CHAPTER 4

Academics and the Uniform Civil Code

No debate on the Uniform Civil Code can logically neglect the concepts of legal pluralism, for the debate is between those who wish to opt for one state legal system (SLS) in area of Family Laws, and those who uphold the cause of a number of non-state Legal Systems (NSLS) to prevail in this area. Legal pluralism, to put it baldly, is seen as a challenge to and an imposition of a limit on state power, which is wielded through state legal system. It is also seen as a creator of social spaces, as an instrument of popular participation in decision-making and as a way of tapping the collective wisdom of the people. In this sense, it is even seen as a complement to the State Legal System. Yet, the debate on Uniform Civil Code has neglected precisely this area.

Most writers who are *against* the Uniform Civil Code have merely implied that legal pluralism is by definition superior as it goes with cultural pluralism, and autonomy of religious minorities. Equally, protagonists of the Code have emphasised the secularising, unifying impact of a Uniform Civil Code without exploring the significance of legal pluralism. Prof. Upendra Baxi appears to have been the only academic to have critically examined the concept of legal pluralism and its manifestations. As a thinker who has been an ardent supporter of non-state legal system (NSLS), his exposè is all the more interesting. [53]

Prof. Baxi mentions two approaches to NSLS - the scientific and the millenarian. The scientific approach sees people's law as part of a development process in which state law steadily becomes more powerful and more pervasive. On the other hand, the millenarian approach celebrates NSLS as "a promise of the human potential to transcend the state and its repressive/ ideological apparatuses".[54] This approach hopes for a Utopia in which the state will cease to be and so will the SLS.

Prof. Baxi observes that those who adopt the millenarian approach are often aware that people's law or NSLS can also be repressive, exploitative

53. Upendra Baxi "Discipline, Repression and Legal Pluralism" in P Sach *et al* edited *Legal Pluralism* 51-61 (Canberra Law Workshop) (1985).
54. *Id.* at 53.

and regressive, but that they also believe that the people's law has been deformed by the exercise of sovereign powers.

He then goes on to give instances when NSLS was "consciously used and developed as an instrument of repression"[55] of which we may refer to a few.

Hindu Law institutionalised the inferior status of women even to the point of legitimating Sati, child marriages, and dedication of young girls as *devdasis*. It also created and enforced untouchability. Muslim Personal Law preserves polygamy, unilateral talaq, differential inheritance rights, and no maintenance beyond divorce. Though Prof. Baxi does not mention it, both Personal Laws recognised slavery, as indeed did laws throughout the world.

Prof. Baxi then notes :

> It is significant that the bulk of the foregoing illustrations relate to women. This suggests far deep-seated conflict between pluralism and feminism. Pluralist social reality is, it appears, overwhelmingly oppressive of women. Moreover, the theoretical analysis of pluralism is also, not unaccountably, usually cast within the dominant ideology of patriarchy. It is, therefore, likely that the state and its law currently offer, at a pinch, a more promising arena of struggle for the emancipation of women than is offered in the domain of the people's law.[56]

He warns, however, that growth of state power may also consolidate patriarchy.

Prof Baxi also refers to the Dawoodi Bohra community in India as an example of deformation of a movement that was originally emancipatory, which arose in the 8th century out of rebellion against the ossified Sunni theology. It has now become a tyrannical theocracy and the Syedna, the head of the community, virtually constitutes a state within a state, levying taxes from conception - all pregnancies have to be registered and tax paid on foetus - to the grave. Disobedience is punished with excommunication and increasingly harsh penalties, including lynch justice.

Finally, Prof. Baxi examines the role of people's power and people's law in the situation of insurgency. While they represent emancipatory

55. *Id.* at 54.
56. *Ibid.*

resistance they also unleash a reign of terror. This is because people's right to punish their enemies, including traitors from within the ranks, is fully accepted. Thus, "insurgency NSLS legitimates a perplexing mix of repression and terror at the very heart of the quest for social emancipation".[57]

His illustration for this phenomenon is Bhindranwale who "skilfully used the existing NSLS of Sikh community" to occupy the Golden Temple first as a sanctuary from the criminal law of the land, and then as a base for developing a state within a state. He organised a para-military force and had a hit-list consisting of people (mostly Sikhs and also Hindus) who dared oppose him, including police officers.

