosy or venereal disease.¹⁴⁴ Before a court grants a divorce on grounds of impotence, however, the husband can have the ruling stayed for one year to give him time to prove to the court that his impotence no longer exists.¹⁴⁵ If the husband so proves, no divorce will be entered.¹⁴⁶ According to some scholars, these grounds are based upon the treatment of marriage as a contract in Islam.¹⁴⁷ It is possible that the rationale is that if the wife enters into marriage with the expectation that her husband is "whole" and can produce children, the absence of any of these attributes should suffice as a condition for divorce.

(3). Failure to provide for maintenance

"Let the man of means spend according to his means, and he whose means are limited, should spend of what God has given him."¹⁴⁸ "Men are the support of women as God gives some more means than others, and because they spend of their wealth (to provide for them)."¹⁴⁹ According to the Qur'an, it is the husband's duty to provide for the wife with whatever means he has.¹⁵⁰ The DMMA codifies this rule, in a sense, by stating that failure to provide maintenance is grounds for divorce.¹⁵¹ A Muslim husband who does not provide for his wife for two years can be subject to divorce.¹⁵²

138. *See id.* § 2(viii)(d).

139. *See id.* § 2(viii)(e).

140. *See id.* § 2(viii)(f).

141. *See id.* § 2.

142. *See id.* § 2(v). Before enactment of the Dissolution of Muslim Marriages Act, the Hanafi school allowed for a wife to obtain a judicial separation only if her husband was impotent. *See PEARL, supra* note 101, at 108. The other schools provided additional grounds, which the Dissolution of Muslim Marriages Act now gives to Hanafites. *See id.* at 111-13.

143. *See* Dissolution of Muslim Marriages Act, No. 8, § 2(vi) (1939)(India).

144. *See id.*

145. *See id.* § 2(ix)(c).

146. *See id.*

147. *See FYZEE, supra* note 4, at 168; *NASIR, supra* note 59, at 85-90.

148. *AL-QUR'AN, supra* note 15, at 65:7.

149. *Id.* at 4:34.

150. *Id.* at 4:34, 65:7.

151. Dissolution of Muslim Marriages Act, No. 8, § 2(ii) (1939)(India).

152. *Id.*

(4). Absence or imprisonment of the husband

A wife may file for divorce if her husband is missing or becomes imprisoned.¹⁵³ If the husband is missing for four years, the court shall grant a divorce.¹⁵⁴ The wife must notify the people who would be her husband's heirs and such heirs have a right to be heard.¹⁵⁵ If granted, the divorce shall not take effect for six months; if the husband or his agent comes forth within those six months and promises the husband will fulfill his marital duties, the court must set aside the decree.¹⁵⁶ Also, the wife can file for divorce if and when her husband is sentenced to incarceration for seven or more years.¹⁵⁷

4. Divorce by Law

Two situations can exist whereby a previously valid marriage will become invalid, making a divorce or court order unnecessary.¹⁵⁸ These are: change of one spouse's religion and creation of a prohibited relation.

a. Change of religion

The DMMA governs the effects of one spouse changing faiths.¹⁵⁹ There are four possibilities that can occur with respect to the religion of the spouses after a valid marriage has taken place.¹⁶⁰ First, if the husband renounces, or apostasies, Islam, the marriage is immediately dissolved.¹⁶¹ Second, it was true that if the wife apostatized, the marriage was again dissolved.¹⁶² That rule existed because there was no other way in India for a wife to divorce her husband.¹⁶³ Because the DMMA allows wives in India to divorce their husbands for a variety of reasons, a wife's renouncement of Islam no longer serves, by itself, as sufficient grounds for divorce.¹⁶⁴ Third, if the couple was married under a different religion and only one spouse converted to Islam, then the marriage is terminated if the other spouse refuses to convert also to Islam.¹⁶⁵ In the third scenario,

153. *See id.* § 2(i),(iii).

154. *See id.* § 2(i).

155. *See id.* § 3.

156. *See id.* § 2(ix)(b).

157. *See id.* § 2(iii),(ix)(a).

158. *See* FYZEE, *supra* note 4, at 178-85; NASIR, *supra* note 59, at 95.

159. Dissolution of Muslim Marriages Act, No. 8, § 4 (1939)(India). For further discussion of the scenarios discussed in this section, *see* MANNAN, *supra* note 77, at 340-41; SINGH, *supra* note 28, at 138-43.

160. *See* FYZEE, *supra* note 4, at 178-85; NASIR, *supra* note 59, at 95-96.

161. *See* FYZEE, *supra* note 4, at 179; SINGH, *supra* note 28, at 138.

162. *See* FYZEE, *supra* note 4, at 179-80; ESPOSITO, *supra* note 4, at 35-36.

