EUIndoPac Jean Monnet University Teaching Module

INTRODUCTION TO COMPARATIVE LAW

The EU and the Indo-Pacific Region. Challenges and Opportunities

(2 -3 BAC)

CLASSIFICATION OF LEGAL FAMILIES: CHINESE AND INDIAN LAW, SHARIA LAW

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by

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1. State of the question. Whereas hard sciences and other social sciences are underpinned by the same concepts and opinions, which are discussed internationally, there is no such thing with respect to the legal systems. Indeed, lawyers have a propensity to insularity. They are intent upon concentrating chiefly on their own legislation and case law. As a result, one has to deal either with Dutch, French, or Belgian law. In spite of on-going internationalisation, the legal world is still divided.

2. Course's aim. The aim of this course is to impart fundamental knowledge of general principles of comparative law. This broad aim will be achieved by:

- Introducing you to the fundamentals of comparative law.
- Comparing different legal systems, among which Indian law, Chinese law, and Muslim law. For each of these legal families, one identifies the historical background against which they have developed, the main sources of law, the interplay between institutions, as well as the organisation of courts.
- Demonstrating how distinct these legal families are.

The lectures do integrate the Saint Louis **EUIndoPac Jean Monnet Module** (funded by the EU Education Agency) that aims at introducing students to the EU's engagement in the Indo-Pacific. The aim of the Jean Monnet Module is to improve student knowledge on Asian law, which is becoming increasingly important given the EU's ambitious agenda for the Asian region. EU-China relations are characterized by deep economic interdependence alongside growing geopolitical friction. While China is one of the EU's largest trading partners—with trade in goods surpassing **€730 billion** in 2024—China simultaneously appears as an economic competitor, and systemic rival. In addition, EU and India finalized a landmark Free Trade Agreement (FTA) and Security and Defence Partnership (SDP) in January 2026, deepening a strategic partnership focused on sustainable growth, digital technology, and security. The EU is India's largest trading partner, with over **€180 billion** in bilateral trade, driven by machinery, services, and high investment.

The EU funding enabled Saint Louis to support the intervention of Asian scholars.

Admittedly, the lectures (30 hours) afford the students a glimpse into the formation of key Asian legal institutions. In a globalised legal world, these lectures should offer students an overview of the main law families.

3. Course's materials. With the aim of facilitating the lectures, this textbook offers a bare outline of the lectures. The Powerpoints are synthetising the legal issues. It is not sufficient to study the Powerpoints in order to succeed the exam.

4. Final Examination and Grading. The final examination will be a written test of two hours. The examination will consist of an essay as well as a shorter legal analysis. Students need to be well prepared (grappling with the terminology, ability to systematically develop legal arguments, etc.).

5. Terminology. Though this is in any way an exam on the legal terminology, students are nonetheless called on to use the relevant terminology in Hindu and in Muslim law. Students are obligated to come to the exam with an English dictionary and a list of the relevant Hindu and Muslim terms (without definition).

INTRODUCTORY CHAPTER

Section I – Originality of the discipline

1. What comparative law means?

Comparative law suggests an intellectual activity with law as its object and with comparison as its process. Put is simply, comparative law is the study of similarities and differences between different legal systems. It affords us a glimpse into the formation of various legal institutions, which develop in parallel.

a) Comparative law is more than the mere study of foreign laws

Consequently, the mere study of foreign law stops short of being comparative law. This discipline requires a specific comparative analysis of the legal issues that are the subject of such exercise. Therefore, a critical comparison is needed. This objective can only be achieved by comparing comparable concepts. What is the point of studying a legal system if we have already established its equivalence in another domestic institution?

b) Comparative law has an extra-territorial dimension

One can compare different legal provisions within a single system. This would be the case regarding the respective scope of former Articles 1382 and Art. 1384 CC. However, such an exercise is anything but comparative law. It requires comparing a legal system or a legal device to other international legal systems or other legal regimes pertaining to other legal systems.

→ It has thus an extra-territorial dimension!

c) Is comparative law a legal branch on its own rights?

A first group of academics take the view that comparative law is nothing more or less than a methodology. Accordingly, its main task consists in acting as a tool for the study of internal

structures of legal knowledge.[1] In stark contrast, a second group of scholars asserts that comparative law is a legal branch in its own rights. It acts not so much as a method but rather as an independent scientific and educational discipline. In effect, the importance of this legal branch has increased significantly in the present age of internationalism and economic globalisation. As a result, comparative law has become 'a relatively independent and scientifically detached educational discipline having its own subject, method and sphere of application, playing its own role in the system of legal knowledge and education, and also having its special social designation.'[2]

2. Origin

Aristote drew its political principles from the study of 150 Greek and barbaric constitutions. Charles de Montesquieu (1689-1755) has been considered to be the first comparatist in modern times. In *L'esprit des lois*, he rejected rightly the concept of universal law; instead, he took the view that diverse societies give rise to legal diversity. Nevertheless, Comparative Law is a rather new field of law. It started with the 1900 international congress for Comparative Law, thanks to the input of Edward Lambert and Raymond Saleilles, two famous French law professors. The 1900 international congress was dominated by a belief in progress: there was a need to develop a common law of mankind: « *world law must be created* ».

Its original goal was to reduce diversities in law of each nation; in so doing, it made an endeavour in harmonizing different legal systems.

➔ That being said, Comparative Law has developed ever since. Given that the belief in progress is fading away, this discipline has become much more sceptical.

Nowadays, it has its own journals, congresses, chairs,….

3. Why is comparative law needed?

Whereas hard sciences and other social sciences are underpinned by the same concepts and opinions, which are discussed internationally, there is no such thing with respect to legal systems.

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[1] G. Samuel, 'Comparative Law and Jurisprudence', *International and Comparative Law Quarterly*, Vol. 47, 1998, p. 817.
[2] Ibidem.

Indeed, lawyers have a propensity to insularity. For instance, the teaching of law has remained both positivistic and legicentric. Lawyers are intent upon concentrating exclusively on their own legislation and case law, albeit a few exceptions as regard EHRC or EU law. One must deal either with Dutch, French, Gerfman or Belgian law. As a result, lawyers are a bit stuck with their *own* methods and principles whereas the world is becoming more and more globalized. Most of students in law will specialize in one branch of Belgian law (administrative, family), and won't be acquainted with foreign modes of reasoning.

That being said, intensive processes of international cooperation in the second half of the 20th century occurred alongside scientific and technological progress and changes in the political, economic and cultural life of societies. The integration of European countries in the Council of Europe as well as in the European Union, the development of European law and of a new European legal order, made comparative law an indispensable component of academic curricula of many law schools and universities in Europe.[3] In St Louis, for instance, there has been an awareness that common law should play a more significant role in legal education. Henceforth, comparative law's aim is to put an end to such narrow mindness.

Hence, comparative law has developed continuously since the XIXth c. on the account that:

- technological developments have made the world smaller;
- national isolationism is on the wane ;
- comparative law offers the gradual approximation of diverging viewpoints.

4. Methodology

Comparative law can be practiced on a large and a smaller scale.

Macrocomparison. The scholar compares the spirit and style of different legal systems instead of concentrating on individual legal problems and their solutions.

= comparing spirit, rationalism, principles and style of different legal systems.

= the scholar endorses a broad approach, and has not a concrete program.

Research is carried out into:

[3] Djalil I. Kiekbaev, 'Comparative Law: Method, Science or Educational Discipline?', online publication.

- Different techniques of legislation;
- Different methods of statutory interpretation;
- Different styles of judicial opinions.

Examples of macrocomparison.

- Role of supreme courts in reviewing the constitutionality of laws,
- Allocation of powers in federalized States,
- Differences between different civil courts/procedures.

Microcomparison. Unlike macrocomparison, microcomparison is dealing with specific legal institutions. The list of possible illustrations is endless (torts, contracts, sale, marriage, divorce, inheritance, etc.). In this connection, a few examples will suffice. For instance, why is a manufacturer liable for the harm caused to a consumer by defective goods? What are the rights of an adulterine child? What are the regimes of strict liability as regards workers' protection?

Is there a clear dividing line between micro- and- macro comparisons?

Microcomparison reaches its limits. It may work only if one takes into account the general context in which specific legal regimes evolve.

By way of illustration, no one could, for instance, give a true picture of the US law concerning strict liability without having knowledge of its general legal background (e.g. jury trial). In a similar vein, in order to compare the functioning of administrative courts in Germany and in France, one needs to understand the political system of each country and their mistrust of general court regarding the review of public authorities' measures.

Which approach do we contemplate in this course? Given that we shall study the major legal systems (Chinese law, Indian law tha encompasses Islamic law, Hindu law, and common law), we endorse a macrocomparison approach. However, on the account that we shall delve into more particular issues such as tort law, this course embraces to some extent a micro comparison approach.

5. Comparisons between comparative law and other legal disciplines

Comparative law is mostly a technique. As a method, it can be used practically in all legal disciplines**.** Bearing this in mind, it must be distinguished from:

- **Private international law**

  Positive law (law as it stands)

- **Public international law**

- **Legal history**

  More intellectual (how the legal system functions)

- **Sociology of law**

Private international law (PIL). This legal discipline can be defined as a set of procedural rules that determines which legal system and which jurisdiction apply to a given dispute. E.g. matrimonial law: a Moroccan and an Italian are seeking divorce in Belgium whereas they were married in Germany.

→ Which court will be competent to adjudicate the case?

→ Which legal rule will be applicable?

The EU has been adopting an array of regulations that provide for the key rules in this area.

- **Rome I** Regulation (EC) No 593/2008 governs the choice of law in the EU.
- **Rome II** Regulation EC) No 864/2007 creates a harmonised set of rules within the EU to govern choice of law in civil and commercial matters.
- **Brussels I** Regulation (EU) No 1215/2012 deals with jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
- **Brussels IIa** Regulation (EC) No 2201/2003 sets out rules determining which court is responsible for dealing with matrimonial matters and parental responsibility in disputes involving more than one country.

Although the two legal disciplines interact, PIL or conflict of laws is a part of positive domestic law (*droit international privé belge*, for instance) whereas comparative law is a genuine intellectual approach. However, comparative law can be extremely useful for international private lawyers in order to determine the most suitable legislation and jurisdiction.

Public international law. Public International Law is the law of the political system of nation-states. The law of nations (treaties, international agreements, protocols, conventions,

international principles, and customs) is by and large deemed to be a supranational system of law.

Comparative law helps to understand the manner in which general principles of international law can be moulded. In effect, two conditions must be fulfilled:

a) **consistent and continuous State practice**;

b) ***opinio iuris*.** The *opinio juris* must be supported by State practice.[4] An important question is what constitutes State practice. Policy statements, commentaries by governments on draft treaties, legislation, decisions of national courts and executive authorities, pleadings before international tribunals, statements made within international organizations[5] and the resolutions adopted by those bodies are all examples of State practice, which should be taken into account when considering a new legal standard as a principle of customary international law. [6]

In addition, the methods of comparative law can also be extremely useful in interpreting international agreements.

Legal history. Legal history is the study of how law has evolved and why it changed. Legal history is closely connected to the development of civilisations. Legal history is consecutive in time whereas comparative law is coexistent in space. However, there is more than this. Legal history often involves a comparative element (e.g. roman law is lectured with a view to letting the Belgian students understand their contemporary civil law). Conversely, lawyers dealing with comparative law must pay heed to the historical circumstances in which the legal institutions under comparison evolved.

Sociology of law. Sociology of law is a discipline that analyses the causal relationship between law and society. A sociological perspective on law does not mean that the focus is placed on a single legal regime but on law in a social context. Therefore, sociologists try to understand the sociological background against which a certain legal arrangement unfolds.

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[4] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA),* ICJ Rep [1986] 111, at para 184.

[5] These institutions can be instrumental in the creation of customary rules.

[6] Brownlie, *Principles of Public International Law,* 5th ed (OUP, 1998) 5.

→ sociological point of view: how legal institutions influence our lives (divorce was patriarchal last century, however, it is subject today to the principle of non-discrimination).

→ legal point of view : how changes in society influence the legal order.

The two disciplines have a great deal to learn from each other but have much of the same method.

Section II - Functions of Comparative Law

1. Interpretation of national rules of law

A practical use of Comparative Law lies in the interpretation of national rules of law. Although a foreign rule cannot be used to bypass unequivocal national rules, it could be used as a tool to interpret domestic law. For instance, where there is a gap in our legal system, this can be filled by a court referring to the solution found in a foreign legal system.

In Europe, several courts are receptive to comparative analysis. By way of example, during judicial proceedings the European Court of Human Rights more and more often reckons upon comparative practice in analysing the judicial decisions and national legislation of states. To name another example, constitutional courts in Europe are facing relatively similar issues: constitutionality of gay marriage, issues of discrimination between sex, issues of affirmative action, supremacy of EU law over constitutional law, etc. As a result, they are keen in understanding the manner in which other constitutional courts are adjudicating similar cases.

>< *American isolationism*: American courts (in particular the Supreme court) are unwilling to look at other countries legal approach. The Bill of Rights is exclusively an American product.

Supreme courts having to resolve antagonistic interests: Constitutional case law on the validity of 'homosexual marriage'

How to strike a balance between the right of Member States (in the EU) and the States in the USA between their sovereign right to prohibit marriage to opposite-sex couples and the citizens' rights to move from one State to another. Both the US SCt and the CJEU had to resolve complex cases related to this issue.

In the USA, States are competent to allow or to prohibit same-sex marriage; this gives rise to difficulties given that couples move across the USA. In *Obergefell v. Kasich,* the **US SCt** obliged all 50 States to perform and recognize the marriages of same-sex couples on the same terms and conditions as the marriages of opposite-sex couples, with all the accompanying rights and responsibilities. All states are thus obliged to issue marriage licenses to same-sex couples and to recognize same-sex marriages validly performed in other States.[7]

We guess that the **CJEU** took into consideration the developments in US constitutional law. Romania does not recognise marriage between persons of the same sex ('homosexual marriage'). A Romanian national and an American national, who got lawfully married in Brussels, contacted the Romanian authorities to request information about the procedure and conditions under which the US citizen, in his capacity as a member of the Romanian family, could obtain the right to reside lawfully in Romania for more than three months. The Romanian authorities informed the spouses that the American spouse only had a right of residence for three months, on the ground, in particular, that he could not be classified in Romania as a 'spouse' of an EU citizen as Romania does not recognise marriage between persons of the same sex. The CJUE ruled that family members of a EU citizen (Romanian), could be accorded such a right of residence in Romania on the basis of Article 21(1) of the Treaty on the Functioning of the EU (EU citizenship).[8]

2. Law making process

Comparative law has a key role in the lawmaking process. Nowadays, the drafters of national legislation take into consideration the foreign experiences (e.g. the influence of Dutch law on gay marriage, adoption by gays or euthanasy; the influence of French law on the Belgian lawmaker prohibiting the burqa, see below). Comparative legal studies are clearly needed in order to foster a significant legal reform.

- Prior to the enactment of its legislative proposals, the European Commission usually carries out comparative analyses in order to examine the qualities and the deficiencies of the 27 legal systems of the Member States.
- After the Berlin wall was pulled down, significant changes occurred in the legal systems of Central European countries such as Poland, former Eastern Germany, Rumania, etc. In countries formerly dominated by communist regimes, new legal regimes were influenced by Western legal principles (the principle of equality, the right to property, right to a fair trial, etc.). In order to reconstruct the legal systems, lawyers delved into comparative law.

[7] *Obergefell v. Hodges*, 576 U.S. 644 (2015).

[8] Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări* (2018).

Whenever it is proposed to adopt a foreign solution, which is deemed to be superior, two questions must be asked whether:

a) Has it proved satisfactory in its country of origin?

b) Will it work in the country where it shall be implemented?

3. International Unification of the Law

Many legal fields such as private law, trade law, labour law, transport law, business law are subject to international agreements. The treaties concluded are subject to international public law. CL plays a significant role in preparation of projects for the international unification of law, whose aim is to reduce and eliminate, so far as desirable and possible, the discrepancies between the various national legal systems. The method is to draw up a uniform law based on work by experts in comparative law and to incorporate it in an international agreement. Accordingly, the international treaty will oblige the parties to apply a uniform law instead of their municipal or domestic law. In preparing these agreements one needs to find out a common denominator to all countries. As a result, lawyers drafting these treaties are comparing the added value and the deficiencies of the national legislations.

Several international organisations are proposing to their members uniform legal regimes. For the convenience of representation, we have been chosen but a few treaties.

a) Council of Europe

To guarantee the respect for its fundamental values (Human rights, democracy, and the rule of law), the Council of Europe has been elaborating relevant conventions, agreements and uniform legislations. The European Conventions and Agreements worked out by the Council of Europe thus serve each Member State as a basis for harmonising and amending their own legislation. These agreements, some of which never entered into force, do cover a swathe of subject-matters ranging from Human rights, Social affairs (European Social Charter, Status of migrant workers), IPR (patents), Culture (Heritage, protection of archeological heritage, landscape, television production, cinematographic co-production, transfrontier television), Extradition and visas, Civil law (children's rights, environmental damage), Criminal law (abolition of death penalty, terrorism, traffic, sexual abuse, sexual exploitation, corruption, cyber criminality, racism, environmental criminal law, transfer of sentenced persons, offences

to cultural property, international validity of criminal judgments, etc.), Bankruptcy law, Tax law (mutual administrative assistance), Public law (protection of minorities, local self-government), Privileges, Health law (drugs, doping, exchange of therapeutic substances), to Animals Welfare (protection of animals for slaughter, animals kept for farming purposes).

Examples of the Council of Europe's treaties

Social Issues

- European Convention on Social Security
- Convention on Social and Medical Assistance
- European Convention on the Status of Migrant Workers

Criminal Law

- European Convention on Mutual Assistance in Criminal Matters
- European Convention on Extradition
- European Convention on the Suppression of Terrorism
- Convention on the Transfer of Sentenced Persons
- Convention on the Protection of the Environment through Criminal Law
- Convention on Cybercrime
- Criminal Law Convention on Corruption
- European Convention on Offences related to Cultural Property

Civil Law

- European Convention on the Adoption of Children
- European Agreement on Au pair Placement
- European Convention on Products Liability
- European Convention on Civil Liability for Damages caused by motor vehicles
- European Convention on the Exercise of Childrens' rights
- Convention on the Adoption of Childrens
- Civil Law Convention on Corruption
- Convention on the Establishment of a Scheme of Registration of Wills

b) European Union

The European Union (EU) shares the same values – human rights, democracy and the rule of law (art. 2 TEU) – than those of the Council of Europe. For the EU Member States, the uniformity is achieved through the harmonisation of the Member States domestic laws and practices. Two legal instruments are widely used in order to achieve this objective: directives and regulations (art. 288 TFEU).

- **Directives**. They lay down specific objectives that must be achieved in every Member State. Against this background, national authorities have to adapt their domestic laws to meet these goals but are endowed with sufficient room for manoeuvre to adjust their domestic legislation.
- **Regulations**. In contrast to directives, regulations are directly applicable. They are on a par with national laws. Accordingly, they don't have to be transposed by the national authorities. They are therefore the most direct form of EU law - as soon as they are passed, they have binding legal force throughout every Member State. Member States are called on to abrogate any contradictory legislations.

Given that the EU counts 27 Member States, the identification of a common denominator to all these countries (some of which are part of the common law (Ireland, Malta, Cyprus) and others which are former Communist states) has become somewhat challenging. In effect, it is a lot easier to find a common denominator for Benelux (only 3 countries) or for the members of the Nordic Council (4 Scandinavian countries and Finland).

c) Unidroit

The International Institute for the Unification of Private Law (Unidroit) is an independent intergovernmental organisation with its seat in Rome.

Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States. The main objective is to prepare harmonised uniform rules of private law as model laws or as international agreements.

The uniform rules drawn up by Unidroit have traditionally tended to take the form of *international Conventions*. The following international agreements were adopted thanks to Unidroit.

- Convention relating to a Uniform Law on the International Sale of Goods (The Hague, July 1, 1964)
- International Convention on Travel Contracts (Brussels, April 23, 1970)
- Convention providing a Uniform Law on the Form of an International Will (Washington, D.C., 1973)

- UNIDROIT Convention on International Financial Leasing (Ottawa, 1988)
- UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995)
- Convention on International Interests in Mobile Equipment (Cape Town, 2001)

However, the low priority which tends to be accorded by Governments to the implementation of such conventions and the time it therefore tends to take for them to enter into force have led to the increasing popularity of alternative forms of unification in areas where a binding instrument is not felt to be essential.

Such alternatives include *model laws* which States may take into consideration when drafting domestic legislation on the subject covered. In other words, they are free to decide whether to follow or not these model laws. They are relevant examples in illustrating this trend:

- Principles of International Commercial Contracts
- Principles and rules capable of enhancing trading in securities in emerging markets
- Model Law on leasing
- Model Franchise Disclosure Law

d) UNCITRAL

Given that disparities in national laws governing international trade created obstacles to the flow of trade, the UN General Assembly established in 1966 the United Nations Commission on International Trade Law (**UNCITRAL**). This organisation's general mandate is to further the progressive harmonization and unification of the law of international trade. UNCITRAL is deemed to be the core legal body of the United Nations system in the field of international trade law.

By way of illustration, the Convention on contracts for the international sale of goods (Vienna 1960) establishes a comprehensive code of legal rules governing the formation of contracts for the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract and other aspects of the contract.

c) Limits to the unification process

So far, all unification of law has been limited in its geographical area of application. Often schemes for the unification of law are designed to apply only within a limited area (Scandinavia, Benelux, EU).

Moreover, unification cannot be achieved so easily. One must find what is common to the jurisdictions concerned that could be incorporated into a future uniform law or an international agreement. Given that unification of civil or commercial law is rather difficult to achieve, one must think of alternative means of achieving the goal of unification through Model Laws. However, adoption of model laws is a matter of recommendation rather than of obligation.

Section III - Methods of comparative law

How comparative lawyers are proceeding? Given that this recent discipline has not yet an established set of methodological principles, a detailed method cannot be laid down in advance. As there are no textbooks laying down a specific methodology, practitioners will have to use their common sense, intuition, creativity. In other words, only sound judgment, common sense, intuition can be of any help. Put it simply, one needs to apply a rule of thumb.

Often it is the feeling of dissatisfaction with the solution applied in its own legal system, which drives one to inquire whether perhaps another legal system could provide for a better legal solution.

Investigation begins with setting the right hypothesis: in practising comparative law, one notices that the national regime is deemed to be insufficient to provide the solution. Admittedly, there is a need to look at other regimes with a view to improving the national system.

Every country must address the same issues, but each country has developed its own mechanism to address them. At this stage, we can lay down an informal procedure of Comparative Law:

1. Premises: functionalism
2. Scope *ratione territoriae* investigation
3. Comparison
4. Critical evaluation

1. Basic methodological principle: Functionalism. Although each legal system faces essentially the same problems, they solve these problems by quite different means. The question to which any comparative law study is devoted must be posed in purely functional terms (not conceptual). For instance, one is likely to be interested to know how foreign laws protect the victims of an accident, the aggrieved party, etc. In effect, the level of legal protection may differ significantly from country to country.

2. Scope. As a matter of course, the researcher is determining the scope of his investigation. Which legal system should he choose? How many legal systems should he encompass? Must his/her selection be based on mastering the official languages?

→ What determines the scope? Finance, language, relevance of the foreign system,…
→ Which legal system is worth studying?

As a matter of course, it is difficult to assert how the comparatist should delimit the scope of his research. It makes more sense to focus on US trust law than on Belgian competition law. Fairness of trial has received more attention in the UK than elsewhere. Flemish environmental law is more interesting than environmental law in Moldavia.

Last, it must be noted that a vast number of legislations often extensively imitate mature legal systems. These affiliated systems are less interesting to compare than more original systems. By way of illustration, France has developed a parental system according to the Code Napoleon whereas Italy has an impressive wealth of ideas on private matters (codification of 1942). In sharp contrast, the legal systems of Spain and Portugal do not justify very intensive investigation.

3. Building a system. The next step in the process of comparison is to build a system. One encounters, as a matter of fact, problems of syntax and vocabulary. One needs to focus on concepts that enable the interpreter to embrace heterogeneous legal institutions, which are functionally comparable. If one finds that different countries meet the same need, one must ask why. Indeed, this is a tall order given that the reasons explaining the success or the failure of a legal regime may lie anywhere in the whole realm of social sciences.

4. Critical evaluation of what has been discovered. One has to compare different legal systems with a view to improving its own legal system by:

- taking over a legal device that is successful in another country; the solution provided for by the foreign legal order will appear clearly superior, better of, worse than the one of the legal order at issue.
- eschewing the mistakes made in other countries.

The comparison should assess whether the foreign legal institution has been efficient and could serve as a model for other countries.

5. Overcoming a flurry of challenges. However, the difficulty faced by the comparatist is the following: one does not have to look at the problem with the eyes of its own system. A number of hurdles have to be overcome.

- Mastering the legal culture. The comparatist must assess the extent to which custom or case law provide proper solutions. As a result, he must eradicate the preconceptions of his native legal system.

➔ Continental law: emphasis placed on abstraction and generality;

➔ Common Law: more inductive and produces more specialised legal institution to solve a specific problem.

- Mastering the foreign language. The meaning of legal terms may differ! The vocabulary is tricky.

➔ The comparatist must overcome the terminological hurdles and assess whether "the apple is not hiding a pear or vice versa". There are indeed '*des termes qui résistent de toute leur force, derrière des tranchées et des fils barbelés, aux tentatives de pénétration. Comment un français d'aujourd'hui peut-il aborder utilement l'étude du droit anglais ou du droit anglo–américain ?*".[9]

- Mastering the concepts ingrained in other legal systems. Each country has developed its own concepts. One may quickly grapple with unknown legal concepts. Are we are comparing "apples and pears"?

- Torts and '*responsabilité civile'* are not the same.

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[9] LEVY-ULMANN, *Communication à l'assemblée Générale de la société de législation comparée,* le 19 décembre 1918, Paris, 1919, p. 10.

- Liability and responsibility mean something different.
- A Scottish lawyer will have problem understanding *'l'enrichissement sans cause'* or '*la théorie de l'équivalence des conditions'*

Institutions may be very different. For instance, the distinction between administrative courts, criminal courts and civil courts doesn't exist in all countries (UK, Scandinavia).

