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Accommodating Religious Demands and Gender-justice Concerns: Indian State Practices after the Shah Bano Judgment

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Summary
This paper is an examination of a new turn in the practice of multiculturalism in India observed by legal and political theorists who have challenged the long-standing argument of multiculturalists that personal laws in India inhibit "gender-equalizing" changes. Recent literature on Muslim Personal Law points out that the demand placed by religion on women through the promulgation of the Muslim Women (Protection of Rights on Divorce) Act, 1986 has not meant an abridgment of the democratic rights of Muslim women. In recent scholarship this impugned law has been viewed as more salutary for women, as this codified Islamic law has prevented destitution of women more effectively than secular state law. By making an analysis of case law on the maintenance of divorced Muslim women in the High Courts and the Supreme Court of India, this paper examines the claim that the Muslim Women's Act is a gender-just personal law. It thereby examines how the Indian judiciary has balanced the demands of religion and gender justice in delivering judgments on maintenance for Muslim divorcees who are governed by their religious law after the enactment of the Muslim Women's Act in 1986.

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Introduction

India's cultural diversity is based on religion, language, caste, sect and region and is accommodated through various multicultural institutions and policies. One such institution is the personal-law system: the plural legal system in India recognizes the personal laws of Hindus, Muslims, Christians, Parsis and Jews.[1] It is one of the most criticized multicultural institutions in India, not only because personal laws are

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1 In India, for purposes of Personal Law, the Constitution recognizes four religious communities: Hindus, Muslims, Christians and Parsis. Sikhs and Buddhists are included within the fold of Hindus.

gender-unequal, but also because they provide limited scope for legal change. The criticism expressed – namely, that personal laws are resistant to legal and social change – is stronger in the case of India's minority communities. This is so because, in conformity with its multicultural practice, the Indian state has only introduced reforms in the personal law of the Hindu community.[2] The initiative for reform among the minority religious communities in India – Muslims, Christians, Parsis and Jews – has been left to the communities themselves. Due to the state's non-intervention in the personal laws of minority communities, it is claimed that women in these communities are doubly disadvantaged: while, on the one hand, the state is seen to have abandoned its responsibility to these women as citizens, on the other, the political and religious representatives of these cultural communities are generally reluctant to introduce gender-equal reforms in their personal laws (Mahajan 2005: 92). The practice of multiculturalism in India is therefore criticized for protecting the cultural autonomy of minority groups at the expense of concerns about gender equality.

In academic writings on Indian multiculturalism, "the Shah Bano controversy" (1985–86) is a threadbare example of the incompatibility between gender-equality and religious/cultural autonomy (Phillips 2005: 127–129; Spinner-Halev 2001: 99–101; Shachar 2004: 81–83). This paper examines Indian state practices in the aftermath of the Shah Bano controversy in accommodating the demands made by the requirements of Muslim Personal Law and the concerns raised by demands of gender justice.[3] The argument advanced in this paper is that *since the Shah Bano judgment was passed in 1985* (AIR 1985 SC 945)*, state practices in India have shifted away from prioritizing either religious autonomy or gender equality to accommodating both of them.* By examining case law on the maintenance of divorced Muslim women since the Shah Bano verdict and the promulgation of the Muslim Women (Protection of Rights on Divorce) Act in 1986, I shall demonstrate *how* the judicial branch of the Indian state has accommodated demands of religious autonomy and concerns of gender justice.

The argument mentioned above is due to a new turn in the practice of multiculturalism in India observed by legal and political theorists, who have

2 In 1955–56, under strong opposition from conservative Hindus in Congress, the Indian Parliament passed the Hindu Code Acts that resulted in the reform of Hindu law. This led to a general presumption in public debate and even in the judiciary that Hindus are governed by a secular, egalitarian and gender-just code and that, in order to liberate Muslim women from their unjust personal-law system, this code should be extended to Muslims as well. However, Flavia Agnes has pointed out the existence of a bias against women in the Hindu Code, which continues to remain hidden in statute books and legal manuals (Agnes 2011: 20–40).

3 The term "gender justice" may be understood as an expansive concept which includes women's rights to equality, freedom, dignity and personal security as well as their right to cultural membership, whilst the term "gender equality" denotes a formal concept of equality between the sexes and, as such, may be procedural in nature. In this paper, however, the notions of gender justice and gender equality are used interchangeably, referring to both areas, i.e., formal and substantive justice for women.

challenged the long-standing claim made by multiculturalists that personal laws in India inhibit "gender-equalizing" changes (Subramanian 2008). In the empirical field, this turn in multiculturalism came with the promulgation of the Muslim Women (Protection of Rights on Divorce) Act, 1986.[4] This piece of legislation has a tainted past, and as such its constitutional validity was challenged through several writ petitions filed immediately after its promulgation in May 1986. The legislation, which has evoked such pejorative adjectives as "anti-women," "unconstitutional" and "obscurantist," was introduced by the Rajiv Gandhi-led Congress government in the wake of the furor created by the Shah Bano judgment. The Act (which we shall name the "MWA" hereafter) sought to circumscribe the rights of divorced Muslim women who, before its promulgation, had been able to find sanctuary under the secular law of the state and thus avoid vagrancy and destitution. The MWA demonstrated to multiculturalists in India and abroad that religious demands and gender-justice demands are incommensurable. However, scholars such as Flavia Agnes, Werner Menski, Narendra Subramanian and Gopika Solanki have argued that the way the MWA has unfolded shows that Muslim Personal Law *can* actually be gender-just. These researchers have observed a new turn in multiculturalism in that the demands that religion places on women through the promulgation of the MWA has not meant an abridgment of their democratic rights. The MWA has been viewed by them as more salutary for women, as this codified Islamic law has been better at preventing destitution among women than secular state law has (Agnes 2011: 167; Menski 2008: 211–249; Subramanian 2008: 647; Solanki 2011: 74–75). This paper examines this claim by analyzing case law on the maintenance of divorced Muslim women in the High Courts and the Supreme Court of India. If the judiciary is providing a gender-just interpretation of the 1986 Act, two interrelated questions need to be answered. First, *in providing a gender-just interpretation of the MWA, is the judiciary prioritizing gender justice at the expense of religious demands? Or has it found a way to balance both demands?* If the first point is the case, then why have we not seen any conservative backlash from the Muslim community yet? If, however, the second point is the case, then another important question needs to be asked, namely, *how has the judiciary balanced the demands of religion and gender justice?*

In the first section of the paper, I briefly define what "legal pluralism" means and how it has been enacted by the post-colonial Indian state. In the same section, I then proceed to outline the legislative history of Section 125, which is a part of criminal law in India, and how it came to conflict with Muslim Personal Law after its amendment in 1973. I subsequently describe the provisions in Muslim Personal Law as codified in the MWA. In order to probe how the Indian judiciary has balanced the demands of religion and gender justice, I distinguish between what I call the "methods" and "concerns" of the Indian judiciary in adjudicating maintenance cases

