TRIPLE TALAQ JUDGEMENT AND ACT: DO MUSLIM WOMEN REALLY BENEFIT?

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Abstract

The debate on the practice of triple *talaq* in India has become highly politicized. This paper examines whether the Shayara Bano judgement and the subsequent Muslim Women Act, 2019, address the challenges that Muslim women face when confronted with triple *talaq*. The article argues that in the judgement and the Act, which involve issues of overlap between Muslim family laws and the Constitution, the Indian state has failed to recognize the inter sectionality of women's identity. The principles on which the judgement and the Act are based, fall short of indicating a path to gender just family laws. The paper argues that shared adjudication[1] between the state and religious actors is a useful framework committed to women's group identity and membership interests, as well as gender justice; hence its adoption by the Indian state can address the concern of gender justice without undermining minority rights.

I Introduction

THE DEBATE on the practice of instantaneous triple *talaq* in India has become highly politicized. Triple *talaq* or *talaq-e-biddat* refers to the practice wherein the pronouncement of the word *talaq* thrice by a Muslim husband either spoken or written or in any electronic form, results in instantaneous and irrevocable divorce. The government has enacted the Muslim Women (Protection of Rights on Marriage) Act, 2019, which criminalizes triple *talaq*, arguing that it is meant to give effect to the Supreme Court judgement in the *Shayara Bano* case, 2017. The government has hailed the Act as a stepping stone towards gender justice. However, the provisions of the Act are being contested as well as supported by different women's groups and legal experts. Within a few days of enactment of the new law, its constitutionality has been challenged in the Supreme Court and the High Court of Delhi. Once again, Muslim women look upto the judiciary to dispense justice. It is important to re-examine the Shayara Bano judgement that propelled this Act. The ambiguities in the court's judgement left open the scope of this interpretation and response by the government. In this backdrop, it is important to understand the principles on which the judgement was based, the lacunae in the judgement, and whether the Act addresses it. This paper critically evaluates

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1 Veit Bader, "Legal Pluralism and Differentiated Morality" in Ralph Grillo (ed.) *Legal Practice and Cultural Diversity* 49–72 (2009); Ayelet Shachar, "Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law" 9 *Theoretical Inquiries in Law* 573–607 (2008); Gopika Solanki, "Beyond the Limitations of the Impasse: Feminism, Multiculturalism, and Legal reforms in Religious Family Laws in India" 40 *Politikon* 83–111 (2013).

the *Shayara Bano* judgement and the subsequent Act. The paper examines whether the judgement and the Act addresses the challenges that Muslim women face when confronted with triple *talaq*. The paper argues that shared adjudication between the state and religious actors[2] is a useful framework of addressing the concern of gender justice without undermining minority rights. Shared adjudication approach is committed to women's group identity and membership interests, as well as gender justice.

Religious practices are often sites of internal contestation which reflects the political and contested nature of religious identities. The conflicts within religious groups need to be recognized in order to attend to the mistreatment and rights violations of vulnerable members of the community or the 'internal minorities'[3] or 'minorities within minorities'.[4] Rights granting absolute autonomy to the religious groups regarding distribution of rights and privileges to group members ignores the disadvantages that befall women. When religious practices clash with constitutional guarantees of individual rights and gender equality, it poses a normative and political dilemma to the state: should the internally contested practices be accommodated? Furthermore, women's reality is marked not only by patriarchal norms of their religious group but also by communal prejudices. Questions of gender and community need to be addressed simultaneously.[5] Without intersectional focus on gender and community, any analysis of concerns of women remains incomplete. Overlap between religious family laws and state laws often become a source of legal dilemmas for women. The paper argues that in the Shayara Bano judgement and the subsequent Muslim Women Act, (Protection of Rights on Divorce) Act, 1986 which involve issues of overlap between religious family laws and the Constitution, the state has failed to recognize the inter sectionality of women's identity. The state's response is based on drawing a dichotomy between religious groups and their rights on one hand, and women and their rights on the other.

II The *Shayara Bano* judgement

In August 2017, the Supreme Court judgement in *Shayara Bano* case set aside instantaneous triple *talaq* or *talaq-e-biddat* as invalid. It did not pronounce a judgement on polygamy and *halala* which had also been challenged in the court. The Supreme Court verdict comprises of three separate judgements. Two judges recommended no

2 *Supra* note 1.

