

## Case 7 Indian Family Law

India is among the world's largest nations, is home to the second largest population (over 1 billion people), and has incredible religious diversity. Article 44 of the Indian Constitution requires a uniform civil code throughout India, but at present much of Indian civil law is based on traditional case law.<sup>1</sup> A key element of Indian civil law includes the separation of some elements of personal or family law (marriage, divorce, child custody, inheritance, alimony, etc.) into three separate streams of jurisprudence: Hindu, Muslim, and Christian. The effect of this tradition is that Hindus, Muslims, and Christians are each governed by a distinct set of legal rules with respect to civil family institutions, though they share a criminal code which also affects family life.

During the English colonial period of India's history, Warren Hasting, a British legislator who helped mold India's civil justice system, attempted to integrate cultural sensitivity into India's family law system. Hasting acknowledged that Hindu and Muslim traditions were integral to Indian identity and spearheaded the integration of traditional religious texts and leaders into the Western legal system. Arguably, Hasting's aim was to acknowledge and respect the indigenous traditions of India. Similarly, feminist scholars in the West have argued that impartial justice is an inappropriate standard in the evaluation of family affairs, preferring more personal standards of care.

The Indian legal system's sensitivity to religious faith stands in stark contrast to the legal system of the United States, which is ostensibly religiously neutral. The U.S. system is inspired by a longstanding western ideal of impartiality in the administration of justice represented by the Greek Goddess, Themis, blindfolded holding a sword in one hand and scales in the other. In this tradition, impartiality is thought to be the best method for reaching justice. As a result, in the U.S. personal legal disputes such as marriage and divorce are governed by a secular legal system insulated from the various religious traditions widely affiliated with personal and family matters.

For decades, women and women's groups in India and abroad have objected to the use of traditional religious laws such as Sharia and Dharmaśāstra. Under Sharia law, Muslim women have been denied divorce, child custody, and maintenance because of misogynistic gender norms within traditional Islam. For example Shah Bano, a 62- year-old Muslim woman, was divorced by her husband and was initially awarded maintenance or alimony payments available to women of other faiths under the Indian criminal code. However, subsequent legislation and courts held that as a Muslim woman, Bano was only eligible for three months of alimony after which it was expected that she would be cared for by relatives.<sup>2</sup>

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<sup>1</sup>Indian Const. 1950. Art. 44 Online at: <http://lawmin.nic.in/olwing/coi/coi-english/coi-indexenglish.htm>; Anil and Ranjit Malhotra "Family Law And Religion -The Indian Experience," *International Association of Matrimonial Lawyers Law Journal*,

[http://www.iaml.org/cms\\_media/files/family\\_law\\_and\\_religion\\_the\\_indian\\_experience.pdf?static=1](http://www.iaml.org/cms_media/files/family_law_and_religion_the_indian_experience.pdf?static=1).

<sup>2</sup> *Mohd. Ahmed Khan vs Shah Bano Begum And Ors*, 1985 AIR 945, 1985 SCC (2) 556 (Indian Supreme Court, 1985), <http://indiankanoon.org/doc/823221/>.