

CHAPTER 3

Public Response to Uniform Civil Code

Most unfortunately, though again not surprisingly, the Uniform Civil Code has been permanently associated in the Indian mind with opposition, if not to say obstruction, by the Muslims. As argued above, the agitation on the Muslim Women's Bill has made it obvious that the Muslim society is not a monolith. There are streams of thoughts and opinions in it with regard to many subjects including legislation and personal law. One has also to remember that there are several minorities in India and that despite the claims made by some Muslim leaders that in opposing the Uniform Civil Code they were speaking on behalf of non-Muslim minorities,³⁹ the latter have distinct and different perceptions and views on this topic. At the same time, those leaders were right when they said that not all Hindus were in favour of the Uniform Civil Code. The difference between the thinking of Muslim and non-Muslim minorities was demonstrated both at the time of the Constituent Assembly Debates and at the time of the first Adoption Bill in 1972. In the Constituent Assembly, Shri R.K. Sidwe (Bombay: Parsi) and Raj Kumari Amrit Kaur both in their own ways exhorted Muslims to give up what Shri K.M. Munshi called their "isolationist outlook on life", for the sake of national unity and the larger interests of the country.⁴⁰ Mr. Sidwe recounted how the Parsi community had repeatedly repulsed British Government's offers for a separate electorate, replying that the interests of Parsis were well-looked after by the sister communities.⁴¹ We have seen that the uneasiness of Scheduled Tribes and Parsis over the Adoption Bill was qualitatively quite different from the stand of unswerving opposition adopted by the Muslims leaders.

In this context, in addition to data from secondary sources, we considered it useful to interview members of various communities in order to ascertain their response to the so far hypothetical Uniform Civil Code. A brief questionnaire of some four or five questions was used⁴² as a tool to facilitate discussion. Members of following communities were interviewed either in person or by letters. They were: Muslim (3), Christian (one group of three

39. *Supra* note 3 at 544 - 545.

40. *Id.* at 548.

41. Shiva Rao. *supra* note 1 at 318

42. See Appendix I.

and 2 individuals), Parsi (2), Jew (one group), Buddhist (1), Bahai (1), Hindu (2) and Atheist (1). We may perhaps create a category called intellectuals as these personalities spoke from the point of view of not the interests of a particular community but of the country as a whole. There were three such individuals interviewed. Altogether opinions of seventeen individuals were elicited though the questionnaire was sent to twice as many.

The first question was - What is your view about the desirability of a Uniform Civil Code? With the exception of the Muslim respondents, every respondent replied by saying that it was desirable. Some of them, who belonged to other minorities, added that it was, however, not possible to have it right now as the Muslims were opposed to it. My Christian⁴³ and Atheist⁴⁴ respondents were in favour of a Uniform Civil Code being enacted straight away, despite the opposition of the Muslims. The replies of Muslim respondents varied. One of them was the well-known reformist, activist scholar, Mr. Asghar Ali Engineer. He replied that one should not talk of Uniform Civil Code at the moment as there was "a lot of misunderstanding about it in both communities. The issue has been thoroughly communalised and is not being debated on its merits. Moreover, there is no properly framed common Code to debate its merits and demerits". The other Muslim respondents were of the opinion that there should be codification of personal law, at the initiative of the community concerned rather than a Uniform Civil Code. They were clearly of the opinion that Hindus should not interfere with Muslim Personal law.

The three intellectuals saw the desirability of the Uniform Civil Code but they were uneasy about passing it without the consent of the Muslims. They also felt that not enough thought had gone into it; that it was an issue for threatening the Muslims. They were Professors Upendra Baxi and Rajani Kothari, and Mr. V.M. Tarkunde advocate, Supreme Court.

My next question was: What aspects of your personal law are non-negotiable? To this question, the non-Muslims replied that all aspects of their personal law were negotiable so long as their faith in the Creator and the ways of expressing it were not disturbed. The Jews would like the custom of tracing the religion of the child through its mother to be saved.⁴⁵ The Parsis would like the Fire Temple to be protected from pollution by entry of non-

43. Ms Jyotsna Chatterjee of Joint Womens Programme. Ms. Radha Kumari & Ms Sadhana Ganguly of Young Women's Christian Association.

