
Uniform Civil Code and Strengthening Family Laws

Subha Bikash Panda, LL. M., Advocate

Orissa High Court, Cuttack.

The subject of Uniform Civil Code ('the UCC', in short) has been a contentious issue in India since its inception. But the irony is despite there being an endless campaign and debate, there is scant clarity on the subject in the public domain. It continues to be a constitutional dichotomy and/or a dilemma insofar as India, the sovereign socialist secular democratic republic is concerned. There is no gainsaying that Article 44 of the Constitution of India clearly deals with the subject in quite unambiguous terms. But, the said Article 44 falls under Part-IV of the Constitution, which deals with the subject of Directive Principles of State Policy. Part-III of the Constitution deals with the subject of Fundamental Rights of the citizens, which contains Articles 12 to 35 of the Constitution. To know accurately about the framing of the Constitution, we need to visit the Constituent Assembly Debates to read into the minds of the framers of the Constitution and most importantly, the circumstances leading to such framing of Articles in different parts of the Constitution. Unless we read into the minds of the framers of the Constitution and examine or analyze the circumstances leading to the framing of different Articles in various parts, we shall not be able to deduce the real purport and/or intent and most importantly the Himalayan helplessness confronted by the erudite scholars who had extensively debated in the Constituent Assembly with all their wisdoms and intuitions. In the above backdrop, let's now proceed to deliberate on the subject.

The Genesis:

Why is it so important to discuss and deliberate on the subject of UCC? Is it truly a constitutional goal to achieve? Or can it be ignored and less prioritized like many other provisions of the Constitution? Will it promote communal disharmony among the people of India to bring legislation in conformity with the UCC? Will it stall national economy and growth by implementation of the mandate of Article 44 of the Constitution? Has the country suffered

in manifold ways in the absence of UCC till date?? These are the questions of vital importance, which need to be answered in Public Interests qua National Interests.

Fundamental Rights:

Fundamental Rights are otherwise known as Natural Rights or Universal Rights, which are axiomatic in nature across the planet applicable to all human beings. These are primordial rights necessary for the development of human personality, which enable a man to live with dignity and honour and in the manner, he likes the best. Part-III of Indian Constitution is inspired by the Civil Rights chapter of the constitution of the USA. These rights are almost similar to the Human Rights contained in the Universal Declaration of Human Rights, 1948 of the UNO. But the most significant aspect of these rights is that these rights are not absolute in nature and have been made subject to public interests viz. public order, morality, health, safety and national security.

Directive Principles of State Policy (DPSP):

Part-IV of the Indian Constitution i.e. from Article-36 to 51, deals with the DPSP. This part has been derived from Irish constitution, as the Constituent Assembly is said to have been influenced and inspired by the Irish national movement, particularly with the Irish Home Rule movement. The DPSP are fundamental in the governance of the country and it is the duty of the State to apply these principles in making laws. The most peculiar and significant aspect of this part is that unlike the Fundamental Rights, the provisions of the DPSP are not enforceable through Courts, as the Courts are precluded to interfere in the policy matters of the State. This is the most anti-people twist insofar as the DPSP are concerned.

Fundamental Rights Vs. DPSP:

Fundamental Rights are basic human rights guaranteed to the citizens by a welfare State. DPSP are the ideals basing upon which the State is to formulate its policy of governance and enact laws to govern its citizens.

Infringement of Fundamental Rights are punishable under law, whereas policies and laws inconsistent with both Fundamental Rights and DPSP can be declared ultra vires by Constitutional Courts under the scheme of Judicial Review. But the primary and substantial difference between fundamental rights and DPSP is that when violation of Fundamental Rights can be assailed before the Constitutional Courts under judicial review, the inaction of the State in not making laws to achieve the objectives of the provisions of the DPSP is not assailable before the said Courts. Implementation of the DPSP has been left to the absolute discretion of the State thereby making the whole of Part-IV of the Constitution immune from enforcement in law irrespective of the ideals contained in the said Part-IV are highly imperative to be implemented insofar as national interest are concerned. Constitutional provisions are thereby made directory and not obligatory and at the same time has been prone to discrimination and/or made illusory at the hands of the States, which are enjoined with the duties to govern their People in consonance with the Constitutional ideals. This is the biggest constitutional mockery deeply imbedded in our Constitutional mechanism concerning governance of the people. However, the only solace and sanguinity that is available to the People is that any rational and proactive State(s) is/are equipped and fortified with the people-friendly ideals contained in the DPSP to enact essential laws in the paramount interests of the People and the nation at large. No one can stand on the way to make such enactments. But it requires a strong State to spring into actions, as weak States may not risk such steps which involve vote bank politics and a host of other issues to the sheer misfortune of the People.