3 Monique Deveaux, *Gender and Justice in Multicultural Liberal States* (Oxford University Press, New York, 2007).

4 Avigail Eisenberg and Jeff Spinner-Halev (eds.), *Minorities within Minorities* (Cambridge University Press 2005).

5 Flavia Agnes, "From Shah Bano to Kausar Bano: Contextualising the "Muslim Woman" within Communalized Polity" in Ania Loomba and R. A. Lukose (eds.) *South Asian Feminisms* 33–53 (Duke University Press, 2012).

intervention in the practice of triple *talaq*, two judges invalidated triple *talaq* on the ground of constitutional values, and one judge invalidated it on the ground of *Quranic* tenets. The three judgements taken together fall short of indicating a path to gender just family laws.

Not intervening in religious practice

The first judgement held that there should be no state intervention in the practice of triple *talaq*. The contention by Khehar J and Nazeer J was that triple *talaq* is an essential practice of Islam, and therefore protected by article 25 of the Constitution which guarantees the right to freely profess, practice and propagate religion. The judgment held that if religious family law is permitted to be challenged on Constitutional grounds, it would open up a plethora of challenges to family laws for vested interests. It contends that, "The practices of polygamy and *halala* amongst Muslims are already under challenge before us. It is not difficult to comprehend, what kind of challenges would be raised by rationalists, assailing practices of different faiths on diverse grounds, based on all kinds of enlightened sensibilities."[6]

It is a conservative judgement as it tries to avoid hard political and normative issues and supports a status quo. It extends absolute protection to family laws and reflects the reluctance to engage with different sections within a religious community. It makes individuals completely dependent on their religious community as they are left with no other avenue to protect their interests. By holding that, "It is not open to a Court to accept an egalitarian approach over a practice which constitutes an integral part of a religion",[7] the judgement pedestalizes religious practices to an unchanging, monolithic and non-negotiable status. Unbounded, absolute accommodation with absence of any state scrutiny, either on the basis of assumption of informed consent and right of free entry and exit, or traditionalist or communitarian stance of the state, fails to protect women's interests.

Leaders of minority groups seeking autonomy from the state often define their belief system as unchanging and incommensurable with the dominant legal regime to subdue demands for reforms from internal dissenters or outsiders. There are differences over interpretation and legitimacy of religious practices within communities which reflects varied interests. Conflicts of culture are often intra-religious, interest-based and political in nature.[8] But the judgement by Khehar and Nazeer JJ looks at religious practices as ossified and fossilized, and does not take into account the political nature of these practices, thus denying flexibility, flux and churning within communities as a potential source of reform.

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6 *Shayara Bano* v. *Union of India* (2017) 9 SCC 1.

7 *Ibid.*

8 Deveaux, *supra* note 3.

The asymmetrical impact in gender terms of this judgement has not been recognized in the verdict. As pointed out by Okin,[9] much of the religious norms are gendered and concerned with personal, sexual and reproductive aspects of life, preserving which has traditionally been majorly the responsibility of women. Thus, defence of religious practices has a greater impact on women. Moreover, an argument often given to defend the right to religion and culture is that culture is essential for an individual's self-esteem and capacity to choose a good life.[10] But the subordinate position of women within their culture can have adverse effects on their self-esteem and capacity to lead freely chosen lives thereby undermining the defence of cultural rights.[11]

Muslim women have been engaging with processes of self-definition and self-organization from below. Mobilization of Muslim women in recent times has led to establishment of organizations such as All India Muslim Women's Personal Law Board, Bharatiya Muslim Mahila Andolan and Bebaaq Collective. These efforts have contributed to articulation of demands of different interpretations and reform of religious family laws as distinct from the male-dominated All India Muslim Personal Law Board (AIMPLB) and have been ready to defy the conservative leadership of their community. Women's groups reinterpret religious scriptures using a feminist lens. They enter in dialogue with established religious and state authorities to promote gender justice. Women's groups in Mumbai have popularized *faskh,* a form of Islamic divorce which gives Muslim women the right to unilateral divorce .[12] Muslim women's groups' attempts to make a standard *nikahnama* mandatory that would ban triple *talaq* and polygyny, and have better provisions of *mehr* and maintenance, have been rejected by a section of clergy as being invalid in Islamic law. The various representative bodies within the community are not able to decide on disputed religious practices and bring reform through bargaining and compromise. In response to the *Shayara Bano* case in 2016, the AIMPLB in its affidavit to Supreme Court said that religious family laws of a community cannot be rewritten for the sake of social reform. It also asserted that abolishing instantaneous triple *talaq* may instigate the husband to murder or burn alive the wife and damage a woman's chances of re-marriage.[13] The AIMPLB advocated polygamy as a 'social need' and 'blessing' for women. As argued by scholars such as

9 Susan Moller Okin, "Is Multiculturalism Bad for Women?" in Martha C. Nussbaum, Joshua Cohen and Matthew Howard (eds.) *Is Multiculturalism Bad for Women* 9–24 (Princeton Univeristy Press, 1999).