44. Mr. P.C. Chatterji, author of *Secular Values for Secular India*, 1985.

45. A group of them were interviewed at Judah Hyam Hall, Humayun Road, New Delhi. They included Mr. E. Kolet, a leader of the community.

Parsis.⁴⁶ Both would like first cousin marriages to be permitted as they are very tiny communities. The Roman Catholics are opposed to divorce.⁴⁷ But under the Indian Divorce Act Catholics *can* already obtain divorce, if they are prepared to disobey the Church. That is left to their conscience. So the Uniform Civil Code will not make any difference to them.

The Buddhists in India, as mentioned above, include tribals and non-tribals. The former come from such far-flung areas as Ladakh, North Eastern States and Kerala. Their languages, customs, rituals vary widely. The Ladakh Buddhists are under Tibetan, the NEFA tribal Buddhists under Chinese and Burmese⁴⁸, and the Kerala Buddhists under Sri Lankan influence. The majority of non-tribal Buddhists are from Scheduled Castes who had converted in 1956 or thereafter under the leadership of Dr. Ambedkar. Therefore, the Buddhist respondent, Mr. Bhagwan Das, Advocate, Supreme Court and a distinguished scholar was specifically asked how the Buddhists, especially the tribals, would respond to a Uniform Civil Code. Would it not create hardships? The tribal way of life is markedly different from that of the plains people. They have, therefore, evolved their own rules and customs. Would it be just to impose a Uniform Civil Code on them? Mr. Bhagwan Das responded that if things were explained properly, the Buddhists everywhere would accept the change which the Uniform Civil Code would bring about. I may add that I was far more apprehensive on this score than Mr Das who himself is not a tribal. My apprehensions were shared by Prof. Baxi who went so far as to say that he would oppose the Code if it was not preceded by a proper understanding of the tribals and their multiple and complex cultures.

Of the Muslim respondents, Mr. Asghar Ali Engineer replied that *nikkah*, talaq-ul-Sunna (not to be confused with talaq-al-bid'a which is the instantaneous talaq by three declarations in one sitting), laws of inheritance and Khu'la or divorce requested by women were not negotiable. Mr Syed Shahabuddin did not answer this question. Mr. Danial Latifi felt that succession and polygamy should not be disturbed.

More specifically, questions were asked about the permissibility of change in the laws regarding polygamy, divorce, adoption and succession.

Non-Muslim respondents saw no objection in banning polygamy; giving equal rights in the matter of divorce to both spouses; permitting

46. Mr. K.J. Gandhi and late Mr. S.D. Nargolwala explained the views of the Parsi-Zoroastrian Community.

47. Simon Stephen, Indian Social Institute, New Delhi.

48. And also Sri Lankan for whenever the Sri Lankan Buddhists were hard-pressed, they took shelter in Burma. I am indebted for all this information to Shri Bhagwan Das.

adoption; and giving equal rights to men and women for succession.

Amongst the Muslim respondents, Mr. Engineer said polygamy should be put under much greater restrictions if not banned altogether. It should be permitted in very exceptional circumstances, and only with the permission of the first wife. Mr. Shahabuddin did not reply. Mr. Latifi was in favour of retaining its legality on the ground that polygamy was not much in vogue.

One factor constantly cited against banning polygamy for Muslims is that Hindus who are now monogamous by law, continue to enter into as many, if not more, polygamous marriages as Muslims. Therefore, banning polygamy has not done Hindu women much good. One has to admit the truth of this charge. One may add that some of the intellectuals and academics spoken to were deeply troubled over the question of polygamy. It was clearly a requirement violated by many legally monogamous communities, not only Hindus for whom monogamy was made compulsory only in 1955, but also other communities; albeit on a smaller scale.⁴⁹ Banning of polygamy also created severe problems in a society which did not accept independence and singleness for women. Yet without a divorce the husband could not marry again. The curious institution of committing bigamy with the wife's consent has grown partly out of this dilemma as only a wife or her relatives, but no third party, may file a criminal complaint against the bigamous husband.