Judicial Review vis-à-vis DPSP:

Unlike inertia of the State in the realm of withholding or violating the Fundamental Rights of the citizens are interfered with by the Constitutional Courts under the scheme of Judicial Review and guidelines are framed to govern the field until appropriate legislation is enacted, no Courts in India has yet shown such activism in framing guidelines to govern the field in case of inertia of the States in not enacting laws in conformity to the DPSP. This is another grey area, which requires to be explored in the judicial arena for the pivotal interest of the nation so as to make the Constitutional goals a reality instead of making the same illusory. Do the People of India not deserve the

fruits of the Constitutional ideal through Courts when there is complete laxity on the part of the States to bring the same into actions? The Judiciary of India is solely answerable against this pivotal question concerning national interests and prosperity of the nation. When every fundamental rights of the citizen(s) can yield before national (plural) interests, then why inertia in not bringing appropriate laws thereby not discharging duties in consonance with the mandates of the DPSP shall not be interfered with by the Courts on the touchstone of the same ground of national (Plural) interests?

Article-44 of the Constitution of India:

“The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.”

The simple interpretation of the above provision suggests that the State means the Union of India, as no regional State would be capable of securing the citizens a uniform civil code throughout the territory of India. But this does not mean that the State(s) may not be able to bring such code for their respective people within their territory. As per Entry-5 of List-III (Concurrent List) of Schedule-VII of the Constitution, matters falling under the UCC are covered under this entry. Hence, UCC is the subject of the Union & the State concurrently. But the irony is that this has been made part of non-justiciable rights of the citizens and as such has been underrated by the makers of our Constitution in comparison to the justiciable rights embodied under Part-III of the Constitution.

Why should there be a Uniform Civil Code at all for the citizens throughout the territory of India?

To address this question, we need to visit the Constituent Assembly debates to know about the minds of the makers of the Constitution. Let me quote few thoughts of some distinguished members of the said assembly. Members viz. M. R. Masani, Hansa Mehta and Amrit Kaur in a dissent note expressed their views on the uniform civil code as being non-justiciable. They maintained as follows:

“One of the factors that has kept India back from advancing into nationhood has been the existence of personal laws based on religion, which keep the nation divided into watertight compartments in many aspects of life. We are of the view that a uniform civil code should be guaranteed to the Indian people within a period of 5 to 10 years.”

The above dissent note then went into demand that the UCC be put into the justiciable part of the fundamental rights. After the draft was finalized by Dr. Ambedkar putting it in the chapter of DPSP of the Constitution, on 23rd of November 1948, the Constituent Assembly took up this matter for discussion. Muslim members vehemently opposed this provision and wanted that this should not include personal laws at all. The residuary part of the UCC should only be implemented with the prior assent of the community in question. Muslim members viz. Mr. Ismail, Nazziruddin and Pocker S. Bahadur argued as follows:

1. That UCC provision tends to violate the freedom of religion provision of the Fundamental Rights chapter;
2. The UCC would create disharmony with the Muslim community;
3. No interference must take place in the personal law without the approval of religious communities;

Mr. K. M. Munshi, Alladi Krishnaswamy and Dr. Ambedkar took part in the debate and defended the UCC. Mr. Munshi made the following points:

1. That the UCC was important for unity of the nation and also for upholding the secular credentials of the Indian Constitution;
2. Till now the debate seemed to be around Muslim sentiments. Munshi argued that even Hindus are insecure about this provision. He asked the members of the Assembly: How was any reform possible in the Hindu society, specifically with regards to the rights of women- if there was no uniform civil code?
3. Munshi asked the Muslim members as to what was inheritance/marriage etc. got to do with personal law?

Mr. Alladi Krishnaswami Aiyar then joined debate as maintained his points as follows:

1. He responded to the arguments of the Muslim members that the UCC would bring about disharmony. He submitted that the UCC would do the opposite- it would in fact create amity among communities. He further paid emphasis on the ability of the UCC to bring about unity in the country.
2. Then he asked the Muslim members why there were no protests when the British interfered with Muslim practices by bringing about a uniform civil code?

At this point Dr. Ambedkar came into the debate and added as follows:

1. Dr. Ambedkar maintained that there was nothing new about the UCC, as it already existed in the form of a

common civil code in the country except for the areas of marriage, inheritance- which are the main targets of the UCC in the draft Constitution;

2. Dr. Ambedkar further reminded the assembly that the UCC was only optional, as it was being placed in the DPSP chapter of the Constitution and the State was not obliged to immediately bring the provisions into effect. It can do so when it wishes to. Hence, this provision of the UCC allowed future legislatures to legislate such that the UCC comes to effect only after the consent of the communities as obtained.

