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THE CRISIS OF SHAH BANO: BETWEEN SHARI'AH AND THE SECULAR

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ABSTRACT

In the official nationalist imagining of India after partition, secularism was constituted as one of the fundamental maps for achieving national integration. After 72 years of independence, a closer look at the project of integration reveals numerous points of departure, a symptomatic of the crisis of secularism. Analysis from various approaches reveals multiple locations of the crises. This paper will try to investigate the crisis from the domain of constitutional secularism. Taking the Shah Bano case of the 1980s as a referent point in conjunction with debates on the Uniform Civil Code, this paper will try to locate the crisis along the threads of personal religious law, minority rights, and gender, based on the notion of identitarian cultural practice where the people constitute a community or a nation with their differences—hence conflict.

**Keywords:** Uniform Civil Code, Shah Bano, Secularism, Shari'ah, personal religious law.

In the official nationalist imagining of India after partition, secularism was constituted as one of the fundamental maps for achieving national integration. After 72 years of independence, a closer look at the project of integration reveals numerous points of departure, a symptomatic of the crisis of secularism. Analysis from various approaches reveals multiple locations of the crises. This paper will try to investigate the crisis from the domain of constitutional secularism. Taking the Shah Bano case of the 1980s as a referent point in conjunction with debates on the Uniform Civil Code, this paper will try to locate the crisis along the threads of personal religious law, minority rights, and gender, based on the notion of identitarian cultural practice where the people constitute a community or a nation with their differences—hence conflict. At large, the conflict emerges out of two polarised positions: the left-liberal secularist who wants to separate religion from politics and thus seek uniformity of law; and the communitarian who tries to maintain religious autonomy and therefore advocate decentralised polity. These two positions, nonetheless, intersect depending on the interpretation of tolerance and intolerance, pluralism and homogenisation, liberal or illiberal and so on.

The law structure of India is dual. Uniform criminal and civil law. Nevertheless, the constitution maintains separate personal laws for various religious communities. This structure reveals a peculiar position of the Indian state that interprets secularism in terms of protection of all religions or an idea of 'sarva dharma sambhava',<sup>1</sup> unlike western normative implications. Within the civil law, the constitution approves a particular

<sup>1</sup>But see, Bhargava, Rajeev. "The Distinctiveness of Indian Secularism." *Critique Internationale*, vol. 35, no. 2, 30 Nov. 2001, pp. 121–147., [www.cairn-int.info/article-E\\_CR11\\_035\\_0121--the-distinctiveness-of-indian.htm?contenu=resume](http://www.cairn-int.info/article-E_CR11_035_0121--the-distinctiveness-of-indian.htm?contenu=resume).

Uniform Civil Code (UCC hereafter) in Article 44 that applies to all Indian citizens irrespective of religious subscription. In Article 44, Indian Constitution states the UCC: "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India" ("The Constitution Of India"). The code exudes a sense of promise to the citizens of India, but it still exists as a Directive Principle.<sup>2</sup> The single sentence of the code fails to provide any road map or an adequate plan of action to describe how the state shall "endeavour to secure" a "uniform civil code" for the citizens. From the perspective of a new nation which gained its independence through the partition, this stance of secularism could be peculiar, yet a unifying balm to the wound. Furthermore, it could be interpreted as an 'endeavour' for 'modernising' a heterogeneous nation with a sizable minority population. What needs to be investigated is whether the state 'endeavour' is carried through the ideology of secularism it professes.

A brief illustration of the Shah Bano case<sup>3</sup> will set the ground for further discussion. Shah Bano was married to Mohd. Ahmed Khan in 1932. After years of marriage, in 1975, Mohd. Khan disowned Shah Bano and drove her out of the matrimonial home along with the children. Although initially, her husband provided 200 rupees as a monthly payment for maintenance, it ceased eventually in 1978. Shah Bano sued Mohd. Khan under Article 125 of the code of Criminal Procedure. It requires the husband to provide 500 rupees maintenance for the wife "who has been divorced by, or has obtained a divorce from, her husband and has not remarried" ("The Constitution Of India"). Article 127 of the same code also states that provisions included in the Article 125 will become void if "any customary or personal law [is] applicable to the parties" ("The Constitution Of India"). The applicable personal law, in this case, is Islamic religious law or *shari'ah*, following which Shah Bano had already claimed the dowry (*mahr*) given to her husband during marriage. Following Article 127, Shah Bano's husband claimed that he had fulfilled all obligations of the Islamic law and the civil code stating that the dowry (3,000 rupees) was the necessary payment for both laws. However, the local Court set a monthly 25 rupees maintenance to be paid to Shah Bano. Later in 1980, Shah Bano made a plea to the High Court of Madhya Pradesh to increase the amount of maintenance, and it was adjusted to 180 rupees per month. After that Khan appealed before the Supreme Court of India claiming that since he had divorced Shah Bano and had a second wife, he is not liable to pay the monthly maintenance.

