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From Accommodation to Substantive Equality: Muslim Personal Law, Secular Law, and the Indian Constitution 1985–2015

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Abstract
The adjudication of religious personal laws of minority communities in India has been a domain of contestation between competing claims of cultural autonomy, gender justice, and individual rights. The Supreme Court of India has time and again been confronted with the conflict between the secular law and legislation that protects group rights of minorities. While the existing literature has taken note of the attempts by the Indian state and the judiciary at legal-pluralist interventions to secure gender justice within the framework of personal laws based on religion, there has not been a sustained analysis of the discursive construction of constitutional law in dynamic interaction with the secular law and tenets of religion. This paper attempts to address this important gap in the scholarship using a discourse analysis of the judgments of the Supreme Court of India from 1985 until 2015 pertaining to post-divorce maintenance for Muslim women. I examine how the "rights" of Muslim women are framed in a realm of dynamic interaction between legislation premised on community identity, notions of constitutionalism, and personal laws based on religion to argue that the state adopts an interventionist role in a legal-pluralist paradigm; it further uses the specificity of community identity to foreground a vision of social justice.

Keywords: Muslim personal law, maintenance, constitution

1. INTRODUCTION

The question of the right to cultural autonomy for minority cultures in a multicultural society has vexed political theorists of liberal constitutionalism.[1] In the 1980s, theorists of constitutionalism challenged the idea of the right-bearing individual as the unit for attaining goals of equality. The assumption that the rights of individuals could be conceived in isolation from their community identity was challenged.[2] In the Indian context, this debate

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1. Sandel (1998), p. 150; Dworkin (1985), p. 83; Kymlicka (1989), p. 189.
2. Chandoke (2002), p. 234.

has played itself out in the quarrel between modernists and legal pluralists vis-à-vis the reform of religion-based personal laws in India.[3] In the 1950s, the interventions to "reform" the personal laws of the religious majority emerged from a modernist impulse to "secularize" the legal system.[4] This impulse was explicated in attempts to uniformize diverse legal and cultural practices; practices that were seen as inimical to a project of modernity and nation-building were restricted, if not outlawed altogether.[5] Critics of the modernist attempts to "reform" personal laws have pointed out the lack of the cultural situatedness of such attempts.[6] The well-intentioned attempts at reform of personal laws to secure what was perceived by modernists as "gender justice" ignored existing cultural practices that worked in the interests of women and children, and introduced legal principles that harmed women located outside the fold of the conjugal family,[7] Kishwar has taken detailed notes of this phenomenon with respect to the reform of Hindu personal law.[8] The modernist reformers had a vision of state-led legal centralism with respect to the reform of personal laws of the religious majority. I define legal centralism here, after Griffiths, as the ideology that "the law is and should be the law of the state, unified for all persons, exclusive of all other law, and unified by a single set of state institutions."[9] In the subsequent decades, the pitfalls of state-led legal centralism oblivious to contemporary social and cultural mores became abundantly clear; the reform of Hindu law was at best a partial success and at worst a further diminution of the rights of women.[10] The project of "reform" through uniformization took away several rights bestowed on women by existing cultural practices. The proponents of legal pluralism advocated for a culturally situated agenda of reform instead of a blanket outlawing of personal law practices. This debate has played itself vis-à-vis the desirability of the Uniform Civil Code (UCC).

The debates in the Constituent Assembly witnessed this conflict between the proponents of legal uniformization and the legal pluralists.[11] The draft articles on the fundamental rights formulated by Dr B.R. Ambedkar and K.M. Munshi had proposed a UCC that would apply to all citizens of India irrespective of custom and religion.[12] During the debate on the UCC, the Muslim members of the Assembly opposed the idea and insisted on the preservation of personal laws based on religion.[13] Following the debate, the article on the UCC was included in the Directive Principles of state policy; Article 44 of the Constitution merely states that the UCC was an ideal that the state should strive to attain.[14] The constitutional framework, thus, did not outlaw the personal law systems based on religion.[15]

3. Agnes (2011b), p. 9.
4. *Ibid.*; Menski (2003), p. 3.
5. Menski, *ibid.*, p. 4; Agnes, *supra* note 3, p. 10; Subramaniam (2014), p. 102.
6. Kishwar (1994).
7. Menski, *supra* note 4, p. 392.
8. Kishwar, *supra* note 6, p. 2151.
9. Griffiths (1986), p. 2.
10. Solanki (2011), p. 67.
11. Sen (2010), p. 133.
12. Sen, *ibid.*, p. 134.
13. *Ibid.*, p. 133.
14. *Ibid.*, p. 134.
15. Agnes, *supra* note 3, p. 145.

However, the Supreme Court has time and again been confronted with the question of the constitutionality of personal laws and the perceived conflicts between the secular law and group specific legislation.[16] This has further complicated the project of a culturally grounded reform of personal laws through judicial interpretation. The question of reconciling the cultural autonomy of minority religious communities with the individual rights of women has come up in the Supreme Court.[17] This conflict lay at the heart of the *Shah Bano*[18] case, where the Supreme Court engaged an ostensible conflict between religion-based personal laws and the constitutional mandate of social justice for women (Agnes, 2011b, p. 166). *Shah Bano* also articulated the tension between an impulse towards legal uniformization borne out by its pronouncements on the UCC and the instantiation of a culturally grounded agenda of reform in its interpretation of the Quran to promote gender justice.

In the decades following *Shah Bano*, the Court has shaped the contours of legal intervention vis-à-vis personal laws and the Constitution.[19] The scholarship on religion-based personal laws and state intervention has been an arena of contestation between secular feminists who perceive these laws as discriminating against women[20] and the proponents of legal pluralism who critique the modernist project of legal unification as oblivious to social realities.[21] The former have highlighted how the personal laws work against gender justice. Some of them have conceived of a UCC as a solution to the inherent injustice of personal laws, albeit indicating that the challenge would be enormous.[22] The latter have highlighted the pitfalls and limitations of a modernist project of legal unification.

The proponents of legal pluralism have outlined the contours of a "plurality conscious legal intervention"[23] as opposed to a state-led project of legal uniformization. Subramaniam has outlined the efforts of the courts to attempt a progressive reading of personal laws which works towards the cause of gender justice.[24]

It is pertinent here to comment on the Indian state's changing engagement with Muslim personal law. In the decades after independence, the modernist reform of Hindu law coincided with a reluctance to reform Muslim law.[25] The community attachment to Islamic law was seen by the legislators as a form of backwardness that needed to be accommodated until such time that the socioeconomic status of Muslims could be uplifted; they would then be amenable to adopt a UCC.[26] The approach of the legislators towards Muslim law failed to build up on the initiatives of reform in the early twentieth century. In the 1930s,

16. Mahmood (1975).

17. Mahmood, *ibid.*, p. 3.

18. *Shah Bano* case: *Mohammed Ahmed Khan v. Shah Bano* AIR 1985 SC 945. In this much debated and analyzed judgment, the Supreme Court of India had awarded maintenance to a 62-year-old divorced Muslim wife and held that there was no conflict between s. 125 of the Criminal Procedure Code and the Quran as far as the obligations of the husband to the divorced wife were concerned. Following an Amendment in 1973, the CrPC expanded the definition of wife to include divorced wife. This judgment was considered by some sections of the Muslim society as interfering with Muslim personal law in requiring the husband to pay the wife maintenance beyond the *iddat* period.

19. *Ibid.*, p. 145; Menski (2011), p. 10; Menski (2012), p. 137.

20. Dhagamwar (1989), p. 50; Ahmed (2006), p. 546; Parashar (2013), p. 9.

21. Mahmood (1995), p. 46; Menski, *supra* note 19, p. 212; Menski, *supra* note 19, p. 10; Menski (2013), p. 46.

22. Dhagamwar, *supra* note 20, p. 89.

23. Menski (2012), p. 216.

24. Subramaniam (2008), p. 661.

25. Subramaniam (2014), p. 204.

26. *Ibid.*, p. 203.

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Muslim leaders such as Maulana Hussain Ahmad Madani of the Jamiyat Ulama i-Hind and the jurist Asaf Ali Fyzee had propounded a number of "culturally grounded" changes in Muslim law.[27] In fact, during the colonial era, community-specific statutory intervention that drew from sources of Islamic law led to increasing rights guaranteed to Muslim women.[28] These included the Mussulman Wakf Validating Act (MWVA) in 1913 and the Dissolution of Muslim Marriages Act (DMMA) in 1939. The DMMA increased women's rights to divorce drawing from rules of Maliki law; the MWVA made it possible for parents to grant property to their daughters instead of extended kin as it allowed bequests to family members.[29]

However, policy-makers in the decades after independence were not mindful of these reform initiatives. It is only in the 1970s that judges as well as policy-makers began to recognize the potential for reform premised on the cultural practices and traditions of minority communities.[30]

In the decades following *Shah Bano*, a combination of statutory intervention by the legislature and innovative judicial reinterpretation by the courts helped in attaining gender justice for Muslim women within a legal-pluralist paradigm.[31] I define "gender justice" here within the framework of "social justice" enunciated by the Constitution in Articles 15(3) and 38.[32] In this vision of social justice, the state creates obligations for the "economically stronger members" of the family to grant shelter and sustenance to women and children (Agnes, 2011a, p. 119).

It is important to take note here of the distinction between this mode of attaining gender justice and the project of the reform of Hindu laws. Though the project of Hindu law reform was also based on statutory intervention, the nature of the intervention originated in a modernist impulse towards uniformization. This is explicitly borne out by the outlawing of existing cultural practices such as polygamy without taking into consideration their social implications—a move that only proved to be detrimental to the interests of women in the long run.[33] In contrast, the cultural foundation of statutory intervention in Muslim law as well as judicial interpretation of the same that largely drew from Islamic legal sources has brought about a more thoroughgoing transformation of the landscape of the Muslim family.[34]

It is significant to point out further in this context that the slippery and contested terrain of Islamic law itself allowed a diverse range of interpretations. Hussin, in a genealogical tracing of Islamic law, underlines the "multiple, slippery and contested" nature of the law as it is constituted through a dynamic interaction between the state and non-state actors.[35]

27. *Ibid.*, p. 203.

28. *Ibid.*, p. 204.

29. *Ibid.*, p. 211.

30. *Ibid.*, p. 205.

31. Menski (2011), p. 20.

32. Art. 15 of the Constitution dwells on prohibition of discrimination on the grounds of religion, race, caste, sex, or place of birth. Art. 15(3) states: "Nothing shall prevent the State from making any special provision for women and children." Art. 38 says that the state shall "strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."

33. Menski, *supra* note 4, p. 392.

34. Solanki, *supra* note 10, p. 30.

35. Hussin (2016), p. 7.

She highlights the tensions and ambiguities that arise as a result of an attempt to "define" Islamic law. The understanding of Islamic law as sharia or the path of moral conduct prescribed by God glosses over its "mutability in time and space"; its definition as *fiqh* or jurisprudential scholarship makes space for debate while overlooking the impact of institutional contexts; reading Islamic law as "personal law," while locating its institutional context, reduces its symbolic and political appeal.[36] Coulson argues that a legal structure emerged from ethical obligations in Islam as the Prophet did not attempt to institute a code but was instead content to offer "solutions as problems arose."[37] He further notes that succeeding generations of jurists build on Quranic precepts that foregrounded an "Islamic code of behavior."[38] The domain of Islamic law as a dynamic realm of multiple meanings lends itself to diverse interpretations by the judiciary.

While the existing literature has taken note of this phenomenon, a sustained analysis of the discursive constitution of state law, both the Constitution and community-specific legislation, in relation to tenets of Islamic legal discourse in a legal-pluralist paradigm has not been carried out. How does the Supreme Court engage discourses of religion and constitutionalism in the realm of personal laws? Does this have an impact on the discursive constitution of state law? Can the state play an interventionist role to foreground ideas of social justice in a legal-pluralist paradigm? What are the implications of the same for the theory and practice of Indian constitutionalism?

