**Feminism and Multicultural Dilemmas in India: Revisiting the Shah Bano Case**

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**Abstract**—Debates in India following on from the *Shah Bano* case highlight the extent to which gender equality may be compromised by yielding to the dominant voices within a particular religion or cultural tradition. As the Indian Supreme Court noted in *Danial Latifi & Anr v Union of India*, the pursuit of gender justice raises questions of a universal magnitude. Responding to those questions requires an appeal to norms that claim a universal legitimacy. Liberal feminist demands for a uniform civil code, however, have pitted feminist movements against proponents of minority rights and claims for greater autonomy for minority groups. Against the background of growing communal tensions, many feminists have argued for more complex strategies—strategies that encompass the diversity of women’s lives and create a sense of belonging amongst women with diverse religious-cultural affiliations. Liberal theories of rights that abstract from the concrete realities of women’s daily lives have not always addressed the institutions and procedures necessary to build that sense of belonging. This article examines the contribution made by discourse ethics theorists to debates on models of multicultural arrangements. It argues that deliberative models of democracy recognize the need for ‘difference-sensitive’ processes of inclusion, potentially assisting feminism in resolving the apparent conflict between the politics of multiculturalism and the pursuit of gender equality.

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**1. Introduction**

Within multicultural states the conflicting claims that arise between the pursuit of gender equality and the protection of minority rights raise particularly intractable questions.¹ Indian constitutional history has long struggled with conflicts between gender equality and religious cultural claims.² The name *Shah Bano* has

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¹ For a recent discussion of these conflicting claims, see: L. Volp, ‘Feminism Versus Multiculturalism’ *Colum. L. Rev.* 101: 1181–1218 (2001).

become synonymous with this struggle. In the Shah Bano case, the Indian Supreme Court departed from traditional interpretations of Muslim Personal law, appealing to a more egalitarian Islam. The spectre of an exclusively Hindu court choosing between competing interpretations of Islam and pronouncing on the appropriate interpretations of Qur’anic verses provoked a furious outcry from conservative forces within the Muslim community. Previous judgments arriving at similar conclusions had provoked little response. The Shah Bano judgment, however, came at a time of heightened communal tensions. The Hindu right party, the Bharatiya Janata Party (BJP), although sitting in opposition, was gaining in popularity, leading to an increased sense of vulnerability amongst the Muslim minority. The Congress Government responded to the heightening communal crisis by passing the 1986 Muslim Women (Protection on Divorce) Act, yielding to the claims of cultural conservatives within the Muslim community and attempting to reverse the Shah Bano judgment. In the Government’s response to the crisis, we see the kind of ‘trafficking of women’ that accompanies so many multicultural arrangements. Gender equality was subordinated to religious claims, as the Government yielded to a discourse of communalism that defined individual identities solely through religious membership.

Shah Bano’s case highlights the tensions that arise when the pursuit of gender equality comes into conflict with the religious claims of a minority group. These tensions, coupled with the communalization of politics and the marginalization of religious minorities, have proven a constant obstacle to the pursuit of gender equality in India, particularly in the field of family law. The recent Supreme Court ruling in the Danial Latifi case represents yet another attempt to resolve these tensions. In a judgment that recognized the diversity of traditions within Islam, the Supreme Court concluded that the duty to make provisions for divorced women, as provided for under the Code of Criminal Procedure, applied equally to the Muslim community. The Court’s ruling ran contrary to the apparent intentions of the 1986 Act, and followed a series of conflicting judgments given by the High Courts in India in the aftermath of the Shah Bano case. Again the


6 Danial Latifi & Anr v Union of India, 2001 AIR SC 3958.

Supreme Court called on the Government to move towards a uniform civil code (UCC) and to return to the Nehruvian ideal of universal citizenship. This ideal, however, has continued to remain elusive.

Many feminist activists in India have called for reform of religious personal laws and for the application of fundamental rights principles to the sphere of marriage and family relations. In more recent years, however, the rise of the Hindu right and Hindutva as a political phenomenon led to fears that reform of personal laws would become yet another tool to silence religious minorities. Secularism became a powerful weapon in the Hindu right’s quest for power, as did the discourse of human rights. Against this background, calls for a uniform civil code ran the risk of becoming a vehicle for greater Hinduization of the state and its institutions. This hijacking of the secular agenda left feminists and human rights activists without their traditional supports, reluctant to challenge the discriminatory practices of religious minorities lest this added further support to the Hindu right.

Negotiating these conflicting agendas has raised many challenges for feminism as the pursuit of gender equality is, once again, constrained by religious claims. For some within the women’s movement, calls for reform of personal laws reflect an exclusionary impulse that denies the recognition of religious differences. As a result, while many feminists continue to campaign for a uniform civil code, the path to a just multicultural arrangement continues to be contested.

This article explores the conflicting claims that have arisen in India between feminism and multiculturalism, focusing, in particular, on the Shah Bano and Danial Latifi cases. In the Shah Bano and Danial Latifi cases, the Supreme Court drew on egalitarian strands within Islam, attempting to ensure a continuing respect for Muslim women’s claim to equal treatment, regardless of religious membership. A commitment to the universal legitimacy of Muslim women’s claims to equal citizenship underpinned the choices made by the Supreme Court in both cases, enabling the Court to negotiate a complex web of competing claims. Conflicts between gender equality and religious cultural claims are not,

8 Hindutva is the ideology underpinning the Hindu right movement in India. It is a movement that is committed to the establishment of a Hindu state and is against the appeasement of religious minorities, a policy that in its view has contributed to the malaise within contemporary Hindu society in India. The primary organizations involved in promoting Hindutva are the Bharatiya Janata Party (BJP), the Rashtra Swayamsevak Sangh (RSS), the Vishva Hindu Parishad (VHP) and the militantly anti-Muslim, Shiv Sena. The BJP and its allies on the Hindu right have argued in favour of a uniform civil code. See generally: D. Chakrabarty ‘Modernity and Ethnicity in India’ in D. Bennett (ed), Multicultural States: Rethinking Difference and Identity (London: Routledge; 1998) 91–110; G. Panday, The Construction of Communalism in Modern India (Delhi: Oxford University Press, 1990); R. Kapur and B. Cossman, Subversive Sites: feminist engagements with law in India (London: Sage Publications, 1996) 234–35. Basu et al describe ‘Hindutva’ as follows: ‘At the heart of Hindutva lies the myth of a continuous thousand year old struggle of Hindus against Muslims as the structuring principle of Indian history. Both communities are assumed to have been homogenous blocks—of Hindu patriots, heroically resisting invariably tyrannical, “foreign” Muslim rulers’. T. Basu et al, Kahki Shorts, Saffron Flags: A Critique of the Hindu Right (New Delhi: Orient Longman, 1993) 2.

of course, unique to India. In many jurisdictions, the defence of culture is frequently accepted, to borrow Leti Volpp’s term, as an excuse for ‘bad behaviour’.\(^{10}\) In these conflicts, culture is all too often taken as a given and the plurality of voices and the traditions of dissent within religious communities are ignored. The challenge for feminism, in India and elsewhere, is not to dismiss religious-cultural claims, but to highlight the potential for re-defining and reforming religious-cultural traditions.