Prof. Baxi observes:

> Significantly, Bhindranwale espoused not merely an autonomous Sikh state but also demands for revival of a Sikh personal law (discriminatory against women) and an amendment of Art. 25 of the Constitution which included Sikhs within the definition of Hindus for the purposes of throwing open places of religious worship of a public character to all classes and sections of Hindus (essentially an ...anti-untouchability measure...) The Bhindranwale NSLS is regressive because it revives the idea of sanctuary which in its religious aspects has been abandoned by human mind.... and because it seeks to revive through the politics of terror both male domination and caste domination.[58]

Prof. Baxi has examined a most fascinating aspect of NSLS. One wishes there were more in-depth studies of this conceptual area.

Keeping this unfortunate and major omission in mind, one may still say that the bibliography on the Uniform Civil Code and related topics such as secularism is quite impressive. The subject has been written about from many angles for at least twenty years, by both Indian and Western thinkers.

One cannot, however, help but notice that all the writing on this subject takes the Muslim personal law as the point of reference. In view of the foregoing description of what other minorities think about the Uniform Civil Code, this is not altogether surprising.

Even here there is a fairly large gamut of perceptions, approach and attitudes, ranging from the philosophical understanding of religion, law and society to immediate concern centred entirely on the day.

57. *Id.* at 55.
58. *Id.* at 56.

It would not be fair to compare any of the present writers with Professor A.A.A. Fyzee. It is saddening to note that in the current debates on neither the Uniform Civil Code nor the Muslim Women's Act has a mention been made of his writings.[59] However, this paper would not be complete without a reference to him or his work.

Professor Fyzee was surely a giant amongst his colleagues. He was a visionary who looked beyond the present and its political demands at both the distant past and into the uncharted future. His approach to law was well beyond the merely legalistic and it encompassed the philosophy of law, life and religion. Unfortunately, he stands alone. Many of those who followed him in time have not followed in his footsteps. Even more regrettably, many of those who claimed to follow him in spirit have ceased to do so.

In his work,[60] Prof. Fyzee explored the difference between law and religion. He wrote:

> Laws are impersonal and objective rules which the state applies to all its citizens without exception. But religion is based on the personal experience of great teachers; its appeal is personal, immediate and intuitive. While its rules, its rituals and its trappings can be of general application in a community, the inner core of belief is exclusively personal. ...A teacher can fire my enthusiasm. But how can he make me believe? Thus, there is a clear difference between a rule of law which can be enforced by the state and a rule of conscience which is entirely a man's own affair.[61]

Prof. Fyzee then continued to examine these differences with reference to the Shariat:

> Today in Islam, this is the greatest difficulty. Sharia embraces both law and religion. Religion is based on spiritual experience; law is based upon the will of the community as expressed by the legislature, or any other law making authority. Religion is unchangeable in its innermost kernel..... If Sharia is the name given to this duality, then one of the forces constantly pulls in the other direction. But laws differ from country to country, from time to time. They must ever seek to conform to the changing patterns of society. ... Laws are like metals in the crucible of time and circumstance; they

59. This author was guilty of the same omission in her paper as presented to the National Convention on Uniform Civil Code by the Bar Council of India Trust.
60. *A Modern Approach to Islam* (1963).
61. *Id.* at 86.

> melt, they gradually solidify into different shapes. This process of evolution is co-terminous with human society. Nothing is static except that which is dead and lifeless. Laws can never be static. India is changing with the rest of the world before our own eyes. These changes are the result of our powers over nature, our views on life, and our desire to improve the social conditions of men. Our legislature pours out a stream of statutory laws and this legislative activity attempts to regulate our own dealings in society.[62]

Professor Fyzee pointed out that from time to time, Islamic concepts of law come into conflict with modern law, for example, Islamic law condemns taking of interest - modern civil law encourages it. Sometimes, there is no direct conflict. Thus, the common law principles of equity have been grafted on to Mohammedan Law of gifts. Even more striking is the replacement of Mohammedan Law of Evidence with the Indian Evidence Act, 1872.