4 See The Muslim Women (Protection of Rights on Divorce) Act, No. 25, Acts of Parliament, 1986.

in the second section. Following this distinction, I analyze certain maintenance cases. In the third section of the paper, I delineate the Supreme Court and High Court maintenance cases that have been selected. In the fourth section, I examine the Shah Bano verdict of 1985 in terms of the methods and concerns of the Supreme Court in providing maintenance to the divorced woman, Shah Bano, under Section 125 of Indian criminal law. The fifth section is an examination of the verdicts of the High Courts on the maintenance of Muslim divorcees in the liminal period – between 1986 when the MWA was passed and 2001 – when the Act's constitutional validity was upheld in the Supreme Court verdict in the Danial Latifi case. In the sixth section, I turn to the Danial Latifi verdict of 2001, where the apex court took up the issue of the constitutional validity of the MWA. In conclusion, I critically assess the legal discourse on which a gender-just interpretation of the MWA is based.

Legal Pluralism in India: Secular State Law versus Religious Personal Law

Legal pluralism stands opposed to the idea of legal centralism, where law emanates from the state and is adjudicated and enforced by state institutions. Legal pluralism, in contrast, is a policy where the state recognizes and regulates non-state laws emanating from personal laws (Solanki 2011: 1–8). The practice of legal pluralism in India was handed down by the British colonial government, which first introduced the distinction between "personal law" (i.e., the laws of marriage, divorce, child custody, division and control of family property and inheritance) and "general law," as it did not want to interfere with the laws that purportedly formed part of the religion of the natives (Parashar 1992: 46). In India, while legal pluralism recognizes and legitimizes the various personal laws of religious communities, the idea of legal uniformity envisages the erasure of all personal laws and the establishment of a Uniform Civil Code (UCC) that applies to every citizen. In India, the idea of the UCC has become an extremely value-laden concept and as such invokes different associations for different groups. Susan and Lloyd Rudolph have observed that Indian law and politics have generally vacillated between the two ideas of legal uniformity and legal pluralism, resulting in conflict and accommodation of various practices in the governance of a pluralist society (Rudolph and Rudolph 2001: 37). For the Hindu right, the UCC has been a tool to construct a Hindu nation in which Muslims and other minorities would assimilate. Up until the Shah Bano controversy, the UCC meant a commitment to secularism and national integration for the modernists, while it was a tool for achieving women's legal equality for the Indian women's movement. Finally, the minorities see the UCC as a majoritarian device for ensuring the political assimilation of minority communities (Rudolph and Rudolph 2001: 54–55). Most of the secular laws functioning today are remnants of British colonial legislation; these laws have remained more or less intact, with few amendments being made in post-colonial

India. Muslim Personal Law, on the other hand, has remained largely uncodified. In fact, the MWA was the first legislation codifying Muslim Personal Law after India's independence. In the next section, I shall provide a brief legislative history of criminal law in Sections 125–8 of the 1973 Code of Criminal Procedure (Cr.P.C.), which came to conflict with Muslim Personal Law after its amendment in 1973. A brief overview of the provisions for Muslim divorcees in the MWA is also included.

The Code of Criminal Procedure, 1973

In Section 488 of the old Code of Criminal Procedure of 1898, a husband was obliged to provide maintenance for his wife and children. Section 488 was introduced by the British colonial government to prevent vagrancy and destitution on the part of women and children.[5] Divorced women were not included within its purview, however. When this Act was amended in 1973, the definition of "wife" was extended in Section 125 to include a man's ex-wife as well. This amendment meant that ex-husbands had to pay maintenance to their divorced wives. The Ulema, members of the Muslim Personal-Law Board and other Muslim leaders found that Section 125 Cr.P.C. interfered with their personal law, as Muslim Personal Law envisages that ex-husbands only have to provide maintenance to their ex-wives during the *iddat* period,[6] and not beyond it. Therefore, through an amendment, Section 127 (3) (b) was added to the Code of Criminal Procedure of 1973, which provided that if the ex-husband discharged his obligation of maintaining his ex-wife according to his personal law, then Section 125 would stand annulled.[7] The amendment did not specify that this provision was expressly meant for the Muslim

5 Bajpai points out that Section 125 of the Code of Criminal Procedure – from which Muslims sought to be exempted – was a piece of colonial legislation in terms of its origin and substance; it was not concerned with individual rights, but with vagrancy as a threat to public order (Bajpai 2011: 201, note 50).

6 Generally speaking, the *iddat* period roughly spans three menstrual cycles (or three lunar months if the woman is not subject to menstruation). It is the waiting period after the dissolution of a marriage where the purpose is to learn whether the wife is pregnant, to provide for reconciliation, or for widows to mourn. Its particularities vary from country to country.

According to the Muslim Women's Act, in the case of a divorced Muslim woman, the *iddat* period means (i) three menstrual cycles after the date of divorce if she is subject to menstruation; (ii) three lunar months after her divorce if she is not subject to menstruation; or (iii) if she is enceinte at the time of her divorce, the period between her divorce and the delivery of her child or the termination of her pregnancy, whichever is earlier. See The Muslim Women (Protection of Rights on Divorce) Act, 1986, Section 2 (b).

7 Section 127 (3) (b) states: "Alteration in allowance. (1) On proof of a change in the circumstances of any person receiving under section 125 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife, child, father or mother, as case may be [sic], the Magistrate may make such alteration in the allowance [as] he thinks fit: (3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that – (b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order." See The Code of Criminal Procedure, 1973, Act No. 2 of 1974.

community, however. In principle, this amendment applied to all religions that included the provision of maintenance for divorced wives in their respective personal laws. The amendment alluded to Muslim Personal Law, as it provides for *mehar*[8] to be given to the divorced wife.

The Muslim Women (Protection of Rights on Divorce) Act, 1986

The Muslim Women (Protection of Rights on Divorce) Act[9] enacted in 1986 restricts Muslim women's access to Section 125 Cr.P.C. As per the Act, divorced Muslim women cannot seek protection against destitution and vagrancy provided under Sections 125–8 Cr.P.C., which was available to all women until 1985, irrespective of their religion. Section 3 of the Act specifies what entitlements a divorced Muslim woman may expect to receive from her former husband. The remedy as per 3 (1) (a) of the MWA is: (i) a reasonable and fair provision of maintenance to be paid to her during the *iddat* period by her former husband; (ii) an amount equal to the sum of *mehar*; (iii) all the property given to her before or at the time of marriage or after the marriage. Section 4 (1) of the Act directs the relatives of the divorced woman, who would inherit her property upon her death as per Muslim law, to provide for her maintenance if she is unable to sustain herself. Further, Section 4 (2) of the Act directs the state *wakf* boards to provide the divorced woman with maintenance if she has no relatives. The Act does not have any exit option for Muslim divorcees who wish to be governed by general law. However, as per Section 5 of the Act, if both spouses jointly agree to be governed by the provisions of Sections 125–8 Cr.P.C., then a divorced Muslim woman may avail herself of the provisions of the general law.