10 Will Kymlicka*, Liberalism, Community and Culture* (Oxford University Press, Oxford, 1989).

11 Okin, *supra* note 9.

12 Solanki, *supra* note 1.

13 Utkarsh Anand, "Triple Talaq Prevents Men from Killing Wives: Muslim Law Board to Supreme Court"*The Indian Express,* Sep. 3, 2016*, available at:* https://indianexpress.com/article/india/india-news-india/triple-talaq-islam-muslim-law-board-supreme-court-prevents-killing-wife-divorce-3010683/.(last visited on Dec.10, 2019).

Razia Patel,[14] a religious tradition is amenable to many conflicting interpretations; the state needs to intervene as gender justice cannot be left at the altar of the chance that progressive interpretation will be adopted by the religious group. Agnes[15] has argued that *Shamim Ara* judgement, 2002, and several succeeding court rulings have already declared instantaneous triple *talaq* as un-Islamic and invalid. Further proceedings in the Supreme Court in *Shayara Bano* case or a new legislation will further polarize public opinion and be a setback for the internal reform efforts by Muslim women who seek to negotiate their rights within the faith.[16] However, the internal reform efforts of the Muslim women groups have been overshadowed by the continuing authority and hegemony of AIMPLB. Yet the judgement by Khehar and Nazeer JJ advocated no state intervention in religious family laws. The court missed a historical opportunity to facilitate a shift to gender just family laws.

Furthermore, by recommending no intervention, the judgement explicitly gives official recognition to only the male dominated bodies such as AIMPLB and Islamic traditions such as *Deobandis* and *Barelvis* (which uphold instantaneous triple *talaq*). It's an open avowal of male dominated bodies' authority to determine the course and interpretation of religious family laws. It denies the legitimacy of Muslim women's bodies as representatives of their faith. It denies agency of women to have a role in the interpretation of Muslim family laws. It makes one ponder that if the AIMPLB itself decides to reform family laws, will the state deny its power to do so on the grounds of sanctity of *shariat* or the family laws being essential practice of a religion? If the state does so, then it ends up becoming orthodox prohibiting reform from within the religion. And if it does not, then the paradox of state supporting reforms initiated by male dominated bodies and disallowing reforms initiated by women's bodies, charges the state of patriarchy. The judgement completely hands over the reins of religion in the hands of male dominated bodies, ignoring the democratic expressions of aspirations of Muslim women. As it is, women have less capacity than men to exercise the right to exit the group, and hence, lesser influence in changing the group's practices to make it more gender egalitarian.[17] Under such circumstances, the judgement further perpetuates power asymmetries of women and men in influencing the course of their religious practices. The absence of inclusive deliberation due to cultural and economic barriers to participation of women in evaluating their group's practices creates a legitimate space for the state to intervene in religious practices to effectuate the demands for

14 Razia Patel, "Only the Constitution" *The Indian Express*, Sept. 9, 2016, *available at:* http://indianexpress.com/article/opinion/columns/muslim-women-ideology-rights-haji-ali-dargah-islamc-traditions-3020994/.(Last visited on Dec. 10, 2019).

15 Flavia Agnes, "Muslim Women's Rights and Media Coverage" *Economic and Political Weekly* 13–16 (2016).

16 *Ibid.*

17 Susan Moller Okin, "Mistresses of their Own Destiny" 112 *Ethics* 205–230 (2002).

reforms being articulated by women's groups. Such state intervention would have democratic legitimacy.

The judgement goes on to say, "Religion and 'Family Law' must be perceived, as it is accepted, by the followers of the faith. And not, how another would like it to be (including self-proclaimed rationalists, of the same faith)."[18] The judgement draws a binary between 'followers of the faith' and 'rationalists of the same faith'. The category 'rationalists of the same faith' is held to be devoid of faith whose opinion should not be taken into account when deciding matters of religious practice. The judgement is conservative as it denies legitimacy to reform seeking sections to represent their faith in any negotiation with the state. It confirms the authority of orthodox sections in determining the course of their religion. As highlighted by the shared adjudication approach (explained in subsequent section), faith is important for those who seek state intervention to reform their family laws. Had they not attached significance to their religion, they could just opt for state laws instead of religious family laws. Shared adjudication as a concept transcends the dichotomy between 'followers of the faith' and 'rationalists of the same faith'.

A lot of criticism of Khehar's and Nazeer's JJ judgement has revolved around its consideration of Muslim family laws as constituting essential practice of Islam. A debate ensued on whether family laws constitute essential practice of a religion or not. A more probing question is that if a dispute does arise over a gender unjust religious practice which *is* an essential practice of a minority religion, should the state then not intervene? This question lingers in the backdrop of Joseph Kurian's J judgement which is discussed in subsequent section.