Prof. Fyzee observed that everywhere in the Islamic world, - North Africa, Central Asia, Indonesia, India - secular law was eating into and replacing the laws of the Sharia. Not only was this done by local secular law but above all by international law. All these were "profoundly influencing not only the body of law but the meaning of justice as it affects the Muslims."[63]

In conclusion, Prof. Fyzee suggested the solution to the clash that arises because Sharia is both law, which by definition must change, and religion which is changeless.

> My solution is (a) to define religion and law in terms of twentieth century thought, (b) to distinguish between religion and law in Islam and (c) to interpret Islam on this basis and give a fresh meaning to the faith of Islam. If by this analysis, some elements, we have regarded as the essence of Islam have to be modified, or given up altogether, then we have to face the consequences. If, on the other hand, belief in the innermost core can be preserved and strengthened, the operation, although painful, will produce health and vigour in an anaemic body which is languishing without a fresh ideal to guide it.[64]

Although hardly any scholar has attained the philosophical heights

62. *Id.* at 87
63. *Id.* at 88.
64. *Ibid.*

of Professor Fyzee, many Muslim writers have come out with sharp criticism of the practices relating to polygamy and instantaneous triple talaq[65], both of which cause tremendous hardships to women and, moreover, are positively frowned upon by their personal law.

Amongst them, Ms. Kamila Tyabji, an advocate and a scholar, also points out that though the Dissolution of Muslim Marriage Act, 1939, gave the Muslim women a statutory right of divorce, "those rights are, however, difficult and expensive to enforce and however aggrieved the wife may be, it is not at all easy for her to get a divorce as for the husband, who has merely to pronounce a few words."

Ms. Tyabji adds that Muslims have found several ways of dealing with the iniquitous situation: the Khojas have several matrimonial courts, and neither a second marriage nor a divorce is possible without recourse to these tribunals. Some families have long ago started incorporating the wife's right to divorce in specified circumstances in the Nikahnama. Thirdly, "an increasing number of enlightened Muslims take recourse to registering their marriages under the Special Marriage Act, 1954 thus showing that even such a step is in no way against the conscience of devout Muslims."[66]

Similarly, Prof. Mohd. Ghouse wrote that "Marriage, divorce, inheritance and other aspects of personal status are, despite the sources of Muslim law regulating them, social or secular activities surrounding religion and the state can validly enact measures of social welfare and reform in respect of matters governed by the Muslim Law."[67]

Prof. Tahir Mahmood is also in agreement with the above understanding of Muslim law. He says it is an incorrect presumption that the minutest details are prescribed by the "nusus" (*i.e.* Quran and Sunna). "Fundamentals of family life as also of public dealings are laid down in these texts in the form of substantive legal principles. But the ... details of these principles are mostly man-made and were worked out by Arab Jurists in the past. Times have changed. Fear of God has diminished and more stringent legal rules, giving lesser freedom of personal decision and narrower description, are necessary".[68]

In another place Prof. Mahmood goes so far as to suggest that all personal laws "and more particularly the Muslim Personal Law must be purged

65. *Cf.* Kamila Tyabji, Tahir Mahmood, Asghar Ali Engineer.
66. Kamila Tyabji, "Polygamy, Unilateral Divorce and Mahr" in Tahir Mahmood ed., *Islamic Law in Modern India*.
67. Md. Ghouse "Personal Laws and the Constitution of India" in Tahir Mahmood, *supra* note 66 at 54-55.
68. Tahir Mohamood "Islamic Law or Debate on Indian Civil Code," in *Islamic C.L. Quarterly* 24-29 (1981).

of all unsatisfactory elements," without "scrapping" the Personal laws.[69]