The "Methods" and "Concerns" of the Indian Judiciary in Adjudicating Maintenance Cases

In order to examine how the Indian judiciary has balanced the demands of Muslim Personal Law and protected the rights of Muslim women at the same time, I have analyzed the maintenance cases in terms of the "methods" employed by the judiciary to balance these demands and the "concerns" that led them to do so. The methods include an examination of the legal, moral and religious exegesis that the judges involve themselves in while adjudicating on family-law cases. Narendra Subramanian says that the judges in the state courts are primarily trained in Western law, particularly in common-law traditions, rather than in religious law. However, he shows that the state courts also draw from several sources in family-law cases and identifies nine major ones:

8 In Muslim marriages, *mehar* is the dower, or "bride wealth," that a husband owes his bride. It can be paid promptly, i.e., right after the wedding, or be deferred, i.e., paid later, often upon divorce.

9 See The Muslim Women (Protection of Rights on Divorce) Act, No. 25, Acts of Parliament, 1986.

(i) *transnational "Western" law,* like transnational human-rights regimes;

(ii) *constitutional rights* present in the Fundamental Rights of the Indian Constitution;

(iii) *criminal laws relevant to matrimonial life* (Subramanian cites the example of Section 125 Cr.P.C., which, after its amendment in 1973, came to conflict with Muslim Personal Law);

(iv) *transnational Islamic law.* Since the late 1970s, remarks Subramanian, judgments and lawyers' pleas have alluded to laws in Islamic states where women enjoy greater rights than in India, like Tunisia, Libya, Jordon, Iraq, Indonesia and Malaysia. Sometimes they have also referred to innovative interpretations of Muslim scholars in India and other countries;

(v) *statutory group-specific law.* Statutes govern many aspects of family life among various religious groups in India. However, they govern fewer features of family relations among the Muslims in India;

(vi) *uncodified group legal tradition.* Pre-colonial legal texts like *Mitakshara* and *Hanafi* texts are the main non-statutory sources of Hindu and Muslim law in India;

(vii) *other group norms.* The Quran, the Bible and many early Hindu texts provide guidelines for individual moral behavior. Subramanian observes that some recent reforms in Indian Muslim Personal Law in the state courts were based on interpretations of Islam's founding texts;

(viii) *emergent group practices and initiatives.* Subramanian points out that courts sometimes draw from emergent group practices and initiatives of a community. He cites the example of the extensive practice and acceptance of divorce in Protestant churches and among the Christian laity, which gave Christians more extensive divorce rights in the 1990s;

(ix) *subgroup laws and custom.* Sometimes, courts also consider long-lasting customs specific to a particular caste, sect or region. These customs form legitimate grounds for departure for some of the religious groups to which these subgroups belong (Subramanian 2008: 636–637). In our examination of case law on maintenance for divorced Muslim women, we will probe *how* the various sources of law enumerated by Subramanian were utilized by judges in the High Courts and the Supreme Court in providing – or not providing – monthly maintenance allowances to divorced Muslim women.

Our analysis of case law also examines the *concerns* of the judiciary in delivering judgments that not only affirm to the requirements of Muslim Personal Law, but are also gender-just. Here, we examine the reasons for providing or not providing lifelong maintenance to Muslim divorcees. Sylvia Vatuk points out the "paternalistic approach" that permeates the legal process with respect to women, particularly the manner in which personal law is administered in the courts. She defines paternalism as "an attitude based on a view of women as inherently weak and vulnerable and

consequently in need of lifelong material and symbolic support and protection from men in their lives: fathers and brothers before marriage, husbands thereafter, and sons and other close male relatives in the latter's absence" (Vatuk 2001: 228). While for Vatuk such paternalism toward women may thwart gender-just outcomes, in Werner Menski's view, the Indian judiciary has been able to achieve gender justice while remaining within this patriarchal context, which, he argues, "no amount of state law can abolish" (Menski 2008: 243). In his opinion, the Indian state has been able to achieve gender justice by shifting its welfare concerns to the male members of families to make them maintain other family members. That is, the judiciary has used the patriarchal context of Indian society to put the burden of maintaining a divorced and homeless woman on the shoulders of male members of her family.

Selection of Cases

The case law on maintenance of divorced Muslim women examined here is restricted to High Court and Supreme Court cases. The two important Supreme Court cases that are studied here are *Mohd. Ahmad Khan v. Shah Bano Begum, 1985* and *Danial Latifi v. Union of India, 2001* ((7) S.C.C. 740 (2001)). A *liminal period* existed between the Shah Bano and Danial Latifi judgments (1986–2001) in which the High Courts interpreted the Act in contradictory ways while the constitutional validity of the Muslim Women's Act was being challenged by several petitions filed in the Supreme Court; some of the High Courts found that maintenance should only be paid *during* the *iddat* period, while others went further, requiring them to be paid *beyond* it as well. High Court judgments favorable to Muslim women, which provided maintenance payments extending beyond the *iddat* period, outnumbered the judgments that restricted maintenance to the *iddat* period. The cases selected here, which both provided and denied lifelong maintenance to Muslim divorcees – are from the High Court judgments that have been referred to in the Danial Latifi judgment. Furthermore, cases that have frequently been cited in academic literature and in various High Court judgments on the maintenance of divorced Muslim women have also been focused upon.

The Shah Bano Judgment, 1985

The Shah Bano judgment was delivered in response to an order by Murtaza Fazal Ali and J. J. Vardarajan in which they had directed a full bench of the Supreme Court to consider the question of whether the earlier Supreme Court judgments, viz., the *Bai Tahira* and *Fuzlunbi* verdicts, were in contravention of the plain language of Section 127 (3) (b) Cr.P.C. and whether they were against the fundamental concept of divorce by the husband under Islamic Law, which was expressly protected by Section 2 of the Shariat (i.e., Muslim Personal Law) Application Act, 1937. The appeal to the Supreme Court was filed by the husband, Mohammad Ahmad Khan, against a High Court order directing him to pay maintenance in the order of

Rs. 179.20 per month to his divorced wife, Shah Bano. The appellant contended that according to Muslim Personal Law, he was not bound to pay any maintenance at all to his divorced wife *after* the *iddat* period. Therefore, the appellant argued, an order of maintenance under Section 125 Cr.P.C. was in conflict with his personal law. The Supreme Court dismissed his appeal against the awarding of maintenance under Section 125 of the 1973 Code of Criminal Procedure. In Shah Bano's case, this victory came after ten years of struggle.[10]

The Shah Bano case had to settle the thorny question of whether there was any conflict between Muslim Personal Law and the secular provisions laid down in Section 125 Cr.P.C. In order to examine what *methods* the Supreme Court took recourse to in providing maintenance to Shah Bano under criminal law, it will be helpful to group these methods under Subramanian's nine sources of family law. The judiciary's methods can be grouped under (i) criminal laws relevant to matrimonial life, (ii) uncodified group legal tradition and group norms from the Quran, and (iii) emergent group practices and initiatives.