Relying only on constitutional values

The second judgement held that triple *talaq* violates right to equality guaranteed under article 14 of the Constitution and is therefore unconstitutional. This judgement by Justice Nariman and Lalit J argued that through the Muslim Personal Law (Shariat) Application Act, 1937 which is a statutory law, the practice of triple *talaq* can be tested on the touchstone of constitutionality under article 13. Those religious family laws on which the state has legislated upon and hence given a statutory form is subject to constitutional scrutiny. However, those religious family laws which the state has not legislated upon, is exempt from constitutional scrutiny. This anomalous judgement was first pronounced by the High Court of Bombay in the *Narasu Appa Mali* case, 1952. The Supreme Court in the *Shayara Bano* case could have explicitly overruled the *Narasu Appa Mali* case and brought under its scrutiny all religious family laws. This gaping loophole in the current legal recourse available to women needs to be addressed.

18 S*upra* note 6.

Rejecting religious family laws on the grounds of constitutional values and introducing state laws has limits in terms of ameliorating the position of women. Opting for state laws rather than religious family laws poses dilemma for observant religious women. Religious belonging offers observant religious women a significant source of meaning and value. They may feel bound to follow the procedure of divorce required by their religion to remove barriers to remarriage. Not removing these religious barriers may adversely affect women's membership status or that of their children, and women's ability to build new families. Muslim women who enter marital relationship through religious ceremony may feel the compulsion to have a divorce through religious procedure. A civil divorce for them may not dissolve the religious aspect of the relationship. Women may end up being in a split position of being divorced according to state law yet married according to their faith. This may expose women to abuse by their ex- husbands.[19] Also, the economic lives of women, their jobs and social security are closely associated with their religious community or cultural group.[20] Thus, opting for state laws and the consequent threat of ostracization can impose a heavy cost on social-economic lives of women.

Relying only on religion

The third judgement invalidated the practice on religious ground. Kurian Joseph J held that triple *talaq* was incompatible with the tenets of Islam. Joseph J reiterated the *Shamim Ara* judgement, 2002, which held that a *talaq* by a Muslim husband can be valid only if it complies with *Quranic* injunctions. Since triple *talaq* is not permitted by the *Quran*, therefore it's invalid. He argued that, "What is held to be bad in the Holy Quran cannot be good in Shariat and, in that sense, what is bad in theology is bad in law as well".[21] Joseph J argues that Muslim family law is not statutory law, and cannot be tested on the grounds of fundamental rights.

The implication of this judgement is that it validates practices which maybe unjust but have religious sanction. The judgement could be used to justify other discriminatory practices such as unequal inheritance rights and polygamy (polygamy was challenged in the Supreme Court in *Shayara Bano* case but the court decided to avoid ruling on it). This judgement implies that religious practices would be scrutinized only through the lens of religion. Women have to wage the battle for equality in the language of religion rather than the language of constitutional values of equality, rights and liberty.

Also, given the heterogeneity within Muslim community, and the diverse sources of law within Islamic jurisprudence, the judgement holding triple *talaq* to be un Islamic may not find resonance in all sections of Muslim population and some sections could

19 (2002) 7 SCC 518

20 Shachar, *supra* note 1.

21 Bader, *supra* note 1.

continue the practice believing it to be Islamic. The court's verdict on what is Islamic and what is not may not find acceptance among different sections of Muslim population. Given the internal diversity of a religious community, appealing only to their religious traditions may not find a common ground. Therefore, state intervention to protect women's basic interests should not be undertaken only in the language of religion. The state should also appeal to constitutional values as they pertain to all sections of Muslim community.

III The Muslim Women (Protection of Rights on Marriage) Act, 2019

After the *Shayara Bano* judgement, the government has enacted the Muslim Women (Protection of Rights on Marriage) Act, 2019,which makes instantaneous triple *talaq* a crime punishable by upto three years in jail. The practice has been made cognisable and non-bailable. The Act provides that only the wife or her relative by blood or marriage can file a complaint against the husband. Also, the magistrate can grant bail after hearing the wife under certain terms and conditions. If the husband and wife want to settle differences, the magistrate can compound the offence which means that the parties can withdraw the case on appropriate terms and conditions.