163. *See* FYZEE, *supra* note 4, at 180.

164. Dissolution of Muslim Marriages Act, No. 8, § 4 (1939)(India); *see also* FYZEE, *supra* note 4, at 180.

165. *See* AL-QUR'AN, *supra* note 15, at 2:221. This is clear from the Qur'an, which states: Do not marry idolatrous women unless they join the faith. A maid servant who is a believer

however, the terminations of the marriage do not occur if the non-Islamic spouse is *kitabī*¹⁶⁶ in the case of a man, or *kitabiyya* in the case of a woman.¹⁶⁷

b. Creation of a prohibited degree

The Qur'an states:

[23] Unlawful are your mothers and daughters and your sisters to you, and the sisters of your fathers and your mothers, and the daughters of your brothers and sisters, and foster mothers, foster sisters, and the mothers of your wives, and the daughters of the wives you have slept with who are under your charge; but in case you have not slept with them there is no offence (if you marry their daughters) and the wives of your own begotten sons; and marrying two sisters is unlawful.¹⁶⁸

In essence, the Qur'an discourages intra-family relations.¹⁶⁹ With respect to this paper, this proclamation means that, if one spouse commits a sexual act with an ascendant or descendant of the other, the couple could be considered related and the marriage is dissolved.¹⁷⁰

B. Hindu Law

The Hindu Marriage Act of 1955 ("HMA") is the law relevant to Hindu divorces.¹⁷¹ The HMA applies:

(1)(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthna or Arya Samaj, (b) to any person who is a Buddhist,

is better than an idolatress even though you may like her. And do not marry your daughters to idolaters until they accept the faith. A servant who is a believer is better than an idolater even though you may like him.

Id. Another verse of the Qur'an states, in relevant part: "Do not retain your (marriage) ties with unbelieving women." *Id.* at 60:10; *see also* FYZEE, *supra* note 4, at 180-86.

^{166.} A *kitabī* is one who believes in a religion that was revealed in a divine book. *See* FYZEE, *supra* note 4, at 182. Generally, these religions are Hinduism, Christianity, and Judaism, but Zoroastrianism is also included. *See id.* at 97, 182.

^{167.} *See* AL-QUR'AN, *supra* note 15, at 2:221. Only India allows Islamic women to marry *kitabīs*. *See* FYZEE, *supra* note 4, at 97. This is permitted pursuant to the Special Marriage Act. Special Marriage Act (1954)(India)(amended 1976).

^{168.} AL-QUR'AN, *supra* note 15, at 4:23.

^{169.} *Id.*

^{170.} *See* NASIR, *supra* note 59, at 96.

^{171.} Hindu Marriage Act (1955)(India)(amended 1976). Some scholars have analyzed the specific levels of mens rea and actus reus that are required under certain provisions of the Hindu Marriage Act. *See, e.g.,* ALLADI KUPPUSWAMI, MAYNE'S TREATISE ON HINDU LAW AND USAGE (12th ed. 1986); RAMESH CHANDRA NAGPAL, MODERN HINDU LAW (1983); DEOKI NANDAN, HINDU LAW: MARRIAGE AND DIVORCE (1989).

Jaina or Sikh by religion, and (c) to any other person domiciled in the territories to which this Act extends who is *not* Muslim, Christian, Parsi or Jew by religion (emphasis added).¹⁷²

As the HMA explicitly states, it does not apply to Muslims. This is the clearest example of the absence of church-state separation in India; religion plays a large role in the application of laws.

The HMA made two changes to the prior rule: it sanctioned only monogamous marriages and introduced the concept of divorce.¹⁷³ Another important aspect of the HMA is that both wives and husbands can invoke it; the HMA is gender neutral.¹⁷⁴ In 1976, the Central Government amended the HMA to its current state via the Marriage Laws (Amendment) Act.¹⁷⁵ The amendments introduced the "breakdown principle" as a ground for divorce; couples could get divorced for the simple reason that the marriage was not working.¹⁷⁶ The HMA, as amended, is divided into two sections: marriages considered voidable and grounds for divorce;¹⁷⁷ this paper deals with divorce only.

Hindu spouses in India can petition for a judicial decree of divorce either on fault grounds or by mutual consent.¹⁷⁸ The HMA provides a list of circumstances, each of which can serve as grounds for divorce.¹⁷⁹ These grounds can be best categorized into: mistreatment of the petitioning spouse, illness on the part of the respondent spouse, absence of the respondent spouse, religious conversion of the respondent spouse, and mutual consent.¹⁸⁰ One interesting aspect of this statute is that Indian courts may not hear petitions for divorce until one year of the marriage has elapsed; there is an exception to this rule, however, in circumstances in which extreme hardship or depravity are factors.¹⁸¹ It is likely this provision exists so that couples married less than a year and seeking a divorce will be required to attempt at reconciliation before separating.