In recent years, liberal feminism has tended to dismiss multicultural politics as ‘bad for women’.\(^{11}\) Dismissing multiculturalism as an oppositional force, however, denies the possibility of arriving at just multicultural arrangements—arrangements that both define the limits of reasonable pluralism and recognize the significance of religious and cultural differences. A deliberative democratic model of multiculturalism recognizes the possibility for reconciling both the pursuit of gender equality and the existence of cultural pluralism. Essential to this reconciliation is an ongoing process of cross-cultural dialogue. Against a background of heightened communal tensions, an ongoing process of dialogue is essential if feminism is to avoid becoming complicit in the politics of communalism. The beginnings of such a dialogue can be seen in the Shah Bano and Danial Latifi judgments and in feminist arguments made in support of Muslim women’s claims in the debates surrounding both cases. Underpinning this dialogue is a dual-track approach to cultural conflicts, one that combines legal regulation with an expanded moral political dialogue on the competing claims at stake.\(^{12}\) A dual-track approach recognizes both the dangers of yielding to religious-cultural claims and the paralysing relativism that comes with assertions of difference. At the same time, however, the commitment to an expanded dialogue recognizes the significance of religious and other differences, the diversity of voices within religious communities and the \textit{de facto} marginalization of many minority communities. The Shah Bano and Danial Latifi cases highlight the diversity of voices that have participated in debates on India’s multicultural arrangements and also the extent to which the State has been willing to compromise the pursuit of gender equality in the interests of placating communal tensions.


2. Shah Bano, *Communal Politics and Feminist Dilemmas*

Debates surrounding gender equality and religious-cultural differences have a long and troubled history in India. Colonial rulers viewed Indian women as ‘dependent subjects’, tied to the claims of their husbands, families, communities. Victorian feminists also contributed to the portrayal of the Indian woman as a dependent subject. As feminists, their own claims to political agency were supported by what they claimed as a special moral responsibility to ‘save’ the downtrodden women of the colonies. Indian women appeared as the natural and logical ‘white woman’s burden’. The claim of Victorian feminists to speak for Indian women was replicated in the claims of many Indian nationalists who saw their political roles as crucially bound up with improving the status of Indian women and safeguarding their honour against the polluting forces of the West.¹³ For many nationalists, the home, and women’s place within it, was reified as a kind of inner space, within which colonial hegemony could be challenged and denied. Colonial rule was portrayed as an interruption in the authentic life-story of the Indian nation.¹⁴ Within the private, domestic sphere, women were charged with safeguarding that story, becoming the bearers of culture, the repository of traditions. Many women were complicit in this idealization of Indian womanhood, supporting nationalist claims that ‘their’ religion or culture treated women with greater respect than did the cultures and traditions of the West. As Uma Narayan notes, gender came to play a role in the ideological service of both colonial Empires and of Third World nationalist movements, ‘helping to position Western and non-Western women against each other as competing cultural embodiments of appropriate femininity and virtue’.¹⁵

The division between public and domestic spheres was given legal sanction by the Warren Hastings Plan of 1772, which provided that Hindus and Muslims in the Indian sub-continent were to be governed by their own laws in disputes relating to inheritance, marriage, caste and other religious usages and institutions.¹⁶ In 1781, succession and inheritance were added to this list. In all other matters, the courts were to act, ‘according to justice, equity and good conscience’.¹⁷ The reception of secular and western laws into other spheres of the legal framework created a sharp dichotomy between systems of personal law and the general law

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¹⁴ Ibid at 17.
¹⁵ Ibid at 19.
¹⁶ Although the courts followed British models of adjudication and procedure, the plan had provided for Hindu and Muslim experts (Pandits and Maulvis respectively) to instruct the courts as to the nature of the Hindu or Muslim law, whenever a matter of Hindu or Muslim law come to be decided upon. The Pandits and the Maulvis were bound by the ‘laws of the Shastras’ in the former case and ‘the laws of the Koran’ in the latter case. In 1793 this Regulation was replaced by Section 15 of Regulation IV to read ‘Hindu laws’ and ‘Mohammedan laws’. See generally, M. Anderson, *Islamic Law and the Colonial Encounter in British India*; C. Mallat and J. Connors, *Islamic Family Law* (London: Graham and Trotman, 1990) 205.
applying irrespective of religion. The division between public and private spheres underpinning the Hastings Plan was a familiar one to the colonial rulers. It reflected a ‘cult of domesticity’ that permeated much of the British legal system. It also reflected the peculiarly western liberal tradition that viewed the privatizing of religion as essential to a modus vivendi between competing conceptions of the good life. For the colonial rulers, maintaining separate systems of religion-based personal law was administratively convenient. By yielding to religious claims, it was hoped to dissipate at least some of the opposition to the colonial project. In the context of colonial rule, however, this division between the public and the private created difficulties.

The colonizing state could not command a ‘sense of belonging’ amongst the colonized. This ‘sense of belonging’ developed instead within the confines of religious communities. As a result, political identities were increasingly forged along communal lines. The ideology of communalism was reinforced by the use of the categories of caste and religion in the censuses undertaken by the British in India. Political representation also became communal, as seats in the legislative assembly were earmarked for different communities according to ideas of proportionality. Personal laws played a key role in demarcating the boundaries of communal and gender identities, becoming highly contested sites of political struggle. Hindu and Muslim women increasingly came to be defined as ‘boundary markers’, leading to minutely defined, stringent controls on women’s behaviour, their roles and status. These controls were exercised particularly within the domestic sphere, where colonized communities continued to maintain a degree of autonomy or ‘freedom’ from colonial rule.