The questions arise, therefore, are: whether section 125 of the Code Of Criminal Procedure is applicable for Muslims or not; whether the *mahr* is adequate for the husband to be released from liability to maintain his divorced wife; and whether UCC applies to all religious communities or not.

In a unanimous decision of the Supreme Court on 23 April 1985, Khan's appeal was dismissed, and it was justified that "Section 125 is truly secular in character" ("Mohd. Ahmed Khan Vs Shah Bano Begum"). To legitimise the verdict furthermore, the Court referred to Qur'an with several interpretations<sup>4</sup> and demonstrated the ruling's conformity to the Islamic religious principles. The *mahr*, an amount "payable in consideration of the marriage", according to the Supreme Court's ruling, "cannot be a sum payable 'on divorce'" ("Mohd. Ahmed Khan Vs Shah Bano Begum"). Therefore, Khan has to provide maintenance. The Court also regretted that "Article 44 of our Constitution has remained a dead letter" and observed: "a common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies" ("Mohd. Ahmed Khan Vs Shah Bano Begum").

However, while the Supreme Court acquiesced with Shah Bano's plea, groups within the Muslim community accused the Court and by extension, the Rajiv Gandhi government of interfering with Muslim religious law. Court's reaffirmation of Article 44 and the usage of Qur'anic authority was viewed by a section

<sup>2</sup> "The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws" ("The Constitution Of India").

<sup>3</sup> See, "Mohd. Ahmed Khan Vs Shah Bano Begum And Ors On 23 April, 1985". Indiantoon.Org, 2020, <https://indiantoon.org/doc/823221/>.

<sup>4</sup> The Court particularly provided interpretations of the ayat 242 from the surah *Al-Baqara*: "Divorced women shall also have such maintenance as is considered fair: this is a duty for those who are mindful of God" (Abdel Haleem 28).

within the community as an attempt at altercation, attack on the legal rights of the Muslim minority, and a blatant force of assimilation. Scholars like Rafiq Zakaria<sup>5</sup> justified that reason for such fierce reaction was not the legal questions of maintenance rather how the Court handled the case:

Unfortunately, the Supreme Court used this case as a hammer against the Shariat, many of its *obiter dicta*, particularly the reference to the degradation of women in Islam, were not only uncalled for but also unjustified. They smacked of prejudice against Islam, which naturally hurt the sentiments of the Muslims, coming as these observations did from the highest judiciary of the land...the Muslims feared that the basis of their religion, which is the Qur'an, was being tampered with and their religious identity threatened. Kuldip Nayar, the noted columnist, writes: "Sectarian riots and discrimination against them in jobs and vocations have made them develop a siege mentality. At every step they see dangers threatening their identity. And since they have often come to grief, they have gone to the other extreme of seeking protection from maulvis and mullahs... The Supreme Court would have done better if it had not made the remarks it did on a common civil code". (qtd. In Awn et al. 73).

Zakaria also provided an insider's understanding of the four bases of Islamic law<sup>6</sup> and *ijtihad* or independent reasoning practised "by means of analogical or syllogistic reasoning" (Esposito 134) within the Islamic legal context. *Ijtihad* has been lauded as a critical legal tool for promoting continued adaptation of the religion into modern times. Therefore, while legal adaptation is accepted in Islam, it condemns *bid'ah* or innovation alien to its overarching framework.

Ultimately, debates in the Parliament resulted in the adoption of The Muslim Women (Protection of Rights on Divorce) Act of 1986. The Act requires the relatives with the prospect of inheritance from the divorced woman to provide "reasonable and fair maintenance" if she is not able to maintain herself after the *iddah*<sup>7</sup> period. If relatives are unable to do so, the obligation falls on the *wakfs*.<sup>8</sup> Therefore, eventually, the Parliament resorted to a conservative reading of the Qur'an.

Does the failure to achieve UCC entail the death of constitutional secularism in India? Did the Court instead of the Parliament then bridge the gap between personal law and the civil law to secure those promising terms of the UCC? An examination of the operative terms can reveal further complexity. As in the centre of the discussion lies Shah Bano, a woman, the question of 'uniformity' has to go beyond the mere agenda of reforming a personal religious law. As citizens of equal worth, concern and respect, the identity of all Indian women cannot be essentialised while religious affiliation constructs a part of their identity. Then how does the state enact 'uniformity' on the different agentic self of a woman of faith? Upendra Baxi asks the same: "What denial of the right to difference may "uniformity" legitimately ordain?" (271). Such question compels to ponder on the multidimensionality of the struggles for women's emancipation in a nation of cultural plurality and difference.

In a nation of heterogeneity, the 'unification' and 'codification' of customs and peoples raise questions of choices. Can a woman citizen then enjoy the choice of subscription to faith and the fluid reversibility of that choice? If the choices and differences are codified in a uniform notion of civility, then how does a subject of faith like Shah Bano remain any less oppressive? For the practices of faith become elements of her identity formation. In this matter, Baxi raises probing questions: "The "endeavor" promised in Article 44 is the endeavor to "secure" the ucc. Is proclaiming a "code" securing it? Or does "securing" a process extend to the "security" of the exercise and enjoyment of a regime of rights thus created by codification?" (274). The discourse surrounding UCC thereby fails to take into account the relationship between human rights and identity. While the state is obligated to bestow equal worth, concern and political respect to all citizen women, it paradoxically tries to reduce the same plural agentic social identity into merely a constitutional codification.