The Act loses sight of the issue at the core of triple *talaq* debate: protecting the interests of women. When a Muslim husband pronounces instantaneous triple *talaq*, the pressing concern for the woman is not whether the divorce was pronounced according to what is approved by Quran. The woman faces an enormous challenge of finding economic, social and emotional support for herself and her children. Making instantaneous triple *talaq* a criminal offence has limited efficacy in empowering women. Ensuring that the husband gets a jail term does not resolve the daunting task that lies ahead of divorce for a Muslim woman. The government could instead promote awareness that under the Muslim Women Act, 1986, the pronouncement of *talaq*, whether instantaneous (*talaq-e biddat*) or over a period of 90 days (*talaqe sunna*) puts responsibility on the husband to give lump sum amount to the wife as maintenance within the *iddat* period (90 days). It would better protect the interests of women by ensuring their economic stability. Removing the current ambiguity regarding Muslim women's rights to maintenance would better equip women to enforce their rights than sending away the husband to jail. Also, the provision of sustenance allowance in the bill is ambiguous and creates confusion. It does not seem necessary because Muslim women are already entitled to full maintenance within the *iddat* period under the 1986 Act. The idea of sustenance allowance brings Muslim women back in the shadows of meagre though continued allowance that they were entitled to under section 125 of Cr PC before enactment of the 1986 Act. In a way, it undermines the progress made in Muslim women's economic rights on divorce through the 1986 Act and its interpretation by the judiciary. In the scenario of the husband paying the wife sustenance allowance while remaining in jail, if after being released from jail he divorces his wife, he will have to pay her full maintenance within the *iddat* period. It is not clear whether the

sustenance allowance would be subtracted from the maintenance amount or will be in addition to it. Putting the husband behind bars for three years just procrastinates the inevitable and eventual divorce which the husband is sure to obtain once he is out of jail. It penalizes the already aggrieved wife and children by keeping them in limbo and stuck in an unwanted marriage for three years. It seems the whole chain of events could be cut short which would save the woman from the traumatic three years of depending on the not-yet-defined sustenance allowance. In fact, as the men accused of instantaneous triple *talaq* would seek time from the court to prove not being guilty, it could turn out to be a drawn out case. Thus, the life of women and the children would remain in limbo not just for three years in case of conviction, but also for the prolonged period in which the case drags.

Furthermore, as Solanki[22] argues, women often drop criminal charges against the husband. Finding employment, shelter, child care and rebuilding their lives becomes their priority and hence they prefer pursuing civil cases rather than criminal cases against the husband. Excerpts from an interview of a victim of domestic violence held in Solanki's [23]field work provides an interesting insight on this. The respondent said: [24]

> After a while, it was difficult to manage to fight the divorce case in the Family Court, and then to appear time and again in the criminal court. We all have jobs and to go to courts means loss of work and the boss yelled at me all the time about my kanoonilafra [legal affairs] and absenteeism. Then my husband used to send goons to follow me, because I had started to work…I just wanted never to see his face and forget about this episode in my life… when the divorce case had to be settled, they approached us for a settlement, and then I thought why not, let us all move on; my family also said so, I also wanted to begin anew and put this past behind me.

Criminalising triple *talaq* thus, does not seem to be a panacea to the challenges faced by women. Moreover, as Solanki [25] has argued, as criminal cases increase the paperwork of the police, they are reluctant to register complaints by women that are of criminal nature.

Women's experiences shed light on the inefficacy of the new law. A major challenge in protecting the rights of women is the implementation of laws made to this effect. There are laws already existing in India which can be used by Muslim women to protect their rights such as the Domestic Violence Act, 2005, the Muslim Women Act, 1986, and the Dissolution of Muslim Marriage Act, 1939. The problem is that Muslim women

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22 S*upra* note 6.

23 Solanki, *supra* note 1.

24 *Ibid.*

25 *Id.* at 94.

are not provided with adequate support through government or non-government organizations in pursuing long legal battles. Marginalized Muslim women need access to free legal aid and support in order to pursue any civil or criminal case. The Domestic Violence Act, 2005 provides for a state appointed protection officer for providing free legal aid to women. However, the majority of victims report their cases through private lawyers than protection officers due to lack of awareness, availability, accessibility and accountability of protection officers. The ratio of the number of domestic violence cases and the number of protection officers appointed is very poor.[26] The new Act has no such provision of providing free legal aid and support to the victims of instantaneous triple *talaq*. Even if the Act had such provisions like the Domestic Violence Act, 2005 has, if the implementation is tardy, it will not help women. Unless the state addresses the problems of marginalization and poverty through providing opportunities of education and employment, enacting another law will not result in any substantive empowerment of the Muslim women. The National Commission for Minorities has reported that cases of instantaneous triple *talaq* through whatsapp and phone continue since the Supreme Court judgement. The new Act has been justified by the law ministry on the grounds that since the judgement has failed to prevent the cases of instantaneous triple *talaq*, a law was necessary to deter the same. However, practices such as child marriage, dowry and domestic violence continue despite the existence of laws prohibiting them. Moreover, very few of these cases are actually reported to state legal actors. Unless the state undertakes massive awareness programmes about the rights of women regarding divorce and puts in place regulatory mechanisms to monitor the practice of divorce, the bill will not empower women. The framework through which such regulatory mechanisms can be put in place has been discussed in the section on shared adjudication.