The struggle to control and delimit women’s roles and status continued post-independence. British historians of the colonial era often characterized India as a society weakened by religious divisions. This characterization was taken up by Indian nationalist leaders themselves. To remedy the failings of communal politics, Nehru proposed a secular, pluralist state and the ideal of universal citizenship. However, although the principle of secularism underpins India’s constitutional framework, the precise meaning of secularism has been contested throughout the history of the State. As Kapur and Cossmann note, secularism has never been taken for granted in India, ‘The struggle to secure its constitutional

18 See, for example, the Indian Penal Code (1860); Code of Criminal Procedure (1861); Code of Civil Procedure (1859).
20 See: Chakrabarty D above n 8 at 98. The process of communalization has been described as involving a ‘dynamic nominalism’, according to which people came to fit the categories that colonial authorities fashioned for them. See: I. Hacking, ‘Making Up People’ in T. Heller, M. Sosna and D.E. Wellbury (eds), Reconstructing Individualism: Autonomy, Individuality and the Self in Western Thought (Stanford, CA: Stanford University Press, 1986) 227–28.
21 Sangari K above n 19 at 238.
and political protection has been long and hard.\textsuperscript{23} As a principle adopted in the cause of national unity and integrity, secularism was intended to provide a \textit{modus vivendi} between communities that had come to define themselves by religious attachments. For many, it has involved a process of drawing lines, demarcating the spheres that ‘legitimately appertain to religion’,\textsuperscript{24} distinguishing between the secular and spiritual aspects of daily life. Under colonial rule, religious personal laws had become closely intertwined with communal identity.\textsuperscript{25} Establishing a secular state, it was hoped, would replace communal identities with the ideal of universal citizenship, an ideal that was articulated by Nehru and his followers. For Nehru, national unity required greater uniformity in the administration of justice and the universal application of a set of general laws. Moving beyond the boundaries of communal identities required reform of the separate systems of personal laws inherited from the colonial era. This meant developing a uniform civil code (UCC) that would apply to all citizens, regardless of communal attachments.

In a struggling nation state, scarred by the trauma of partition and civil war, however, ‘gender trouble’ could not be countenanced. As many commentators have noted, at times of national crisis and rapid social change, changes in gender relations are perceived as paradigmatic symptoms of cultural threat and loss.\textsuperscript{26} To ease the sense of anxiety in the fledgling nation-state, a compromise was arrived at. Rather than insisting on uniformity within personal laws, article 44 of the Directive Principles of State Policy directed the State to move towards the adoption of a UCC. The UCC was an aspiration of India’s constitutional framework. This compromise, it was hoped, would secure the loyalty of Muslim leaders. Even this compromise, however, attracted criticism from Muslim members of the Constituent Assembly. Ambedkar, one of the chief architects of the constitutional text was unmoved by this opposition. Noting that for almost every aspect that governed human relationships, a uniform code of laws already existed in the country, he defended the need to extend the general protection of the law to marriage and family relations.\textsuperscript{27} In defence of Article 44, Ambedkar argued that the intention was not to invade the domain of religion but merely to introduce uniformity into the regulation

\textsuperscript{23} Cossmann and Kapur above n 9 at 1.
\textsuperscript{24} Per Shri KM Munshi, Member of the Drafting Committee, in the Constituent Assembly, (Constituent Assembly Debates, Vol. VII, pp. 547–48, quoted in V.N. Shukla’s \textit{Constitution of India} (9th edn) by M.P. Singh (Eastern Book Company, 1994).
\textsuperscript{26} See U. Narayan above n 13 at 20. See also: V. Moghadam, ‘Patriarchy and the Politics of Gender in Modernising Societies: Iran, Pakistan and Afghanistan’ (1992) \textit{International Sociology} 7:35–47.
of marriage and succession.\textsuperscript{28} He and other drafters of the Constitution, however, underestimated the extent to which communal identities had become intertwined with separate systems of personal law. The connection between religion and personal laws was to prove resistant to the reforming agenda of a secular state for many years to come. As a result, women’s claims to equal treatment in matters of marriage and family relations continued to be constrained by the demands of religious communities and attempts at reform of Muslim Personal law, in particular, were to be repeatedly thwarted by conservative forces.\textsuperscript{29}

\textit{Shah Bano}’s case highlights both the potential of expanding the rights accorded to women within minority communities and the dangers to feminism in yielding to dominant voices within religious communities.\textsuperscript{30} The \textit{Shah Bano} case arose from an application for maintenance brought by Shah Bano against her former husband, Mohammed Khan. Her application relied upon section 125 of the 1973 Code of Criminal Procedure. The 1973 Code, based on the earlier 1872 Code, applied to all Indian citizens, regardless of religion, and was enacted primarily as a safeguard against vagrancy, ‘or at least some of its consequences’.\textsuperscript{31} Shah Bano’s husband contended that his liability to pay maintenance should be determined, not under the general law but rather under Muslim Personal Law, in accordance with which the liability of the husband to maintain his divorced wife was limited to the three-month period of \textit{iddat} following divorce. The All India Muslim Personal Law Board, a statutory body intervening on behalf of Mohammed Khan, argued that the courts had no right to interfere with the arrangements made by Muslim communities for the maintenance of divorced Muslim women. These arrangements included the payment of \textit{mahr} (marriage settlement or dower) and the provision of support through \textit{Shah Bano}’s extended family network.\textsuperscript{32} The case, which culminated in an appeal to the Supreme Court, raised the question of how and whether the personal laws of a religious community could be subject to the scrutiny of a general law. The key question to be decided by the Court is summarized by Veena Das\textsuperscript{33}:

How would one resolve conflicts which arise between the desire to preserve culture by a filiative community such as an ethnic or religious minority, and a similar but affiliate

\textsuperscript{28} See: Constituent Assembly debates, Vol VII, pp. 550–52. See also D.C. Ahir above n 27.


\textsuperscript{32} Above n 3 at 954, para. 31 \textit{per} Chandrachud C.J.

\textsuperscript{33} V. Das, above n 31 at 137.
community such as the community of women, which wishes to reinterpret that culture according to a different set of principles.

It was not the first time that this question fell to be negotiated by the Indian judiciary. Two earlier decisions of the Supreme Court had concluded that section 125 could be relied upon by Muslim women seeking maintenance.34 A number of adjudication strategies were open to the Supreme Court. They could simply accept the claims of Mohammed Khan and his supporters and adopt a policy of non-interference in the personal laws of religious communities. They could, in other words, ignore the apparently general provisions of the 1973 Code and yield to the privatizing rule of the Shariat Act. This, in itself, however, would not resolve the dispute as the precise meaning and scope of Muslim Personal Law (MPL), itself, was contested. Not all Muslims agreed with the interpretation of the Shari’ah put forward by the MPL and Shariat Boards. The Supreme Court could also have chosen to simply apply the general provisions of the 1973 Code and reject the ‘defence of culture’ raised by Mohammed Khan and his supporters. Choosing this route would have had the added advantage of bringing uniformity to the rules regulating the payment of maintenance, reflecting the constitutional imperative to introduce a uniform civil code. The Supreme Court, however, did not choose either of these strategies. Instead, the Court engaged in a process of reinterpretting the Shari’ah, to determine whether or not there was a conflict between the Code and the requirements of MPL.