I. *Criminal laws relevant to matrimonial life.* The judges noted that under Section 125 (1) (a), if a person with sufficient means neglects or refuses to maintain his wife, who is unable to maintain herself, he can be asked by the court to pay a monthly maintenance to her with the upper limit of five hundred rupees. In clause (b) of the *Explanation* on Section 125 (1), the term "wife" includes a divorced woman who has not remarried. As noted above, this requirement to maintain ex-wives was also contested by the appellant as being against Muslim Personal Law. The judiciary noted that since Section 125 is part of Indian criminal law, the religion professed by the spouses has no place in the scheme of these provisions. The judgment declared:

> Whether the spouses are Hindus or Muslims, Christians or Parsis, pagans or heathens is wholly irrelevant in the application of these provisions. The reason is axiomatic, in the sense that section 125 is part of the Code of Criminal Procedure, not of the Civil Laws which define and govern the rights and obligations of the parties belonging to particular religions. [...] Such provisions, which are essentially of a prophylactic nature, cut across the barrier of religion.[11]

From above, the judges noted that Section 125 Cr.P.C. was enacted to provide a remedy for persons who are unable to maintain themselves. Since this particular Section is based on concerns of social justice, religion had no role to play here. The judges contended: "[...] Section 125 *overrides* the personal law, if there is any

10 In April 1978 the respondent, Shah Bano, filed a petition against the appellant under Section 125 Cr.P.C. In November 1978, the appellant divorced his wife by an irrevocable *talaq*. In 1979, the lower court awarded Rs. 25 per month to Shah Bano as maintenance under Section 125. The respondent then filed a revision petition to the High Court of Madhya Pradesh, where the maintenance amount was increased to Rs. 179.20 per month.

11 *Mohd. Ahmad Khan v. Shah Bano*, at pt. 855: 8.

conflict between the two."[12] Thus, the judgment clearly maintained that social justice comes prior to religious demands. The judges further argued that the liability imposed by Section 125 to maintain close relatives who are indigent is founded upon the "individual's obligation to the society [sic]" to prevent vagrancy and destitution. This, the judgment maintained, "is the moral edict of the law and morality cannot be clubbed with religion."[13] Menski observes that since the late 1980s, there has been an expansion of the judicial domain in family law. During this period, he argues, there has been a subtle shift away from demands for a Uniform Civil Code (UCC), and despite this, there has been, he notes, "harmonization of personal laws." Menski contends that the main new message of uniformity is that all Indian men, as controllers of most of the property and resources in India, are primarily liable for the welfare of wives and children who are in need of support (Menski 2008: 234–236). Despite the bugle call for an imposition of the UCC in the Shah Bano judgment, which later became the highlight of the judgment, the Supreme Court attempted to harmonize the Muslim Personal Law system with secular law by invoking social-welfare concerns, which, to quote the judges, "cut across the barrier of religion."

II. *Uncodified group legal tradition and group norms.* In order to demonstrate that Section 125 Cr.P.C. does not conflict with Muslim Personal Law, the judges involved themselves in religious exegesis, which later became one of the main reasons for the Shah Bano controversy. An exclusively Hindu bench choosing between competing interpretations of Islam and pronouncing on the appropriate interpretations of Quranic verses provoked a furious outcry from conservative sections of the Muslim community. The Supreme Court judges contended that the appellant's argument – that in Muslim Personal Law, the husband's liability to provide maintenance to his divorced wife is limited to the *iddat* period – cannot be accepted if the divorcee is unable to maintain herself. They maintained that Muslim Personal Law "does not contemplate or countenance the situation envisaged by section 125 of the Code." Thus, the judges argued,

> the *true position* is that, if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of iddat. If she is unable to maintain herself, she is entitled to take recourse to section 125 of the Code.[14]

To show that this "true" position does not conflict with Muslim Personal Law, the judges went on to *interpret* and *reinterpret* Islamic laws. After examining the relevant textbooks on Islamic law such as *Mulla's Mahomedan Law* and *Tyabji's Muslim Law*, the judges contended that these works were inadequate for establishing the appellant's contention that a Muslim husband is under no obligation to provide

12 Ibid., at pt. 857: 9 (my own emphasis).

13 Ibid., at pt. 856: 8–9.

14 *Mohd. Ahmad Khan v. Shah Bano*, at pt. 860: 11 (my own emphasis).

for the maintenance of his divorced wife if she is unable to maintain herself. This Court, therefore, went on to interpret the Quran in order to establish the "true" position. The judges quoted verses *(Aiyats)* 241 and 242 of the Quran to show that even in the Islamic concept of *mataaoon bil ma'aroofe* (fair and reasonable provision), there is an obligation on the part of Muslim husbands to provide for their divorced wives. The judgment thus concluded:

> These Aiyats *leave no doubt* that the Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teachings of the Quran.[15]

According to Pratap Bhanu Mehta, the Indian judiciary has involved itself in an act of reinterpreting and regulating the meaning of religion in order to square the constitutional dilemma of protecting liberal constitutionalism and, at the same time, protecting the right to religious freedom. He argues that while, on the one hand, constitutional practice requires religion to be subordinated to public purpose, on the other hand, it also requires public purpose not to impinge upon religious practice. Mehta contends that the only way to achieve this "happy congruence" is by regulating and trying to control the meaning of religious doctrine (Mehta 2008: 313). Thus, through the process of "internal reasoning and argumentation,"[16] Indian courts have sought to establish that "the requirements of justice have a basis in the different comprehensive doctrines." In other words, for the Indian judiciary, since the demands of justice are *not* opposed to the demands of religion, not only are different religious doctrines compatible with each other, there is also *no serious disagreement* between religious demands and demands of justice in the secular laws of the state (Mehta 2008: 326).

III. *Emergent group practices and initiatives.* At the conclusion of the judgment, the judges pointed to group practices among Muslims in India and Pakistan in order to appeal for reform in Muslim Personal Law. The court cited the Report of the Pakistan Commission on marriage and family laws to evince *Sharia's* capacity for evolution.