The Act does not address the ambiguities left unanswered in the *Shayara Bano* judgement by the Supreme Court. While the judgement and the Act declare instantaneous triple *talaq* to be invalid, both are silent on what is the legally valid form of divorce. The state could codify the gender egalitarian provisions within Muslim family laws regarding divorce. The state could through laws and massive campaigns, make people aware of the more gender just practices of divorce in Islam such as *talaq-e-sunna* (divorce over a period of 90 days with attempts at reconciliation)and *mubaraat* (divorce through mutual consent). The state could create awareness of the rights of women to initiate divorce that is *khula* and *faskh*. The state could also spread awareness about the Dissolution of Muslim Marriage Act, 1939, which gives Muslim women the right to dissolve marriage

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26 Solanki, *supra* note 1.

27 Aarefa Johari, "Twelve years since the Domestic Violence Act, how well do protection officers help women in need?" *Scroll* (2018), *available at:* https://scroll.in/article/830882/twelve-years-since-the-domestic-violence-act-how-well-do-protection-officers-help-women-in-need.(last visited on Sep.30, 2019).

on various grounds such as cruelty, failure of the husband to provide for the maintenance of the wife and fulfil his marital obligations. The 1939 Act also contains a clause that a woman if married before the age of 15 years, can repudiate the marriage before attaining the age of 18 years (provided that the marriage has not been consummated). This clause encapsulates the idea of consent and agency of women which is given significance in the Islamic concept of marriage and divorce. The idea of consent is also inherent in the concept of *nikahnama* or the marriage contract in which the wife can stipulate the terms and conditions of the marriage. The government could push for certain mandatory provisions to be included in the *nikahnama* such as prohibition of instantaneous triple *talaq* or polygamy. The state can protect women's rights by codifying gender egalitarian provisions within Muslim family laws; it would have more legitimacy and acceptability in the minority community and hence have more efficacy. The 1986 Act is an example of creatively protecting women's rights from within the ambit of Muslim family law, without evoking a backlash from the minority community. The 1986 Act took Muslim women out of the purview of section 125 of Criminal Procedure Code, 1973 and was criticized for violating Muslim women's right to equality. However, the Act has been invoked by the judiciary to secure rights of divorced Muslim women. Section 3(1) (a) of the Muslim Women Act, 1986 entitles Muslim women to a "reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period". Muslim women can now claim large lump sum settlements which provides better protection than the meagre, though continued, maintenance under section 125.[27]

There are limits in the capacity of state laws to transform the socio-economic situation of vulnerable members of society. Reform laws initiated by the state promises formal gender equality; however it relegates the multifarious practices out of sight, making women more vulnerable to hidden and private oppression. The inadequacy of legal reforms is evidenced by the continued legitimacy of these practices in the social structure. There is a wide gap between legal validity and societal validity and this hinders the compliance and enforceability of state laws. It reflects the need for emergence of reforms by collaborating with the community to enhance democratic legitimacy and practicability of reforms. Agnes[28] points out the inadequacy of state intervention as a means for religious reforms. She gives the example of the Hindu Marriage Act, 1955, wherein the provision of monogamy has turned out to be detrimental to women in polygamous marriages. The law recognizes only monogamous marriages thus denying rights of maintenance to the second wives. In *Anupama Pradhan* v. *Sultan Pradhan* case,[29] 1991, the court took recourse to uncodified Hindu law and held that since the couple is governed by ancient Hindu Law which permits bigamy, the second wife is entitled to