This paper attempts a discourse analysis of the judgments of the Supreme Court of India from 1985 until 2015. I look at judgments pertaining to maintenance for Muslim women as well as those where personal laws come into conflict with fundamental rights provisions of the Constitution. I attempt to look at how the "rights" of Muslim women are framed in a realm of dynamic interaction between legislation premised on community identity, notions of constitutionalism, and personal laws based on religion. I also examine how the state positions itself vis-à-vis the conflicts between individual rights and community autonomy and the larger implications of the same for the practice of constitutionalism. I choose 1985 as a starting point for my enquiry, as it was a watershed moment for the politics of personal law reform in India. In the infamous *Shah Bano* judgment, the Supreme Court of India awarded maintenance to an old divorced Muslim woman under the Criminal Procedure Code and opined that there was no conflict between the tenets of the Quran and the secular law with respect to maintenance. The *Shah Bano* case witnessed protests by the orthodox Muslim clergy at what they perceived as state "interference" in religion-based personal laws. The sense of a threat to cultural autonomy was also exacerbated because of the reinterpretation of the Quran by a Bench of five Hindu judges and their subsequent pronouncements on the desirability of a UCC.[39]

On the other hand, the discourse of equal rights for Muslim women was appropriated by the Hindu right and led to clarion calls for the enactment of a UCC to "reform" the iniquitous Muslim society.[40] The judgment and the subsequent enactment of the Muslim Women's

36. *Ibid.*, p. 7.
37. Coulson (1978), p. 22.
38. *Ibid.*, p. 13.
39. Menski, *supra* note 23, p. 21.
40. Hasan (1998), p. 78.

(Protection of Rights) to Divorce Act (MWA) in 1986 presented a unique challenge to the Indian women's movement and the Indian state; the challenge was to navigate a polycentric legal universe without compromising either the rights of Muslim women or the cultural autonomy of a minority religious community. This is why I start my enquiry at this important juncture in the Indian state's engagement with the contesting claims of religious group rights, individual rights, and constitutionalism.

2. METHODOLOGY

Fairclough describes critical discourse analysis as a method which focuses on "productive semiotic work which goes on in particular texts and interactions."[41] Discourse analysis also focuses on "interdiscursivity" of the text as it illuminates the "genres, discourses, and analyses it draws upon and how it works them into particular affiliations."[42] He further notes that this gives rise to "hybridity" or the "mixing of different discourses." This method enables us to delineate the structuring of discourse as well as the interactions and conversations between them.[43] Bernard observes that "discourse-centred approaches" enable us in locating the use of language vis-à-vis broader social processes as we study language "as a form of social action."[44] This method is particularly useful in the analysis of judgments as we locate them in the broader sociopolitical context of the apparent conflicts between cultural accommodation and individual rights in India. I use this method instead of a mere review of case-law as the paper intends to move beyond a mere superficial "reading" of judgments to focus on the construction of arguments illuminating the interplay of discourses. This methodology helps in unravelling the manner in which the Supreme Court negotiates a range of legal orders in a multicultural society to articulate a vision of rights. I read the text of the judgments of the Supreme Court from 1985 until 2015 closely to delineate the discursive constitution of state law and the category of "rights" rewarded by the state in relation to community identity and individual rights guaranteed by the Constitution. I attempt to read the structuring of the discourses of constitutionalism and Islamic law in the construction of legal arguments. I attempt to look at the interplay of constitutionalism, general law, statutory interventions premised on community identity, and Islamic legal discourse. The method of discourse analysis enables us to see how these discourses are made to speak to each other in the construction of an argument.

3. LITERATURE REVIEW

I locate my empirical analysis of the judgments of the Supreme Court within the broader theoretical framework of legal pluralism. Griffiths states that societies can be legally plural both in a "strong" sense where the law is "neither systematic nor uniform" as well as in a "weak sense" where the "sovereign commands different bodies of law for different groups in the population."[45] He also distinguished between legal pluralism as the existence of

41. Fairclough (2001), p. 124.
42. *Ibid.*, p. 124.
43. *Ibid.*, p. 133.
44. Bernard (1998), p. 412.
45. Griffiths, *supra* note 9, p. 5.

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diverse legal orders in a social group and legal pluralism as a problem of dual legal systems in post-colonial societies where European imperial powers imposed legal orders on pre-existing arrangements. In the 1970 to 1980s, the literature on legal pluralism focused on the dynamic relationship between official and unofficial legal ordering.[46] Moore propounds the idea of a "semi-autonomous social field" which can create rules and customs internally but which is also vulnerable to external forces from the larger world.[47] Galanter states that legal orders exist in a reciprocal relationship in open social networks. Merry notes the analytic problem presented by this paradigm of legal pluralism; she highlights the indeterminacy of the boundaries of social life and non-state law.[48] She argues that there are "no clear boundaries between what can and cannot be called non-state law." The scholarship on legal pluralism in the 1980s saw an increasing focus on the "dialectic and mutually constitutive relationship" between state law and non-state legal orders.[49] This mode of analysis continued in the subsequent decades. Kolff writes on how state codification changes custom and religion.[50] Eckert notes the phenomenon of formal devolution of state power in a legal-pluralist paradigm as well as the presence of "parallel judicial authority that would control specific groups of people."[51] The literature, however, has not paid enough attention to how a range of legal orders in state law in a legally plural paradigm constitute each other. Tamanaha, in a review of theoretical approaches in legal pluralism, notes that clashes can exist within normative versions of the "official law."[52] He further notes that some legal orders of the state are "internally plural and diverse with complex combinations of transplanted indigenous norms and systems."[53]

This theoretical lacuna provides an important vantage point from which to begin exploring the relationship between community-specific, culturally grounded legislation and a normative constitutional rights discourse in India. The interaction between Muslim personal law in India and the Constitution provide an ideal case for exploring this theoretical problem. It is important to note here that Muslim personal law consists of community-specific statutory intervention (such as the Muslim Women's Protection of Rights to Divorce Act 1986), judicial interpretations as well as tenets of Islamic law. I therefore consider Muslim personal law as a normative constituent legal order of the Indian state. At the same time, the slippery, contested nature of Islamic law makes the judicial reinterpretation of Muslim personal law a domain of discursive tension and contestation. Muslim personal law is, after Tamanaha, an "internally plural" legal order. How does the Constitution interact with and constitute this legal order? Is it in turn constituted by it? I propose to ask these questions with an intent to address the theoretical lacuna in the legal pluralism literature on the relationship between variants of state law.

In India, feminist scholarship on personal laws in the 1970s and 1980s failed to capture the possibility of a discursive interplay between constitutionally guaranteed rights and

46. Galanter (1981); Merry (1988).
47. Moore (1972), p. 722.
48. Merry, *supra* note 46, p. 878.
49. *Ibid.*, p. 879.
50. Kolff (1992).
51. Eckert (2004), p. 31.
52. Tamanaha (2008), p. 400.
53. Tamanaha, *ibid.*, p. 410.

community affiliation. The debate was premised around the desirability of a UCC which was perceived as an instrument of gender justice. Secular feminist scholarship raised concerns about the injustice and unequal treatment of women inherent in all personal laws.[54] In her long treatise on a proposed UCC, Dhagamwar argues that state-made law offers "a more promising arena of struggle for the emancipation of women than what is offered in the domain of people's law." She further conceives of the UCC as a "harbinger of genuine democracy"[55] and finds personal laws problematic from the perspective of taking away from the state its obligations towards some citizens.[56] Dhagamwar's criticism of the personal laws and her conceptualization of a gender-just UCC in its place can be located in a modernist understanding of state-led legal unification as an instrument of emancipation and empowerment of the marginalized. She forecloses the possibility of a vision of constitutionalism being woven into personal laws or community-specific legislation.

There was scholarship around this time that questioned the premise of all religion-based personal laws being unjust. Mahmood emphasizes the surprisingly "modern" outlook of the Quranic law as it provides for a contractual nature of marriage, concept of divorce, and allows, even promotes, remarriage of divorcees and widows. He also notes that the judgments of the Kerala High Court have attempted a liberal interpretation of Muslim law that favours women.[57]

The 1990s saw scholars acknowledging the limits of state-led legal centralism. Kishwar argues that the Hindu personal code did not introduce any legal principles that were not already present in existing legal systems in India. She further points out that a number of existing liberal principles were decimated by the Hindu code.[58] For example, she points out how the Hindu Marriage Act introduced the notion of "adversarial divorce" premised on the principle of making divorce as difficult as possible—a concept imported from nineteenth-century Britain.[59] In contrast, customary Indian practices provided for more flexible forms of dissolution of marriage and separation. She also points out the religious bias in the Hindu Minority and Guardianship Act 1956, which provides that a parent ceases to be a natural guardian on her conversion to another religion.[60]

Mahmood, while in favour of the "reform" of personal laws, felt that this could be achieved by the state through gradual evolution. He argues that Article 44 of the Constitution, which spoke of the need for the state to enact a UCC, was more in the form of a guiding principle to be kept in mind while enacting civil laws rather than an aim to formulate a code.[61]

In the 2000s, a lot of scholarship speaks of the efficacy of legal-pluralist interventions in furthering the goals of the Constitution.[62] Menski is critical of the modernist project of legal uniformization that he refers to as an instrument of domination used by those who

54. Dhagamwar, *supra* note 20, p. 6.
55. *Ibid.*, p. 55.
56. *Ibid.*, p. 57.
57. Mahmood, *supra* note 16, p. 185.
58. Kishwar, *supra* note 6, p. 2145.
59. *Ibid.*, p. 2150.
60. *Ibid.*, p. 2153.
61. Mahmood, *supra* note 21, p. 123.
62. Menski, *supra* note 31; Menski, *supra* note 23; Sezgin (2013); Solanki, *supra* note 10; Agnes, *supra* note 3.

"wish to rule an amorphous uncritical mass with minimum hassle and maximum power." He underscores the potential of personal laws to empower people and rejects the contention of modernists that these laws are primarily used as instruments to "undermine gender justice."[63] He further argues that India has crafted a strategy of careful combination of judicial reinterpretation and parliamentary intervention to further reforms in personal laws while managing cultural diversity.[64] He also warns against the UCC being appropriated as an instrument to "Hinduise the nation and simply get rid of Muslim and Christian personal laws."[65]

Sezgin has acknowledged the presence of multiple sites of resistance to patriarchal religious authority within communities. Based on his field research in Israel, Egypt, and India, he claims that religious laws have a negative impact on fundamental rights and freedoms.[66] He, however, recognizes that individuals "renegotiate their rights and duties under the law and try to reform the system from within."

Solanki, in an insightful empirical study of family courts in Bombay, points to a "shared adjudication model" adopted by the Indian state where the state shares adjudicatory authority with multiple sites of non-state law leading to the attainment of gender justice.[67] This model is said to consist of multiple sites of adjudication where social organizations compete as well as co-operate and communicate with the state.[68] She traces the phenomenon of "centralisation" and "decentralisation" of state law based on the extent of its interaction with non-state law. While Solanki gives us a framework for understanding the ways in which juridicial power resides in both the state and non-state actors in a multicultural, legal-pluralist paradigm, her work builds up on a clear analytic distinction between state and non-state law that is not useful in delineating the discursive constitution in the realm of ideas of these two entities. The artificial compartmentalization that she dwells on between state and non-state law precludes the possibility of a discursive interaction between constitutionalism, the secular law, and tenets of religion.

Redding points out the limitations in "liberal legal theorising" that foreground and valorize the practices of state law and denigrate those of non-state law.[69] The literature on uniformization of personal laws in India discussed above clearly suffers from this flaw. It largely draws upon an explicitly positivist understanding of a "rule of law" as a normative standard set by the state.

While the literature on legal-pluralist interventions[70] presents a more nuanced picture of the functioning of personal laws than the feminist scholarship of the 1970s and 1980s, a sustained analysis of the discursive interaction between normative orders, both within and outside the state, is lacking. The paper proposes to address this critical gap in the existing literature by illuminating the interplay of discourses in the normative legal orders of the Constitution, the secular law, and Muslim personal law.

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63. Menski, *supra* note 31, p. 18.
64. Menski, *supra* note 23, p. 219.
65. *Ibid.*, p. 228.
66. Sezgin, *supra* note 62, p. 44.
67. Solanki, *supra* note 10, p. 41.
68. *Ibid.*, p. 4.
69. Redding (2014), p. 942.
70. Menski, *supra* note 31; Menski, *supra* note 23; Solanki, *supra* note 10; Sezgin, *supra* note 62.