The analysis of the Shah Bano judgment demonstrates what I call *a dual process* of *harmonization* of Muslim Personal Law with secular laws of the Indian state undertaken by the judiciary to balance the demands of religion and gender justice. The harmonization of personal law with general law is "dual" because in the first strategy the judiciary invokes social-welfare concerns, which are seen to override religious considerations. In the second strategy, the judiciary involves itself in a reinterpretation of religious texts to show that there is no conflict between Muslim Personal Law and secular Indian law in the first place. In the Shah Bano case, the Supreme Court judges firstly followed a course that Menski notes, whereby the state invokes its social-welfare concerns to achieve gender justice and places this burden

15 Ibid. at pt. 864: 13 (my own emphasis).

16 This phrase is used by Akeel Bilgrami (1998).

on the male members of society instead of taking it upon itself. Such a harmonization process essentially makes use of the entrenched traditional patriarchal norms of society and uses them to the benefit of women. Thus, Menski claims that "in the arena of maintenance law, the Indian state is now simply saving itself from welfare claims by its own disadvantaged citizens, throwing the welfare burden back to the claimant's family to save its own coffers, promising access to justice to people who need the support of the courts." The Indian "post-modern state," he says, is willing to "co-opt tradition" in order to achieve gender justice and at the same time remain diversity-sensitive (Menski 2008: 246–247). Siobhan Mullally critically examines such a strategy of the Indian judiciary and points out that the Shah Bano judgment hid behind a "discourse of protection" rather than simply asserting the fundamental rights of Muslim women (Mullally 2004: 680).

Secondly, another parallel process of harmonization of Muslim Personal Law with the secular laws of the state took place that was more contentious and eventually led to the Shah Bano controversy. This was the Supreme Court's attempt to show that there was *no conflict* between the provisions of the secular laws of the state and the requirements of Muslim Personal Law. As Mehta points out, the Indian judiciary achieves this harmonization through the logic of the "essential practices" test. Through this test, Mehta argues, the courts not only "define, interpret, and regulate" the meaning of religion, they also seek to "minimize the conflict between the free exercise of religion and the secular purposes of the state" by arguing that the practices being regulated are not essential to that religion. Mehta further notes that through the doctrine of the essential practices test, the Indian judiciary has argued in many instances that "the secular, public purposes of the state *just are* the best expression of the free exercise of the particular religion in question" (Mehta 2008: 322–323). While this strategy has generally been used to regulate Hindu religious practices,[17] when the Supreme Court in the Shah Bano verdict used the same strategy to define, interpret and regulate Muslim religion by acquiring interpretive authority over the Quran, the minority Muslim community saw this as the specter of Hindu majoritarianism raising its head. Thus, this second strategy of the Indian judiciary refuses to acknowledge that there is any conflict between religious personal laws and state law. By involving itself in religious reinterpretation, the judiciary has sought to demonstrate that, so interpreted, the moral requirements of religion are also the best expression of the legal requirements of state law.

17 The essential practices test was formulated by the Supreme Court in the case involving the *Commissioner of Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swaminar*, popularly known as the *Shrirur Math case.* Also see *Shastri Yagnapurashdasji v. Muldas Bhundardas Vaisya,* also known as the *Satsang case,* where the Supreme Court used the essential practices test to determine whether the *Satsangis* were Hindus, which also meant considering who was a Hindu in the first place (Mehta 2008: 322–324).

High Court Judgments in the Liminal Period: 1986–2001

As a result of the huge uproar over the Shah Bano verdict, the Congress government implemented the Muslim Women (Protection of Rights on Divorce) Act the following year, 1986. On the face of it, this short act seemed to protect the interests not of Muslim women, but Muslim men, as the provisions of the Act debarred divorced Muslim women from accessing secular law in Section 125 Cr.P.C., which protects destitute women. This Act seemed to free Muslim men from the obligation to provide lifelong maintenance to their divorced wives, which is safeguarded under Section 125 Cr.P.C. Thus, for many people, the Act was a misnomer, since it seemed to prevent rather than protect the rights of Muslim women. It was only in the 1990s, when appeals by Muslim men against various High Court verdicts started accumulating, that the MWA caught the attention of legal scholars such as Flavia Agnes and Werner Menski. This empirical reality suggested that the High Court judges were interpreting the Act in such a way that it prevented vagrancy and destitution among Muslim women.

In this section of my paper, we shall take a look at the liminal period between 1986 when the MWA was passed and 2001 when the constitutional validity of the MWA was upheld in the Supreme Court. By making an analysis of various High Court judgments in this period, we will probe *how* the High Courts were providing a gender-just interpretation of the Act when on the face of it the piece of legislation seemed to take maintenance rights away from divorced Muslim women. We will also examine maintenance cases where the High Courts did not provide gender-just interpretations of the Act and compare these "maintenance-denying" verdicts with the "pro-women" verdicts.

"Pro-Women" High Court Judgments

One of the stated intentions of the Congress government in introducing the Muslim Women's Bill was to "nullify" the effect of the Shah Bano decision.[18] Despite this, in the 2001 Danial Latifi verdict where the constitutional validity of the MWA was challenged, the Supreme Court not only upheld the Act's constitutional validity, but at the same time attested the rationale found in the Shah Bano judgment in providing lifelong maintenance to Muslim divorcees. In this section, our analysis of High Court judgments will show that well before the Danial Latifi verdict, High Courts also used the Shah Bano verdict as a precedent to deliver gender-just verdicts. That is, in interpreting the MWA's provisions, these courts followed the harmonization process found in the Shah Bano verdict. As such, the majority of the High Courts *did not* construe the MWA as a reversal of the Shah Bano judgment; instead, the Shah Bano judgment became a basis for them to provide a gender-just interpretation of the MWA.

18 Lok Sabha, Eighth Series, Vol. 17, Part I (Apr 28 – May 8, 1986): 493.

Although the High Courts took the Shah Bano judgment as a precedent to be followed, they have departed from it in a crucial way since then. In our analysis, we see that the High Courts giving pro-women verdicts have reduced their reliance on religious exegesis to bring congruity between personal law and secular law. These courts instead harmonize the requirements of the MWA with the secular law of the state by invoking the social-welfare concerns of the state present in the Act. In other words, High Courts delivering gender-just verdicts have reduced their reliance on the kind of harmonization Mehta talks about and have increasingly followed the harmonization process pointed out by Menski instead. In this section, I will demonstrate that the High Courts delivering gender-just verdicts have hardly followed the dual harmonization process found in the Shah Bano verdict since the Shah Bano judgment and the promulgation of the Muslim Women's Act. It seems that the Shah Bano controversy was a lesson for the Indian judiciary, making it realize that reinterpretation of religious texts was *not* the best way to harmonize the minority communities' personal laws with the general laws of the state.