To conclude with, in order to analyse correctly how foreign legal systems function, one needs to set aside the concepts of its own legal system.

-Access to the relevant documentation. Although many legislations can be found on internet, it is uncertain whether they are still in force. In addition, there are no legal textbooks on Internet; one needs to get access to the right library!

Foreign law might appear unclear on the account that the solution is provided by customs (or social practice), by the case law, etc. In order to understand another legal system, one needs therefore to understand how the foreign society works.

For instance, the lawyers don't necessary play the same role in these societies:

USA: 1 lawyer for 200 people
Belgium: 1 lawyer for 1000 people
China: 1 lawyer for 25000 people.

As a result, the comparatist should rely upon the expertise of foreign lawyers,

6. Concluding remarks

As a result, a comparative study shouldn't end up with a compilation. A textbook of comparative law should not try to stuff the student with an overload of foreign data. It should rather lay out the different approaches to a single problem, state the critical arguments, which illuminate it, indicate which is the best solution to follow. Such a critical analysis could help to develop a sense of how national law can be improved.

CHAPTER II- THE CONCEPT OF FAMILY OF LAWS

1. Introductory remarks

Lawyers are frankly obsessed with definition, classification, systematisation, conceptualisation, … (civil law, public law, etc.). Indeed, like other legal experts, comparatists lawyers are trying to divide legal devices into specific fields, to classify legal systems into families. In so doing, they gather distinct legal orders into a broader family. A Nigerian lawyer shares much more in common with a lawyer from Ghana than with a lawyer from Ivory Coast on the ground that the English-speaking lawyers practice law in former British colonies. Their respective national legal systems belong to the common law family and not to the civil law. Hence the idea of classification is to identify, to compare, to highlight the core elements of similar legal orders with a view to attaching them to a broader cluster of similar legal systems.

- Italian legal system + French legal system + Belgian legal system
  = Roman-Germanic law

- Arabic legal system + Lebanese legal system + Syrian legal system
  = Islamic law

This classification exercise is somewhat remote from positive law; it is more a genuine intellectual exercise.

However, classification remains the subject of an ongoing debate. For instance, the way in which one should draw the dividing line between public and private law in Belgium has always been dogged with controversies. In effect, different legal disciplines may interfere to such an extent, or even overlap (because society becomes more complex) that classification becomes nugatory. Moreover, families of law are likely to disappear or to fade away (Socialist law surviving in Cuba, China, North Korea and Vietnam) whereas other families are likely to gather momentum thanks to social upheavals (Islamic law).

2. The need to define broad families

Each political society in the world has its own set of laws. Moreover, each system has been developing its own concepts as well as vocabulary, arranging rules into proper categories, setting out original techniques for expressing and interpreting rules of law. It follows that each legal system constitutes a system in its own rights.

However, it would be impossible to understand from the outset hundreds of legal systems. For the sake of clarity, legal systems need to be classified into broader families of laws. Indeed, legal systems may share similar institutions and basic legal rules with other ones. As a result, they share several similarities in terms of legal techniques and institutions that enable the comparatist to draw analyses.

It is therefore possible to gather laws into **families** and contrast them with each other. In that sense, the comparatist should consider the fundamental elements of the families through which the rules to be applied are themselves discovered, interpreted and assessed.

Accordingly, the classification of legal systems into a limited number of families of laws simplifies by and large the presentation of the law.

Hurdles to overcome

The question arises as to whether this classification is a genuine intellectual approach far away from positive law. Perhaps some legal systems could be grouped into families. But how does one decide what these groups should be? Upon which similarities, relationship should one place emphasis? Put it another way, which common qualities are the crucial ones? Supposing one knows what these groups should be, how does one decide whether a particular system belongs to one group rather than another one? Grouping is indeed a difficult exercise:

- Is it possible to divide such a diverse legal world into but a few legal families?
- How do we decide which families are the salient ones? According to which criteria?
- Which are the features that could lead to say that this legal system belongs to this family?

The coexistence of different families within one legal system

It often happens that several legal systems co-exist together in a single state. In this connection a few examples will suffice.

The sources of **Nigerian law** are the Constitution, legislation, English law (common law, doctrines of equity), customary law, Islamic law, and judicial precedents. By virtue of being a British colony, English Law became a source of Nigerian law (the Common Law of England, Doctrine of Equity, English law made before October 1, 1960 (independence day) and that was not abrogated). Common law has been complemented by Nigerian legislation (Acts of National Assembly or Acts of Parliament or Acts of the States given that each state has its own legal system). Customary laws are accepted by the indigenous people to whom they relate. They can encompass marriage, divorce, succession and inheritance, land and chieftaincy matters. In addition, much emphasis has been placed in Nigeria upon judicial precedents. In particular, it must be noted that Sharia has been instituted as a main body of civil and criminal law in 9 Muslim-majority states and in some parts of 3 Muslim-plurality states since 1999.

Sharia law is encapsulated in Article 244 of the Nigerian Constitution (Chapter VII on Judicature. That provision reads as follows:

'(1) An Appeal shall lie from decisions of a Sharia Court of Appeal to the Court of Appeal as of right in any civil proceedings before the Sharia Court of Appeal with respect to any question of Islamic personal law which the Sharia Court of Appeal is competent to decide.

(2) Any right of appeal to the Court of Appeal from the decisions of a Sharia Court of Appeal confer by this section shall be:

(a) exercisable at the instance of a party thereto or, with the leave of the Sharia Court of Appeal or of the Court of Appeal, at the instance of any other person having an interest in the matter, and

(b) exercised in accordance with an Act of the National Assembly and rules of court for the time being in force regulating the powers, practice and procedure of the Court of

Similarly, Article 245 of the Constitution deals with Customary Courts.

'(1) An appeal shall lie from decisions of a Customary Court of Appeal to the Court of Appeal as of right in any civil proceedings before the Customary Court of Appeal with respect to any question of Customary law and such other matters as may be prescribed by an Act of the National Assembly.

(2) Any right of appeal to the Court of Appeal from the decisions of a Customary Court of Appeal confer by this section shall be:

(a) exercisable at the instance of a party thereto or, with the leave of the Customary Court of Appeal or of the Court of Appeal, at the instance of any other persons having an interest in the matter;

(b) exercised in accordance with any Act of the National Assembly and rules of court for the time being in force regulating the powers, practice and procedure of the Court of Appeal.'

Israeli law is a mixed legal system reflecting the sheer complexity of the history of the State of Israel. Its legal system is based on common law.[10] That being said, it has been influenced by a swath of sources ranging from the civil code of the Ottoman Empire (personal status and marriage law in the hands of the religious courts), German Civil law, religious law. For instance, personal status and marriage law in the hands of the religious courts (Jewish Halakha and Muslim Sharia in relation to family law). To some extent some legal developments were influenced by European codification (brought by European Jewish lawyers after WW II). For instance, during the 1960s the Common Law in areas of contracts and torts was codified. Since the 1990s the Israeli Ministry of Justice, together with leading jurists, has been working on a complete recodification of all laws pertaining to civil matters. Moreover, the Israeli courts have been influenced in recent years by US law.

Quebec's legal system was established when New France was founded in 1663. Given that Quebec became an English colony in 1763 (Treaty of Paris), it has therefore a *bijuridical* legal system on the account that it mingles former French legal approach (the Civil Code of Québec, Code of civil procedure, etc.) with common law. Since 1866, the Province of Quebec applies the Civil Code of Lower Canada. A new *Civil Code of Quebec* was enacted in 1991, and came into force in 1994. This Code repealed both the *Civil Code of Lower Canada* and the *Civil Code of Quebec* of 1980. In contrast, in areas of law under federal jurisdiction, Quebec is, like the other Canadian provinces, subject to common law.

The Civil Code consists of ten books:

- Persons
- The family
- Successions
- Property
- Obligations
- Prior claims and Hypothecs
- Evidence
- Prescription
- Publication of Rights
- Private international law

Scottish law is a hybrid or mixed legal system, containing common law as well as civil law elements. Scots law recognises four sources of law: legislation, legal precedent, specific academic writings and custom. There are important differences between Scots Law and English law in several fields (property, criminal law, trust law, inheritance, family law) whereas there are greater similarities in areas as commercial law, consumer rights, taxation, employment law and health and safety regulations.

Federal States. In addition, it must also be noted that federal states such as Belgium, Switzerland, Germany, Spain, and USA have been developing a formidable body of law in grating legislative competences to their regional entities.

[10] The United Kingdom was granted a Mandate for Palestine on 25 April 1920 that ended in 1948.

3. Factors contributing to the juristic style of families of laws

Five factors are likely to influence the style of a legal family:

- historical background
- mode of thought
- distinctive institution
- legal sources
- ideology

Historical background. Trading issues shaped the legal culture in all continental countries. There was no centralised power in Western Europe.

➔ Historical factors gave rise to the discovery of Roman Law: as a result, most continental countries were shaped by Roman Law.
➔ History = key factor in shaping law. That's why one has to keep history in mind.

History explains why the French and the German legal systems have much more in common with each other than with common law.

Modes of thought. The differences between CL and G/Rom family correspond to differences in mentality due to historical events.

> E.g. On the continent, during the *ançien regime* the King was vested with much power. As a result, the courts were endowed with little power. Furthermore, Napoleon Bonaparte in concentrating all legislative and executive powers gave little independence to the French courts.
>
> >< in England, the courts were known to be more independent than their French counterparts.

G/R family is characterised by abstract legal norms, well-articulated systems, the influence of professors on the law-making process, and the need to codify and to foster a complete (free of gaps) legal system.

In sharp contrast, Common Law marks a gradual movement from decisions to decisions. In a nutshell, common lawyers pay heed to the case law and gives emphasis to the role of judges. As a result, such a legal system does not purport to be complete.

- G/R: deducing solution from rule (theory, systematisation); Abstract in terms of legal construction
- CL: deducing solution from cases (precedents);

	Roman/Germanic Law	**Common Law**
Sources of law	Solution will be found in statutes Emphasis on codification	Case law No codification, even statutes are based on a casuistic approach
The manner in which rules are framed	General and abstract rules This trend is embedded since 18th c. Such rules can apply to a wide range of a issues for a fairly long time.	Gradual shift from case to case
Legal technique	Deduction of a solution from legal rules	Emphasis on a casuistic approach
Coherence	Well-articulated system No gaps	Reluctance towards completeness ➔ reinforcing the power of courts and the role of case law
Practitioners	Law professors hold greater prestige than their	Courts play a more prominent role than the law faculties

	counterparts in English-speaking departments	

As a matter of course, the differences in style correspond with the differences in mentalities attributable to different historical events.

The Role of Principles in both families
'The challenge however lies in the significant difference between the roles that legal principles play within these two families. Civil law jurisdictions are guided largely by statute law, whilst common law jurisdictions also recognize judge-made law as binding. Within civilian systems, judges are not allowed to create rules.[11] *When adjudicating on a case, common law judges are firmly guided by the need to adhere to the doctrine of precedent, whilst civil law judges are not bound to follow precedents. For instance, in contrast to the approach followed by common law courts, a number of civil law courts apply teleological rather than historical methods of interpretation in relation to treaties; they seek to give effect to what they 'conceive to be the spirit rather than the letter of the Treaties'.* *This distinction has significant consequences for the concept of principles in both families. The concept of principle is analyzed differently from respectively civilian and common law perspectives.* *Common lawyers do not generally take legal principles as their starting point, but proceed by reference to specific cases. Conversely, civilian lawyers tend to start with principles before focusing on the individual facts of the case'.* N. de Sadeleer, *Environmental Principles: from Political Slogans to Legal Rules*, 2nd ed. (Oxford, Oxford University Press, 2020) 16-17.

Distinctive institutions. Each legal order is likely to develop institutions or legal regimes that are likely to be taken over later on. By way of illustration, the trust is typical to CL whereas the ombudsman has been developed in the Scandinavian countries. The concept of obligation is fundamental in G/R family whereas that concept is unknown in English legal thought.

Legal sources. The sources of G/R family have to be linked to the importance of the lawmaker whereas CL is related to the key role played by courts in shaping the law.

According to a German scholar, the importance given to the lawmaker is embedded within the intrinsic nature of the legal family:

[11] See French Cciv., Art 5.

The codification movement, which failed to prosper in England ..., expresses another characteristic feature of continental legal thought, namely the view that, ideally, the rules should all be contained in a major enactment which the judges are dutifully and obediently to apply. If a court is doing more than applying the law when it makes a decision, the decision itself can have no force as law bound the very case in which it is rendered.
This view squares with the constitutional theory propounded by Montesquieu, and generally accepted on the Continent, that the legislative, judicial and executive powers should be kept separate.
The German and the common lawyer thus have a quite different perceptions of the role of the judge'

N. HORN et al., *German Private and Commercial Law*, Oxford, Clarendon Press, 1982, 11-12.

Ideologies. Before the end of the cold war, socialist law would be ranked among the major legal systems of the world. It was deeply marked by the Marxist-Leninist ideology.

4. A wide array of classifications

Of course, the whole exercise of classification is of a didactic nature. So far, scholars have proposed various classifications. To give just but a few examples:

Classification of **ESMEIN**	Roman Germanic Anglo-Saxon Slav Islamic	
Classification of **ARMINJON, NOLDE, WOLFF**[12]		Islamic French (all the countries that codified their law either in 19th or in the first half of the 20th century, using the code Napoléon as their model) German Scandinavian English Russian Hindu
Classification of **DAVID**[13]	Roman-Germanic (comprising those legal systems where legal science was formulated according to Roman law) Common Law Socialist Law Hindu, far-East, African, Jewish, …	
ZWEIGERT and KÖTZ[14]	Roman family Germanic family Common Law	

[12] *Traité de droit comparé*, Paris 1950-1952.
[13] David proposed the classification of legal systems, according to the different ideology inspiring each one. See David, R., *Droit comparé*.
[14] *An Introduction to Comparative Law*, 3rd edition, Oxford, OUP. These two authors claim that, to determine such families, five criteria should be taken into account, in particular: the historical background,

Nordic families
Families of laws of the far East
Religious families

At this stage, I would like to make a few remarks.

1. These various classifications depend on various criteria (language, subject-matters, culture, politics, ideology, religion, history, etc.). Arguably, the outcome of classification differs according to the criteria selected.

None of these classifications is less valid than another. In other words, they are all valid in their own rights provided they are based on objective criteria.

- So far, comparatists have been chiefly giving emphasis to private law in order to achieve their grouping. As a consequence, such groupings may be highly relative.

- Much depends on the period over which the classification is taking place. Does it make any sense to speak about 'socialist law' nowadays?

2. These classifications are far from being perfect. We have to be aware that on the one hand, German private law has been deeply influenced by Roman Law. On the other, German constitutional Law was conceived in line with US constitutional law. In fact, US lawyers were heavily involved in the writing of the German constitution. At an early stage, unlike other constitutions of European countries, the German constitution provides ground for judicial review of constitutional law.

→ Regarding constitutional issues, German law is closer to the US system
→ With respect to civil law, it is much closer to the other legal orders belonging to the German-Roman family.

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the characteristic way of thought, the different institutions, the recognized sources of law, and the dominant ideology.

4. Furthermore, any legal system is a product of society at a certain time in history → so these legal families will eventually change (thanks to the EU process of harmonisation).

    a. E.g. Chinese law quickly evolves with economic development.
    b. E.g. African nations live under indigenous customary law that, as a matter of course, evolves with lifestyle, language, urbanisation, etc.
    c. E.g. All African legal systems have been influenced by the legal systems of European colonisers.

5. To conclude with, one's division of the world into legal families is vulnerable to alteration by historical events as well as by the subjective perception of the scholars carrying out that kind of exercise.

5. Mattei's three paterns of law

Professional Law. This grouping encompasses the common law as well as the Romano-Germanic family. The hallmarks are:

- the rule of law (see Article 2 TEU)
- the separation of legal and political decision-making and
- the secularization of law.

The legitimacy of this system is justified by the fact that impartial and independent courts are empowered to review decisions enacted by public bodies.

Political Law. In a nutshell, politics and law are not separated.

- Law is the outcome of political processes.
- Both the legislative and the executive powers are not subject to judicial review.
- Authorities are free to determine the content of their action.

This grouping includes African and South American countries, swathes of Asia (Korea, China,…).

Traditional Law. As far as religious systems are concerned, impossibility to separate the law from the religion. The interpretation of the law remains in the hands of clerics whereas in the

professional western legal realm lawyers are considered as professionals. This grouping includes 1) Muslim countries 2) India 3) Asian countries where Confucian conceptions of the law prevail. By way of illustration, the *Quoran* does not enshrine principles, it merely provides in a somewhat chaotic fashion *ad hoc* decisions.

CHAPTER III - CHINESE LAW

I. Key Features of Chinese Law

Culturally. Heritage of **traditional Chinese culture** (before 1912)

Politically. Influence from the **Soviet Law,** deeply rooted in Marxist-Leninist ideology (since 1949)

Legally. Member of the **continental Civil Law** family. Particularly, modern Chinese law (since 1980s) was influenced in some way by the German and French legal systems.

II. Legal History of China in a nutshell

There are **two key phases** in the legal history of China.

(1) Prior to the foundation of the People's Republic of China (PRC) in 1949:
- Before 1912: The Imperial China period
- 1912 – 1949: ROC ("Republic of China")

(2) People's Republic of China (PRC) period: 1949 – now

Features of Law in Imperial China (before 1912)

Confucianism (the thought of Confucius as transcribed by his disciples and elaborated over centuries) is central to an understanding of pre-XXth century Chinese law.

Confucianism held that the principles of ethical value and moral rules in the "five relationships" – those between ruler and subject, husband and wife, father and son, elder brother and younger brother, and friend and friend – are the foundation of a well-ordered society.

Confucians stressed that everyone should cultivate his inner virtue and demonstrate filial piety, which enable him to maintain and strengthen these relationships and to properly fulfil the responsibilities that go with them.

"Confucianization of law" – principles of ethical value and moral rules –played an important role in imperial China. The tradition of Confucianism favours dispute resolutions by means other than legal techniques. Confucianism leads to a dim view of law.

Accordingly, there was little formal law (no civil law or private law) in China prior to the 20th century.

The imperial legal system unfolds overwhelmingly around criminal law. In particular, the penalties and punishments were often considered as barbaric, according to modern human rights standards.

1949 – 1978: The new Communist government decided in 1949 to abrogate all the legislation of the Kuomintang (from the 1912 overthrow of China's Qing dynasty to 1949) on the ground that it was 'reactionary' and 'western in spirit'.

At the outset, the first legal arrangements were significant influenced by Soviet Law. Nonetheless, Mao-Tse-Toung (president of the PRC 1954 -1959, president of the communist party and the military commission until his death in 1976) took the view that law was 'an obstacle to the spontaneity of social processes'.[15]

1966 – 1976: The **Cultural Revolution** was launched by Mao-Tse-Toung in 1966 and lasted until his death in 1976. Lawyers '*were hunted down by the Revolutionary Guards, tortured, deported to work in distant fields, imprisoned or killed*'. [16]

Post-1980: With the death of Mao-Tse-Toung in 1976 and the arrest of the Gang of Four,[17] the cultural revolution came to an end.

In 1978, after being purged during the cultural revolution, Deng Xiaoping became the leader of the communist party. Credited as the "Architect of Modern China", he guided the country into an era of major reform that transitioned China toward a socialist market economy. In the two decades following the cultural revolution, PRC made under the helm of Deng Xiaoping an endeavor to foster entrepreneurial initiative. Against this background, there has been a genuine interest in the value of the legal order. To increase productivity, the state regulation of the economy had to be reformed. China realised also that its economic development needed a genuine legal structure.

Post-1980 PRC's legal reforms have increasingly incorporated elements of the continental civil legal system, such as the **western concept "rule of law"** to promote **foreign investment** and to integrate **market mechanisms** within the socialist economy framework. This entailed the protection of foreign undertakings and the encouragement of private economic initiatives. Whether the regulation of the economy is being applied by administrative and judicial authorities in the same way than in the west remains to be seen.

However, principles and theories of the Soviet Law are still the fundamental pillars of the current PRC legal system which can be regarded as a combination of the continental Civil Law system and the Soviet Law system. All in all, PRC is still a socialist country in which the party and state control extensively the economy.

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[15] K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, 3rd ed. (Oxford: OUP, 1998) 292.
[16] Ibidem, 292.
[17] Led by Jiang Qing (Mao Zedong's wife), the Gang of Four was a radical Maoist faction within the Chinese Communist Party (CCP) that gained immense power during the Cultural Revolution (1966–1976). They were supported by the leader Mao Zedong to carry out the radical "Cultural Revolution," aiming to eradicate moderate leaders like Deng Xiaoping.

III. Introduction to the Constitution of China

The 1982 **Constitution** of the People's Republic of China is the fourth constitution in PRC history, superseding the 1954 constitution, the 1975 constitution, and the 1978 constitution. It was adopted by the 5th National People's Congress (National Legislative body) on December 4, 1982, with further amendments in 1988, 1993, 1999, 2004, and 2018.

The 1982 Constitution is a lengthy, hybrid document with 138 articles (original version). Large stemmed from the 1978 constitution.

The **Constitution** is the supreme law of the People's Republic of China. It establishes the fundamental principles of governance, the structure of state institutions, and the rights and duties of citizens.

IV. Structure of the Constitution of China

1. Preamble
2. Chapter I: General Principles
3. Chapter II: The Fundamental Rights and Duties of Citizens
4. Chapter III: The Structure of the State — which includes such state organs as (1) the National People's Congress (NPC), (2) the President of the People's Republic of China, (3) the State Council, (4) the Central Military Commission, (5) the Local People's Congresses at All Levels and Local People's Governments at All Levels, (6) the Autonomous Organs of Ethnic Autonomous Areas, (7) the Commissions of Supervision, and (8) the People's Courts and People's Procuratorates.
5. Chapter IV: The National Flag, the National Anthem, the National Emblem and the Capital

- Discussion: Why does the Constitution of China put the "Fundamental Rights and Duties of Citizens" Chapter before the "Structure of the State" Chapter?

V. General Remarks on the Structure of the Constitution of China

The 1982 Constitution reflects the more flexible and less ideological orientation of foreign policy since 1978. Such phrases as "proletarian internationalism" and "social imperialism" have been abrogated. (Preamble)

1. The 1982 State Constitution provided a legal basis for the broad changes in China's social and economic institutions. (Chapter I)
2. In reaction to the ten years "Cultural Revolution" (1966-1976) which lead to violence and chaos, the 1982 Constitution gives greater attention to clarifying citizens' "fundamental rights and duties" than the 1954 and 1978 constitutions did. (Chapter II)

3. The 1982 State Constitution significantly revised governmental structure. (Chapter III)

VI. What You Need to Know about the Preamble of China's Constitution

1. The political declaratory nature of the constitutional preamble undermines the applicability of the constitution.
2. Since the introduction of the preamble in the 1954 Constitution, it has become increasingly lengthy with each amendment.
3. President Xi now has the distinction of being the first Chinese leader ever to have his theories enshrined in the Constitution during his own lifetime.
4. There are some controversies surrounding the Preamble: Whether the preamble and the main text hold equal legal force; and whether the constitutional preamble contradicts the main text.

VII. General Principles Art. 1 – 3: defining a socialism/communism regime based on

Article 1 The People's Republic of China is a **socialist state governed by a people's democratic dictatorship** that is led by the working class and based on an alliance of workers and peasants.

The **socialist system** is the fundamental system of the People's Republic of China. Leadership by the **Communist Party** of China is the defining feature of socialism with Chinese characteristics. It is prohibited for any organization or individual to damage the **socialist system**.

Article 2 All power in the People's Republic of China belongs to the people.

The organs through which the people exercise state power are the **National People's Congress** and the **local people's congresses** at all levels.

The organs through which the people exercise state power are the National People's Congress and the local people's congresses at all levels.

The people shall, in accordance with the provisions of law, manage state affairs, economic and cultural undertakings, and social affairs through various channels and in various ways.

Article 3 The state institutions of the People's Republic of China shall practice the **principle of democratic centralism.**

The National People's Congress and the local people's congresses at all levels shall be created through democratic election and shall be responsible to the people and subject to their oversight.

All administrative, supervisory, adjudicatory and procuratorial organs of the state shall be created by the people's congresses and shall be responsible to them and subject to their oversight.

The division of functions and powers between the central and local state institutions shall honor the principle of giving full play to the initiative and motivation of local authorities under the unified leadership of the central authorities.

Remarks:

1. Emphasis is placed throughout the 1982 Constitution on **socialist law as a regulator of political behavior**.
2. Unlike the 1977 USSR Constitution, the text of the 1982 Constitution originally did not explicitly mention the Communist Party of China (**CPC**) except for the preamble.
3. The 2018 amendments inserted phrases such as the "Communist Party of China" and its "leadership" into the main body (Art.1) of the Constitution. Prior to the 2018 Amendment, the CPC and its leadership were only mentioned in the preamble.
4. The 2018 amendments may be seen as providing **a constitutional basis** for China's status as **a one-party state**. It renders any competitive multi-party system unconstitutional.
5. The leadership of the CPC is now constitutionally enshrined as the "defining feature of socialism with Chinese characteristics", and therefore it establishes one-party rule as an end-in-itself.

- Discussion: What is the relation between Art.4 of the Constitution and the Tibet and Uyghur Issues?

VIII. General Principle Art. 5: the Rule of Law

> **Article 5** The People's Republic of China shall practice law-based governance and build a socialist state under **the rule of law**.
> The state shall safeguard the unity and sanctity of the socialist legal system.
> **No law, administrative regulation or local regulation shall be in conflict with the Constitution**.
> All state organs and armed forces, all political parties and social organizations, and all enterprises and public institutions must abide by **the Constitution** and the law. Accountability must be enforced for all acts that violate the Constitution or laws.
> No organization or individual shall have any privilege beyond the Constitution or the law.

Remarks:

1. Article 5 originates from the 1999 Amendment to the Constitution.
2. Due to the 1999 Amendment, Article 5 introduces the western legal concept of "rule of law" (Etat de droit) into the Chinese Constitution.
3. The recognition of the Rule of Law mirrors the increasing influence of the western legal concepts and theories on the modern Chinese law since the 1980s ("reform and opening up" policy).