The debate between legal centralism, implicit in a modernist impulse to "secularize" legal systems and limit the influence of cultural practices and legal pluralism, in the sense of statutory interventions grounded in community identity that build on cultural practices and lend themselves to judicial reinterpretation as a means of securing gender justice for women, is by no means a settled one. This is most evidently discernible in the literature that tends to posit community autonomy in opposition to personal freedoms of individuals guaranteed by the Constitution. In recent times, scholars continue to harp on the ill-effects of personal law systems. Dhagamwar further points out that religion and customs condoned by the personal laws were often in violation of criminal laws and were taking away the rights granted to women under the formal legal system. While Dhagamwar raises a serious concern of the conflicts between personal law and state-made secular law, especially in instances where personal law hinges on criminality, her proposal of debunking informal legal systems such as caste panchayats altogether[71] forecloses the possibility of a more creative intervention by the state. It precludes the possibility of the state acting as an arbiter of "justice" within the framework of personal laws by aligning itself with interpretations of the same that align with the state's agenda.

Ahmed and Ahmed argue that a UCC will help the cause of national integration and the attainment of equality amongst citizens. These authors also stated that most of the personal laws were unjust towards women.[72]

Parashar has taken issue with the post-modernist, legal-pluralist framework, portraying it as working against the interest of gender justice. She argues that a legal system that gives primacy to customary practices and recognizes them as "law" is discriminatory towards women, as most of these practices are unjust.[73] Her argument is also premised on an assumption of most personal laws as inherently unjust. She conceives of personal law as an unchanging, fixed code and does not allow for any possibility of an ever-evolving entity that, as Redding points out, is constantly constituted and re-constituted in its dynamic interaction with the state law.[74]

Bhat in his insightful review of the case-law on freedom of religion in India, makes a significant contribution to the debate between individual rights and community rights. He argues that the construction of a doctrine of "essentiality" consolidated the regulatory hold of the state on denominational religion while restricting the individual's right to freedom of religion.[75] He argues that the Supreme Court, in adjudicating on the freedom of religion guaranteed under Articles 25 and 26 of the Constitution, has restricted the definition of religion to only those facets that it considers "essential."[76] He further identifies two distinct discursive movements deployed by the Supreme Court in its adjudication on religious freedom; the Court posits an "external critique" of religion and religious practices as falling foul of constitutional ideals while also constructing "true faith" that constitutes religion.[77] I find Alam's theoretical frame useful in explicating the shifting terrain of the Supreme

71. Dhagamwar (2003), p. 1491.
72. Ahmed & Ahmed (2006), p. 546.
73. Parashar, *supra* note 20, p.8.
74. Redding, *supra* note 69, p. 950.
75. Bhat (2009), p. 29.
76. *Ibid.*, p. 30.
77. *Ibid.*, p. 42.

Court's engagement with religion. I build up on this frame further in my work to illustrate the interplay of the discourses of personal laws and fundamental rights that animates the judgments of the Supreme Court; I also delineate the larger political implications of the ways in which these discourses are used to construct a legal argument.

4. *SHAH BANO*

The *Shah Bano* judgment has been perceived in the scholarship on family law in India as a watershed moment for Indian secularism and multiculturalism, as the state had to reconcile what seemed like conflicting claims of community autonomy, voiced in the language of minority rights and individual women's rights.[78] In this controversial judgment, the Supreme Court had ruled that the husband of a divorced Muslim wife was obliged to pay maintenance as per the provisions of s. 125 of the Criminal Procedure Code (CrPC) and rejected the husband's contention that he was only obligated to pay maintenance for three months following the *iddat* period as per Muslim law. However, it is important to note that *Shah Bano* was not the first instance where the Supreme Court had ruled in favour of the right to maintenance of a divorced Muslim wife under the said provision. Earlier, in *Bai Tahira v. Ali Hussain Fidaalli Chothia*[79] and *Fuzlunbi v. K Khader Ali*,[80] the Court had upheld the right of a divorced Muslim woman to maintenance under the secular law.

In *Shah Bano*, the Court was called upon to adjudicate on two central questions: whether s. 125 of the CrPC was applicable to a divorced Muslim wife and whether s. 127(3)(b) insulates a Muslim husband from the liability to pay maintenance for his wife once the dower has been paid within the period of *iddat*.[81] The appellants and the interveners in the case had argued that the husband did not have any obligation to pay maintenance to a divorced wife beyond the *iddat* period—a period of three months after the divorce. The appellants contended that s. 127(3)(b) of the CrPC protected the Muslim husband from the requirements to pay maintenance under s. 125.

The judgment, delivered by Chandrachud C.J., navigates a number of discourses to construct an argument for the applicability of the secular law to divorced Muslim women. In addition to a textual construction of the rights of the divorced Muslim woman from the secular law, *Shah Bano* also resorts to Islamic legal sources to validate the same. Further, it touches upon the politically contentious issue of the need for a UCC. The competing discourses that come into play in the text of the judgment are the secular law, tenets of Islam, and national identity premised on legal uniformity.

Chandrachud C.J. categorically states that the provisions under s. 125 are "too clear and precise to admit of any doubt or refinement" and that the religion of the spouse is irrelevant.

78. Agnes, *supra* note 3, p. 159; Menski, *supra* note 39, p. 19.

79. 1979 (2) SCC 322.

80. AIR 1980 SC 1730.

81. S. 125(1)(a) of the CrPC 1973 grants a wife who is "unable to maintain herself" the right to approach a first-class magistrate to claim a monthly maintenance of Rs 500 from her husband. The definition of "wife" under the section includes a divorced wife, "a woman who has been divorced by or obtained divorce from her husband and has not remarried." The section further states that, if a husband provides maintenance on the condition that his wife stay with him and if the wife refuses to do so, the magistrate may consider any "grants of refusal" stated by her and may make an order of maintenance accordingly. S. 127(3)(b) states that, where a woman has received before the date of an order under s. 125 the whole of the sum under any customary or personal law applicable to such parties payable on such divorce, the magistrate shall cancel such an order.

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He states that s. 125(1)(b) contains no words of limitation and therefore applies to spouses irrespective of religion. He further emphasizes the social justice aspect of s. 125 of the CrPC; he states that the section is "founded upon the individual's obligations to the society to prevent vagrancy and destitution." Thus, the Court, even while making no explicit reference to the Constitution, outlines the constitutional mandate of social justice. Article 15(3) of the Constitution allows the state to make special provision for women and children. Article 38 of the Constitution, a part of the Directive Principles of State Policy, mandates the state to "secure a social order for the promotion of the welfare of the people."[82]

However, the state here is seen as the final arbiter of justice. This is amply borne out by the thrust on state law as a site of justice. Chandrachud C.J. observes that s. 125 of the CrPC was enacted as a remedy for "a class of persons unable to maintain themselves" irrespective of their religion. He further states that the prevention of vagrancy was the "moral edict of the law" and "morality cannot be clubbed with religion." The Court thus attempts a literal interpretation of the criminal law to unequivocally assert the rights of divorced Muslim women who are unable to maintain themselves.

In *Shah Bano*, Chandrachud C.J. adopts a paternalistic attitude to the Muslim community from the very beginning in some of his assertions. Some of the scholarship on *Shah Bano* has taken note of how the judgment became a seminal moment for imagining the woman victimized by the iniquitous "Muslim" society as a point of entry into the personal law debate.[83] This was a trope later on appropriated by the Hindu right who translated it into clarion calls for a UCC.[84] The observations of Chandrachud C.J. betray a paternalistic attitude towards an iniquitous Muslim society desperately in need for reform. His reasoning is premised on these very assumptions in a set of rhetorical questions:

> Does the Muslim personal law impose no obligation upon the husband to provide for the maintenance of his divorced wife? Undoubtedly, the Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so, for reasons good, bad or indifferent. Indeed, for no reason at all. But, is the only price of that privilege the dole of pittance during the period of *iddat*?

He goes on to state that these were some of the "important" as well as *agonizing* questions that the judgment had to answer. These series of rhetorical questions typify the Muslim woman in desperate need of being "rescued" from the clutches of a patriarchal religious law. The judge also resorts to hasty and vague generalizations about the unrestricted right of the Muslim man to divorce his wife "whenever he chooses to do so," completely oblivious to the diverse positions in Islamic law on the subject. Muslim law by no means encourages the practice of arbitrary divorce.[85] For instance, classic Hanafi law, while providing for various forms of *talaq*, clearly attaches moral merit to those which offer the opportunity for revocation while the *al-bida* or the instantly effective modes are said to be the least meritorious.[86]

82. Art. 38(1) of the Constitution reads: "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."

83. Hasan, *supra* note 40, p. 78.

84. *Ibid.*, p. 79.

85. Pearl & Menski (1998), p. 280.

86. *Ibid.*, p. 280.

The judgment does appropriate Islamic legal sources to consolidate the authority of the state law. However, the use of Islamic legal sources sits uneasily with hasty generalizations on Islam and the imagination of the Muslim woman as a "victim" who needs to be rescued by the secular law. The Court refers to *Aiyats* (verses) 241 and 242 of the Quran to show that there is an obligation of Muslim husbands to provide for their wives. The Court refers to the translations of the Quran by Yusuf Ali, Muhammed Zafrullah Khan, and Dr Allamah Khadim Rahmani Nuri to conclude that the Quran imposes an obligation on the Muslim husband to "make provision for or to provide maintenance to the divorced wife." The Court rejects the contention of the appellant that the word "*Mata*" in Aiyat 241 means "provision" and not "maintenance" and observes that this is "a distinction without a difference."

This strategy is further borne out by the way in which the Court settles the ostensible dispute between s. 127 and s. 125 of the CrPC. The appellants had argued that s. 127(3)(b) of the CrPC absolves the Muslim husband of the liability to pay maintenance under s. 125. The former allows a magistrate to cancel an order under s. 125 if the divorced woman has received on the date of the divorce a sum "payable on divorce" under the personal law or customary law applicable to the parties. The Court cites *Mulla's Principles of Mahomedan Law* to define *Mahr* "as a sum of money of other property which the wife is entitled to receive from the husband in consideration of the marriage." The Court holds that *Mahr* is a sum payable out of respect and not a sum payable "on divorce." The Court thus takes upon itself the task of interpreting Muslim personal law even while outlining the "truly secular" character of the criminal law under consideration. Commentators have observed how the controversy around *Shah Bano* was on account of the reinterpretation of the verses of the Quran by a five-judge Bench of Hindu judges.[87] The interaction of discourses in *Shah Bano* shows a clear hierarchization between state law and non-state law; there is also an attempt to define and outline the limits of Islamic legal discourses by the state and make them subservient to the agenda of the state law. I use *Shah Bano* as a starting point to trace the forms in which this interdiscursivity plays out in subsequent judgments following the enactment of the Muslim Women's (Protection of Rights) to Divorce Act 1986.

Shah Bano also stirred up a hornets' nest in its comments about the desirability of a UCC as an instrument of national integration. The Court lamented that Article 44 of the Constitution, which calls for a UCC, had not been implemented. The UCC is seen as an instrument of national integration which would do away with the "disparate loyalties to laws which have conflicting ideologies." The pronouncements on the UCC are extraneous to the reasoning of the judgment. While the Court uses Islamic legal sources to strengthen the authority of state law and takes upon itself to define the tenets of non-state law, it decries the allegiance to "conflicting ideologies." This is clearly premised on an understanding of the state as the progenitor of the law and a consequent insistence on allegiance to the same. In its engagement with discourses of Islamic law, constitutional ideals of social justice, and the criminal law, the state consolidates further its authority as the site of law. It is perhaps this characterization of the personal law systems as inimical to objectives of legal uniformization and hence national integration, which led to the judgment being perceived by Muslims as an assault on their cultural autonomy.