Prof. Mahmood was quick to point out that though the Special Marriage Act 1954 had been attacked by religious leadership of all three large communities - Hindu, Muslim and Christian, in fact the Act came closest to Muslim concept of marriage as contract and hit the Hindu concept of marriage as a sacrament the hardest. "Nevertheless while the majority community has shown little concern about the new revolutionary legislation, the superficiality of the alleged conflicts between the Secular Marriage Law of India and the law of Islam is seldom realized by Muslims who have just been dittoing the unequivocal condemnation of the Act by their orthodox leadership."[70]

Prof. Mahmood has also lamented the sad fate that befell the Indian Adoption of Children Bill 1972 because the religious leaders opposed it.[71] He warns that the unity shown by the 'ulama' in opposing reform must not be expected in favour of any reform whatsoever.[72]

Of late, Prof. Mahmood's opinions seem to have undergone a sea change. Even a cursory glance at his writings after the *Shah Bano* judgment and the ensuing Muslim Women's Bill controversy indicate that his opinions have changed radically. Whether he is talking to a popular publication like *India Today* or writing in a learned journal, he writes more like the religious leaders and ulemas whom he had only lately subjected to harsh criticism. Prof. Mahmood characterises people who were critical of those Muslims who wished to deny maintenance to a divorced wife, as persons who thought that "the law of Islam leaves a divorced woman wholly unprotected and unprovided for after the period of iddat" and described them as

> awfully ignorant of the socio-legal theories of Islam. The fact is that Islam does not leave any woman, married, divorced, separated or widowed, without adequate protection even for a day. The concept of marriage in Islam is certainly very different from that subscribed by all the indigenous faith--which, incidentally, is shared also by Christianity, the religion of our foreign masters who had enslaved us both politically and intellectually.[73] Islam would not look at marriage as

69. Tahir Mahmood "Common Civil Code, Personal Law and Religious Minorities" in Mohammad Imam, ed., *Minorities and the Law* 460 at 476 (1972).
70. Tahir Mahmood "Family Law Reform: Perspectives in Modern India" in T. Mahmood, (ed) *Family Law and Social Change*, 93 (1975).
71. *Id.* at 100.
72. *Id.* at 108.
73. One regrets this disingenious attempt to tar Christianity with the imperial brush which is unworthy of a scholar. What has imperialism to do with the validity of the Christian concept of marriage?

> perpetual bondage; from the very beginning it treats it as a dissoluble union. After the dissolution of the marriage, therefore, it would not keep the former spouses tied down to each other for any purpose. At the same time it would provide adequate protection, financial and social, to the man and woman who were formerly married. In a truly Islamic society, a divorced woman would, in fact, not remain unmarried for long after her *iddah*. Divorce itself would, in the society, be exceptional and would be resorted to only in the cases of marriages broken past repair. No husband would divorce his wife if he knows that she can neither hope to get remarried nor look around for any other source to fall back upon for her maintenance. The facility of divorce is certainly not given to men by Islam in order to drag women into destitution and vagrancy.[74]

At the National Convention on the Uniform Civil Code, Prof. Tahir Mahmood seemed to have changed his views once more. Addressing the participants he said that in his opinion, it was not necessary for a Muslim to abide by the entire Shariat, in order to remain a Muslim. In that case, one fails to see why Prof. Mahmood was so implacably opposed to maintenance to divorced wives, for the sole ground of opposition was that the Shariat did not ordain it.

As remarked above, the academic debate on the Uniform Civil Code is more a debate on the Muslim Personal Law. It is hardly a debate from the secular point of view and therefore, not a debate on the Uniform Civil Code. Changes in Family Law are accepted or rejected in terms of what is posited and seen to be posited in the Muslim Personal Law. As a result, the same set of factors, for example, destitution of a divorced wife, has been seen in one light before the *Shah Bano* controversy and in a very different light afterwards. Before the controversy, the facts of this case would have been interpreted to lend force to the argument that radical reform in Muslim Personal Law was necessary. After the case, these very facts are being used to defend original Islamic Law and practices and to demand a return to them rather than reform.In any case, the discussion is not in terms of secular values or secularisation of law.