The Chief Justice concluded that in cases of conflict, the Code of Criminal Procedure would override the personal laws of religious communities.35 The obligation imposed by section 125 was founded upon the obligation to prevent vagrancy and destitution. That, he said, was ‘the moral edict of the law’ and morality, he said, could not be ‘clubbed with religion’.36 The duty to pay maintenance ‘cut across the barriers of religion’.37 This view was accepted by the five judge bench (all of whom were Hindu). It was open to the Court at this point, to simply apply the general law. The Court, however, did not stop at simple legal regulation. Having determined the priority of the general law, the Court went on to examine whether there was in fact a conflict between the requirements of Muslim personal law and the Code of Criminal Procedure. Noting the Shari’ah’s capacity for evolution, and citing the Report of the Pakistan Commission on Marriage and Family Relations in support of this view,38 the Court undertook

34 Two of the earlier decisions were: Bai Tahira v Ali Hussain Fidaali Chothia (1979) 2 SCC 316 and Fazlunbi v K Khader Vali & Anr (1980) 4 SCC 125.  
35 Above n 3.  
36 Ibid at 948, para. 7.  
37 Ibid.  
38 Above n 3 per Chandrachud C.J., at 955, para. 34, citing Report of the Commission on Marriage and Family Laws, Gazette of Pakistan, Extraordinary, 20 June 1956, (Majority report) 1197. The Report’s conclusion draws on the work of Muslim scholar, Allama Iqbal. In the Commission’s view, MPL was a ‘growing organism’, that had become a conservative and rigid force under colonial rule, failing to respond to ‘progressive forces’ and ‘changing needs’ (p. 1203). The Commission’s report included many proposals and recommendations for reform, leading
a review of a range of sources of the Shari’ah capable of giving guidance on the question of maintenance. Contrary to the view of the All India MPL and Shariat Boards, the Court concluded that the Quran imposed an obligation to provide maintenance beyond the period of iddat. Also contrary to the view of the Board, they concluded that the payment of Mahr (dower) was not sufficient to discharge this obligation. Much of the debate turned on the interpretation of the Arabic word mata, which the Court interpreted as requiring that a husband make provision for his divorced wife, where she was unable to maintain herself. In other words, the duty to make provision for a divorced wife fulfilled the same purpose as section 125 of the Code, to prevent vagrancy and destitution. Following this interpretation, the Court concluded that there was no conflict between MPL and section 125 of the Code. Any contrary view, they said, would ‘do less than justice to the teaching of the Holy Quran’.

Much of the Supreme Court judgment is couched in the discourse of protection. The duty to pay maintenance was conceived as a societal obligation to prevent vagrancy and destitution. Divorced women were represented as a segment of society that had traditionally been subject to unjust treatment and in need of special treatment. Chandrachud C.J. cited Verse 241 of the Quran to support his finding of a duty ‘in kindness’ to provide for divorced Muslim women. He spoke also of the ‘suffering sections of society’ and the duty to ameliorate this suffering. The Supreme Court perhaps recognized the discontent that its findings would generate. Hiding behind the discourse of protection, rather than simply asserting the fundamental rights of Muslim women was perhaps a strategy to diffuse further conflict. If this was their strategy, however, it failed. As Seyla Benhabib notes, the Shah Bano controversy raised issues that went far beyond the case at hand, ‘into the very heart of the practice of legal pluralism, of religious coexistence . . . and of the meaning of Indian national unity and identity’. Touching as it did on communal sensibilities, the Supreme Court’s negotiation of the conflicting cultural claims raised in the Shah Bano case was to give rise to considerable controversy.

Ultimately to the adoption of the 1961 Muslim Family Law Ordinance in Pakistan. A strong note of dissent, however, was entered to the Commission’s final report by Maulana Ihtehshamul Haq, signalling the beginning of a controversy that was to plague reforming forces for many years to come. See: Gazette of Pakistan Extraordinary, 30 August 1956 (note of dissent) 1604. See generally: J.L. Esposito, ‘Muslim Family Law Reform in Pakistan’ Journal of Malaysian and Comparative Law (1977) 4(2) at 293; D. Pearl, ‘Family Law in Pakistan’ Journal of Family Law (1969) at 165; S. Mullally, ‘Separate Spheres: protective legislation for women in Pakistan’ Asian Yearbook of International Law (1994) 4 at 47–67.

39 In arriving at this conclusion, the Court followed two of its earlier judgments: Bai Tahira v Ali Hussain Fidaalli Chothia (1979) 2 SCC 316 and Fazlunbi v K Khader Vali & Anr. (1980) 4 SCC 125.
40 Above n 3 at 952, para 22.
42 Ibid at 954, para. 29
43 S. Benhabib, above n 12 at 92.
3. Reinstating the Ties that Bind: the Aftermath of Shah Bano

The spectacle of an exclusively Hindu Supreme Court determining the scope and content of Muslim personal law provoked an outcry from conservatives within the Muslim community. Shah Bano, under pressure from her own community, disassociated herself from the judgment of the Court and withdrew her claim for maintenance. The All India MPL Board called for legislation to reverse the Court’s ruling. Their call led to the enactment of the 1986 Muslim Women (Protection of Rights in Divorce) Act, which attempted to reverse the Supreme Court’s judgment in Shah Bano and provided for a limited obligation to pay maintenance to divorced Muslim women only for the period of iddat. Beyond the period of iddat, the duty to provide for a divorced woman’s well-being fell to the extended family, or failing that, to the broader community through its waqf boards.

Many individual Muslims and Muslim organizations had spoken out in defence of the Supreme Court decision and Shah Bano. Cabinet Minister Arif Mohammad Khan argued that the 1986 Act was anti-constitutional, anti-Islam and inhuman, and several Muslim groups sent protest letters and demonstrated against the Act. In spite of this diversity of Muslim opinion on the matter, the Congress Government yielded to conservative forces within the Muslim community. The mass rallies and political power of the legislation’s proponents were important considerations for the Government. The Congress Party had lost support in a number of Muslim dominated districts in the 1985 elections. The Muslim community had been a key constituency of the Congress Party since independence. By passing the 1986 Act and granting continuing autonomy in the area of personal law, the Government hoped to assure the support and votes of the Muslim community. The Government tempered its deference to the claims of conservative Muslims by recommending the adoption of a UCC by the year 2000. The pursuit of gender equality was deferred, yet again, in the interests of placating communal sensibilities. Absent from the response of the ruling Congress party was a recognition of the legitimacy of Shah Bano’s claims to equal treatment, and of Muslim women’s rights to participate in debates determining the limits of cultural claims. The silencing of Shah Bano, following the Supreme Court’s judgment in her favour, illustrates further the denial of this right. Feminist and other emancipatory interpretations of the Shari’ah were ignored as the ruling Congress party rushed to placate the dominant voices within the Muslim community.