87. Agnes, *supra* note 3, p. 159.

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5. POST *SHAH BANO*

Following the *Shah Bano* judgment, the Supreme Court enacted the Muslim Women's (Protection of Rights to Divorce) Act (MWA) 1986, which many commentators[88] continue to wrongly interpret as overturning the gains of *Shah Bano*. Section 3(1)(a) of the Act entitled a divorced Muslim woman to "maintenance" and a "reasonable and fair provision" to be made and paid within the *iddat* period (a period of about three months from the date of divorce after which a woman is allowed to re-marry). In the subsequent decade, a number of judgments of the High Courts held contradictory positions about whether the Act obligated husbands to pay maintenance only for the *iddat*.[89] A number of judgments of the Kerala High Court interpreted "reasonable and fair provision" to be an obligation in addition to maintenance to be paid to divorced Muslim wives until they were re-married. Several High Court judgments used this provision in the decade following *Shah Bano* to award generous amounts of "reasonable and fair provision" in addition to "maintenance" that were not confined to the *iddat* period. This position was decisively settled by the Supreme Court in *Danial Latifi v. Union of India.*[90]

The Act further provided for two years of maintenance for the children of the divorced Muslim woman to be awarded to her where she herself maintains the children born to her before or after the divorce as well as *mehr* and all other properties gifted to her by her relatives, husband, and husband's relatives to be returned to the woman upon dissolution of the marriage. It creates obligations on the relatives and the state *wakf* board to take care of the divorced wife in the event that a woman is unable to maintain herself beyond the *iddat* period.[91]

After the enactment of the Muslim Women's (Protection of Rights to Divorce) Act (MWA) 1986, the Supreme Court creatively reinterprets the statute and secular laws to articulate a regime of rights for divorced Muslim women. It engages the discourses of Islamic law, the Constitution, as well as diverse orders of state law to construct a regime of rights. The interplay of discourses in the construction of this category of rights moves beyond the statist conception of justice evinced in *Shah Bano.* In the subsequent judgments, the hierarchy constructed in *Shah Bano* between state law and personal law is dismantled and gives way to a discursive constitution of several normative orders of state law in relation to cultural norms and the Constitution. The state lays down a welfare regime in a legal-pluralist paradigm where it creates positive obligations and responsibilities on society to safeguard the rights of divorced Muslim women.

Along with this, there is a gradual expansion of a rights regime for destitute Muslim women under the secular law. Sen has viewed the jurisprudence of the Supreme Court vis-à-vis the reform of Muslim personal laws as a movement towards imposing legal uniformity. He argues that post *Shah Bano*, the Court has advocated for the UCC in the interests of national integration and attempted to privilege secular laws over personal laws and customary practices.[92] This interpretation of the Court's pronouncements as a move

88. Vatuk (2008), p. 56; Williams (2006).
89. Subramaniam, *supra* note 24, p. 661.
90. (2001) 7 SCC 740.
91. Hasan (2014), p. 264.
92. Sen, *supra* note 11, p. 148.

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towards legal uniformization fails to capture the complex discursive interplay between variants of state law and the Constitution and the larger implications of discursive shifts in interpreting the category of "rights" for the practice of constitutionalism. I will examine the implications of this trend in jurisprudence for the practice of constitutionalism vis-à-vis minority rights.

5.1 Section 125 of the CrPC

As a corrective measure to historical injustice in a deeply patriarchal society, the Indian Constitution allows positive discrimination for women under Article 15(3).[93] Section 125 of the CrPC is a form of compensatory discrimination which empowers the state to secure rights of maintenance for married women through special provisions overriding the norm of equality and nondiscrimination under Articles 14 and 15.[94] In the constitutional scheme, positive discrimination is an instrument of attaining substantive equality between individuals placed in unequal situations due to structured socioeconomic inequalities. In an attempt to attain a vision of social justice, the framers of the Indian Constitution privileged substantive equality over formal equality.[95] In its interpretations of the applicability of s. 125 of the CrPC, the Supreme Court articulates this very vision of substantive equality as it engages the ostensibly competing claims of group rights, individual rights, and personal laws. While *Shah Bano* had relied on the "secular" state law as the site of justice and merely sought validation for the same in Islamic legal discourses, subsequent judgments of the Supreme Court create multiple constituent normative orders of state law in relation to notions of "justice" in non-state law to attain substantive equality.

Following the *Shah Bano* judgment and the enactment of the MWA, there was much confusion about the applicability of s. 125 of the CrPC to divorced Muslim wives. Some commentators erroneously interpreted the MWA as overturning the gains of *Shah Bano* and therefore denying Muslim women the right to claim maintenance under s. 125 (Williams, 2006; Vatuk, 2008; Hasan, 1998). Section 5 of the Act itself very clearly states that spouses continue to have the option of being governed by s. 125 of the CrPC if both the husband and the wife are agreeable to it.[96]

A discourse analysis of the judgments of the Supreme Court post *Shah Bano* reveal a much more intricate, polycentric legal universe. The Court asserts the "rights" of Muslim women to welfare provisions promised by the secular law; individual rights are not seen in conflict with group rights premised on community identity. The Court also, occasionally, reinterprets the secular law and culturally grounded statutory interventions in the light of principles of Islam. The Court rejects any apparent conflict that appellants try to prop up between the secular law under s. 125 of the CrPC and the MWA by stridently emphasizing the social justice aspect of both of these legislations.

93. Agnes, *supra* note 3, p. 130.

94. *Ibid.*, p. 131.

95. Bajpai (2010); Bajpai (2012).

96. S. 5 of the MWA states: "If on the date of the first hearing of the application under sub-section (2) of section 3, a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of sections 125 to 128 of the Code of Criminal Procedure, 1973, and file such affidavit or declaration in the court hearing the application, the Magistrate shall dispose of such application accordingly."

In *Noor Saba Khatoon v. Mohd. Quasim*,[97] the question before the Supreme Court was whether the rights of the children of Muslim parents under s. 125 of the CrPC were restricted by the grant of maintenance to a divorced Muslim woman for her children under s. 3(1)(a) of the MWA. Section 125 of the CrPC creates a liability on a parent with sufficient means to grant children maintenance until they attain majority or are able to maintain themselves whichever is earlier. In case of female children, the liability exists until they get married. Section 3(1)(b) of the MWA grants a maintenance of two years to divorced Muslim women to maintain their children.

The facts of the case are that the appellant had filed a grant of maintenance under s. 125 of the CrPC for herself and her three children—aged six years, three years, and 1.5 years, respectively—as her husband had refused to maintain her. After the trial court granted the petition in favour of the appellant, the husband divorced her and filed an application seeking a modification of the trial court order in view of the provisions of the 1986 Act. The trial court restricted the grant of maintenance to the *iddat* period but did not go back on its earlier order on maintenance to children. The High Court ruled that the grant of maintenance to children of Muslim parents was restricted to the period of two years prescribed under s. 3(1)(b) of the MWA notwithstanding the provisions of s. 125 of the CrPC. The Supreme Court was thus confronted with the question of whether the rights to children under s. 125 of CrPC came into conflict with the rights to the divorced mother under s. 3(1)(b) of the MWA.

Dr Anand J., in his succinct judgment, not only unequivocally rejects the idea of any conflict between the secular law and the MWA here, but goes further to illustrate how the two have similar aims. The Court observes that the maintenance granted to the mother under s. 3(1)(b) of the MWA is an "extra amount" for the nourishment, nursing, and taking care of infant(s) up to a period of two years. The social justice aspect of a culturally grounded legislation is clearly highlighted. The Court also notes that s. 125 of the CrPC grants an absolute right to minor children to claim maintenance from their father until they attain majority or, in the case of female children, until they get married.

5.2 Use of Islamic Legal Discourse

The Court observes that a Muslim father has an "absolute" obligation to provide for his children as long as he has the financial wherewithal to do so and the children have no independent means to support themselves. The Court states that the 1986 Act did not intend to take away "the independent rights of the children to claim maintenance under s. 125 of the CrPC where they are minor and unable to maintain themselves." The Court observes that it would be "unreasonable, unfair, inequitable and even preposterous to deny the benefit of s. 125 of the CrPC to the children only on the ground that they are born to Muslim parents." The language of social justice and substantive equality, in the use of the words "unreasonable, unfair, inequitable," is clearly invoked in upholding maintenance under the secular law.

The Court further cites provisions of Muslim personal law to grant moral authority to the secular law. The Court observes that, even under Muslim personal law, minor children have an absolute right to receive maintenance from the father until they attain majority and, in the case of girls, until they get married. The Court observes that Muslim law considers the act of providing maintenance to a daughter a great religious virtue. The Court cites Mahmood's

97. (1997) 6 SCC 233.

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Statute Law Relating to Muslims in India (1995) to illustrate the provision of maintenance in Muslim personal law:

> By Muslim law, maintenance *(nafaqa)* is a birthright of children and an absolute liability of the father. Providing maintenance to daughters is a great religious virtue. The Prophet had said: "Whoever has daughters and spends all that he has on their upbringing will, on the Day of Judgment, be as close to me as two fingers of a hand. If a father is poverty-stricken and cannot therefore provide maintenance to his children, while their mother is affluent, the mother must provide them maintenance subject to reimbursement by the father when his financial condition improves."

It is important here to carefully read the Court's use of Islamic legal sources. The Court cites Islamic legal sources which speak of providing maintenance to daughters as a *great religious virtue.* The reference to the act of granting maintenance as a religious virtue is a significant discursive movement; the Court here invests the secular law with the moral persuasive authority of religion. The idea of liability in the secular law is conflated with the idea of a religious obligation and virtue in the Court's articulation. I argue here that the normative order of state law is re-constituted as a morally persuasive force in making it speak to the Islamic legal discourse. Unlike in *Shah Bano*, we do not see any hasty generalizations on the urgent need to "reform" Islam and rescue Muslim women; nor are there paternalistic pronouncements on the need to secure national integration using a UCC. The judgment conflates a liberal discourse of rights contained in the secular law with a discourse of religious obligation and moral good. In navigating a legal universe where both culturally grounded, community-specific legislation and the secular law exist, *Noor Saba Khatoon* uses multiple normative legal orders to create rights for destitute Muslim women. The enactment of the MWA offers a new strategy where the discourse of rights in the secular law is made to speak to moral obligations in the religious law. This is a considerable departure from the discursive terrain within which *Shah Bano* functions; in that terrain, state law was seen as the only site of justice for Muslim women that was then validated by Islamic legal sources. This, in *Shah Bano*, was accompanied by pronouncements on the need for uniformization using the UCC. In the 1990s, the Supreme Court charts a different path of navigating multiple normative legal orders in securing justice for women.

In engaging the discourses of the secular law and culturally grounded, community-specific legislation, the Court illustrates the similarity in their emphases on social justice. This juxtaposition of a discourse of community rights, namely the rights available to a divorced woman for maintaining her children, and individual rights, namely the rights available to the children under the secular law, can be read as a foregrounding a vision of constitutionalism where community rights and individual rights complement each other to bring about substantive equality. As Chandoke (2002) pointed out, group rights are "preconditions for individual rights" and enhance substantive equality (Chandoke, 2002, p. 232). Unlike in *Shah Bano*, we do not find any repudiation of citizens following "conflicting ideologies" as a threat to national integration.

5.3 Community Arrangements and the Court

In *Secretary, Tamil Nadu Wakf Board and Another v. Syed Fatima Nachi*,[98] the Court deploys a purposive interpretation of the MWA to consolidate socioeconomic welfare

98. (1996) 4 SCC 616.

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measures flowing from community affiliations. This case involved a divorced Muslim wife filing a petition against the state *wakf* board seeking maintenance under s. 4(2) of the MWA.[99] In this instance, the woman claimed that neither her heirs nor her relatives had the means to maintain her after her divorce. She had no other means of support for herself and her two female children. The state *wakf* board, the appellants in this case, had argued that subsections (1) and (2) of s. 4[100] were mutually exclusive and orders had to be passed against the heirs and the relatives of the divorced woman before she could approach the *wakf* board for maintenance.

Puncchi J., in a purposive interpretation of the statute, focuses on the meaning of the statute as a whole rather than individual sections. He observes that accepting the arguments of the appellants would have a "devastating effect" on the purpose of the statute. A divorced woman could not be expected to "run after relatives," fighting litigation in succession against them only to get "negative orders justificatory to the last resort" of approaching the state *wakf* board.