Some attempts have been made to explore what constitutes secularism. The late Prof. A.B. Shah considered the essence of secularism to consist in looking upon religion as a "strictly personal relationship between a man and his maker, if he believed in him. What secularism demands is not a denial of the transcendental ...it rather insists on the acceptance of a truly spiritual view of religion, and all that goes with it."[75]

74. Tahir Mahmood. "Shah Bano Judgment - Supreme Court Interprets Quran", *Islamic CLQ* (1985) 110.
75. A.B. Shah "Meaning of Secularism for India" in Tahir Mahmood, *supra* note 70 at 79.

Prof. Shah argued that "Arts. 25 and 26 of the Constitution made it clear that the basic unit of the Indian state is the individual citizen and not any collective group defined by language, caste or religion. It is the individual citizen who has fundamental rights...."[76]

Justice M.H. Beg defined secularism as all human thought and action directed towards securing human welfare in this world without any reference to, or seeking the intervention of, the divine or unseen powers.[77] He quotes the Encyclopaedia Britannica which defines secularism as "a branch of utilitarian ethics designed for the physical, social and moral improvement of mankind which neither affirms nor denies the theistic principles of religion".

Prof. S.S. Nigam, on the other hand, feels that religion permeates every aspect of life in India and, naturally, he feels, it permeates our law also. He approves of the British policy of leaving those areas alone in which law was tinged with religion very strongly and waiting for the affected community to ask for legislation. He is of the opinion that "the respective area in which religious influence is still strong have to be demarcated with sympathy, understanding and vision".[78] If this vision is accepted then a Uniform Civil Code will become an impossibility.

Indian interpretation of secularism seems to lie between these two schools of thought. As with so many other Indian institutions, so with secularism. India's understanding of the term does not seem akin to what the Encyclopaedia Britannica, or Prof. Shah and Justice Beg have to say of it. In the Indian polity, secularism has been confused with equal status for all religions rather than treated as absence of religion.[79] It is significant that the preamble to the Constitution nowhere mentioned the word secular. It was inserted in 1976. Equal status for all religions is not a concept which will demarcate a line between the area of life where religion plays a part and where it does not. Nor is it a concept that is in accordance with a Uniform Civil Code for the latter clearly requires an interpretation of secularism more akin to Justice Beg's than that of Professor Nigam.

It is not surprising therefore that those thinkers who decry the shortcomings of Muslim Personal Law should stop short of Uniform Civil Code. One may add that others, who are not students of Muslim Personal Law also share their misgivings. Not only Ms. Kamila Tyabji but Prof. Rajkumari Agrawal as well, have cautioned that the Uniform Civil Code would not necessarily help to achieve national unity. Ms. Tyabji warned in 1975.

76. *Ibid.*
77. M.H. Beg, *Impact of Secularism on Life and Law.* 139-140 (1985).
78. S.S. Nigam, *Uniform Civil Code and Secularism : Its Implications for Law and Life in India* 156, (1966).
79. P.C. Chatterji, *Secular Values for Secular India* 14 (1984).

> It is naive to imagine that there is any one system of law which is pre-eminently national and right for all and also naive to imagine that such a code (Common Civil Code) would cut down the number of communal riots or lead to integration; it will serve no purpose except to divide us.[80]

K.B. Aggarwal voiced a similar opinion when he said that

> a Uniform Civil Code as distinct from a modernised personal law is necessary but by no means a sufficient condition for integration into a single modern nation..... there has therefore to be a certain minimum degree of homogeneity among the citizens as regards their rights, obligations and outlook, no matter what religion they follow and what language they speak.[81]

Rajkumari Agrawala went even further. Commenting on the expected goal of the Uniform Civil Code viz. achievement and promotion of national solidarity she said

> It may suffice to remind and point out that uniform laws for crimes, contracts, torts, constitutional rights etc. exist in the country. They have been in existence now for over hundred years. If they have failed to inculcate the concept of national unity what prompts us to believe that uniform family laws alone will do the trick.[82]

No one believes that the Uniform Civil Code *alone* will do the trick. Nevertheless, Prof. Agrawala should try to visualise living in a world in which there were separate criminal laws, and then answer her own question as to whether a uniform law brings about unity in public life.