One of the initial High Court judgments deciding whether the MWA takes away the rights conferred upon a divorced woman under Muslim Personal Law is *Arab Ahemadhia Abdulla And Etc. v. Arab Bail Mohmuna Saiyadbhai And Ors. Etc.* (AIR 1988 Guj 141), delivered in 1988. The court in question had to interpret the provisions of the MWA and decide whether as per the Act a divorced Muslim woman is entitled to maintenance only during the *iddat* period or whether she is entitled to lifelong maintenance as observed by the Shah Bano verdict. By quoting the *Preamble* of the MWA, the judge observed that Parliament enacted the Act to protect – and not take away – the rights of Muslim women in Muslim Personal Law and the secular provisions of Sections 125–8 Cr.P.C. Next, the judge construed the provisions under Section 3 (1) of the Act as two separate and distinct provisions to be made by the husband to his divorced wife. Taking the Shah Bano case as a precedent and construing two separate duties of "provision" and "maintenance" for the husband laid down in the MWA, the judge concluded:

> ...it can be said that whatever is laid down by the Supreme Court in Shah Bano's case is codified by the Parliament by enacting the Muslim Women Act.[19]

Thus, the judge observed that a husband has to provide post-*iddat* maintenance to his ex-wife as well. Accordingly, the court affirmed that the MWA does not abrogate the duty of the husband to provide for his ex-wife, which is protected under Section 125 Cr.P.C. Rather, it noted that since the Act requires the magistrate to determine reasonable and fair provision and maintenance "having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband," the upper limit of Rs. 500 stated in Section 125 is not there in the Act.[20] Furthermore, the judge observed that

19 *Arab Ahemadhia Abdulla v. Arab Bali Mohmuna Saiyadbhai,* at pt. 15: 7.

20 Ibid. at pt. 16: 8.

reasonable and fair provision for the divorced wife would include provision for her residence, food, clothes, etc., and thus it anticipates the future needs that the divorced woman is likely to have. The judge hinged upon the different phraseology of "provision" and "maintenance" to be "made" and "paid" present in the Act to grant post-*iddat* maintenance to the Muslim divorcee under the MWA.

In the case of *Kaka v. Hassan Bano And Anr.* (II (1998) DMC 85), the judges on the full bench stated that "an unqualified effort on the part of the state to assure the basic need of an individual is a constitutional obligation,"[21] and in a secular state like India, "the religion of the individual or denomination has nothing to do in the matter of socio-economic laws of the state."[22] Therefore, the judges contended that personal laws cannot abrogate statutory rights that are provided under general laws of the state and that a personal law "must tilt in favor of the statutory rights when the situation so demands."[23] The judges also argued that the provisions of the MWA are a panacea to the socio-economic problems faced by Muslim divorcees, and as per the Act, maintenance of such a divorcee is the primary duty of the husband.[24] Menski remarks that the courts have concluded from the MWA that a divorcing husband continues to bear some responsibility for the woman he is divorcing, both in law and in principle. As such, he maintains, what is disputed "is no longer the factum of this responsibility, but the extent of provisions to be made by the man" (Menski 2001: 240). When the MWA was passed in 1986, there was a strong assumption that the Act would take away a divorced Muslim woman's right to lifelong maintenance from her former husband. However, the obligation to maintain a Muslim divorcee has a *lexical ordering* in the Act, for Section 3 of the Act holds that first and foremost the woman's ex-husband is liable for her maintenance, and only then is it the turn of the relatives and ultimately the *wakf* boards. We have seen that the High Courts have followed this sequence of responsibility. Thus, in providing gender-just interpretations of the Muslim Women's Act, the High Courts have used "moralising reminders about the duties of humans and the responsibilities of the spouses" (Menski 2001: 236) in shifting the social burden from the state to the individual.

In the table below, I have summarized the shifting method of adjudication of Muslim Personal Law in the High Courts after the enactment of the MWA. Table 1 shows that the High Courts giving gender-just interpretations of the Act have *rarely* reverted to reinterpretation of the Quran in order to harmonize the Act with the secular provisions of Section 125 Cr.P.C.; out of the five pro-women High Court verdicts analyzed, only one made use of religious reinterpretation. However, two out of five High Courts made use of updated textbooks on Islamic law. Secondly, we see

21 *Kaka v. Hassan Bano* at pt.1: 1.
22 Ibid. at pt. 4: 1.
23 Ibid. at pt. 5: 1.
24 Ibid. at pt. 43–44: 12.

that four out of five High Courts used the Shah Bano verdict as a precedent to provide lifelong maintenance to divorced Muslim women under the MWA. Thirdly, only one High Court invoked the demand for a uniform civil code (UCC). Thus, despite the controversy, the Shah Bano judgment continues to be regarded as a correct interpretation of Muslim Personal Law, where the requirements of religion were seen to be *in congruence* with the requirements of the secular law of the state. This is where the paradox lies. The cases examined demonstrate that in the aftermath of the Shah Bano controversy, the Indian judiciary has *rarely* and *gingerly* used religious reinterpretation as a means of achieving congruence between Muslim Personal Law and secular law. Nevertheless, the judiciary has increasingly used the logic of harmonization found in the Shah Bano judgment. Thus, the *presupposition* in the Shah Bano case – namely, that demands of Islamic law are *just the same* as the requirements of secular state law – has been followed in the later High Court judgments on the maintenance of Muslim divorcees. As we shall see later, even the Danial Latifi verdict used this strategy to uphold the constitutional validity of the MWA. Menski thus rightly opines that the Shah Bano case became a catalyst for re-assessing the basic principles of Muslim law on post-divorce maintenance. He states that it is now well-established in modern Indian law that there is really *no conflict* between the Quranic pronouncements about a husband's obligation toward his divorced wife and the welfare-based statutes of the modern Indian state (Menski 2001: 261). This is so because – following the reasoning in the Shah Bano verdict – both religion and the state are seen to place an obligation on divorcing husbands to look after the future welfare of their ex-wives.

It seems that a new phase of adjudication of Muslim Personal Law has evolved since the Shah Bano verdict. As the interpretation of the Quran and the call for a UCC became the most controversial aspects of the Shah Bano verdict, the judiciary seems to have reduced its reliance on methods of religious reinterpretation since 1986, while calls for legal uniformity have also become scarce. However, in doing so, the judiciary has not done away with concerns of gender justice. Contrary to scholars like Anne Phillips and Martha Nussbaum, who argue that the promulgation of the Muslim Women's Act has doubly disadvantaged Muslim women (Phillips 2005: 127–129; Nussbaum 2008: 147), our analysis of the Indian judiciary suggests that the judiciary has continued to harmonize Muslim Personal Law with the requirements of secular law since 1986. The approach of harmonizing a minority community's religious laws with the secular law of the state has changed since the Shah Bano controversy, however. Instead of undertaking an exercise in religious reinterpretation, the Indian judiciary has increasingly invoked the social-welfare concerns of the state to do away with gendered imbalances in minority personal laws. Thus, even before the Supreme Court's verdict on the constitutional validity of the MWA, the majority of High Court decisions in India affirmed that the 1986 Act was *not* a retrograde step taken by the Congress government, but a pro-women

statute which does not violate the tenets of the Quran and at the same time codifies the decision reached in the Shah Bano verdict.