The Court also relaxes procedural requirements of the law in order to ensure easy access to social justice for women. She is allowed to plead and prove the facts of her relatives' inability to pay in one proceeding itself and subsequently approach the state *wakf* board for maintenance. Though there is no explicit reference to the Constitution, the Court invokes the constitutional ideals of social justice. Further, it secures access to justice using a culturally grounded legislation that builds up on existing community networks to secure welfare. The purposive interpretation of a statute grounded on community identity conflates a discourse of rights guaranteed by the Constitution and community identity. This discursive strategy is a significant departure from paternalistic pronouncements in *Shah Bano* on the urgent need to reform an unequal Muslim society typified by unscrupulous men divorcing their wives at will. Hasty generalizations about the nature of Muslim society in *Shah Bano* give way to a recognition of how community structures could be used to secure justice. This trend continues in the decade after.

6. *DANIAL LATIFI* AND AFTER

In *Danial Latifi*, the Court removed much of the confusion around the provisions of the much maligned and misunderstood Muslim Women's (Protection of Rights to Divorce) Act 1986.

99. This section mandates the state *wakf* board to provide maintenance for a divorced Muslim woman where her relatives or children do not have the wherewithal to support her. The section states: "Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (1), the Magistrate may, by order, direct the State Wakf Board established under section 9 of the Wakf Act, 1954, or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order."

100. S. 4(1) of the MWA provides for relatives of a divorced Muslim woman who has not re-married herself to grant her maintenance. The relevant provisions state: "(1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where a Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order."

The Court decisively settled in the light of previous judgments that permanent alimony could be paid to Muslim women even after the passage of the MWA. This concretized a vision of a gender-just interpretation and application of Muslim personal law by the judiciary without any attempt at a centralized uniformization through the UCC.[101] Following the *Danial Latifi v. Union of India*[102] judgment, there has been further expansion of a rights regime for the welfare of Muslim women through a combination of community-specific statutory intervention and individual rights guaranteed by the provisions of the CrPC and the Constitution.

The judgment comes in response to a challenge to the constitutional validity of the MWA on the grounds of violation of Articles 14, 15, and 21 of the Constitution. The petitioners had contended that s. 125 of the CrPC was meant to prevent vagrancy and destitution of women; the exclusion of Muslim women from this provision, the petitioners argued, was inimical to the right to equality and led to discrimination between women on the grounds of religion and thus violated both Articles 14 and 15 of the Constitution.

Rajendra Babu J., in an elaborate explication of *Shah Bano* as well as the MWA, clearly articulates the rights of divorced Muslim women. The most significant contribution of the judgment is its careful delineation of the similarity in the aims of a piece of legislation grounded in community identity, the MWA, and the secular law, the CrPC. *Danial Latifi* coherently articulates a discursive strategy that had been adopted by judgments since the enactment of the MWA—that of emphasizing the social justice aspect of both the MWA and the CrPC. In doing so, it also highlights how legislation grounded in community identity provides additional rights to women without taking away rights provided by the secular law; this is used as a strategy to uphold the constitutionalism of this legislation.

The judgment, through a careful reading of s. 3 of the MWA, establishes that the aims of the section are similar to that of the CrPC. The Court states that s. 3(1)[103] of the Act creates two separate and distinct obligations for the husband: (1) to make a "reasonable and fair provision" for his divorced wife and (2) to provide "maintenance" for her. The Court attempts a purposive interpretation of the statute to secure social justice for divorced Muslim women. The Court thus observes that the Parliament intended that the divorced Muslim woman gets sufficient means of livelihood after the divorce and the word "provision" thus means "something that is provided in advance for meeting some needs." It further reads "within" as meaning "on or before," "not beyond" and not as "during" or "for." It therefore argues that nowhere has the Parliament provided that "reasonable and fair provision and maintenance is limited only for the *iddat* period and not beyond it." The Court rules that the husband's liability to make provisions would extend to the whole life of the divorced wife unless she married again.

The Court compares these provisions of the MWA with s. 125 of the CrPC to argue that the object of the CrPC to prevent vagrancy and destitution are satisfied by the MWA too. The Court here illustrates that the constitutional aims of social justice can be met both by secular legislation and community-specific statutory interventions that build up on existing practices and religious discourse of law.

101. Menski (2008), p. 213.

102. (2001) 7 SCC 740.

103. S. 3(1)(a) of the MWA reads as follows: "(1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to—(a) reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband."

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It further illuminates the relationship between legislation premised on community identity and the Constitution. In a purposive construction of the MWA, *Danial Latifi* demonstrates how the statute creates and consolidates the right to maintenance for divorced women premised on community identity; therefore, the Court refutes the idea that the legislation violates the right to equality or equal protection of laws under Article 14 or the protection against discrimination on the basis of religion under Article 15. The MWA is understood, instead, as an enabling legislation that provides additional rights on the basis of community identity while taking into account the specificity of cultural practices. In its articulation of the constitutionality of the MWA, *Danial Latifi* traces the contours of state intervention where group rights protected through statutory intervention contribute to attaining gender justice and substantive equality. The Court holds that the right to equality guaranteed under Article 14 and prevention of discrimination protected under Article 15 are not violated when the state enacts a legislation for a particular group—"divorced Muslim women"—which is equally or more beneficial than the general law (s. 125 of the CrPC). The Court foregrounds a vision of constitutionalism where positive obligations are laid upon the state to create a welfare regime for Muslim women even while addressing their particular community affiliation.

Instead of a regime of direct welfare payments, the state creates obligations on the community to attain a vision of social justice. In this unique form of positive discrimination, the state addresses the specific social situation of Muslim women using the MWA; the Court further consolidates the right to equality and against discrimination enshrined in Articles 14 and 15 of the Constitution.

6.1 Chand Patel*: Islamic "Obligation"*

In *Chand Patel v. Bismillah Begum and Another*,[104] social justice provisions of the secular law are implemented using extensive references to Islamic legal discourse. However, we do not see any references to the UCC or hasty generalizations on Muslim society, unlike in *Shah Bano*. A trend is discernible in the 1990s onwards of a constructive engagement with Islamic legal sources to secure rights for women which is not accompanied by fallacious and hasty generalizations about Islam or stereotyping of Muslim women as mere victims to religious authority. The emphasis on the UCC as a means of securing gender justice also disappears. *Chand Patel* carries forward a trend discernible in the 1990s.

In *Chand Patel*, the petitioner, a married woman, had filed an application for maintenance for her and her minor daughter from her husband under s. 125 of the CrPC; she claimed that she had been married for eight years and that the marriage was consummated. She also admitted that her husband was married to her elder sister at the time of their wedding. The husband argued that the marriage was void, as Muslim law prohibited a man from marrying his wife's sister in his wife's lifetime, and refused to pay maintenance for the wife and the minor daughter.

The question posed to the Court was whether a marriage of a Muslim man to his wife's sister while his earlier marriage with the other sister was subsisting would be void or merely irregular or voidable even though the subsequent marriage had been consummated. Altamas Kabir J. uses the tenets of Muslim personal law to address the demands for

104. (2008) 4 SCC 774.

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maintenance made under the secular law. He states that, if the marriage were held to be irregular, the marriage will subsist for all purposes unless declared to be void by a competent court. The judgment draws from *Mulla's Principles of Mohammedan Law* to illustrate the difference between a void and an irregular or voidable marriage. It also highlights the obligations on the husband in case of a voidable marriage. Paragraph 263 of the *Principles of Mohammedan Law* sets out the terms for an "unlawful conjunction" as follows:

> A man may not have at the same time two wives who are so related to each other by consanguinity, affinity or fosterage, that if either of them had been a male, they could not have lawfully intermarried, as for instance, two sisters, or aunt and niece. The bar on unlawful conjunction renders a marriage irregular, not void.

This principle on "unlawful conjunction" is culled out from *Hedaya*, a central text of Islamic personal law composed in the twelfth century by Muslim jurist Burhan al-Din al-Marghinani.

The Court further relies on *Tajbi v. Mowla Khan*[105]—a decision of the Bombay High Court which held that a marriage with a sister of an existing wife was not void (*batil*), but irregular (*fasid*). The Bombay High Court relied on the views expressed in *Fatwa-i-Alamgiri*, an authority on Islamic law compiled by the Emperor Aurangzeb Alamgir. The reasoning adopted was that a marriage with a "permanently prohibited woman" had always been considered void in Islamic law. However, a marriage with a "temporarily prohibited woman," if consummated, would create legal obligations. The logic behind this was that marriage with a sister of an existing wife could become lawful either by the death of the first wife or the husband divorcing her.

Paragraph 267 of the *Principles of Mohammedan Law* is cited further to explain the legal obligations of a voidable marriage, if consummated. The text states that, if consummation has taken place, a wife is entitled to "(i) dower, proper or specified, whichever is less; (ii) she is bound to observe the *iddat*, but the duration of the *iddat* both on divorce and death is three courses; (iii) the issue of the marriage is legitimate." The text, however, adds that an irregular marriage, though consummated, does not create mutual rights of inheritance between husband and wife.

Altamas Kabir J. thus ruled that, as per the tenets of Hanafi law, an irregular marriage continues to subsist until terminated by a court of law, and the wife and the children of such marriage would be entitled to maintenance under the provisions of s. 125 of the CrPC.

This case is significant on more than one count. Not only does it use sources of Islamic law to create moral authority for the secular law; it also recognizes the rights to maintenance of a woman in a somewhat polygamous arrangement. The recognition of the rights of a woman in an irregular marriage and the consequent award of maintenance using the secular law is a creative judicial intervention that augments rights of women while recognizing existing social realities of polygamous unions. We thus see a combination of Islamic legal discourse with the secular law in ways that recognize community arrangements and create welfare mechanisms for women within the same. The judgment conflates the socioeconomic rights guaranteed by the state with a notion of community responsibility towards destitute women. This again articulates the role of the state as an arbiter of social justice that invigorates

105. ILR (1917) 41 Bom 485: (1917) 39 IC 603.

community notions of "justice" to achieve its aims of attaining social justice and substantive equality. The significance of this discursive movement will be discussed further in the next section of the paper, which dwells on fundamental rights and Muslim personal law.

In a series of judgments in the decade following *Danial Latifi*, there has been further expansion of the rights regime laid down in this judgment, as the Court has allowed for pleas for maintenance filed by divorced Muslim women under s. 125 of the CrPC. This regime of socioeconomic "rights" is created without an attendant emphasis on the need for legal uniformization through enactment of a UCC. The Court preserves and expands the socioeconomic rights of Muslim women provided by the secular law; it also upholds instruments of social justice bequeathed on them by the specificity of their religious identity.

In *Iqbal Bano v. State of UP and Another*,[106] the Court reiterates that a divorced Muslim woman is not barred from filing a petition for maintenance under s. 125 of the CrPC. The Court here attempts to simplify procedural requirements for bringing about a harmonization of the secular law and legislation for a particular community that eventually works towards attaining gender justice. Since s. 125 of the CrPC and the MWA petitions are tried before the same court, the Supreme Court holds that a court could treat an application under s. 125 of CrPC as an application under the 1986 Act.

In *Shabana Bano v. Imran Khan*,[107] the Court reiterates this stance using a cumulative reading of *Danial Latifi* and *Iqbal Bano*. The reasoning of the Court emphasizes the beneficial nature of MWA. The Court rules that a divorced wife's petition under s. 125 of the CrPC "would be maintainable before the Family Court as long as the appellant does not remarry." Also, the amount of maintenance to be granted under the *iddat* period would not be restricted to the *iddat* period only. A divorced Muslim woman is thus entitled to claim maintenance under s. 125 of the CrPC from her husband even after the expiry of the *iddat* period as long as she did not re-marry.

In *Shamim Bano v. Ashraf Khan*,[108] there is further convergence between the secular law and legislation premised on community identity. In this case, a Muslim woman, who had been deserted by her husband, had initially applied for maintenance under s. 125 of the CrPC. The appellant was divorced by her husband while this application was still pending. She then filed an application under s. 3 of the MWA. The magistrate allowed the application under the MWA but rejected the one under the CrPC. The appellant then approached the High Court; the High Court held that s. 125 of the CrPC would only be available to the appellant until the time of divorce unless she had exercised the statutory option under s. 5 of the MWA to be governed by the CrPC. The High Court thus ruled that the wife was not entitled to maintenance under s. 125 of the CrPC, as she was now governed by the MWA after her divorce.