The conceptualisation of Uniform Civil Code has always proved to be difficult. How is it to be achieved? Justice Chagla's tentative suggestion was:

> One community might be prepared to accept and work social reform, another may not yet be prepared for it and Art. 44 does not lay down that any legislation that the state may embark upon must necessarily be of an all embracing character. The state may rightly decide to bring about social reform by stages and the stages may be territorial or they may be community

80. Kamila Tyabji quoted in Tahir Mahmood, *Indian Civil Code or Islamic Law*. 29 (1976).
81. K.B. Aggarwal "Advisability of Legislating a Uniform Indian Marriage Code" in Mohammad Imam. *Supra* note 69 at 440.
82. Rajkumari Agrawala. "Uniform Civil Code - A formula not a Solution" in Tahir Mahmood, *Supra* note 70 at 110.

wise.[83]

Justice Krishna Iyer made a more familiar suggestion:

> At present, we are a distance away from a common Civil Code for all religions. Since first things must be first, let us tackle the job of modernising the Islamic law first, preserving its genius and great principles but approximating the law to the general system and eventually enriching the latter in many respects.[84]

Justice Iyer is on grounds familiar to us. Codification of personal laws as the first step towards Uniform Civil Code has been advocated by many. The idea of codification of personal laws *at the initiative* of the concerned community has been used by others to stop all attempts at codification, leave alone at drafting a Uniform Code.

The notion that all secularism consists of equal status to all religions which can continue to permeate all aspects of life finds an echo in the reassurances sought or given that a Uniform Civil Code will embody what is best in all personal laws, rather than demanding that the Uniform Civil Code should confer the best possible rights on all citizens. Even Justice Iyer who rightly envisaged the Uniform Civil Code as not an adaptation of the Hindu Law, saw it as a synthesis of the good in our diverse personal laws.[85]

Another scholar of Islamic law, Professor J.N.D. Anderson, wrote:

> ....it must be presumed that a Uniform Civil Code would represent one, drawn up by consultation between the different communities in India on the principle of give and take, not a Hindu Code enforced on every citizen irrespective of his tradition or religion.[86]

By the same token, popular Muslim opposition to the Uniform Civil Code is rooted in the belief that the Uniform Civil Code will impose Hindu Laws upon them, even in matters like saying their prayers and burying their dead.

Even Prof. Tahir Mahmood[87] had reckoned the best solution to be a transitory dual system of personal laws. He expressed the view that existing personal laws should not be scrapped though they should be shorn of

83. *Narsuppa Mali*, AIR 1962 Bom. 85 at 87.
84. V.R. Krishna Iyer, "Reform of Muslim Personal Law" in Tahir Mahmood, *supra* note 66 at 18-19.
85. *Id.* at 17.
86. J.N.D. Anderson, "Muslim Personal Law in India," in Tahir Mahmood, *supra* note 66 at 36.
87. *Supra* note 69 at 479.

unsatisfactory elements. Prof. Mahmood made a pointed reference to Muslim personal law in this context. "At the same time, the Government should also prepare a Common Civil Code and put it to referendum. If the majority of the total number of the members of a particular-community voted for the Common Civil Code, the Code should be applied to it otherwise their personal law should govern the community". Anyone can see how utterly impractical and confusing this would be.

The contribution of academics to Uniform Civil Code has been disappointing. The discussion has revolved round Muslim personal law; neither the concept of secularism nor the possible contents of the Uniform Civil Code have been examined in depth or with clarity. No other community has been involved in this debate, not even the Hindus. Not even the notion of codification of personal laws as condition precedent for a Uniform Civil Code has been analysed. One is left with the impression that many of the writers were only putting off the day when serious thinking on this subject would have to be done.