- Discussion: Why did China amend the Constitution in 1999 to introduce Art.5 the principle of the Rule of Law? What was the relation between Art.5 (1999 Amendment) and China's efforts to apply for the membership of WTO?

IX. General Principles Art. 6 – 8: defining the socialist economic system

Article 6 The foundation of **the socialist economic system** of the People's Republic of China is **socialist public ownership** of the means of production, that is, ownership by the **whole people and collective ownership** by the working people. The system of socialist public ownership has eradicated the system of exploitation of man by man, and practices the principle of "from each according to his ability, to each according to his work."
In the primary stage of socialism, the state shall uphold a fundamental economic system under which **public ownership is the mainstay** and **diverse forms of ownership develop together**, and shall uphold an **income distribution system** under which **distribution according to work** is the mainstay, while **multiple forms of distribution** exist alongside it.
Article 7 The state sector of the economy, that is, the sector of the socialist economy under **ownership by the whole people**, shall be **the leading force in the economy**. The state shall ensure the consolidation and development of the state sector of the economy.

Article 8 Rural collective economic organizations shall practice a two-tiered system of both unified and separate operations with household contract management as its basis. Rural economic cooperatives — producer, supply and marketing, credit and consumer cooperatives — are part of the socialist economy under collective ownership by the working people. Working people who belong to rural collective economic organizations shall have the right, within the scope prescribed by law, to farm cropland and hillsides allotted to them for their private use, engage in household side line production, and raise privately owned livestock.

The various forms of **cooperative economic activities in cities and towns**, such as those in the handicraft, industrial, building, transport, commercial and service trades, shall all be part of the socialist economy under collective ownership by the working people.
The state shall protect the lawful rights and interests of urban and rural collective economic organizations and shall encourage, guide and assist the growth of the collective sector of the economy.

Remarks:

1. The socialist economic system reckons upon two components:

(1) **Socialist public economic sectors/ownership:** the mainstay of the economic system.

A. **State sector** of the economy (ownership by the whole people): the leading force in the economy.

B. **Collective economic sectors** (ownership by the working people in the community): divided into

- rural collective economic organizations (**rural areas**): it is worth noting that members of the expanded rural collectives have the right "to farm private plots, engage in household sideline production, and raise privately owned livestock",
- cooperative economic activities in cities and towns (**urban areas**).

(2) **Non-public economic sectors/ownership:** these sectors develop alongside the socialist public economic sectors; they are considered as an important component of the socialist market economy

2. Income distribution system of the socialist economic system:

(1) distribution according to how much people work is the mainstay

(2) multiple forms of distribution exist alongside (such as distribution according to shareholdings, rental profits, investments, intellectual properties, and so on)

X. General Principles Art. 9 – 10: defining the ownership and usership of the

Article 9 All mineral resources, waters, forests, mountains, grasslands, unreclaimed land, mudflats and other natural resources are owned by the state, that is, by the whole people, except for the forests, mountains, grasslands, unreclaimed land and mudflats that are owned by collectives as prescribed by law.

The state shall ensure the rational use of natural resources and protect rare animals and plants. It is prohibited for any organization or individual to seize or damage natural resources by any means.

Article 10 Land in cities is owned by the state. **Land in rural** and suburban areas is owned by collectives except for that which belongs to the state as prescribed by law; housing sites and cropland and hillsides allotted for private use are also owned by collectives. ….

Remarks:

1. Public ownership for lands and natural resources is deemed to be the "golden constitutional principle". Natural resources are owned by the state. In some circumstances, the forests, mountains, grasslands, unreclaimed land and mudflats can be owned by "collectives" as prescribed by law.
2. Land in urban areas is owned by the state, and in rural/suburban areas is owned by "collectives".
3. It follows that individuals only have land-use rights and the usership for natural resources. (the separation of ownership and usership)

♦ Discussions: How to analyze the constitutional roots of China's current economic crisis?

XI. General Principles Art. 11 – 15: defining the socialist market economy

Article 11 Non-public economic sectors that are within the scope prescribed by law, such as individually owned and private businesses, are **an important component of the socialist market economy**. **(1999 Amendment)**
The state **shall protect** the lawful rights and interests of non-public economic sectors such as individually owned and private businesses. The state shall **encourage, support and guide** the development of non-public economic sectors and exercise oversight and regulation over non-public economic sectors in accordance with law.

Article 12 Socialist public property is **sacred and inviolable**.
The state shall protect socialist public property. It is prohibited for any organization or individual to seize or damage state or collective property by any means.

Article 13 Citizens' lawful private property is inviolable. **(2004 Amendment)**
The state shall protect the right of citizens to own and inherit private property in accordance with the provisions of law.
The **state may**, in order to meet the demands of the public interest and in accordance with the provisions of law, **expropriate or requisition citizens' private property** and furnish compensation.

Article 15 The state shall practice a **socialist market economy**. **(1993 Amendment)**
The state shall strengthen economic legislation and improve macro regulation.
The state shall, in accordance with law, prohibit disruption of the socioeconomic order by any organization or individual.

Remarks:

1. The 1993, 1999 and 2004 Amendments to the 1982 Constitution provide an extensive legal framework for liberalizing economic policies, setting up the legal basis for a socialist market economy.
2. It allows the collective economic sector not owned by the state a broader role and provides for limited private economic activity.
3. The primary emphasis is given to expanding the national economy, which is to be accomplished by balancing centralized economic planning with supplementary regulation by the market.

♦ Discussions:
- Based on Art. 12 and Art.13, compare the regime's attitudes towards public property and private property.
- Based on China's constitution, whether and to what extent can China's economic system be considered as a market economy?

XII. General Principles Art. 18: regulating foreign economic organizations and activities

> **Article 18** The People's Republic of China shall permit foreign enterprises, other economic organizations and individuals, to invest in China and to enter into various forms of economic cooperation with Chinese enterprises or other economic organizations in accordance with the provisions of law of the People's Republic of China.
> All foreign enterprises, other foreign economic organizations and Chinese-foreign joint ventures in the territory of China shall abide by the law of the People's Republic of China. Their lawful rights and interests shall be protected by the law of the People's Republic of China.

Remarks:

1. One key difference between the 1978 and 1982 Constitutions is the latter's **approach to external investment** in order to modernize the economy.
2. Whereas the 1978 Constitution stressed "self-reliance" in modernizing the economy, the 1982 Constitution provides the constitutional basis for the considerable body of laws passed by the NPC in subsequent years permitting and encouraging **extensive foreign participation** in all aspects of the economy.

♦ Discussions: based on the Constitution, compare Chinese government' s attitude towards foreign economic activities in China and foreign political activities in China.

CHAPTER IV - INDIAN LAW

1st Part. Indian Constitution in a nutshell
2nd Part. Indian Federal structure
3rd Part. Indian Personal Laws

1st Part. Indian Constitution in a nutshell

1. History

Adopted on 26 November 1949, the Indian Constitution was one of the earliest post-colonial Constitutions. The Government of India Act 1935, which was the constitution and governing document of British India until its independence, provided the basis for the constitution of India.

Originally it had 395 articles, 22 parts, and 8 schedules; it is the longest written constitution. It consists of approximately **448 to 470 articles** organized into **25 parts** and **12 schedules**.

The Constitution of India is the supreme legal authority which binds the legislative, executive, and judicial branches of government; they are bound by it.

It empowers Parliament and the Legislatures of States and Union Territories to enact statutes.

The Constitution establishes India as a 'Sovereign Socialist Secular Democratic Republic' with a Parliamentary form of Government.

It grants all citizens Fundamental Rights and empowers the independent judiciary to invalidate legislations or government actions which violate the Constitution.

2. Immutability of the basic constitutional structure

The Constitution of India is remarkable for its durability, although heavily amended over time. The Indian constitution is the world's most frequently-amended national governing document.

Any amendment to the Constitution requires a two-thirds majority in the Rajya Sabha. The Indian Constitution does not contain a provision to limit the powers of the parliament to amend the constitution.

However, the Supreme Court of India established in the landmark *Kesavananda Bharati v. State of Kerala* (1973) case that Parliament cannot amend the "basic structure" of the Constitution. Therefore, an amendment cannot destroy what it seeks to modify; it cannot modify the constitution's basic structure or framework, which are immutable. Such an amendment will be declared invalid.

The *Kesavananda Bharati v. State of Kerala* decision laid down the constitution's basic structure:

1. Supremacy of the constitution
2. Republican, democratic form of government
3. Its secular nature
4. Separation of power
5. Its federal character

In *Golaknath v. State of Punjab* decision, the Supreme Court ruled that Punjab could not restrict any fundamental rights protected by the basic structure doctrine.

Accordingly, the Parliament or a State legislature can only amend the constitution to the limit of its basic structure.

3. **Governance**

India is governed by a **bicameral Parliament** (Lok Sabha and Rajya Sabha) with the executive directly accountable to the parliament.

The executive is composed of a **President** (nominal head) and **Prime Minister** (real executive) which heads the council of ministers.

The Constitution bestows all the national government's executive power upon the president. The president is chosen by an electoral college composed of the members of both the national and state legislatures. this *de jure* power is not exercised by the president whose role is mostly ceremonial.

De facto, the prime minister is the head of government, holding the primary executive authority and acting as the main link between the President and the Cabinet (in Belgium the federal government). He/She leads the majority party or a coalition comprising a majority. He/She must have the support of a majority of the members of the lower House of Parliament. The Lok Sabha can pass a motion of no confidence, removing the prime minister from office.

4. Doctrine of separation of powers

The rule of law entails the separation of powers between the three organs of the ‘Government’.

However, the doctrine of separation of powers has not been accepted in India in its strict sense. Each branch is, in some form or the other, dependent on the other organ which checks and balances it.

There is express mention that the **executive power** of the Union and of a State is vested by the constitution in the President and the Governor (Articles 53(1) and 154(1)). However, there is no corresponding provision vesting the legislative and judicial powers.

The President's function and powers are enumerated in the Constitution itself. The prime minister, acting via the president, can unilaterally exercise the legislative power, adopting ordinances that have the force of law. Governments have been abusing the ordinance system to enact laws that could not pass both Houses of Parliament.

Parliament is competent to make any law provided that it does not breach the Constitution. The prime minister is responsible before the parliament.

The judiciary is independent and there can be no interference with its judicial functions either by the Executive or by the Legislature.

5. Independence of the judiciary

The judiciary protects the fundamental rights enshrined in the constitution from infringement by any state body, and balances the conflicting exercise of power between the central government (Union) and a state.

The doctrine has highlighted that an independent judiciary is a basic feature of the Constitution. Indeed, the Indian Constitution provides for a single integrated system of courts to administer both Union and State laws.

At the apex of the entire judicial system is the Supreme Court of India. This Supreme Court is the guardian of the Constitution: the court reviews and may invalidate unconstitutional laws. The Supreme Court comprises the Chief Justice of India and not more than 33 other Judges appointed by the President of India. The decisions of the Supreme Court are binding on all Courts (High courts) within the territory of India.

Article 13(2) '*Laws made after the adoption of the constitution must be compatible with it, or they will be deemed void ab initio'*.

Article 13(3) '*In such situations, the Supreme Court (or a high court) determines if a law is in conformity with the constitution. If such an interpretation is not possible because of inconsistency (and where separation is possible), the provision which is inconsistent with the constitution is considered void'*.

Besides, the **high courts of India** are the highest courts of appellate jurisdiction[18] in each of the 25 states. Judges in a high court are appointed by the president of India.

Cases heard at or appealed to the High Courts can be further appealed to the Supreme Court. Under the administration of each High Court are the District Courts. Each State is divided into judicial districts presided over by a District Judge, which is the principal civil court of original jurisdiction.

[18] The work of most high courts primarily consists of adjudicating on appeals from lower courts.

Village/Panchayat Courts also function in some States adjudicate civil and criminal disputes of petty and local nature.

2nd Part. Indian Federal structure

The Government of India Act, 1935 envisaged the federal scheme. After independence, the framers of the Indian Constitution aimed at establishing a federal system taking into account the social diversities and the vast size of the country. In India, federalism is indeed vital because different people from different background and culture live together.[19]

However, the words 'federation' and 'federal' do not appear in any article of the Constitution. The framers declared that India was a "Union of States" (**Article 1)**. Use of word 'Union of Sates' and not the 'Federal of Federation' connotes a unique distinctive character and nature of the Indian Constitution.[20] The Constitution featured thus a **federal structure with unitary features** or a "federation with a strong centralizing tendency".

As of April 2026, India consists of **28 states** and **8 union territories**. These 36 entities form the federal structure of the country, with states having their own elected governments, while union territories are primarily administered by the central government. Each State and Union territory has its own government. At the Union level, the States are represented in the *Rajya Sabha* or Council of States. The *Rajya Sabha* is coequal with the lower house or *Lok Sabha*, and its consent is required for a bill to become a law. Analogous to the president and prime minister, each has a Governor and a chief minister.

Two-fold distribution of legislative powers with respect to:

- territory,
- and subject matter.

1. Distribution of legislative powers with respect to territorial jurisdiction

Parliament can legislate for the whole or any part of India, including extraterritorial laws. State Legislatures can only legislate for their respective states.

- **Theory of Territorial Nexus:**

The Legislature of a State may make laws for the whole or any part of the State. Accordingly, State Laws are void if they have extra-territorial operation i.e. it is applied to subjects or objects located outside the territory of the state. However, there is one exception of this general rule. A State law of extra-territorial application will be valid if there is sufficient nexus between the

[19] M. Asad Mali, 'Changing dimensions of federalism in India: an appraisal', *ILI Law Review,* Vol. II, 2019, p. 85.
[20] Ibidem, p. 91.

object and the State. It is done by the application of *doctrine of territorial nexus,* as the following case illustrates it.

State of Bombay v. R.M.D.C.s
In this case, the Bombay State levied a tax on lotteries and prize competitions. The tax applied to a newspaper printed and published in Bangalore but had wide circulation in Bombay. The Court held that there existed a sufficient territorial nexus to enable the Bombay State to tax the newspaper. If there is sufficient nexus between the taxpayer and the State seeking to tax him, the tax statute would be upheld. For the application of the doctrine, there must be:

- on the one hand, a connection between the State and the subject matter of law which must be real and not illusory and,
- on the other hand, the liability sought to be imposed must be pertinent to that connection.

2. Distribution of legislative powers with respect to subject matter

The Constitution of India establishes a clear framework for the distribution of legislative powers between the Union and the States, reinforcing the Federal System of India.

Article 246 of the Constitution addresses the division of legislative powers between the Union and the 28 States and establishes a hierarchical structure among three lists:

- a Union List,
- a State List,
- and a Concurrent List.

These lists set out the various subjects (in Belgium, the special laws refer to "*compétences*" or "*bevoegdheden*") on which Parliament and State Legislatures are empowered to make laws.

Seventh Schedule of the Constitution
Clause (1): Parliament has exclusive authority to legislate on subjects listed in the Union List.
Clause (2): Both Parliament and State Legislatures can legislate on matters in the Concurrent List.
Clause (3): State Legislatures have exclusive powers over subjects in the State List.
Clause (4): Parliament holds the right to legislate on State List matters for Union Territories.

2.1. Union List

The Union List contains 97 items (originally) of national importance of exclusive jurisdiction of the Union government, where the states are prohibited from legislating.

(Article 246) List I—Union List 1.

1. Defence of India
2. Naval, military and air forces; any other armed forces of the Union.

2A. Deployment of any armed force of the Union …
3. Delimitation of cantonment areas, local self-government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas.
4. Naval, military and air force works.
5. Arms, firearms, ammunition and explosives.
6. Atomic energy and mineral resources necessary for its production.
7. Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.
8. Central Bureau of Intelligence and Investigation.
9. Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India; persons subjected to such detention.
10. Foreign affairs; all matters which bring the Union into relation with any foreign country.
11. Diplomatic, consular and trade representation.
12. United Nations Organisation.
13. Participation in international conferences, associations and other bodies and implementing of decisions made thereat.
14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.
15. War and peace.
16. Foreign jurisdiction.
17. Citizenship, naturalisation and aliens.
18. Extradition.
19. Admission into, and emigration and expulsion from, India; passports and visas.
20. Pilgrimages to places outside India
21. Piracies and crimes committed on the high seas or in the air; ….
22. Railways.
((other transport issues))
35. Public debt of the Union.
36. Currency, coinage and legal tender; foreign exchange.
37. Foreign loans.
38. Reserve Bank of India.
39. Post Office Savings Bank
40. Lotteries ...
41. Trade and commerce with foreign countries; import and export across customs frontiers; definition of customs frontiers.
42. Inter-State trade and commerce.
45. Banking.
46. Bills of exchange, ...
47. Insurance.
48. Stock exchanges and futures markets.
49. Patents…
((other economic issues))

The **Indian Parliament** is competent to make laws on matters enumerated in this **Union List**.

Only Parliament has power to make laws on matters not included in the State List or the Concurrent List.

2.2. State List

The **State List** enumerates 66 items (originally) of local interest.

State Legislatures are competent to make laws on matters enumerated in the State List. Powers can only be permanently removed from the State List via a constitutional amendment approved by a majority of the States.

List II—State List
1. Public order ….
2. Police (including railway and village police)
4. Prisons, reformatories, Borstal institutions ….
5. Local government
6. Public health and sanitation; hospitals and dispensaries.
7. Pilgrimages, other than pilgrimages to places outside India.
8. Intoxicating liquors,
14. Agriculture
17. Water
18. Land
21. Fisheries
40. Salaries and allowances of Ministers for the State.
41. State public services
43. Public debt of the State
46. Taxes on agricultural income.
47. Duties in respect of succession to agricultural land.
48. Estate duty in respect of agricultural land.
49. Taxes on lands and buildings

2.3. Concurrent List

Both the Union and the States have the power to legislate on the 47 matters enumerated in the Concurrent List.

This list covers, among others, education, marriage and divorce, transfer of property other than agricultural land, education, contracts, bankruptcy and insolvency, trustees and trusts, civil procedure, contempt of court, adulteration of foodstuffs, drugs and poisons, economic and social planning, trade unions, labor welfare, electricity, newspapers, books and printing press, stamp duties etc.

List III—Concurrent List

1. Criminal law, …
2. Criminal procedure,

(…)

3. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession

9. Bankruptcy and insolvency.
10. Trust and Trustees.
11A. Administration of Justice; constitution and organisation of all courts, except the Supreme Court and the High Courts.]
17. Prevention of cruelty to animals.
17A. Forests.
17B. Protection of wild animals and birds
25. Education, ….

In case of conflict between a Union law and a State law on a subject enumerated in this list, the Union law prevails.

2.4. Residuary Powers

Pursuant to Article 248, matters not enumerated in any list fall under Parliament's jurisdiction.

Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent list or the State list.

2.5. Jurisprudential Principles

Independent judiciary is one the essential feature of federalism. In the *Automobile Transport v. State of Rajasthan*,[21] the Supreme Court stressed that Indian Constitution is a federal constitution that must be observed.

'The evolution of a federal structure or a quasi-federal structure necessarily involved, in the context of the conditions then prevailing, a distribution of powers and a basic part of our constitution relates to that distribution with the three legislative lists in the Seventh Schedule. The constitution itself says by Art. 1 that India is a Union of States and in interpreting the constitution one must keep in view the essential structure of a federal or quasi-federal constitution, namely, that the units of the Union have also certain powers as has the Union itself. There is a risk that a legislature will legislate on a subject that touches upon subjects enumerated in the three lists'.

2.5.1. Broad interpretation of each entry

Entry in the various lists should be interpreted broadly.

[21] AIR 1962 SC 1406.

In *Calcutta Gas Ltd. V. state of Bengal,* the Supreme Court held that *the "widest possible" and 'most liberal" interpretation should be given to the language of each entry. A general word used in an entry…..must be construed to the extent to all ancillary or subsidiary matters which can fairly and reasonably be held to be included in it.* [16]

2.5.2. "Doctrine of pith and substance"

The courts determine if a legislature has encroached upon the field assigned to another entity. The court will apply the doctrine to determine whether the legislature concerned was competent to pass that law.
In case of encroachment, the law should be held to intra vires.

To ascertain the true character of the legislation the court pays heed to

- the enactment as a whole,
- to its object,
- and to the scope and effect of its provisions.

In *State of Bombay v. F.N. Balsara (*AIR 1951 SC 318)*,* the Bombay, Prohibition Act prohibited sale and possession of liquors in the State of Bombay. This Act was challenged before the Supreme Court on the ground that it incidentally encroached upon import and export of liquors across custom frontier- a central subject (List I). The applicants contended that the prohibition, purchase, use, possession and sale of liquor will affect its import in Bombay. The Supreme Court held that Act valid because the 'pith and substance' of the Prohibition Act fell under the State List (List II) and not under the Union List (List I) even though the Act incidentally encroached upon the Union Powers of Legislation. The Act was in resonance with the subject-matter assigned to the States. Incidental trespass does not amount to an *ultra vires* encroachment.

2.5.3. Colorable Legislation

A legislature passes a law with respect to a matter outside its legislative competence by giving to the legislation a "different color" so as to bring it within its competence.

In *K.C.G. Narayan Dev v. State of Orissa,* the Supreme Court explained the meaning and scope of the doctrine of colorable legislation in the following terms:

"If the Constitution distributes the legislative power amongst different Legislative bodies, which have to act within their respective spheres marked out by specific legislative Entries, or if there are limitations on the legislative authority in the shape of fundamental rights, question arises as to whether the Legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers.

Such transgression may be ***patent, manifest or direct****, but it may also be* ***disguised, covert or indirect****, or and it is to this latter class of cases that the expression colourable legislation has been applied in judicial pronouncements.*

The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise. In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject matter is substance which is beyond the whole doctrine of colourable legislation is based upon ***the maxim that you cannot do indirectly what you cannot do directly****. In these cases, the Court will look in the true nature and character of the legislation and for that its object, purpose or design to make law on a subject is relevant and not its motive. If the legislature has power to make law, motive in making the law is irrelevant."*

2.5.4. Repugnancy Between a Union Law and a State Law

This test revolves around conflicts between Union and State laws in the Concurrent List. Article 254(1) only applies where there is inconsistency between a Union Law and a State Law relating to a subject mentioned in the Concurrent List.

Article 254(1) reads as follows: *'if any provision of law made by the legislature of the state is* ***repugnant*** *to any provision of a law made by parliament which is competent to enact or to any provision of the existing law with respect to one of the matters enumerated in the Concurrent List, then the law made by the parliament, whether passed before or after the law made by the legislature of such stage or, as the case may be,*

- *the existing law shall prevail*
- *and the law made by the legislature of the state shall, to the extent of the repugnancy be void.'*

In *Deep Chand v. State of Uttar Pradesh*, the Supreme Court laid down the following tests for determining the repugnancy between the Union Law and a State Law.
"*Repugnancy between two statutes may thus be ascertained on the basis of the following three principles:*

1. *Whether there is direct conflict between the two provisions;*
2. *Whether Parliament intended to lay down an exhaustive code in respect of the subject-matter replacing the Act of the State Legislature and*
3. *Whether the law made by Parliament and the law made by the State Legislature occupy the same field…*"

To sum up, the **three tests of the Repugnancy Test** are:

(a) **Direct collision**: There is a conflict between the Union statute and the State statute. It is impossible to obey one law without violating the other. "One says "do" and the other says "do not"".

(b) **Intention of Parliament:** If Union Parliament intended to create an exhaustive code on the subject, any State law is considered repugnant.

(c) **Same subject-matter:** Both the State and the Union regulate the same entry in the Concurrent List.

Coexistence test: If both Acts can operate without conflicting, there is no repugnancy.

Under Article 254(2), a State law prevails if it received Presidential assent, unless a subsequent central law overrides it.

On May 4th 2021, the Supreme Court in *Forum for Peoples Collective Efforts v State of West Bengal* ruled on the constitutional validity of the West Bengal Housing Industry Regulation Act, 2017 (WB-HIRA). The petitioner argued that the contested WB-HIRA heavily overlapped with, and often simply included identical provisions from, the parallel Central legislation on Real Estate, 2016 (RERA). As both Acts dealt with subjects from the Concurrent List, the petitioner claimed that the State enactment (WB-HIRA) was constitutionally impermissible.

The Supreme Court applied the rules of interpretation based on Article 254 in order to determine 'repugnancy' between State and Union legislations.

The Court applied the 'three tests of repugnancy' A statute is deemed 'repugnant' when it covers the same subject area as another statute but contains contradictory provisions.

Given that West Bengal's WB-HIRA was virtually identical to the Central RERA, the entire WB-HIRA was unconstitutional.

3rd Part. Constitution and Personal laws

Dr. Sayed Qudrat Hashimy and Nicolas de Sadeleer

Introduction

In India, personal law does not differ from State to State. Each community is governed by one single system of law. Though its members may be settled, domiciled or residing in any part of the country, they will be governed by the same law. Hindus, the majority community, as well as the Muslims, the biggest minority community, are subject to their separate family laws.

Hindus and Muslims have all along claimed that their law is of divine origin. No such claim is made by other communities. The Modern Hindu law, by judicial interpretation and legislative modification, has undergone significant change. Accordingly, any claim of divinity can hardly be sustained today. Muslim law, as administered in modern India, has also undergone changes, although it has been subject to fewer legislative modifications, albeit not insignificant.

Smaller minorities, like Christians, Parsis and Jews, whose number, in the extent of the population of India, is insignificant, have their own separate family laws.

1. BRIEF HISTORY OF COLONIAL LAW MAKING IN INDIA

One must distinguish Hindu law from Sharia law.

Hindu law. The classical Hindu, called *Dharmasastra* in Sanskrit, is the doctrine of proper behaviour. Before British colonisation, classical Hindu law rested neither on the formal laws laid down by secular rulers nor on court decisions.

Hindu law changed a great deal during the British colonization (British East India Company (1757–1857), and the British Raj (1858–1947)).[22] Property and obligations traditional rules were replaced by the Common Law. However, the British empire did not bring any modification to family law and the law of succession. Accordingly, inheritance, marriage, caste issues were determined in accordance with the rules of Hindu law.

A few British statutes abolished provisions of Hindu which were found particularly repellent:

- the prohibition of a widow's remarriage,[23]
- the rule that a Hindu forfeited all his property and rights of succession in case of apostasy,[24]
- the murder of female infants,[25]
- the practice of sati or widow immolation practiced amongst some classes of Indian Hindus.