The questions posed to the Supreme Court were: (1) whether a divorced Muslim wife could claim maintenance under s. 125 of the CrPC; (2) whether an application under s. 3 of the MWA would disentitle a woman from maintenance under s. 125 of the CrPC; and (3) whether consent under s. 5 of the MWA was necessary to maintain an application under s. 125 of the CrPC.

106. (2007) 6 SCC 785.

107. (2009) 1 SCC 666.

108. (2014) 12 SCC 636.

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The Court, in answering these questions, brings about further convergence between the MWA and the CrPC to secure rights grounded in community identity for aggrieved women. The Court relies on *Danial Latifi* to assert the liability of a Muslim husband to make reasonable and fair provision for the future of the divorced wife that includes maintenance as well as provision extending beyond the *iddat* period to be made by the husband "within" the *iddat* period under s. 3 of the MWA. The Court also refers to the principle laid down in *Shabana Bano* that an application under s. 125 of the CrPC would be maintainable as long as the appellant did not re-marry. Further, Dipak Misra J. emphasizes the "duty" of the law to establish welfare mechanisms to prevent destitution of divorced women. The judge observes that the breakdown of a marriage leads to a "loss of economic and social security and in certain cases, inadequate requisites for survival." The judge further observes that it is the "duty" of the law to recompense and "the primary obligation is that of the husband." Again, the language of moral obligation and duty is invoked to protect and augment the right of Muslim women across a range of normative legal orders. It is important to note the conflation of the discourses of secular law and religious, community obligations in this observation. The Court acknowledges the "duty" of the law to compensate for the breakdown of marriage but at the same time mobilizes community ideas of the "primary obligation of a husband" to enforce its writ. A legal universe is created where it is possible for women to navigate a range of normative orders, the CrPC, and the MWA to attain rights to maintenance after divorce.

The discourse analysis of case-law pertaining to reward of maintenance in the post-*Shah Bano* period illustrates how the normative orders of state law—community-specific legislation, the Constitution, and the statutory, secular law—interact with and constitute one another. Following the enactment of the MWA after the controversial *Shah Bano* judgment, the tension in the text of *Shah Bano* between Islamic legal discourses and the impulse towards uniformization is creatively resolved by the Supreme Court. This is achieved using a number of discursive strategies. The categories of moral obligation and religious virtue are made to speak to the category of "rights" under the secular law. This use of the Islamic legal discourse grants a moral persuasive authority to the law in *Noor Saba Khatoon* and *Chand Patel*. There is also an emphasis on the social justice aspect of both the MWA and the CrPC. In *Secretary, Tamil Nadu Wakf Board and Another v. Syed Fatima Nachi*, the Court uses existing community structures to enforce rights guaranteed under the MWA. In *Chand Patel*, Islamic legal sources are used to ensure welfare measures for a woman in an irregular marriage; the existing social reality of polygamous unions is thus recognized and a set of obligations and rights on the spouse are created for the same. An analysis of the discursive interaction between community rights recognized by the state, constitutionalism, and the secular law points to how the engagement with Muslim law by the state has moved beyond the discourse of minority "accommodation." In the decades after independence, the lack of attempts to reform Muslim law were premised around the need for granting cultural autonomy through minority "accommodation."[109] The legislators framed the community attachment to Islamic law as an object to be reformed and replaced by the secular law eventually when the community was ready for it.[110] This language of reform and accommodation is implicated in imagining the Muslim minority as located outside of the

109. Subramaniam, *supra* note 5, p. 201.

110. *Ibid.*, p. 203.

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fringes of the secular nation-state.[111] While the Muslim minority's cultural practices and community rights were deemed as worthy of protection, there was no attendant emphasis on promoting substantive equality for the cultural "other." In the case-law subsequent to the enactment of the MWA, one sees a gradual transformation of the rhetoric of "reform" and "accommodation" into one of rights that are imagined as a combination of religious duty and obligation as well as liability under the secular law and the Constitution. This helps in the attainment of substantive equality promised by the Constitution under Articles 14 and 15. This paper contributes to the existing literature on personal law reforms in India by charting this changing narrative of the state's engagement with Muslim personal laws as a result of the discursive interaction between the secular law, community rights, and the Constitution.

It is significant that pronouncements in favour of the UCC give way to assertion of socioeconomic rights in relation to ideas of social obligations in a framework of Islam. This discursive transformation denotes a movement away from assertion of the need for national "integration" using the UCC to recognizing the specificity of community "difference" in creating a regime of rights. This discursive transformation of state law belies Sen's (2010) assertion that "the Court has post-Shah *Bano* chosen to view the debate on the UCC versus personal law as a "zero-sum conflict."[112]

7. REDEFINING THE CONTOURS: MUSLIM PERSONAL LAW AND FUNDAMENTAL RIGHTS

In this interplay of the secular law, personal laws, and the Constitution, there are two distinct discursive movements that one can discern. On the one hand, the Supreme Court establishes a regime of substantive equality through positive discrimination and a creative harmonization of the secular law, culturally grounded community-specific statutory laws, and the constitutional ideals. The Court foregrounds a vision of constitutionalism as social justice premised on substantive equality. However, this agenda of protecting socioeconomic rights is premised on the specificity of community identity and builds up on as well as creates community networks of support for destitute women.

On the other hand, there is a discursive movement to read personal laws in light of constitutional provisions so as to limit arbitrary imposition of cultural practices that work against the interest of justice and the mandate of the Constitution. The Court articulates a vision of "rights" that is premised on imposing limits to the arbitrary practices of personal laws that threaten the constitutional guarantee of fundamental rights. The position of the Supreme Court vis-à-vis the relationship between personal laws and the fundamental rights provisions of the Constitution undergoes a transformation in the post-*Shah Bano* era.

In *State of Bombay v. Narasu Appa Mali*,[113] the Bombay High Court, while adjudicating upon the constitutionality of the Bombay Prevention of Hindu Bigamous Marriages Act 1946, held that the that personal laws could not be tested against constitutional provisions of fundamental rights, as they were based on religious precepts and customary practices and

111. *Ibid.*, p. 201.

112. Sen, *supra* note 92, p. 149.

113. AIR 1952 Bom 84.

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could not be termed "laws in force" as defined by Article 13[114] of the Constitution. Chagla C. J. observed that the Constitution dealt with personal laws only in some respects. He states:

> The scheme of the Constitution, therefore, seems to be to leave personal law unaffected except where specific provision is made with regard to it and leaves it to the Legislatures in future to modify and improve it and ultimately put it on the statute book as a common and uniform Code.

Chagla C.J. upheld the constitutionality of the Act in question by arguing that polygamy was not an integral part of Hinduism. He further stated that, even if polygamy were to be recognized as an aspect of Hinduism, the state was still empowered to legislate on questions related to marriage under Article 25(2)(b) of the Constitution. He ruled that the state had the power to legislate with regard to social reform under Article 25(2)(b) even if it interfered with the freedom to profess, practise, and propagate religion under Article 25(1). Thus, in *Narasu Appa Mali*, the social reform mandate of the state is unambiguously privileged over the individual's right to freedom of religion.

Another issue raised by the petitioners in *Narasu Appa Mali* was the differential treatment meted out to Hindus and Muslims as a result of the Act. The petitioners alleged that the Act resulted in discrimination under Article 14 (right to equality and equal protection of laws) and Article 15 (no discrimination on the basis of race, religion, caste, sex, or place of birth) of the Constitution. The question posed to the Court was whether there was a reasonable ground to treat Muslims as a different class to whom the laws restricting polygamy would not apply. Chagla C.J., in deciding on this issue, foregrounds an argument for the right to cultural autonomy of religious minorities and cultural difference as a valid ground for the state to make different laws for communities. He argues that the state was entitled to consider the "educational development" of the two communities; while one community may be prepared to accept social reform, the other might not yet be ready for it. He observes that Article 14 does not mandate that all legislation has to be of an "all-embracing" character. Polygamy is also recognized as a component of the personal law and hence not considered as discriminating against women on the basis of sex. The emphasis here is on recognizing and preserving the cultural autonomy of Muslims.

An analysis of the judgments subsequent to *Shah Bano*, however, indicates a more interventionist approach by the Supreme Court as both personal laws and customary practices are weighed against the fundamental rights provisions of the Constitution. With the exception of *Ahmedabad Women's Action Group v. Union of India*,[115] the case-law illustrates attempts to weigh personal law practices against the fundamental rights provisions of the Constitution. In the aforementioned case, while adjudicating on the question of constitutionality of Muslim personal law providing for polygamy and unilateral *talaq* and Shia and Sunni inheritance laws, the Supreme Court dismisses the writ petitions citing *Narasu Appa Mali.* As Agnes notes, following the *Shah Bano* judgment and the enactment of the MWA Act, there is a concerted endeavour to test the constitutionality of personal law provisions against notions of "justice, equality, non-discrimination."[116] This strategy can be

114. Art. 13 of the Constitution deals with laws inconsistent with or in derogation of the fundamental rights. Art. 13(1) states: "All laws in force in the territory in India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of this Part, shall to the extent of such inconsistency, be void."

115. (1997) 3 SCC 573.

116. Agnes, *supra* note 3, p. 148.

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best studied by illuminating the interaction of the discourses of Islamic law, personal laws, and the Constitution in the judgments of the Supreme Court post *Shah Bano*.

In *Shamim Ara v. State of UP and Anr*,[117] the Supreme Court engages multiple treatises on Islamic law to construct a legal argument against the arbitrary issuance of *talaq*—for instance, *talaq* pronounced in the absence of the wife or through mere pleading in judicial proceedings. The rights to maintenance of a Muslim woman who had been divorced arbitrarily are upheld by weaving a complex argument using multiple Islamic legal sources. In this case, the appellant, on behalf of herself and two of her minor children, had filed an application for maintenance under s. 125 of the CrPC complaining of desertion and cruelty by her husband. In the family court, the husband claimed that he had divorced her and was therefore not liable to pay maintenance. He did not furnish any more particulars of the *talaq* including the circumstances under which or the persons in whose presence the *talaq* was pronounced. Nor did he furnish any reasons for the justification of the *talaq* or any proof of efforts at reconciliation. The family court allowed the plea of the husband on the basis of an affidavit in a civil suit litigation that stated that he had divorced his wife; the wife was not even a party to this litigation. The High Court ruled that the filing of a written statement by the husband was a proof of divorce.

The Supreme Court was thus faced with the question of whether the appellant wife would be considered as divorced given that there was not sufficient evidence to suggest the same; subsequently, the Court had to decide on her eligibility for claims of maintenance under s. 125 of the CrPC.

R.C. Lahoti J. engages multiple sources of Islamic law to construct an argument that protects the welfare of women by the secular law. The judgment refers to paragraph 310 of *Mulla on Principles of Mahomedan Law*, which states that "pronouncement of the word *talak* in the presence of the wife or when the knowledge of such pronouncement comes to the knowledge of the wife, results in dissolution of the marriage."[118] The text further notes that, if a husband informs his wife that she had been divorced, it leads to a divorce between them despite there being no proof of the same. This statement of law by Mulla was based on certain rulings of Privy Council and the High Courts.

The judgment also takes note of Tahir Mahmood's *The Muslim Law of India*, which states that all schools of Muslim law allow the husband to divorce his wife by unilateral action and without the intervention of the court. The power to pronounce *talaq* is deemed a unilateral action. Mahmood takes notes of a few decided cases to note that a husband's plea of divorce in judicial proceedings for maintenance affected a *talaq*.

R.C. Lahoti J. observes that such a liberal construction of *talaq* is heavily skewed in favour of husbands and has subsequently met with strong disapproval of eminent jurists. He then goes on to cite some High Court judgments that use other Islamic legal sources to question this interpretation of the legal position on *talaq*. Krishna Iyer J., in *A. Yousuf Rawther Sowramma*,[119] observes that the "arbitrary, unilateral power" of the Muslim husband to inflict divorce is not in accordance with Islamic injunctions. Iyer quotes from Ahmad A. Galwash's *The Religion of Islam*: "The whole Quran expressly forbids a man to seek pretexts

117. (2002) 7 SCC 518.

118. *Ma Mi v. Kallander Ammal*, AIR 1927 PC 15. *Rashida Ahmad v. Anisa Khatun*, AIR 1932 PC 25.