<sup>5</sup> See, "In Defence of the Shariat", published in the *Illustrated Weekly* on March 2 and 9, 1986.

<sup>6</sup> Qur'an, hadith, *qiyas* (the principle of analogy) and *ijma* (consensus).

<sup>7</sup> A three-month waiting period following the divorce to ensure that the woman is not pregnant by her recently divorced husband (Esposito 131).

<sup>8</sup> Pious trusts established under section 9 of the Wakf Act, 1954.

Beyond the individual, UCC also ignores the question of preservation of collective identities and community rights.

Shah Bano, on the one hand as a woman of faith accepts *talāqu l-bid'ah*<sup>9</sup> of the *shari'ah*, on the other, she rejects its existential impact as a divorced citizen woman. Therefore, she appeals to the Court contesting the interpretation of *matā*<sup>10</sup> or maintenance. Taking her as a social and juridical subject, the Court then “appropriates her being as constituting a summons for the Indian state to act expeditiously for the achievement of the UCC” (Baxi et al. 281). Furthermore, political parties and other ‘progressive’ intellectual groups also appropriate her for various politics of identity; consequently, her agentic self is rendered to a promotional performance of women’s rights under the banner of constitutional secularism of the modern Indian nation. Contrarily, her contestation imperils the position of the Muslim Personal Law Board as the hermeneutic authority of *shari'ah*. Baxi questions in this regard: “How may we read her invocation of the Supreme Court of India—as a challenge contesting its supremacy, or as an exercise in co-opting it in terms of aiding reformation of the sharia law and jurisprudence from within itself, in ways that engage its constructive renewal?” (282). Although Shah Bano can be read as a figure of resistance to the traditional patriarchal construction of *shari'ah*, this, in turn, perils her position as a woman of faith. Is Shah Bano then a woman seeking to feminise *shari'ah* or a woman citizen seeking to feminise the nation’s constitutional practice of secularism? Without all the answers, Shah Bano becomes a servitor or an actor for various parties.

Nonetheless, some clarification can be fetched. After the case had been closed, in an informal interview with Dr Seema Sakahre, Shah Bano claimed (in the presence of her kin) that “she chose to be a Muslim woman, not a *napak aurat*” (Baxi et al. 282). Articulation of these contesting signifiers (*pak aurat* and *napak aurat*), complicates Shah Bano’s position in the socio-cultural framework of the nation. If an *aurat* refers to the notion of a woman citizen in the generic structure and a *pak aurat* to a Muslim woman, another agentic notion within the structure, then Shah Bano’s enunciation forms a contradictory position that resists the assimilationist discourse of the UCC and also opposes that of the *shari'ah*’s. However, the very site from where she claimed herself as a *pak aurat* constructed her as *napak* since she sought a feminist interpretation of *matā*. The Court, on the other hand, constructed her as a Muslim woman but without the insider’s identitarian signification like *pak* and *napak*. Therefore, both the UCC and the personal law confiscates her identitarian position at various locations. What Shah Bano’s case clarifies is that when we try to de-essentialise a particular identity category (Muslim woman) in the context of personal law (*shari'ah*), the homogenising codification (UCC) of the nation-state results in destabilisation. Shah Bano’s identification and search for gender equality within the lived tradition of *shari'ah* offers an example of ‘multiplicity of identifications and collective identities’ which ‘constantly subvert each other’, a position outside the polarised thinkers of the nation (Baxi 151). Therefore, framed in the context of nation formation, Article 44 remains “confined to its own prison house” (Baxi et al. 275) while articulating on identity, religion, difference and autonomy. The terms of the Article, for now, are, in the words of Ernesto Laclau, merely “floating signifiers” (36).

The equal value of truth and dignity conveyed through UCC establishes a constitutional *conception* of ‘uniform’ life, but the practising ground is located in a much complex grid of reality where it has to battle faith, gender, caste and many other elements. The state that fails to secure the minimal condition of security to the Muslim lives may forfeit its ‘endeavour’ to reform egalitarian law for now. We may decry the guardians of *shari'ah* but the national ‘guardians’ of constitutional secularism, by entangling the UCC discourse in a shroud of political suspense, also remains a suspect in the wake of Ayodhya, Babri Masjid, Gujarat carnage, and NRC-CAA.

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<sup>9</sup> The least approved method of Muslim divorce in which the husband pronounces three times “I divorce you, I divorce you, I divorce you”.

<sup>10</sup> From the ayat no 241 of Surah *Al-Baqara*: “Wa Lilmuṭallaqāti Matā`un Bil-Ma`rūfi Ḥaqqān `Alá Al-Muttaqīna” (Bukhari).

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