One may remember that a move that had been afoot in 1980-1981 to introduce irrevocable breakdown of marriage as a ground for divorce available even to the offending party, had been opposed by women activists because, it was argued, women were not yet equipped to face the social problems such a law would create for them. The idea, not always clearly thought out or expressed, seems to be that one should leave polygamy alone where it exists rather than create more confusion, contradiction and unhappiness.

Protagonists of this line of reasoning are as uneasy as they are being honest about social realities. On the other hand, if one accepts it, then the Child Marriage Restraint Act would be the next casualty and many other

49. In this context I would refer to what a Christian young woman told me. Her cousin, a graduate, had been married to a fellow Christian who did not disclose the fact of his being already married abroad to a foreigner. When the state of affairs came to light the girl's father refused to take her back. "My uncle forgot all his law, he remembered only that he was a Judge", said my respondent. The man lived half the year with each "wife" and both regarded him as their husband.

pieces of social legislation might follow suit. Thus the answer to the problem of retaining polygamy is not so simple. Besides, if any one religion is permitted to keep what some men would regard as a privilege, and all women as well as fathers of daughters as a threat, it will generate prejudices and undesirable social pressures. No Muslim could be edified by the spectacle of non-Muslims converting to Islam merely to take advantage of the Islamic laws permitting polygamy.

Muslim respondents were against any change in their law of succession which worked out elaborately the shares of various relatives in all permutations and combinations. Mr. Latifi, however, said that the Indian Succession Act should be made optional for all. Mr. S.D. Nargolwala, a Parsi, remarked that the Muslim law of succession was perhaps wiser than other laws. By restricting the testator's right to will away his/her property to one third of the estate, it ensured that children were not left destitute in a fit of anger, or because of evil influence of others over the aging testator. With regard to adoption, with the exception of Muslims, the respondents had no objections. On the contrary, they welcomed the proposition. The Parsis did have a practical problem as did the Scheduled Tribes. We have referred to both above.⁵⁰ The Parsi respondents, however, referred me to case law which clearly showed that as Fire Temples were private trusts, no one could enter them unless permitted by the conditions imposed by the settlers of the trust, at least, as interpreted by the trustees. So, if the trustees refused entry to the non-Parsi child adopted by Parsi parents, they could not be compelled to give such permission. The same law would hold for Parsi Charitable Trusts, which were fully private trusts, established for Parsis. So the likelihood of non-Parsis entering the Fire Temple or enjoying the trust funds as a result of adoption by Parsis was practically non-existent. The Christian respondents were emphatic that adoption should be permitted straight-way to non-Hindus. As Christian orphans could not be adopted here, their community were of necessity compelled to send them abroad for adoption.

Mr Asghar Ali Engineer thought adoption could be allowed on an optional basis, which indeed is all that it is. No one can be compelled to adopt. Mr Shahabuddin did not answer this question and Mr. Latifi was opposed to its extension to Muslims, echoing at least in part, reasons heard on other occasions. These were -- 1. The Quran forbids it; 2. Changing the given name of the adopted child to the adoptive father's name was not permitted as it amounted to denying one's father; 3. It would disturb succession, and do injustice to the heirs; 4. It would double the number of persons, whom the child could not marry in his original family and in his new family. A most extra-

50. *Petite v. Jeejeebhoy*, 11 Bom. L.R 85; *Saktar v. Bella*, AIR 1925 PC. 298.

ordinary objection was raised which was contradictory of the fourth one. This individual, a distinguished law man, (who shall remain nameless) was under the impression that the adopted child would be free to marry its blood sister or brother, and that the Hindu Law permitted it.

The only answer to the first objection can be given by making a reference to the arguments used by the Minorities Commission.⁵¹ The Commission had pointed out that freedom of religion also meant freedom for members within a minority to practice the religion according to their perceptions. If anyone perceived the Quranic injunction in this light they would not adopt a child. But no one can be put under compulsion in the name of freedom of religion for the minority.