The pursuit of a feminist agenda following on from the Shah Bano case was further complicated by the response of the Hindu right. The BJP campaigned against the 1986 Act, arguing that it violated both the constitutional principle of

44 See: A.A. Engineer, above n 30.
secularism and the rights of Muslim women. It violated the principle of secularism because the Muslim community was allowed to opt out of the general Code of Criminal Procedure and it violated Muslim women’s right to equal treatment because they were to be treated differently from Hindu women. Bal Thackeray, a Hindu nationalist politician argued that the issue was ‘not of religion, but of poisonous seeds of treacherous tendencies . . . Those who do not accept out Constitution and laws, should quit the country and go to Karachi or Lahore . . . There might be many religions in the country, but there must be one constitution and one common law applicable to all’. The exclusionary impulse underpinning many calls for reform of MPL is evident in this statement. The Hindu right was not concerned with gender equality but rather with further fueling the politics of communalism. As Kum Kum Sangari notes, the dominant model in twentieth century Hindu communal discourse had come to rest on male rivalry;

the excessive patriarchal privileges of Muslim men were chastised; women were figured as property endangered by men of ‘other’ groups, men as proprietors governing competing patriarchies, communal tension as between Hindu and Muslim men.

Ultimately, in this debate, conservative nationalists within both the Hindu and Muslim communities distorted the discourse of equality to undermine substantive equality as between women and men, and ‘substantive secularism’, that is, equal respect and accommodation for minority communities.

The role of the judiciary in adjudicating cultural claims was again the subject of debate in Danial Latifi & Anr v Union of India. This case followed on from the Shah Bano controversy and arose from a constitutional challenge brought against the Muslim Women (Protection on Divorce) Act, 1986. The Shah Bano controversy and the enactment of the 1986 Act had given rise to a series of constitutional challenges and conflicting judgments in High Courts throughout India. The Kerala, Bombay and Gujarat High Courts had each concluded that a husband’s duty to make ‘fair and reasonable provision’ for his divorced wife, (provided for under section 3 of the 1986 Act), included a duty to make arrangements for his wife’s future well-being beyond the iddat period. A similar conclusion was arrived at by a full bench of the Punjab and Haryana High Court. Opposing views had been adopted in other High Courts, however, limiting Muslim women’s right to maintenance to the iddat period, following the

46 Cited in A.A. Engineer, above n 30 at 243–45.
47 K. Sangari, above n 19 at 238.
48 Kapur and Cossmann, above n 9 at 257.
49 2001 AIR SC 3958
letter of the 1986 Act. These judgments contributed to the emergence of a complex web of institutional materials on the subject of Muslim women’s right to maintenance following divorce. They also brought into question the compatibility of the 1986 Act with the constitutional guarantee of equality and the terms of India’s multicultural arrangement.

In the Danial Latifi case, the Supreme Court was finally given the opportunity to review the constitutional validity of the 1986 Act. The case arose from a series of petitions claiming that the Act violated the constitutional guarantees of equality, life and liberty and that it undermined the secular principles underpinning India’s constitutional text. The Solicitor General, defending the constitutionality of the Act, urged the Supreme Court to adopt a contextual approach to the claims raised. He argued that in assessing the fairness and reasonableness of the Act, the Court should take account of the distinct personal laws of the Muslim community. In other words, he argued, religion-based personal laws could not be subject to the same tests of justice as applied to other legislation. That there was no right of exit for Muslim women, no ‘opt out’ of the personal laws that applied to them was not considered problematic. The All India MPL Board, intervening in the case, argued that the Supreme Court judgment in Shah Bano was based on an erroneous interpretation of MPL, which the 1986 Act had attempted to correct. The Board criticized the ‘unsafe and hazardous’ route taken by the Supreme Court in Shah Bano, and also criticized the Court’s failure to recognize the distinct social ethos of the Muslim community, in particular, the role of the extended family network in providing for the needs of divorced women. The 1986 Act, they argued, attempted to correct these failings and to recognize the legitimacy of the Muslim Community’s claim to a distinct religious-cultural identity. The National Commission for Women, also intervening in the case, urged the Supreme Court to follow the judgments adopted by the Kerala, Gujarat and Bombay High Courts— viz. that the duty to make fair and reasonable provision for a divorced Muslim woman extended beyond the iddat period. The Commission argued that any other construction of the 1986 Act would be a denial of Muslim women’s equal right to life and liberty, as guaranteed by the Constitution.

In its judgment on the competing claims brought to it, the Supreme Court adopted what might be viewed as a quintessentially universalist stance. Questions relating to basic human rights and the pursuit of social justice, it held, should be decided on considerations other than religion or other ‘communal constraints’.

52 See: Umar Khan Bahamami v Fathimnurisa 1990 Cr.L.J. 1364; Abdul Rashid v Sultana Begum 1992 Cr.L.J. 76; Abdul Haq v Yasima Talat 1998 Cr.L.J. 3433; Md. Marahim v Raiza Begum 1993 (1) DMC 60.

53 See Articles 14, 15 and 21 of the Constitution of India. In Olga Tellis v Bombay Municipal Corporation 1985 (3) SCC 545 and Maneka Gandhi v Union of India 1978 (1) SCC 248, the Supreme Court held that the right to life and personal liberty, guaranteed by Article 21 of the Constitution, included the right to live with dignity.

54 See above, n 3.

55 See above, n 6, per Rajendra Babu J. at 3967, para 20.
In the Court’s view, the duty to secure social justice was one that was universally recognized by all religions. Vagrancy and destitution were societal problems of universal magnitude and had to be resolved within a framework of basic human rights. Applying a literal interpretation to the 1986 Act, the Court concluded, would deny Muslim women the remedy claimed by Shah Bano under section 125 of the Criminal Procedure Code. The Court concluded that this reading of the 1986 Act would lead to a discriminatory application of the criminal law, excluding Muslim women from the protection afforded to Christian, Hindu or Parsi women, simply because of their religious membership.56 Applying the presumption of constitutionality to the Act, the Court concluded that this reading could not have been intended by the legislature as it would be contrary to the constitutional guarantees of equality and non-discrimination.57 The Court concluded, therefore, that while the duty to pay maintenance was limited to the iddat period, the requirement to make fair and reasonable provision for a divorced Muslim woman extended to arrangements for her future well-being. Adopting this interpretation of the 1986 Act enabled the Court to uphold the constitutionality of the Act and to avoid the communal triumphalism that might have accompanied a finding of unconstitutionality. It also enabled the Supreme Court to go beyond the limited remedy provided for in the Code of Criminal Procedure under which a statutory amount is set out for the payment of maintenance. The duty to make reasonable provision for a divorced woman allowed for much greater flexibility and attention to the particular needs of divorced women.