High Court Judgments Denying Lifelong Maintenance

There are only a few High Court cases that have been reported that oppose the pro-women interpretation of the MWA. The oft-cited "male-centered" view is the full-bench verdict in *Usman Khan Bahamani v. Fathimunnisa Begum and others* (AIR 1990 AP 225). In order to determine the Muslim man's liability to pay maintenance to his divorced wife, the judges undertook a detailed analysis of Muslim law principles as laid down in the Quran, Hidayah,[25] and other textbooks on Islamic laws and various judicial decisions. This judgment particularly stressed the phrase "within the iddat period" of the Act, concluding:

> there is nothing in the section which can be read to mean that the husband is liable to make reasonable and fair provision and maintenance beyond the iddat period.[26]

The majority verdict construed that the Act was not a piece of legislation passed to protect the rights of Muslim women, but rather one introduced by Parliament to "nullify the effect of [the] Shah Bano case"[27] and "to bring the law of maintenance payable to the wife in consonance with the principles of Muslim law."[28] However, apart from establishing its anti-maintenance stance based upon Parliament's intention, this majority verdict also pointed out that Section 3 (1) (a) of the MWA could not have meant lifelong maintenance, because this would mean that the husband had to make maintenance provisions in "lump sum" amounts within the *iddat* period. The judges noted:

> The question is, is it possible to make such a payment within the stipulated period of Iddat which may be deemed to be a reasonable and fair provision to cover up the necessities of life of the divorced woman for the entire period of her remaining life or until she gets remarried. In other words, how an assessment can be made that a provision is reasonable and fair provision payable within the period of Iddat forecasting the future needs that may arise fifty to sixty years hence.[29]

The decision not to provide maintenance beyond the *iddat* period was also based on a technical problem: deciding on the amount of lifelong maintenance if "within the iddat period" was also to be read as post-*iddat* maintenance.

25 Hidayah is a classic *Hanafi* juridical text from the twelfth century authored by Burhan-ud-din Ali ben Abu Bakr al-Marghilani (Subramanian 2008: 639).

26 *Usman Khan Bahamani v. Fathimunnisa Begum*, at pt. 8.

27 Ibid. at pt. 21.

28 Ibid. at pt. 15.

29 Ibid. at pt. 24.

Table 1: High Courts' Methods of Adjudication of Muslim Personal Law after the Promulgation of the MWA in 1986

"Pro-women" Cases	Year	Reinterpretation of the Quran	Updated Textbooks on Religion	Shah Bano Verdict as a Precedent	UCC
Arab Ahemadhia Abdulla v. Arab Bail Mohmuna Saiyadbhai (AIR 1988 Guj 141)	1988	Yes*	No	Yes	Yes*
K. Zunaideen v. Ameena Begum (1998 (1) CTC 566)	1997	No	No	Yes	No
Kaka v. Hassan Bano (II (1998) DMC 85)	1997	No	Yes	Yes	No
Jaitunbi Mubarak Shaikh v. Mubarak Fakruddin Shaikh (2000 (1) BomCR 696)	1999	No	Yes	Yes	No
Shakila Parveen v. Haider Ali ((2001) 2 CALLT 413 HC)	2000	No	No	No	No
"Lifelong Maintenance-denying" Cases					
Usman Khan Bahamani v. Fathimunnisa Begum (AIR 1990 AP 225)	1990	Yes	Yes	N/A	No
Abdul Rashid v. Sultana Begum (1992 CriLJ 76)	1990	No	No	N/A	No
Abdul Haq v. Yasmin Talat (1998 CriLJ 3433)	1997	Yes*	Yes*	N/A	No

Symbols: An asterisk (*) means the Court itself was not involved in a reinterpretation of the Quran or invoked the UCC, but quoted from the Shah Bano judgment. N/A means "not applicable."

The Danial Latifi Judgment, 2001

In September 2001, a full bench of Supreme Court judges promulgated a decision on the constitutional validity of the impugned 1986 Muslim Women's Act. In the case *Danial Latifi v. Union of India*, the Supreme Court announced this decision after 15 years of sitting on a host of constitutional petitions filed against the Act.[30] In 2001, however, this same court not only upheld the constitutional validity of the MWA, but paradoxically also maintained that the MWA codified the rationale found in the Shah Bano case.[31] Thus, like the "pro-women" High Court maintenance cases examined above, this court opined that the MWA was not introduced by Parliament

30 These constitutional petitions are: Danial Latifi and Sona Khan v. Union of India; Susheela Gopalan and others v. Union of India; Tara Ali Baig, Anupam Mehta, Lotika Sarkar and Upendra Baxi v. Union of India; Abdul Kader Alibhai Sheth v. Union of India; Shanaz Sheikh, Kamila Tyabji and Anees Sayyad v. Union of India; Rashidaben v. Union of India (Parashar 1992: 311, note 23).

31 *Danial Latifi v. Union of India*: 11.

to nullify the Shah Bano verdict, but rather it was an act introduced for the welfare of Muslim divorcees, which was in consonance with Islamic principles and constitutional guarantees.

Siobhan Mullally notes that the strategies adopted by the Supreme Court in the Danial Latifi case were similar to those adopted in the Shah Bano case (Mullally 2004: 684). She remarks that both these judgments involved a "cross-cultural dialogue," and underpinning this dialogue is a "dual-track approach" that combines legal regulation with an expanded "moral political dialogue" on the competing claims at stake. According to her, both the cases went on to explore the meaning and scope of Muslim Personal Law, initiating a dialogue that recognizes the diversity within Islam and within the Muslim community itself. However, Mullally remarks that undertaking such a religious exegesis will always mean running the risk that the Court's judgment will be perceived as a denial of the Muslim community's right to a distinct cultural identity (ibid.: 685).