The abolition of sati is called the founding moment in the history of women in modern India.[26]

The British colonial administration also played an important role in reforming certain social practices. One notable reform was the abolition of the Sati system, a practice in which a widow immolated herself on her husband's funeral pyre.[27] Widows were burned voluntarily, by coercion, on their husbands' funeral pyres.

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[22] K. Zweigert and H. Kötz, *An Introduction to comparative law*, 3td. Ed, Oxford, OUP, 1998, p. 313-319.

[23] Pursuant to Hindu Widows Remarriage Act (Act XV of 1856). '*No …marriage shall be illegitimate by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage,…*'

[24] The Hindu Disposition of Property Act, 1916.

[25] Female Infanticide Prevention Act, 1870 (Act VIII of 1870). This act was passed under pressure of Christian missionaries and social reformers seeking an end to female infanticides.

[26] L. Mani, "Contentious Traditions: The Debate on SATI in Colonial India" in Culture and Critique, Fall 1987, at p.1.

[27] BBC News, 'What is the Sati practice and why is it controversial in India?' BBC News (19 April 2023) https://www.bbc.com/news/world-asia-india-65311042 accessed 15 March 2026.

On December 4, 1829, this traditional practice was abolished by Lord William Bentinck, Governor General of India (Regulation XVII, A. D. 1829 of the Bengal Code). [28]

This prohibition gave rise to significant opposition from traditional Hindu sectors. A first petition was submitted to the company by Hindus of Bihar, Bengal, Orissa:

- '*Under the sanction of immemorial usage as well as precept, Hindoo widows perform, of their own accord and pleasure, and for the benefit of their Husbands' souls and for their own, the sacrifice of self - immolation called Suttee which is not merely a sacred duty but a high privilege to her who sincerely believes in the doctrines of her religion and we humbly submit that any interference with a persuasion of so high and self - annihilating nature is not only an unjust and intolerant dictation into matters of conscience, but is likely wholly to fail in procuring the end proposed*'.

In 1832, 800 orthodox Hindus lodged a case before the Privy Council in London. The petitioners claimed that the practice was nowhere enjoined in Hindu law as an imperative duty and that, indeed, a life of austerity was more particularly enjoined to the widow. They argued:

"*…on what ground can strangers to our faith, even though rulers, assume the right to determine that the option which our Holy Religion… expressly gives [to perform sati], shall exist no longer, and what right can they have to choose for us?...*
Of what value to us are the opinions, of what authority are the glosses and expositions of strangers to our Faith and feelings?
Our belief and our practice is that of countless generations of Forefathers and even if our Customs or our practice were not in precise agreement with the letter of our sacred writers (which however we do not admit) still we humbly urge that we ought not to be questioned or dictated to in such matters by any Human power, and especially by Rulers of a religion, Faith, and system of moral and manners…, so essentially and entirely different from our own, that it is impossible for them to understand our feelings or even comprehend our Sacred Books."[29]

The Company asserted, no incompatibility between a regard for the religious opinions of Hindus and "*the suppression of practices repugnant to the first principles of civil society, and… natural reason.*" The crux of the appeal, therefore, was about the rights and limits of the state in legislating in matters of religious belief and practice.

The Privy Council dismissed their appeal. It upheld the ban on sati on the ground that it was justified by a universal notion of justice and humanity.

All in all, the British courts case law played a major role in modifying Hindu law. A specific case law gradually emerged between 1772 and 1947 (when India became a dominion). As a matter of course, British judges faced difficulties in applying the Hindu rules given that few of them have been translated from Sanskrit into English. The British courts relied on English

[28] Bengal Sati Regulation 1829 (Regulation XVII of 1829).
[29] National Archives, Privy Council Registers: PC2/213, fol. 409.

translations of several Hindu texts and judicial precedents, creating a distinct "case law" called '**Anglo-Hindu law**'.

'Anglo-Hindu law' blended traditional Hindu scriptural law (*Dharmashastras*) and custom with British legal frameworks. The British judges exercised free discretion, often with reference to 'justice, equity, and good conscience'. They applied general principles of law. Accordingly, they reckoned upon prior decisions as binding authorities (precedents) in accordance with the principle of '*Stare Decisis'*. The jurisprudential 'Anglo-Hindu law' approach was very far from the traditional Hindu law which did not regard judicial decisions as binding at all.

Over time, between 1828-1855, a series of British acts of Parliament were passed in Westminster to revise the Anglo-Hindu and Anglo-Muslim laws, such as those relating to the right to religious conversion, widow remarriage, and right to create wills for inheritance. These changes triggered discontent, call for jihad and religious war, and became partly responsible for the 1857 Indian revolt against the British rule.

In 1858, the governing powers of the East India Company were transferred to the Crown and were to be exercised on behalf of the Crown. A universal criminal code for India was adopted in 1864, a procedural and commercial code by 1882, which overruled pre-existing Anglo-Hindu and Anglo-Muslim laws. However, the personal laws for Muslims remained sharia-based, while the Anglo-Hindu law applied, independently of any text, to matters such as marriage, divorce, inheritance.

2. Relevant constitutional provisions

Indian Constitution proclaims India as a secular state, prohibiting it to officially favor or adopt any religion. The word "Secular" was formally inserted into the Preamble by the 42nd Constitutional Amendment (1976), although secular principles were already embedded in the Constitution from 1950. For e.g. the Preamble states that India is a: "*Sovereign, Socialist, Secular, Democratic and Republic*."

However, Indian secularism is different from strict separation models (like France or the U.S.).

Indian secularism means the state respects and treats all religions equally, rather than keeping religion completely separate from the state. By way of illustration, the Indian government may recognize and give holidays for festivals of different religions, such as Diwali (Hindu), Eid (Muslim), Christmas (Christian), and Guru Nanak Jayanti (Sikh). This shows equal respect for multiple religions, not preference for just one.

In *Kesavananda Bharati v. State of Kerala* (1973), the Supreme Court of India has held that secularism is part of the basic structure of the Constitution, meaning it cannot be removed even

by constitutional amendment.[30] This is settled case law. In *Kesavananda Bharati v. State of Kerala* (1973), the Supreme Court of India established the Basic Structure Doctrine, under which secularism has been recognized as an essential and unamendable feature of the Constitution.

India has no official state religion and guarantees freedom of religion under the Constitution. However, the state (the state means both Union and State) can intervene in religious practices if they conflict with social reform, equality, or public welfare. By way of illustration, the Indian government banned the practice of "triple talaq" (instant divorce in some Muslim communities) through the Muslim Women (Protection of Rights on Marriage) Act, 2019, arguing that it violated women's rights and equality.)

Several provisions of the Constitution of India support secularism: Articles 14, 15, 25, 26, 27, and 28, which ensure equality before the law, prohibit discrimination, and protect the freedom to profess, practice, and propagate religion.[31]

Provision of the Constitution	**Explanation and Case Law Examples**
Article 14 – Equality before law **It guarantees equality before the law**.[32]	Article 14 guarantees that all individuals are equal before the law, irrespective of religion. The Supreme Court emphasized that equality is a basic feature of the Constitution.[33] The state (both Union and States) cannot give legal advantages or disadvantages to people based on their religion. All citizens must be treated equally before the law. For example, equality before the law means that government jobs cannot be restricted to followers of a particular religion, public services such as schools and hospitals must be accessible to individuals of all religions, and If a person is a victim of a crime, the police and courts must apply the same law and protection regardless of the person's religion.
Article 15 – Prohibition of discrimination ***The State shall not discriminate against any citizen on grounds***	Article 15 prohibits the state from discriminating on grounds of religion, race, caste, sex, or place of birth. For Instance, the Supreme Court upheld the principle of equality while discussing "reservations" in

[30] The basic structure doctrine was established in Kesavananda Bharati, while secularism was later clearly affirmed as part of the basic structure in cases such as *S.R. Bommai v. Union of India* (1994).
[31] Constitution of India 1950 arts 14, 15, 25–28.
[32] Constitution of India, art 14.
[33] *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

only of religion, race, caste, sex, place of birth or any of them.[34]	employment.[35] The term "reservations" means affirmative action policies in India. These are special measures (such as quotas) in education, government jobs, or political representation for historically disadvantaged groups, especially Scheduled Castes (SC), Scheduled Tribes (ST), and Other Backward Classes (OBC). Article 15 means that the state cannot treat people differently or deny benefits simply because of their religion. By way of illustration, the government cannot refuse admission to a public university, deny a government scholarship, or exclude someone from public welfare programs just because they are Muslim, Hindu, Christian, Sikh, or any other religion. This ensures equal access to state benefits regardless of religious identity.
Article 25 – Freedom of religion ***All persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion, subject to public order, morality and health.***[36]	Article 25 guarantees freedom of conscience and the right to freely profess, practice, and propagate religion, subject to public order, morality, and health. For e.g. the Supreme Court reaffirmed the constitutional limits on religious freedom to maintain secularism.[37] Article 25 allows individuals to freely follow their religious creed, and spread their religion, but the state may restrict practices that threaten public order, health, or morality. For example, the Supreme Court has allowed the regulation or prohibition of certain religious practices when they conflict with constitutional values or social welfare.
Article 26 – Freedom to manage religious affairs ***Every religious denomination has the right to manage its own affairs in matters of religion, establish and maintain institutions for religious and charitable purposes, and manage its property, subject to***	Article 26 provides every religious denomination the right to manage its own religious affairs, including establishing institutions and administering property. For instance, the Supreme Court emphasized the right to manage religious practices in schools.[39] However, many schools, colleges, universities are private. Article 26 primarily protects religious denominations in managing their own affairs, including running educational institutions they establish.

[34] Constitution of India 1950, art 15.
[35] *Indra Sawhney v Union of India* (1992) 3 SCC 217.
[36] Constitution of India 1950, art 25.
[37] *S R Bommai v Union of India* (1994) 3 SCC 1.
[39] *Bijoe Emmanuel v State of Kerala* (1986) 3 SCC 615.

public order, morality, and health.[38]	However, it applies only to institutions run by a religious denomination, not purely private or commercial schools. Example: A church-run (St. Joseph's University in Bangalore or St. Philomena's in Mysore) school or madrasa (Muslim religious center) can exercise rights under Article 26 to manage its affairs, but a private secular school owned by an individual or company is not covered under this article.
Article 27 – No tax for promotion of any religion ***No person shall be compelled to pay any tax, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.***[40]	Article 27 prohibits the state (or the Union and the States?)[41] from levying taxes for the promotion or maintenance of any religion. For intance, the Supreme Court discussed state neutrality in religious matters.[42]
Article 28 – Freedom from religious instruction in state-funded institutions ***No religious instruction shall be provided in any educational institution wholly maintained out of State funds. Nothing in this article shall prevent religious instruction in an institution which is administered by the State but has been established under any endowment or trust requiring religious instruction.***[43]	Protects individuals in state-funded educational institutions from being compelled to receive religious instruction. For e.g. the Supreme Court held that students could not be forced to sing religious songs in schools.[44]

[38] Constitution of India 1950, art 26.
[40] Constitution of India 1950, art 27.
[41] In the Constitution, the term "State" includes both the Union (central government) and the States/Union Territories, unless it explicitly refers only to India. For example, Delhi is a Union Territory, not a full state, but constitutional provisions still apply to it as "State."
[42] *M Ismail Faruqui v Union of India* (1994) 6 SCC 360.
[43] Constitution of India 1950, art 28.
[44] Bijoe Emmanuel v State of Kerala (1986) 3 SCC 615.

Both the Supreme Court and High Courts are Constitutional Courts and have the power to interpret the Constitution. However, the Supreme Court is the highest authority, and its decisions are binding on all courts, while High Courts' interpretations are binding only within their respective states or jurisdictions.

These constitutional provisions, as interpreted by the Supreme Court, ensure that religion in India is a matter of personal conscience, while the state can intervene to prevent practices that violate public order, morality, or fundamental rights, or any issue of public interest including environment and health, maintaining the essence of Indian secularism.

We will see below that, in certain circumstances, religious law is likely to discriminate against women. Against this background, one must bear in mind the Constitution guarantees to all Indian women equality (Article 14), no discrimination by the State (Article 15(1)), equality of opportunity (Article 16), and equal pay for equal work (Article 39(d)) and Article 42). Furthermore, the Union legislature has passed laws in order to improve the conditions of women, such as the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

3. Personal Law system in India

- Personal laws primarily govern marriage, divorce, adoption, maintenance, succession, inheritance, and guardianship. Personal law refers to both Hindu Law and Muslim Law. In academic curricula, Hindu Law is referred to as 'Family Law I', while Muslim Law is called 'Family Law II'.
- Despite being a secular state, India allows different religious communities to follow their own personal laws in family matters: Hindu law for Hindus, Muslim law for Muslims, and other personal laws for Christians, Parsis, etc.
- This scheme was developed during the British colonial rule, when the rulers decided to apply different personal laws.[45]

In India, criminal law and most civil laws (mortgages, contracts, property transfer, …) are uniform, meaning they apply equally to all citizens regardless of religion. We provide a few illustrations.

- **Criminal Law:** The Indian Penal Code (IPC) applies to everyone Hindu, Muslim, Christian, Sikh, or others so a theft case follows the same procedure and punishment for all.
- **Civil Law:** Laws on contracts, mortgages, and property transfer (e.g., Transfer of Property Act, Contract Act) are applicable to all citizens, unlike personal laws which vary by religion.

[45] This system developed historically during British colonial rule, when the British decided to apply different personal laws.

- This highlights that while India respects religious personal laws, the core criminal and civil framework is uniform.

One must bear in mind that "*marriage and divorce; infants and minors; adoption; wills, intestacy and succession*" are listed in the Concurrent List. As a result, both the Union and the 28 States can regulate these personal matters. However, if a state law conflicts with a Union law, the Union law prevails. For instance, if the Union passes a law standardizing adoption procedures across India, a state law on adoption that conflicts with the Union law will be overridden, and the Union law will apply.

3.1. Application of Hindu Law in India

One key question is who is Hindu? Under Hindu law, a person is considered Hindu if they are not a Muslim, Christian, Parsi, or Jew (Hindu Minority and Guardianship Act, 1956; Hindu Marriage Act, 1955). This definition includes Buddhists, Jains, and Sikhs, who are treated as Hindus for most personal law purposes.[46]

In British India, Hindu law was discriminating to some extent women. After independence, the new Indian institutions decided to modernize the legal system and to improve women's situation in India. Against this background, the Union Parliament adopted several statutes known as the Hindu Code Bills:

1) Hindu Marriage Act, 1955
2) Hindu Succession Act, 1956
3) Hindu Minority and Guardianship Act, 1956
4) Hindu Adoptions and Maintenance Act, 1956

These Acts were enacted by the Indian Parliament to reform and codify Hindu personal law.[47] They address several key issues.

(a) Marriage and divorce

According to *Dharmasastra,* marriage is a sacrament which forges an unbreakable community between the spouses' families. For Hindus marriage was chiefly an arrangement between the families involved. It was commonly negotiated by the parents of the spouses, as it is still often today. Accordingly, divorce was impermissible. Furthermore, Hindu law also provided a flurry of obstacles to marriage. For instance, marriage between members of different castes was prohibited.

The 1955 Hindu marriage Act was very progressive because it curtailed several prohibitions and the abrogated the ban on marriage between members of different castes.

[46] Hindu Marriage Act 1955 (India) s 2; Hindu Minority and Guardianship Act 1956 (India) s 2.
[47] Constitution of India 1950, art 249. ; Article 249 allows Parliament to legislate on national interest.

Previously, divorce was largely governed by customary practices, but Section 13 of the Hindu Marriage Act, 1955, introduced legal grounds and procedures for divorce, making it a formally regulated legal process.[48] Section 13 stands as the cornerstone of divorce law for Hindus in India as it attempts to balance the sanctity of marriage with the practical reality that some marriages cannot be sustained. It provides both fault-based and no-fault grounds for divorce. Accordingly, the main forms of divorce are mutual consent divorce, where both spouses agree to terminate their marriage, and fault-based divorce, where one spouse seeks divorce on specific grounds such as cruelty, adultery, desertion, or mental disorder.[49] This provision represents thus a significant departure from traditional Hindu law, which historically did not recognize divorce except in very limited circumstances.

Before the 1955 reform, practices such as polygamy were permitted under certain Hindu customs. However, in contrast to Sharia law, polygamy was never much practiced among the Hindus. Under the Hindu Marriage Act 1955, the new legal framework established monogamy as mandatory.[50]

(b) Inheritance

Prior to the (Amendment) Act 2005), daughters were not entitled to inherit ancestral property under traditional Hindu law. Customary law was enforced which favored the exclusion of daughters from inheritance in favour of sons. The former was deprived of any share of their father's property. The Hindu Succession (Amendment) Act 2005 fostered greater equality between the heirs. It granted daughters equal rights as sons, making them "*coparceners*" in ancestral property inherited from their father or other ancestors. [51] For example, if a father inherits land from his father and has two sons and a daughter, all three now have equal rights to the property.[52]

- **Before 2005:** The father inherits ancestral land from his father. He has two sons and one daughter. Only the sons are "coparceners" and inherit the property; the daughter has no automatic share.
- **After 2005 (Hindu Succession (Amendment) Act 2005):** The 2005 amendment grants daughters equal birthright in ancestral property, ensuring gender equality. Since 2005, the daughter is also a coparcener. The two sons and one daughter share the property equally, each with full rights to claim, use, or sell their share independently.

In addition to the above social reform the Hindu women get right to *Stridhana*. Section 14 specifically recognizes a woman's right to *Stridhana* and her control over it. *Stridhana* in Hindu law is the property that a woman owns and controls completely it includes gifts, dowry, property

[48] ibid ss 13–13B.
[49] Hindu Marriage Act 1955 (India) ss 13, 13B.
[50] Hindu Marriage Act 1955.
[51] Under Hindu law, when a daughter acquires rights in ancestral property, she is called a "coparcener". Coparcenary: A member of a Hindu joint family who has birthright to ancestral property, meaning she can demand her share, sell it, or use it like any other coparcener.
[52] Hindu Succession (Amendment) Act 2005 (India) s 6.

received from relatives, inheritance, or any earnings she acquires, over which she has full rights to keep, use,s ell, or dispose of independently, without needing her husband's or family's permission, and is recognized under the Hindu Succession Act 1956.[53]

(c) Adoption

Adoption is now legally recognized and regulated under statutory law through the Hindu Adoptions and Maintenance Act 1956, which provides for legal procedures and rights related to adoption.[54]

3.2. Application of Muslim Law in India

The presence of Islam is not only significant in the Middle East, the Arabian Peninsula as well as in large parts of Africa. It is also present in Asia. In 1947, the Muslims succeeded in establishing Pakistan as a state of their own. In India, the most populous country, about 14.2% to 15% of the inhabitants are Muslims. The vast majority of Indian Muslims belong to the Hannafi School, although there are some Shafis on the West Coast. The non-Chinese population of Malaysia and Indonesia is predominantly Muslim.

Muslim law in India is also referred to as Mohammedan Law. Muslim personal law in India is primarily based on the principles of Islamic Sharia (that are explained in the following chapter), although its application is recognized through statutory legislation.

In British India, it was decided Sharia law should be applied in disputes between Muslims. However, Sharia law was subject to major changes. In 1832, the British colonial government abolished accepting religious *fatwa* as a source of law. Whenever the British judges found the rules of the Sharia to be '*deficient, obscure, obsolete or inconsistent*' with '*justice equity and good conscience*' they had recourse to the principles and concepts of the Common Law with which they were more familiar'. [55]

Later on, in the course of the XIXth and XXth c. British legislation concerning Muslim personal law were fewer in number compared to laws related to Hindu law. Several British acts impinged upon the ways in which Indian Muslims were abiding to Sharia law: the usurious loans act, 1918, the religious toleration act, freedom of religion act, 1850, the Guardian and wards act, 1890, etc.

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[53] Hindu Succession Act 1956 (India) s 14.
[54] Hindu Adoptions and Maintenance Act 1956.
[55] K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, 3rd ed. (Oxford: OUP, 1998) 310.

We shall discuss two major Acts enacted in the 30s under the British rule that apply to Indian Muslims.

The Muslim Personal (*Shariat*) Application Act, 1937

The Muslim Personal Law (Shariat) Application Act 1937,[56] adopted during British rule, provides that Muslims in India are governed by Islamic law in personal matters such as marriage, divorce, maintenance, inheritance, and waqf (charitable endowments). At the time the law was enacted, it applied to the territories that now make up India, Pakistan, and Bangladesh, but after partition, it continued to apply in India only to Muslims residing there.

The Act applies to all Muslims regardless of the school he belongs. The Islamic law of India was the Hanafi law since the Muslim rulers by and large belonged to the Hanafi school.[57]In India, a Muslim is anyone who follows Islam by faith or identifies as a Muslim, and who is therefore governed by Muslim personal law in matters such as marriage, divorce, inheritance, and maintenance under the Muslim Personal Law (Shariat) Application Act 1937.[58]

Article 1 of the Muslim Personal Law (*Shariat*) Application Act 1937 determines the scope of application of Personal Law to Muslims: « *Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal properly inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)* ».

We shall address marriage, divorce and inheritance.

(a) Marriage (*Nikah*)

Marriage is treated as a civil contract between the parties and includes the provision of *mehr* (dower), which is an amount payable by the husband to the wife as part of the marriage agreement.

By way of illustration, in the context of Muslim personal law in India, the concept of dowry is generally referred to as “mahr”, which is a sum or property the groom agrees to give the bride at the time of marriage for example, ₹2,00,000. This mahr is the bride’s exclusive property, which

[56] Muslim Personal Law (Shariat) Application Act 1937.
[57] See below.
[58] Muslim Personal Law (Shariat) Application Act 1937 (India) s 2.

she can use, keep, or demand independently, and even after marriage, the husband cannot unilaterally take it, unlike gifts voluntarily given by her family.

(b) *Divorce*: *The Dissolution of Muslim Marriages Act, 1939*

In 1939 the Dissolution of Muslim Marriages Act was enacted, as stated in the Preamble, `to consolidate and clarify the Muslim Law regarding suits for dissolution of marriage of women married under Muslim law' and `to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie'.

As discussed below in the chapter on Sharia law, under Muslim law, the husband has extensive powers of pronouncing divorce (*talaq*) extra judicially. A Muslim woman, on the other hand, has no such corresponding right unless her husband has delegated the right to her or has consented, in lieu of some consideration to a dissolution sought by her (*khula*), or they have mutually agreed to end the marriage (*mubaraat*). The lack of rights of Muslim women regarding dissolution of an unhappy marriage became a concern in British India because Muslim women opted to convert to another religion.

Under Section 2 of the 1939 Act, the wife may obtain a **judicial decree for dissolution of marriage from the Court** on any one of the nine grounds mentioned therein. Several grounds are mentioned in the Act based upon which a woman may go to Court to obtain divorce and even a single ground is sufficient for a married woman to obtain a dissolution of her marriage:

- the husband's failure to provide maintenance for two years [Sec.2 (ii)],
- his imprisonment for a period of seven years [Sec.2 (iii)],
- his impotency [Sec.2 (v)],
- his insanity for two years,
- or if he is suffering from leprosy or virulent venereal disease [Sec.2 (vi)]
- and his cruelty [Sec.2 (viii)]. Cruelty need not only be physical; mental cruelty can be a ground for divorce.

Muslim law recognizes several forms of divorce, including talaq, khula, and mubarat. However, triple talaq (instant talaq) was declared unconstitutional by the Supreme Court of India in *Shayara Bano v Union of India* (2017).[59] Subsequently, it was criminalized through the Muslim Women (Protection of Rights on Marriage) Act 2019.[60] In the case, Shayara Bano, a Muslim woman, was divorced instantly by her husband through triple talaq (he said “talaq” three times). The Supreme Court held that instant triple talaq is unconstitutional, null and void, and cannot be used to dissolve a marriage.

(c) Inheritance

Inheritance under Muslim law is based on Quranic principles, which prescribe fixed shares for heirs. For example, female heirs such as daughters or sisters are entitled to specified shares, though generally smaller than those of male heirs.

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[59] *Shayara Bano v Union of India* (2017) 9 SCC 1 (SC).
[60] Muslim Women (Protection of Rights on Marriage) Act 2019.

Therefore, Unlike Hindu law, which has been extensively codified through parliamentary legislation, Muslim personal law in India remains largely uncodified and is primarily derived from religious jurisprudence and traditional Islamic legal principles.

3.3. Uniform Civil Code (UCC)

One of the major constitutional debates in India concerns the Uniform Civil Code (UCC). The concept of UCC is provided under Article 44 of the Constitution of India 1950,[61] that reads as follows: *"the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."*.

In other words, the UCC aimed to replace the existing religion-based personal laws with a single common set of civil laws applicable to all citizens in matters relating to family law, such as marriage, divorce, inheritance, adoption, and maintenance.

After independence in 1950, the Indian government laid before the Union parliament the draft of a civil code which aimed at unifying the whole family law and the law of succession. The draft was strongly opposed by conservatives for whom any codification of Hindu law was anathema.

Arguments in favour of the UCC include:

a) Promoting equality before the law
b) Advancing gender justice
c) Strengthening national integration

Arguments against the UCC include:

a) Concerns regarding protection of religious freedom
b) Potential impact on minority rights
c) Preservation of cultural and religious diversity

Instead of a civil code, the Indian lawmaker adopted separate acts ruling the most important parts of Hindu law. At present, India continues to follow a plural personal law system, where different religious communities are governed by their respective personal laws, although various reforms have been introduced over time through legislation and judicial decisions.

3.4. Judicial Approach

Indian courts often play an important role in balancing religious freedom, fundamental rights, and social reform when interpreting personal laws in India. Through judicial review, the courts ensure that personal laws are applied in a manner consistent with the constitutional principles of equality and justice.

[61] Constitution of India 1950, art 44.

1- *Mohd Ahmed Khan v Shah Bano Begum* (1985)[62]

Facts of the Case

Shah Bano, a 62-year-old Muslim woman, was divorced by her husband, Mohd Ahmed Khan, through the pronouncement of triple talaq after more than forty years of marriage. After the divorce, she filed a petition under Section 125 of the Code of Criminal Procedure 1973 (CrPC) seeking maintenance on the ground that she was unable to maintain herself. Her husband argued that under Muslim personal law, his obligation to provide maintenance extended only during the *iddat* period (approximately three months after divorce). He claimed that after paying the *mehr* (dower) and providing maintenance during the *iddat* period, he had no further financial responsibility. The case eventually reached the Supreme Court of India.