119. AIR 1971 Ker 261.

for divorcing his wife. So long as she remains faithful and obedient to him, 'if they (namely women) obey you, then do not seek a way against them'" (Quran IV, p. 34). Galwash further states that "a divorce is permissible in Islam only in cases of extreme emergency. When all efforts at reconciliation have failed, the parties may proceed to a dissolution of marriage by '*talaq*' or by '*khola*'."

Krishna Iyer J. lamented that Muslim law as applied in India had followed a path contrary to the teachings of the Quran.

R.C. Lahoti J. further takes note of the judgments of the Gauhati High Court in *Jaiuddin Ahmed v. Anwara Begum*[120] and *Rukia Khatun v. Abdul Khalique Laskar*.[121] The High Court, in these judgments, while ruling on the validity of *talaq*, interpreted the "correct law of *talaq* as ordained by the Holy Quran." The judgments state that the "correct law" is that *talaq* must be for a reasonable cause and must be preceded by an attempt at reconciliation by the husband and the wife by two arbiters, one each from the family of the husband and the wife, respectively.

The Court further refers to the rights to divorced Muslim woman in *Bai Tahira v. Ali Hussain Fidaali Chothia*.[122] *Bai Tahira* invokes Article 15(3) of the Constitution in order to emphasize s. 125 of the CrPC as a form of positive discrimination for divorced, destitute women. The judgment had further argued that the "protection against moral and material abandonment manifest" in Article 39[123] of the Constitution is part of the social and economic justice promised by Article 38.

R.C. Lahoti J., after examining various sources of Islamic law, ruled that *talaq*, in order to be effective, had to be pronounced. He further noted that a mere plea in the written statement of a divorce having been pronounced sometime in the past cannot be "itself treated as effectuating *talaq*." The Court disagrees with the commentaries of Mulla and Tahir Mahmood that a mere plea of previous *talaq* as a written statement even though unsubstantiated can be accepted as a proof of *talaq*.

The Court here constructs an argument for awarding maintenance to an aggrieved wife while navigating multiple discourses on the validity of *talaq* in Islamic law. We see in these diverse interpretations of the sources of Muslim law by the state. While earlier judgments of the Privy Council and the High Courts cited by Mulla recognize *talaq* even without substantiation or if it is pronounced in the absence of the wife, the judgments of the High Courts in the 1970s and 1980s emphasize the tenets of the Quran as restricting the rights

120. (1981) 1 Gau LR 358.

121. (1981) 1 Gau LR 375.

122. AIR 1979 SC 362.

123. Art. 38 of the Constitution states: "State to secure a social order for the promotion of welfare of the people—

(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of national life.

(2) The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst groups of people residing in different areas or engaged in different vocations."

The relevant sections of Article 39 of the Constitution are cited here: "Article 39. Certain principles of policy to be followed by the State.—The State shall, in particular, direct its policy towards securing—

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood."

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to divorce. The appropriation of these latter interpretations of the Quran and Muslim law to check instances of arbitrary divorce is an important discursive strategy adopted by the Court. Also, the contested, slippery nature of Islamic law where multiple sources lend themselves to a range of interpretations enables the Court to construct an argument that safeguards women from the arbitrariness of some cultural practices. The emphasis in the judgment on the "correct law" laid down by the Quran, again, creates a moral obligation on the Muslim man to not divorce his wife arbitrarily. But the Court also assumes the authority to determine the "correct law" as per the Quran. The use of Islamic legal sources to construct an argument for maintenance under the secular law also ensures that an individual right of a distressed Muslim woman is not seen in opposition to the community right to autonomy, but rather as a religious and moral obligation of the husband.

Vishwa Lochan Madan v. Union of India[124] came in response to a petition that seemed like an alarmist, reactionary Hindu right-wing demand for the abolition of personal laws altogether, and specifically the curtailment or abolition of Muslim personal law. The petitioner advocate Vishwa Madan Lochan alleged that the All India Muslim Personal Law Board was striving to establish a "parallel Muslim judicial system in India" though the institution of *dar-ul-qazas* that would take over the role of the sovereign state. This judgment engages the ostensible conflict between community autonomy and the fundamental rights guaranteed under the Constitution.

The petition alleged that the *dar-ul-qazas* run by the All India Muslim Personal Law Board consists of a parallel judicial system which issues *fatwas* that violate the constitutional provisions. This petition was prompted by the issuance of a number of *fatwas* that were deemed to violate the fundamental rights of Muslim women. In one such *fatwa* issued by Dar-ul-Uloom of Deoband, the marriage of Imrana, a 28-year-old woman who had been raped by her father-in-law, was dissolved though the husband and the wife never approached the Dar-ul-Uloom.

Chandramauli Kr Prasad J. dwells on the legal status of the *fatwa*. He defines the features of a formal legal system as he states that adjudication by a legal authority is "enforceable and binding and meant to be obeyed unless upset by an authority by law itself." He further states that a person deriving benefit from adjudication must have the right to enforce it while the person against whom an order is passed has to comply with it. The judge also notes that the power to adjudicate must "flow from a validly made law." He then goes on to argue that a *Dar-ul-Qaza* or a *fatwa* is not sanctioned by a competent legislature and hence cannot be defined as the law.

However, it is important to highlight that the judges do not give in to the demands raised in the petition of declaring the scheme of *dar-ul-qazas* or *fatwas* unconstitutional. The Court observes that:

> Dar-ul-qaza is neither created nor sanctioned by any law made by the competent legislature. … In case any person or body tries to impose it, their act would be illegal. Therefore, the grievance of the petitioner that Dar-ul-Qazas and Nizam-e-Qaza are running a parallel judicial system is misconceived.

This is also a recognition of the fact that the legal-pluralist paradigm does not violate the constitutional scheme. Here is a qualified recognition of the right to cultural autonomy of the religious minorities.

124. (2014) 7 SCC 707.

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This is further evident in the judge's analysis of the relationship between the fundamental rights guaranteed by the Constitution and the *fatwas*; the judgment deals with an ostensible conflict between the right to cultural autonomy of the minorities implicit in running an informal justice delivery system and the individual rights of the Muslim woman.

The observations in the judgment are significant:

> Fatwas touching upon the rights of an individual at the instance of rank strangers may cause irreparable damage and therefore, would be uncalled for. It shall be in violation of basic human rights. It cannot be used to punish the innocent. No religion including Islam punishes the innocent. Religion cannot be allowed to be merciless to the victim. Faith cannot be used as a dehumanising force.

The Court, in engaging the discourses of constitutionalism and personal law, marks a departure from the position in *Narasu Appa Mali*, in that personal laws are no longer seen to be immune from the fundamental rights provisions. The Court explicitly states that *fatwas* cannot violate basic human rights. The judgment forbids a *dar-ul-Qaza* from issuing a *fatwa* that touches upon the "rights, status and obligation of an individual unless such an individual has asked for it." It further rules that an attempt to enforce a *fatwa* by coercion is illegal and "has to be dealt with in accordance with law." This is a very significant pronouncement vis-à-vis a polycentric legal universe where the constitutional provisions and both codified and uncodified personal law practices co-exist and at times come into conflict. It also comments on the existing plurality of religions and indicates that no religion will be allowed to override the fundamental rights expectations of the Indian Constitution. The Court, while refraining from outlawing the institution of *dar-ul-qazas* issuing *fatwas*, lays down the contours of a scheme where state law in the form of an overarching framework of constitutionalism tries to regulate to some degree the operations of cultural practices that constitute Muslim personal law.

7.1 Personal Laws and Freedom of Religion

In *Khursheed Ahmad Khan v. State of UP*,[125] the Supreme Court engages an apparent conflict between an individual's right to freedom of religion guaranteed under Article 25(1) of the Constitution and the power of the state to legislate on religion under Article 25(2)(b).[126] This case can also be seen as a conflict between personal laws inherent in the right to cultural autonomy and the state's mandate to implement social reform under Article 25(2)(b). In this case, the appellant, a Muslim man, was dismissed from service for violating Rule 29(1) of the UP Government Servants' Conduct Rules, 1956, which prohibited him from contracting a second marriage during the existence of the first marriage without the permission of the government.

The Court constructs an argument premised on the difference between religious faith or belief and practices in navigating the competing claims of the fundamental right to freedom of religion and hence cultural autonomy and the social reform commitments of the state. In an analysis of this judgment, I build on Bhat's frame of the Supreme Court's construction of a

125. (2015) 8 SCC 439.

126. Art. 25(2)(b) of the Constitution allows the state to make laws "providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."

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doctrine of essentiality[127] (Bhat, 2009, p. 29). He delineates the dual discursive movement of the Supreme Court in positing a critique of religious practices that violate rights guaranteed under the Constitution as well as appropriating authority to define "true" religion. This is a useful frame to begin examining the engagement of the Court with the competing claims of cultural autonomy, personal laws, and fundamental rights.

The Court refers to *Javed v. State of Haryana*,[128] where it was ruled that polygamy was not an integral part of Islam and legislation related to monogamy could be enacted within the power of the state to bring about social reform under Article 25(2)(b). The Court also cites *Narasu Appa Mali*, which had drawn a distinction between religious belief and religious practices in adjudicating upon the constitutionality of the Bombay Prevention of Hindu Bigamous Marriages Act 1946. *Narasu Appa Mali* had argued that the practice of polygamy among Hindus did not acquire the sanction of religion simply because it was permitted. The State of Bombay was thus held to be within its power to enforce monogamy as a measure of social reform among Hindus.

The Court cites a number of High Court judgments, including *Badruddin v. Aisha Begum*[129] and *RA Pathan v. Director of Technical Education*,[130] which hold that bigamy among Muslims is not a religious practice, belief, or injunction. *RA Pathan* cites the Quran to argue that, though contracting plural marriages is a matter of practice, it is not a religious injunction or mandate.

The Court therefore rules that the service rules of the UP state government prohibiting contract of a second marriage during the subsistence of a first marriage without permission from the government do not violate the freedom of religion guaranteed under Article 25 of the Constitution. The Court holds that the UP government's service rules would be protected by Article 25(2)(b) of the Constitution, as it flows from a legislation that provides for social welfare and reform. The Court here weighs the claims of freedom of religion and cultural autonomy against social reform directed at the welfare of women. This is again achieved by citing High Court judgments that use religious authority to distinguish between religious belief and practices. Building upon Bhat's argument, it can be contended that the Court not only defines "true religion," but also makes a clear distinction between personal law practices permissible in a religion and the essential practices of the same. The personal law practices are not insulated from the mandate of social reform under the Constitution. This further instantiates an attempt to carve out the contours of cultural practices that constitute a personal law system. In doing so, the Supreme Court invokes the textual authority of the Quran.

It is also important to read this judgment's engagement with polygamy. The judgment upholds the constitutional validity of a legislation that attempts to regulate polygamy among government servants. The state's permission is required to contract a second marriage as per this legislation. We have noted in the earlier section of the article that the Supreme Court's recognition of the rights of a woman in an irregular marriage in *Chand Patel* posits a culturally grounded approach to the question of polygamy. In contrast to the outlawing of polygamy altogether in Hindu law, the Court recognizes the social reality of polygamy

127. Bhat, *supra* note 75, p. 29.
128. (2003) 8 SCC 369.
129. 1957 All LJ 300.
130. (1981) 22 Guj LR 289.

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and ensures welfare mechanisms for women in such unions. Further, in upholding the constitutional validity of a statute regulating polygamy, the Court illustrates the possibility of carrying out the constitutional mandate of social reform without dismantling the cultural autonomy of Muslims altogether. This is implicit in the way the Court engages the textual authority of the Quran to make a distinction between permitted practices and those that are mandated by religion. This discursive move is then used in articulating a relationship between personal laws and the Constitution.