Personal Laws vis-à-vis Human Rights:

Critically looking into the above debates, after efflux of 75 years one can easily interpret the minds of the respective members who participated in the debate. It appears, the Muslims were the main obstacles in making the UCC a justiciable right for the citizens of India. Why the Muslims opposed with such vehemence? It is quite obvious for the Muslims, who always want to maintain their distinct identity. In common prudence, no rational man can ever argue that marriage/inheritance/adoption etc. are religious practices for any other religion except the Muslims. What is the reason behind this? The only reason for this is to maintain their distinct identity and culture with certain agenda. At the time of the constitutional assembly debate, the whole of the nation had not recovered from the trauma of partition of India. Thus there was Himalayan helplessness before the collective wisdom of the nation, as it had then already failed and given in to the unjust demands of the Muslims. It was quite obvious for the erudite members of the assembly to yield before the unjust and irrational demands of the Muslim members of the assembly, who had advanced absurd arguments in opposing the UCC to be a justiciable right. Had there been sensibility, wisdom and harmony of mind prevailed over the Muslim members of the assembly, the UCC would have then become a justiciable right and the fate of this country would have been different than today. In the absence of the UCC as a justiciable right, the country as a whole, including the Muslim community, has to suffer horrendously. Shah Bano's case before the Supreme Court of India of the year 1985 is still fresh in the memory of the country, where the victim was a Muslim lady, who was divorced by the barbaric practice of triple talaq and was left penniless and homeless. The Supreme Court came to her rescue on the anvil of protecting human rights, but the

then ruling party of the country for the sake of its sheer vote bank turned down the decision of the Supreme Court by bringing ordinance at the instance of Mullahs on the sole plea of protecting personal laws. This very episode loudly told the entire world that the bourgeois of the Muslim communities wanted their mediaeval personal laws to prevail over the Human Rights of the Muslim citizens of this country. This shocked the conscience of the country, but yet to no avail.

Personal Laws vis-à-vis Secular Credentials:

Any religious scripture viz. the Bhagwat Gita, the Vedas, the Quran or the Bible etc. in no parlance or connotation could be treated to be embodied with personal laws to govern the citizen's rights to marriage, divorce, inheritance, adoptions etc. India essentially being a Secular country from time immemorial, religion (the methods of worshiping the almighty) has never prevailed over the politics and governance of the people. It is the Dharma (i.e. the virtues, righteousness and basic human values) that had played the major role in administration of justice and governance of the people. So, the distinction between Religion & Dharma must be clearly defined and for that matter, personal laws have to be segregated from religion and may be declared as secular. Then only the State or the Union will be able to implement the UCC in its true perspectives, as the experiment has been successfully implemented in the State of Goa. Besides, the Law Commission of India may be tasked to take out empirical study with regard to UCC in other parts of the globe where there are sizable number of Muslim populations. If all the developed countries in the world can rationalize their personal laws and bring the same under one umbrella like the UCC irrespective of their demography, then why the same cannot be implemented in India. We have already travelled more than 75 years in our journey as an independent nation. Enough materials and experiences we have with us for introspection, then why to continue practice with colonial agenda? Moreover, as there is no embargo against implementation of the UCC by bringing proper legislation, the Union or the State(s) are free to do so. Why the discretion shall not be used for collective interests of the nation? The recent issue of demand for same-sex marriage also stems from the same crisis of absence of a UCC. Had there been UCC in the field for governance of the people, then such host of demands in the realm of marriage and personal rights would not have

cropped up. Absence of UCC, therefore, has put the entire equilibrium of the society at stake.

Conclusion:

Harmony among the people, national integration and national security are dominant issues before the nation. These factors have got direct nexus with the very existence of this ancient nation. Already there has been severe damage and loss to the land and people (the demography) of this nation on the plea of safeguarding religious pluralism. If we glance at all the past censuses, we may clearly find rapid decrease in Hindu population and constant growth of Muslim population. Why is this happening? The reason is existence of different personal laws for different populations of one single country. Is it not the duty of the State to look into the securities and welfare of all the communities living in this country by adopting a holistic approach? Then why the cards are to be played in the line of majority and minority? The demography of this country is equally important on par with other assets. In no circumstances, the demography of the country can be put to peril thereby risking the national security. Population growth has to be rationalized forthwith. No community can be allowed to assert its communal or religious rights against national security and national growth. For the sake of national integration and communal harmony, it is high time that Uniform Civil Code to regulate and rationalize the personal laws of the citizens of India must be implemented and necessary other legislations may be brought into force in consonance with the spirit of such UCC. Constitutional Courts must be given authority under Judicial Review to intervene where the States are failing to bring appropriate legislation(s) in consonance with the sprits of UCC, like the Courts having the power to interfere where there is breach of Fundamental Rights or excess of demand for enforcement of fundamental rights. Nation's interests i.e. the plural interests vis-à-vis the basic human rights must be prioritized against religious or communal rights to make India truly Secular. All double standards in the name of majority and minority or in any other form whatsoever, must be abandoned. Then only we can proudly say that India is the country of One Nation, One People and One Law. Then only we can be able to achieve true prosperity in our secular democracy. 