Judgment

In 1985, the Supreme Court held in favor of Shah Bano, ruling that a divorced Muslim woman is entitled to maintenance (Spousal Support). Section 125 of the Criminal Procedure Code (CrPC) is a secular law that requires a person to provide maintenance (financial support) to certain dependents including a wife, minor children, or parents if they are unable to maintain themselves. The Court clarified that Section 125 CrPC (Criminal Procedure Code, 1973) is a secular provision designed to prevent destitution and applies to all citizens irrespective of religion.

Section 125 of CrPC. Orders for maintenance of wives, children and parents.

'If any person having sufficient means neglects or refuses to maintain
(a) his wife, unable to maintain herself,
(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
(c) his father or mother, unable to maintain themselves,
the Magistrate of the first class may, upon proof of such neglect or refusal, order such person to pay monthly maintenance to the dependent at a rate the magistrate considers reasonable, having regard to the income of the person and the needs of the dependent.
If the person ordered to pay maintenance refuses or willfully neglects to pay, the magistrate may direct the attachment of his property or, if necessary, imprison him for up to one month, or until payment is made, whichever is earlier.'

2- *Shayara Bano v Union of India* (2017)[63]

Facts of the Case

Shayara Bano, a Muslim woman, was married to Rizwan Ahmed in 2002. In 2015, her husband divorced her by pronouncing instant triple talaq (*talaq-e-biddat*) through a written communication. This form of divorce allowed a Muslim husband to unilaterally and instantly terminate the marriage by pronouncing "talaq" three times. Shayara Bano challenged the constitutional validity of triple talaq, as well as related practices such as polygamy and nikah

[62] Mohd Ahmed Khan v Shah Bano Begum (1985) 2 SCC 556 (SC).
[63] *Shayara Bano v Union of India* (2017) 9 SCC 1 (SC).

halala, before the Supreme Court of India. She argued that the practice of instant triple talaq violated the fundamental rights guaranteed under the Constitution, particularly Articles 14, 15, and 21, which protect equality, non-discrimination, and personal liberty.

Judgment

In 2017, a five-judge constitutional bench of the Supreme Court, by a 3–2 majority, declared the practice of instant triple talaq (*talaq-e-biddat*) unconstitutional and invalid. The Court held that the practice was arbitrary and violated the fundamental right to equality under Article 14 of the Constitution of India 1950. As a result, the practice of instant triple talaq was set aside and rendered legally ineffective. The Supreme Court called into question the other talaq.

4. Conclusion

India's constitutional system combines secular governance with religious legal pluralism. While the state (India) remains neutral toward religion, the Constitution allows communities to follow their own personal laws in family matters.

In India, because matters like marriage, divorce, succession, and adoption are in the Concurrent List, states can make laws on these issues whenever the Union has not legislated, but if a Union law exists, it prevails over any conflicting State law. Changes made through statutes in the religious laws of the communities in India continue to affect familial relations and personal laws.

In India, Hindu law has been largely codified and reformed through statutes such as the Hindu Marriage Act 1955 and the Hindu Succession Act 1956. These legislative enactments reformed and modernized the Hindu Law applicable in India. In contrast, Muslim law remains primarily based on religious jurisprudence, allowing practices like polygamy. It follows that Indian Muslim men are allowed to marry up to four wives simultaneously, as permitted under Islamic law. Similarly, in the case of Bangladeshi Muslim law, only a handful of laws have been enacted after 1947.

The continuing debate over the Uniform Civil Code reflects the tension between religious freedom and legal uniformity in India's secular framework.

CHAPTER V - ISLAMIC LAW

WARNING: In this chapter we analyse Sharia law from a theoretical perspective. As a matter of course, this short summary does not do entirely justice to the diversity, the complexity and the richness of this legal system. Of importance is to note that only but a few countries apply traditional Sharia law. In most Muslim countries, Sharia law blends with a mixture of Western legal devices. As a result, these legal regimes are much more complex than the traditional vision explained below. In addition, it is fair to say that the author of these notes does want to disregard Muslim religion or hurt the feelings of the faithful. He merely wants to depict Sharia law from a theoretical point of view. His analysis is positivistic and does not entail value judgments. This chapter contains no image that could be considered as offensive.

I. INTRODUCTION

Regarding the traditional religious family (Mattei scheme), Islamic Law is a case in point on the account that it gives practical expression to the religious faith of the Muslim. In other words, Islamic law is one of the facets of Islamic religion itself.

In fact, one needs a minimum general knowledge of Islam to understand Muslim law, or Islamic law. In effect, the meaning of the word 'Islam' is "submission or surrender to Allah's (God's) will." Therefore, Muslims must first and foremost obey and submit to Allah's will. Mohammad the Prophet was called by God to translate verses (Ayat) from the Angel Gabriel to form the most important book in Islam, the Qur'an.

Given that there are over 1.2 billion Muslims today worldwide, over 20% of the world's population, the importance of Islamic law cannot be belittled. Our Western societies are influenced by Muslim faith. By way of illustration, the Belgian population counts 638.000 Muslims whereas the French population counts 4.700.000 Muslims.

II. SHARIA: STATE OF QUESTION

Literary 'the way to follow', ***Sharia*** is the Arabic word for Islamic law. Therefore, the term Sharia refers to the body of Islamic law. This law constitutes *'a divinely ordained path of*

conduct that guides the Muslim towards the fulfilment of his religious convictions' ([64]). *Sharia* may stand as a **symbol of ideological unity of all Muslim communities** ([65]).

Given that Sharia specifies how the Muslim should conduct himself in accordance with his religion, Sharia governs both public and private lives of those living within an Islamic state. As a result, Sharia governs many aspects of day-to-day life, politics, economics, banking, business law, contract law, and social issues (prayer, fasting alms, pilgrimages, etc.).

Islamic legal theory recognizes that the divine revelation did not start out in a comprehensive fashion. It took several centuries of work by Islamic jurists to extract the full content of the recognized sources of law.

As a result, Islamic law does not conform to the notion of law as found, for example, in common law or civil law systems. Rather than a uniform and unequivocal formulation of rules it is a **scholarly discourse** consisting of the opinions of religious scholars, who argue, on the basis of what the law should be. This discourse is based on:

- the text of the Qu'ran,
- the Prophetic *ḥadiths*,
- and the consensus among the first generations of Muslim scholars,

According to Islamic orthodox views, these efforts are directed not in formulating a new law but to the discovery of a law, which already exists.

III. SOURCES OF ISLAMIC LAW

Shar'iah law has several sources from which it is possible to draw its guiding principles. It consists of:

- the ***Qu'ran*** which is the sacred book of Islam ;
- the prophet's ***Sunna*** ;
- classical *fiqh* derived from consensus of legal scholars (***ijma***);
- classical *fiqh* derived from analogy (***qiyas***).

[64] K. ZWEIGERT & H. KOTZ, *oc,* 54.
[65] Ibid., 55.

Given that this broad definition of Sharia lumps together the revealed with the unrevealed, the sources are rather of a different nature and are not of equal importance.

- ***Qu'ran***: a fundamental revealed source
- ***Sunna***: a fundamental revealed source
- ***ijma***: a legal consensus
- ***qiyas***: a juristic reasoning by analogy.

Qu'ran as well as *Sunna* are nothing more than historical bases. It follows that Islamic law is mostly based upon *Fiqh*.

FIRST SOURCE : *QU'RAN*

The *Qu'ran* is the holy book of Islam. It is the collection of the utterances of the prophet Muhammad, which are based on divine revelation.

The *Qu'ran* is unquestionably the primary expression of Muslim law. The *Qu'ran* contains:

- 114 *sourates* (chapters)
- 6219 *ayats* (verses) among which 550 have somewhat a legal content (70 related to personal statute, 13 related to procedural law, 13 to criminal law, 10 to constitutional law, 25 to international law).

Therefore, the *Qu'ran* is far from being a legislative document on the account that it contains a great number of moral precepts of general nature (compassion, retribution, fairness in commercial dealings). There is neither legal logic nor thematic approach. *« Il est inutile de rechercher un groupement par matières, procédant d'un ordre logique ou historique. Le classement des sourates a été opéré suivant leur longueur, commençant par une sourate d'ouverture, qui, elle est très brève ».* [66]

[66] François–Paul Blanc, *Le droit musulman*, 2ème éd., Paris, Dalloz, 2007, p. 10-11.

Furthermore, the *Qu'ran* prescribes that a Muslim must act in accordance with specific commandments: in his business dealings he must act in good faith, he must not bribe judges, he must abstain from usury and gambling. However, it does not specify what are the legal consequence of breaching these commandments.

For the convenience of representation, we have chosen but a few examples. For instance, the *Qur'an* admonishes those who oppress others and transgress beyond the bounds of what is right and just: *"The blame is only against those who oppress men with wrongdoing and insolently transgress beyond bounds through the land, defying right and justice. For such there will be a chastisement grievous (in the Hereafter)"* (42:42). As a matter of law, such a precept of proper ethical behaviour (take pity on the weak and helpless) does not entail any legal obligations.

Only a few statements in the Koran amount to legal rules capable of direct application. By way of illustration, the taking of life is allowed only by way of justice (i.e. the death penalty for murder), but even then, forgiveness is better. *"Nor take life - which Allah has made sacred - except for just cause..."* (17:33).

Another case in point is the Sharia prohibition specific interest or fees (known as *riba*, or usury) attached to a loan or a debt. Several verses of Sourate 2 expressly prohibit any increment on a loan or debt. Riba is considered amongst the seven heinous sins.

275. Those who devour usury will not stand…
276. God will deprive usury of all blessing, but will give increase for deeds of charity
278. O ye who believe! Fear God, and give up … usury.

By the same token, verse 310 of Sourate 30 reads as follows: '*You who have believed, do not consume usury, doubled and multiplied, but fear Allah that you may be successful'.*

To sum up, given that here is no real attempt to deal with any one legal topic comprehensively, the *Qu'ran* is not akin to a code of law. This is well explained by Coulson.

Legal nature of Shar'iah

For the first community of Muslims, founded in Medina under the leadership of the Prophet Muhammad in A.D. 622, Islam meant obedience to the will of Allah transmitted to His community through his Messenger in a series of revelations which occurred piecemeal, through Muhammad's lifetime and which, duly collected and written down, form the Quran.

But the Quran is not essentially a legislative document. It contains a great number of oral precepts of a general nature relating to such matters as just retribution, fairness in commercial dealings, and compassion for the weaker members of society, but these norms are not generally translated into any legal structure of rights and duties. Thus, wine drinking and usury are simply declared to be 'forbidden'. Polygamy is permitted, a husband being allowed to have up to a maximum of four wives concurrently, provided he treats his wives with impartiality; but nothing is said as to the precise legal significance of this proviso or as to any remedies a wife may have in the event of its infringement. In short, the Quran is not a code of law (in the sense that it does not attempt to be comprehensive) but the basic formulation of the Islamic religious ethic.

*Certainly the Quran does contain any regulations of a more strictly legal tone. These range over a wide variety of subjects and constituted far-reaching reforms of the customary tribal law of Arabia. New criminal offences, with attendant penalties were introduced-such as the penalty of flogging for fornication and for an unproved accusation of illicit sexual relations. The **legal status of women** was greatly improved in a variety of respects, inter alia by the rule that the dower or payment made by the husband in consideration of marriage, belonged to the wife herself and not, …., to her father or other guardian who had given her in marriage. And yet most of these rules have the appearance of ad hoc solutions for particular problems. There is no real attempt in the Quran to deal with any one legal topic or relationship comprehensively. Its regulations set out to modify the existing customary law in certain particulars rather than to supplant that law with an entirely new system.*

The 'general nature of Qur'anic law is aptly illustrated by the provisions relating to the institution of divorce by unilateral repudiation, or talaq. Under the patriarchal customary law of Arabia the right or a husband to terminate his marriage at will by simply repudiating his wife was undisputed. The Quran makes no attempt to deprive husbands of this power, but simply urges them not to abuse it, speaking of 'releasing wives with consideration' and 'making a fair provision' for wives who are so repudiated. An existing legal institution is subjected to new moral standards directed solely, so far as the Quran itself is concerned, at the individual conscience.'[67]

[67] J. Coulson, "Islamic law", in *An Introduction to Legal Systems*, p. 54-65.

SECOND SOURCE : SUNNAH (or the Muslim Way of Life)

The *Sunnah* is the second source of Islamic law after the *Qu'ran*, and is incorporated in many books of *hadith*. The *Sunnah* gives more detailed information than the *Qur'an.* It is there to support and to interpret the fundamental text. On the account that it is a revealed source, it can be placed on equal footing with the *Qu'ran*.

Sunnah means "way" or "custom", and therefore, the *sunnah* of the prophet means "the way of the prophet", or what is commonly known as the *Prophet's traditions*. It includes traditions about what the Prophet has allowed or prohibited during the 23 years of his ministry. Accordingly, the Muslim community has to behave consistently with what the Prophet

- said (sayings)
- did (deeds)
- permitted (allowances)

Sunnah must be made distinct from both:

- the *Qu'ran,* which is revelation*,*
- *fiqh*, which are opinions of the classical jurists.

Traditions regarding the life of Muhammad and the early history of Islam were passed down orally for more than a hundred years after the death of Muhammad in 632. Two centuries later, the scholars of the Abbasid period were faced with a huge corpus of miscellaneous traditions, some of them contradicting each other. Many of these traditions supported differing views on a variety of controversial matters. As a result, scholars had to decide which hadith were to be trusted as authentic narrations and which had been invented for various political or theological purposes.

For this purpose, the Muslim scholars used a number of techniques which Muslims now call the *« science of hadith »* (about 3000). The ***hadiths*** are collection of traditions relating to the sayings and deeds of the Islamic prophet Muhammad. The commonest technique consisted of a careful examination of the *isnad*, or chain of transmission. Each hadith was accompanied by an isnad: A heard it from B who heard it from C who heard it from a companion of Muhammad. The overwhelming majority of Muslims consider ***hadiths*** to be essential supplements to and clarifications of the Qur'an, Islam's holy book.

Many contemporary Muslims – in particular Sunni Muslims - regard the collections of **Bukhari** (البخاري صحيح)[68] and **Muslim** (مسلم صحيح)[69] who classified the hadiths in the ninth century a.d. as particularly reliable, and tend to accept them as sure and certain, although they were compiled two centuries after the death of the Prophet. It is said that al-Bukhari collected over 300,000 hadith and included only 2,602 traditions in his *Sahih*. Hadith collections are, as a consequence, regarded as important tools for determining the *Sunnah*, or Muslim way of life, by all traditional schools of jurisprudence. That being said, Sunni and Shi'a Islam rely upon different sets of hadith collections.

THIRD AND FOURTH SOURCES : THE ROLE OF FIQH

Neither the *Qu'ran* nor the *Sunnah* could answer all questions. In situations when Muslims have not been able to find a specific legal ruling in the *Qur'an* or *Sunnah*, the consensus of the community is sought, or at least the consensus of the legal scholars within the community. It follows that the primary source of Islamic law – the *Qu'ran,* - can be subject to the interpretive power of a later source.[70]

Fiqh is the process of interpreting positive law within a systematic body of rules and principles.

By definition, *Fiqh* is the Islamic jurisprudence. It means to extract religious rulings on practical matters from the main sources of Islam (i.e. Qur'an and *Sunnah* as well as other sources). *Fiqh* literally means to "*comprehend and understand*" (Qur'an 3:7 and 4:162). The science of *Usul al Fiqh* engenders the ability to have knowledge of *Shari'ah* rulings through study. The real beginning of Islamic law, as law, took place one hundred years after the death of the Prophet when non-formal and administrative practices began to be formally expressed by jurists in a doctrinal form.

Fiqh covers not only civil and criminal law but also food, hygiene and prayer.

This **jurisprudence (*Fiqh*)** is made up of the **rulings (*Fatwah*)** of **Muslim Islamic jurists**

[68] Sahih al-Bukhari is a collection of hadith compiled by Imam Muhammad al-Bukhari (d. 256 AH/870 AD) (rahimahullah). This collection is recognized by the overwhelming majority of the Muslim world to be the most authentic collection of reports of the *Sunnah* of the Prophet Muhammad.

[69] Sahih Muslim is a collection of hadith compiled by Imam Muslim ibn al-Hajjaj al-Naysaburi (rahimahullah). Along with Sahih al-Bukhari, this collection is considered to be one of the most authentic collections of the Sunnah of the Prophet.

[70] H.P. Glenn, *Legal Traditions of the World* (Oxford, OUP, 2004) 189.

(*Ulama*) with the aim of directing the lives of the Muslims.

When a Muslim has a question that needs to be answered from an Islamic point of view, s/he shall ask an Islamic scholar to answer her/his question ; the answer is known as a " *fatwā*". In other words, a *fatwā* is an Islamic religious ruling, a scholarly opinion on a matter of Islamic law.

Fatwā are deemed to be binding precedent by those Muslims who have bound themselves to the scholar who handed them down. The people who pronounce these rulings (an issuer of *fatwā* is known as *Mufti*) are supposed to be knowledgeable, and base their rulings in knowledge and wisdom. They need to supply the evidence from Islamic sources for their opinions. *Fatwās* generally set out the scholar's reasoning in response to a particular case. Given that Islam is very non-hierarchical in structure, it is not uncommon for scholars to come to different conclusions regarding the same issue. As a result, the binding effect of *fatwā* is likely to vary. Since there is no hierarchical priesthood or anything of the sort in Sunni Islam, *fatwā* is non-binding for Sunnis, whereas in Shia Islam it could bind an individual depending on his relation to the scholar.

By way of illustration, a person who is going to be on a 12 hour flight may not be able to perform his/her prayers on time. So s/he might ask a Muslim scholar his opinion on the matter. The scholar might advise him/her to delay his/her prayer until the airplane lands. His opinion is likely to be supported with evidence extracted from the *Qu'ran or the Sunnah*.

The **Ulama's** are Muslim scholars who are specialized in Islamic law (mufti, qadi, faqih). When the *Ulama*'s reach a consensus on an issue, it is interpreted as ***Ijma***. Sunni Muslims regard *ijma* as the third fundamental source of *Sharia* law, after the divine revelation of the *Qu'ran,* the prophetic practice or *Sunnah*.[71] *Ijma* means the consensus of the *ummah*. In other words, this is an agreement among the qualified scholars, or followers of Islam. It is a genuine product of schools of law. In reality, *Ijma* refers only to the consensus of traditional Islamic scholars (Arabic *ulema*) on particular points of Islamic law.

Given that the Prophet Muhammad once said that *« My community will never agree upon an error »,* such a consensus is deemed infallible. This hadith is often cited as support for the validity of *ijma*.

Attention should be drawn to the fact that *Ijma* has nothing to do with the custom of western

[71] For Shia, the status of ijmā is ambiguous.

legal systems. In order that a rule of law be admitted by *ijma*, it is not necessary that the mass of the faithful support it. The unanimity required is that of competent persons, those whose special role is to discover and reveal the law (the legal scholars of Islam which are the heirs of the prophet).

Various proponents of liberal movements within Islam criticize the traditional view that ijma' is only a consensus among traditional Islamic scholars (Arabic *ulema*). They claim that truly democratic consensus should involve the entire community rather than a small and conservative clerical class.

The issues with which the scholars of al *Usul* are primarily concerned include the following:

- Logic and its predications
- Linguistics
- Commands and Prohibitions
- Deeds (in particular, those of the Prophet)
- Consensus *al Ijma'*
- Narrations relating to the Sunnan
- Analogical reasoning *al Qiyas*
- Following a specific school of legal thought *Taqlid*

To conclude with, if the *Qur'an* consists of some 500 verses, the work of the Islamic jurists now fills libraries.[72]

FOURTH SOURCE : QIYAS

The main sources could not provide for all the possible situations of everyday life.

[72] R. Arnaldez, *La loi musulmane* (1993) 85.

Given these limitations, the *Shar'iah* judge can use the legal precedent to decide new cases and its application to a specific problem. In other words, the judge can use a broad legal construct to resolve a very specific issue. The *Qiyas* are not explicitly found in the *Qur'an, Sunna*, or given in the *Ijma.*

Sunni Islam uses *qiyas* as the fourth source, whereas *Shi'a* Islam uses '*aql*' (intellect).

In Sunni Islamic jurisprudence, ***qiyas*** is the process of analogical reasoning from a known injunction to a new injunction.

According to this method, the ruling of the *Quran* and *sunnah* may be extended to a new problem provided that the precedent and the new problem share the same operative or effective cause (***illah).***

However, a hard core of traditionalists still adamantly reject the validity of these interpretative processes.

Example of *qiyas*

(i) For example, a computer crime or theft of a computer is found neither in the Qur'an nor in the Sunna. Nonetheless, the act of theft as a generic term is prohibited. As a result, the judge must rely on logic and reason to create new case law or Qiyas.

(ii) The rule as regards the minimum dower payable by the husband on marriage was unclear.

In the Maliki school, an attempt has been made to base the rule of the minimum dower on *qiyas*. A rough parallel has been drawn between amputation of the hand, as the penalty prescribed by the Koran for theft, and the loss of a woman's virginity as the physical result of marriage. Since the Prophet had ruled that the penalty of amputation was not applicable unless the stolen goods reached a minimum value of three dirhams, the husband in respect of marriage should pay the same sum.

(iii) For example, qiyas is applied to the injunction against drinking wine to create an injunction against cocaine use.

1. Identification of a clear, known thing or action that might bear a resemblance to the modern situation, such as the wine drinking.

2. Identification of the ruling on the known thing. Wine drinking is harram, prohibited.

3. Identification of the reason behind the known ruling (‘illah’). For example, wine drinking is haram because it intoxicates. And intoxication is bad because it removes Muslims from God’s mindfulness.

The reason behind the known ruling is applied to the unknown thing. For instance, cocaine use intoxicates the user, removing the user from mindfulness of God. It is therefore prohibited.

THE USE OF STRATAGEMS OR HIYAL

The Sharia is highly formalist: it requires that the letter of the law rather than its spirit be respected. Many formal rules can therefore be circumvented provided that there are not directly violated.

Through the use of contract considerable changes Signific have been made to the rather vague rules laid down by Islamic law. Therefore, Muslim law evolved gradually through private contract. Below are two examples that clearly illustrate the flexibility of Islamic law.

Marriages

Polygamy and husband’s repudiation of his wife are permitted. However, Muslim countries allow husbands and wives to stipulate at marriage that the wife will be allowed to exercise her husband’s prerogative, and as a result, will be at liberty to repudiate herself or that she will be able to do so if the husband does not remain monogamous. Other contracts could award the wife substantial damages if she is unjustly repudiated by her husband.

Loans bearing interests – device of a double sale

Loans at interest are rendered impermissible by the prohibition of usury (*Riba*) in the *Qu’ran*. This prohibition prevented the creation of a favourable environment for trade. As a result, the device of the double sale has been used with a view to circumventing that prohibition. In that case, the borrower is selling some object to the lender, which the lender immediately sells back to the borrower at a higher price. The increased price represents in fact the agreed rate

of interest payable by a future specified date. Hanafi and Shafii courts generally accept the validity of such *hiyal.*

It is also possible to hold that the ban on interest loans applies only to physical persons. Therefore, banks are exempted from this obligation.

IV. SUNNIS AND SHIITES: THE GREAT DIVISION

Within the Muslim community different schools are admitted, each of which maintains a particular interpretation of Muslim law. One has to distinguish between the Sunnis and the Shiites.

The Shiites

Shiites have their own version of Sharia Law. Among the various sects the numerically strongest group is that of the Shiites (mostly in Iraq and in Iran). Muhammad died in 632. He did not organised his succession. Shiites differ from the Sunnites in their **concept of constitutional law (caliphate).** In their view, the leadership has a divine character. The Prophet had appointed **Ali ibn Abi Talin** (r. 656–661), his cousin and son in law (Fatima's husband), as the sole interpreter of his legacy, in both political and spiritual terms. It follows that the caliphate can be hold exclusively by a member of the Prophet's family. In other words, the successor of Mohammad must be one of the descendants of Ali, who were twelve in number. Accordingly, they consider themselves as legitimists.

To understand the schism, one must look at a major historical event. The Muslim world quickly became divided after the death of the Prophet given that he did not regulate his succession. The **battle of Kerbala,** 680 AD has a central place in Shia history and tradition. It took place between a small group of supporters and relatives of Muhamad's grandson, Husayn Ibn Ali and a larger military detachment from the forces of Yazid, the Ummayad Calife. Huseyn was killed and beheaded in the battle, along with most of his family and companions. In contrast to the Sunnis, **Shiites** believe that the fourth caliph, Husayn Ibn Ali, had previously been nominated by Muhammad as his heir. They are taking the view that the rulers who followed Muhammad as illegitimate. Instead, the rightful successors of Muhammad are believed to be Ali and eleven divinely-appointed Imams of his lineage. Given that the twelfth Iman did not have any heir (931 AD), Shiites are facing the absence of a legitimate religious figure.

The imams (*ayatollahs*) play in the Shiite world an almost exclusive role as source of law and provider of opinions (*fatwahs*) (see the role of Ayatollah Kohmeini in Iran).

	Sunnis	**Shia (or Shi'ah)**
Origins	Theology developed especially in 10th c.	Ali is Muhammad's true and legitimate successor. Thus the killing of Ali's son Husayn in 680 AD (battle of Kerbala) is a major event
Did Muhammad designate a successor?	No. The Calife is a human leader designated by the Muslim community.	Yes. The Calife must be seen as the infallible manifestation of God and the perfect interpreter of the Qur'an
Current adherents	940 million (90% of the Muslim population)	120 million (10% of the Muslim population)
Primary locations	The majority of Muslim countries	Iran (90-95% of the population), Irak (63-65%), Yemen (roughly 35-45%), Azerbaidjan (65-85%), Bahrein (55-75%), Lebanon (see the conflict with Hezbollah)
Religious authority other than the Qu'ran	Ijma' (consensus) of the Muslim community	Infallible Imams
Sources of Muslim law	Sunnis consider all Hadith and Sunnah narrated by any of twelve thousand companions to be equally valid.	Shi'as give preference to *sunnah* and hadith credited to the Prophet's family and close associates.
Hiearchy of the clergy	None	There is a hierarchy to the Shi'a clergy and political and religious authority is vested in the most learned who emerge as spiritual leaders (Ayatollahs, (Persian: آیت‌الله, "Sign of God").