In another instance of the Supreme Court laying down the contours for the operation of Muslim personal law, Sudhanshu Jyoti Mukhopadhyay J., in *Juveria Abdul Majid Patni v. Atif Iqbal Mansoori and Another*,[131] rules on the validity of an ex-parte *fatwa* as a form of divorce and the rights of an aggrieved wife under the Domestic Violence Act 2005. In this case, an ex-parte *khula* was obtained by the appellant wife from a mufti under the Muslim personal law in 2008. The respondent husband, instead of accepting the *khula*, filed a petition in a family court seeking restitution of conjugal rights. Subsequently, the wife filed an application in 2009 under s. 12 of the Protection of Women Against Domestic Violence (DV) Act, 2005. The questions posed to the Court were whether the divorce was valid and whether the woman could seek reliefs under the Domestic Violence Act, 2005.

The Court attempts to understand the provisions of *khula* divorce as codified in the Muslim Personal Law (Shariat) Application Act, 1937, in adjudicating upon the validity of the divorce. The Court notes that *khula* is one amongst the various forms of divorce recognized by the 1937 Act. The Court also details out all of the components under a *khula* divorce: the wife does not want to continue with the marriage and approaches her husband for the dissolution of the same; this may or may not be accompanied by an offer to give up her *mahr*; the mufti provides an advisory opinion or *fatwa* based on the Shariat of his school; if the matter cannot be settled privately, then the *qazi* is required to deliver a judgment (*qaza*). In this instance, the wife had only obtained an ex-parte *khula* from a mufti that was merely an advisory decision and the husband had not accepted the same. Therefore, the Court ruled that there was no certainty about the occurrence of the divorce. The court here engages with the various components of a form of divorce codified in the Muslim personal law to identify its validity within the contours of the same legal system.

The Court uses the rule laid down by *Shamim Ara* to argue that *talaq*, in order to be effective, has to be for a reasonable clause and preceeded by attempts at reconciliation between husband and wife and two arbiters. Also, *talaq*, in order to be effective, has to be pronounced. The Court observed that, in the present instance, neither the appellant nor the respondent placed any evidence to substantiate the divorce. Hence, the divorce could not be said to have taken place. The Court, again, lays down the contours of non-state law as it insists on definite pleading and evidence to prove the fact that a *khula* divorce had taken place.

Juveria provides an example of the Court conflating both the internal logic of the Muslim personal law system based on Islamic legal discourse and the rules laid down by a precedent to enunciate its position vis-à-vis a personal law practice. The Court holds that the requested relief under the secular law to the aggrieved wife under the DV Act was maintainable.

131. (2014) 10 SCC 736.

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8. CONCLUSION

The discourse analysis of case-law of the Supreme Court of India post *Shah Bano* reveals a complex terrain of discursive interplay between apparently competing claims of community autonomy, individual rights, religion-based personal laws, and the secular law. This paper attempts to contribute to the existing literature on the subject by a sustained analysis of the discursive constitution of normative orders of the law—the secular law, the Constitution, and personal law framed by the state—and the relationship between them. The feminist scholarship of the 1970s and 1980s foreclosed the possibility of this discursive interplay; the analysis was premised within a dichotomous construction of state and non-state law. The literature on legal-pluralist interventions[132] posits new frames for understanding the relationship between state law and personal law systems yet the analysis fails to capture the complex interaction in the realm of ideas and discourses between state law and the wide realm of cultural practices and codified law that constitute Muslim personal law. This paper has addressed this critical gap in the scholarship using a discourse analysis of judgments of the Supreme Court post *Shah Bano* that dwell on maintenance claims as well as apparent conflicts between personal law provisions and the Constitution.

In *Shah Bano*, the reinterpretation of Quranic verses is in tension with the essentializing of Islam and the emphasis on securing "national integration" using a UCC. The judgment resorts to ill-informed generalizations about the unrestricted right of husbands in Islam to divorce their wives at will. Notwithstanding the invocation of the textual authority of the Quran, the secular law is seen as the site of justice. This is further instantiated in the emphasis on the UCC and the repudiation of citizens following "conflicting ideologies."

The discourse analysis of judgments post *Shah Bano* illuminates a more complex conversation between the secular law, the Constitution, and Muslim personal law. I argue that the secular state law itself is re-constituted as a result of the discursive interaction with Islamic legal sources and culturally grounded legislation (MWA). This is achieved using a number of discursive strategies. In *Noor Saba Khatoon*, the secular law is invested with the moral persuasive authority of religion; the category of "great religious virtue" and moral obligation as mandated by the textual authority of the Quran are invoked to attain the aims of the secular law with regard to maintenance. The secular state law thus remains not only a contract between the state and the individual upon whose transgression there are punitive consequences, but is imagined in relation to virtue and obligation in religion. I argue that this is a significant departure as compared to the invocation of a UCC; it invests the secular law with the authority of a moral force that appeals to community identity to attain the constitutional mandate of social justice. This discursive movement enacted by the Supreme Court of conflating religious tenets with constitutional ideals while adjudicating on personal laws has implications for minority rights. As the Supreme Court transforms the secular law and the constitutional mandate of social justice for women into a moral imperative and ethic grounded in the tenets of Islam, it enhances individual rights even while preserving community autonomy to some degree. It is significant to note that this trend in the jurisprudence of the Supreme Court emerges in the backdrop of the growth of Hindu nationalism in the years following *Shah Bano*. Following *Shah Bano* and the enactment of

132. Menski, *supra* note 31; Menski, *supra* note 23; Solanki, *supra* note 10; Sezgin, *supra* note 62.

the MWA, Hindu nationalists demanded the introduction of a UCC as a corrective measure primarily to address the "gender-unequal" practices of Muslims.[133] This paper has argued that *Shah Bano* itself was premised on generalizations about Islam and a paternalistic attitude towards the reform of Muslim women. The UCC was seen both by *Shah Bano* and the Hindu nationalists as an instrument of "national consolidation" through a cultural assimilation of minorities. In the years following *Shah Bano*, the Supreme Court has erected a moral foundation for the rights awarded to women by the Constitution. I argue that this enunciation is far removed from both the discourses of national integration foregrounded in *Shah Bano* and the rhetoric of "cultural accommodation" of the framers of the Constitution. The imagination of rights guaranteed by the Constitution within the framework of religious duty or obligation of a pious Muslim articulates a vision of substantive equality envisaged in Articles 15(3) and 38 premised on the religious identity of Muslim women.

In *Secretary Tamil Nadu Wakf Board*, the purposive interpretation of a community-specific, culturally grounded legislation secures socioeconomic welfare measures which in turn secure the social justice envisaged in Article 38 of the Constitution. This is borne out by the gradualist extension of the rights to maintenance as well as the emphasis on the obligations of the husband and the community in protecting the socioeconomic rights of a divorced Muslim wife. The Court also illustrates the similar aims of secular legislation and statutory intervention premised on community identity. A form of positive discrimination under Article 15(3) is thereby enacted in the judicial reinterpretation of the MWA.

While the Nehruvian state took upon itself the task of social transformation using the law, the state in a legal-pluralist paradigm creates a set of rights and obligations from existing social arrangements in the community. Baxi, in an illuminating essay on constitutional justice, outlined the neoGandhian critique of Indian constitutionalism. He argues that the neoGandhian thinkers, such as Acharya Vinoba Bhave, felt that a constitutional state can achieve justice only if "a tradition of community/social trust are reinvented or reinforced, rendering citizenship into an ethical, not merely, legal notion."[134] In awarding maintenance to divorced Muslim wives, the Court attempts to create an ethic of social obligation and responsibility in furthering its aims of attaining social justice. It is this communitarian vision of constitutionalism that is exemplified in the state awarding socioeconomic rights to Muslim women to the extent that it revivifies existing community obligations and arrangements that serve the ends of gender justice for women.

I further argue that the Supreme Court engages multiple sources of Islamic law—both codified, statutory law and religious textual authority—to construct this narrative of moral force that consolidates the mandate of the secular law and the Constitution. In *Chand Patel*, the Court adopts the reasoning and internal logic of Islamic law cited in *Fatwa-i-Alamgiri*, an authority on Islamic law, to award maintenance to a wife in a voidable marriage (that has been consummated) under the secular law. The authority of the Quran is invoked on a number of occasions to emphasize the moral obligation of the husband to award maintenance to a wife. In *Juveria*, the Court engages with the various components of the *khula* form of divorce laid out in Muslim Personal Law (Shariat Application) Act 1937 to identify the validity of a divorce while adjudicating on claims under the secular law (Domestic Violence

133. Subramaniam, *supra* note 25, p. 222.

134. Baxi (2002), p. 47.

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Act 2005). The secular law thus attempts to engage codified cultural practices in Muslim personal law and religious textual authority on their own terms while adjudicating on a claim made under the secular law. We have noted, in the introduction, how ethical obligations enunciated in the Quran laid down the foundations for the legal structure in Islam.[135] Jurisprudence itself is seen as the science of understanding the correct discovery of God's will.[136] In Islamic law, legal authority is circumscribed by a moral compass; the authority of the law did not lie merely in the fact of an existing practice, but in "the theoretical arguments of the scholars as to why it ought to be observed" (Coulson, 1964, p. 82). The Supreme Court appropriates the internal logic and reasoning of various sources of Muslim law—both codified statutory law and authority of the religious text—to create a moral compass for the secular law.

The Court engages multiple authorities on the subject of *talaq* to arrive at a reasoned interpretation of Islamic law that is in keeping with the constitutional mandate of social justice and positive discrimination for women. In doing so, the Court appropriates the authority to define "the correct law" mandated by religion. In *Shamim Ara*, the Court rejects the position held by commentaries on Muslim law based on interpretations of Privy Council and High Court judgments; it emphasizes instead the textual authority of the Quran to lay down the "correct law" on *talaq*. This brings to the fore the complex relationship between the normative constituent orders of state law in the context of Muslim personal law in India. The state law privileges the authority of the Quran as the "correct" source of Muslim personal law over the case-law codified in commentaries on Muslim personal law. This highlights the tension between the normative constituent orders of the secular law, the Constitution on the one hand and Muslim personal law on the other. I have argued in the introduction, building up on the theoretical frame of Tamanaha, that Muslim personal law is an "internally plural" legal order. I argue here that the internally plural order of Muslim law allows the Supreme Court to appropriate sources of Islamic legal authority that are amenable to its objectives of foregrounding the constitutional vision. Also, we see a conflict enunciated within state law itself, especially in relation to adjudication on the forms of *talaq*, as the case-law based on codified Muslim personal law comes into conflict with constitutional aims of substantive equality and positive discrimination. The state then resorts to the uncodified source of Muslim law in the religious text. In doing so, it furthers its claim as a moral force in addition to attaining the aims of the Constitution.

This paper thus addresses a theoretical lacuna in the literature on legal pluralism in delineating the relationship between a range of constituent normative legal orders of state law—Muslim personal law and the secular law, the Constitution. I have shown that these orders exist in an ambiguous relationship of tension and complementarity with each other in the Indian context. The discourse analysis of the case-law reveals that the Supreme Court emphasizes the similarity in the aims of the two in certain contexts, while invoking other sources of Islamic law to refute the contentions of codified Muslim law in others. The literature on legal pluralism in the 1980s and subsequent decades had focused on the "dialectic and mutually constitutive relationship" between state and non-state law. This paper further illuminates the phenomenon of mutual constitution and conflict within normative

135. Coulson (1964), p. 22.

136. *Ibid.*, p. 75.

orders of state law itself; the internally plural nature of one of the orders allows the creative resolution of this conflict.

This conflict is instantiated further in the Supreme Court's adjudication on conflicts between personal law provisions and fundamental rights guaranteed by the Constitution. On the one hand, the Court ensures substantive equality for Muslim women by invoking religious virtue and community identity. On the other hand, it lays down the contours for personal law practices in relation to fundamental rights provisions. In *Khursheed Ahmad Khan*, the Court appropriates the authority to define "essential" practices of a religion while adjudicating on a conflict between personal law practices and the constitutional mandate of the state to enact social reform legislation. In *Vishwa Lochan Madan*, the Court prohibits the issuance of *fatwas* that violate "basic human rights." Even in a legal-pluralist paradigm, the Supreme Court circumscribes the domain of personal law practices weighing them against the tenets of the Constitution. This analysis brings into focus the power differential between legal orders of state law and personal law in a legally plural paradigm. The introduction of culturally grounded legislation and an agenda of community-specific interventions to attain substantive equality co-exists with attempts to define the limits of personal law practices. This illustrates the power differential that exists between legal orders in a legal-pluralist paradigm.

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