28 Agnes, *supra* note 14.

29 Flavia Agnes, "Liberating Hindu Women" 50 *Economic and Political Weekly*14–17 (2015).

maintenance. In 2005, Supreme Court held that though polygamous Hindu marriages are illegal, they are not 'immoral' and financially dependent women cannot be denied maintenance.[30] Though the Hindu Code was introduced to facilitate social change, the ground reality did not change much. The state law changed, but the Hindu customary social structure went underground. It is reflected in numerous practices such as the denial of inheritance rights of women though they are entitled under the state law, or the widespread practice of dowry and child marriage though they are prohibited by state laws. The Hindu Marriage Act, 1955 reflects that criminalising a religion-cultural practice falls short of ensuring gender justice. The Hindu Marriage Act, 1955 makes different forms of customary marriage practices a criminal offence. But if we challenge the formal legal validity of these marriages and penalize them, the result may be that women of that community are not able to approach official legal actors for help.[31] In the event that instantaneous triple *talaq* is pronounced by a husband, it could be the case that the woman wants dissolution of marriage and an agreement is reached on adequate maintenance. On the failure of husband to provide for maintenance, the woman cannot approach state legal actors because they will challenge the legal validity of divorce and penalize the husband. The woman then won't have any recourse but to approach the religious bodies for enforcing the agreement on maintenance. The Act denies the agency of women to determine their best interest and how to pursue them. By upholding values that are alien to religious and cultural beliefs and practices, the state ends up denying rights to women who are situated in these diverse practices. Therefore, it is questionable whether the Supreme Court judgement or the Act criminalising triple *talaq* on the grounds of constitutional values will be effective. Moreover, opting for state laws carries the threat of social exclusion or ostracism whereby women could be shunned by their communities or places of worship. Women's economic and social lives are dependent on close ties with their community. They are subject to economic, social and emotional pressure to abide by their religious laws. Thus, upholding women's agency to exercise rights derived from multiple sources may be a more effective strategy in reforming gender unjust religious practices.

IV Shared adjudication approach

Adoption of shared adjudication by the state could guide future judgements and laws on other religious practices being challenged not only in the Muslim community but also in other communities. This section explicates what shared adjudication entails.

'Shared adjudication'[32] or 'joint governance'[33] or 'associational governance'[34]is a useful framework of addressing the concern of internal minorities without undermining

30 1991 CriLJ 3216.

31 *Ibid.*

32 Solanki, *supra* note 1.

33 *Ibid.*

34 Shachar, *supra* note 1.

minority rights. It aims at greater coordination between multiple sources of law and identity so that women are not forced to choose between rights of citizenship and group membership. Shared adjudication is based on competition and collaboration between state and religious legal actors whereby ex-post judicial review is complemented by ex-ante regulatory control.[35] It could involve agreement by religious arbitration bodies to comply with basic safeguards protecting gender justice, beyond which variation is accommodated. Qualified recognition of religious authority could provide non-coercive condition for a moderate interpretation of religious laws and reforms to emerge from within the religious community. Thus, a pluralistic legal regime based on 'regulated interaction' between religious and secular laws and context-sensitive decision-making can advance gender justice and minority rights simultaneously.[36] Such an approach prevents the retreat of minority groups into 'reactive culturalism' due to fear of assimilation into dominant culture.

Bader[37] suggests that the aim should be to arrive at a 'moral minimum' which is as universal as a plural society can get. Instead of equal respect and non-discrimination, minimal morality aims at 'decent respect' and some kind of due process. He makes a distinction between basic interests and best interests. The role of state must be restricted to protecting the basic interests of women rather than claiming to protect their best interests.[38] The state must recognize the agency of women to determine their own best interests. The idea of basic interest instead of best interest alleviates the paternalism inherent in the state's claim of protecting 'vulnerable' women of the minority community. He argues that this is the most effective means to prevent the violation of the most basic rights of internal minorities. A maximalist intervention may delegitimize state mechanism in the eyes of the minority group.

Bader[39] suggests several mechanisms to implement shared adjudication approach. Religious arbitrators and arbitration bodies could undergo training and they could be certified and monitored by the state.Each party to the dispute should receive a "statement of principles of faith based arbitration that explains the parties' rights and obligations under that particular school of religious law."[40] Information material should be widely distributed within communities regarding such principles. Oral agreements hinder monitoring of decisions.[41] Hence, written agreements must be made in religious

35 Bader, *supra* note 1.

36 Shachar, *supra* note 1.

37 *Ibid.*

38 Bader, *supra* note 1.

39 *Ibid.*

40 *Ibid.*

41 See Bader (2009) for detailed recommendations of Boyd Committee formed in Canada in 2004, on implementing shared adjudication framework.

arbitration bodies. In India, the parties can appeal to state legal system against the religious arbitration's award. However, Bader argues that appealing to state machinery is challenging because it requires resources and involves the threat of social ostracization. Shachar[42] suggests 'structural reversal point' whereby mandatory judicial review becomes a part of the process before religious arbitration settlements can be finalized. So the burden of initiating judicial review is not borne by the vulnerable party, but is built into the process itself. If the arbitration settlement violates the minimum safeguards, then civic authorities should have the power to overrule it. This approach provides women a choice of law and choice of courts. Coalitions with different groups within the Muslim community can be formed which would facilitate drawing from more egalitarian practices within Muslim family laws to achieve gender equality from inside. Without such regulated arbitration, unqualified, ignorant imams would continue to make arbitrary pronouncements on the lives of women without any accountability. If a minority group demands recognition of its legal system, the state can demand that all relevant organizations or internal voices are represented at the negotiation table, thus ensuring that vulnerable members are also able to represent their interests.[43] Religious arbitration bodies depend on the state machinery to ensure that their awards are complied with; this can be leveraged by the state to impose basic safeguards.[44] Just as private arbitration is allowed for commercial disputes, the state can explore the possibility of extending private arbitration to intra-religious disputes with suitable safeguards.