The problem of changing the name of the child or not changing it may not prove to be insurmountable. Many communities in India do not use a surname and the last names of father and son do not always tally. One cannot help but think, however, of the ease with which a woman's name is changed on marriage throughout the world. Those tribes where women keep their clan name have a better reason for objecting on this basis. Again, since converts to Islam are required to give up their old names, this particular rule cannot possibly be an insurmountable difficulty.

The third objection is factually correct. Adoption will disturb succession as the adoptive parents would like to leave their property to their adopted child. Yet, even this objection will not stand the test of further scrutiny. If the childless couple had given birth to a child in their later years, any relatives who had entertained expectations of inheritance would have been equally disappointed. Yet, succession would have been disturbed without a demur. Since the adopted child is, for all legal purposes exactly like the natural or biological child of the adoptive parents, surely this objection is not really valid.

The fourth objection would have been expected from Parsis whose numbers are very small and Jews whose numbers are microscopic. The fifth objection is simply wrong on facts; it is the fourth objection which states correctly the law on prohibited degree of relationships for adopted children.

Mr Danial Latifi pointed out that the existing Hindu law of succession permitted parents to dispose of their entire self-earned property as they chose. This could be used to deny an adoptive child its share and the Muslim law of succession offered better protection to children.

51. *Supra* note 16 at 21-23.

Extraordinary though it may seem, no one seems to have noticed what the Shariat Act has to say in the matter of adoption, wills and legacies. S. 3 of the Shariat Act clearly says that Muslims wishing to be governed by the Shariat in these matters must make a proper declaration after filling up the proper form and paying the fees, before an authority appointed for the purpose. In the absence of this declaration they would not be governed by the Shariat but by their customary laws. It would be interesting to see how many Muslims had signed those declarations. There appears to be no bar in the Muslim Law against making a universally applicable law of adoption for India.

On maintenance to divorcees, the non-Muslims had no problems. Of the Muslims, Mr. Engineer was in favour of S.125 Criminal Procedure Code being applied to all women. Mr. Danial Latifi was also for maintenance for divorcees but he supported his opinions by referring to the Quran, and not the Criminal Procedure Code. Mr. Syed Shahabuddin had been a staunch supporter of the Muslim Women's Bill. The distinguished and anonymous law man mentioned above parried the question by saying that -

(i) in the Shah Bano case the court should not have interpreted the Quran and; (ii) the Hindus should have stayed out of the controversy.

We asked a few respondents some additional questions regarding the custody of the children in case of divorce, or in case of death of the parent who had custody. All those who replied said that the matter should be determined on merits in each case, and that the child's interests should be paramount. Mr Engineer also cited from the Muslim Personal Law to show that this was permissible.

To sum up, while respondents from smaller minorities had certain specific problems, they were not opposed to the Uniform Civil Code in principle. On the contrary, they wanted it but felt that it would create difficulties with Muslims. Secondly that the Muslims would prevent it from being passed, therefore, it was irrelevant to discuss the subject.

The Muslims saw a larger area of their law as non-negotiable than did the others.

The Muslim respondents made several good points about lacunae in other personal laws. But since they seem unwilling to accept change in their own laws these points will not carry the weight they deserve.

The last and important factor in assessing the response of Indians to Uniform Civil Code would be the masses. Alas, they are illiterate and our access to them is limited. They can be asked to respond to specific questions and concrete situations, as they did over Muslim Women's Bill, and as they continue to do by filing complaints under S. 125 Criminal Procedure Code. As they also do by adhering to local customs including adoption and even inter-religious adoption in remote areas like Santhal Parganas, or by serenely declaring themselves *Karta* of the family as they do in Maharashtra.⁵² Unless and until their religious passions are aroused they are busy enough getting past every day that dawns without thinking about remote questions like the Uniform Civil Code.

52. See Dhagamwar Vasudha : *Uniform Civil Code Mainstream* July 6, 1983.