In this paper, I have tried to argue that in the aftermath of the Shah Bano controversy, the Indian judiciary has increasingly relied on the state's social-welfare concerns in order to harmonize the requirements of Muslim Personal Law with the general laws of the state. Our examination of the Danial Latifi verdict demonstrates that the judiciary's increased reliance on welfare concerns has taken precedence over the reinterpretation of religious texts. The judges in the Latifi case did not feel the need to re-examine the requirements of Muslim Personal Law or whether it conflicted with secular law. Rather, they maintained:

> In this case to find out the personal law of Muslims with regard to divorced womens [sic] rights, the starting point should be Shah Banos [sic] case and *not* the original texts or any other material all the more so when varying versions as to the authenticity of the source are shown to exist.[32]

Thus, despite the controversy, the judges simply reaffirmed that the Shah Bano case had rightly interpreted the requirements of Islamic law. The Shah Bano verdict, then, set the stage for an *a priori* assumption in the Indian judiciary that there is *no* conflict between Muslim Personal Law and secular state law, as both the moral imperatives of religion and the legal requirement of the state are the same.

For the judiciary, since the state's social-welfare concerns are *just the same* as the moral demands of religion, and since women and children in India are essentially dependent on the male members of their family, social realities dictate that these male members are responsible for the weak and the vulnerable, and not the state or society in general. In other words, the Indian judiciary has ensnarled the patriarchal realities of Indian society with the state's social purposes, producing a result where the male family members are the ones mainly responsible for the welfare of women and children. As Menski observes, this strategy that the Indian state has been

32 *Danial Latifi v. Union of India*: 11 (my own emphasis).

following is not just restricted to Muslim Personal Law. According to him, all Indian family laws – especially those introduced since 2001 – have been skillfully harmonized with the Indian legal system, so while this harmonized system of legal regulation "uses the input of personal status laws," it nevertheless "achieves a measure of legal uniformity." The end result is that while "the boundaries of Indian general law and personal laws have thus become ever more fuzzy," none of the personal laws have been abolished by these new legal developments (Menski 2008: 213–214).

The Danial Latifi verdict attests to the patriarchal social reality in which women's lives are embedded and maintains that the provisions of the MWA have to be interpreted while bearing this social reality in mind:

> In interpreting the provisions where [a] matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is *male dominated* both economically and socially and women are assigned, invariably, a *dependant* role, irrespective of the class of society to which she [sic] belongs.[33]

The judges opined that societal problems of vagrancy and destitution pertain to basic human rights and social justice. Therefore, they need to be decided on the basis of considerations other than religion. The judges further contended that when a matrimonial relationship breaks down in such a condition,

> …it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the [woman's] matrimonial life such as the heirs who were likely to inherit the property from her or the wakf boards. Such an approach appears to us to be a kind of distortion of the social facts.[34]

Thus, the judges clearly maintained that given the social reality, no matter what the Act's provisions are, the responsibility of maintaining the financial interest of the divorcees lies first and foremost with the husband.

In a similar way to the pro-women verdicts of the High Courts discussed above, this court also latched on to the different phraseology of "maintenance" and "provision" in the Act to argue for lifelong maintenance for Muslim divorcees. The judges opined that Parliament had not provided that reasonable and fair provision and maintenance be limited to the *iddat* period only, and not beyond it. So it actually extends to the rest of the divorced woman's life until she gets married again. The judges further contended that the same question of a husband's responsibility for maintaining his ex-wife post-*iddat* arose in the Shah Bano case, and although this position was available to Parliament when it promulgated the Act, it retained the

33 *Danial Latifi v. Union of India*: 7 (my own emphasis).

34 Ibid.

separate wordings of "provision" and "maintenance" to be "made" and "paid" in the Act. Applying a literal interpretation of the 1986 Act, the judges argued, would deny Muslim women the protection provided by criminal law, which is available to all women, irrespective of their religious affiliation. Such a reading of the Act, the judges contended, could not have been intended by Parliament, as it would go against the constitutional guarantees of equality and non-discrimination. Thus, the judges remarked:

> ...though it may look ironical that the enactment intended to reverse the decision in Shah Banos [sic] case, [it] actually codifies the very rationale contained therein.[35]

By construing the MWA in this way, the judges argued that since the Act fulfills the obligation present in Section 125 Cr.P.C. – which is to prevent destitution and vagrancy – it cannot be unconstitutional. In other words, since Muslim Personal Law meets the legal requirements of state law and provides the constitutional guarantees, the Act is constitutionally valid. The Danial Latifi verdict demonstrates that the Indian state does not require formal legal uniformity to secure equal democratic citizenship rights for all its citizens. Table 1 shows that even the High Courts now rarely invoke demands for a UCC while dealing with personal laws. While the Indian state has let the Muslim community keep its specific personal laws, the latter has not been exempted from social-welfare obligations, which apply to all Indians across religions. Thus, the MWA is an example of *gender-just personal law*.

Conclusion: A Critical Assessment of the Legal Discourse of the MWA

Sylvia Vatuk's analysis of family courts demonstrates that the "pervasive paternalism" that exists among the judicial authorities hinders women's access to their rights. She remarks that assumptions made by the judicial authorities about a woman's "nature," her proper "place" in society, and the notion that the institution of marriage is the only secure guarantee of a woman's well-being all hinder a woman's access to the civil-court system (Vatuk 2001: 242). Imbued with such paternalistic attitudes, the legal counselors of family courts, Vatuk argues, "cannot but commit themselves to getting couples back together." In the context of family-court negotiations, she points out that women are regularly encouraged to drop criminal charges against their husbands, to reduce or even completely withdraw their demands for property, maintenance, or custody, and even to resume living with husbands who have subjected them to long-standing abuse in the past (ibid.: 231–232).

While such problems of paternalistic attitudes on the part of the judicial authorities will not just be faced by Muslim women, but women of all denominations, Vatuk's analysis provides a powerful critique of the legal discourse of the MWA that Menski

35 *Danial Latifi v. Union of India*: 10.

celebrates. As we have seen, a gender-just interpretation of the MWA is grounded in a discourse of welfare and protection rather than simply on a discourse of rights. Vatuk's analysis shows that "a legal discourse of rights that is transformed into a discourse of welfare, whose defining terms are set, not by the woman herself, but by her counselor, her advocate, the judge… and by the realities imposed by the society within which she lives" (ibid.: 232) can act as a barrier preventing a woman from obtaining her legal rights. Thus, while the discourse of welfare present in the adjudication of the MWA cases is salutary for Muslim divorcees, this same discourse of welfare can hinder women's access to their legal rights in the first place. What are the limitations of such a discourse of protection, then? Does it empower women, or does it produce "dependent subjects?" Does the use of such patriarchal norms for the benefit of derelict women embed patriarchy even further in society? Secondly, this discourse of protection shifts the burden of protecting vulnerable sections of society from the state to the male members of the woman's family. What happens when such male members evade this responsibility or are unable to provide support to these vulnerable members? This discourse of protection, which has been used increasingly by the judiciary to provide gender-just verdicts based on the MWA, needs to be looked at more critically to probe the extent to which it helps or hinders the rights of women.

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