172. Hindu Marriage Act, § 2 (1955)(India)(amended 1976).

173. *Id.* § 13; see also Raj Kumari Agrawala, *Reform of Hindu Matrimonial Law - Some Slips*, in *STUDIES IN THE HINDU MARRIAGE AND THE SPECIAL MARRIAGE ACTS* 71, 73-76 (V. Bagga ed., 1978); ALMENAS-LIPOWSKY, *supra* note 99, at 45. Actually, certain areas of India did have customary rules regarding divorce prior to the HMA, but the HMA was the first divorce legislation regulating Hindus in India. See SINGH, *supra* note 28, at 13-14. The Indian Divorce Act of 1869 also applied to all of India, but only to its Christian population. See *id.* at 284. Furthermore, the Special Marriage Act of 1954, with its divorce provisions, is relevant to civil marriages only. Special Marriage Act (1954)(India)(amended 1976).

174. Hindu Marriage Act, §§ 12-13 (1955)(India)(amended 1976).

175. Hindu Marriage Act (1955)(India)(amended 1976).

176. *See id.* § 13B.

177. *Id.* §§ 12-13B.

178. *See id.* §§ 13, 13B.

179. *Id.* § 13.

180. *See id.* §§ 13, 13B.

181. *See id.* § 14(1).

1. Mistreatment

Hindus can divorce on grounds that the respondent spouse has mistreated the petitioning spouse.¹⁸² The mistreatment can be adultery or either mental or physical cruelty.¹⁸³ Cruelty can exist when one spouse fails to consummate the marriage or treats the other with continuous torment or neglect.¹⁸⁴

2. Illness

This category pertains to marriages in which the respondent spouse suffers from some form of illness. The illnesses, both mental and physical, are specifically listed.¹⁸⁵ The mental illnesses include an unsound mind and a mental disorder¹⁸⁶ of such degree that makes it unreasonable for the petitioner to live with the respondent.¹⁸⁷ Alternatively, a spouse could be suffering from leprosy or communicable venereal disease.¹⁸⁸

3. Desertion or Criminal Behavior

If one spouse is absent for a period of time or convicted of a crime, the other spouse has a valid reason for divorce.¹⁸⁹ In the case of desertion, the petitioner has a valid claim for divorce if the respondent spouse has deserted the petitioner for at least two years.¹⁹⁰ Interestingly, the statute provides that desertion includes neglect of the spouse, not just physical absence.¹⁹¹ Alternatively, divorce can be granted if the respondent is not known to be alive, by people who would know, for at least seven years.¹⁹²

182. *See id.* §§ 13(1)(i)-(ia).

183. *See id.*

184. *See SINGH, supra* note 28, at 88. For an exhaustive list of instances in which Indian courts have found cruelty, *see id.* at 87-98.

185. *See Hindu Marriage Act*, §§ 13(1)(iii)-(v) (1955)(India)(amended 1976).

186. *See id.* § 13(1)(iii). The HMA defines "mental disorder" as a "mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia." *Id.* § 13(1)(iii)(a). The HMA then defines "psychopathic disorder" as: "a persistent disorder or disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment."

Id. § 13(1)(iii)(b).

187. *See id.* § 13(1)(iii).

188. *See id.* §§ 13(1)(iv)-(v).

189. *See id.* §§ 13(1)(ib), (vi), (2)(ii).

190. *See id.* § 13(1)(ib).

191. *See id.* § 13(1)(ib) n.1. The HMA defines "desertion" as "the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful [sic] neglect of the petitioner by the other party to the marriage." *Id.*

192. *See id.* § 13(1)(vii).

With respect to criminal behavior, the HMA severely restricts the types of crimes for which the respondent could have been convicted that would give rise to a claim for divorce. The crimes listed are: rape, sodomy, and bestiality; all concern either forced or deviate sexual conduct.¹⁹³

4. Religious Conversion or Renouncement

In keeping with the highly religious tradition of India, this category allows for divorce if one spouse either (1) changes his or her religion from Hinduism or (2) renounces the world by entering a holy order after the marriage has been performed.¹⁹⁴

5. Mutual Consent

Under the "breakdown principle," the couple can agree to be divorced.¹⁹⁵ The parties must allege that "they have been living separately for a period of one year or more, that they have not been able to live together and that they have agreed that the marriage should be dissolved."¹⁹⁶ One interesting feature of this method is that the court cannot act sooner than six months after and not later than eighteen months after the petition is filed.¹⁹⁷ The waiting period is imposed for the purpose of giving the couple a chance to reconcile and withdraw the filing.¹⁹⁸