The solutions so reached may not prioritize liberal values of individual rights and autonomy. But such solutions meet the test of procedural justice. The participants should not be forced to arrive at 'morally universal values'.[45] This idea is also reflected in Nussbaum's distinction between 'comprehensive liberalism' and 'political liberalism.'[46] The state should not be 'comprehensive liberal' postulating autonomous lives to be better than hierarchically organized lives, allowing the state to favour those religions that foster autonomy while disrespecting religions that don't. The state should be rooted in 'political liberalism' which recognizes plurality of conceptions of good life in a society.

In the *Shayara Bano* verdict of the Supreme Court, one judgement relied solely on religion. It failed to provide any guideline as to how should the state respond when a

42 Ayelet Shachar, "Religion, State and the Problem of Gender: New Modes of Citizenship and Governance of Diverse Societies" 49 *McGill Law Journal* 49–88 (2005).

43 *Ibid.*

44 Veit Bader, "Associative Democracy and Minorities within Minorities" in A. Eisenberg and J. Spinner-Halev (eds.) *Minorities Within Minorities* 319–339 (Cambridge University Press, 2005).

45 Bader, S*upra* note 1.

46 *Supra* note 3

religious practice which is an integral part of religion, violates women's rights. Another judgement relied solely on constitutional provisions. It has the risk of being ineffective due to inefficacy of reforms from above and continued legitimacy of the practice in the social structure. A verdict principled in shared adjudication would have tied together the loose ends that these two judgements have left open. The verdict provides no guidance as to how the state should deal with practices that have Islamic validity but are gender unjust and being contested by Muslim women. The shared adjudication approach can be useful in framing the state's response. Shared adjudication approach broadly has two aspects; *Firstly*, the state can codify the gender egalitarian provisions within religious family laws so that there can be mainstreaming and religious elite's acceptance of these provisions. *Secondly*, regarding the gender unjust provisions in religious family laws, the state can impose statutory safeguards to protect basic interests of women beyond which the community can have the freedom to exercise their religious practices. Consider the case of polygamy. The state could codify the conditionalities imposed by Quran on a Muslim husband to practice polygamy, that is, equal treatment of all his wives. The husband could be made subject to legal action if wife contests polygamy on the ground of unequal treatment and the husband is found to be guilty. It could be one way to keep a legal check on the practice and keep it in abeyance. However, if a consensus is reached among representative bodies of women that irrespective of egalitarian treatment of wives by a Muslim husband, polygamy still violates the basic interests and dignity of women, then a democratic argument can be made for the state to direct religious bodies to abolish it, or abolish it itself (if the religious bodies fail to do so). Thereby, the state would be imposing safeguards to protect women's basic interests.

V Conclusion

Regarding the *Shayara Bano* case, Agnes[47] has argued that a further legislation or judicial proceeding was not needed as judiciary had already abolished arbitrary triple *talaq* through *Shamim Ara* judgement and subsequent cases. But, just as codification of maintenance provisions through the Muslim Women Act, 1986, has helped Muslim women, similarly, codification of procedures of a valid divorce and abolishing arbitrary triple *talaq* through a legislation has the potential of bringing respite to women. Similar challenges to religious family laws are bound to emerge as women's movement gains ground. Institutionalization of shared adjudication can be a watershed development in terms of protecting the interest of internal minorities. It would disable the male dominated religious bodies to continue interpreting religious family laws with male bias with impunity. It would help in mainstreaming the gender egalitarian provisions

47 Martha C Nussbaum, "A Plea for Difficulty", in Martha C. Nussbaum, Joshua Cohen and Matthew Howard (eds.) *Is Multiculturalism Bad for Women* 9–24 (Princeton Univeristy Press, 1999).

48 *Supra* note 15.

in the religious family laws. It would not leave Muslim women vulnerable and at the mercy of another high profile case like *Shayara Bano* which comes up once every few decades and ends up taking very slow and small steps towards a gender just society. Democratic expressions of women's interests and their denial by community leaders creates the space for state to intervene. State laws protecting women's interests become indispensable so that a woman can approach state machinery when societal options fail to deliver justice. The process of social transformation has to be layered which requires synergy between the state and religious groups. Shared adjudication is an attempt in this direction.