The strategies adopted by the Supreme Court in the Latifi case were similar to those adopted in Shah Bano and are of particular interest to feminists concerned with the politics of multiculturalism. In the Latifi case, the Supreme Court combined an appeal to universal principles of human rights with an ‘insider methodology’, drawing on internal traditions of resistance within Muslim communities.58 Insider methodologies, however, do not remove the responsibility of normative justification. Cultures and traditions consist of many competing sets of narratives. The problem is how to choose between competing narratives and how to justify that choice against those who would deny the validity of egalitarian choices. The Supreme Court in the Danial Latifi case, appealed to the universal legitimacy of women’s claim to equal citizenship. Ultimately, this ensured for Muslim women a more egalitarian application of the Shari’ah. The Court’s judgment treads a fine line between yielding to the cultural claims of the Muslim community, on the one hand, and on the other hand, ensuring Muslim women’s

56 Ibid para 33.
57 Ibid.
right to equal citizenship. As in the *Shah Bano* case, priority was given by the Supreme Court to the general law—in this case, the constitutional guarantee of equality. The Court recognized that the rights of Muslim women could not be constrained by their membership of a religious community.

The interpretation of the 1986 Act adopted by the Court avoided the kind of binary reasoning that could have led to a condemnation of MPL and to further communal tensions. In both the *Shah Bano* and the *Lati* cases, the Supreme Court adopted a dual-track approach. Not content to remain within the confines of strict legal regulation, they went on to explore the meaning and scope of MPL, initiating a dialogue that recognized the diversity within Islam and within the Muslim community itself. The risk, as always, however, is that the Court’s judgment will be perceived as yet another denial of the Muslim community’s right to a distinct cultural identity and will serve to further undermine the community’s ‘sense of belonging’ in the Indian state. Against a background of continuing tensions between Hindu and Muslim communities, this risk will continue to threaten the pursuit of gender equality. While a uniform civil code remains elusive, the search for egalitarian interpretations of the Shari’ah will be the essential to securing greater equality for Muslim women.

### 4. Is Multiculturalism ‘Bad for Women’?

In the controversy surrounding the *Shah Bano* and *Danial Latifi* cases, we see the tensions that arise between feminism and the politics of multiculturalism. The adoption of the 1986 Act, apparently denying divorced Muslim women’s right to maintenance, illustrates just how ‘bad’ multicultural arrangements can be for women. No doubt, Susan Okin would view the Congress Government’s response to the *Shah Bano* judgment as yet another example of why feminism should oppose the politics of multiculturalism.\(^59\) However, the Supreme Court, in both the *Shah Bano* and *Danial Latifi* cases, found alternative ways of negotiating cultural conflicts without adopting the oppositional either/or stance that we see in Okin’s writings. Deliberative democratic models of multiculturalism also find alternative ways of negotiating such conflicting claims and are of particular interest to feminists concerned with the politics of multiculturalism.

One of the most insightful discussions of multicultural politics in recent years is to be found in Seyla Benhabib’s work, *The Claims of Culture*.\(^60\) Benhabib’s discussion of cultural conflicts is rooted in a ‘cosmopolitan point of view’,\(^61\) from which the negotiation of difference is both a pragmatic and a moral imperative. Her proposals are rooted in a deliberative model of democracy and a normative framework that draws on the insights of discourse ethics. Rather than appealing

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\(^{59}\) S.M. Okin, above n 11.

\(^{60}\) S. Benhabib (2002), above n 12 at 101.

\(^{61}\) S. Benhabib (1995), above n 12 at 253.
to an ‘overlapping consensus’, 62 or to a universal legislating reason, Benhabib relies on a virtuous circle—a dialectical process of reflecting on the ‘universal and necessary presuppositions of communicative speech’. 63 She identifies these presuppositions as the principles of universal respect and egalitarian reciprocity. 64 These core moral principles define the limits of reasonable pluralism, providing a normative framework within which conflicting cultural claims can be negotiated. Within a constitutional framework, they are the constitutional essentials that trump other legal claims.

Drawing on the core moral principles of universal respect and egalitarian reciprocity, Benhabib sets about defining the terms of a just multicultural arrangement. She sets out three key principles for such arrangements: (a) Egalitarian reciprocity; (b) Voluntary self-ascription; (c) Freedom of exit and association. 65 Adhering to these principles, she argues, avoids what Ayelet Shachar has described as the ‘paradox of multicultural vulnerability’ 66 – where women and children become the bearers of culture, the repository of traditions. The first principle, egalitarian reciprocity, requires that members of minority communities should not be granted lesser civil, political, economic and cultural rights because of their membership status. Any other arrangement serves only to reinforce inequalities within groups. The denial of such rights is evident in the Shah Bano and Danial Latifi cases. In both of these cases, the dominant voices within the Muslim community were seeking to limit the rights of divorced Muslim women. If the Supreme Court had listened to these voices, a woman’s status as a Muslim would have defined the limits of her rights. With the passing of the 1986 Act, the Congress Government attempted to do just that. The Supreme Court, and a number of High Courts, however, reasserted the priority of Muslim women’s right to equal citizenship. The requirements of egalitarian reciprocity, albeit couched in the discourse of protection, ultimately won out.

The second requirement set out in Benhabib’s dual-track approach is that of voluntary self-ascription. This requirement recognizes the importance of individual self-determination. Underpinning this requirement is a recognition that the right to define and control membership cannot be granted to the group at the expense of the individual. In the Shah Bano case, Mohammed Khan and his supporters were attempting to confine Shah Bano within the limits of group membership by denying her the right to invoke a generally applicable law. With the passing of the 1986 Act, the Government defined Muslim women first

64 S. Benhabib (1992), above n 12 at 29.
65 Ibid at 130.
and foremost as members of a religious community. Any choice as to whether a
religion-based system of personal laws would be applicable to them was denied.
Group membership and the consequences it entailed was not based on the
voluntary decision of Muslim women, but rather was determined by the claims
of community and religion. Many feminists have been critical of the priority
 accorded to individual autonomy in liberal theories of rights. As the Shah Bano
case illustrates, however, without a commitment to the overriding priority of individual
 autonomy, women remain vulnerable to the claims of nation, religion or community.