IV. CONCLUSION

In the United States, there are religious influences on the legal system based upon which laws are enacted, but those laws apply to persons of all faiths alike because of the intended church-state separation. In India, the family-law system operates rather differently. In 1937, India, as a colony of Great Britain, allowed Muslims to follow Islamic family law.¹⁹⁹ The Muslim Personal Law (Shariat) Application Act of 1937 had two effects. The first was to give Muslims religious autonomy; they could observe the family laws of their own religion without ramification. The second effect was to empower Muslim husbands at the expense of their Muslim wives. India with the Shariat Act alone allowed a husband to divorce his wife at the mere pronouncement of the word *talaq*, but Islam granted a wife that right only if her husband delegated it to her. This left Muslim wives with limited means of escaping abusive or otherwise harm-

193. *Id.* § 13(2)(ii).

194. *See id.* §§ 13(1)(ii), (vi); *see also* Diwan, *supra* note 4, at 654.

195. *See* Hindu Marriage Act, § 13B (1955)(India)(amended 1976). This is the section that the Marriage Laws (Amendment) Act of 1976 added. *See supra* notes 175-76 and accompanying text.

196. *Id.* § 13B(1).

197. *See id.* § 13B(2).

198. *See id.*

199. *See* discussion *supra* part III.A.

ful marriages.

The Dissolution of Muslim Marriages Act of 1939 changed that. The DMMA gave Muslim wives the legal means for obtaining divorces. It also lists the grounds upon which Muslim wives can file for divorce. By 1940, Muslim husbands had the right to divorce by *talaq* and *lian*, and wives could resort to *faskh*. While not granting wives the same *talaq* rights as husbands, the DMMA certainly closed the gap between the two spouses.

Meanwhile, Hindus had no national form of divorce at all. The Indian Parliament gave Hindus the statutory right to divorce in 1955.²⁰⁰ The HMA, unlike the DMMA, empowers both wives and husbands. It puts both spouses on the same level and applies only to Hindus and other enumerated religious groups.

First impression would dictate that the existence of two sets of family laws in India would create a legal nightmare. It is interesting, considering the strife-ridden past of the Hindus and Muslims, that the DMMA closely resembles the HMA. What could have led to the similarities?

India enacted the DMMA eight years before gaining independence in 1947 from Great Britain and enacted the HMA eight years after independence. Clearly, British control over India in 1939 influenced passage of the DMMA, but India was independent when it passed the HMA in 1955. Nevertheless, Great Britain, while not having actual control over India in 1955, had already left its mark there, and its colonization may have influenced the Hindu family law system. The exposure to Western notions of divorce impacted India just when it was about to create its own system of government. In a sense, it is not surprising that Hindus and Muslims in India share concepts of when marriages should no longer continue; a common experience of colonization helped imbibe those concepts. It appears that, although the laws appear to be non-secular because of the Shariat Act, the family law system of India actually is secular. Despite the similarities, though, there are differences.

The most obvious difference between the systems is the Muslim husband's right of *talaq*. Because this right stems from the Qur'an, an Islamic text, the Hindus do not share it. Another difference is the ground for divorce based upon criminal behavior, in which the DMMA is broader than the HMA. While Islamic law grants a divorce if the husband is sentenced for any crime, Hindu law grants a divorce only in cases where the respondent is guilty of a sexual crime. One possible explanation is that Great Britain had "liberal" views toward divorce, and the DMMA, as a product of British India, also had "liberal" provisions for divorce. Consequently, the independent and socially conservative India that enacted the HMA sought to limit the grounds for divorce based upon criminal behavior.

200. See discussion *supra* part III.B.

It would be interesting to see what effect a uniform civil code would have upon these laws and on India. The biggest result would be that either Muslims would give up the right of *talaq* or Hindus would be given such a right. Both seem equally unlikely in light of the pervasive religious underpinnings of Hindu and Islamic society. The claim that a uniform civil code is a means to oppressing the Muslim minority is one that both Muslim husbands and wives could make. Muslim husbands could allege that losing the right of *talaq* is an affront to their cultural traditions and their "status" as husbands. Muslims wives could argue only that their tradition will suffer; a uniform code would empower Muslim wives by making them less susceptible to such an informal method of divorce as *talaq*. If husbands are given a power to divorce under the DMMA as their wives are, so that the DMMA and HMA both apply to husbands and wives, it is difficult to see what objection Muslims would have. The argument comes back to *talaq* being a Qur'an-ordained tradition. Perhaps the real issue is what place ancient tradition should have in a world governed by modern rules.