Sunni Islam

On the other hand, the **Sunni** branch takes the view that the first four caliphs - Mohammed's successors - rightfully took his place as the leaders of Muslims. They recognize the heirs of the four caliphs as legitimate religious leaders. As the calife has to be elected, it can also be destituted. The caliphs ruled continuously in the Arab world until the break-up of the Ottoman Empire at the end of the First World War.

The four schools of Sunni Islam are each named by students of the classical jurist or *ulama* who taught them. The *Sunni schools* are:

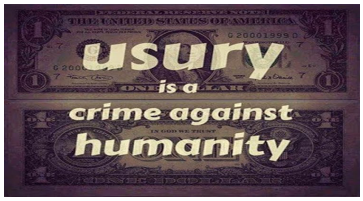
- **Shafi'i** has spread Far-East (Indonesia and Malaysia)
- **Hanafi** has the greatest number of adherents. It has spread North and East (Turkey, the Balkans, Central Asia, Indian subcontinent, Egypt, China)
- **Maliki** prevails throughout the Western part of the muslim world (North Africa, West Africa and several of the Arab Gulf states)
- **Hanbali** (Arabia). That school endorses a literal interpretation of the Qu'ran. It has long held sway in Saudi Arabia.

These schools share the same fundamental structure of doctrine and the same basic legal institutions. Indeed, these four schools share most of their legal sources, but differ on the particular *hadiths* they accept as authentically given by Muhammad and the weight they give to analogy or reason (*qiyas*) in deciding difficulties. As a result, they differ both in terms of substantive and in terms of sources of law.[73]

For instance, the grounds of divorce vary from school to school. They are also important differences in the extent of the prohibition of *riba* (usury). The differences result from the

[73] Glenn, above, 195.

different *hadiths* adopted by each school and the particular forms of *ijma*, which they had developed.



Nevertheless, each law school recognized the legitimacy of diverging interpretations. According to the Prophet, '*difference of opinion within my community is a sign of the bounty of Allah'*. It follows that the different versions of the holy law are seen as divinely ordained.

Since the notions of difference between schools and consensus (*ijma*) are inherently reconciliable within Islam, it follows that Muslims may freely change schools when the need presents itself.[74] As a result, there is no notion of conflict of laws or evasion of law within Islam. Exit from a given school to join another is always possible.

The following extracts summarize the historical developments of Sharia.

Historical development of Sharia

'Up to the year A.D. 661 Medina continued to be the centre of Muslim activity. During his lifetime Muhammad was accepted as the supreme arbitrator of the community and solved legal problems, as and when they arose, by interpreting the relevant Quranic revelations. After the Prophet's death in 632 the mantle of his judicial authority was assumed by the Caliphs, who succeeded to political leadership (...)

Under 'the hegemony of the Umayyad dynasty (A.D. 661-750), Islam was transformed from the small and closely knit religious community of Medina into a vast military empire with its central government at Damascus. Local governors were appointed to control the affairs of the conquered provinces, and it became standard practice for the local governor to delegate his judicial powers to an official known as the qadi. It was the activities of the qadis, or judges, that produced a growing diversity in Islamic legal practice.(...)

Many scholars now devoted themselves to the task of documenting the sunna through the collection and classification of hadiths, and during the latter part of the ninth

[74] Glenn, above, 196.

century several compilations of hadiths were produced which claimed to have sifted the genuine from the false. Two such manuals in particular, those of ***al'Bukhari*** *(870) and* ***Muslim*** *(875) have always enjoyed a high reputation as authentic accounts of the sunna of the Prophet.*

But despite this activity in support of Shafi doctrine, his dream of a basically uniform and common law for Islam was not to be realised. In fact, as a result of his work two more schools of law were formed in addition to those which already existed.(…)

Geographically, from medieval times onwards, the division between the schools was well defined, inasmuch as the courts in different regions of Islam had gradually come to apply the doctrine of one particular school-whether as a result of the voluntary adoption of a school by the population of a given area or because the political authority appointed judges who were wedded to the doctrine of a particular school.

Thus, broadly speaking ***Hanafi law*** *became to predominate in the Middle East and the Indian Sub-continent,* ***Maliki law*** *in North, West and Central Africa and* ***Shafi law*** *in East Africa and parts of the Arabian peninsula, Malaysia and Indonesia. The* ***Hanbali school*** *did not succeed in gaining any real territorial do until it was officially adopted by the political Wahhabi movement, …., since when it has been the law applied by the courts in Saudi Arabia.*

It is true that the several schools have the ***same fundamental structure of doctrine and the same basic legal institutions****. (….) The philosophy of the mutual orthodoxy of the schools should not obscure the fact that geography and history created a four-fold division in the legal practice of Sunni Islam.*

Sunni*, or orthodox' Islam is the term used to distinguish the vast majority of Muslims from certain minority groups or sects of Muslims who diverge from the Sunnis on basic theological issues and tenets.*

Among these important sects the numerically strongest group is that of the ***Shi'a****, who oppose the Sunni belief that Muhammad was the last person to have contact with the divinity and maintain that after his death divine inspiration was transmitted to the line of his descendants through his surviving daughter Fatima. These descendants of the Prophet are recognised by the* ***Shi'a*** *as rulers, or Imams, by divine right. The Shi'a possess their own particular version of Sharia law (….)."*[75]

[75] N.J. Coulson, "Islamic law", in *An Introduction to Legal Systems*, p. 54-65.

By way of illustration, Shiite law and Sunni law differ as regards **the position of the female and non-agnatic descendants of the deceased vis-à-vis the collaterals**.

- The former recognizes that any lineal descendant will totally exclude all collaterals (brothers, sisters and grandparents) from inheritance. As a result, rights of inheritance are awarded to certain close female relatives (wife, daughter). It follows that the rights of females prevail over the rights of the extended tribe. Accordingly, Shiite law rests firmly upon the predominance of the narrower tie of relationship existing between parents and their descendants.
- In contrast, in Sunni law, the daughter does not exclude male agnate collaterals, however remote. It recognises the claims of agnate collaterals, that should prevail over the claims of the descendants. From a Sunni perspective, Qu'ran is rather an adaptation of customary tribal rules from Arabia than a real departure from tradition. From a practical point of view, Sunni law endorses the concept of the extended family or tribal group.

Although there are many aspects of the laws of inheritance upon which the Sunni schools are divided among themselves, the fundamental scheme of succession common to them all. In particular, they all subscribe to the basic principle, that is the male agnates who have pride of place as legal heirs. In total contrast, Shii law wholly repudiates the of the agnatic tie. As for the male agnates,' the Shi'a Imam Jafar is alleged to have said, 'dust in their jaws.' According to Shi'a law, all relatives, male and female, agnate and non-agnates, are integrated into a single system of priorities, under which parents and lineal descendants exclude brothers and sisters and grandparents, who in turn exclude uncles and aunts and their issue.

It is perhaps in the position of the female and non-agnatic descendant of the deceased vis à vis the collaterals that the divergence between the two systems is at its most apparent. In sunni Law the daughter does not exclude male agnate collaterals, however remote, while dauhger's children, male or female, are totally excluded by any male agnate collateral. In Shi'a law, on the other hand, any lineal descendant will totally exclude all collaterals from inheritance.

This distinction has both a social and juristic significance. From the standpoint of social relationships Sunni law, recognising the claims of the agnate collaterals, embodies the concept of the extended family or tribal group."

N.J. Coulson, "Islamic law", in *An Introduction to Legal Systems*, p. 65

V. DEVELOPMENTS AFTER THE 19th CENTURY

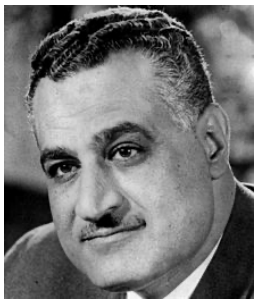
During the 19th century the history of Islamic law took a sharp turn due to new challenges the Muslim world faced.

Firstly, societies underwent transition from the agricultural to the industrial stage.

Secondly, new social and political ideas emerged and social models slowly shifted from hierarchical towards egalitarian. Secularist movements pushed for laws deviating from the opinions of the Islamic legal scholars. In this connection, let's mention the role played by 2 key political figures in the course of the XXth c.

Mustafa Kemal Atatürk introduced a radical departure from previous reformations established by the Ottoman Empire. For the first time in history, Islamic law was separated from secular law, and restricted to matters of religion. He ushered in major legal reforms. On 1 March 1926, the Turkish Criminal Code was passed. It was modelled after the Italian Penal Code. On 4 October 1926, Islamic courts were closed.

Gamal Abdel Nasser Hussei overthrew of the monarchy in 1952. Served as president from 1956 until his death in 1970. He had used ulema (scholars) as a counterweight to the Brotherhood's Islamic influence.



Thirdly, the emergence of Western hegemony greatly affected the legal systems in the Islamic world. In effect, the West had risen to a global power and colonized a large part of the world, including Muslim territories. As a result, Islamic influence has been quite diluted. Western-

style legislation prevailed but for rules on marriage, filiation, inheritance, family life, etc.. Islamic law remained thus peripherical to public life. As discussed above, the **Muslim Personal Law (Shariat) Application Act, 1937** encompasses personal matters—including marriage, divorce, maintenance, inheritance, and guardianship— that are subject to Islamic Shariat law rather than local customs.

Accordingly, in Muslim countries, codified state law started replacing the role of scholarly legal opinion. For instance, in most Islamic countries that came under European colonial rule, *Shari'a* criminal law was immediately substituted by Western-type criminal codes (e.g. Nigeria). In 1927, Turkey abandoned the *Shari'a* in favour of the adoption of the Swiss family law in its place. By the same token, the Egyptian civil code of 1949 conceived by Al-Sanhuri has been seen as a model for a number of countries in the region (Syria, Kuwait, Libanon, etc.).

To conclude with, Sharia law has been adapted in a variety of ways to the circumstances of contemporary society. Thus despite the claim to control the totality of human life, the practical significance of Sharia is nowadays confined to the area of private law. Indeed, several legal disciplines (criminal law, land law, commercial law) could not tolerate anymore the cumbersome nature of Sharia procedure, according to which the plaintiff was obliged to produce two male, adult, Muslim witnesses to support his claim.

However, with the Iranian revolution (1979), Sharia made a vigorous return. It was back at centre stage of political life of most Muslim countries. In particular, after the Arab spring revolutions (2011), in many countries with a sizeable Muslim population (Egypt, Tunisia), the enactment of all modern legislation 'is subject to scrutiny of its compatibility with Islamic law'.[76] What is more, the havoc wrought by ISIS in Irak and Syria and the mayhem caused by Boko Haram came recently to limelight.

J. Coulson's chapter on "Islamic law" in its *Introduction to Legal Systems* highlights the ever-increasing gap between theory and reality.**'**

'But for two principal reasons the medieval legal manual are far from presenting a factual picture of the laws that govern the Muslims today.

[76] C. MALLAT, 'Comparative Law and the Islamic Legal Culture', in *The Oxford Handbbook of Comparative Law* (OUP, 2006) 611.

a) In the first place law in contemporary Islam is by no means exclusively Islamic. Inevitably perhaps, in Islam as in other philosophies of life, there has always existed some degree of conflict between theory and reality and of tension between the religious idealism of the doctrine and the demands of political, social, and economic expediency. On grounds of practical necessity Muslim states and societies have recognised and applied laws whose terms are contrary to religious doctrine expounded in the medieval legal manuals. Within the vast geographical spread of Islam and the many different peoples who make up its four hundred million adherents, customary law has always controlled many aspects of life. And in recent times an ever-increasing field of legal relationships has become governed by laws imported from foreign, and particularly European, sources.

Behind this complex diversity of current legal practice the Sharia may stand as a symbol of the ideological unity of all Muslim communities and, in so far as it is applied in practice, may be regarded as the common law of Islam. Nevertheless, Sharia doctrine forms only part of the law applied by Muslim courts.

b) The second reason why the medieval Sharia texts can no longer be regarded as complete authorities for current law in Islam is the fact that the doctrine they expound does not today have a paramount or exclusive validity as the expression of Sharia law. In several Muslim countries now apply laws which are at variance with the dictates of the traditional authorities but which purport none the less to represent a legitimate version of Allah's law. These recent developments have given to Islamic law a new historical perspective. Sharia doctrine, which grew to maturity in the first three centuries of Islam and which then remained essentially static for a period of ten centuries, appears now in the course of further evolution.
It will be evident from these introductory remarks that Sharia law today has been conditioned by a legal history in Islam extending over almost fourteen centuries.

J. Coulson, "Islamic law", in *An Introduction to Legal Systems*, 64.

VI. DIFFERENCE BETWEEN ISLAMIC LAW AND WESTERN LAW

As opposed to Western law which is entirely secular, the system is essentially religious in nature. It follows that the unique ground of validity of Islamic law is that it is the manifested will of the Almighty; it does not depend upon the authority of the lawmaker. The consequences of this difference are manifold:

1.THEOCRACY: 'The unique ground of validity of Islamic law is that it is the manifested will of the Almighty: it does not depend on the authority of any earthly law-giver'. [77] God is the absolute Lawgiver. In other words, **sovereignty is vested exclusively in Allah**. '*No other entity,*

[77] K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, 3rd ed. (Oxford: OUP, 1998) 304.

institutions or power, personally or collectively, can have sovereign rights over other members of that community'. As a result, *'the Islamic State has only a limited derivative legislative power'.*[78]

« *La pensée démocratique que la volonté du nombre peut faire la loi, en s'exprimant par les différents modes de suffrage, est une idée qui n'a jamais pénétré l'Islam. En terre musulmane, la loi doit être respectée parce qu'elle est la volonté du pouvoir, et que cette volonté reflète ou incarne celle de Dieu… ».*[79]

As a theocratic society, Islam considers the state to be the servant of revealed religion. Hence, there is **no separation of church and State**. The religion of Islam and the government are one. Islamic law is controlled, ruled and regulated by the Islamic religion. The theocracy controls all public and private matters. For instance, According to Article 1 of the Basic Law of Saudi Arabia, "*The Kingdom … is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet (God's prayers and peace be upon him) are its constitution.*" The preamble of the Constitution of the Islamic Republic of Pakistan 1973 stresses that "*the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah".* Pursuant to Article 2*, "Islam shall be the State religion of Pakistan".* Pursuant to Article 31*, "Steps shall be taken to enable the Muslims of Pakistan, individually and collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam* .."*.* In contrast, India is a secular state.

2. GEOGRAPHICAL SCOPE: Islamic law stands in sharp contrast to Western law on the grounds that it represents a personal rather than a territorial system of law. Put it simply, obligations tend to be more personal than territorial. In effect, Islamic law is based on religious prescriptions, which are binding to all members or the faith irrespective of geographical or national links. However, according to Western legal traditions, there is one legal system. Within the country's boundaries, all citizens are bound by that system. Moreover, as soon as they cross the border, they become bound by the legal system of the adjacent country.

3. COMPLETENESS OF AN ALL-ENCOMPASSING LEGAL SYSTEM: Given that Islamic law reflects the will of Allah rather than the will of the human lawmaker, it covers all areas of life and not simply those that are of interest to society. Sharia regulates thus every aspect of life. Indeed, it deals with subjects as diversified as

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[78] SHAMIN, *Islamic law and its Implications for the Modern World,* Ragston, 1989.
[79] François–Paul Blanc, *Le droit musulman*, 2ème éd., Paris, Dalloz, 2007, p. 9.

- **ritual practices and ethic duties**, such as fasting, prayers, alms, and pilgrimage, permissible foods and dress,
- the **prohibition of specific behaviours** (drinking, homosexuality, adultery, fornication,etc.).
- and those topics which are strictly legal in the western sense of the term.

As a result, Islamic law is intended to be complete supplying the answers to all questions.

4. ABSENCE OF RIGHTS: Sharia is centred on the idea of man's obligations rather than on any rights he might have. The issue of rights, in the subjective sense, is absent from Islamic law.[80] Islamic law does not contemplate an individual potestas.

5. COHERENCE: From a legal point of view, the organisation of the Qu'ran is not systematic at all. Therefore, '*the structure of Islamic law cannot be made systematic, in any western sense.*'[81]

6. IMMUTABILITY: Islamic law is in principle immutable given that Islam starts from the proposition that all existing law comes from Allah who at a certain moment in history revealed it to man through his prophet Muhammad. The Allah's law was given to man once and for all.

7. DIVINELY INSPIRED: Because Muslim law is based on religious tenets, it is divinely inspired and essentially non-rational. Muslim lawyers resist abstraction, systematization and codification. For instance, there is no comprehensive theory of obligations such as in the Western European countries. One is also struck by the lack of legal certainty. Since the Muslim scholars interpreted the hadiths in different ways, one often encounters various opinions with regard to a single legal issue.

Given that it was stabilised during the middle Age, Islamic law is conservative, not to say archaic. The idea to adapt the *fikh* to contemporary situations is completely foreign to the whole system. For that reason, Islam regards with suspicion all forms of legal reasoning which enable the law to evolve. As a result, the Fiqh has been unable of adapting to modern societies.

Extracts from 'Islam's philosophical divide. Dreaming of a caliphate', *The Economist*, August 6th 2011, 21

The statistics do not look very encouraging. Of the 50-plus countries where Muslims are in the majority only two enjoy political liberty …
More than most other religions, the founding texts of Islam include very specific

[80] Glenn, above, 192.
[81] Glenn, above, 191.

injunctions about crime, punishment and family law. By modern standards these commands are anything but liberal. The Koran mandates flogging for unlawful sex, and a strongly held tradition ascribes to Muhammad the view that adulterers should be stoned to death. Over inheritance, the Koran is also specific – a daughter is entitled to have half as much as a son – and the various legal schools of Islam are even more so, setting out with absolute precision the entitlement of each distant relative.
In most understandings of liberal democracy, penal and civil codes are a matter for the people's freely elected representatives to decide, within the confines of a humanly drafted constitution. How can that possibly be reconciled with the notion that such questions have been settled for ever by divine revelation?
Contemporary Muslims acknowledge that the issue is a tricky one. If the Koran is a revelation of God, then its prescriptions cannot simply be dismissed as irrelevant or outdated.

VII. MISCELLANEOUS

1. Application of Sharia law in the Western World

Sharia law can be applied in all those States as a source of foreign law in the event of a conflict of laws in the context of private international law. In such cases, however, Islamic law is not applied as such but as the law of a (non-European) sovereign State, subject to the requirements of public-policy (*ordre public*). In case an Islamic obligation runs counter the *ordre public,* the Belgian court is called on to dismiss it.

In addition, recourse to Sharia Councils is provided for by law in a few Western States (the United Kingdom, the Ontario Province in Canada). Such councils operated as arbitration tribunals. However, the recourse to these councils is an option and not an obligation for Muslims living in these entities. However, these Sharia Councils decisions cannot undermine the application of civil law and the jurisdiction of the civil courts.

2. Comparison between Muslim and Canon Law

Like canon law, Muslim law is the law of the church. Beyond this similarity, there are fundamental differences between the two legal systems.

- Muslim law is an integral part of the Muslim religion. It is part of the revealed character of that religion. No authority in the world can change this law. The Muslim who does not obey is a sinner, even a heretic, who must be excluded from his community.

- In contrast, Christianity spread in a Roman society where law was of great importance. Christianity never replaced Roman law. The church did not take the place of Roman law.

- Finally, canon law is not a complete legal system. It is only a complement to Roman law and other civil rights. It is the work of man, not the word of God.

The Christian religion was therefore able to develop in the West in parallel with Roman law. In fact, Roman law was taught in universities approved by the Popes in the Middle Ages[82].

IX. CRIMINAL LAW

The three major crime categories in Islamic Law are:

1. *Hadd* [plural *Hudud*] Crimes (most serious).
2. *Tazir* Crimes (least serious).

1. Hadd Crimes

Classic Sharia identifies the most serious crimes as those mentioned in the *Qu'ran.* Provisions regarding offences mentioned in the *Qu'ran* (murder, apostasy from Islam, making war upon Allah and His messengers, theft and adultery) and constituting violations of the claims of God (*ḥuqūq Allāh*), with mandatory fixed punishments (*ḥadd*, plural *ḥudūd*).

These crimes have fixed punishments because God sets them. These are ***Hadd*** crimes or crimes against God's law. The punishment prescribed under *Hadd*, cannot not be varied, increased and decreased. In other words, they have no minimum or maximum punishment attached to them. Accordingly, the judge is not endowed with discretion whatsoever.

- Adultery: death by stoning.
- Highway robbery: execution; crucifixion; exile; imprisonment; or right hand and left foot cut off.
- Theft: right hand cut off (second offence: left foot cut off; imprisonment for further offences).
- Slander (the unfounded accusation of unlawful sexual intercourse): 80 lashes
- Drinking wine or any other intoxicant.
- Fornication: 100 lashes in public and exile for 1 year.

[82] R. David et C. Jauffret Spinosi, *Les grands systèmes de droit contemporains,* 11e édition, Paris, Dalloz, 2002, p. 358-359.

Adultery belongs to the class of *hadd* crimes which are subject to specified punishments.

The following verses of the *Quoran* address **adultery**.

- "*Nor come nigh to fornication/adultery: for it is a shameful (deed) and an evil, opening the road (to other evils)*." [Quran 17:32]
- "*The woman and the man guilty of fornication/adultery,- flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day: and let a party of the Believers witness their punishment*." [Quran 24:2]

According to traditional jurisprudence, four witnesses are required to prove the offense.[83] Making an accusation of *zina* without presenting the required eyewitnesses is called *qadhf*, which is itself a *hadd* crime.

- "*And those who accuse chaste women then do not bring four witnesses, flog them, (giving) eighty stripes, and do not admit any evidence from them ever; and these it is that are the transgressors. Except those who repent after this and act aright, for surely Allah is Forgiving, Merciful*." [Quran 24:4-5]

Although stoning is not mentioned in the Quran, all schools of traditional jurisprudence agreed on the basis of hadith that adultery is to be punished by stoning if the offender is *muhsan* (adult, free, Muslim, and having been married). This view is supported by the following hadith:

'*Ubada b. as-Samit reported: Allah's Messenger as saying: Receive teaching from me, receive teaching from me. Allah has ordained a way for those women. When an unmarried male commits adultery with an unmarried female, they should receive one hundred lashes and banishment for one year. And in case of married male committing adultery with a married female, they shall receive* ***one hundred lashes*** *and be* ***stoned to death*** »(Sahih Muslim 17 :4191).

The Quoran is dealing with **apostasy** in many of its verses.

- '*Make ye no excuses: ye have rejected Faith after ye had accepted it. If We pardon some of you, We will punish others amongst you, for that they are in sin'*. (Quran 9 : 66)
- '*He who disbelieves in Allah after his having believed, not he who is compelled while his heart is at rest on account of faith, but he who opens (his) breast to disbelief-- on these is the wrath of Allah, and they shall have a* ***grievous chastisement'***. (Quran 16 : 106)

Until the late 1800s, most Islamic scholars in both Sunni and Shia schools held that for adult men, **apostasy** in Islam was a crime as well as a sin, an act of treason punishable with the death penalty. As of 2016, the major schools of Islamic jurisprudence, and most scholars therein, continue to hold the traditional view that the death penalty is required by both the

[83] In the Shafii, Hanbali, and Hanafi law schools the lashing is imposed for the married adulterer and his partner only if the crime is proven, either by four male adults eyewitnessing the actual sexual intercourse at the same time or by self-confession. In the Maliki school of law, however, evidence of pregnancy also constitutes sufficient proof.

Quoran and Hadiths. However, Western Muslim scholars argue that the death penalty is an inappropriate punishment.

Extract of "Islam and punishment. By the book", *The Economist*, July 4th 2015, p. 52

"Islam's sacred texts are not more bloodthirsty than those of Judaism and Christianity. The Old Testament names 36 misdeeds… as meriting death; the Koran just two *hiraba* ("spreading mischief") and murder. It says that the family of a murder victim may forgive and therefore spare the killer. Death, stoning, amputation and the lashes are reserved for a small number of serious crimes, including **theft** and **adultery**, collectively known as *hudud*.

Under the Ottoman empire, just one person was stoned to death in 600 years. But since the early 1970s, when only Saudi Arabia ruled according to the Koran, the trend has been for ever-harsher punishments. In 1979 post-revolutionary Iran brought in Sharia; Pakistan, Afghanistan and Sudan soon followed. In 2014 Brunei introduced a strict sharia code; ….

"spreading mischief", literally meaning "waging death against Allah and his angels", is generally now taken to include **homosexuality** and **apostasy**. Such definition-stretching is possible since Islamic law relies on not only the Koran, but also thousands of hadith... For some crimes, judges can choose to order whippings and the like, even if the Koran does not insist on it.

The **intertwining of state and religion** is only a partial explanation. Though all Muslim countries mention Islam in their constitutions, they differ in the weight they give it. Saudi Arabia and Pakistan regard it as the only source of law. But far more pick and mix. Egypt's criminal code is inspired by those of Britain and France. Across much of Irak, tribal law holds sway.

(….)

Reformist scholars point to Koranic verses and hadith in favour of mercy, and the strict conditions set for the harshest punishments. A conviction for **adultery**, for example, requires eyewitness testimony from four male Muslims- a high bar. They argue that the use of religion to cloak political decisions is distorting Islam to such an extent that some rulings contradict the Koran. Today adultery is punishable by stoning, whereas the Koran prescribes 100 lashes… According to Sadakat Kadri, a barrister in London…., when Islam was founded that was rather progressive.

(…)

Liberal lawyers in Saudi Arabia want more penalties codified to stop judges using harsher sentences than prescribed: more than half of 2015's sentences have been for crimes for which

other sentences were available. Still, a lawyer in Riyadh points out : “It’s impossible to get away from the fact that the current jurisprudence says lashes, stoning and the death penalty are required in certain cases”. (…)”

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2. Tazir Crimes (or misdemeanor)

While *Hadd* crimes are crimes against God's law, *Tazir* crimes are crimes against society. Given that these crimes are not mentioned in the *Qu’ran*, they are deemed to be less serious than *Hadd* crimes. They can be administered at the discretion of the judge, called a Qadi. In sharp contrast to Hadd crimes, there is no fixed punishment. Accordingly, the quadis are free to punish the offender in any appropriate way. T*azir* punishments vary according to the circumstances: they change from time to time and from place to place. They vary according to the gravity of the crime and the extent of the criminal disposition of the criminal himself. The judge can choose the punishment (flogging, seizure of property, confinement).