This brings us to Benhabib’s third and final requirement, that of freedom of
exit and association. To satisfy the requirements of a just multicultural
arrangement, the freedom of the individual to exit and to disassociate from the
group must be unrestricted. Shah Bano, in invoking the Code of Criminal Pro-
cedure—a general law—was seeking to exit from the confines of Muslim per-
sonal law. Following on from the Supreme Court judgment, the Government
sought to deny Muslim women this right to disassociate themselves from the
personal laws associated with their religious membership. Danial Latif,
in challenging the constitutionality of the 1986 Act, was questioning the denial of
this right to Muslim women. At the heart of this dispute is a tension between a
communitarian politics of multiculturalism and the requirements of demo-
cratic equality. Communitarian multiculturalists, such as Bikhu Parekh, view
culture as constitutive of individual identities. For Parekh, culture cannot be
viewed as a context of choice alone; cultural membership is not an optional
extra. This stronger reading of the role of culture has implications for multicul-
tural arrangements. If we accept the claims of the communitarian multicultur-
alist, we must recognize cultural membership as a basis for legitimate
differentiation. On this reading, states would be required to allow minority
groups to opt out of general laws, including constitutional guarantees of equality
and fundamental rights. India’s declaration under the 1979 UN Convention on
the Elimination of All Forms of Discrimination Against Women, stating its policy
of non-interference in the personal laws on minority communities, would not

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67 B. Parekh, Rethinking Multiculturalism: Cultural Diversity and Political Theory (Cambridge MA: Harvard Uni-
versity Press, 2000).
68 India ratified the 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women,
(the Women’s Convention) subject to a declaration limiting its obligation to challenge the personal laws of religious
communities. The full text of the declaration reads: i) With regard to articles 5 (a) and 16 (1) of the Convention on
the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares
that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal
affairs of any Community without its initiative and consent. ii) With regard to article 16 (2) of the Convention on
the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares
that though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a
vast country like India with its variety of customs, religions and level of literacy. See: United Nations Treaty Collec-
of the Committee on the Elimination of Discrimination Against Women: India. 01/02/2000. UN Doc. A/55/38,
paras 30–90, para 40. Unlike other states parties to the UN Convention on the Rights of the Child, India has not
entered a reservation or declaration invoking religious-cultural claims. The declaration submitted on rati-
fication refers only to the question of child labour and the need for progressive reform in this area. For the full text of
the declaration, see: http://www.unhchr.ch/html/menu3/b/treaty15.asp.htm
only be permissible, it would, in fact, be required to protect the distinct cultural identities of religious communities. The Government of India officially claims a policy of non-interference. However, as we see in the controversy surrounding the Shah Bano and Danial Latifi cases, both the judiciary and the legislature have wavered between a reforming agenda and a deference to cultural claims.

The principles for a just multicultural arrangement, as set out by Benhabib, are not compatible with the stronger reading of the role of culture put forward by communitarian multiculturalists. Critics might argue that Benhabib's core principles are themselves rooted in a commitment to individual autonomy that reflects a peculiarly western set of values. This argument has been made against Will Kymlicka's model of multicultural citizenship. Kymlicka seeks to contain the politics of difference within the constraints of liberal justice.69 ‘Internal restrictions’ denying the priority of individual autonomy, regardless of their roots in religion, culture or tradition, cannot be permitted. Although the value of cultural membership is recognized, it is its contribution to individual human flourishing that is valued and granted legal recognition.70 Kymlicka's liberal theory of minority rights is criticized as being too tied to western liberal values, and insufficiently sensitive to cultural differences.71 For women like Shah Bano, however, the right to invoke a generally applicable law, and to challenge the terms of her cultural membership, is as fundamental as it is to any ‘western’ woman. Unless the freedom of exit and association is recognized as a core principle in any multicultural arrangement, the pursuit of gender equality will always be subject to the constraints of communal claims, whether from the nation, the family or religious community. Not only will women be denied a right of exit but the very possibility of reinterpreting religious laws or renegotiating religious-cultural legacies will be denied. There may also be times when internal critiques are not enough, when the possibility of radical social criticism requires us to move outside of, or beyond, the constitutive norms of particular communities. There may be times when one’s own culture and traditions are so reified, dominated by such brutal forces, when debate and conversation are so dried up or simply made impossible, that the social critic becomes the social exile.72 When that happens, the right to exit and disassociation is fundamental to any pursuit of an emancipatory agenda.

72 S. Benhabib (1992), above n 12 at 222.
The deliberative democratic model of multiculturalism outlined by Benhabib may challenge different ‘ways of life’ in a very fundamental sense. Voluntary self-ascription or freedom of exit and association are principles that may be incompatible with a way of life that views group membership as a given. These conditions are necessary, however, if gender equality is to be safeguarded in a multicultural society. Importantly, however, the dual-track approach recognizes the need to go beyond mere legal regulation of conflicting cultural claims. This is important in a context where communal tensions are running high and legal regulation of cultural claims may fuel those tensions further. A combination of legal regulation and enforcement of constitutional essentials with an expanded moral-political dialogue allows for a process of contestation and challenge and also allows for subordinated voices within religious communities to be heard. Such dialogues can lead to a reinterpretation of inherited traditions, and a recognition that religious communities and systems of personal law may have within themselves the possibilities of more egalitarian outcomes. The strategies adopted by the Indian Supreme Court provide us with valuable lessons on the cultural mediation of human rights norms. In the Shah Bano case, we see the Supreme Court appealing to an egalitarian Islam, recognizing the diversity within Islam and rejecting the dominant voices of the Islamic Shariat and All-India Muslim Personal Law Boards. Instead, the Supreme Court chose to listen to sub-altern voices, voices that were seeking equality within and between religious communities. Those voices, though often appealing to background cultural justifications to support their claims, accepted Muslim women’s right to be treated as equal citizens. A commitment to the constitutional essential of equality was the starting point for the Supreme Court’s judgment in the Lati case. In the Shah Bano case, it was the generally applicable law, the Code of Criminal Procedure and the societal obligation to ensure that Muslim women were not vulnerable to destitution and poverty as a result of a discriminatory application of the law. In both of these cases, we see an attempt to combine legal regulation with an expanded moral-political dialogue on the meaning and scope of constitutional essentials and religion-based personal laws.