3. *Qesas* Crimes and *Diya*

Islamic Law has an additional category of crimes (*Qesas* crime). Traditional *Qesas* crimes include:

1. Murder (premeditated and non-premeditated).
2. Premeditated offences against human life, short of murder.
3. Murder by error.
4. Offences by error against humanity, short of murder.

This is one of retaliation (or blood money). The victim has a right to seek either retaliation or retribution. With respect to the former, the family of the victim has a right to seek *Qesas* punishment from the murderer. Punishment can also come in the form of a retribution "*Diya."* *Diya* is paid to the victim's family as part of punishment.

One of the most serious limitations on the efficiency of Sharia courts lay in the rigid system of evidence. The plaintiff bears the burden of proof: the plaintiff must produce two male, adult, Muslim witnesses ‘*whose moral integrity and religious probity are unimpeachable’*. If the plaintiff fails to discharge this burden of proof, the defendant is offered the oath of denial.

Given the rigidity of this procedure, Sharia courts appeared to be unsatisfactory organs for the administration of certain spheres of the law ([84]).

[84] K. ZWEIGERT H. & KOTZ, oc, 67-68.

IX. PRIVATE LAW: THE MARRIAGE

1. Introduction

Mariage (or *Nikah*) 'is the nucleus of the family. The very foundation of the family and society is the marriage. It confers on parties, the status of husband and wife and gives rise to certain rights and obligations'.[85] *Nikah* literally means the 'union of two sexes'. It is not a sacrament but a civil contract. Whereas in traditional Muslim societies, marriage is viewed as a contract designed primarily in the husband's interest, this is not the case in European national laws. In Europe, marriage has long been regarded as a lasting institution, established in the best interests of the children. For instance, in Belgium, the 19th and 20c legislation governing marriage was rooted in Christian law, which has enshrined the concept of marriage as a sacrament, thereby reinforcing its unity and indissolubility.

As a social obligation, the marriage is registered by the *Kazi* who performs a short ceremony. **Formalities** are rather simple: the contract is signed when entering the marriage. Furthermore, permission must be granted by the father. In Islam, both genders are considered equal in value. At the same time, Islamic law recognizes the differences between genders, resulting in different rights, obligations, and distinct roles.

However, spouses must fulfil several **conditions**:

- Women must be chaste. Accordingly, a fornicator can only marry another fornicator.
- Women must choose a Muslim husband to marry; however, men can choose a Christian or a Jewish bride.
- The husband must pay for his wife's expenses.
- The wife is not allowed to leave her house against her husbands will.
- The marriage is aimed to be permanent, but can be terminated by the wife or husband engaging in the *Talaq* (divorce) process.
- The couple inherit from each other.

When spouses are to be married, the husband must pay a dowry (*mehr)* to his bride. The dowry

[85] Rega Surya Rao, *Lectures on family law-II. Muslims and personal laws*, 2nd ed. Hyderabad, Asian law house, 202, p. 12

belongs to the wife herself and not, as was common under customary law, to her father. It goes without saying that Islamic law had improved the legal position of the wife. For instance, it softened old Arab customary rule according to which a husband could repudiate his wife at any time without any restriction. The dowry was originally a purchase price that came to serve as consideration for the promise of marital union. Accordingly, the dowry is a very important factor in the stability of marriage. The husband's right to divorce his wife whenever he pleases (*Talaq*) is significantly limited by the fact that his wife retains the dowry in the event of a divorce. In some Muslim societies, a woman demands that her husband provide a substantial dowry, far exceeding her husband's financial means. Therefore, the higher the amount of a dowry, the stabler the marriage.

Since divorce is allowed in Islam, the amount promised (when the dowry exceeds the husband's financial means) or paid to the bride forms part of her personal property and is of assistance to her in times of financial need, such as a divorce, desertion by the husband, or repudiation (Talaq). While the dowry is usually in the form of cash, it may also be a house or viable business that is put in her name and can be run and owned entirely by her if she so chooses.

The marriage can be terminated by the husband engaging in the *Talaq* (divorce) process. The repudiation can occur only when the husband took equitable account of her needs and made suitable provision for her maintenance thereafter.

2. Polygamy

The Qur'an allows a man to have four wives at any one time[86]:

"*And if you fear you shall not be able to deal justly with the orphan girls, then marry (other) women of your choice; 2, 3 or 4, but if you fear you may not be able to deal justly (with them) then only one.*" (verse 4:3)

According to traditional Islamic law, a man may take up to four wives, and each of those wives must have her own property, assets, and dowry. The husband does not have to seek permission from his first wife. However, his wife can set a condition, before marriage, that the husband cannot marry another woman during their marriage. That being said, Muslim polygamy, in practice and law, differs greatly throughout the Islamic world. In some Muslim countries, polygamy is authorised (Saudi Arabia, Western and Eastern African countries), while in most others it has been prohibited (Tunisia, Turkey, etc.).

[86] The Prophet Muhammad had nine wives, but not all at the same time.

The situation in India is complex, to say the least. The **Muslim Personal Law (Shariat) Application Act, 1937,** that still applies to Muslims in India. **a**llowed a Muslim man to have up to four wives, provided he treats them equally and fairly whereas Muslim women were not permitted to have more than one husband. In contrast, the **Hindu Marriage Act, 1955** outlawed this practice. The **Indian Penal Code, 1860 (Section 494)** criminalizes marrying again during the lifetime of a husband or wife (bigamy): '*Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment* ….'. That being said, when there is a conflict between the Indian Penal Code and personal laws, the personal laws supersede the general criminal law.

3. Dissolution of marriage

Unlike Christianity which has a great antipathy to divorce, Islamic law has always had a more liberal approach.[87] Divorce is allowed in Islam. The Muhammadan law of divorce is founded upon express injunctions contained in the *Qnr'an,* as well as in the Traditions (*hadith*), and its rules occupy a very large section in all Muhammadan works on jurisprudence.

The *Quran* sets the grounds of divorce in very general terms: *'And if you fear that the two (i.e. husband and wife) may not be able to keep the limits ordered by Allah, there is no blame on either of them if she redeems herself (from the marriage tie) ..'* (Surate 2, verse 229).

Though marriage is a civil contract, a high degree of sanctity is attached to it. Accordingly, divorce should not be sought readily. Indeed, keeping the unity of the family is considered a priority for the sake of the children. For instance, in the Sunnī tradition, it is said that '*divorce without a valid reason shakes the throne of God'*. By the same token, '*divorce being an evil, it must be avoided as far as possible*'.[88] Accordingly, *Talaq* is permissible inasmuch that the marriage is completely broken. It follows that all means of reconciliation have to be exhausted. According to Muslim scholars, divorce granted on frivolous and flimsy grounds would destroy the stability of family life.[89] That being said, the legal situation is quite complex.

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[87] I. Edge, 'A comparative approach to the treatment of non-muslim minorities inthe middle East with special reference to Egypt', C. Mallat & J. Connors (ed.), *Islamic Law* (London, Graham & Trotman, 1990)46.
[88] Divorce Under Muslim Law, Legal Service India website, 2009.
[89] Sahih Muslim, *The Book of Divorce (Kitab Al-Talaq),* 261.

A. Husband's rights: Talāq

As a reminder, talaq was ruled unconstitutional by the Supreme Court of India in 2005. However, it still applies in Pakistan and in Bangladesh, although it is regulated in these two Muslim countries by statutory law rather than being purely based on traditional Sharia law. The aim of this subsection is to provide an overview of traditional Sharia law.

***Introduction*:** The Arabic word for divorce is *talaq* which means" freeing or undoing the knot". *Talaq Hasan* or the triple *talaq* is where a husband repudiates HIS wife by three sentences of divorce.

Of importance is to stress at the outset that this form of repudiation is applied in but a few Muslim countries. Indeed, many countries have been banning this practice (Turkey, Algeria, Tunisia, Indonesia, Pakistan[90], Bangladesh,…).

***Capacity*:** Every Muslim husband of sound mind, who has attained the age of puberty, is competent to pronounce *talaq*. It is not necessary for him to give any reason for his pronouncement.

***Grounds*:** Moreover, the husband may divorce his wife by repudiating the marriage without giving any reason. In other words, the husband is endowed with absolute power of divorcing his wife unilaterally, without assigning any reason, literally at his whim.

***Formalities*:** It merely consists of the husband saying three times to his wife at anytime she is not menstruating "*I divorce you, I divorce you, I divorce you"* (Arabic: *talaq*). The husband is not required to file a lawsuit.

- According to **Sunni** law, a *talaq*, may be oral or in writing. It may be simply uttered by the husband or he may write a *Talaqnama*. No specific formula or use of any particular word is required to constitute a valid *talaq*. The words of *talaq* must clearly indicate the husband's intention to dissolve the marriage. As a result, any expression which clearly indicates the husband's desire to break the marriage is sufficient. It need not be made in the presence of the witnesses.
- According to **Shias**, *talaq* must be pronounced orally, except where the husband is unable to speak. If the husband can speak but gives it in writing, the *talaq* is void under Shia law. Here *talaq* must be pronounced in the presence of two witnesses. This procedure renders

[90] In Pakistan, a husband has to notify an arbitration council/Shariat court about the talaq immediately after its pronouncement. The effect of the notice is to freeze the talaq for 90 days during which the council tries to reconcile the wife and the husband. After the expiry of 90 days, the *talaq* takes effect.

repudiation less straightforward than in the Sunni system.[91]

***Reconciliation*:** According to Sunnī and Shī'a jurisprudence, the couple is supposed to make an attempt to reconcile, with the help of mediators from each family. The appropriate verse from the Quran is:

*And if you fear a breach between the two, then appoint judge from his people and a judge from her people; if they both desire agreement, God will effect harmony between them, surely God is Knowing, Aware. (*Surate 4.35).

The reconciliation should take place during the period of *Iddat.* This period usually lasts three months. If the wife is pregnant, it lasts as long as pregnancy lasts. The waiting period is basically a term of probation during which reconciliation can be attempted. During that period, the wife cannot be expelled from her place of residence and cannot be harassed. In spite of exhausting all means of reconciliation, the hatred between the husband and wife may not fade away. In this case, divorce becomes inevitable.

***Temporal scope*:** The divorce must be pronounced within the term of *Tahr*, a period of purity when the woman is not passing through the period of menses and when during which the husband has not had sexual intercourse with her. This requirement is not applicable when the wife has passed the age of menstruation or the parties have been away from each other for a long time, or when the marriage has not been consummated.

- According to **Sunni** rite *(Talaq-i-Biddat*), the triple declaration of *talaq* can be made at ounce in a period of purity, either in one sentence or in three. This type of *talaq* is not recognized by the Shias.
- According to **Shiite** rite (*asan talaq*), the husband is required to pronounce the formula of *talaq* three time during three successive tuhrs. Example: 'W, a wife, is having her period of purity and no sexual intercourse has taken place. At this time, her husband, H, pronounces *talaq*, on her. This is the first pronouncement by express words. Then again, when she enters the next period of purity, and before he indulges in sexual intercourse, he makes the second pronouncement. He again revokes it. Again when the wife enters her third period of purity and before any intercourse takes place H pronounces the third pronouncement. The moment H makes this third pronouncement, the marriage stands dissolved irrevocably, irrespective of *iddat*.'[92]

***Validity*:** Under Shia law as well as under the Maliki and Shaafi schools of Sunnis, a *talaq* pronounced under compulsion, coercion, undue influence, fraud, or voluntary intoxication is

[91] C. Mallat, 'Shi'ism and Sunnism in Iraq : Revisiting the Code', C. Mallat & J. Connors (ed.), *Islamic Law* (London, Graham & Trotman, 1990) 85.
[92] Divorce Under Muslim Law, Legal Service India website, 2009.

void. In contrast, under Hanafi law, a *talaq*, pronounced under compulsion, coercion, undue influence, fraud and voluntary intoxication etc., is still valid and as a result dissolves the marriage. However, under forced or involuntary intoxication *talaq* is deemed to be void.

***Completion*:** After the completion of the talāq procedure, the couple is divorced. As a result, the husband is no longer responsible for his wife's expenses.

B. Wife's rights

Conversely, under Islamic law, once a marriage is consummated, a wife has absolutely no right to divorce without her husband's permission. Whereas the man is permitted to repudiate his wife (*talaq)*, the woman is allowed to obtain the dissolution of marriage under specific conditions.

(i) Dissolution of the marriage according to contractual terms (*Talaq Taffiz)*

The possibility of divorce has been stipulated in the marriage contract. Accordingly, the wife has the right to repudiate herself. However, the right cannot be granted absolutely, it must be subject to a condition. By way of example, the contract can stipulate that if her husband marries a second wife, she will have the right to repudiate herself. This kind of divorce is called 'Delegated Divorce' (*Talaq Taffiz*).

(ii) Dissolution of the marriage by mutual consent (*Mubarat*)

The marriage can also be dissolved through mutual consent. *Mubaraat* means literally 'release'. Pursuant to Surah 4 Verse 128**:** '*If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; ...*'. Where the desire for separation is mutual, there too dissolution by mutual agreement for a consideration to be paid by the wife to the husband is lawful (see below the reasoning held by the Court of Lahore). In such a case it is usual for the wife to offer her husband some compensation if he would release from the bounds of matrimony (usually the amount paid as dower).

(iii) Dissolution of the marriage by *Khula*

In case the wife does not want to keep on for emotional reasons, then she can still request *khula*. The wife can obtain from her husband the right to be separated in return for a payment. The husband takes the payment and lets his wife go, whether this payment is the *mahr* which he gave to her, or more or less than that. This woman's right is known as *Khula'* (meaning literally, the putting off or taking off a thing). In order to obtain *Khula*, the wife must obtain her husband's permission.

Sources. The *Khula'* is based on the Quranic verse (Quran 2:229)

> The basic principle concerning Khula this is the verse in which Allah uttered:
>
> *"And it is not lawful for you (men) to take back (from your wives) any of your Mahr (bridal-money given by the husband to his wife at the time of marriage) which you have given them, except when both parties fear that they would be unable to keep the limits ordained by Allah (e.g. to deal with each other on a fair basis). Then if you fear that they would not be able to keep the limits ordained by Allah, then there is no sin on either of them if she gives back (the Mahr or a part of it) for her Khul (annulment*)." [al-Baqarah 2:229]

The Sunnah supports the *Khula*. The Prophet said to Tahbit Ibn Qays:

'*The wife of Thabit bin Qais came to the Prophet and said, "O Allah's Apostle! I do not blame Thabit for defects in his character or his religion, but I, being a Muslim, dislike to behave in un-Islamic manner if I remain with him." On that Allah's Apostle said to her, "Will you give back the garden which your husband has given you as Mahr?" She said, "Yes." Then the Prophet said to Thabit, "O Thabit! Accept your garden, and divorce her onc*e' (Narrated by al-Bukhari, 5273). In this case, the divorce can be granted but without any access for financial rights. In addition, she must pay the husband the dowry.

Divergences among schools. As I already stressed, Islam law is far from being monolithic. As a result, diverging interpretations of khula exist across Islamic schools of law and regions in regard to the compensation, consent of the husband, role of the court and judge, number of witnesses a woman must have, and the *iddah* ("waiting") period, and child custody. With respect to compensation, most Islamic schools of law agree that the husband is not entitled to more than the initial amount of dower (*mahr*) given to the wife provided that the husband is not at fault (e.g. impotent). However, some schools suggest that the husband is entitled to obtain a greater compensation than the initial amount of dower. With respect to the husband's consent, most schools agree that husband's agreement is not required if the grounds of divorce are related to cruelty or impotence. Only a person versed in Islamic law i.e. a Qazi or Islamic Sharia court judge, can grant the khula without the husband's consent.

Difference with *Mubarat*. *Khula* is quite similar to *Mubarat*. For that reason, the Lahore Supreme Court mentions side by side *Khula* as well *Mubarat*, as dissolution by mutual agreement. However, the difference lies in the fact in Mubarrat she might not have to return her Mahr.

(iv) Divorce by judicial process (*Ila, Zihar, Lian, Tafrid*)

When the wife may not obtain a divorce by mutual consent or by *Khula*, which implies an agreement with her husband, who may be recalcitrant, she has only one way out: to sue him.

In India, for instance, pursuant to the 1939 Dissolution of Muslim Marriages Act, the wife may obtain a judicial decree for dissolution of marriage from the Court on any one of the nine grounds mentioned therein.

Conditions. The wife can only obtain a divorce under the following conditions:

- firstly, she must initiate proceedings before a judge (*Quasi*)[93];
- secondly, she must prove that her husband has failed to comply with basic duties:
    - her husband is **impotent** (*kâli*)
    - he refuses or is **unable to provide maintenance** (*nafaka*)
    - he is **not paying the dowry** (*mahr*)
    - he is accused of **apostasy**
    - or that the wife has been **ill-treated** to such an extent that married-life becomes intolerable (see below the reasoning held by the Court of Lahore).

Evidence. Accordingly, she must prove that she has been subject of bad treatment, that her husband is unable to sustain her financially or that he is sexually impotent. As discussed above, the grounds in Indian law are rather similar. If it is proven, the judge grants her divorce with a full access to all her financial rights. given that the wife must provide proof of the faults committed by her husband, it will generally be difficult for her to obtain a judicial divorce.

Iddah

When a woman is granted a divorce, she must enter a waiting period known as *Iddah*. During this period, a woman is not allowed to remarry until three full menstrual cycles have passed to ensure that she is not pregnant.

To conclude with, it is obvious that there is some disparity between the rights of men and women in matters of divorce.[94]

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[93] This judicial process is called "faskh," which is a form of annulment.

[94] S.H. Amin, *Islamic Law and its Implications* (London, 1979) 79.

Kinds of dissolution of marriage	Initiation	Relationship between spouses	Court or arbitrators intervention	Compensation
Talaq	Divorce takes place at the initiative of the husband	Arbitrary act of the husband on the account that there is disobedience or non-performance of marital obligations. However, in Iran for instance the husband the husband can repudiate a blameless wife.	Extrajudicial divorce Intervention of Tribal elders	Liability to pay to the wife the *mahr* (dower)
Khula	Divorce takes place at the initiative of the wife	The wife is not endowed with a similar right of repudiation than her husband. As a result, the wife has no right to divorce herself; she can't compel her husband to do so.	Court or *Qazi* Attempt to reconciliation	According to several schools, in requesting a divorce, the wife must forfeit her right with respect to dower or some other property (see below Court of Lahore).
Mubaraat	Divorce takes place at the initiative of spouses	Mutual consent	Medium of a judicial procedure. A court grants the divorce on the grounds that the marriage has irretrievably broken down	Compensation paid by the wife
Divorce by judicial process	Divorce takes place at the initiative of the wife	Fault-based divorce	A court grants the divorce on the grounds that the husband is an apostate, etc. The release can take effect provided the husband 'was at fault.	

We shall deal with a case that highlights the differences between the three modes of dissolution.[95]

[95] Asaf A.A.A FYZEE, *Cases in the Muhammadan Law of India, Pakistan and Bangladesh* (2nd. ed. , Oxford, OUP, 2005).

Sayeeda Khanam v. Muhammad Sami
PLD 1952 Lahore 113

Divorce- *shiqaq*- religious texts considered - incompatibility of temperaments – narrow interpretation- invalid ground to obtain divorce

Facts: The facts of the case, …, are that the wife as plaintiff had sued for dissolution of her marriage with the defendant her husband on the grounds of failure to maintain her for a period exceeding two years' failure to discharge marital obligations without reasonable cause for a period exceeding three years, cruelty, false accusation of immorality, depriving her of her dower, obstructing her in the saying of her prayers, and, as to the clash of temperaments, that the defendant was of irritable nature and changing demeanour and given to imposing his will by force, and further that as a result of the difference in the temperaments of the spouses, the plaintiff had begun to hate the defendant.

In the 50s, in Pakistan (a former part of the British Indian Empire) pursuant to the Dissolution of Muslim Marriages Act 1939, a woman married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on any ground which is recognized as valid for the dissolution of marriages under Muslim Law.

Procedure:

- The **trial court** found that the plaintiff failed to demonstrate the discharge of marital obligations. However, the trial court found that there has been cruelty. As a result, it granted the plaintiff divorce.
- On **appeal**, the district court overturned the trial court's judgment on the account that no cruelty has been proved.
- The plaintiff instituted a **second appeal** before the court of Lahore. The question at issue was whether the **incompatibility of temperaments** of defendant and plaintiff was enough to secure for the plaintiff a **dissolution of her marriage**, as it has been asserted by the district judge. In other words, the question that was addressed by the court of Lahore was whether ***shiqaq*** or incompatibility of temperaments could be regarded as a valid ground for divorce.

Judgment [Cornelius A., CJ] (excerts):
This reference to a Full Bench involves the question whether incompatibility of temperaments between the spouses constitutes a valid ground for dissolution of a marriage under Muslim law, ….

Muslim law recognizes *'shiqaq'* as an adequate ground for divorce. It falls within clause (ix) of section 2 of the Dissolution of Muslim Marriages Act 1939. This clause lays down that a woman married under Muslim Law shall be entitled to obtain a decree for, the dissolution of her marriage on any (other) ground which is recognized as valid for the dissolution of marriages under Muslim law. (…)

It is necessary first to consider the meaning to be given to the phrase, incompatibility of temperaments' [*'shiqaq'*]. The expression is not a term of art, and learned counsel for the parties in the course of an exhaustive argument have been unable to furnish us with any authoritative judicial interpretation of the expression. In the ordinary dictionary meaning, 'incompatibility' may be rendered as 'incapacity for harmonious combination or association', 'incapacity for appearing or being thought of together or of entering into a system of theory or practice.'

'Temperament' may be defined as 'constitution or frame of mind', 'disposition', 'character of mind or mental reactions which are characteristic of an individual'. With reference to the parties to a marriage, the expression 'incompatibility of temperament must be understood in relation to the various forces acting on the couple which compel or induce them in the direction of harmonious and happy association. There are in favour of such a result, a considerable number of powerful factors. Besides the fact that the pair belongs to opposite sexes and may be assumed to possess a normal desire for making a happy union of their lives, there are the various pressures which are exercised by their respective families and by society, and in addition, through the procreation of children, the forces which guide them in the direction of mutual adaptation are greatly reinforced by the affection which accompanies the raising of a family. Where, therefore, it is found that there is such a lack of agreement between the couple as to fall within the full meaning of the expression 'incompatibility of temperament', this must be traced to a total lack of sympathy between them, such as induces a resistance to mutual adaptation, despite the various influences guiding the couple in that direction. There should and must be basically hatred or aversion on the part of one or both of the parties to the marriage to produce such a result.

This finding does not, however, conclude the matter, for the learned Single Judge, in the referring order, has included also the matter of aversion and hatred as between the spouses, as constituting a breach upon which a claim for dissolution could be grounded. In the referring order, the learned Single Judge has placed considerable emphasis upon the Arabic word *'shiqaq'* meaning a breach or separation into two from a condition of unity, as used in verse 35 of Chapter IV of the Holy *Qur'an*. Towards the close of the order, he has used words which convey the impression that, in his opinion, *shiqaq* by itself is an adequate ground for divorce in Muslim law. Elaborate arguments have been addressed to us on this point, and, speaking with great respect to the view of the learned Single Judge, it seems that the texts of revealed scripture do not support his view.

It's unnecessary to elaborate the differences between divorce by *khula* and divorce as sought by the plaintiff in the present case. In *khula*, the marriage is dissolved by an agreement between the parties for a consideration paid or to be paid by the wife to the husband, it being also a necessary condition that the desire for separation should come from the wife. Where the desire for separation is mutual, there too dissolution by mutual agreement for a consideration to be paid by the wife to the husband is lawful, but it is described in that case as *mubar'aat*. It has been held by the courts in India that for the purpose of dissolving a marriage under either of these modes, it is sufficient that the husband should propose to pronounce *talaq* or otherwise to dissolve the marriage for a consideration and that the wife should accept the proposal; it is not necessary then that the word *'talaq'* should be pronounced but the contract itself operates to dissolve the marriage. (*Muhaminadan Law* by Tyabji, 3rd Edition, sections 162 and 163). I may refer also in this context to an observation in the learned work of Syed Ameer Ah on Mahommedan Law, Fifth Edition, Volume II, at page 507 in the Chapter entitled '*Khula* and *Mubar'aat'*. The passage reads as follows:

When the wife, owing to her aversion to the husband, or her unwillingness to fulfil the conjugal duties, is desirous of obtaining a divorce, ***she may obtain a release from the marital contract by giving up either her settled dower, or some other property****; such a divorce is consequently called* ***khula****.*

In order to differentiate between the separation in this form, and separation by decree of a court on one of the numerous grounds available under Muslim law, I cannot do better than refer to another passage from the same learned treatise which occurs at the commencement of section 1 of Chapter XV, at page 519:

*According to the Sunni and Shiah schools, when the married parties have no tangible cause of complaint against each other, but a **mutual aversion** due to incompatibility of temper, want of sympathy, etc., they can **dissolve the marriage- tie by mutual agreement**. When the husband is guilty of conduct which makes the matrimonial life intolerable to the wife, when he neglects to perform the duties which the law imposes on him as obligations resulting from marriage, or when he fails to fulfil the engagements voluntarily entered into at the time of the matrimonial contract, she has the right of preferring a complaint before the Kazi or Judge and demanding a divorce from the court.*

The words employed by the learned author are admirably precise and clear. It would appear, therefore, that unless the wife can adduce one or more instances of such behaviour, as will entitle her to present a prayer for dissolution thereon to the *Kazi*, if she finds the marriage tie intolerable for no more specific reason than that there is incompatibility of temperaments between the parties or that she has aversion for the husband, she must by the offer of consideration induce the husband to release her. Once the husband has agreed, the release takes effect, and it would seem that the husband would have a right of suit to recover the consideration in return for which he consented to the arrangement, should there be failure of payment on the part of the wife. The divorce, however, would take effect as soon as there was an agreement.

I propose now to consider in some detail … the words of revealed Scripture as contained in Chapter IV of the Holy *Qu'uran* with respect to the subject of *shiqaq* as between the spouses. (..)
***34.** Men are maintainers of women, because Allah has made some of them to excel others and because they spend out of their property; the good women are therefore obedient, guarding the unseen as Allah has guarded; and as those on whose part you fear desertion, admonish them, and leave them alone in the sleeping places and beat them; then if they obey you do not seek a way against them; surely Allah is High, Great.*
***35.** And if you fear a breach between the two, then appoint a Judge from his people and a Judge from her people; if they both desire agreement, Allah will effect harmony between them: surely Allah is Knowing, Aware.*
***128**. And if a woman fears ill-usage or desertion on the part of her husband, there is no blame on them, if they effect a reconciliation between them, and reconciliation is better; and avarice has been made to be present in the (people's) minds; and if you do good (to others) and guard (against evil), then surely Allah is aware of what you do.*
***130.** And if they separate, Allah will render them both free from want out of His ampleness, and Allah is Ample-giving, Wise.*
(…)

With these preliminary remarks, I proceed to state what in my view is the intention of the verses which have been reproduced above.

Verse 34 commences with a statement of the reasons for the superiority of men over women, and proceeds to enjoin obedience and right conduct upon good women. Then, it is prescribed, with reference to women who become rebellious to their husband's authority, that the husbands should admonish them, and withdraw their company from them in the sense of refusing to cohabit with them and should beat them. The nature of the treatment enjoined indicates that the husband is not responsible, in any way, for the wife's behaviour, by any conduct on his part. If by these methods, obedience on the part of the wife is restored, then no further action is to be taken against her.

[**Verse 35**] But if a *shiqaq* (breach) be feared, then an elder holding authority is to be appointed from the tribe of each of the spouses.

Does the word *'shiqaq* 'refer to any kind of breach? Obviously it cannot mean any slight or temporary difference, but must be confined to serious rifts calling for the intervention of tribal elders for the preservation of coherent society. Can it mean a breach from any cause, or is there emphasis upon the cause stated in the preceding verse (i.e., 34)? I incline strongly to the latter view, namely that the breach must be due to refusal by the wife to render obedience to her husband. For in such conduct, there is a breach of the bond of obedience by which the wife is bound to her husband, and on her part, there is also a breach of an underlying though unexpressed term of the contract of marriage, namely that she shall be obedient to her husband.

What the elders are to do, how they are to proceed, what powers they have of a procedural nature, and whether or not they have power to impose their decision upon the couple, is not stated, but the verse declares that if the spouses desire agreement, then Allah will effect harmony between them.

In logical order, after verse 35 should be read **verse 128**; which deals with the converse problem, namely, that of a woman who is faced with unjust treatment or aversion on the part of her husband. In this case, there is no mention of reference to elders or otherwise, but the verse proceeds to say that reconciliation is the best course, and no blame will attach to the couple if they effect reconciliation; then follow certain rules of general guidance, which are intended, in the context, perhaps to minimize the danger that reconciliation may be frustrated by the parties being guided purely by their self-interest, such as that avarice is found in the minds of human beings, and that the people should do good to others and guard against evil. Noticeably, there is no reference here to *shiqaq* or breach between the spouses.

Next in order should be read **verse 130**, which lays down clearly that if the spouses separate, Allah will render them both free from want out of His ampleness. When this verse is read in conjunction with the repeated injunctions in verses 35 and 128, that reconciliation and agreement is the better course, its effect may be appropriately understood to be that, having made every effort at restoring normal relations between themselves, then, if still the spouses cannot agree, and they separate, their action will not merit disapproval. As to how they are to separate, nothing is said in the verse, but there is no doubt of the various processes provided by the law of Islam in this respect, and these divide into three classes, namely,

* **separation, by divorce pronounced by the husband,** [*talaq*]
* **separation by mutual agreement,** [*mubarat*]
* **and separation by judicial decree**.

As has been seen, the opinion of the learned writer Syed Ameer Ali is that where **there is nothing except incompatibility of temperament, aversion, hatred and dislike, the marriage can only be dissolved by the method of mutual agreement;** it could of course also be dissolved by the husband acting unilaterally, but we are dealing with a case in which the husband is not willing to grant a divorce.

….

[The view of *Imans*] is that the *hakama* [arbitrators] cannot grant a divorce unless they be authorized to do so by the husband; where the husband does not agree, the matter is one for the jurisdiction of the judge.

The same conclusion can also, in my opinion, be drawn from the consideration that in the favour of verses from the Holy *Qur'an* which have been cited above, the provisions for mediation is only made in the case where the wife, without cause furnished by her husband, becomes intolerant of his authority and refuses to perform her marital obligations. There is no such provision in the case where the wife fears unjust treatment, or hatred, avoidance or shunning amounting to desertion, on the part of her husband. The omission cannot be without significance. Where the wife is an injured party, there is first an injunction that an attempt at reconciliation should be made by the parties, having cleared their hearts of selfishness, and acting solely with a desire to do good and to avoid evil. There is then a reference to the permissibility of separation where reconciliation is not possible. How is separation to be effected in such a case surely, either by *khula* or by reference of the injury, as a justiciable issue, to the proper authority, for the wife cannot (except in the rare case of special delegation) divorce herself, and she has no power to compel the husband to divorce her. There must be some fault on the husband's part to justify recourse to the *Qazi*, for the seeking, by a woman, of divorce from her husband, without fault, is severely deprecated.

[*Talaq*] On the other hand, where the wife's determined disobedience and non-performance of her marital obligations is the cause of estrangement, there being no fault in the husband, he can very well deal with the case under his unilateral power of divorce, but it is enjoined that there should first be a reference to tribal elders. This would ensure not only the sanctity and preservation of marriages against the danger that divorces may be given too lightly, but also that marriages are not reduced to contracts of unwilling slavery for the wife. The need of reference to the judicial authority of the State does not arise for there is available the powerful influence of the tribal elders to ensure that everything is done by the parties which is necessary to bring about a proper and complete resolution of the difficulty. Delegation of the husband's power of divorcing his wife to the elders can likewise be ensured, if it should prove necessary.

In either case, there must be more than mere irreconcilability of disposition, or mere hatred or dislike between the spouses to attract the application of these verses from the Holy *Qur'an*. These are, at the most, incidents of the psychology of the spouses in relation to each other. If the couple are incapable of mutual adjustment, that would show that they are psychologically incapable of meeting on a common ground, that they are askew like: the skew lines of the mathematician which never meet. If there is simple aversion or hatred between them, that amounts to no more than a state or feeling. For such a state of affairs, neither of the spouses need be worthy of blame. But the verses clearly do not apply unless there is some fault, in the nature of a wrong action or a wrongful act, on the part of the wife in the first case and of the husband in the second case.

I am accordingly of the opinion that, under Muslim law, such matters as **incompatibility of temperaments, aversion, or dislike cannot form a ground for a wife to seek dissolution of her marriage**, at the hands of a *Qazi* or a court, but they fall to be dealt with under the powers possessed by the » husband as well as the wife under Muslim law as parties to the marriage contract.

4. Recognition of *talaq* by French and Belgian courts

When the wife decides to sue for divorce in France, the husband of Algerian or Moroccan origin who have emigrated to France travel back to Algeria or Morocco to seek an Islamic divorce (*talaq*) under which the wife receives extremely low financial compensation. The husband then seeks the French court to stop all proceedings in France because the parties are already divorced.

The French courts generally refuse to recognize Islamic divorce decrees. Since 2004, the French *Cour de cassation* has been ruling that Islamic divorces are in fundamental contravention of French public policy since they infringe the principle of equality between spouses that is mandated by the European Convention of Human Rights (Article 5, Protocol VII). It should be stressed that most of the cases adjudicated by the French *Cour de cassation* relate to women who were either French national or were resident in France when the marriage took place.

As regard the validity of *`talâq'* by Belgian courts, see **Cour de Cassation belge, 29 septembre 2003**.

Faits : Bien que résidente en Belgique, la défenderesse a été répudiée par son mari sous la forme *`talâq'* prononcée par un tribunal marocain. Elle a déclaré ultérieurement accepter ladite répudiation. Parant, elle a revendiqué auprès de l'ONSS ses droits d'épouse divorcée, au motif qu'elle avait indiscutablement acquiescé à la répudiation. Selon elle, cet acquiescement avait comme effet que la répudiation n'est pas nécessairement contraire à l'ordre public international belge et peut, en conséquence, produire ses effets en Belgique**.**

Droit marocain: Dans la procédure *`talâq'* la femme n'intervient pas, à proprement parler, pendant la procédure et elle n'est informée de la répudiation que lorsque celle-ci est prononcée (même si elle est convoquée pour la date du prononcé) ; la seule forme de compensation pour l'épouse est l'octroi par le mari, pendant la période d'abstinence (*idda*) d'un lot de consolation (*moutâ*) qui est déterminé en tenant compte des ressources et de la situation de la femme répudiée.

Procédure : La Cour d'appel a jugé que la répudiation prononcée par un tribunal marocain n'était pas contraire aux principes d'ordre public belge et au respect des droits de la défense par application de l'article 570 du Code judiciaire. Par consequent, en sa qualité d'épouse divorcée, la défenderesse avait droit au revenu garanti aux personnes âgées isolées.

L'arrêt de la Cour d'appel du travail de Bruxelles constatait expressément que " dans la procédure *'talâq'*, la femme n'intervient pas, à proprement parler, pendant la procédure et qu'elle n'est informée de la répudiation que lorsque celle-ci est prononcée". La Cour d'appel reconnaissait de la sorte que la défenderesse n'avait pas été entendue lors de la procédure de répudiation et que ses droits de la défense " n'ont guère été respectés au cours de la procédure de répudiation ". La Cour d'appel décida néanmoins que les effets de la répudiation devaient être admis au motif que la défenderesse " a indiscutablement acquiescé à la répudiation et reconnu que ses droits n'ont pas été lésés en déclarant ultérieurement accepter ladite répudiation et surtout en revendiquant ses droits d'épouse divorcée ".

L'ONSS contestait ce régime trop favorable au motif que l'intéressée n'était pas divorcée.

Jugement : The cour de cassation overturned the court of appeal judgment on the following ground:

'Attendu qu'il ressort de l'arrêt que, pour prétendre au bénéfice du revenu garanti aux personnes âgées en qualité de femme divorcée d'un travailleur salarié, la défenderesse se prévaut d'"un acte de répudiation intervenu le 27 décembre 1994, dûment entériné par les autorités marocaines" ;

Que la cour du travail a considéré que, pour apprécier si cette répudiation peut sortir ses effets en Belgique, il lui appartenait de vérifier si les conditions de l'article 570, alinéa 2, du Code judiciaire étaient réunies ;

Attendu que les jugements régulièrement rendus par un tribunal étranger, relativement à l'état des personnes, produisent, en règle, leurs effets en Belgique, indépendamment de toute déclaration d'exequatur ;

Qu'ils ne sont toutefois tenus, en Belgique, pour régulièrement rendus que s'ils satisfont aux conditions énoncées dans l'article 570 du Code judiciaire ;

Que le respect des droits de la défense figure parmi ces conditions ;

Attendu que, si l'arrêt constate que la défenderesse " a été dûment convoquée le 11 octobre 1994 pour comparaître le 10 novembre 1994 devant le tribunal de première instance de Chefchaouen", et qu'elle a déclaré n'avoir "pu se rendre sur place pour des raisons personnelles et matérielles", il considère "que les droits de la défense de la (défenderesse) n'ont guère été respectés au cours de la procédure de répudiation " ;

Qu'en se fondant sur la circonstance que la défenderesse a " ultérieurement accept(é) la (...) répudiation et (...) revendiqu(é) ses droits d'épouse divorcée " et en en déduisant qu'elle " a indiscutablement acquiescé à la répudiation et, ce faisant, reconn(u) que ses droits n'ont pas été lésés ", l'arrêt ne justifie pas légalement sa décision que la répudiation litigieuse satisfait à la condition énoncée à l'article 570, alinéa 2, 2°, du Code judiciaire ;

Qu'en cette branche, le moyen est fondé ;

PAR CES MOTIFS, la Cour casse l'arrêt attaqué.'

Attention should be drawn to the fact that under specific conditions, Belgian law acknowledges the validity of *talaq*, albeit restrictively.

Indeed, Article 57 of the **Belgian Code of International Private Law** runs as follows:
Article 57. Foreign Divorce based on the Will of the Husband
'§1. A foreign deed establishing the intent of the husband to dissolve the marriage without the wife having the same right cannot be recognized in Belgium.
§2. Such deed can however be recognized in Belgium after verifying whether the following cumulative conditions are satisfied:

1°the deed has been sanctioned by a judge in the State of origin,
2° neither the spouses had at the time of the certification the nationality of a State of which the law does not know this manner of dissolution of the marriage;
3° neither the spouses had at the time of the certification their habitual residence in a State of which the law does not know this manner of dissolution of the marriage;

4° the wife has accepted the dissolution in an unambiguous manner and without any coercion;
5° non of the grounds of refusal provide for in article 25 prohibits the recognition.'

First observation: Account must be taken of the fact that this provision does not mention *talaq*. However, in stating 'A foreign deed establishing the intent of the husband to dissolve the marriage without the wife having the same right', the Belgian lawmaker implicitly refers to the practice of *talaq*. Indeed two conditions have to be fulfilled:
a) the unilateral will of the husband to dissolve the marriage;
b) the fact that the wife can't avail the same right'.

The fact is that *Khula*, as discussed above, does not confer the same right to the wife. As a result, one can't argue that the recognition of *Khula* fulfils that second condition.

Second observation: Article 57 of the Belgian Code of International Private Law departs from former *Cour de cassation* case-law. In the 29 of September 2003 judgment, the *Cour de cassation* took the view that the divorce is void on the account that the rights of defense flowing from Article 570 of the Judiciary Code were not safeguarded. *A contrario*, the *Cour de cassation* was ready to recognize the unilateral dissolution provided that the rights of the wife were preserved. Article 57 is requesting further conditions with respect to the nationality of the spouses or their residence at the time of the certification of the marriage.

Third observation: As a matter of practice, so far, Belgian courts have been refusing to recognise a number of *talaq* on the grounds that one or several of the conditions were not fulfilled. However, a few judgments recognized the validity of *talaq*.

By way of illustration, two Morrocans were married in Morroco. At that time, they did not have their habitual residence in Belgium. The *talaq* has been sanctioned by a Moroccan court and duly accepted by the wife in 'an unambiguous manner and without any coercion'. As a result, pursuant to Article 57, a Belgian court will have to reach the conditions that the conditions set out in that provision are fulfilled. Accordingly, the unilateral repudiation should be recognised.

In contrast, such unilateral repudiation can't be recognized by a Belgian court where, for instance:

- the wife was Belgian at the time of the certification;
- the wife had a residence in Belgium at the time of the certification;
- the unilateral repudiation had not been sanctioned by a Moroccan court.

IX. PRIVATE LAW: INHERITANCE

The Qur'an contains three verses which give specific details of inheritance and shares:

[4:11] Allah instructs you concerning your children: for the male, what is equal to the share of two females. But if there are [only] daughters, two or more, for them is two thirds of one's estate. And if there is only one, for her is half. And for one's parents, to each one of them is a sixth of his estate if he left children. But if he had no children and the parents [alone] inherit from him, then for his mother is one third. And if he had brothers [or sisters], for his mother is a sixth, after any bequest he [may have] made or debt. Your parents or your children - you know not which of them are nearest to you in benefit. [These shares are] an obligation [imposed] by Allah . Indeed, Allah is ever Knowing and Wise.

[4:12] And for you is half of what your wives leave if they have no child. But if they have a child, for you is one fourth of what they leave, after any bequest they [may have] made or debt. And for the wives is one fourth if you leave no child. But if you leave a child, then for them is an eighth of what you leave, after any bequest you [may have] made or debt. And if a man or woman leaves neither ascendants nor descendants but has a brother or a sister, then for each one of them is a sixth. But if they are more than two, they share a third, after any bequest which was made or debt, as long as there is no detriment [caused]. [This is] an ordinance from Allah, and Allah is Knowing and Forbearing.

[4:176] They request from you a [legal] ruling. Say, " Allah gives you a ruling concerning one having neither descendants nor ascendants [as heirs]." If a man dies, leaving no child but [only] a sister, she will have half of what he left. And he inherits from her if she [dies and] has no child. But if there are two sisters [or more], they will have two-thirds of what he left. If there are both brothers and sisters, the male will have the share of two females. Allah makes clear to you [His law], lest you go astray. And Allah is Knowing of all things.

Muslim jurists are reckoning upon these verses as a starting point to expound the laws of inheritance. They reckon also upon haddith and quiyas. Though they are share the same principles, the laws of inheritance for the Sunnis and the Shiites differ in a number of features due to the acceptation or the rejection of certain haddiths.

Only relatives with a legitimate blood relationship to the deceased are entitled to inherit. Primary heirs are entitled to a share of the inheritance. Accordingly, they are never totally excluded. There are five primary heirs:

1. Surviving Spouse
2. Son
3. Daughter
4. Mother/Father

It must be noted that children are not placed upon equal footing.

- For instance, illegitimate children and adopted children have no shares in inheritance.
- Moreover, a son's share is double that of a daughter's. A daughter is entitled to only

half that of the son on the account that women, upon marriage are entitled to a "dowry" from the husband.

Under certain circumstances, other heirs can also inherit as residuaries, namely the father, paternal grandfather, daughter, agnatic granddaughter, full sister, consanguine sister and mother. This group usually take a designated share or quota of the estates. Their shares are fixed. The share taken by each sharer will vary.

For instance, where the surviving spouse is the widower she will receive :
- 1/8th of the estate, if there are any children,
- and 1/4th where the couple is without lineal descendants.

Indeed, according to **Haddith 958:** 'When the husband dies and he does not leave any children, his permanent wife will inherit **a quarter** of the property and the remainder is for the remaining heirs'.

If the deceased's only child is female, she is entitled to half of the estate. If the deceased also has brothers and a mother, his daughter will receive one-sixth.

ECtHR, *Molla Sali v. Greece* 19 December 2018

The question arose as to whether these inheritance rules can be modified by a public will. The case *Molla Sali* that has yet to be adjudicated by the CtHR epitomizes the restrictions placed by Muslim law upon the inheritance rights of the spouse of the deceased.

The applicant, Ms Chatitze Molla Sali, is a Greek national who was born in 1950 and lives in Komotini (Greece).

On the death of her husband, Ms Molla Sali inherited his entire estate under the terms of a will drawn up by her late husband before a notary.

However, the two sisters contested the will, on the grounds that their brother had belonged to the Thrace Muslim community of the deceased had initiated legal procedures with the aim to challenge the validity of the will drafted by their brother. They argued that the notarised will drawn up by their brother, a Greek national of Muslim faith, was devoid of legal effect because Sharia law only recognises intestate succession. Accordingly, they claimed that any aspect of succession to the proprietary rights of the deceased should have taken place according to Islamic law of inheritance instead of the rules of the Civil Code. As a result, they asserted a claim to three-quarters of the property bequeathed.

They relied in particular on the 1920 Treaty of Sèvres and the 1923 Treaty of Lausanne, which provided for Islamic customs and Islamic religious law to be applied to Greek nationals who were Muslims. Inherited from the Ottoman Empire, Sharia law continues therefore to apply to Muslim populations under Greek jurisdiction after the recapture of Western Thrace.

Article 11 of the Treaty of Athens provides:

"8.1. The muftis, in addition to their authority over purely religious affairs and their supervision of the administration of *vakouf* [public] property, shall exercise jurisdiction between Muslims in matters of marriage, divorce, maintenance payments (*néfaca*),

guardianship, trusteeship, emancipation of minors, Islamic wills, and succession to the position of Mutevelli (*tevliet*).

8.2. The judgments rendered by the muftis shall be executed by the proper Greek authorities.

Article 14 § 1 of the Treaty of Sèvres provided as follows:

"Greece agrees to take all necessary measures in relation to Moslems to enable questions of family law and personal status to be regulated in accordance with Moslem usage."

In accordance with these treaties, the Greek courts have held that Sharia law must apply to all members of the Muslim community of Thrace, in matters of marriage, divorce, and succession.

The two sisters' claims were dismissed by the Greek courts at first instance and on appeal. However, the Court of Cassation quashed that judgment on the grounds that questions of inheritance within the Muslim minority should be dealt with by the mufti in accordance with the rules of Islamic law. …

Relying on Article 14 (prohibition of discrimination), combined with Article 1 of Protocol No. 1 (protection of property), Ms Molla Sali complains of the application to her inheritance dispute of Sharia law rather than the ordinary law applicable to all Greek citizens, despite the fact that her husband's will was drawn up in accordance with the provisions of the Greek Civil Code. She also alleges that she was subjected to a difference in treatment on grounds of religion.

Article 14 of the Convention

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as ... religion ... or other status."

Article 1 of Protocol No. 1

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

- *Whether there was an analogous or relevantly similar situation and a difference in treatment*

The ECtHR held that the applicant was in an analogous or relevantly similar situation to that of a beneficiary of a civil law will drafted by a non-Muslim testator.

138. The first task is to ascertain whether the applicant, a married woman who was a beneficiary of her Muslim husband's will, was in an **analogous or relevantly similar situation to that of a married female beneficiary of a non-Muslim husband's will.**

139. The Court notes that during his lifetime the applicant's husband, who was likewise a member of the Thrace Muslim community, had drawn up a notarised public will in accordance with the provisions of the Civil Code, bequeathing his entire estate to his wife. It is beyond doubt that she expected, as any other Greek citizen would have done, that on her husband's death his estate would be settled in accordance with the will thus drawn up.

141. In conclusion, the applicant, as the beneficiary of a will made in accordance with the Civil Code by a testator of Muslim faith, was in a **relevantly similar situation** to that of a

beneficiary of a will made in accordance with the Civil Code by a non-Muslim testator, and was **treated differently** on the basis of "other status", namely the testator's religion.

Whether the difference in treatment was justified

It is settled case law that a difference in treatment can be allowed only:

(i) when the authority pursues a "legitimate aim" ;
(ii) and there is a "reasonable relationship of proportionality" between the means used and the aim pursued.

According to the Greek government, the difference in treatment was justified because Greece sought to honour its international agreements and provide protection to the Muslim minority as foreseen in the above-mentioned treaties. Accordingly, the protection of the Thrace Muslim minority was deemed to be an aim in the public interest.

The ECtHR dismissed that argument.

…. Although the ECtHR understands that Greece is bound by its international obligations concerning the protection of the Thrace Muslim minority, in the particular circumstances of the case, it doubts whether the impugned measure regarding the applicant's inheritance rights was suited to achieve that aim. Be that as it may, it is not necessary for the Court to adopt a firm view on this issue because in any event the impugned measure was in any event not proportionate to the aim pursued. (§143)

The ECtHR found that the wording of the Treaties of Sèvres and Lausanne does not provide for any application of religious law (§151).

Further, the ECtHR noted that divergent case law, that has created legal uncertainty that was in conflict with the rule of law (§153).

In addition, the Court noted that several international bodies have expressed their concern about the application of Sharia law to Greek Muslims in Western Thrace (§154).

Last, the Court held that

'157. Refusing members of a religious minority the right to voluntarily opt for and benefit from ordinary law amounts not only to discriminatory treatment but also to **a breach of a right of cardinal importance in the field of protection of minorities**, that is to say the **right to free self-identification**. The negative aspect of this right, namely the right to choose not to be treated as a member of a minority, is not limited in the same way as the positive aspect of that right (…). The choice in question is completely free, provided it is informed. It must be respected both by the other members of the minority and by the State itself. That is supported by Article 3 § 1 of the Council of Europe Framework Convention for the Protection of National Minorities which provides as follows: "no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice". The **right to free self-identification** …. is the **"cornerstone" of international law on the protection of minorities in general**. This applies especially to the negative aspect of the right: no bilateral or multilateral treaty or other instrument requires anyone to submit against his or her wishes to a special regime in terms of protection of minorities.

158. Lastly, the Court notes that the present case highlights the fact that Greece is the only country in Europe which, up until the material time, applied Sharia law to a section of its citizens against their wishes. This is particularly problematic in the present case because the application of Sharia law caused a situation that was detrimental to the individual rights of a widow who had inherited her husband's estate in accordance with the rules of civil law but who then found herself in a legal situation which neither she nor her husband had intended.'

Concluding remarks:

- A State can "*create a particular legal framework in order to grant religious communities a special status entailing specific privileges*".

- However, the State's wish to preserve a given minority's autonomy and to enhance cultural pluralism could not justify, for the sake of protecting that minority, restricting the fundamental rights of those members of the minority who had decided not to follow its rules and practices. The "*right to free self-identification*" of the minority member is the cornerstone of the reasoning. This right entails the right "*the right to choose not to be treated as a member of a minority*".

- In so doing, the ECtHR has condemned the forced application of Sharia to members of a minority. With that being said, the Court did not condemn Sharia law itself that can still be applied in Greece in as much as the Greek Muslims accept it. Accordingly, the mufti jurisdiction must be optional. What matters is individual consent to be subject to Sharia law.

Concluding remarks

Theoretically, Islamic law is an all-embracing religious system of law.

It is static, not open to amendment, reform or repeal.

In Islamic law, there are set, fixed values, which are independent from the values of the people.

It is the Islamic nation, the *umma*, which has to follow the rules of Islamic law as opposed to attempting to bring the law in line with people's attitude.

Terminology

Fatwa: verdict
Idda: Waiting period upon separation
qadi: judge of Muslim jurisprudence
Khula: divorce
Mahr: dower
Shiqaq: marital discord
Talaq: divorce

SELECTED BIBLIOGRAPHY

F.–P. BLANC, *Le droit musulman*, 2ème éd. (Paris, Dalloz, 2007)

H. P. GLENN, *Legal Traditions of the Worlds*, 2nd ed. (OUP, 2000)

R. DAVID & C. JAUFFRET-SPINOSI, *Les grands systèmes de droit contemporains,* 11th ed. (Dalloz, 2002)

K. ZWEIGERT H. & KOTZ, *An Introduction to Comparative Law*, 3rd ed. (OUP, 1998)