The emphasis on the importance of ongoing dialogue and contestation distinguishes Benhabib’s dual-track approach from alternative multicultural arrangements such as Ayelet Shachar’s ‘joint governance’ model.73 Shachar’s model involves a complex system of multicultural jurisdictional authorities each drawing on diverse sources of legal authority, depending on the nature of the claims in question. The problem, however, is that Shachar privileges legal regulation at the expense of political-cultural dialogue. The legal process is shielded from both the dynamism and the unpredictability of such dialogue. The result is ‘a kind of multicultural cold war’,74 peace without reconciliation, bargaining without mutual

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74 S. Benhabib, above n 12 at 129.
understanding. The process of moral and political learning, necessary for any vibrant multicultural society are stifled by legal manoeuvres. As Benhabib points out, ‘The laws, as the ancients knew, are the walls of the city, but the art and passion of politics occur within those walls’. What is needed is a dialectic between constitutional essentials and the actual politics of multicultural societies. This is a dialectic that is missing from Shachar’s multicultural accommodationism.

The failure to provide for an ongoing process of dialogue and confrontation can lead either to a legitimation of ‘culture-controlling elites’ or to fragmentation and conflict. In the aftermath of the Shah Bano case, the Congress Government yielded to the demands of conservative forces within the Muslim community, legitimating the claims of ‘culture-controlling elites’. This led to fragmentation and conflict within the women’s movement, within the Muslim community itself and between minority and majority communities in India. Such conflict, in turn, limits the possibility of transforming the inherited traditions of religious communities. Issues relating to group-specific rights and cultural claims need to be understood in the context of the lives of religious communities, who are often isolated from the comforts of citizenship and denied a sense of belonging. In the context of Hindutva and the rise of the Hindu right, a vulnerable minority is unlikely to accept a proposal for reform that threatens its own dominant traditions. This is the challenge faced by feminists in India who, on the one hand, advocate universal human rights principles as a means to peaceful co-existence and, on the other hand, recognize that these principles have been hijacked and distorted by the policies of Hindutva.

5. Concluding Remarks

Proposals to reform the personal laws of religious communities raise particular difficulties for feminism. On the one hand, many feminists have criticized discriminatory personal laws. They have called for a uniform civil code that would guarantee women equal rights regardless of their religious membership. On the other hand, feminists have been concerned to recognize the significance of religious and cultural differences between women and have sought to avoid the homogenizing tendencies of universal norms. A concern not to further isolate and marginalize minority communities further complicates debate. Martha Nussbaum argues that the role of religion in debates on models and multiculturalism makes criticism and scrutiny more difficult. It is, she says, a peculiarly liberal dilemma:

If the government defers to the wishes of the religious group, a vulnerable group of individuals will lose basic rights; if the government commits itself to respecting the

75 Ibid at 130.
77 M. Nussbaum, Sex and Social Justice (Oxford: Oxford University Press, 1999) at 84.
equal human rights of all individuals, it will stand accused of indifference to the liberty of conscience.

Missing from this debate, however, is a recognition of women’s right to liberty of conscience as dissenting voices are silenced and feminist interpretations of religious traditions are rejected. Protecting the right to liberty of conscience also requires that dissenting voices within religious communities are given a say. The right to ‘opt out’ or to follow more egalitarian religious teachings forms part of the right to liberty of conscience. Multicultural arrangements too often deny such intra-group liberties. Though accommodation is made in the name of respecting differences, dissenting voices within religious communities are given little support. A defensive liberalism seeks to resolve multicultural dilemmas by dismissing multicultural politics, as Susan Okin does, or by placing cultural conflicts on the privacy side of the public/private divide, as Rawls does. We see such defensiveness in the Government of India’s declaration of a policy of ‘non-interference’ in the personal laws of religious communities made on ratification of the 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women. A democratic multiculturalism, recognizing the need both for legal protection of universal norms and for ongoing debate and contestation attempts to avoid the dangers of such compromises.

The deliberative democratic model of multiculturalism, proposed by Benhabib, recognizes the importance of challenging, negotiating and if necessary, subverting the boundaries of cultural identities. This process of challenge and re-negotiation takes place at a number of levels, within and between minority and majority cultures. We can see the beginnings of such a process of negotiation and challenge in the Supreme Court judgments in the Shah Bano and Danial Latifi cases. The Supreme Court engages in a close scrutiny of the cultural claims made to support restrictions on a divorced Muslim woman’s right to maintenance. In the Shah Bano case, the Court, perhaps recognizing the heightened nature of communal tensions in India, sought to root its findings in Islam itself. In the Latifi case, the Court remained within the constraints of the 1986 Act and avoided a finding of unconstitutionality while continuing to assert the primacy of the constitutional guarantee of equality. Opting to listen to subaltern voices concerning the meaning and scope of Islam, rather than those of the All-India Muslim Personal Law Board and the Islamic Shariat Board was, in many ways, more controversial than an application of constitutional principles or international standards. The Courts’ judgments, by appealing to an egalitarian Islam, however, ultimately lend more support to those seeking to reinterpret inherited traditions and practices. For Muslim feminists, seeking to challenge the dominant voices within Muslim communities, it offers support to their claim to define

their own ‘minority selves’. As Uma Narayan points out, however, this process of renegotiating religious legacies can only take place if women are assured of an equal right to participate in the definition of religious norms. The core principles of egalitarian reciprocity, voluntary self-ascription and freedom of exit, ensure that women’s human rights are not determined by religious membership. These limits are necessary to ensure that multicultural arrangements meet requirements of gender justice.

Engaging in feminist critique becomes difficult where communal tensions are running high. In India, the Hindu Right had, for some time, hijacked the discourse of equality and human rights, challenging the religious laws of minority communities, not in the name of equality but rather domination. The rise of Hindutva as a political phenomenon left little space for feminism to challenge discriminatory personal laws and practices.

In both the Shah Bano and the Danial Latifi cases, the Supreme Court appealed to the universal legitimacy of human rights principles to support its reading of the Shari’ah. In doing so, they refused to yield to the dominant voices in the Muslim community or to exempt cultural traditions and practices from scrutiny and challenge. These cases illustrate the role that universal norms can, and must, play in resolving conflicting claims. As Benhabib points out, ‘Moral autonomy and cultural pluralism need not always conflict, but when they do it is important to know where one stands’. In the context of multicultural societies, the pursuit of gender equality requires us to engage in an ongoing moral conversation, informed by the core principles of universal respect and egalitarian reciprocity. Such dialogues can be risky and unpredictable. They may lead to further polarization or to greater intercultural understanding. Ultimately, the goal is to arrive at just multicultural arrangements and to ensure that the rights and responsibilities of citizenship are accorded to vulnerable minorities. A deliberative democratic model of multiculturalism and a dual-track approach to cultural conflicts can assist feminism in the pursuit of these goals.

79 This term is borrowed from Karen Knop. See: K. Knop, Diversity and Self-Determination in International Law (Cambridge: Cambridge University Press, 2002).
80 U. Narayan, above n 11 at 37.
81 S. Benhabib (2002), above n 12 at 58.